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Law Notes
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THE NEW MICHIGAN BUSINESS TAX: It Creates More Problems than it Solves

By **George Runstadler, III**

Michigan has a new Michigan Business Tax ("MBT") that is effective January 1, 2008. The MBT replaces the much maligned Michigan Single Business Tax ("SBT"). Unfortunately, the defects of the SBT are also present in its replacement. In effect, the "single" business tax has been replaced by a "double" business tax.

An Overview of the MBT

An overview of the provisions of the MBT is as follows –

- The MBT has two components – the Business Income Tax (at 4.9%) and the Modified Gross Receipts Tax (at 0.8%). These two components are added together and then reduced by a myriad of credits, most of which were part of the superseded SBT, to produce the new MBT.
- Business Income is generally federal taxable income adjusted and allocable to Michigan.
- The Gross Receipts Tax base is very similar to the old SBT base. It attempts to include gross receipts less payments to others for inventory, capital assets, and materials and supplies. It is essentially a form of Value Added Tax.
- An alternative Small Business Tax is provided in lieu of the Business Income and Gross Receipts Tax. The Small Business Tax is 1.8% of Adjusted Gross Receipts. Businesses that have (i) no officer that receives more than $160,000 per annum compensation (phasing out to $180,000), (ii) less than $18 million in gross receipts (phasing out to $20 million), and (iii) business income of less than $1.3 million are eligible for the Small Business Tax.

Major New MBT Credits Are –

- A compensation credit equal to 0.37% of Michigan compensation.
- An investment credit equal to 2.9% of new capital assets in Michigan.

However, the compensation credit and investment credit may not exceed 65% of MBT.

- A personal property credit of 35% of personal property taxes paid on industrial personal property. **This credit is refundable.**

The Unitary Business Concept

- The law includes the "Unitary Business" concept which requires a Michigan business to include as one business all businesses operated in the United States which are under common control (50%)

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THE SARBANES-OXLEY ACT:
How Non-Profit Organizations Should Respond

By **Thomas M. Sullivan**

When passed into law in 2002, the Sarbanes-Oxley Act ("the Act") was directed at responding to accounting and financial reporting abuses of certain publicly traded companies. Although by its terms, Sarbanes-Oxley only applies to publicly traded companies, the Act also has an impact upon non-profit organizations ("NPOs"), including charitable organizations. An NPO confronted with a regulatory investigation or a request for information by a potential donor will find the organization's credibility enhanced by implementing appropriate policies consistent with certain provisions of Sarbanes-Oxley. Since each NPO is unique both in its mission and its management style, the policies a particular NPO should adopt in response to the Act will be dictated by that NPO's unique operations, size, and governing procedures.

The days when charitable organizations and other NPOs were deemed by the public to be trustworthy because of their honorable missions and benevolence have, for the most part, gone by the wayside. That, coupled with the ever-increasing competition for donations, makes the credibility and the appearance of credibility of an NPO highly important. The following briefly describes portions of Sarbanes-Oxley which the governing boards and management of NPOs should consider, and, where appropriate, use by implementing appropriate policies in their own organizations.

Audit Committees

The governing boards of many NPOs do not have a standing audit committee. Briefly, the role of an audit committee is to proactively oversee an NPO's financial reporting, compliance reporting, and disclosure obligations. As such, the audit committee's functions include procedures to evaluate the information it receives from management, including the Chief Executive Officer ("'CEO"), the Chief Financial Officer ("CFO"), program administrators, and external auditors. Based upon those due diligence procedures, the audit committee draws conclusions and makes recommendations. In addition to the benefits provided to the governing board, audit committees provide credibility to external auditors, agencies, and regulators who oversee the NPO's operations. Audit committees also enhance an NPO's credibility with potential donors.

If an audit committee is formed, it should include at least one "financial expert." The financial expert and all other members of the audit committee should be free from all conflicts of interest and should receive no compensation for their service on the committee. The audit committee will recommend the selection of the outside auditing company, oversee its operations, and review the details relating to the audit. With the exception of very small NPOs, at the very least, an annual review performed by a qualified external accounting firm should be undertaken. Where practical, it is also prudent for all board members to receive some training in understanding financial statements. After receipt of the audit committee's findings, the full governing board should review the report and have the final say in approving the audit results.

Conflicts of Interest with Outside Auditors

Based upon guidance given by Sarbanes-Oxley, NPOs should seriously consider rotating the outside audit firm's lead partner at least every five years. Over time, the lead partner will form a bond with NPO management that could color the independence of the audit review process. Exchanging staff between the audit firm and the NPO should be carefully avoided in order to prevent any conflict of interest such an action could create. Further, the audit firm should not provide non-auditing services except for tax return preparation – and then only with the oversight of the audit committee. However, budget restraints and other factors may, in some instances, make this recommendation difficult for an NPO to implement. The outside auditors must disclose to the audit committee all material accounting policies and practices and the audit committee must oversee and enforce a meaningful conflict of interest policy.

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Conflicts of Interest within the Non-Profit Organization

NPO governing boards and management must understand and fully comply with all laws, particularly those relating to compensation and benefits provided to the NPO's board and executives. These laws include, but are not necessarily limited to, "intermediate sanctions" and "self dealing" laws. NPOs must establish a conflict of interest policy which is regularly reviewed and steadfastly enforced. Personal loans should not be made to board members or executives. If the governing board determines that such a loan is necessary, then all loan terms must be disclosed and formally approved by the board and the loan process must be thoroughly and properly documented.

Financial Statement Certifications

Both the CEO and CFO should sign off on all financial statements and on the IRS Return of Organization Exempt from Income Tax (Form 990) confirming that they are accurate in all material respects. The audit committee should then review and approve financial statements and the Form 990 and make its recommendation to the board for final determination. Steps should be taken to ensure that all disclosure forms are filed on time. It is particularly important that the Form 990 be filed in a timely manner without the use of extensions – unless an extension is required by unusual circumstances.

Destruction of Documents

Sarbanes-Oxley specifically addressed irregularities discovered in the document destruction process of some public companies. These irregularities were one of the driving forces for the adoption of the Act. Serious consideration should be given to a written mandatory document retention and periodic destruction policy. Any such policy should include provisions for electronic files and voicemail messages. Should an NPO be faced with any form of official investigation or if the NPO has reason to believe that such an investigation may be made, the NPO should stop document destruction until the matter is resolved. Failing to do so could raise serious questions including the possibility of criminal charges of obstruction of the investigation.

Protecting Whistle-Blowers

Sarbanes-Oxley also addresses concerns relating to the lack of whistle-blower protection. Serious consideration should be given to adopting an internal whistle-blower protection policy. Some have argued that Sarbanes-Oxley's whistle-blower protection and document destruction provisions may apply to all public sector entities, including NPOs. Therefore, failure to provide appropriate whistle-blower protections could expose an NPO to suits for civil remedies for discrimination and also to the possibility of awards of special damages and attorneys' fees. Therefore, it is prudent to adopt procedures to handle all types of employee complaints to ensure that they are taken seriously and handled appropriately. Such a policy could include establishing confidential and/or anonymous methods to encourage employees to report irregularities. With or without a policy, there is risk in taking any detrimental action against an employee who has reported a claim, even if the claim is determined to be unfounded by the NPO.

Conclusion

Strict adherence to each and every provision of Sarbanes-Oxley would not make sense for most NPOs. However, there are certain provisions of Sarbanes-Oxley that all NPOs should consider and, if appropriate, respond to by adopting suitable policies. If confronted by a regulatory investigation or by requests from potential donors, the existence of proper policies consistent with provisions of Sarbanes-Oxley may go a long way to affirm the credibility of your organization.

THOSE IN THE FOOD SERVICE INDUSTRY should be aware that two bills updating the Michigan Food Law of 2000 have been enacted and will take effect on April 1, 2008.

Among the notable changes to the law are: adoption of the 2005 Food and Drug Administration ("FDA") Food Code (replacing the 1999 FDA Food Code presently adopted in Michigan), clarification of issues concerning the consumer advisory against consuming raw or undercooked foods of animal origin, and addition of a requirement that managers of food service establishments in Michigan be certified in safe food handling, preparation, and storage.

DENIED ENTRY INTO CANADA

By **Scott D. Relf**

Are you considering travel to Canada for business or recreation? Be aware that with heightened security and enforcement at the border, a trip to Canada is becoming increasingly difficult, especially for individuals with a history of criminal charges. The Canadian government excludes certain non-Canadian citizens from entering Canada if they deem them members of an "inadmissible class."

Many convictions in the US, including driving under the influence of alcohol ("DUI"), driving while intoxicated ("DWI"), reckless driving, and negligence, can make a person inadmissible for entry into Canada. Felony criminal convictions as well as shoplifting, theft, possession of illegal substances, and unauthorized possession of a firearm will trigger inadmissible status.

For individuals who have traveled smoothly back and forth to Canada in the past, being unexpectedly refused entry at the border can be frustrating and embarrassing. It can also be quite costly if a business is unable to effectively service its Canadian customers because key personnel are barred entry into Canada due to a prior criminal background.

In order to increase the chance of being granted entry into Canada, individuals with a history of criminal convictions or a pending prosecution should be prepared in advance of entry. They should be made aware of the initial risk that the border officer will ask about prior criminal charges.

Generally, border officers use a random process in choosing whether to question a person entering Canada regarding their criminal background. If questioning does not occur, an individual should not volunteer any information about prior convictions or pending criminal charges.

If questioned by a border officer about criminal matters, an individual should provide honest and direct answers since border officers usually have immediate access to all state and FBI criminal records at the time of the crossing. Further, if questioning does occur, criminal background information may have been previously relayed to the border officer.

Honesty is the preferred policy. It is much easier for an individual to overcome inadmissibility due to criminality than due to misrepresentation.

While individuals should answer honestly about criminal matters, they should not provide specific details about pending charges. For example, an individual who provides sufficient information to a border officer about a pending DUI case can be denied entry even though not convicted.

An individual who is barred from entry into Canada, has four possible options: 1) a temporary resident permit; 2) a criminal rehabilitation; 3) being deemed rehabilitated; and 4) an expungement of the conviction.

There are two ways to obtain a temporary resident permit. First, an individual can appear at the border and apply for one if denied entry due to a conviction. Border officers have wide discretion in granting or denying such an application and it generally requires less paperwork. Such a permit is generally valid for a single entry. In contrast, a successful application for a temporary resident permit at a Canadian consulate in the US will result in a multiple entry permit and assurance ahead of time that entry into Canada will be permitted.

If more than five years have passed since the completion of an individual's sentence, the individual can apply for criminal rehabilitation. This process generally takes around a year and requires extensive paperwork, but will permanently resolve the individual's admissibility to Canada.

If more than ten years have passed since the completion of an individual's sentence, that person can be "deemed rehabilitated" at a port of entry to Canada. This is not a formal application process but is assessed by immigration officials at the border.

Finally, under some circumstances, it may be easier and faster to bring a motion to vacate and expunge a conviction in the US. Canadian officials will generally treat an expungement as the equivalent of no conviction.

Berry Moorman PC can assist you or your business in overcoming inadmissible status into Canada and offers a wide range of US and Canadian immigration services.

TWO WAYS TO MAXIMIZE THE TAX ADVANTAGES OF CHARITABLE GIFTS

By **Dennis M. Mitzel**

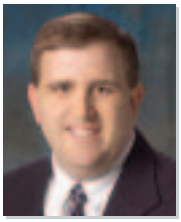
As year-end approaches, plan ahead to obtain the greatest tax benefit from charitable contributions.

IRA Charitable Rollover Provisions Expire at Year End

Under the Pension Protection Act of 2006, certain charitable contributions can be paid directly from an IRA to a charitable organization without the IRA distribution being reported as taxable income. This provision is in effect only for charitable contributions made by December 31, 2007. The IRA account holder must be age 70 1/2 or older and the maximum contribution is $100,000. Although the gift cannot be deducted as a charitable contribution, because the distribution is not included in the account holder's gross income, the distribution is not subject to Michigan tax. This direct contribution is also helpful for non-itemizers or for individuals whose itemized deductions are partially phased out. Individuals interested in making these direct gifts should contact their IRA provider.

Charitable Gifts with Appreciated Assets

In general, individuals transferring appreciated stock to a public charity receive a charitable deduction equal to the full fair market value of the stock. In addition to the tax deduction, there is no gain to report on the transferred securities, thus maximizing the benefits of the gift.



LABOR AND EMPLOYMENT CLIENT ALERT: New EEOC Guidelines Support the Growing Trend of "Caregiver Discrimination" Lawsuits

By **Randolph T. Barker**

The US Equal Employment Opportunity Commission ("EEOC") recently issued a new Enforcement Guidance ("Guidance") in response to the rise in lawsuits by employees and job applicants claiming employer "family caregiver discrimination."

The Guidance describes circumstances in which an employer's actions toward an employee or applicant caregiver could violate Title VII of the Civil Rights Act ("Title VII") or the Americans with Disabilities Act ("ADA") where those actions are based on the caregiver's membership in a protected class such as race, sex, or disability.

The EEOC noted that caregiving responsibilities for children, the elderly, and the disabled predominantly fall on women and on an increasing number of men. Some of the topics covered by the Guidance include –

- **Sex Discrimination**: Treating men and women differently in response to requests for accommodations to allow them to fulfill family caregiver responsibilities could violate Title VII. Examples include:
  - Denying male caregiver requests for child care leave, but granting similar requests by females;
  - Denying women with young children employment opportunities that are available to men with young children or women without children; and
  - Strictly enforcing attendance policies against caregiver females, while loosely enforcing those same policies against males or non-caregiver females.
- **Pregnancy Discrimination**: Reducing the workload of a pregnant employee or an employee returning from maternity leave, even for benevolent reasons, could be considered discriminatory conduct. Similarly, employers must treat pregnant employees under work restrictions the same as non-pregnant employees with those same limitations.
- **Disability Discrimination**: Employer discrimination against a caregiver based on the caregiver's association or relationship with a disabled person could violate the ADA. For instance, an employer may not reject an applicant who is a single parent caring for a disabled child simply because the employer believes that caregiver's obligations could make the person unreliable.
- **Retaliation Claims**: The EEOC considers caregivers to be "particularly vulnerable" to employer retaliation due to the challenges they face in balancing their work and family responsibilities – potentially deterring the person from bringing a discrimination claim with the EEOC or engaging in some other protected activity.

In all of the situations listed above, employers might also have specific obligations toward caregivers under other federal statutes or under Michigan law.

Although the EEOC Enforcement Guidance lacks the force of law, it provides insight into how the EEOC might respond to the employer's decisions. In order to avoid costly litigation, employers should take the Guidance into account in establishing policies and training supervisors.

If you have questions regarding the Guidance or your employment policies contact a member of Berry Moorman's Employment and Labor Group.

The New MBT - *from page 1*

and which in any way contribute to or are associated with a Michigan business.

- The tax base of the "Unitary Business" is allocated to Michigan by use of a single sales factor only. Sales with a Michigan destination are Michigan sales and are compared to total sales to determine the business apportioned to Michigan.
- The tax is imposed upon all Michigan business activity – including sales and services. However, services as an employee or director and self-employment income applicable to return on capital are excludable from services income. Tax is imposed upon the business enterprise including pass-through entities such as S corporations and limited liability companies.
- A business activity is a Michigan business subject to allocation if it has sales with a Michigan destination of $350,000 or more or if an employee or agent has one day or more physical presence in Michigan.

MBT Requirements/Relief

- A business with less than $350,000 of Michigan sales need not file a return. For Michigan sales in excess of $350,000, a credit against the tax is given equal to the following fraction:

$$\frac{\text{Michigan Sales less } \$350{,}000}{\$750{,}000}$$

Obviously, the credit expires at $750,000 of Michigan sales.

- Quarterly tax installment payments are required if the annual MBT exceeds $800. Penalties can be avoided if 85% of the tax liability is paid quarterly or, after 2009, estimated tax payments are made equal to the previous year's MBT. The prior year's exemption is lost if the tax liability is over $20,000.
- As an accommodation to business, companion bills have provided property tax relief in the form of an exemption from some school taxes for industrial and commercial property.

The Problems with the SBT Continue with the MBT

There were two majors complaints about the SBT: 1) it was much too complicated and 2) it taxed businesses even when they experienced a loss. The new MBT is more complicated than the previous SBT and businesses losing money may still be subject to the tax.

Moreover, under three provisions of the new tax, many businesses that were exempt from the SBT will be subject to the MBT:

1) The MBT's Unitary Business concept requires all related businesses in the United States under common control be treated as one business;

2) The sales destination factor is the only factor that will be used to allocate this business within and without Michigan; and

3) Any business with any presence in Michigan or with Michigan destination sales in excess of $350,000 will be subject to its provisions.

For example, a profitable automobile parts supplier located in Indiana with substantial sales to Michigan plants will be quite shocked to learn that Michigan has determined that a substantial portion of its business is Michigan related and is subject to the MBT. It is probable that there will be a constitutional challenge to the MBT on the basis that it unduly burdens interstate commerce.

Some Recommendations for Early 2008 to Minimize MBT Liability

Below are some steps businesses should take in early 2008 to minimize their MBT liability –

- The MBT requires quarterly tax installment payments if the tax exceeds $800. The first quarterly installment is due April 15, 2008 for all calendar year taxpayers and the required payment is 25% of the 2008 MBT. Many taxpayers will miss this filing requirement either because they do not know they are subject to the tax or cannot calculate the MBT for 2008. Moreover, payment of a sum equal to 25% of the prior year's SBT will not avoid the penalty.

  Therefore, it is important to estimate a business's 2008 MBT tax liability as soon as possible.
- A refundable credit equal to 35% of the personal property tax charged on Industrial Personal Property is available only if a Personal Property Tax Return is filed on or before February 20, 2008. The return must identify the property as Industrial Personal Property and must be filed by February 20, 2008.

  Much greater attention should be given to the Personal Property Tax return for 2008 than was given in prior years. In addition to the potential MBT credit, the appropriate classification of property into industrial and commercial categories could provide more effective use of the exemption of these assets from school taxes.

Members of the Tax Compliance Group at Berry Moorman are always available to provide more detailed guidance through this complicated web of new state taxes.

FIRM NEWS

David Foy, George Runstadler, and **Scott Relf** gave a presentation to the New Dentists of Oakland County on "Office Leases - A Tenant's Perspective and Key Provisions for Associate and Partner Contracts." Dave, George, and Scott gave their presentation on October 23, 2007.

Thomas E. Dew, Louise L. Labadie, and **Dennis M. Mitzel** attended the thirty-third Annual Notre Dame Tax and Estate Planning Institute on October 11-12, 2007 in South Bend, Indiana. The Institute provides comprehensive continuing legal education presented by nationally recognized experts in the fields of tax and estate planning.

Five Berry Moorman attorneys were recognized in *Michigan Super Lawyers 2007* as outstanding attorneys in their practice areas. **Donald F. Carney, Jr.** was listed for his accomplishments in trust and estate litigation. **Dennis M. Mitzel** and **Harvey B. Wallace II** were designated for their achievements in the practice of estate planning and probate law. **Robert W. Morgan** was recognized for his proficiency in employment and labor law. **Thomas M. Sullivan** was included for his expertise in business and corporate law.

Patrice M. Ticknor attended the 2007 Medicaid & Health Care Planning Update and the Estate & Financial Planning for Families with Special Needs Children seminars cosponsored by the Probate and Estate Planning Section and the Elder Law Section of the State Bar of Michigan.

Thomas E. Dew has been named as an Adjunct Professor of Law at the Ave Maria Law School in Ann Arbor for the 2007-2008 academic year. He is teaching a course in Wills, Trusts, and Estates for the fall, 2007 semester.

Randolph T. Barker, a member of the State Bar of Michigan Real Property Probate Law Special Committee on Leasing, recently submitted, on behalf of the Section, an amicus curiae brief to the Michigan Supreme Court in the case of *In re Smith Trust*. In *Smith*, the Michigan Court of Appeals created a default rule for interpreting "right of first refusal" clauses that are commonly included in both residential and commercial lease agreements. In his brief, Randy argued that if the Supreme Court adopts this new rule, countless leases containing these clauses could be interpreted in a way the parties did not originally contemplate. Adoption of this new rule would also have a significant impact on the way in which future lease agreements are negotiated and drafted.

George Runstadler is an Adjunct Professor for both the Cooley Law School LLM program and the Walsh College Masters of Tax program. During the year, George teaches Estate and Gift Taxation and Income Taxation of Estates and Trusts at both institutions.

Dennis Mitzel and **Harvey Wallace** were selected for inclusion in *The Best Lawyers in America 2008* in recognition of their accomplishments and expertise in the trusts and estates area of law.

Dennis M. Mitzel acted as moderator for the Institute of Continuing Legal Education seminar titled "Preparing Estate and Gift Tax Returns and Post-Death Tax Planning" held at St. John's Center on September 12, 2007. Dennis also spoke on basis issues related to estate and income tax planning.

Dennis M. Mitzel and **Teresa V. Fleming** spoke on estate planning issues at a state of Michigan pre-retirement seminar held in Saline, Michigan on August 28, 2007.

Louise L. Labadie spoke at Cadillac Place in Detroit on October 9, 2007 on estate planning issues. The presentation was part of a seminar given to state of Michigan employees on pre-retirement planning.

Randolph M. Wright represented the firm at the US Russia Business Council meeting in Moscow on October 22-24, 2007. Three hundred representatives from US companies doing business in Russia attended the meeting. Despite the current political debate between the US and Russia, those in attendance reported a dramatic increase in business and profits because of the robust Russian economic climate.

Donald F. Carney, Jr. was elected mayor of the city of Birmingham for 2008. Don previously served as mayor in 2004 and was initially elected as a city commissioner in 2001.

Randolph T. Barker was recently admitted to the practice of law in Ohio, expanding the firm's ability to serve our clients regarding business and employment matters that arise in that state.

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