

Associated Bank, N.A. and Affiliates,
Appellants,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER FOR JUDGMENT**

vs.

Commissioner of Revenue,

Docket No. 8851-R

Appellee.

Filed: April 18, 2017

This matter came before the Honorable Thomas G. Haluska, Judge of the Minnesota Tax Court, on stipulated facts.¹

Walter A. Pickhardt, Faegre Baker Daniels, appeared on behalf of appellant Associated Bank, N.A., and its affiliates.

Jennifer A. Kitchak, Assistant Minnesota Attorney General, appeared on behalf of appellee Commissioner of Revenue.

Associated Bank, N.A., and its affiliates appeal a Commissioner of Revenue order increasing their Minnesota franchise tax liability for tax years 2007 and 2008 and imposing substantial understatement penalties. The Commissioner concluded that the statutory net income apportionment rules under Minn. Stat. § 290.191 (2016) did not fairly reflect all of Appellants’ income attributable to Minnesota. As a result, the Commissioner applied an alternative apportionment method under Minn. Stat. § 290.20, subd. 1 (2016), and adjusted apportionment factors for three of Appellants’ members. Appellants contend the Commissioner improperly invoked Minn. Stat. § 290.20, subd. 1. We agree and reverse the Commissioner’s order.

¹ The parties agreed to proceed without a hearing, but on written stipulation of facts, joint exhibits, and briefing. See Minn. R. 8610.0110 (2015). The parties appeared for oral argument on January 18, 2017.

Based upon all of the files, records, and proceedings herein, the court now makes the following:

FINDINGS OF FACT

1. During 2007 and 2008, Appellant Associated Bank, N.A. (“Associated Bank”), was a nationally chartered bank headquartered in Wisconsin and a wholly-owned subsidiary of Associated Banc-Corp, a bank holding company.

2. In September 2007, Associated Banc-Corp created two limited liability companies under Wisconsin law: Associated MN Retail RE, LLC (“Retail LLC”) and Associated MN Commercial RE, LLC (“Commercial LLC”).

3. Retail LLC’s members are Associated Bank and Associated Minnesota Real Estate Corporation (“MN Real Estate”).

4. Commercial LLC’s members are Associated Bank and ASBC Investment Corporation.

5. On September 12, 2007, MN Real Estate transferred portfolios of loans secured by Minnesota real estate to Retail LLC.

6. On September 12, 2007, Associated Bank transferred portfolios of loans secured by Minnesota real estate to Commercial LLC.

7. The loan transfers resulted in no change in the management of the loans, except that new reports were generated to track the portfolios.

8. Associated Bank remained the mortgagee of record for all Minnesota loans held by Retail LLC and Commercial LLC, and borrowers made loan payments directly to Associated Bank, as the collection agent for Retail LLC and Commercial LLC.

9. From September 12, 2007 through the end of 2007, Retail LLC's loans earned \$10,728,355 in interest income and Commercial LLC's loans earned \$17,173,108 in interest income.

10. In 2008, Retail LLC's loans earned \$41,881,147 in interest income and Commercial LLC's loans earned \$72,804,316 in interest income.

11. Associated Banc-Corp created Retail LLC in Wisconsin to minimize Retail LLC's members' Minnesota franchise tax liability.

12. Associated Banc-Corp created Commercial LLC in Wisconsin to minimize Commercial LLC's members' Minnesota franchise tax liability.

CONCLUSIONS OF LAW

1. Retail LLC and Commercial LLC are not "financial institution[s]" as defined in Minn. Stat. § 290.01, subd. 4a(a) (2016).

2. The general apportionment rules of Minn. Stat. § 290.191, subd. 2 (2016), not the financial institution rules of Minn. Stat. § 290.191, subd. 3 (2016), apply to Retail LLC and Commercial LLC.

3. The Commissioner of Revenue failed to demonstrate that "[t]he methods prescribed by section 290.191" did not "fairly and correctly" determine Appellants' "taxable net income allocable to" Minnesota and, thereby, failed to rebut the presumption under Minn. Stat. § 290.20, subd. 1 (2016).

ORDER FOR JUDGMENT

1. The June 29, 2015 order of the Commissioner of Revenue is reversed.
2. The Commissioner shall recalculate the amount of tax owed by (or the amount of refund due to) Appellants for the years at issue in light of this order and the parties' stipulation, which includes adjustments on other issues, and shall notify Appellants of the recalculation within 14 days of the date of filing of this order.

IT IS SO ORDERED.

BY THE COURT:



A handwritten signature in blue ink that reads "Thomas G. Haluska". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas G. Haluska, Judge
MINNESOTA TAX COURT

DATED: April 18, 2017

MEMORANDUM

Associated Bank, N.A., and its affiliates appeal a Commissioner of Revenue order assessing \$2,161,053.00 in additional franchise tax, a substantial understatement penalty of \$432,210.60, plus interest for 2007; and \$2,779,757.00 in additional franchise tax, a substantial understatement penalty of \$555,951.40, plus interest for 2008.² Minnesota levies a franchise tax on corporations "that produce gross income attributable to sources within this state."³ During 2007 and 2008, Minnesota used a statutory unitary-business/formula-apportionment method that

² Ex. J1, at COR3394 (Notice of Determination on Appeal). The parties have agreed that no substantial underpayment penalty shall apply. Stipulation of Facts ¶ 92.

³ Minn. Stat. § 290.02 (2016).

combined the income of the unitary business and apportioned that income by a formula that divided the taxpayer's Minnesota sales, property, and payroll by its total sales, property, and payroll.⁴ A separate statute provided, however, that upon a finding that the apportionment "methods prescribed by [Minn. Stat. § 290.191 (2016)] do not fairly reflect all or any part of taxable net income allocable to this state," the Commissioner was authorized to "require the determination of net income by the use of another method, if that method fairly reflects net income."⁵ Invoking this authority, the Commissioner applied an alternative method and adjusted apportionment factors for three of Appellants' members.⁶ Appellants argue the Commissioner improperly relied on the exception.⁷ We agree.

I. BACKGROUND

During 2007 and 2008, Associated Bank, N.A. ("Associated Bank"), was a nationally chartered bank headquartered in Wisconsin and a wholly-owned subsidiary of Associated Banc-Corp, a bank holding company.⁸ Associated Bank "was engaged in the business of banking," with banking locations in Wisconsin, Illinois, and Minnesota and with loan production offices in other states.⁹

In May 2007, Associated Banc-Corp advised the federal Office of the Comptroller of Currency that it "proposed creating two limited partnerships for the purposes of holding real estate

⁴ Minn. Stat. § 290.191, subds. 1-3 (2016); see *Kimberly-Clark Corp. & Subs. v. Comm'r of Revenue*, 880 N.W.2d 844, 846 (2016).

⁵ Minn. Stat. § 290.20, subd. 1 (2016). This statute also allowed a taxpayer to petition the Commissioner for the necessary finding and for the application of an alternative apportionment. *Id.*

⁶ Ex. J1, at COR3402-09.

⁷ Appellants' Opening Br. 3 (filed October 28, 2016).

⁸ Stip. Facts ¶¶ 1, 2, 10.

⁹ Stip. Facts ¶ 8.

loan[s] related to assets then held by” Associated Bank and a related entity, Associated Minnesota Real Estate Corporation (“MN Real Estate”).¹⁰ In June 2007, an officer of Associated Banc-Corp explained to the Comptroller’s office:

There will be no change in the management of the transferred assets and therefore, the safety and soundness of the assets will be unaffected by the transaction. The proposed structure will also be federal tax neutral. . . . *For Minnesota tax purposes, the proposed structure should minimize Associated’s Minnesota tax liability by reducing the Minnesota apportionment ratio.*

Minnesota has specific apportionment rules for financial institutions that are different than those applicable to a general corporation. The definition of “financial institution” contained in [Minn. Stat. § 290.01, subd. 4a (2016)] does not include partnerships. As a result, the proposed limited partnerships will not [sic] be subject to the apportionment rules applicable to general corporations and therefore, will exclude all interest income from the sales factor flowing up to their respective partners. . . . *By excluding the interest earned on the Minnesota loans, the effect is a reduction in Associated’s Minnesota apportionment ratio and thus its Minnesota tax liability.*¹¹

In September 2007, Associated Banc-Corp created two limited liability companies under Wisconsin law:¹² Associated MN Retail RE, LLC (“Retail LLC”);¹³ and Associated MN Commercial RE, LLC (“Commercial LLC”).¹⁴ Retail LLC’s members are Associated Bank and

¹⁰ Stip. Facts ¶¶ 19, 23. MN Real Estate is a Wisconsin-organized real estate investment trust, or REIT. *Id.* ¶ 23.

¹¹ Stip. Facts ¶ 20; Ex. J4 (emphases added).

¹² Stip. Facts ¶ 21.

¹³ Stip. Facts ¶ 24; Ex. J5 (LLC agreement).

¹⁴ Stip. Facts ¶ 50; Ex. J14 (LLC agreement). Although the LLCs are sometimes referred to here as partnerships, they are in fact limited liability corporations that were taxed like partnerships. Stip. Facts ¶¶ 24, 29, 50, 56; *see* Minn. Stat. § 290.01, subd. 3b (2016) (“For purposes of this chapter . . . , a limited liability company that is formed under either the laws of this state or under similar laws of another state, will be treated as an entity similar to its treatment for federal income tax purposes.”); *see also* 26 U.S.C. § 7701(2) (2012) (“The term ‘partnership’ includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term ‘partner’ includes a member in such a syndicate, group, pool, joint venture, or organization.”).

MN Real Estate.¹⁵ Commercial LLC's members are Associated Bank and ASBC Investment Corporation ("ASBC").¹⁶ On September 12, 2007, MN Real Estate transferred to Retail LLC a \$707 million portfolio of loans secured by Minnesota real estate.¹⁷ The same day, Associated Bank transferred to Commercial LLC a \$1.359 billion portfolio of loans secured by Minnesota real estate.¹⁸ The loan transfers resulted in no change in the management of the loans, except that new reports were generated to track the portfolios.¹⁹ Associated Bank remained the mortgagee of record for all Minnesota loans held by both Retail LLC and Commercial LLC, and borrowers made loan payments directly to Associated Bank, acting as the LLCs' collection agent.²⁰

From September 12, 2007, through the end of 2007, Retail LLC's Minnesota loans earned \$10,728,355 in interest income and Commercial LLC's Minnesota loans earned \$17,173,108 in interest income.²¹ In 2008, Retail LLC's loans earned \$41,881,147 in interest income and Commercial LLC's loans earned \$72,804,316 in interest income.²²

For tax years 2007 and 2008, Retail LLC and Commercial LLC each filed Minnesota partnership tax returns.²³ Because they did not consider themselves financial institutions under

¹⁵ Stip. Facts ¶ 24; Ex. J5.

¹⁶ Stip. Facts ¶ 50; Ex. J14. ASBC is a wholly owned subsidiary of Associated Bank organized in Nevada. Stip. Facts ¶ 12.

¹⁷ Stip. Facts ¶¶ 25-26.

¹⁸ Stip. Facts ¶¶ 51-53. To the extent either LLC held unsecured loans, the borrowers had Minnesota mailing addresses. Stip. Facts ¶¶ 26, 52-53.

¹⁹ Stip. Facts ¶¶ 27, 54.

²⁰ Ex. J27, at 4 § III (Master Loan Participation Agreement); Ex. J28, at 2-3 §§ I, II (Mortgage Loan Service Agreement); Ex. J29, at 2-3 §§ I, II (Mortgage Loan Service Agreement); Ex. J30, at 4 § III (Master Loan Participation Agreement).

²¹ Stip. Facts ¶¶ 31, 33, 58, 60.

²² Stip. Facts ¶¶ 37, 38, 64, 66.

²³ Exs. J9 (2007 Retail LLC Minnesota Partnership Return), J13 (2008 Retail LLC Minnesota Partnership Return), J18 (2007 Commercial LLC Minnesota Partnership Return), J22 (2008 Commercial LLC Minnesota Partnership Return).

Minn. Stat. § 290.01, subd. 4a(a), both LLCs used the general apportionment formula in Minn. Stat. § 290.191, subd. 2.²⁴ Under that formula, interest income is excluded from the sales factor and intangible property is excluded from the property factor.²⁵ By excluding interest income from the sales factor and the value of the loan portfolio from the property factor, each LLC reported an overall apportionment factor of zero.²⁶

For tax years 2007 and 2008, Associated Bank filed combined Minnesota Corporation Franchise Tax Returns with certain affiliates engaged in its unitary business (collectively, Appellants).²⁷ In doing so, Associated Bank and MN Retail combined their apportionment factors with Retail LLC's factors, which were zero.²⁸ Similarly, Associated Bank and ASBC combined their apportionment factors with Commercial LLC's factors, which were also zero.²⁹

The Commissioner audited Appellants and issued a Notice of Change of Tax.³⁰ Appellants filed an administrative appeal.³¹ The Commissioner affirmed the audit decision, which used an alternative apportionment method under Minn. Stat. § 290.20, subd. 1.³² The Commissioner determined that the LLCs' loan interest income and loan values resulted from Minnesota business activity and therefore should have been included when calculating Associated Bank, ASBC, and

²⁴ Stip. Facts ¶¶ 43, 70.

²⁵ Minn. Stat. § 290.191, subds. 5(a)(1), 9.

²⁶ Stip. Facts ¶¶ 44-47, 71-74; Exs. J9, J13, J18, J22.

²⁷ Stip. Facts ¶ 3. The parties agree that during 2007 and 2008, Associated Bank, MN Retail, and ASBC were "financial institution[s]" as defined by Minn. Stat. § 290.01, subd. 4a. Stip. Facts ¶¶ 9, 17, 48.

²⁸ See Ex. J1, at COR3399. In Minnesota, partners, not partnerships, are subject to tax. Minn. Stat. § 290.31, subd. 1 (2016).

²⁹ See Ex. J1, at COR3399.

³⁰ Stip. Facts ¶ 6.

³¹ Stip. Facts ¶ 6; see also Ex. J1.

³² Ex. J1, at COR3396, 3400.

MN Real Estate’s apportionment factors in order to “fairly allocate taxable net income of the Minnesota unitary group to Minnesota.”³³ Specifically, for both tax years—Minn. Stat. § 290.191, subd. 2, notwithstanding—the Commissioner included the interest from Retail LLC and Commercial LLC’s loans in the sales factor numerators and denominators of the LLCs’ members on a pro rata basis and the value of Retail LLC and Commercial LLC’s loans (intangible property) in the property factor numerators and denominators of the LLCs’ members also on a pro rata basis.³⁴

The Commissioner’s adjustments resulted in the assessment of \$2,161,053.00 in additional tax, plus interest, for 2007; and \$2,779,757.00 in additional tax, plus interest, for 2008.³⁵ Appellants timely appealed the assessments to this court.³⁶

II. BURDEN OF PROOF

“The Tax Court shall hear, consider, and determine . . . every appeal de novo.”³⁷ Nevertheless, Minn. Stat. § 271.06, subd. 6, provides that the Commissioner’s orders are “prima facie valid.”³⁸ As a result, it is typically the taxpayer who must overcome the presumed validity of an assessment by demonstrating that the methodology used by the Commissioner to arrive at the assessment was invalid or that the calculation of tax is incorrect.³⁹ Here, however, Minn. Stat.

³³ Ex. J1, at COR3402-09; Stip. Facts ¶¶ 78-81.

³⁴ Stip. Facts ¶¶ 78-81.

³⁵ Ex. J1, at COR3394.

³⁶ Notice of Appeal (filed Aug. 4, 2015).

³⁷ Minn. Stat. § 271.06, subd. 6 (2016).

³⁸ *Id.*; see Minn. Stat. § 270C.33, subd. 6 (2016) (“A return or assessment of tax made by the commissioner is prima facie correct and valid.”); *Conga Corp. v. Comm’r of Revenue*, 868 N.W.2d 41, 53 (Minn. 2015).

³⁹ See *Karma LLC v. Comm’r of Revenue*, No. 8765-R, 2016 WL 1730741, at *2 (Minn. T.C. Apr. 22, 2016) (citing *More, Inc. v. Comm’r of Revenue*, No. 8395-R, 2016 WL 715004, at *14 (Minn. T.C. Feb. 19, 2016)).

§ 290.20, subd. 1, provides a different presumption when a party seeks to use an alternative apportionment method: “The methods prescribed by section 290.191 shall be presumed to determine fairly and correctly the taxpayer’s taxable net income allocable to this state.”⁴⁰ Thus, Minn. Stat. § 290.20, subd. 1, effectively shifts the burden from the taxpayer to the Commissioner in this case because she is the party invoking an alternative apportionment method.⁴¹

III. ANALYSIS

The parties agree that Retail LLC and Commercial LLC are not financial institutions, and are treated as partnerships for Minnesota income tax purposes.⁴² Under Minn. Stat. § 290.191, the general apportionment rules apply to the LLCs, which means (1) that interest income is excluded when calculating the sales factor and (2) that intangible property is excluded when calculating the property factor.⁴³ Invoking Minn. Stat. § 290.20, subd. 1, the Commissioner argues the general

⁴⁰ (Emphasis added); see *HMN Fin., Inc. v. Comm’r of Revenue*, 782 N.W.2d 558, 566-67 (Minn. 2010).

⁴¹ Tr. 24 (“[T]he Commissioner is not relying in this case on the general presumption of correctness of the order. . . . We accept that it is the Commissioner’s burden to rebut the presumption of correctness that’s set forth in [Minn. Stat. §] 290.20.”); see *Connexus Energy v. Comm’r of Revenue*, 868 N.W.2d 234, 242 (Minn. 2015) (applying a canon of construction, “when a conflict exists between two statutory provisions, the ‘[s]pecific provisions in a statute control general provisions.’ ” (quoting *Beck v. Groe*, 245 Minn. 28, 41, 70 N.W.2d 886, 895 (1955))); see also Walter Hellerstein & John A. Swain, *State Taxation: Corporate Franchise, Net Income, and Capital Stock Taxes* § 9.20[4] (3rd ed. 2017) (“Courts construing equitable apportionment provisions have almost invariably held that the burden of proof rests on the party seeking to invoke the provision. In other words, the party seeking a deviation from the standard apportionment provisions must demonstrate that they ‘do not fairly represent the extent of the taxpayer’s business activity in the state’ and that the proposed alternative method ‘effectuate[s] an equitable allocation and apportionment of the taxpayer’s income.’ ” (citations omitted)).

⁴² Stip. Facts ¶¶ 29, 48, 56, 75; see Minn. Stat. § 290.01, subd. 4a(a) (“ ‘Financial institution’ means: (1) a holding company; (2) any regulated financial corporation; or (3) any other corporation organized under the laws of the United States or organized under the laws of this state or any other state or country that is carrying on the business of a financial institution.”).

⁴³ Minn. Stat. § 290.191, subs. 5, 9-10.

apportionment method does not fairly capture the LLCs' (and therefore Appellants') Minnesota taxable income.⁴⁴ Minnesota Statutes § 290.20, subd. 1, specifically provides:

The methods prescribed by section 290.191 shall be presumed to determine fairly and correctly the taxpayer's taxable net income allocable to this state. If the methods prescribed by section 290.191 do not fairly reflect all or any part of taxable net income allocable to this state, the taxpayer may petition for or the commissioner may require the determination of net income by the use of another method, if that method fairly reflects net income. These other methods may include:

- (1) separate accounting;
- (2) excluding any one or more of the factors;
- (3) including one or more additional factors; or
- (4) some other method.

The Minnesota Supreme Court examined this provision in *HMN Financial, Inc. v. Commissioner of Revenue*.⁴⁵ The court determined that the statute's plain meaning presumes "that a taxpayer has 'fairly and correctly' determined its Minnesota taxable income if that taxpayer used the reporting methods outlined in section 290.191."⁴⁶ Similar to *HMN Financial*, here the Commissioner does not assert that Appellants "did not properly follow 'the methods prescribed by section 290.191.'" ⁴⁷ Instead, the Commissioner tries to rebut Minn. Stat. § 290.20's presumption of fair allocation, asserting that she has broad statutory authority to disregard business entities, like Retail LLC and Commercial LLC, structured to minimize Minnesota tax liability.⁴⁸ The Commissioner asserts that the general apportionment method does not fairly capture the LLCs' Minnesota taxable income because: (1) the LLCs' income was substantial (over \$142 million);

⁴⁴ Comm'r's Opening Br. 14-15 (filed Oct. 28, 2016).

⁴⁵ 782 N.W.2d at 566-67.

⁴⁶ *Id.*

⁴⁷ *Id.*; see, e.g., Comm'r's Opening Br. 1.

⁴⁸ Comm'r's Opening Br. 9, 14-15.

(2) the “loans retained each and every aspect of their Minnesota character”; and (3) “millions of dollars of Appellants’ revenue from Minnesota loans would become invisible for tax purposes.”⁴⁹

In *HMN Financial*, the taxpayers, “motivated solely by a desire to reduce their taxes,” “organized their businesses in compliance with relevant statutes” to create a “captive REIT.”⁵⁰ Although the corporate franchise tax benefits to HMN Financial “were considerable,”—approximately \$2.5 million over three tax years—the supreme court concluded that the Commissioner failed to rebut Minn. Stat. § 290.20’s presumption of fairness and correctness.⁵¹ Noting that “the Commissioner appear[ed] to take issue with the result rather than the methods HMN used to reach that result,” the court determined that the Commissioner could not invoke Minn. Stat. § 290.20 to look through or disregard the taxpayers’ corporate structure.⁵² We similarly conclude that the Commissioner cannot meet her burden by disregarding the business structure Appellants attained by means of these lawfully created LLCs.

Furthermore, we agree with Appellants that the Commissioner cannot circumvent Minn. Stat. § 290.191 and *HMN Financial* by applying the financial institution apportionment rules,

⁴⁹ Comm’r’s Opening Br. 14-15.

⁵⁰ *HMN Fin.*, 782 N.W.2d at 561 & n.1 (explaining that “[a] ‘captive Reit’ is a business structure . . . in which a corporation owns [a] holding company, which in turn owns a real estate investment trust”).

⁵¹ *Id.* at 562, 567.

⁵² *Id.* The Commissioner argues *HMN Financial* is not on point “because in *HMN*, there was no direct invocation of Section 290.20, nor any facts alleged regarding the propriety of apportionment methods.” Comm’r’s Opening Br. 17. We disagree. Before the tax court, “[t]he Commissioner also assert[ed] that it has the statutory authority to review HMN’s transaction and to ‘require the determination of income by the use of another method (here other than allocation under Section 290.191) if that method fairly reflects net income.’” *HMN Fin., Inc. v. Comm’r of Revenue*, No. 7911-R, 2009 WL 1506929, at *15, 20 (Minn. T.C. May 27, 2009), *rev’d*, 782 N.W.2d at 561. Regardless, in *HMN Financial*, the Commissioner clearly relied on Minn. Stat. § 290.20, along with other statutory grounds, on appeal to the supreme court. *HMN Fin.*, 782 N.W.2d at 566-67. The court rejected the Commissioner’s arguments, and we are bound by its decision. *Id.*

rather than the general apportionment rules, to the LLCs.⁵³ Although Retail LLC and Commercial LLC are *not* financial institutions, the Commissioner effectively treats them as such by including both their interest income and intangible property in their members' apportionment factors. The Commissioner stresses that her method did "not directly adjust the apportionment factors" of the LLCs, but "instead adjusted the member-partners' factors," which are admittedly financial institutions.⁵⁴ We are not persuaded: the Commissioner cannot evade *HMN Financial's* look-through prohibition and Minn. Stat § 290.20's presumption in this way. Put another way, section 290.20 does not authorize the Commissioner to effectively "reverse legislative judgment that partnerships must not use the financial institution apportionment formula"⁵⁵ by adjusting the members' factors as if the partnerships were financial institutions.⁵⁶

We agree that by creating the LLCs in Wisconsin, Appellants were taking advantage of a tax loophole to minimize their Minnesota tax liability.⁵⁷ But it is up to the legislature to close tax

⁵³ See Appellants' Opening Br. 12-13; Appellant's Reply Br. 4-5 (filed Nov. 21, 2016). Appellants also argue that the Commissioner improperly relied on Minn. Stat. § 290.311, subd. 1(b) (2016), to conclude that the apportionment method, *i.e.*, whether the general or financial institution rules apply to interest, is determined at the partner level instead of the partnership level. Appellants' Opening Br. 7-9 (citing Ex. J1, at COR3402). On appeal, the Commissioner has abandoned Minn. Stat. § 290.311, subd. 1(b), as a basis for affirming her order. Comm'r's Opening Br. 8 n.6. As a result, we do not address Appellants' argument on this issue.

⁵⁴ Comm'r's Reply Br. 3-4 (filed Nov. 21, 2016); see Stip. Facts ¶¶ 9, 17, 48.

⁵⁵ Appellants' Opening Br. 13.

⁵⁶ Appellants also argue that the plain meaning of Minn. Stat. § 290.20 does not allow the Commissioner to use the financial institution apportionment formula as an alternative because it is not "another method" than one "prescribed by section 290.191." Appellants' Opening Br. 16. Because we conclude the Commissioner has not met her burden, we do not address this argument.

⁵⁷ See, e.g., Ex. J4; *Loophole*, *Black's Law Dictionary* (10th ed. 2014) (defining loophole as "[a]n ambiguity, omission, or exception (as in a law or other legal document) that provides a way to avoid a rule without violating its literal requirements," especially in "a tax-code provision that allows a taxpayer to legally avoid or reduce income taxes").

loopholes—not the Commissioner⁵⁸ or the courts.⁵⁹ And thus far, the legislature has declined to act on proposed legislation that would allow LLCs to be classified as financial institutions.⁶⁰ Although the Commissioner argues she is not trying to close a loophole, just fairly allocate business activity under these specific circumstances,⁶¹ this distinction is foreclosed by *HMN Financial*.⁶²

⁵⁸ See *HMN Fin.*, 782 N.W.2d at 570 (“The Commissioner clearly dislikes the tax consequences that occurred under the relevant statutes, but it is for the legislature, not the Commissioner, to change the law that creates such consequences.”); see also *id.* (“Indeed, the Commissioner does not cite any authority addressing the issue of whether the Commissioner can tax according to substance rather than form when a taxpayer has structured its business to be in full compliance with the relevant tax statutes.”).

⁵⁹ See *Wallace v. Comm’r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971) (rejecting the argument that a statutory omission was a result of legislative oversight on the “well-established ground that courts cannot supply that which the legislature purposely omits or inadvertently overlooks”); *LumiData, Inc. v. Comm’r of Revenue*, No. 8195-R, 2013 WL 6834796, at *9 (Minn. T.C. Dec. 18, 2013), *aff’d*, 853 N.W.2d 142 (Minn. 2014) (“Where the Legislature determines that a particular transaction is nontaxable only if it is attended by specified formalities—here, the exchange of certain documents—a court may not simply disregard the statutorily required formalities under the guise of elevating substance over form.”).

⁶⁰ In January 2015, as part of budget recommendations, Governor Dayton proposed to expand the financial institution definition to include LLCs performing the activities of such institutions. Minn. Mgmt. & Budget, *2016-17 Governor’s Budget - Tax Aids, Credits and Refunds*, at 7 (January 27, 2015), <http://www.mn.gov/mmb-stat/documents/budget/2015-gov-rec/g90.pdf>. A month later, omnibus tax bills were introduced in the Senate and House of Representatives that included proposed amendments to Minn. Stat. § 290.01, subd. 4a, to expand the definition of “financial institution,” but these proposed changes did not become law. H.F. 848, art. 3, § 6 (introduced Feb. 12, 2015); S.F. 826, art. 3, § 6 (introduced Feb. 12, 2015). According to Appellants, the proposed amendments would have classified Retail LLC and Commercial LLC as financial institutions for apportionment purposes. Appellants’ Reply Br. 4; cf. *State, Dep’t of Pub. Safety v. Ogg*, 310 Minn. 433, 436, 246 N.W.2d 560, 562 (1976) (stating that the legislature’s failure to amend a statute following the court’s interpretation despite several intervening legislative sessions suggested acquiescence); *State v. Rohan*, 834 N.W.2d 223, 226-27 (Minn. App. 2013) (“[W]hen the legislature fails to amend a statute that has been interpreted by the supreme court, the legislature is deemed to have acquiesced to that interpretation.”).

⁶¹ Comm’r’s Opening Br. 17.

⁶² See, e.g., Comm’r’s Reply Br. 4 (“There is no need to resort to legislative history or items of proposed legislation to understand that the Legislature intended to tax interest income earned by banks and lenders in Minnesota in the ordinary course of business.”); *id.* at 5 (“[I]t is the policy of this State that a business engaged in Minnesota money lending activities must pay tax on interest income received as a result of such activities. Appellants, and especially the three members of the

Based on the foregoing, we reverse the Commissioner's order.

T.G.H.

Wisconsin LLCs—all of which are themselves financial institutions—are not exempt from this requirement.” (citation omitted).