STATE OF MICHIGAN

COURT OF APPEALS

REDKEN LABORATORIES,

Plaintiff-Appellant,

V

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
September 18, 2001

No. 221439
Court of Claims
LC No. 97-016781-CM

Before: Markey, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the lower court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

Plaintiff is a Delaware corporation with its principal place of business in New York, New York. Plaintiff is not registered to do business in Michigan. Plaintiff brought this action seeking to recover taxes paid under Michigan's Single Business Tax Act (SBTA), MCL 208.1 *et seq.*, for the years 1990 through 1993. This case involves the jurisdictional standard which defendant (hereinafter "the Department") applied to determine single business tax (SBT) liability. Prior to 1993 and consistent with its revenue bulletins, the Department had applied the criteria set forth in PL 86-272 (15 USC 381) to determine whether a person's business activities created a sufficient nexus with Michigan to subject that person to SBT liability.[1] Plaintiff relied on the Department's

[1] 15 USC 381 addresses the level of business activity required for a state to impose a net income tax on income derived in that state from interstate commerce. The statute provides in relevant part:

> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
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> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(continued…)

representations and conducted its business accordingly to avoid SBT liability.

In 1993, this Court decided *The Gillette Co v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993), which rejected PL 86-272 as the applicable jurisdictional nexus standard for SBT liability in favor of the much broader Due Process/Commerce Clause test.[2] Under the new standards, plaintiff was subject to SBT liability, which the Department then retroactively assessed for years 1990 to 1993. Plaintiff paid the tax under protest and then instituted this action to recover the taxes paid.

Plaintiff alleged that the retroactive application of the Due Process/Commerce Clause jurisdictional tests for SBT liability announced in *Gillette* violated plaintiff's due process and equal protection rights. Plaintiff asserted that it had relied on the Department's representations in its bulletins that plaintiff's nexus with Michigan would be evaluated under PL 86-272 for purposes of determining SBT jurisdiction and tax liability.

In July 1998, the Michigan Legislature enacted MCL 205.30c (hereinafter "the Voluntary Disclosure Act" or VDA) which added § 30c to the Department of Revenue Act. The section provides, inter alia, that the Department may enter into a voluntary disclosure agreement with persons who have not filed a return and have "a filing responsibility under nexus standards issued by the department after December 31, 1997," or "contest liability for a tax or fee administered under this act as determined by the commissioner." MCL 205.30c(1). If a person meets the eligibility requirements and enters into a voluntary disclosure agreement, that person is relieved of "any tax, delinquency for a tax, penalty, or interest covered under the agreement for any period before the lookback period identified in the agreement." MCL 205.30c(4)(a). The "lookback period" for persons subject to SBT is "the 4 most recent completed fiscal or calendar years over a 48-month period or the first date the person subject to an agreement under this section began doing business in this state if less than 48 months." MCL 205.30c(10)(ii).

Plaintiff subsequently amended its complaint to add a count challenging the constitutionality of MCL 205.30c on equal protection grounds. Plaintiff amended its complaint a second time to allege that the doctrine of equitable estoppel bars the retroactive application of *Gillette*.

The Department filed a motion for summary disposition pursuant to MCR 2.116(C)(8), arguing that *Gillette, supra,* and *Guardian Corp v Treasury Dep't*, 198 Mich App 363; 499 NW2d 349 (1993) were dispositive of plaintiff's challenges to the retroactive application of the Due Process/Commerce Clause jurisdictional standard as a matter of law. Also, the Department

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> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

[2] On February 1, 1998, the Department issued RAB 1998-1. This bulletin adopted the Due Process/Commerce Clause jurisdictional tests consistent with the *Gillette* holding, and declared that this jurisdictional standard was effective for all tax years ending in and after 1989.

argued, this Court's opinion in *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286; 590 NW2d 612 (1998) held that the jurisdictional nexus standard in *Gillette* may be retroactively applied. The Department further maintained that plaintiff had failed to state a constitutional challenge to the VDA because plaintiff failed to plead that a similarly situated class of taxpayers have been afforded different treatment than plaintiff under the VDA.

The Court of Claims rejected plaintiff's due process argument in reliance on the analysis in *Syntex*, *supra*, because plaintiff did not have a vested right in the continued application of a tax law and "proper application of the law cannot be considered a due process violation." The court also rejected plaintiff's equal protection claim. The court concluded that even if plaintiff can show that it was similarly situated with other differently-treated taxpayers, plaintiff failed to show the lack of a rational basis for the different treatment. Finally, the Court of Claims granted summary disposition of plaintiff's estoppel claim. The court concluded that "to apply the doctrine of estoppel here would be contrary to public policy, which favors the efficient and effective collection of tax revenue."

I. Retroactive Application of *Gillette*

On appeal, plaintiff first argues that the Court of Claims erred in granting summary disposition based upon the retroactive application of *Gillette*, *supra*. Plaintiff maintains that it justifiably relied upon the Department's revenue bulletins in which the Department advised of the jurisdictional standard to determine whether an out-of-state business is subject to taxation under the SBTA. Plaintiff argues that *Gillette* overturned existing precedent and established a new principle of law and therefore should be given prospective application only.

This Court reviews de novo a grant or denial of summary disposition based on a failure to state a claim under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Guardian Photo, Inc v Dep't of Treasury*, 243 Mich App 270, 276; 621 NW2d 233 (2000). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Id.*, citing *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). "All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts." *Guardian Photo*, *supra* at 276. "[Q]uestions concerning the retroactivity of earlier judicial decisions are for this Court to decide de novo as matters of law. *Lincoln v General Motors Corp*, 461 Mich 483, 490; 607 NW2d 73 (2000). See, generally, *Michigan Educational Employees Mut Ins Co v Morris*, 460 Mich 180, 189-197; 596 NW2d 142 (1999).

In *Gillette*, *supra*, this Court rejected PL 86-272 as the jurisdictional nexus test for assessing SBT. This Court held that the proper inquiry is the broader Due Process/Commerce Clause test.[3] This Court retroactively applied the Due Process/Commerce Clause test and

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[3] The *Gillette* Court articulated the proper inquiry under the Due Process/Commerce Clause jurisdictional test. The Due Process Clause requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Gillette*, *supra* at 311-312, quoting *Quill Corp v North Dakota*, 504 US 298, 306; 112 S Ct 1904, 1909; (continued…)

determined that the SBT was properly assessed based on the facts in that case.[4]

"Generally, a judicial decision is to be given complete retroactive effect." *Bolt v City of Lansing (On Remand)*, 238 Mich App 37, 44; 604 NW2d 745 (1999). Our Supreme Court recognized in *Lindsey v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997) that particular circumstances may warrant only prospective application: "[W]here injustice might result from full retroactivity, this Court has adopted a more flexible approach, giving holdings limited retroactive or prospective effect. This flexibility is intended to accomplish the "maximum of justice" under varied circumstances." *Bolt*, *supra* at 44, quoting *Lindsey*, *supra* at 68.

In *Syntex*, *supra*, this Court rejected the petitioner's due process argument and held that the retroactive application of *Gillette* is permissible:

> . . . The test to determine whether laws comport with due process is essentially the same as that for equal protection: they must be sustained if rationally related to a legitimate government purpose. As noted, we find that there was a rational basis for respondent's decision regarding enforcement of the DP/CC test announced in *Gillette*. Therefore, that enforcement decision did not violate petitioner's due process rights.
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> . . . Due process principles prevent retrospective laws from divesting rights to property or vested rights or from impairing contracts. While petitioner may not have expected this Court to reject the P.L. 86-272 test, the Court's decision is not unexpected and indefensible because the appellate courts of this state had never resolved whether the P.L. 86-272 test was appropriate for determining single business tax liability, *Gillette*, *supra* at 307, n 1, and petitioner knew that the *Gillette* decision could affect its pending matter. In any event, petitioner did not have a vested right in the continuation of any tax law. Therefore, proper application of the law cannot be considered a due process violation in this case. [*Syntex*, *supra* at 292-293 (citations omitted).]

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119 L Ed 2d 91, 102 (1992), quoting *Miller Bros Co v Maryland*, 347 US 340, 344-345; 74 S Ct 535; 98 L Ed 744 (1954). "A tax will sustain a Commerce Clause challenge when it: (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state." *Gillette*, *supra* at 313, quoting *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977), *Caterpillar, Inc v Dep't of Treasury, Revenue Division*, 440 Mich 400, 415; 488 NW2d 182 (1992).

[4] On the same day that *Gillette* was decided, this Court decided *Guardian Industries Corp v Dep't of Treasury*, 198 Mich App 363; 499 NW2d 349 (1993). In *Guardian*, this Court undertook the same analysis and determined that PL 86-272 was not intended to apply to the SBT.

We reject plaintiff's attempts to distinguish *Syntex* on the basis that *Syntex* involved a pending matter. Although this was one consideration for this Court's rejection of the due process argument, this Court's reasoning applies in the instant case. The *Gillette* decision "is not unexpected and indefensible because the appellate courts of this state had never resolved whether the P.L. 86-272 test was appropriate for determining single business tax liability." *Syntex, supra* at 293. Further, in this case as in *Syntex*, plaintiff "did not have a vested right in the continuation of any tax law. Therefore, proper application of the law cannot be considered a due process violation." *Id.* Notably, in its brief on appeal plaintiff acknowledges that it was aware that PL 86-272 "according to its literal terms, did not apply to the SBT[.]" We conclude that *Syntex* is controlling authority and the court properly granted summary disposition on that basis.

II. Equal Protection under the Voluntary Disclosure Act, MCL 205.30c(3)(a)

Plaintiff next argues that the Court of Claims erred in granting summary disposition of its constitutional challenge to § 30(c)(3)(a) of the VDA on equal protection grounds. Plaintiff argues that pursuant to § 30(c)(3)(a), taxpayers who failed to comply with the terms of the Notice of Inquiry sent by the Department after the *Gillette* decision may be absolved of tax liability for years prior to 1994. Conversely, taxpayers such as plaintiff were required to pay, and plaintiff did pay under protest, SBT for the years beginning from 1989.

This Court reviews constitutional questions de novo. *Citizens for Uniform Taxation v Northport Public School Dist*, 239 Mich App 284, 290; 608 NW2d 480 (2000). In *Caterpillar, Inc v Dep't of Treasury, Revenue Division*, 440 Mich 400; 488 NW2d 182 (1992), this Court articulated the principles to be employed when deciding the constitutionality of a tax statute:

> A statute is presumed constitutional absent a clear showing to the contrary. It is the duty of the Court to give the presumption of constitutionality to a statute and construe it as constitutional unless the contrary clearly appears. The presumption of constitutionality is especially strong with respect to taxing statutes. State legislatures have great discretionary latitude in formulating taxes. The legislature must determine all questions of State necessity, discretion or policy in ordering a tax and in apportioning it. And the judicial tribunals of the State have no concern with the policy of State taxation determined by the legislature. A taxpayer challenging a tax on constitutional grounds must overcome a strong presumption in favor of the taxing statute's validity and point out with specificity the constitutional provision that is violated. A taxing statute must be shown to clearly and palpably violate [ ] the fundamental law before it will be declared unconstitutional. [*Caterpillar, supra* at 413-415 (citations omitted).]

"Legislation challenged on equal protection grounds is accorded a presumption of constitutionality, and this Court's inquiry is restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *Id.* at 290, citing *Vargo v Sauer*, 457 Mich 49, 61; 576 NW2d 656 (1998). Because this case involves neither a fundamental right nor a suspect classification, this Court applies the rational-basis standard of review. *Citizens for Uniform Taxation, supra* at 290, quoting *Vargo, supra* at 60. A statute is upheld under this standard if it furthers a legitimate governmental interest and if the challenged

classification is rationally related to achieving that interest. *Citizens for Uniform Taxation, supra* at 290, quoting *Vargo, supra* at 60.

We conclude that the Court of Claims properly granted summary disposition of plaintiff's equal protection claim. Accepting the allegations in plaintiff's complaint as true for purposes of the motion for summary disposition, plaintiff fails to plead an identifiable class of differently-treated taxpayers under the VDA with which plaintiff is similarly situated. The group referenced in plaintiff's complaint is the "more than 2,000 taxpayers to which the Department sent its Notice of Inquiry, which ignored or refused to comply with the terms of the Notice of Inquiry, who are now under 1993 Public Act 221 permitted to file returns for only the four most recent years, and are absolved of liability for Single Business taxes for the years ending in and after 1989 through 1993." The VDA permits the Department's commissioner to enter into voluntary disclosure agreements; it does not entitle the taxpayer to such relief. The VDA sets forth specific criteria and requirements to qualify for a voluntary disclosure agreement. Plaintiff's complaint does not mention the eligibility of the nonfilers to enter into voluntary disclosure agreements. The mere fact that not all of the potential nonfilers filed a return or paid SBT, without regard to their SBT liability, does not state an equal protection claim under the VDA because plaintiff does not allege the common characteristics of the class to which plaintiff claims it is similarly situated. Plaintiff attempts to clarify that it is deprived of the opportunity to avail itself of the protections afforded by the VDA and enter into a voluntary disclosure agreement. However, plaintiff has failed to plead a specific group, with which plaintiff is similarly situated, that received voluntary disclosure agreements.

Moreover, as a matter of law plaintiff cannot show the absence of a rational basis for the disparate treatment. The legislature's enforcement decision concerns the allocation of limited resources to ensure compliance with the tax code. The legislature's allocation of these limited resources for this purpose provides a rational basis for the enactment of the VDA, which affords those who qualify the opportunity to enter into a voluntary disclosure agreement. See *Syntex, supra* at 293. The fact that persons who received notices of inquiry, owed SBT, and did not file returns may ultimately be relieved of their SBT liability for years prior to 1994, does not violate equal protection merely because plaintiff was denied the opportunity because plaintiff paid its SBT prior to the enactment of the VDA. Despite the seemingly unfair effect of the VDA on plaintiff, the legislature's enactment of the VDA is properly viewed as "a decision regarding how to allocate its resources to achieve maximal compliance." See *Syntex*, *supra* at 293. Accordingly, the Court of Claims correctly granted summary disposition pursuant to MCR 2.116(C)(8).

III. Plaintiff's Estoppel Argument

Next, plaintiff claims that the Court of Claims erred in granting summary disposition of its claim that the Department should be estopped from retroactively applying the jurisdictional nexus standard announced in *Gillette* to taxpayers who relied upon the Department's SBT interpretations prior to that decision.

"Equitable estoppel is not an independent cause of action, but rather a doctrine that may assist a party by preventing the opposing party from asserting or denying the existence of a particular fact." *West American Ins Co v Meridian Mutual Ins Co*, 230 Mich App 305, 309-310; 583 NW2d 548 (1998). See *Hoye v Westfield Ins Co*, 194 Mich App 696, 705-707; 487 NW2d

838 (1992), citing Prosser, Torts (4th ed), § 105, pp 691-692. The doctrine of estoppel may apply "where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *West American, supra* at 310. "Equitable estoppel arises where one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position." *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998).

Estoppel is inapplicable to the case at bar. The Department's representations in its bulletins were not knowing misrepresentations. Rather, the Department stated its intent to apply PL 86-272 as the jurisdictional standard under the SBTA. The Department consistently and uniformly applied PL 86-272 as the jurisdictional nexus test until this Court's decision in *Gillette, supra*. This Court in *Gillette* applied a new standard retroactively. Moreover, this Court in *Syntex* permitted the retroactive application of the new standard and rejected constitutional challenges on due process and equal protection grounds. Further, with respect to plaintiff's claims of justifiable reliance, plaintiff acknowledges that by its terms PL 86-272 did not purport to be the jurisdictional standard for the SBTA. Accordingly, plaintiff's claims of unfairness and injustice based on the retroactive application of the new standard must fail.

IV. Plaintiff's Motion for Leave to Amend its Complaint to Add Class Action Allegations

Finally, plaintiff challenges the Court of Claims' denial of plaintiff's motion for leave to amend its complaint to include class action allegations to its claim challenging the constitutionality of the VDA.[5] "This Court reviews a grant or denial of a motion for leave to amend pleadings for abuse of discretion." *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997).

"A trial court should freely grant leave to amend if justice so requires." *Phinney*, *supra* at 523; MCR 2.118(A)(2). "Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Phinney, supra.* See also *Dampier v Wayne County*, 233 Mich App 714, 734; 592 NW2d 809 (1999), quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

At the hearing on plaintiff's motion, the court expressed its concerns regarding the propriety of class certification. The court also suggested that amendment would cause delay and that the court was not inclined to grant the motion because the case was ready for trial. The court denied plaintiff's motion without making findings of fact.

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[5] Although plaintiff's argument below and on appeal to a large extent addresses the propriety of class certification, the Department correctly emphasizes that the Court of Claims did not deny certification, but rather denied plaintiff's motion for leave to amend its complaint to add class action allegations.

Plaintiff argues that the court's failure to make findings requires reversal. This Court addressed this issue and articulated the rule in *Dampier, supra*: "To safeguard and implement the policy favoring amendment, this Court has directed that upon denial of a motion to amend 'such exercise of discretion should be supported by specific findings as to *reasons* for the same.'" *Dampier, supra* at 734, quoting *Ben P Fyke & Sons, supra* at 656 (emphasis in original). Further, "[a] court must specify one of the *Fyke* reasons in its denial, and a failure to do so constitutes error requiring a reversal unless such amendment would be futile." *Dampier*, *supra* at 734.

Based upon our foregoing analysis, plaintiff's amendment would be futile because plaintiff failed to state a claim upon which relief can be granted. The addition of class action allegations would not save plaintiff's claim.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Donald S. Owens