STATE OF MICHIGAN

COURT OF APPEALS

CMS ENERGY CORPORATION, CMS ELECTRIC AND GAS COMPANY, CMS ENGINEERING COMPANY, CMS ENTERPRISES COMPANY, CMS GAS TRANSMISSION AND STORAGE COMPANY, CMS GENERATION COMPANY, CMS GENERATION FILER CITY OPERATING COMPANY, CMS GENERATION OPERATING COMPANY, CMS GRANDS LACS HOLDING COMPANY, CMS LAND COMPANY, CMS MARKETING SERVICES AND TRADING COMPANY, CMS MARYSVILLE GAS LIQUIDS COMPANY, CMS OIL AND GAS COMPANY, CONSUMERS ENERGY COMPANY, ES SERVICES COMPANY, MICHIGAN GAS STORAGE COMPANY, and TERRA ENERGY LTD., Plaintiffs-Appellants/Cross-Appellees,	UNPUBLISHED October 15, 2013
v	No. 309172 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee/Cross-Appellant.	LC No. 08-000063-MT

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

In this Single Business Tax Act (SBTA)[1] case, plaintiffs, a group of related companies collectively referred to as "CMS," appeal as of right the Court of Claims' order denying their

[1] The SBTA is former MCL 208.1 *et seq*. The SBTA has been repealed. See 2006 PA 325; *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 94 n 1; 815 NW2d 811 (2012).

motion for summary disposition pursuant to MCR 2.116(C)(10) and granting summary disposition in favor of defendant, Department of Treasury, pursuant to MCR 2.116(I)(2). Because we conclude that defendant properly exercised its discretion under the SBTA and that defendant did not violate plaintiffs' right to equal protection under either the United States or the Michigan constitution, we affirm.

The facts of this case are not disputed. In 1999, plaintiffs requested permission from defendant pursuant to MCL 208.77(1) to file a consolidated or combined Single Business Tax (SBT) return for the 1998 tax year. In previous years, the 17 total plaintiffs filed separate SBT returns. Defendant approved plaintiffs' consolidation request on October 25, 2002. On December 20, 2002, plaintiffs filed a single consolidated Michigan Single Business Tax Annual Return ("the 1998 return"). The 1998 return calculated plaintiffs' SBT base by deducting the business loss carryovers for the current year as well as all the available business loss carryovers incurred in prior years by each of the members of the consolidated group.

Defendant audited plaintiffs' return and disallowed a portion of plaintiffs' claimed business loss carryover deductions based on defendant's policy with respect to consolidated or combined returns as promulgated in Revenue Administrative Bulletin 1989-49, (RAB-89-49) that limits business loss carryover deductions. The limitation requires any pre-1998 business loss carryovers applied against the allocated SBT base be calculated as though the individual members were filing separate SBT returns. Plaintiffs had a greater tax liability after defendant's adjustments brought the return into compliance with defendant's policy regarding the business loss carryover deduction. Accordingly, defendant issued notice of its intent to assess additional taxes. Following an informal conference, defendant issued a final assessment in the amount of $11,451,324.53. Plaintiffs paid the final assessment amount under protest, and on July 1, 2008, filed a complaint seeking a refund of the final assessment.

As the case proceeded through the Court of Claims, plaintiffs made several discovery requests. Defendant refused to produce several documents sought by plaintiffs, claiming that the documents were protected from disclosure by the deliberative process privilege and by MCL 205.28(1)(f). In response, plaintiffs moved to compel discovery. Following a hearing regarding plaintiffs' motion to compel, the Court of Claims ordered production of some documents but held that some were not discoverable. Plaintiffs did not file an interlocutory appeal. Eventually, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10). At the hearing regarding plaintiffs' summary disposition motion, plaintiffs argued that defendant lacked any legal or statutory basis for its limitation on plaintiffs' business loss carryover deduction and that defendant's disparate treatment of plaintiffs constituted an unconstitutional violation of equal protection and the uniform application of tax law in violation of the United States and Michigan constitutions.

Subsequently, the Court of Claims issued an opinion and order denying plaintiffs' motion and granting summary disposition in favor of defendant pursuant to MCR 2.116(I)(2). In its decision, the Court of Claims concluded that when defendant exercises its discretion under MCL

For ease of references, all cited SBTA provisions refer to the version in effect at the time the tax was imposed.

208.77(1) regarding whether to permit a consolidated SBT return, it may also use its discretion to limit the business loss carryover deduction. The Court of Claims noted that the deduction for business losses is limited by MCL 208.23b(h) to losses that are "available," and defendant, in exercising its lawful discretion, determined that certain losses were not "available" when filing a consolidated return. The Court of Claims further found that "there is a good reason" for defendant's position because permitting plaintiffs to deduct business loss carryovers from previous years once approval to consolidate is granted would allow plaintiffs to get around defendant's prohibition against retroactive consolidation—a prohibition that has been upheld by this Court. Finally, the Court of Claims noted that defendant's policy, as set forth by RAB-89-49, does not conflict with any provision of the SBTA. Plaintiffs now appeal the Court of Claims' decision as of right.

On appeal, plaintiffs argue that they are entitled to deduct their business losses pursuant to the plain language of MCL 208.23(b)(h), and that defendant does not have any statutory authority to reduce, suspend, or eliminate the statutory deduction. Specifically, plaintiffs argue that the Court of Claims erred by concluding that MCL 208.77(1) gives defendant discretion to limit the business loss deduction because that provision does not include any language addressing how a consolidated or combined SBT return is calculated. Plaintiffs also argue that the "available" losses limitation refers only to the time limitation set forth by the statute and does not give defendant authority to otherwise limit the deduction. Further, plaintiffs argue that RAB-89-49 does not carry the force of law.[2] Plaintiffs instead maintain that defendant was required to promulgate a rule under the Administrative Procedures Act to carry out its policy. Finally, plaintiffs maintain that defendant's policy is not entitled to respectful consideration because it conflicts with the plain language of the SBTA.

We review de novo a trial court's decision to grant or deny summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

We also review de novo questions of statutory interpretation. *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 96; 815 NW2d 811 (2012). The goal of statutory interpretation is to ascertain and give effect to the Legislature's intent, which is determined by examining the specific language of the statute. *Id.* at 97. The Legislature "is presumed to have intended the meaning it plainly expressed." *Id.*

"Agencies have the authority to interpret the statutes they are bound to administer and enforce." *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993). This Court

[2] Defendant concedes that bulletins do not carry the force of law, but nonetheless argues that it has discretionary authority to enforce its policy that is set forth in the bulletin.

will uphold an agency's exercise of discretion unless there is no rational basis for it. *Guardian Indus Corp v Dep't of Treasury*, 198 Mich App 363, 382; 499 NW2d 349 (1993), citing *Clarke-Gravely Corp v Dep't of Treasury*, 412 Mich 484, 489; 315 NW2d 517 (1982). Moreover, while the statutory language itself is ultimately controlling, agency interpretations are granted "respectful consideration," and if persuasive, should not be overruled without "cogent reasons." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008).

Defendant's discretion to require or permit the filing of a consolidated or combined SBT return is set forth by MCL 208.77(1), which provides:

> (1) The commissioner may require or permit the filing of a consolidated or combined return by an affiliated group of United States corporations if all of the following conditions exist:
>
> (a) All members of the affiliated group are Michigan taxpayers.
>
> (b) Each member of the affiliated group maintains a relationship with 1 or more members of the group which includes intercorporate transactions of a substantial nature other than control, ownership, or financing arrangements, or any combination thereof.
>
> (c) The business activities of each member of the affiliated group are subject to apportionment by a specific apportionment formula contained in this act which specific formula also is applicable to all other members of the affiliated group, and would be so applicable to each member even if it were not a member of the affiliated group.

The SBTA permits the deduction of business losses in MCL 208.23b(h), which provides:

> Deduct any available business loss. As used in this subdivision, "business loss" means a negative amount after allocation or apportionment as provided in chapter 3 and after adjustments as provided in section 23 and subdivisions (a) to (g) without regard to the deduction under this subdivision. The business loss shall be carried forward to the year next following the loss year as an offset to the allocated or apportioned tax base including the adjustments provided in subdivisions (a) to (g), then successively to the next 9 taxable years following the loss year or until the loss is used up, whichever occurs first, but for not more than 10 taxable years after the loss year.

RAB-89-49 provides generally that: "The business loss deduction, statutory exemption, and Section 31 reductions are computed as though the member corporations were filing as one corporation," however, it also contains an "exception" to this general rule. The exception provides:

> A business loss carryover from a member's single business tax return filed for a separate return year is limited to that member's allocated or apportioned tax base after application of the capital acquisition deduction, net of recapture of capital

acquisition deduction, and computed as though such member were filing separate returns.

In *Clarke-Gravely Corp*, 412 Mich at 490, our Supreme Court considered the effect of MCL 206.335, part of the Michigan Income Tax Act. MCL 206.335 was subsequently replaced by the SBTA,[3] and was almost identical to MCL 208.77(1).[4] The issue in *Clarke-Gravely Corp* was whether a section of the Michigan Income Tax Act, which provided for the tolling of the three-year statute of limitations for refunds, was applicable when a corporate claimant of a refund originally filed an individual income tax return and then, more than three years later, was permitted to file a combined return as provided by MCL 206.335. Relevant to this case, § 335 of the Income Tax Act provided discretionary authority to the tax commissioner to permit or require combined reporting. *Id.* at 492-493. Section 335 was repealed and replaced by MCL 208.77(1), which provides the same discretionary authority. The Court held that § 335 was "pivotal" to its decision, noting that the discretionary power of the tax commissioner was "at the heart of § 355." *Id.* The majority of the Court held that "the tax commissioner has broad discretionary power to require or permit combined reporting." *Id.* at 488. Thus, the Court agreed with the plaintiffs that they had a right to interest on the combined refunds that were accepted by the defendant. *Id.* The Court held that the tax commissioner was not bound by the three-year limitations period on refund claims; thus, the rejection of one of the plaintiffs' returns should be reconsidered. *Id.* at 489. Accordingly, the Court remanded the case to the tax commissioner to determine whether, "in the exercise of his discretion, there exists any rational basis to refuse to accept the taxpayers' 1971 amended return," in light of the fact that the tax commissioner was not bound by the statute of limitations. The Court further concluded that if no rational basis for refusal of the return exists, the commissioner shall pay the plaintiffs' refund with interest. *Id.* In sum, our Supreme Court in *Clarke-Gravely Corp* recognized that the Department of Treasury has broad discretionary power in regard to combined tax returns, and further, acknowledged that a decision of the Department of Treasury in regard to combined returns will be upheld so long as there is a rational basis for the decision. *Id.* at 488-489.

This Court's decision in *Guardian Indus Corp* is similarly relevant to resolution of the issues presented by this case. In *Guardian Indus Corp*, the plaintiffs challenged the defendant's imposition of a prospective-only limitation on the filing of consolidated SBT returns. 198 Mich App at 381. The plaintiffs argued that the commissioner lacked authority to impose requirements on their ability to file a consolidated return. *Id.* This Court disagreed, and held that the language of § 77(1) was clear, and it provided the commissioner with discretion to allow consolidation of tax returns. *Id.* at 381-382. Citing *Clarke-Gravely Corp*, this Court held that

---

[3] The sections of the Income Tax Act discussed by *Clarke-Gravely* were repealed by 1975 PA 233. The Court acknowledges that "combined reporting now falls under the Single Business Tax Act, specifically MCL 208.77." *Clarke-Gravely*, 412 Mich at 490 n 2.

[4] MCL 206.335 provided in pertinent part: "In the discretion of the commissioner, any taxpayer [meeting certain corporate control criteria] . . . may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the commissioner may require."

the rational basis standard set forth in *Clarke-Gravely Corp* applied to decisions under the SBTA because the tax commissioner's discretionary authority under the SBTA is the same as the authority that was granted under the Income Tax Act. *Id.* at 382. This Court further explained that because the commissioner has discretion, it will uphold the commissioner's decision not to allow consolidation retroactively unless there is no rational basis for the decision. *Id.* This Court went on to conclude that there was a rational basis for the limitation, and thus, the Court of Claims did not err by "holding that the commissioner had the inherent discretionary authority to impose a prospective only limitation to consolidation of returns filed under the SBTA." *Id.*

Guardian Indus Corp is particularly informative because the SBTA does not contain any provision specifically permitting the Department of Treasury to impose a prospective-only limitation on consolidated returns; however, this Court found that the Department of Treasury had the power to impose such a requirement on the basis of its inherent discretionary authority over consolidated returns provided by MCL 208.77(1) because it had a rational basis for the requirement. *Id.*

Similarly, in this case, defendant seeks to impose a limitation on plaintiffs' combined return that is not specifically provided for by the SBTA on the basis of its discretionary authority over combined returns. Further, defendant has a rational basis for this limitation because the limitation prevents a profitable corporation that is in an affiliated group with less profitable members from reducing its tax liability when submitting a consolidated or combined return. If such tactics were permitted, corporations would be able to avoid payment of SBT otherwise owed to the state. Moreover, permitting plaintiffs to deduct business losses in contravention of RAB-89-49 would, in a narrow sense, allow plaintiffs to retroactively take advantage of deductions in violation of the holding in *Guardian Indus Corp* upholding defendant's policy barring retroactive consolidation because the deductions at issue relate to prior tax years in which plaintiffs filed separate SBT returns. Defendant's deduction policy set forth by RAB 89-49 merely prevents affiliated groups from taking advantage of the business loss carryover deduction to a greater extent than each individual member would be entitled to if filing separately by requiring each individual member of an affiliated group to calculate their business loss carryover deduction in the manner required by § 23b(h), which contains no provision specifically addressing consolidated or combined returns. Accordingly, defendant's policy does not conflict with any provision of the SBTA. Thus, we conclude that defendant's enforcement of its policy as set forth by RAB-89-49 is within the discretionary authority granted to it by the Legislature, and affirm the Court of Claims' order granting summary disposition in defendant's favor.

While we need not address plaintiffs' specific arguments in light of our conclusion that the discretionary authority granted to defendant by the Legislature in MCL 208.77(1) clearly empowers defendant to enforce its policy, we briefly address why we find plaintiff's arguments unavailing.

First, we address plaintiffs' argument that defendant lacks statutory authority to enforce its policy. Plaintiffs are correct in asserting that no provision of the SBTA specifically provides that business loss carryover deductions are not allowed for affiliated groups filing a consolidated or combined SBT return. However, this is a specious argument because defendant has never relied on any specific statutory provision of the SBT for authority to enforce the limitation found in RAB-89-49. Rather, defendant's position below and now on appeal has consistently been that

its authority to enforce its policy announced in RAB-89-49 flows from the discretionary authority it has over consolidated or combined returns under MCL 208.77(1). As discussed *supra*, we agree that defendant possesses this discretionary authority. Thus, it is of no consequence that the SBTA does not specifically authorize such action because the SBTA, in § 77(1), specifically authorizes defendant's exercise of discretion in regard to consolidated or combined returns.

Next, we reject plaintiffs' position that defendant was required to promulgate an administrative rule under the procedures set forth in the Administrative Procedure Act, MCL 24.201 *et seq.*, in order to enforce its policy. Defendant's policy is an exercise of its discretionary authority, and defendant is not required to promulgate a rule in order to enforce discretionary authority that is granted to it by the Legislature. See *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 164-165 n 26; 445 NW2d 428 (1989) (finding that clearly expressed legislative procedures and requirements are "in no way dependent upon the adoption of formal procedural rules").

Finally, we note that plaintiffs argue that defendant's interpretation of the SBTA should not be given respectful consideration under *In re Rovas*, 482 Mich at 108, because defendant's policy is inconsistent with the SBTA. First, we note that the policy set forth by RAB-89-49 is not inconsistent with any specific provision of the SBTA because the SBTA is silent in regard to the calculation of the business loss carryover deduction when a consolidated or combined return is filed. Moreover, as discussed *supra*, defendant's policy merely requires that affiliated groups calculate their business loss carryover deductions as if they were filing separately in compliance with § 23b(h). However, more to the point, we note that RAB-89-49 does not represent defendant's interpretation of the SBTA in the sense contemplated by *In re Rovas*. Rather, RAB-89-49 is an exercise of defendant's discretionary authority under the SBTA, and is properly analyzed under the framework set forth by the Court in *Clarke-Gravely Corp*, 412 Mich at 489 and *Guardian Indus Corp*, 198 Mich App at 382. Thus, the standards announced in *In re Rovas* do not apply to this case because when an agency exercises its discretionary authority, courts must consider first whether the agency has been granted statutory discretion, and if so, must then consider whether the agency has a rational basis to support its exercise of discretion.

Plaintiffs also argue that Treasury's imposition of its business loss deduction policy violated the Equal Protection Clause of the United States Constitution as well as the Michigan Constitution's prohibition against arbitrary classifications in state taxation because defendant has not enforced its policy against any other taxpayers. Specifically, plaintiffs note that defendant admitted in its answer to plaintiffs' request for admissions that it has settled every other case where its business loss deduction policy was challenged. Defendant does not dispute that it has settled previous cases, but argues that it has not treated similarly situated taxpayers differently because the cases that it settled involved multiple issues which were resolved in single settlements. Defendant further argues that the fact that it decided not to litigate all the issues in previous cases does not prohibit it from litigating the business loss deduction issue in this case, where the issue is narrowly and properly presented.

We review constitutional questions de novo. *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441, 443; 691 NW2d 57 (2004).

The Equal Protection Clause of the United States Constitution, US Const, Am XIV, and the Uniformity of Taxation Clause of the Michigan Constitution, Const 1963, art 9, § 3, requires defendant "to exercise 'equal treatment of similarly situated taxpayers.'" *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 538; 831 NW2d 255 (2013), quoting *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984). Plaintiff bears the burden of establishing that defendant "failed to treat similarly situated enterprises equally and that its failure to do so was intentional and knowing, rather than mistaken or the result of inadvertence." *Id.* (quotation marks and citation omitted). Defendant is "only required to show a rational basis for its decision." *Id.*

We conclude that plaintiffs have not met their burden of proving that defendant failed to treat similarly situated enterprises equally. Defendant maintains that the settled cases involved multiple issues under different circumstances, and plaintiffs do not dispute that assertion on appeal. The Court of Claims concluded that there was no evidence that defendant treated plaintiffs' differently than any other similarly situated taxpayer, explaining that plaintiffs relied on "multiple cases that [defendant] has settled where business loss carryover was *one* issue of many; here the *only* issue is business loss carryovers." (Emphasis by Court of Claims.) The Court of Claims stated that it was not going to consider the fact that defendant previously settled cases wherein the business loss carryover deduction was one of many issues as proof of disparate treatment because "[p]arties settle cases for many reasons and where multiple issues are present, as with all of the cases plaintiffs cite to, there is no way of knowing why and which issues necessitated settlement. There is simply no evidence presented that [defendant] treated plaintiffs any different than any other similarly situated taxpayer." Plaintiffs offer no further explanation or support for their equal protection claim on appeal.

Under these circumstances, we agree with the Court of Claims that defendant's settlement of previous cases involving the calculation of the business loss carryover deduction is not evidence of unconstitutional disparate treatment. Further, we note that defendant's disparate treatment of plaintiffs, i.e. its decision not to settle the case but to litigate the issue, has a rational basis in light of the fact that the business loss carryover deduction is the only issue presented in this case, unlike all the previous cases wherein the issue was raised. Finally, we note that plaintiffs cite no authority, and we have found none, to support their claim that defendant's settlement of previous litigation constitutes evidence of disparate treatment in violation of the Equal Protection Clause. Accordingly, we reject plaintiffs' constitutional challenge and agree with the Court of Claims' decision that summary disposition in favor of defendant was appropriate.[5] Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

[5] In light of our decision that summary disposition regarding plaintiffs' claims was appropriate, we need not address plaintiffs' arguments or defendant's arguments on cross-appeal regarding the Court of Claims' decision on plaintiffs' motion to compel certain documents during discovery. Regarding plaintiffs, we need not address their arguments because plaintiff's merely argue that the documents were necessary to show that defendant "fabricated" its limitation on the business loss carryover deduction. Whether defendant's limitation was "fabricated" has no

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

bearing on whether defendant has the authority to publish and enforce its limitation. Further, because defendant is the prevailing party, its claims on cross-appeal are moot.