STATE OF MICHIGAN

COURT OF APPEALS

COSMAIR, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
March 20, 1998

No. 198240
Court of Claims
LC No. 95-015815-CM

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Court of Claims denying plaintiff's motion for summary disposition and granting defendant's cross-motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Prior to 1993, the parties believed that PL 86-272, which is codified at 15 USC 381, protected businesses that merely solicited orders in Michigan from being subject to the single business tax under MCL 208.1 *et seq.*; MSA 7.558(1) *et seq*. After closing its Michigan facility in 1983, plaintiff opined that it was no longer subject to the single business tax, although it nevertheless paid the tax for 1984-88. Defendant, which denied plaintiff's subsequent requests for refunds, disagreed with plaintiff's interpretation of PL 86-272 and twice advised plaintiff that its activities were sufficient to establish defendant's jurisdiction to assess the single business tax. Plaintiff requested that defendant postpone its hearing and final tax assessment until this Court issued its decision in *Gillette Co v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993).

In *Gillette, supra* at 311, this Court found that PL 86-272 was inapplicable to the imposition of the single business tax and that such taxation would instead depend upon an analysis under the due process and commerce clauses ("the DP/CC test"). Ultimately, this Court held that the DP/CC test did not prevent the retroactive imposition of the single business tax against Gillette for tax years 1976-81. *Id.* at 311-314. Defendant subsequently notified nonfiling potential taxpayers who were no longer protected by PL 86-272 that they were subject to defendant's jurisdiction according to the decision in

Gillette; however, the notice also stated that recipients of the notice would be permitted to voluntarily pay the single business tax for the years 1989-93, with interest, but without penalty. Defendant did not send the notice to plaintiff and refused to extend the same option to plaintiff when plaintiff requested it. Plaintiff argues that defendant's retroactive application to plaintiff of the DP/CC test for tax years 1984-88 is a violation of plaintiff's constitutional rights to equal protection and uniform taxation because it is not being treated the same as the nonfiling potential taxpayers, to whom defendant did not apply the test beyond 1989.[1]

We review de novo the decision of the Court of Claims to grant defendant summary disposition. *Gainey Transportation Service, Inc v Dep't of Treasury*, 209 Mich App 504, 506; 531 NW2d 774 (1995). Although the Court of Claims apparently misconstrued some of plaintiff's arguments, we nonetheless affirm its decision to grant defendant summary disposition as the right result in this case. *General Aviation, Inc v Capital Regional Airport Authority (On Remand)*, 224 Mich App 710, 716; 569 NW2d 883 (1997). We hold that plaintiff's rights were not violated because it was not similarly situated to the class of taxpayers receiving the notice and because there was a rational basis for defendant's disparate treatment.

Equal protection of the law is guaranteed by both the federal and Michigan constitutions. US Const Am XIV; Const 1963, art 1, § 2. The Michigan Constitution also guarantees uniformity of taxation. Const 1963, art 9, § 3. These constitutional rights require that similarly situated taxpayers be treated equally and that any disparate treatment have a rational basis. *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984). A rational basis for disparate treatment exists when a set of facts can be reasonably conceived to justify the alleged discrimination and disparate treatment is not invalid merely because it results in some inequity. *St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd*, 215 Mich App 69, 73; 544 NW2d 705 (1996).

Plaintiff was not similarly situated to the group of potential taxpayers that received defendant's notice. Plaintiff had a pending matter before defendant, had not relied on the application of PL 86-272 in its decision to conduct business in Michigan, believed that the *Gillette* decision could impact its pending matter before defendant, and had prior notice that defendant considered plaintiff liable for the single business tax in Michigan for years prior to 1989. In contrast, the class of potential taxpayers did not have pending matters before defendant, had not been previously audited by defendant, and were effectively without notice of their single business tax liability in Michigan until this Court issued its decision in *Gillette.*

Additionally, a rational basis exists for defendant's disparate treatment. As a threshold matter, we note that plaintiff has mischaracterized defendant's action in this case toward the nonfiling potential taxpayers as an act of amnesty, which would be prohibited by MCL 205.28(1)(e); MSA 7.657(28)(1)(e). Defendant did not forgive this group for any unpaid single business tax assessments for tax years before 1989, but merely made a decision pursuant to its enforcement power as to how to allocate its resources to achieve the optimal level of compliance. MCL 205.13(h); MSA 7.657(13)(h). Considerations of due process, availability of records, the nonfilers' reliance on defendant's bulletins,

and defendant's limited resources reasonably justify defendant's enforcement decision. Although plaintiff believes that it has been treated more harshly, disparate treatment is not invalid merely because it results in some inequity. *St Louis, supra* at 73.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

[1] In a related argument, plaintiff asserts that defendant's disparate treatment is also attributable to defendant's "re-adoption" of the test enunciated in PL 86-272, despite this Court's holding in *Gillette, supra*. Specifically, plaintiff argues that defendant used plaintiff's alleged liability under PL 86-272 to distinguish between plaintiff and the group of non-filing potential taxpayers, which had not been liable for the single business tax under PL 86-272. According to plaintiff, this would be an unlawful distinction to draw and would require reversal, much like reversal was required in *Armco, supra*, where the department used an improper means of distinguishing between two groups of taxpayers. However, even assuming that we were willing to engage in the now futile analysis of whether plaintiff is liable under PL 86-272, a resolution of this argument in plaintiff's favor would not alter our holding in this case. Our holding depends on various other factors establishing that plaintiff was not similarly situated to the group receiving defendant's notice and that defendant's disparate treatment had a rational basis. Indeed, it is not the topic or outcome of plaintiff's litigation with defendant that set plaintiff apart from the others but the very fact that the parties were engaged in litigation and therefore were previously known to one another.