

STATE OF MICHIGAN
COURT OF APPEALS

THE GILLETTE COMPANY,

Plaintiff-Appellant,

v

REVENUE DIVISION, DEPARTMENT OF
TREASURY, COMMISSIONER OF REVENUE,
and STATE TREASURER,

Defendants-Appellees.

UNPUBLISHED

July 13, 1999

No. 205766

Court of Claims

LC No. 95-015719 CM

Before: Murphy, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Court of Claims granting summary disposition in favor of defendants. We affirm.

Plaintiff is a Delaware corporation, with its base of operation in Boston, Massachusetts. Plaintiff manufactures and sells at wholesale personal care products, razors, and ball point pens. During the period 1976 through 1981, defendant Department of Treasury (the Department) assessed taxes against plaintiff under the Single Business Tax (SBT) Act, MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.* During that period, plaintiff maintained a sales staff in Michigan who, among other things, took orders from customers and submitted them to the main office to be filled and shipped.

Plaintiff filed three separate petitions with the Michigan Tax Tribunal (MTT) contesting the Department's SBT assessments for tax years 1976 through 1981. In the MTT, plaintiff argued, among other things, that the Department lacked jurisdiction to make the challenged assessments pursuant to 15 USC 381 (PL 86-272), which prohibits, generally, a state from imposing a "net income tax" on income derived within the state if the only business activities within the state are the solicitation of orders, which are then sent outside the state for approval or rejection, and, if approved, are filled and shipped from outside the state. Following a lengthy hearing, the MTT approved the assessments in a published decision. *Gillette Co v Dep't of Treasury*, 1989 WL 28250 (MTT, February 13, 1989) (NO. 73916, 90676-7).

Plaintiff appealed the decision of the MTT to this Court, which affirmed on different grounds. *Gillette Co v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993). This Court determined, sua sponte, that because Michigan's single business tax is a "consumption-type value added tax," and not an income tax, PL 86-272 was not relevant for determining whether plaintiff's contacts with Michigan were sufficient to subject it to taxation under to the SBT Act. Rather, this Court held that the proper analysis for determining whether plaintiff's contacts with Michigan were sufficient to subject it to taxation under the SBT Act was the traditional Due Process and Commerce Clause (DP/CC) test, US Const, Am XIV and art I, § 8, cl 3, which are set forth in *Quill Corp v North Dakota*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992). See also *Complete Auto Transit, Inc v Brady*, 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977). This Court then applied the DP/CC test and concluded that plaintiff's activities within Michigan were sufficient to subject it to taxation under to the SBT Act.

Plaintiff's claims in the instant case arise from its contention that shortly after this Court's decision in *Gillette, supra*, the Department adopted an administrative policy to apply the *Gillette* decision to other potential single business taxpayers only retroactively to 1989, without penalty. The Department also sent notice to the nonfiling taxpayers of its decision, but the Department did not send the notice to plaintiff and refused to extend the same option to plaintiff. Rather, the Department continued to demand payment from plaintiff for the 1976-1981 assessments. Under protest, plaintiff paid the taxes and penalties for the relevant time period, but filed the instant complaint in the Court of Claims on April 10, 1995, seeking a refund. The Court of Claims summarily dismissed plaintiff's complaint.

Plaintiff argues that the Department's retroactive application to plaintiff of the DP/CC test for tax years 1976-1981 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 the Department did not apply the test before 1989. Assuming, without deciding, that the Court of Claims possessed subject matter jurisdiction over plaintiff's complaint, see *Hirych v State Fair Comm*, 376 Mich 384, 394; 136 NW2d 910 (1965), and that plaintiff's claims were not precluded by the doctrine of res judicata, see *In re Quintero*, 224 Mich App 682, 691; 569 NW2d 889 (1997); *Welch v District Court*, 215 Mich App 253, 257; 545 NW2d 15 (1996), the Court of Claims properly granted summary disposition in favor of defendants.

We review de novo the decision of the Court of Claims to grant summary disposition. *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 492; 516 NW2d 108 (1994). In our opinion, plaintiff's constitutional rights were not violated because plaintiff was not similarly situated to the class of taxpayers receiving the notice and, alternatively, because there was a rational basis for the Department's disparate treatment. See *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286; 590 NW2d 612 (1998).

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. *Syntex Laboratories, supra* at 291. Because plaintiff had a pending matter before the Department, plaintiff had prior notice that defendant considered plaintiff liable for the single business tax in Michigan for years before 1989. *Id.* In contrast, the class of potential taxpayers did not have pending matters before the Department, and therefore these taxpayers were effectively without notice of their single business tax liability in Michigan until this Court issued its decision in *Gillette. Id.*

Alternatively, a rational basis exists for the Department's disparate treatment. Considerations of due process, availability of records, the nonfilers' reliance on the Department's bulletins, and the Department's limited resources reasonably justify and provide a rational basis for the Department's enforcement decision. *Id.* Although plaintiff believes that it has been treated more harshly, disparate treatment is not invalid merely because it results in some inequity. *Weeks v Bd of Trustees, Detroit General Retirement System*, 160 Mich App 81, 86; 408 NW2d 109 (1987).

Further, we note that plaintiff has mischaracterized the Department'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).¹ The Department 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; MSA 7.657(13). *Syntex Laboratories, supra* at 293.

Affirmed.

/s/ William B. Murphy
/s/ Martin M. Doctoroff
/s/ Janet T. Neff

¹ Plaintiff also contends that the Legislature's July 1, 1998 enactment of MCL 205.30c; MSA 7.657(30c) confirms that the Department engaged in the granting of unlawful administrative amnesty. Again, however, we reiterate that the Department "did not forgive liability for unpaid taxes for years before 1989, but rather made a decision regarding how to allocate its resources to achieve maximal compliance." *Syntex Laboratories, supra* at 293. The authority to enter into voluntary disclosure agreements, which was granted to the Department by MCL 205.30c; MSA 7.657(30c), does not impact the Departments' conduct with respect to nonfiling potential taxpayers.