STATE OF MICHIGAN

COURT OF APPEALS

INTERNATIONAL HOME FOODS, INC., Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	FOR PUBLICATION October 4, 2005 9:10 a.m. No. 253748 Court of Claims LC No. 02-000081-MT
LENOX, INC., Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 253760 Court of Claims LC No. 01-018141-MT Official Reported Version

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

KELLY, P.J. (*dissenting*).

I respectfully dissent. The majority holds that "because defendant had in place an RAB [Revenue Administrative Bulletin] favorable to plaintiff's position for the tax years before the *Gillette* [*Co v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993)] decision was released, defendant is bound by that RAB." *Ante* at ___. Thus, according to the majority, defendant is prohibited from applying *Gillette* retroactively. However, the retroactive application of *Gillette* has previously been decided by this Court on the identical issues presented here. In *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441, 448-449; 691 NW2d 57 (2004), this Court held:

> The retroactive application of the SBT for the tax years at issue does not discriminate against or unconstitutionally burden interstate commerce. See *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993); *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286; 590 NW2d 612 (1998). *Moreover, defendant is not estopped from retroactively applying the*

new rule created by case law simply because it had issued revenue administrative bulletins advising taxpayers of what the then-applicable rule was.[1] Contrary to what plaintiff asserts, defendant did not "bait and switch." Cf. *Newsweek, Inc v Florida Dep't of Revenue*, 522 US 442; 118 S Ct 904; 139 L Ed 2d 888 (1998). *In addition, plaintiff has no vested right to continued application of a particular taxing standard, so it cannot claim that imposition of the SBT constitutes unfair and unjust treatment. Syntex Laboratories*, *supra* at 293. Finally, defendant was not barred by the doctrine of laches from retroactively applying the SBT because plaintiff cannot show hardship as a result of the delay. See *Speaker-Hines & Thomas, Inc v Dep't of Treasury*, 207 Mich App 84, 91; 523 NW2d 826 (1994), and *Amway Corp v Dep't of Treasury*, 176 Mich App 285, 294-295; 438 NW2d 904 (1989), vacated in part and remanded on other grounds 433 Mich 908 (1989).

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[1] Plaintiff also incorrectly argues that defendant was required by MCL 24.203(6) to follow its earlier statements of the law as set out in the revenue administrative bulletins. MCL 24.203(6) is part of the Administrative Procedures Act, which does not apply to revenue administrative bulletins. The revenue division act at MCL 205.3(f) authorizes the bulletins, and nothing in that act makes them binding on defendant in the face of contrary judicial decisions.

[Emphasis added.]

More recently, this Court reaffirmed these principles in *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App ___ ; ___ NW2d ___ (2005). In *JW Hobbs*, the trial court ruled that the RABs were binding and could only be applied prospectively. This Court determined that the trial court erred, holding:

> RABs are actually issued under MCL 205.3(f), which allows defendant to "issue bulletins that index and explain current department interpretations of current state tax laws." Our Supreme Court has held that RABs are only interpretations of the applicable statutes and do not have the force of law. See, e.g., *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 21; 678 NW2d 619 (2004). In *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441, 448-449; 691 NW2d 57 (2004), this Court stated, "[m]oreover, defendant is not estopped from retroactively applying the new rule created by case law simply because it had issued revenue administrative bulletins advising taxpayers of what the then-applicable rule was. Thus, defendant is not legally bound to adhere to its stated interpretation of tax law in its RABs.
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> Finally, the argument that new state taxing standards may not be imposed retroactively has been rejected by the United States Supreme Court in *Harper v Virginia Dep't of Taxation,* 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993). [*JW Hobbs, supra* at ___.]

I also believe that the majority's reliance on *In re D'Amico Estate,* 435 Mich 551; 460 NW2d 198 (1990), is misplaced. In *D'Amico,* the defendant Department of Treasury changed its position, and later had its change endorsed by the courts. *Id*. at 559 n 11. In contrast, defendant in these cases changed its position only after it was forced to do so by the courts. And the general rule is that judicial decisions are to be given complete retroactive effect. *JW Hobbs, supra* at ___. Finally, while the *D'Amico* Court held that the defendant was bound by its prior RAB, at least with regard to the estates of people who purchased lottery tickets before the defendant advised inheritance tax field examiners of a "new development," defendant here is seeking retroactive application to only those tax years that were still open.

Because the precise issues raised in these cases were resolved in *Rayovac*, *JW Hobbs,* and *Syntex Laboratories v Dep't of Treasury,* 233 Mich App 286, 292-293; 590 NW2d 612 (1998), we are constrained to follow their holdings. MCR 7.215(J)(1). The majority's opinion creates an impermissible conflict with previously published opinions of this Court.

/s/ Kirsten Frank Kelly