STATE OF MICHIGAN

COURT OF APPEALS

TOPPS COMPANY, INC,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
June 11, 1999

No. 203495
Court of Claims
LC No. 96-016324 CM

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff appeals by right a Court of Claims order denying its motion for reconsideration of an order granting defendant's motion for summary disposition. We affirm.

I

Prior to 1993, the Department of Treasury did not assess taxes under the Single Business Tax Act (SBTA), MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.*, unless the taxpayer's business activities had a sufficient nexus with the state of Michigan pursuant to PL 86-272, codified at 15 USC 381. *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 288; __ NW2d __ (1998). In *Gillette Co v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993), this Court held that PL 86-272 did not apply to taxes imposed under the SBTA, and that the proper test is the Due Process/Commerce Clause test set forth in *Quill Corp v North Dakota*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992). In accordance with the *Gillette* decision, defendant determined that plaintiff was liable for the SBT for fiscal years 1990-1993.[1] Defendant paid the assessment under protest, but filed a complaint in the Court of Claims for return of the money. Applying *Gillette* retroactively, the Court of Claims granted defendant's motion for summary disposition. Plaintiff now appeals.

II

Plaintiff argues that the trial court erroneously gave retroactive application to this Court's 1993 decision. This Court has already held that *Gillette* is properly applied retroactively. *Syntex, supra*, 233 Mich App 292-293.

III

Plaintiff further argues that defendant should be estopped from collecting past single business taxes. We disagree.

Estoppel arises when "a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Westfield Companies v Grand Valley Health Plan*, 224 Mich App 385, 390-391; 568 NW2d 854 (1997). Here, plaintiff paid taxes under the SBTA in fiscal years 1990 and 1991, *before* Michigan collected this tax from businesses in plaintiff's circumstances. Accordingly, plaintiff cannot now argue reliance on defendant's prior position. Additionally, defendant never misrepresented *facts*; rather it asserted a legal position that was subsequently deemed contrary to Michigan law. Furthermore, defendant's representation of the law was neither intentional nor negligent. Rather, its position was based on a good-faith understanding of Michigan law. See *Adams v Detroit*, 232 Mich App 701, 708; __ NW2d __ (1998), holding that "[e]quitable 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."

Additionally, estoppel is inapplicable because defendant did not change its position regarding plaintiff's immunity from taxation under the SBTA, but rather was required by this Court to change its policy. Defendant's reliance on *In re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990), is misplaced. In *D'Amico*, the Treasury Department first changed its position, and later had its change endorsed by the courts. *Id.*, 559 n 11. Thus, the Department changed its position *before being required to do so* pursuant to a court order. *Id.*, 564. Conversely, in this case, defendant changed its position only *after it was forced to do so* by an order of this Court. *Gillette, supra*, 198 Mich App 311. Estoppel therefore does not apply.

IV

Finally, plaintiff contends that defendant's retroactive application of the due process/commerce clause test violates plaintiff's constitutional rights under the Due Process Clause, US Const, Am V, XIV. We disagree.

The Supreme Court has held that retroactive application of a tax does not violate due process simply because taxable events transpired before the taxing statute was passed. In *Welch v Henry*, 305 US 134; 59 S Ct 121; 83 L Ed 87 (1938), the Supreme Court stated:

> [t]he objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. . . . Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged

> to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute. [*Welch, supra,* 305 US 146-147 (citations omitted).]

More recently, the United States Supreme Court held in *United States v Carlton*, 512 US 26; 129 L Ed 2d 22; 114 S Ct 2018 (1994), that a retroactive amendment to a tax statute did not violate due process where the retroactive period was of reasonable length (slightly more than one year) and where the government's purpose was neither illegitimate nor arbitrary. *Id.*, 32-33. In *Carlton*, the executor of a decedent's estate challenged an amendment which restricted the availability of an estate tax deduction. The executor of a decedent's estate had engaged in a particular transaction for the sole purpose of taking advantage of the deduction. *Id.*, 28-29. The Court rejected the executor's due process argument, noting that there was "no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage" in the transactions at issue. *Id.*, 32. The Court further noted that the executor's reliance, by itself, was insufficient to establish a constitutional violation because "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id.*, 33. Finally, the Court stated that the executor's lack of notice regarding the amendment was not dispositive because "a taxpayer 'should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation.'" *Id.*, 34, quoting *Milliken v United States*, 283 US 15, 23; 51 S Ct 324; 75 L Ed 809 (1931).

Relying on *Carlton*, the Third Circuit held in *Tate & Lyle, Inc v Commissioner of Internal Revenue Service*, 87 F3d 99 (CA 3, 1996), that a retroactive application of a tax *regulation* did not violate the Due Process Clause although the six-year retroactive application period was longer than that contemplated by *Carlton*. *Id.*, 107. The Court found that *Carlton* was distinguishable because "*Carlton* involved the retroactive application of a *statute*, and here we are dealing with the retroactive application of a *regulation*." *Id.* (emphasis in original).

In the case before us, we find no basis for plaintiff's contention that the retroactive application of *Gillette* violated due process. There is no indication that defendant's conduct in collecting back SBTA taxes was arbitrary or capricious. Additionally, the circumstances here present a less compelling case against retroactive application. *Carlton* involved retroactive application of a statutory amendment; *Tate & Lyle*, a regulation. Here, the SBTA has been in existence throughout the relevant period; only the interpretation of that statute is being applied retroactively. Accordingly, we find no due process violation in the retroactive application of *Gillette*, notwithstanding lack of notice or plaintiff's alleged reliance.

Plaintiff's arguments to the contrary are unpersuasive. Plaintiff cites *Welch, supra,* 305 US 134, and *United States v Hemme*, 476 US 558; 106 S Ct 2071; 90 L Ed 2d 538 (1986), and then states that

> [c]learly, Topps could not have altered its behavior to avoid incurring SBT under the *Gillette* jurisdictional standard because it could not have anticipated application of the

> *Gillette* standard prior to *Gillette*. Second, tax should not be retroactively applied if the taxpayer did not have notice of the tax when the taxpayer engaged in the transaction.

Plaintiff refers to a "transaction" because it relies on a case involving gift taxes, wherein a specific gift was made and taxed two years later on the death of the donor. *Hemme, supra*, 476 US 563. The United States Supreme Court has made clear that the analysis applicable to gift taxes, which might affect vested rights, is not the same analysis to be applied to other taxes, which generally do not affect vested rights:

> In the cases in which [the Supreme] Court has held invalid the *taxation of gifts* made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. [*Welch, supra*, 305 US 147 (emphasis added).]

The case at bar does not involve a gift tax; therefore, plaintiff's reliance on the *Hemme* case is misplaced.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] Plaintiff paid the SBT in 1990 and 1991, though it later sought return of that money.