STATE OF MICHIGAN

COURT OF APPEALS

J.W. HOBBS CORPORATION, Plaintiff-Appellee/Cross Appellant,	FOR PUBLICATION September 1, 2005 9:00 a.m.
v	No. 254069 Court of Claims
REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN, Defendant-Appellant/Cross-Appellee.	LC No. 02-000166-MT Official Reported Version

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

O'CONNELL, P.J. (*dissenting*).

In *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441, 444-448; 691 NW2d 57 (2004), this Court braided three separate concepts it gleaned from distinct branches of law into a single lash that enabled defendant to drain years of back taxes from an unwitting Wisconsin battery manufacturer that claimed it was not, and never had been, subject to Michigan's single business tax. The first concept was a neutered "nexus" requirement that allowed defendant to tax any manufacturer that ever sent a living representative into the state to solicit purchase orders. The second was the retroactive effect of opinions, regardless of how potentially devastating, unforeseeable, and inequitable. The third, and most sinister, was the idea that the manufacturer could not estop defendant from collecting the taxes even though defendant had issued official advice and memoranda reassuring the manufacturer that it could do business in the state without fear of taxation.[1]

[1] If I were writing on a clean slate, I would require defendant to follow its own published interpretations contained in Revenue Administrative Bulletin 1989-46 and its SBT Bulletin 1980-1. To hold otherwise allows defendant to "bait and switch" taxation policies, increasing business transactions in the immediate future and setting the stage for a surprise tax on those transactions after they are completed and irreversible. Cf. *Newsweek, Inc v Florida Dep't of Revenue*, 522 US 442, 444; 118 S Ct 904; 139 L Ed 2d 888 (1998). I find that position untenable. Tea has been thrown into Boston Harbor over taxing tactics less onerous than this
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The majority in this case takes up these lithe concepts and adds a twist, surmising that, although it is not sure whether defendant's latest grasp at liberalizing the "nexus" requirement violates the Constitution, defendant may nevertheless stretch as far back through the years as it chooses and fill its treasury with whatever it may find. This grand grope is allowed despite defendant's years of inveigling official statements declaring that its arms were too short to tug on plaintiff 's coattails, let alone reach into its pockets.[2]

Because this panel lacks the power to overrule *Rayovac*,[3] I would simply distinguish it on the basis that the manufacturer's sales force in that case consisted of three salespeople and their regional manager. While negligible, this meager "force" arguably fell within the meaning of the phrase "sales force" as it was used in *Quill Corp v North Dakota*, 504 US 298, 315; 112 S Ct 1904; 119 L Ed 2d 91 (1992), to describe a satisfactory "nexus" between the manufacturer and a taxing state. In this case, the solitary "salesperson" was employed by an independent contractor and did not deal exclusively in plaintiff 's goods. Therefore, plaintiff did not have the necessary "presence" in this state and the salesperson cannot represent a sales "force" within any meaningful interpretation of that word. *Quill Corp*, *supra* at 311, 315; see also *Rayovac*, *supra* at 444. The salesperson did not transfer any title to goods because he merely relayed the sales through a catalog. Cf. *Rayovac*, *supra* at 447. Therefore, not even a liberal interpretation of the *Quill Corp* nexus requirement would support a finding of a nexus in this case, and we should affirm the Court of Claims on this alternate ground.

/s/ Peter D. O'Connell

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oppressive retroactive exaction. At least the 1773 Parliament did not subject American colonists to a tax on tea they had already drunk.

[2] Not only does defendant's sudden policy switch blow a dark cloud over this state's credibility, it forces out-of-state businesses to think twice about doing business in this state. Plaintiff has learned the hard way the truth of Hamlet's exhortation that an administrator "may smile, and smile, and be a villain . . . ." Shakespeare, *Hamlet*, act 1, sc 5. Trust is the cornerstone to a good business foundation, and if an outside business cannot trust this state's interpretation of its own tax laws, how can it trust the state enough to build and grow here?

[3] I note that, absent *Rayovac*, there is sufficient legal basis to deny defendant the retroactive relief it requests. Defendant's repeated, consistent, and official reassurance that plaintiff's activities were not taxable should equitably estop it from recovering taxes it previously declared were not owed. *Fisher v Muller*, 53 Mich App 110, 127; 218 NW2d 821 (1974). It would be ignorant to assume that business decisions are not influenced by such a basic and inescapable economic force as taxation. The fact that defendant may have assessed penalties against plaintiff for following its advice and not paying the tax would also bear on the issue. I encourage the court, on remand, to allow plaintiff an opportunity to develop a record regarding the business decisions it made while suffering under the false sense of security offered by defendant's retracted assurance of immunity.