STATE OF MICHIGAN

COURT OF APPEALS

GENERAL MOTORS CORPORATION, Plaintiff-Appellant,	UNPUBLISHED May 9, 2000
v	No. 213186 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC No. 97-16561-CM

Before: Smolenski, P.J., and Griffin and Neff, JJ.

PER CURIAM.

Plaintiff General Motors Corporation appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.11(C)(10). We affirm in part and reverse in part.

This case arises from a dispute between plaintiff and defendant Michigan Department of Treasury regarding the payment of use tax on certain parts provided by plaintiff under its Goodwill Adjustments Policy program (the "goodwill program"), under which plaintiff and its dealers provide parts and repairs to vehicles after the warranty has expired. Plaintiff paid defendant $744,555 under protest, for additional use taxes and interest claimed by defendant for 1990 through 1992. Plaintiff subsequently appealed these use taxes in a five-count complaint filed in the Court of Claims against defendant pursuant to MCL 205.22; MSA 7.657(22). Count I alleged that defendant lacked statutory authority to impose the use tax assessments against plaintiff for parts supplied under its goodwill program. Count II alleged that defendant did not impose the tax against other similarly situated taxpayers in violation of the Equal Protection and Uniformity Clauses of the federal and state constitutions. Count III alleged that defendant retroactively revoked its letter rulings regarding the use tax in violation of the Due Process Clauses of the federal and state constitutions. Count IV alleged that defendant's imposition of the tax constituted double-taxation in violation of the Commerce Clause of the federal constitution. Finally, Count V requested declaratory relief.[1]

The following procedural history is relevant to the issues raised on appeal. While the parties engaged in discovery, the trial court denied plaintiff's motion to compel production of certain third-party tax records.[2] After denying plaintiff's motion to compel, the trial court granted defendant's motion for

summary disposition with respect to count II, but allowed plaintiff to file an amended complaint. Defendant subsequently moved for summary disposition with respect to count II pursuant to MCR 2.116(C)(8) and with respect to all counts pursuant to MCR 2.116(C)(10). The trial court denied defendant's motion for summary disposition under MCR 2.116(C)(8), but dismissed all counts pursuant to MCR 2.116(C)(10).

An appellate court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358, 547 NW2d 314 (1996). [*Id.* at 119, 121.]

First, plaintiff contends that the trial court erred in dismissing its claims alleged in count I. At the time of plaintiff's dispute, the General Sales Tax Act (GSTA) defined a "sale at retail" as "a transaction by which is transferred for consideration the ownership of tangible personal property, when the transfer is made in the ordinary course of business and is made to the transferee for consumption or use . . ."[3] MCL 205.51(1)(b); MSA 7.521(1)(b). In addition, the GSTA defined "gross proceeds" as "the amount received in money, credits, subsidies, property, or other money's worth in consideration of a sale at retail within this state, without deduction on account of the cost of the property sold, the cost of material used, the cost of labor or service purchased . . ." MCL 205.51(1)(h); MSA 7.521(1)(h). Here, plaintiff alleged that the "gross proceeds" arising from the retail sale of plaintiff's vehicles under the GSTA included an amount sufficient to cover the anticipated costs of the components and parts, as well as the anticipated costs of the labor to install the components and parts provided by plaintiff to its "customers" under the goodwill policy. Plaintiff further alleged that § 4(a) of the Use Tax Act (UTA), MCL 205.94(a); MSA 7.555(4)(a), which provided that "the [use] tax levied shall not apply to . . . [p]roperty sold in this state on which transaction a tax is paid under the general sales tax act . . . , if the tax was due and paid on the retail sale to a consumer," prevented defendant from imposing a use tax on the vehicle components and parts at the time that the component parts were provided to its customers under the goodwill program. In short, plaintiff alleged that defendant had no statutory authority to impose a use tax on the vehicle parts and components provided by plaintiff to its customers under the goodwill program, because the customer paid sales tax on the parts and components as part of the retail sale transaction.[4]

In reaching our decision, it is necessary to discuss the relationship between the sales tax and the use tax. The sales tax is a "privilege tax" imposed directly on the seller, which the seller may pass on to the purchaser and collect at the point of sale. *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 408; 590 NW2d 293 (1999). The "privilege" taxed by the sales tax act is "the privilege of engaging in

the business of making retail sales of tangible personal property

within this state." *Combustion Engineering, Inc v Dep't of Treasury*, 216 Mich App 465, 467; 549 NW2d 364 (1996). In contrast to the sales tax, the UTA creates the use tax as an excise tax for the "privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property or services specified . . . ." *World Book, supra* at 408, quoting MCL 205.93(1); MSA 7.555(3)(1).[5] While the UTA places the ultimate liability on the consumer, MCL 205.97; MSA 7.555(7), sellers with sufficient connection to Michigan are required to collect the tax and remit it to defendant. *Id.*; MCL 205.95(a); MSA 7.555(5)(a); MCL 205.97; MSA 7.555(7). Furthermore, the provisions of the GSTA and the UTA are complementary, *World Book, supra* at 408, "[b]ecause the use tax [MCL 205.94(a); MSA 7.555(4)(a)] exempts from taxation property on which a sales tax is paid," *Combustion Engineering, supra* at 468.

> Thus, as a general rule, property for which a consumer has already paid a use tax is not subject to the provisions of the General Sales Tax Act. Similarly, the Use Tax Act does not apply to property sold in Michigan on which Michigan sales tax has already been paid, if the tax was due and paid on the retail sale to the consumer. [citations omitted.] [*World Book, supra* at 408.]

We conclude that plaintiff's goodwill program was not subject to the sales tax under the GSTA. Consequently, parts supplied by plaintiff under the goodwill program were subject to the use tax under the UTA. While plaintiff's retail customers purchased tangible personal property (the vehicles) from plaintiff's dealers, we cannot conclude that the customers acquired any enforceable rights in the goodwill program as part of that transaction. Plaintiff's service bulletin no. 57-05-0, directed at plaintiff's service managers, defined the goodwill program as follows:

> Individual, case-by-case, goodwill adjustments are intended to recognize that circumstances, outside the parameters of the written warranty, may exist where special consideration is in order to enhance customer satisfaction and loyalty. Such goodwill adjustments should not be confused with special policy adjustments provided to all involved owners through a special bulletin and direct mail. Case-by- case goodwill adjustments are not legal obligations like the terms of General Motors warranties.[6]

In addition, a Buick Policy Adjustment Guidelines brochure noted that:

> Policy adjustments are totally discretionary, goodwill actions sponsored by Buick. These adjustments are intended to provide valued customers with equitable solutions to out-of-warranty service problems.

Plaintiff's bulletin and guidelines indicate that although a particular customer might benefit from a dealer's discretionary out-of-warranty adjustment intended to enhance that customer's satisfaction and loyalty, plaintiff's dealers were not obligated to provide all customers with goodwill adjustments. Given the discretionary nature of the goodwill program, we conclude that the program was not part of the consideration received by plaintiff's retail customers as part of the retail transaction. As a result, the value of the goodwill program was not included in the gross

proceeds arising from the retail sales of plaintiff's vehicles. Cf. *Barbat v M E Arden Co*, 74 Mich App 540, 543-544; 254 NW2d 779 (1977) ("[a]n unenforceable promise cannot constitute consideration"). Because neither plaintiff nor its dealers paid sales tax on the parts supplied under the goodwill program, these parts were not exempt from the use tax. Accordingly, we hold that the trial court did not err in dismissing plaintiff's count I.[7]

Next, plaintiff contends that the trial court erred in dismissing its equal protection and uniformity claims raised in count II, because the court denied plaintiff all discovery with respect to defendant's treatment of third-party taxpayers and effectively prevented plaintiff from securing the evidence necessary to substantiate its allegations. We agree. "Generally, summary disposition is premature if granted before discovery on a disputed issue is complete." *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Here, plaintiff's count II, as amended, alleged that defendant had reached an agreement with other manufacturers with similar goodwill programs "under which, in exchange for paying and not disputing a use tax assessment on policy parts, one or more members of the class was afforded more advantageous treatment in other disputed areas of taxation." Plaintiff further alleged that this advantageous treatment violated the equal protection and uniformity clauses of the United States and Michigan constitutions, US Const, Am XIV, § 1; Const 1963, art 1, § 2; Const 1963, art 9, § 3.

Although plaintiff seeks relief under both the Equal Protection and Uniformity of Taxation Clauses, Const 1963, art 1, § 2, and art 9, § 3, there is no discernible difference in the analysis of these two challenges. *Armco Steel v Dep't of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984). The purpose of the Uniformity of Taxation Clause, Const 1963, art 9, § 3, is to guarantee equal treatment of similarly situated taxpayers. *Id.*; *Ann Arbor v Nat Center for Mfg Sciences, Inc*, 204 Mich App 303, 305; 514 NW2d 224 (1994). In order to establish a claim of disparate treatment, plaintiff must establish "that [defendant] has failed to tax similarly situated enterprises and that its failure to do so was intentional and knowing, rather than mistaken or the result of inadvertence." *MCI v Dep't of Treasury*, 136 Mich App 28, 36-37; 355 NW2d 627 (1984). "Some rational basis for a disputed classification must be shown to exist." *Armco*, *supra* at 592.

We agree with plaintiff that it should have been given the opportunity to perform discovery with respect to defendant's enforcement of the use tax on other similarly situated manufacturers before the trial court granted defendant's motion for summary disposition of its amended count II. Discovery rules are to be liberally construed. *Haglund v Van Dorn Co*, 169 Mich App 524, 529; 426 NW2d 690 (1988). Under MCR 2.302, a plaintiff only needs to show that the information is "reasonably calculated" to lead to discovery of admissible evidence. *Id.*; MCR 2.302(B)(1). Here, plaintiff presented evidence that the goodwill program was not subject to the use tax from 1978 to 1985, but was subject to the use tax from 1986 to 1992. In support of its claim, plaintiff presented the affidavit of Charles J. White, a senior tax specialist employed by plaintiff. In his affidavit, White stated that he was informed that Ford Motor Company (Ford), and perhaps Chrysler Corporation (Chrysler), may have received treatment for their goodwill programs different from that given to plaintiff. White further stated that he had conversations with Mr. Richard Scofield, a former tax counsel to Ford, during which Scofield indicated that Ford "had opted to yield" to defendant on the issue of whether use tax was

payable on Ford's similar repair program in order to obtain a "better deal" in other disputed areas of taxation. The fact that defendant changed its position with respect to plaintiff's use tax liability in 1986, coupled with White's affidavit, indicates that defendant may have compromised its use tax treatment of a similar program at Ford. Under these circumstances, we find that plaintiff has established that information regarding plaintiff's treatment of Ford's use tax liability is discoverable under MCR 2.302. Accordingly, we hold that the trial court erred in granting defendant's motion for summary disposition without allowing plaintiff to engage in some discovery with respect to defendant's treatment of similar programs at Ford.[8]

Next, plaintiff contends on appeal that the trial court abused its discretion in denying its request for third-party tax records because the discovery sought was neither unduly burdensome nor infringed upon the privacy of third parties. We disagree. "A motion to compel discovery is a matter within the trial court's discretion, and the court's decision to grant or deny a discovery motion will be reversed only if there has been an abuse of that discretion." *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). In civil cases, an abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). Here, the trial court determined that although it had authority to release certain taxpayer information under MCL 205.28(1)(f); MSA 7.657(28)(1)(f), it was not convinced that the requests for information were reasonably calculated to lead to relevant information. We agree with the trial court's assessment that plaintiff's discovery requests "can be fairly described as a fishing expedition." Accordingly, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion to compel.

Next, plaintiff contends that the trial court abused its discretion in refusing to reconsider its ruling denying plaintiff's third-party discovery with respect to its equal protection and uniformity claims. We disagree. A trial court's decision to deny a motion for reconsideration is reviewed for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). The movant must show that the trial court made a palpable error or that a different disposition of the motion for summary disposition would result from correction of the error. *Id.* The relevant court rule, MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

In light of our determination that the trial court did not abuse its discretion in denying plaintiff's original motion to compel, we cannot conclude that the trial court committed palpable error in denying plaintiff's motion for reconsideration.

Next, plaintiff contends that the trial court abused its discretion by denying its motion for reconsideration on the ground that the court was limited to the materials before it at the time the motion to compel was denied. While we disagree with the trial court's assertion that MCR 2.119(F) prevents a trial court from hearing additional evidence on a motion for rehearing or reconsideration, we nonetheless find that the trial court did not abuse its discretion in denying plaintiff's motion. The "palpable error" standard set forth in MCR 2.119(F)(3) does not preclude a trial court from exercising its discretion to review additional evidence on a motion for reconsideration.

> If a trial court wants to give a "second chance" to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule [MCR 2.119(F)(3)] does is provide the trial court with some guidance on when it may wish to deny motions for rehearing. [*Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986).]

See also *Michigan Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 645-646; 419 NW2d 439 (1988) (affidavits attached to motion for reconsideration cannot be ignored).

While the trial court could have considered additional evidence presented by plaintiff at the hearing on the motion for reconsideration, plaintiff contends on appeal that the court failed to consider plaintiff's amended complaint when it ruled on plaintiff's motion to reconsider the denial of its motion to compel. Plaintiff presents no authority for the proposition that a trial court must consider additional pleadings filed after its denial of a motion but before the motion for reconsideration. Because plaintiff's motion to compel discovery arose from the allegations made in its original complaint, we conclude that the court was within its power to reconsider its previous order in light of that complaint.

Next, plaintiff contends that the trial court erred in granting defendant's motion for summary disposition with respect to plaintiff's due process claim in count III. Plaintiff argues that defendant retroactively revoked its position that warranty repairs were not subject to use tax when defendant held the goodwill program repair parts were taxable for the same audit period in which it ruled twice, in Letter Rulings 86-24 and 89-61, that no use tax was payable on warranty repairs. We disagree. Plaintiff cites *Cleveland-Cliffs Iron Co v Dep't of Revenue*, 329 Mich 225, 243; 45 NW2d 46 (1950) for the proposition that a statute may not impose a tax retroactively. However, the prohibition against imposing a tax retroactively expressed in *Cleveland-Cliffs* does not apply here, because plaintiff's claim involves the alleged retroactive application of tax letter rulings, not the retroactive application of a tax statute. See, e.g., *Garavaglia v Dep't of Revenue*, 338 Mich 467, 470-471; 61 NW2d 612 (1953) (liability for sales tax is controlled by statute and cannot be imposed by administrative rulings or regulations). While letter rulings are authorized by statute and given deference by this Court, faulty administrative interpretations do not rewrite legislation or have the authority independent of the enabling statute. See MCL 205.3(f); MSA 7.657(3). See generally, *Gainey Transportation Services, Inc v Dep't of Treasury*, 209 Mich App 504, 505-510; 531 NW2d 774 (1995). Thus, even if defendant changed its use tax enforcement policy from the policy as stated in its letter rulings, such a change did not constitute an illegal retroactive imposition of a tax.

Finally, plaintiff contends that the trial court erred in granting defendant's motion for summary disposition with respect to plaintiff's Commerce Clause claim alleged in count IV. We disagree. The Commerce Clause, US Const, art 1, § 8, authorizes the United States to "regulate Commerce . . . among the several states." However, the Commerce Clause does not restrict a state's ability to tax its own citizens or regulate intrastate commerce. "It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that state." *Oklahoma Tax Comm'n v Jefferson Lines, Inc*, 514 US 175, 184; 115 S Ct 1331; 131 L Ed2d 261 (1995). Here, although plaintiff made general allegations that its vehicles are sold to retail customers in Michigan and in other states, plaintiff limited count IV of its amended complaint to retail sales in Michigan, alleging in pertinent part:

> By imposing a use tax on vehicle parts and components provided by General Motors to its customers under Plaintiff's Goodwill Adjustments Policy, Defendant will subject General Motors to double taxation, the threat of double taxation and/or to the pyramiding of sales and use taxes under the Michigan Sales and Use Tax Acts, since a sales tax was paid on the parts and components at the time of the original sale at retail of Plaintiff's new vehicles to its customers.

Because plaintiff's count IV is limited to alleged double-taxation by a single state, the federal constitution's Commerce Clause is inapplicable. Accordingly, we affirm the trial court's order dismissing plaintiff's count IV.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, a question of public policy being involved.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Janet T. Neff

[1] While plaintiff filed the present suit in the Court of Claims, it appears that plaintiff filed similar actions in the Michigan Tax Tribunal in MTT Nos. 240838, 240839, 240840, 240884, 240885 and 240886.

[2] Plaintiff sought leave to file an interlocutory appeal on the discovery issue in *General Motors Corp v Dep't of Treasury*, Docket No. 207432, which this Court denied in its order dated June 25, 1998.

[3] Although MCL 205.51; MSA 7.521 has been amended since 1992, those amendments are not relevant to the issues raised in this appeal.

[4] While plaintiff alleges that sales to its "customers" are subject to sales tax under the GSTA, we note that the sales transactions occurred between plaintiff's dealers and the retail customers, not between plaintiff and the retail customers.

[5] We note that the use tax rate was four percent at the time of the dispute in 1990 through 1992.

[6] Although this bulletin was issued in April, 1995, we find no evidence that the discretionary nature of the goodwill program changed between 1990 and 1995.

[7] Plaintiff also disputes that §4(a) of the Use Tax Act, MCL 205.94(a); MSA 7.555(4)(a) is an exemption to the sales tax, contending that the use tax simply does not apply to the goodwill program. Plaintiff's contention is without merit. This Court has previously recognized that §(4)(a) "provides the exemption for property for which sales tax is paid." *Combustion Engineering*, *supra* at 468.

[8] While White stated that he had conversations with Mr. James Schick, a former Chrysler employee, his statement failed to reveal the existence of a similar tax "deal" between defendant and Chrysler.