STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN HOME PRODUCTS CORPORATION, WYETH-AYERST PHARMACEUTICALS, WYETH-AYERST LABORATORIES, WYETH-HOLDINGS CORPORATION, and GENETICS INSTITUTE INC.,	UNPUBLISHED September 28, 2010
Plaintiffs-Appellees,	
v	No. 292344 Court of Claims
DEPARTMENT OF TREASURY,	LC No. 07-000020-MT
Defendant-Appellant.	

Before: MURPHY C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's grant of summary disposition in favor of plaintiffs. Plaintiffs submitted consolidated single business tax returns in 1999 through 2002, and defendant conducted an audit and then determined that there had been a deficiency because plaintiffs had failed to submit proper forms requesting permission to file consolidated returns. Plaintiffs contended that they met the relevant statutory requirements and therefore defendant exceeded its authority by denying their consolidated returns, whereas defendant contended that it had the authority to impose procedures for the exercise of its discretion to allow consolidated returns. The trial court found for plaintiffs, and defendant now appeals. For the reasons herein, we affirm.

Plaintiff American Home Products Corporation is referred to as "Wyeth," and the other plaintiffs ("WAP," "WEL," "Wyeth-Holdings," and "Genetics Institute") were, at all times relevant to this appeal, either wholly-owned subsidiaries of Wyeth or had been wholly acquired by Wyeth and no longer existed as independent entities. There appears to be no dispute that all of the plaintiffs had significant and ongoing interrelationships and intercorporate transactions. From 1983 through 1988, defendant required Wyeth and WAP to file consolidated single business tax returns. From 1989 through 1991, defendant "accepted" consolidated returns from Wyeth and WAP. From 1992 through 1994, defendant "accepted" consolidated returns from Wyeth, WAL, and a third non-party entity. From 1995 through 1998, defendant accepted consolidated returns filed by all plaintiffs to this appeal. Plaintiffs never checked a certain box

on their returns indicating that they were consolidated returns. Plaintiffs also did not include treasury forms requesting or scheduling consolidated filing.

For the "years at issue," 1999 through 2002, defendant audited plaintiffs' consolidated returns and found deficiencies. It appears that this audit took place in late 2004. Defendant issued "intents to assess" based on defendant's determination that plaintiffs had failed to properly ask permission to file consolidated returns and had failed to follow the proper procedures for doing so. Those determinations were based on plaintiffs' failures to file the treasury forms noted above. The deficiencies were computed as the difference in liability between the consolidated returns actually submitted and the individual returns defendant found plaintiffs should have submitted. Plaintiffs paid the assessments under protest and commenced suit for a refund.

The trial court opined that defendant "cannot simply hunt for mushrooms and wherever they find the mushrooms, that's where they're going to dig" and accused defendant of playing "hide the egg" because the forms at issue were not required by statute, so defendant was "asking [plaintiffs] to do things that are not part of the statute and that are not—that you don't require of everybody, and it seems to me digging for the deepest pocket." The trial court concluded:

> I believe the key question is whether the changes in the membership of plaintiff and its subsidiaries throws out the past dealings. I think that the treasury agreed with the past way that the tax filings were handled and the consolidation and then there were some changes that they were concerned about. However, it does appear that filing years in question would have qualified under MCL 208.77 so that they would be allowed to file a consolidated return. Therefore, I am granting the motion for summary disposition. It is true that treasury has broad discretion. However, I also believe that is arbitrary and capricious. I also believe that it violates the constitution and does not treat this plaintiff fairly when we look at how they are applying their own rules and the statutes.

The trial court ordered plaintiffs' taxes refunded, and this appeal followed.

The Single Business Tax Act, MCL 208.1 *et seq.*, was repealed effective December 31, 2007, pursuant to 2006 PA 325. But during the dates at issue in this matter, MCL 208.77(1) provided as follows:

> The commissioner may require or permit the filing of a consolidated or combined return by an affiliated group of United States corporations if all of the following conditions exist:
>
> (a) All members of the affiliated group are Michigan taxpayers.
>
> (b) Each member of the affiliated group maintains a relationship with 1 or more members of the group which includes intercorporate transactions of a substantial nature other than control, ownership, or financing arrangements, or any combination thereof.

> (c) The business activities of each member of the affiliated group are subject to apportionment by a specific apportionment formula contained in this act which specific formula also is applicable to all other members of the affiliated group, and would be so applicable to each member even if it were not a member of the affiliated group.

Defendant does not appear to seriously contest, at least for purposes of the instant summary disposition proceeding and appeal, that plaintiffs satisfy the three criteria set forth in the statute. At issue is the extent and nature of the discretion granted to the commissioner. Effectively, defendant essentially asserts that its discretion is almost absolute, whereas plaintiffs essentially assert that defendant's discretion is almost illusory. We agree with neither position.

There is very little authority on the issue. This Court has previously upheld a decision by defendant to refuse a group of affiliated taxpayers' request to file a retroactive consolidated tax return. *Guardian Industries Corp v Dep't of Treasury*, 198 Mich App 363, 381-382; 499 NW2d 349 (1993). This Court explained that the unambiguous language of MCL 208.77 granted defendant "discretion to allow consolidation of tax returns" and the refusal to do so would be upheld "unless there is no rational basis for it." *Id*. at 382. This Court relied on our Supreme Court's decision in *Clarke-Gravely Corp v Dep't of Treasury*, 412 Mich 484; 315 NW2d 517 (1982).[1] Our Supreme Court explained that defendant had the discretion to require or permit combined tax reporting, and just because a group of taxpayers had been "permitted for some years to retroactively utilize the combined reporting technique does not nullify the commissioner's discretionary power for the year at issue." *Clarke-Gravely Corp*, 412 Mich at 493 (FITZGERALD, J., dissenting, but agreed with in relevant part by the majority that defendant "has broad discretionary power to require or permit combined reporting," see 412 Mich at 488).

This broad discretionary power nullifies plaintiffs' argument that they should be permitted to file consolidated tax returns in the years at issue because they had been permitted to do so in the past. This is irrespective of the fact that, as defendant points out and plaintiffs largely ignore, the prior consolidated filings involved a different combination of entities. Significantly, *Clarke-Gravely Corp* makes it clear that defendant can stop permitting consolidated filings at any time. The only restriction on its discretion to do so would be if "there is no rational basis for it." *Guardian Industries*, 198 Mich App at 382.

For the same reason, there is not *necessarily* any prohibition against defendant conditioning its permission on taxpayers' compliance with a requirement that they submit forms asking for permission and providing certain information, even though those forms were never mandated by promulgating a rule. Plaintiff correctly points out that, because the requirement of those forms was set forth in a Revenue Administrative Bulletin (RAB) that was not adopted under the Administrative Procedures Act, MCL 24.201 *et seq.*, the requirement does not have the force of law. See *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 21; 678 NW2d 619 (2004). However, it may be used as a guide to explain a law or rule. See *Danse Corp v City of Madison Heights*, 466 Mich 175, 181; 644 NW2d 721 (2002). The applicable

[1] The decision in *Clarke-Gravely Corp* was based on the predecessor statute, MCL 206.335. See *Clarke-Gravely Corp*, 412 Mich at 490 n 2 (FITZGERALD, J., dissenting).

statute gives defendant facially absolute discretion whether to allow consolidated filing, provided certain prerequisites are met. An RAB could not be used to "impose requirements not found" in the statute, *id*., but it could be used to guide defendant's exercise of its otherwise unrestricted discretion.

In other words, defendant could not create additional prerequisites for eligibility for consolidated filing. However, defendant has considerable discretion beyond those prerequisites, and that discretion must be exercised in some manner. In effect, the RAB at issue here simply sets forth a procedure for taxpayers to seek a favorable exercise of that discretion. This does not add any additional prerequisites to those enumerated in MCL 208.77(1), but rather seems to dictate how a group of taxpayers should go about bringing to defendant's attention the fact that they satisfy those prerequisites. Plaintiffs are correct in stating that because this procedural instruction lacks the force of law, defendant cannot necessarily *absolutely* refuse to permit consolidated filing *just* because a group of taxpayers did not comply with the requirements. However, in the event defendant does make such a denial, the question is whether "there is no rational basis for" that denial. *Guardian Industries*, 198 Mich App at 382.

Defendant argues that there are a number of rational reasons why its form requirements are necessary and appropriate. Those reasons may be relevant in other actions premised on different facts, but we need not evaluate them here. Under the circumstances of this particular case, defendant permitted *these plaintiffs* to submit consolidated returns for the years at issue with no complaint at the time, and its prior course of performance would have objectively suggested that it generally had no concerns with plaintiffs' consolidated filings. We presume, although we do not decide, that defendant could have rejected plaintiffs' filings for failure to submit the proper forms in any given year, irrespective of prior dealings. But here, defendant had no apparent concern until an audit two years *after* the years at issue.

In *Guardian Industries*, 198 Mich App at 382, this Court held that because the denial of retroactive consolidation did not contravene the purpose behind the consolidated filing statute, the treasury's decision had a "rational basis" sufficient to uphold it. The purposes behind the consolidated filing statute are "to ease taxpayers' administrative expenses, thereby encouraging multi-state corporations to remain or become active in Michigan." *Id.* Corporations are expected to be able to evaluate prospectively what filing status will be optimal, and permitting them to go back and change it later would generate unnecessary administrative burdens; therefore, allowing prospective-only filing of consolidated returns did not contravene the purposes of the statute. *Id*. The situation here is inverted: defendant permitted consolidated returns and now seeks to retroactively require individual filing, or at least the equivalent difference in assessed taxes. Again, we presume without deciding that defendant could (at least in theory) have rationally rejected each consolidated filing when plaintiffs filed it, and done so on the basis of plaintiffs' failure to comply with defendant's procedure. But defendant instead accepted those returns—seemingly unconcerned with its own procedures—and now seeks retroactive modification. In effect, defendant did "permit the filing of a consolidated or combined return," MCL 208.77(1), for each year in question, but then decided differently in hindsight.

We conclude that "there is no rational basis" for defendant's assessment of tax deficiencies against plaintiffs in this case, under the narrow factual circumstances presented here.

Having accepted returns that ignored defendant's own procedure without any apparent concern, defendant cannot now *retroactively* require compliance with that procedure without violating the purpose behind the consolidated filing statute.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens