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## Michigan's Grand Grope: After Several Contrary Decisions Gillette Ruled Not To Be Applied Retroactively

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The Michigan Court of Appeals recently held in a 2-1 decision scheduled for publication, that the Department of Treasury ("Department") may not retroactively apply a court decision favorable to the Department if prior to the decision the Department had issued an interpretive ruling supporting the taxpayer's position. See *Int'l Home Foods, Inc. v. Dep't of Treasury*, 2005 Mich. App. LEXIS 2432 (Mich. Ct. App. 2005). The interpretive ruling relied upon by the taxpayer was a long-standing Revenue Administrative Bulletin ("RAB") stating that the protection of P.L. 86-272 applies to the Michigan Single Business Tax ("SBT"). The issue before the Court was the applicability of the Court's decision in *Gillette*<sup>1</sup> to the taxpayer for tax years before the decision, when there was an RAB favorable to the taxpayer.

In *Gillette*, the Court of Appeals held that the SBT is not an income tax and that P.L. 86-272 did not apply as an appropriate nexus standard for the SBT. This aspect of the *Gillette* decision was contrary to the Department's then-stated position in its RAB and surprised both the Department and the taxpayer. In fact, while the taxpayer was challenging an assessment by the Department, neither party had raised the issue of whether P.L. 86-272 applied to the SBT. Rather, the Court raised and addressed the issue on its own. Despite the surprise decision by the Court and the Department's then-existing RAB, the Department thereafter sought to apply *Gillette* retroactively.

In addressing whether the taxpayer in *International Home Foods* could rely upon the Department's prior-published RAB applying P.L. 86-272 to the SBT, the Court first looked to its earlier holding in *Syntex Laboratories v. Dep't of Treasury*, 590 N.W.2d 612 (Mich. Ct. App. 1998). In *Syntex*, the Court held that the Department could apply *Gillette* retroactively. However, as explained in *International Home Foods*, "it did so only in response to a constitutional due process argument by the [taxpayer]." The Court noted that the *Syntex* decision did not address the issue here, whether the Department is precluded from applying *Gillette* retroactively because of its previously published rulings. The Court distinguished its recent and contrary holding in *J.W. Hobbs*<sup>2</sup> by noting that the controlling issue regarding previously published rulings had not been addressed

<sup>1</sup> See *Gillette v. Dep't. of Treasury*, 497 N.W.2d 595 (Mich. Ct. App. 1993).

<sup>2</sup> See *J.W. Hobbs v. Dep't of Treasury*, 2005 Mich. App. LEXIS 2157 (Mich. Ct. App. 2005). Rather, *J.W. Hobbs* merely follows *Syntex*.

in *J.W. Hobbs* or earlier cases. Rather, the Court said *J.W. Hobbs* merely followed the precedent in *Syntex*.

Regarding the issue of retroactivity in light of the Department's RAB, the Court in *International Home Foods* analyzed the Michigan Supreme Court's decision in *In re D'Amico Estate v. Dep't of Treasury*, 460 N.W.2d 198 (1990). Relying upon that decision, the Court concluded that the Department is bound by the position stated in its earlier RAB and cannot apply a different position to the detriment of a taxpayer for activities occurring before March 31, 1993, the date of the Court's opinion in *Gillette*.

As noted above, just a few months earlier the Court in *J.W. Hobbs* found that the Department could apply *Gillette* retroactively. In a dissenting opinion described by the majority as a "Shakespearean dissent," Judge O'Connell had this to say regarding the Department's decision to apply *Gillette* retroactively: "This grand grope is allowed despite the [Department's] years of inveigling official statements declaring that its arms were too short to tug on plaintiff's coattail's, let alone reach into its pockets."

Perhaps the Michigan Supreme Court will review and reconcile the divergent holdings.■



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