

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Michael Burt,
Petitioner,

v

MTT Docket No. 313389

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith, III

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION

This appeal involves Individual Income Tax for tax years 1995, 1996, 1998, 1999, 2000, 2001, 2003 and 2004. The assessment for tax year 1997 has been cancelled and is no longer at issue. On December 18, 2008, Respondent filed a motion for summary disposition under MCR 2.116(C)(10) and (C)(8). On December 26, 2008, Petitioner filed a Motion for Summary Disposition against Respondent for using unlawful methods and unverified numbers to calculate his income tax liability for the years under appeal.

II. FINDINGS OF FACT

For tax year 1995, Petitioner timely filed an income tax return and timely submitted payment of \$1,750 in satisfaction thereof. On March 10, 2004, Petitioner filed a second income tax return for tax year 1995. Petitioner's second 1995 income tax return stated a balance due of \$3,400 and was submitted without payment. As a result, the Department issued Assessment M840887 for the 1995 tax year in the amount of \$1,650 plus interest. Assessment M840887 reflects the \$3,400 tax liability reported by Petitioner on his second 1995 return minus the \$1,750 previously tendered with Petitioner's original 1995 return.

For tax year 1996, Petitioner timely filed an income tax return and timely submitted payment of \$1,433 in satisfaction thereof. On March 10, 2004, Petitioner filed a second income tax return for tax year 1996. Petitioner's second 1996 income tax return stated a balance due of \$4,460 and was submitted without payment. The Department determined an amount due of \$3,911 for Petitioner's second 1996 return. As a result, the Department issued Assessment M840888 for the 1996 tax year in the amount of \$2,478 plus interest. Assessment M840888 reflects the \$3,911 tax liability determined by the Department on Petitioner's second 1996 return minus the \$1,433 previously tendered with Petitioner's original 1996 return.

For tax year 1998, Petitioner filed an income tax return on March 10, 2004. Petitioner's 1998 income tax return stated a balance due of \$3,380 and was submitted without payment. The Department determined an amount due of \$3,314 for Petitioner's 1998 return. As a result, the Department issued Assessment M840890 for the 1998 tax year in the amount of \$3,314 plus penalties and interest.

For tax year 1999, Petitioner filed an income tax return on March 10, 2004. Petitioner's 1999 income tax return stated a balance due of \$3,562 and was submitted without payment. As a result, the Department issued Assessment M420861 for the 1999 tax year in the amount of \$3,562 plus penalties and interest.

For tax year 2000, Petitioner filed an income tax return on March 10, 2004. Petitioner's 2000 tax return stated a balance due of \$3,857 and was submitted without payment. As a result, the Department issued Assessment M420862 for tax year 2000 in the amount of \$3,857 plus penalties and interest.

For tax year 2001, Petitioner filed an income tax return on March 10, 2004. Petitioner's 2001 income tax return stated a balance due of \$1,994. As a result, the Department issued Assessment P481894 for tax year 2001 in the amount of \$1,994 plus penalties and interest.

For tax year 2003, Petitioner filed an income tax return on October 15, 2004. Petitioner claimed a refund of \$615, which the Department subsequently issued. The Department later audited Petitioner's 2003 tax return and made several adjustments resulting in a revised amount due of \$10,273 plus interest.

For tax year 2004, Petitioner filed an income tax return on October 15, 2005. Petitioner's 2004 income tax return stated tax due of \$4,145. Petitioner claimed to have made \$5,159 in estimated payments and claimed a \$996 refund. The Department audited Petitioner's 2004 tax return and determined that it had only received \$3,330 in estimated payments from Petitioner. The Department made other adjustments to Petitioner's 2004 income tax return and computed a revised amount due of \$3,861 plus interest.

III. RESPONDENT'S CONTENTIONS

Respondent states that "Petitioner filed tax returns for 1995 through 2001 in 2004. The Department accepted these returns as valid returns and made no adjustments. Each return stated that Petitioner had a tax liability that he was required to pay. Petitioner failed to submit payment with the returns filed by Petitioner." Respondent's Brief, p 12. Respondent contends that "[a] taxpayer who is required to file a return and to pay a tax and fails to do so, is subject to the administration, audit, assessment, interest, penalty, and appeal provisions contained in the Revenue Act, MCL § 205.21 through § 205.30." Respondent's Brief, p 6. Respondent further argues that MCL 205.67 grants "authority to the Department to issue an assessment based on the best available information," and that the "Department assessed Petitioner for these tax years

using the best information available—the returns filed by Petitioner.” Respondent’s Brief, p 12. Respondent concludes its argument in favor of summary judgment for the assessments for tax years 1995 through 2001 by stating that “Petitioner has the burden to show that the Department assessed him in error. He cannot meet this burden.” Respondent’s Brief, p 12.

Regarding the assessment for tax year 2003, Respondent contends that it “used the best available information to assess Petitioner for a tax deficiency for tax year 2003.” Respondent’s Brief, p 12. According to information Respondent obtained from the IRS, Respondent determined that Petitioner failed to report his wife’s income in the computation of household income and he failed to report 1099-MISC income totaling \$291,000.00 earned in 2003. Respondent’s Brief, p 13. Respondent argues that “Petitioner has the burden to prove that the information that the IRS provided the State is incorrect. He cannot meet this burden.” Respondent’s Brief, p 13.

Regarding the assessment for tax year 2004, Respondent contends that it “used the best available information to assess Petitioner for a tax deficiency for tax year 2004.” Respondent’s Brief, p 13. First, Respondent claims that it only received \$3,330 in estimated payments, rather than the \$5,159 in estimated payments claimed by Petitioner on his 2004 income tax return. Respondent’s Brief, p 13. Second, Respondent claims that upon review of Petitioner’s 2004 income tax return, it “disallowed a \$77,100.00 deduction as a premature distribution of pension . . . [p]ursuant to MCL § 206.30(8)(d)(ii).” Respondent’s Brief, p 14. Respondent states that “Petitioner has the burden to show that the assessment was in error. He cannot meet this burden.” Respondent’s Brief, p 14.

Regarding the applicability of the statute of limitations on Respondent’s assessments for tax years 1995-2000, Respondent relies on language from MCL 205.27a, which states in

pertinent part that “[a] deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, whichever is later.” MCL 205.27a(2); Respondent’s Brief, p 9. Respondent argues that “Petitioner filed his returns in 2004. The Department was authorized to assess a deficiency for these tax years for 4 years beyond the date that the returns were filed . . . [and] [t]he assessments were issued in 2005. Therefore, the assessments were properly issued.” Respondent’s Brief, p 9.

IV. PETITIONER’S CONTENTIONS

Petitioner, in his motion for summary disposition, disputes 1099 income for 2003. Petitioner states Respondent “relied upon documentary testimony provided by the IRS for 2003 that is fraudulent and shows 1099’s totaling \$291,246 . . . Petitioner does not know what other amounts are, but is aware that there remains a significant false testimony as 1099’s for 2003.” Petitioner’s Motion, p 3. Petitioner then moves for summary disposition regarding the 2003 tax year’s 1099 income of \$11,167, arguing that the “2003 1099’s only total the amount on the Michigan ICRF.” Petitioner’s Motion, p 3.

Petitioner further disputes his 2003 assessment, and argues that “Respondent has, actual or constructive, defrauded Petitioner for using fraudulent or false statements in its assessment for 2003 of \$11,167 and credits for homestead exemption.” Petitioner’s Motion, p 4.

Petitioner also alleges that he has made payments toward his tax liability for 1995, 1996, and 1998. Petitioner states that “Respondent has, actual or constructive, defrauded Petitioner for failure to admit payments made for 1995, 1996, and 1998 in the amounts of \$2,221, [\$]1,433, and \$300.” Petitioner’s Motion, p 3-4.

Petitioner next contends that he is entitled to an income tax credit for 1995 in the amount of \$697 and an income tax credit for 1996 in the amount of \$708. Petitioner’s Motion, p 4.

Petitioner supplied an amended MI-1040X income tax return and Schedule C “Profit or Loss From Business” form for 1999 and 2000, which indicate a credit of \$697 and \$708, respectively. Petitioner’s Exhibits C and D.

Petitioner further argues that the assessments for 1995 and 1996 are beyond the statute of limitations. Petitioner states if “the assessment for 1997 was beyond the statute of limitations . . . 1995 and 1996 are also beyond the statute of limitations.” Petitioner’s Motion, p 4; Petitioner’s Exhibit B.

Petitioner also disputes the penalties assessed by Respondent for income tax liabilities arising from the 1995, 1996, 1998, 1999, 2000, and 2001 tax years. Petitioner contends that “Respondent has, actual or constructive, defrauded Petitioner for failure to provide information when information could not be provided and is not required to be provided by penalties of \$850 in 1995, \$997 in 1996, \$828 in 1998, \$882 in 1999[,] \$882 in 2000 and \$498.50 in 2001.” Petitioner’s Motion, p 4.

Petitioner further contests the AGI determined by the Department of Treasury for tax years 1995, 1996, 1998, 1999, 2000, 2001, 2003, and 2004. Petitioner states that “[b]y defining taxable income using AGI from the invalid form, a duplicate tax is placed on a federal transaction wherein both the federal and state tax the same amount.” Petitioner’s Brief, p 4. Petitioner also states that “the reliance of Michigan State Income Tax on the Internal Revenue Code for calculation of ‘Adjusted Gross Income’ is invalid since the exemption amount used in that calculation form to make a determination that the form should be made cannot be found in the IRC.” Petitioner’s Motion, p 5.

Petitioner requests summary disposition because (1) “Respondent has evaded providing Petitioner a verification that its assessments are valid and in conformance with federal Code,” (2)

Respondent has . . . defrauded Petitioner for using information from an information collection request form (ICRF), 1040 to trigger penalties and interest, which does not comply with the Paperwork Reduction Act,” and (3) “[t]he power to lay and collect a tax on income from whatever source derived has been completely delegated to the federal government by the states.” Petitioner’s Motion, p 4-5.

V. APPLICABLE LAW

In 1967 the state of Michigan imposed an income tax on the net income of its citizens. Public Act 281 of 1967. The legislature defined net income using the definition supplied in the Internal Revenue Code for federal income tax purposes. MCL 206.28. Therefore, the definition of net income in Michigan is “gross income minus . . . deductions allowed.” IRC 63(a). The Michigan Department of Treasury is the agency responsible for the collection of taxes in Michigan. MCL 205.1. The Michigan Department of Treasury has the power to determine tax liability for a taxpayer if it believes, after examination of a tax return, that the taxpayer has not satisfied his or her tax liability. MCL 205.23. If a Michigan taxpayer refuses to pay a tax, the Michigan Department of Treasury has the power to “assess the tax against the taxpayer and notify the taxpayer of the amount of the tax.” MCL 205.24. To determine a correct assessment of tax, the Department of Treasury “may obtain information on which to base an assessment of the tax. By its duly authorized agents, the department may examine the books, records, and papers and audit the accounts of a person or any other records pertaining to the tax.” MCL 205.21. Any tax liability determined by the Department of Treasury is subject to interest and penalties. MCL 205.23(2); MCL 205.24. If a taxpayer wishes to contest an assessment, decision, or order of the Department of Treasury, the taxpayer may “appeal the contested portion of the assessment, decision, or order to the tax tribunal.” MCL 205.22. The Michigan Court of

Appeals has clarified the responsibilities of the taxpayer in appealing an income tax assessment imposed by the Department of Treasury. Specifically, the Court of Appeals imposed the burden of proof in determining the correct amount of net income on the taxpayer, stating, in pertinent part:

[I]mposing the burden on the taxpayer is consistent with the overall scheme of the tax statutes and the Legislature's intent to give the Department a means of basing an assessment on the best information available to it under the circumstances . . . imposing the burden of proof on the taxpayer to come forward with positive proof of his income, as distinguished from the negative burden of disproving the Department's computation . . . is particularly appropriate. *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988).

Respondent moves for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated "[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact." Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider.

Neubacher v Globe Furniture Rentals, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.

Id. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.

McCart v J Walter Thompson, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

Respondent further moves for summary disposition pursuant to MCR 2.116(C)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed to state a claim on which relief can be granted. Summary disposition should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery. *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion for summary disposition under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts. *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

VI. CONCLUSIONS OF LAW

The Tribunal has carefully considered the motion under MCR 2.116(C)(8) and (10), and finds that granting Respondent's motion is warranted, based on the pleadings and other documentary evidence filed with the Tribunal. Respondent has proven through pleadings and

documentary evidence that there is no genuine issue in respect to any material fact regarding the income tax assessments for tax years 1995, 1996, 1998, 1999, 2000, 2001, 2003, and 2004.

MCR 2.116(C)(10).

Summary Disposition under MCR 2.116(C)(10)

The Tribunal finds that summary disposition under MCR 2.116(C)(10) is appropriate in this matter. When the pleadings, documents, affidavits, and evidence are viewed in a light most favorable to Petitioner, the non-moving party, it is clear that a reasonable jury could find for Respondent regarding the income tax assessments issued for 1995, 1996, 1998, 1999, 2000, 2001, 2003 and 2004. The following facts were submitted by Respondent and have not been disputed by Petitioner.

1. Petitioner filed income tax returns covering tax years 1995, 1996, 1998, 1999, 2000, 2001 and 2003 in 2004. Petitioner filed an income tax return covering tax year 2004 in 2005.
2. The information provided in these income tax returns was furnished by Petitioner and any credit or tax due was determined by Petitioner.
3. Petitioner's tax returns indicated a net tax deficiency for tax years 1995, 1996, 1998, 1999, 2000 and 2001 and were submitted without payment.
4. The Department, upon Petitioner's failure to pay the tax due, issued an assessment covering these tax years pursuant to MCL 205. 24. Petitioner's tax returns indicated a net tax credit for tax years 2003 and 2004. The Department, upon examination of Petitioner's tax returns for 2003 and 2004, believed that Petitioner had not satisfied his tax liability and adjusted the amount due pursuant to the authority granted to the Department by MCL 205.23.

In support of its position, Respondent has supplied Petitioner's Michigan income tax returns and an affidavit from Steve McBride, a Departmental Specialist in the Tax Policy Division of the Department of Treasury, detailing the Department's process for determining and issuing the assessments at issue.

The burden thus shifts to Petitioner to establish that a genuine issue of disputed fact exists. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The Michigan Court of Appeals, in a similar case, stated that a petitioner must come forward with "positive proof of his income" to correctly establish the amount of income tax due. *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988).

Petitioner has not established that a genuine issue of material fact exists for trial. Rather than supplying proof of income for the tax years at issue as required by *Kostyu*, Petitioner has spent his energies contesting the method of assessment used by Respondent. Petitioner must supply correct income figures to establish a genuine issue of material fact and move forward, and Petitioner has failed in this regard. Petitioner has submitted amended income tax returns for 1995 and 1996 with its Motion for Summary Disposition, but Petitioner has not supplied evidence establishing his income for those years. As such, these amended returns are unsubstantiated assertions of income and will not suffice to overcome a motion for summary disposition under MCR 2.116(C)(10). Because Petitioner has not supplied evidence of income for the tax years in question, Petitioner has failed to establish the existence of a material fact regarding the liabilities and assessments for 1995, 1996, 1998, 1999, 2000, 2001, 2003 and 2004.

Similarly, there is no genuine issue of material fact regarding penalties and interest imposed on the overdue amounts determined by Respondent. The Department is permitted to assess penalties and interest in accordance with MCL 205.24 and MCL 205.23(2).

There is also no genuine issue of material fact regarding the applicability of the statute of limitations arising from tax liabilities from the 1995 and 1996 tax year. MCL 205.27a states that “[a] deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, **whichever is later.**” MCL 205.27a; [emphasis added]. In the instant case, Petitioner filed the income tax return for 1995 and 1996 on March 10, 2004. Therefore, applying MCL 205.27a, the later date is the date the return was filed: March 10, 2004. The assessments were issued in 2005; therefore, the Department of Treasury complied with MCL 205.27a.

Finally, there is no genuine issue of material fact concerning the acknowledgement of payments received from Petitioner by Respondent. Petitioner’s Exhibit A indicates that the amounts paid by Petitioner have been acknowledged by Respondent.

VII. JUDGMENT

IT IS ORDERED that Respondent’s Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Petitioner’s Motion for Summary Disposition is DENIED.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: February 18, 2009
dju

By: Kimbal R. Smith III