

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

Robert A. and Phyllis G. Krueger,
Petitioners,

MTT Docket No. 342850

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

Petitioners, Robert A. and Phyllis G. Krueger, appeal the denial by Respondent, Michigan Department of Treasury, of income tax refund claims totaling \$46,940, for tax years 1994 through 1997. Petitioners filed claims for refund on February 4, 2003, to report a 1997 loss on cancellation of debt based on a final determination of tax issued by the Internal Revenue Service on November 5, 2001. Petitioners claim the statute of limitations was open and that their claims were timely filed. Respondent argues that the claims were filed beyond the statute of limitations and therefore denied Petitioners' claims for refunds. The Tribunal disagrees and finds Petitioners entitled to the refunds.

BACKGROUND

Petitioners filed federal claims for refund on August 14, 2001, based upon the United States Supreme Court opinion, *Gitlitz, et al v Commissioner of Internal Revenue*, 531 US 206 (2001). As a result of *Gitlitz*, Petitioners were entitled to claim an additional loss from the discharge of indebtedness by their S corporation. On November 5, 2001, the Internal Revenue Service (IRS) notified Petitioners that the federal claims had been accepted and that their accounts for tax years 1994 through 1997 were changed, reducing taxable income and creating a refund of federal income tax paid. Based on the IRS's determination that the proper year for inclusion of the loss was 1997, Petitioners believed the statute of limitations for tax year 1997 was suspended until November 5, 2002¹, and that they still had one year and 62 days² after that date remaining to file a claim for refund with the State of Michigan. Petitioners filed the Michigan claims on February 4, 2003.

¹ The statute of limitations is suspended until one year after a final determination is made by the IRS. MCL 205.27a(3).

² The remainder of the original 4-year statute of limitations on the date the federal claims for refund were filed was August 14, 2001 to October 15, 2002, i.e., one year and 62 days.

On January 23, 2006, Respondent issued notices denying Petitioners' refunds as being filed beyond the statute of limitations. Petitioners requested and Respondent granted an Informal Conference, which was held on August 22, 2007. Respondent's Hearing Referee recommended the refunds be denied, finding that the suspension period ended one year after November 5, 2001. On January 25, 2008, Respondent issued a Decision and Order of Determination, accepting the Referee's recommendation but for different reasons. Respondent determined that the filing of the federal amended return did not toll the general limitations period and Petitioners failed to file the State amended returns within 120 days after the granting of the federal refunds as mandated by the Income Tax Act.

Petitioners filed this appeal with the Tribunal on February 22, 2008. On August 18, 2010, Petitioners filed their First Amended Petition and on October 22, 2010, they filed a Motion for Summary Disposition. On November 12, 2010, Respondent filed a brief in opposition to Petitioners' motion for summary disposition and in support of Respondent's motion for summary disposition. On November 30, 2010, Petitioners filed a brief in reply to Respondent's brief in opposition to Petitioners' motion for summary disposition.

STIPULATION OF FACTS

The parties have stipulated to and the Tribunal finds the following facts:

1. "Petitioners are individuals whose current legal address is 12303 Craven Drive, Shelby Township, Michigan 48315."
2. "Petitioners seek refunds for Michigan income taxes paid for the tax years 1994 through 1997."
3. "Petitioners also sought a refund for Michigan income tax for the 1998 tax year which Respondent allowed."
4. "Petitioners received a federal extension of time to file their 1997 federal individual income return until October 15, 1998."
5. "The federal extension of time also extended the filing period for Petitioners' 1997 MI 1040 to October 15, 1998."
6. "Based upon the United States Supreme Court Decision *Gitlitz et al v Comm'r of Internal Rev*, 531 US 206; 121 S Ct 701; 145 Led 2d (2001), Petitioners filed amended federal returns with the Internal Revenue Service on August 14, 2001 requesting refunds for the 1994 through 1997 tax years."
7. "The Internal Revenue Service allowed recognition of additional loss for 1997 and carry back of the loss to the prior years granting Petitioners refunds for 1994 through 1997."
8. "The federal refunds were granted November 5, 2001."
9. "On February 3, 2003, Petitioners filed amended State returns for tax years 1994 through 1997."
10. "For tax year 1998, Petitioners filed their amended State return on June 11, 2003."
11. "Petitioners filed claims for refunds of their Michigan income tax with Respondent on February 4, 2003, for tax years 1994 through 1997."
12. "Petitioners' State claims reflect an overpayment of tax, contain sufficient information

- for Respondent to determine the amount of refund and the extension of the statute of limitations, and were filed on a form prescribed by Respondent.”
13. “The State claims included copies of evidence of filing of the federal claims on August 14, 2001, copies of the acceptance notice for the tax years 1994-1997, and copies of the refund checks.”
 14. “Respondent denied Petitioners’ State claims.”
 15. “Petitioners requested and were granted an informal conference according to MCL 205.21.”
 16. “An informal conference was conducted before Patricia M. Snow, Hearing Referee, on August 22, 2007.”
 17. “On January 5, 2008, Daniel M. Greenberg, Administrator of Respondent’s Office of Hearings, issued a Decision and Order of Determination which agreed with the Referee’s recommendation denying Petitioners’ State refund claims, for reasons other than those set forth by the Referee.”
 18. “Respondent’s denial of Petitioners’ State refund claims is based upon its position that Petitioners’ claims were filed beyond the statute [sic] of limitations for the years at issue, excepting Petitioners’ refund claim for the 1998 tax year.”

The parties have stipulated as to the following documents and exhibits:

1. Form 2688, 1997 Application for Additional Extension of Time to File U.S. Individual Tax Return.
2. IRS Forms 1040X for the years 1997 through 1994.
3. IRS correspondence dated November 5, 2001 granting claim for refund for tax year 1997.
4. IRS correspondence dated November 5, 2001 granting claim for refund for tax year 1996.
5. IRS correspondence dated November 5, 2001 granting claim for refund for tax year 1995.
6. IRS correspondence dated November 5, 2001 granting claim for refund for tax year 1994.
7. Forms MI-1040X for the years 1997 through 1994.
8. Forms MI-1040X for the calendar year 1998.
9. The Michigan Department of Treasury Decision and Order of Determination dated January 25, 2008 with the attached Reasons and Authority for the Decision of the Department of Treasury and the Informal Conference Recommendation.

PETITIONERS’ CONTENTIONS

Petitioners request the Tribunal grant Summary Disposition in their favor pursuant to MCR 2.611(C)(10) on the basis that the documentary evidence demonstrates that there is no genuine issue of material fact, and find that they are entitled to judgment as a matter of law. Petitioners contend that Respondent erred in denying their claims for refund based on its determination as to the running of the applicable statute of limitation. They argue that “Respondent’s determination of the Statute of Limitations ignores the statutory language set forth in MCL 205.27a(3) and MCL 206.325(2) and is in error.”³

³ Petitioners’ Brief in support of Motion for Summary Disposition, p. 5.

Petitioners maintain that MCL 205.27a provides for the suspension of the statute of limitations pending a final determination of tax. They assert that subsection (3) is triggered by their filing the federal claim, arguing that the Internal Revenue Service's consideration and approval of the federal claim was a final determination. They state:

[U]nder the income tax rules, regulations and the Internal Revenue Service's Manual statements, claims for refund are examined to determine if they are valid and if there is a basis for a change to a taxpayer's tax liability. A claim for refund filed with the Internal Revenue Service necessarily involves a determination of a liability for federal income tax. Having established the Internal Revenue Service makes a determination of tax liability upon the submission of a claim for refund and determined that 1997 was the proper year for . . . [Petitioners] to claim the additional deduction, the Tribunal is bound to give the statutory language of MCL 205.27a(3)(a) meaning and hold that the Federal Claims tolled the statute of limitations for the period of determination and for one year after that period. (Petitioners' Brief, p. 11)

Petitioners rely on *Fegert v Michigan Department of Treasury, infra*, a decision in which the Tribunal found that "Petitioners' federal income tax refund claim constituted a 'period pending a final determination of tax,' and as result, MCL 205.27a(3) is applicable."⁴ Petitioners assert that the statute "clearly states that the period pending a final determination of tax **includes** an audit, conference, hearing or litigation of liability for federal income tax. Use of the term 'including' can be used as a term of enlargement." [Emphasis in original]⁵ They contend that because the "Internal Revenue Service had to make a determination as to whether 1997 or 2001 was the applicable tax year, the filing of a Claim for Refund with the IRS constitutes a final determination of tax." (Petitioners' Brief, p. 7)

Petitioners also argue that under the rules of statutory construction, the Tribunal must conclude that "in reading MCL 205.27a(3), to give meaning to the word 'including', the conditions that would suspend the statute of limitations for the period pending a final determination and for one year after that period, would be more than just an audit, conference, hearing or litigation." (Petitioners' Brief, p. 8) They assert that the word "'including' as set forth in the statute, . . . must be used as a term of enlargement as there are other forms of final determinations of tax that suspend the running of the statute of limitations." *Id.* p. 9

Petitioners assert that Respondent erred in determining that MCL 205.27a(3) only suspends the running of the statute of limitations for a period of one year and does not apply if the general four year statute of limitations has not expired. They contend that Respondent's position cannot be reconciled with the plain language of the statute, and would render the word "including" nugatory in contravention of *Olemenchuk v City of Warren*, 466 Mich 524; 647 NW2d 493

⁴ PB, p. 6, citing *Fegert v Michigan Department of Treasury*, MTT Docket No. 313942 (2006), reversed on other grounds, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2006 (Docket No. 270236).

⁵ PB, p. 7, citing *Sandy Pines Wilderness Trails, Inc v Salem Township, et al*, 232 Mich App 1; 591 NW2d 658 (1998).

(2002), *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004), and *People v Borchard-Ruthland*, 460 Mich 278, 285; 597 NW2d 1 (1999). (Petitioners' Brief, p. 9) Petitioners maintain that when they filed their federal claims, their "'Michigan statute of limitations clock' stopped on August 14, 2001 with 1 year and 62 days remaining. It did not 'restart' until November 5, 2002. The 'clock had been stopped' for 62 days and one year thereafter, thus extending the statute of limitations well beyond February 4, 2003." (Petitioners' Brief, p. 10, referring to *Clarke-Gravelly Corp v Dept of Treasury*, 412 Mich 484; 315 NW2d 517 (1982)).

Petitioners further assert that they were not required to file a claim for refund within 120 days of the IRS's approval of the federal claims as set forth under MCL 206.325(2). They contend that the statute requires that a taxpayer must file an amended return within 120 days only if there was an increase in federal income tax of at least \$500 as a result of a federal audit. They maintain that if an increase resulting from an audit is less than \$500, "or there is a change that results other than from a federal audit, the requirements of 206.325(2) **do not apply.**" [Emphasis in original] (Petitioners' Brief, p. 12) Petitioners point out that in their case, the federal claims resulted in a determination by the IRS of a "decrease" in taxable income, "not an increase," an "overpayment" of federal tax, not a "deficiency" and the claim was "not the result of a federal audit but rather a taxpayer-initiated claim that was fully accepted after a determination made by the IRS." (Petitioners' Brief, p. 12)

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioners are barred from claiming their requested refund because the request was not made within the time limitations provided by MCL 205.27a. Respondent asserts that the statute of limitations on refund requests is provided under the Revenue Act at MCL 205.27a(2), which clearly establishes a four-year limitation period for requesting a tax refund. Respondent relies on a Michigan Supreme Court decision in which the Court held that the four-year statute of limitations applies to all taxpayers seeking refunds.⁶ The Court stated: "All other classes of refund claimants, including petitioner herein, were subject to the four-year limitation period contained within MCL 205.27a(2)."⁷ Respondent contends that the "Michigan Supreme Court left no question about the fact that the MCL 205.27a(2) statute of limitations applies to all refund claims, except those made by community action agencies. The [Petitioners] are not a community action agency."⁸

Respondent further asserts that "[t]he tolling provisions of MCL 205.27a do not apply in this case, because there was no 'audit, conference, hearing, or litigation for federal income tax . . .'" (RM, p. 3) Respondent maintains that MCL 205.27a(4) limits the tolling provisions by providing: "The running of the statute of limitations is suspended only as to those items that were the subject of the audit, conference, hearing, or litigation for federal income tax or a tax

⁶ With one exception for community action agencies. See *DaimlerChrysler Corp v Department of Treasury*, 469 Mich 1032; 679 NW2d 67 (2004).

⁷ *DaimlerChrysler Corp v Department of Treasury*, 469 Mich at 1032.

⁸ Respondent's Motion for Summary Disposition (RM), p. 3.

administered by the department.”⁹

Respondent maintains that because Petitioners voluntarily filed amended federal income tax returns, there was no “audit, conference, hearing, or litigation for federal income tax” as required to toll the statute of limitations. (RM, p. 4)

Respondent also contends that the Income Tax Act places additional requirements on claiming a refund of Michigan income tax and that Petitioners did not meet those requirements. Specifically, Respondent argues that this case involves the Income Tax Act, MCL 206.1 *et seq.*, which mandates that a taxpayer file an amended Michigan return whenever there is any change to federal income tax that affects Michigan income.¹⁰ Respondent asserts that the exception to this requirement (i.e., when a federal audit results in an increase in federal tax of less than \$500) is not applicable to this case because there was no federal audit of Petitioners’ income tax return. MCL 206.325(2) further provides that “[t]he amended return shall be filed within 120 days after the final alteration, modification, recomputation, or determination of deficiency.” *Id.* Respondent asserts that it properly denied the refunds because Petitioners did not comply with the statutory requirement by filing the amended return within 120 days of the granting of the federal refunds.

Respondent responds to Petitioners’ reliance on the Court of Appeals opinion in *Fegert v Department of Treasury*, *supra*, by arguing that it was unpublished, therefore not precedentially binding and “[f]urthermore, . . . it was wrongly decided.” (RM, p.5) Respondent suggests that the *Fegert* Court may not have been made aware of the statutory provisions of MCL 205.27a(4) and MCL 206.325. It asserts that the “Court’s failure to consider them – for whatever reason – does not negate the existence of the statutes, and this Tribunal must apply them, rather than follow an incorrectly decided Court of Appeals decision that is not precedential.” (RM, p. 6)

Finally, Respondent maintains that “[t]he Courts have previously shown no sympathy for taxpayers who, by their own neglect, miss the deadline to claim a tax refund.” (RM, p. 6) It looks to the Court of Appeals decision in *Asama Coldwater Manufacturing Inc v Department of Treasury*,¹¹ arguing that had Petitioners “merely followed the mandate of 206.325(2) and filed their amended returns on time – when they were required by law to submit them – they would have received their requested refunds. Instead, they neglected or ignored the rules, and Treasury then properly denied the refunds.” (*Id.* p. 7)

STANDARD OF REVIEW

Petitioners move for Summary Disposition pursuant to MCR 2.116(C)(10), which provides that a motion will be granted if the documentary evidence demonstrates that there is no genuine issue

⁹ MCL 205.27a(4).

¹⁰ MCL 206.325(2).

¹¹ *Asama Coldwater Manufacturing Inc v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued June 8, 2010 (Docket No. 290584).

of material fact and the moving party is entitled to judgment as a matter of law.¹² The moving party bears the initial burden of supporting its position by presenting documentary evidence for the court to consider.¹³ The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* 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). Respondent filed its motion for summary disposition pursuant to MCR 2.116(I)(2), which provides that “[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.” *Washburn v Michailoff*, 240 Mich App 669; 613 NW2d 405 (2000) (citing MCR 2.116(I)(2)).

CONCLUSIONS OF LAW

MCL 206.30(1) permits the carry back of losses in accordance with Internal Revenue Code Section 172(b)(3). For 1997, losses could be carried back three years.¹⁴ Provided the statute of limitations period is open for 1997, a taxpayer may carry losses incurred in 1997 back to tax years 1994, 1995, and 1996.

MCL 205.27a provides in part:

(2) 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. The taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set for the filing of the original return.

* * * *

(3) The running of the statute of limitations is suspended for the following:

- (a) The period pending a final determination of tax, including audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department and for 1 year after that period.
- (b) The period for which the taxpayer and the state treasurer have consented to in writing that the period be extended.

(4) The running of the statute of limitations is suspended only as to those items that were the subject of the audit, conference, hearing, or litigation for federal income tax or a tax administered by the department.

The parties have stipulated that Petitioners were granted an extension to file their 1997 Michigan income tax return until October 15, 1998. They further agreed that the 1997 return was timely

¹² *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

¹³ *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

¹⁴ For tax years beginning in 1998, losses may only be carried back two years.

filed. Therefore, pursuant to MCL 205.27a(2), Petitioners were entitled to file a claim for refund by October 15, 2002, unless the statute of limitations was otherwise extended.

Petitioners contend that a redetermination of tax by the IRS triggered the suspension provision of MCL 205.27a(3) and that the determination in *Fegert v Department of Treasury, supra*, should apply. The facts in that case are virtually identical to the facts here at issue in that Petitioner, Robert Krueger, and Donald Fegert were 50% shareholders in Tri-Mark Metal Corporation, an S corporation. The amended Michigan returns filed by Petitioners and Mr. Fegert arose from recognition of the additional loss at the shareholder level from the sale of stock in Tri-Mark Metal Corporation during 1997. In *Fegert*, the Court of Appeals rejected the Tribunal's interpretation of the statute when it determined the statute of limitations was extended to one year after the granting of a federal refund claim. The Court stated:

MTT's interpretation in its summary disposition order violates the plain language of the statute. In essence, the MTT inserts an "or" between subsections (2) and (3). However, subsection (2) and (3) are not alternative provisions; they are consecutive provisions if a taxpayer pursues a final determination of tax liability. Further, the MTT inserts the phrase "whichever is later" to determine which provision to apply.

In conclusion, the Court of Appeals found that subsection (3) simply suspends the four-year statute of limitations period pending a final determination of tax liability and for an additional year thereafter. This is consistent with the Tribunal's holding in *Polasky v Michigan Department of Treasury*, MTT Docket No. 275480 (2001), that the statute of limitations was suspended for the period pending a final determination of tax and a period of one year thereafter.

Petitioners sought an informal conference with Respondent's Division of Hearings. The Hearing Referee recommended the refunds be denied despite acknowledging that *Fegert* cannot be factually distinguished from Petitioners' situation, which presents the same issue with respect to interpretation of the Revenue Act statute of limitations.¹⁵ The Hearing Referee noted that "[d]espite the absence of precedent, the Court of Appeals designated that *Fegert* be an unpublished decision and the Michigan Court Rules provide that unpublished opinions are not precedentially binding under the rule of stare decisis. See MCL 7.215(C)(1)"¹⁶ The Referee goes on to state "[t]his Referee finds that the Petitioners have established that the IRS made a determination that changed their original federal income tax returns . . . and that this determination was an event that activated the Michigan statute of limitations suspension provisions at MCL 205.27a(3)." *Id.* However, the Referee concluded that Petitioners were not entitled to the refunds because "[t]he suspension period ended one year after November 2, 2001, the date notices redetermining the Petitioners' federal income tax liability were issued." (ICR, p. 7)

Notwithstanding the Referee's recommendation, Respondent issued a Decision and Order of

¹⁵ Informal Conference Recommendation (ICR), p. 3.

¹⁶ *Id.* p. 4,

Determination finding the same conclusion but for different reasons. Respondent writes in its Reasons and Authority for the Decision of the Department of Treasury, that the refund claims “shall remain denied for the reason that the filing of an amended federal return is not a triggering event that tolls the statute of limitations as provided by statute.”¹⁷ Unlike its Referee, Respondent determined that the voluntary filing of an amended federal return by a taxpayer and a final determination by the IRS on that return is not an event that triggers the suspension of the general limitations period. It argues that MCL 205.27a(4), “in its strong and specific words limits the triggering events to *only* audit, conference, hearing or litigation.” [Emphasis in original] (R&A, p. 4) “To hold otherwise could encourage abuse by taxpayers that desired to toll the state statute of limitations by filing federal refund claims.” *Id.* The Tribunal finds this argument to be meritless. Clearly, if a taxpayer wanted to toll the state statute of limitations, he or she would merely need to file a state claim for refund; a federal claim is not necessarily a prerequisite.

In construing the statute, the Tribunal must presume that every word has some meaning and the Tribunal should avoid any construction that would render any part of a statute surplusage or nugatory. *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004). A statute should be construed “as a whole to harmonize its provisions and carry out the purpose of the Legislature.” *Nowell v Titan Ins Co*, 466 Mich 478, 482 n.5; 648 NW2d 157 (2002), quoting *Macomb Co Prosecutor v Murphy*, 464 Mich 149; 159; 627 NW2d 247 (2001). “Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest.” *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998), overruled in part on other grounds 461 Mich 265 (1999), citing *Franges v Gen Motors Corp*, 404 Mich 590, 612; 274 NW2d 392 (1979).

MCL 205.27a(3) provides for the suspension of a statute of limitations for determining a tax. The language clearly states that “[t]he running of the statute of limitations is suspended for . . . [t]he period pending a final determination of tax, **including** audit, conference, hearing, and litigation of liability” Respondent asks the Tribunal to interpret the word “including” to mean “limited to” based on its reading of section (4), which states “[t]he running of the statute of limitations is suspended only as to those items that were the subject of the audit, conference, hearing, or litigation for federal income tax or a tax administered by the department.”¹⁸ The Tribunal is not persuaded. Section (4) is read to mean that in a situation where a final determination of tax is due to an audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department, then the tolling of the statute of limitations applies only to those items that were the subject of the audit, conference, hearing, or litigation for federal income tax or a tax administered by the department. There is no indication that the Legislature intended to limit the term “final determination.” Furthermore, Respondent’s interpretation disrupts the harmonious reading of the statute with section (3)(b), rendering it potentially nugatory. The Tribunal finds that Petitioners’ filing of the federal refund claims resulted in a final determination of federal income tax.

The Tribunal does not disagree with Respondent’s comment that a “prudent taxpayer would have

¹⁷ Reasons and Authority for the Decision of the Department of Treasury (R&A), p. 2.

¹⁸ MCL 205.27a(4).

filed a ‘protective’ amended state return consecutively with the federal amended return to preserve its claim and avoiding the risk of the statute of limitations running.” (R&A, p. 4) Regardless, the statute provides the limitations and a taxpayer is entitled to a refund if in fact a claim for refund is filed in accordance with such statute.

The Tribunal finds Respondent’s claim that the Court of Appeals erred in its decision in *Fegert* to be without merit. To suggest that the Court may not have been aware of the statutory provisions of MCL 205.27a(4) and MCL 206.325, is speculation. Furthermore, had Respondent believed the Court erred by failing to consider the entire statute, it could have appealed the decision to the Supreme Court following the Court’s denial of Respondent’s request for reconsideration. Nevertheless, although an unpublished opinion of the Court of Appeals is not precedentially binding on any court or this Tribunal, it may be viewed as persuasive and certainly indicative of the higher Court’s interpretation. The Tribunal further finds it disingenuous that Respondent suggests the unpublished *Fegert* be ignored yet asks the Tribunal to follow *Asama Coldwater Manufacturing Inc v Department of Treasury*,¹⁹ also an unpublished opinion of the Court of Appeals, in support of an alternative argument. *Asama* dealt with a matter where the taxpayer was entitled to refunds of certain credits but the four-year statute of limitations under MCL 205.27a(2) applied to bar the refunds. It did not involve an argument of suspension of the statute of limitations and the Tribunal finds it not relevant to the case at issue.

The Tribunal finds Respondent’s argument under MCL 206.325 unpersuasive. The statute provides in part that:

A taxpayer shall file an amended return with the department showing any final alteration in, or modification of, the taxpayer's federal income tax return that affects the taxpayer's taxable income under this act and of any similarly related recomputation of tax or determination of deficiency under the internal revenue code. If an increase in taxable income results from a federal audit that increases the taxpayer's federal income tax by less than \$500.00, the requirement under this subsection to file an amended return does not apply but the department may assess an increase in tax resulting from the audit. The amended return shall be filed within 120 days after the final alteration, modification, recomputation, or determination of deficiency.²⁰

There is no question that there was a modification of Petitioners’ federal income tax return which affected Petitioners’ Michigan taxable income; therefore, an amended return was required pursuant to this section of law. Respondent correctly concludes that the exception does not apply because there was no federal audit nor was there an increase in federal income tax of less than \$500.00. However, this provision is a filing requirement; it is not a statute of limitations. The statute of limitations is provided under MCL 205.27a(2), which states “[i]f a person subject to tax . . . fails to notify the department of any alteration in or modification of the federal tax liability, the department, within 2 years after discovery of the . . . failure to notify, shall assess

¹⁹ *Asama Coldwater Manufacturing Inc v Department of Treasury*, unpublished opinion *per curiam* of the Court of Appeals, decided June 8, 2010 (Docket No. 290584).

²⁰ MCL 206.325.

the tax with penalties and interest as provided by this act” This provision does not override Petitioners’ right to a timely filed claim for refund.

Finally, summary disposition can be granted under MCR 2.116(C)(10) only where the parties’ documentary evidence demonstrates that there are no genuine issues of material fact. The parties filed a joint stipulation of facts and no additional material facts were raised. The Tribunal finds as a matter of law that Petitioners’ filing of the federal claims for refund on August 14, 2001, resulted in a final determination by the IRS. Furthermore, the running of the statute of limitations under MCL 205.27a(2) was suspended until November 5, 2002, which was one year after the IRS issued the final determination. The statute of limitations expired on January 6, 2004 and Petitioners’ claim for refund was filed timely.

Although Petitioners are the prevailing party, Petitioners have not, under the circumstances of this case, shown good cause to justify the granting of their request for attorney fees and costs.

Therefore,

IT IS ORDERED that Petitioners’ Motion for Summary Disposition is GRANTED and Petitioners’ refund in the amount of \$46,940.00 plus accrued interest shall be issued.

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

IT IS FURTHER ORDERED that Petitioners’ request for attorney fees and costs is DENIED.

IT IS FURTHER ORDERED that the officer charged with refunding the affected taxes and interest shall issue a refund as required by this Order within 28 days of the entry of this Final Opinion and Judgment.

This Order resolves all pending issues and closes this case.

MICHIGAN TAX TRIBUNAL

By Cynthia J Knoll

Entered: January 5, 2011