

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

Strathmore Finance Company Inc.,
Petitioner,

v

MTT Docket No. 311682

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Judith R. Trepeck

**ORDER GRANTING RESPONDENT'S MOTION FOR
SUMMARY DISPOSITION**

INTRODUCTION

This appeal involves Petitioner's Single Business Tax (SBT) Assessment for the 2000 tax year. Petitioner filed an appeal with the Tribunal on September 8, 2004, requesting the Tribunal for a "redetermination of the Order of Determination set forth by the Department of Treasury in its Notice of Final Assessment dated August 24, 2004." On March 14, 2006, Respondent filed a Motion for Summary Disposition under MCR 2.116(C)(8) and (10). MCR 2.116(C)(8) entitles the moving party to Summary Disposition when a plaintiff has failed to state a claim upon which relief can be granted. MCR 2.116(C)(10) entitles the moving party to Summary Disposition when there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. On March 28, 2006, Petitioner submitted its response in opposition to Respondent's motion.

FINDINGS OF FACT

Petitioner did not file SBT quarterly estimated tax returns or pay quarterly estimated SBT tax for the 2000 tax year. (The tax was remitted with Petitioner's Application for Extension of Time to

File Michigan Tax Returns.) Respondent used available information and assessed Petitioner \$55,098.46 in penalties and \$3,259.48 in interest for the 2000 tax year. Respondent issued Intent to Assess L350457 reflecting those figures for underpayment and/or late payment of SBT estimates. In a letter dated August 19, 2002, Petitioner protested the penalty to the Department of Treasury, asking for a penalty waiver. On December 10, 2002, the Department of Treasury denied the protest stating that a waiver of penalty had previously been granted Petitioner regarding Intent to Assess K615790 for the 1999 tax year and that reasonable cause did not exist to grant an additional waiver. Subsequently, Petitioner requested an informal conference. Said conference was held on July 22, 2004, where Petitioner contended reasonable cause for waiver based upon internal and external accounting personnel changes. On August 10, 2004, the Decision and Order of Determination was issued by Department of Treasury affirming the assessment as originally determined.

RESPONDENT'S CONTENTIONS

Respondent relies on MCL 208.73 and 208.71(1) contending that an annual or final SBT return must be filed with the Department by the last day of the fourth month after the end of the taxpayer's tax year, and a taxpayer that reasonably expects liability to exceed \$600.00, or adjustments to exceed \$100,000, shall file an estimated return and pay an estimated tax for each quarter of the taxpayer's tax year. Respondent contends that Petitioner did not file quarterly estimated returns or pay its quarterly estimated tax liability for tax year 2000 as required by statute. Respondent further contends that MCL 205.24(2), MCL 205.23 are "clear and unambiguous" and that a taxpayer that fails to file a return or pay tax is subject to penalty up to 50% of the tax deficiency and is subject to interest from the time the tax was due until paid.

Respondent also contends that “Petitioner failed to exercise ordinary business care and prudence in failing to file and pay quarterly estimated SBT returns” and as such, “the penalty assessed must not be waived for reasonable cause.” Respondent further contends that Petitioner did not follow administrative rule 205.1013, which lays out the requirements to establish reasonable cause for waiver of penalty. Respondent contends that Petitioner did not prove its burden regarding a penalty waiver. To meet the burden of proof, a taxpayer must prove “reasonable cause” and there must be an absence of “willful neglect.” The Tribunal has determined “willful neglect” to mean something more than mere negligence, but less than fraud, and does not require evidence of an intentional, conscious decision not to file a tax return while being cognizant of a legal duty to do so. Respondent contends that Petitioner’s failure to file is not a reasonable cause and the failure to file constituted willful neglect.

PETITIONER’S CONTENTIONS

Petitioner filed a Response and Brief in Support of Petitioner’s Response to Respondent’s Motion for Summary Disposition on March 29, 2006. Petitioner argues that it “has established reasonable cause to obtain a waiver of the implemented penalties within the parameters set forth by RAB 2005-3.” Petitioner further contends ...“it has met its burden of submitting or establishing clear and convincing evidence in establishment of reasonable cause as defined by RAB 2005-3.” Petitioner further contends it used ordinary business care and prudence, which is sufficient to waive the penalties applicable to Petitioner under R205.1013. Petitioner maintains this contention based on its reliance on its accountants to ensure the timely adherence to the State tax reporting requirements and this should be enough to show reasonable cause to avoid the assessed penalties. “The most significant disruptions have been caused, however, by the high

turnover over the past ten years in the Petitioner's accounting department. The change, however, by Petitioner of its outside certified public accountants during the prior taxable year at issue also contributed to the company's accounting problems." It is further stated that for the taxable period at issue, Petitioner has filed and paid timely all federal government taxes and forms, and the sole shareholder of Petitioner did the same with regard to individual tax obligations.

Petitioner's brief went on to state that the "...failure to file the applicable Single Business Tax estimated return was attributable to events which were not foreseeable by the company and which Petitioner had little control over...." Petitioner relies on MCL 205.24(4), R205.1013 and RAB 2005-3 contending that "it meets the criteria to establish a valid waiver of the failure to file/pay penalties assessed by the Department."

In addition to Petitioner's contentions stated in the Brief in Support of Petitioner's Response to Respondent's Motion for Summary Disposition, it was stated at the prehearing, by Petitioner's representative, that the reason that estimates were not filed and paid was that the taxpayer anticipated Brownfield credits that would have decreased the tax. The credits, it was stated, came last year.

APPLICABLE LAW

Standards for Determining Motions for Summary Disposition:

Under **MCR 2.116(C)(8)**, a motion for summary disposition will be granted when a plaintiff has failed to state a claim upon which relief can be granted. A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a

claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. *Spiek v Dep't of Transportation*, 456 Mich 331, 337 (1998).

Beaudrie v Henderson 465 Mich 124 (2001).

Under **MCR 2.116(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 *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), the Michigan Supreme Court set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

In reviewing a motion for summary disposition under MCR 2.116(c)(10), the trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties, MCR 2.116(g)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(c)(10) if affidavits or other documentary evidence show there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(c)(10), (g)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence.

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.

McCarty 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). In the event, however, it is determined 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).

With regard to determination of negligence, administrative rule 205.1012 sets the negligence standard and states:

- (1) Negligence is the lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances. The standard for determining negligence is whether the taxpayer exercised ordinary care and prudence in preparing and filing a return and paying the applicable tax in accordance with the statute. The facts and circumstances of each case will be considered.
- (2) When the department imposes a negligence penalty, the department bears the burden of establishing facts to support a finding of negligence and the taxpayer bears the burden of establishing facts that will negate a finding of negligence. The taxpayer shall file a written statement that explains, in detail, the facts which are relied upon to defeat the penalty and which constitute reasonable cause.

The Single Business Tax Act (SBTA) requires Petitioner to file an annual return. MCL 208.73.

Section 24 of the Revenue Act states in relevant part:

1. If a person fails or refuses to file a return or pay a tax administered under this act within the time specified, the department, as soon as possible, shall assess the tax against the person and notify the person of the amount of tax. A liability for a tax administered under this act is subject to the interest and penalties prescribed in sections (2) to (5).
2. [I]f a taxpayer fails or refuses to file a return or pay a tax within the time specified, a penalty of \$10.00 or 5% of the tax, whichever is greater, shall be added if the failure is for not more than 1 month, with an additional 5% penalty for each additional month or fraction of a month during which the failure continues or the tax and penalty is not paid, to a maximum of 50%. In addition to the penalty, interest at the rate provided in section 23 shall be added on the tax from the time the tax was due, until paid.
MCL 205.24

Rule 205.1013(8), with regard to failure to file or pay penalty; waiver of penalty; reasonable cause, states:

The following factors alone do not constitute reasonable cause for failure to file or pay. However, these factors may be considered with other facts and circumstances and may constitute reasonable cause. The following factors are for illustration only and are not an exclusive listing of factors:

- a. The compliance history of the taxpayer.
- b. The nature of the tax.
- c. The taxpayer's financial circumstances, including the amount and nature of the taxpayer's expenditures in light of the income the taxpayer, at the time of the expenditures, could reasonably expect to receive before the due date prescribed for paying the tax.
- d. The taxpayer was incorrectly advised by a tax advisor who is competent in Michigan state tax matters after furnishing the advisor with all necessary and relevant information and the taxpayer acted reasonably in not securing further advice.
- e. The taxpayer's accounting and financial system that is designed to ensure timely filing breaks down due to unavoidable circumstances and, upon discovery, the taxpayer promptly complies.
- f. The death or serious incapacitating illness of the taxpayer or the person responsible for filing the return or making the payment or a member of his or her immediate family.
- g. Lack of funds to make timely payment.
- h. A taxpayer's reliance on an employee or agent to file the return or make the payment.

The Tax Tribunal has authority under its enabling act to review *de novo* the department's final determination denying the taxpayer's petition for a penalty waiver. MCL 205.731, MCL 205.732. The Tribunal may reverse or modify the department's final decision and may order waiver of a penalty imposed under section 24(4) of the revenue act. MCL 205.24(4) states in relevant part:

- (4) If a return is filed or remittance is paid after the time specified and *it is shown* to the satisfaction of the department that the failure was due to *reasonable cause* and not to *willful neglect*, the commissioner or an authorized representative of the commissioner shall waive the penalty prescribed by subsection (2). MCL 205.24(4) [emphasis added].

The taxpayer must prove both “reasonable cause” and an absence of “willful neglect.” The term “willful” is subject to various meanings depending on the context. *Blacks Law Dictionary*, (5th ed rev), p 1435 In the statutory scheme involved here, the term “willful neglect” means something more than mere negligence, but less than fraud. As used in MCL 205.24, the term “willful neglect” does **not** require evidence of an intentional, conscious decision to not **file** a tax return while being fully cognizant of a legal duty to do so.

CONCLUSIONS AND APPLICATION OF APPLICABLE LAW

The issue to be decided is whether Respondent’s Motion for Summary Disposition under MCR 2.116(C)(8) and (10) should be granted. The issue of reasonable cause for waiver of penalty must be considered in rendering this decision.

Petitioner received waivers of penalties in various appeals in prior years for various entities, all of which are related as they filed one return for federal and state tax purposes. Of interest in this appeal is the waiver of penalties in Docket Number 297849 related to Petitioner’s failure to file/pay single business tax returns for the tax years ended October 1988 and 1992, and December 1996 through 1998. The Tribunal, in its decision dated August 3, 2004, included “Augmented Stipulation of Facts” as follows:

- ...
5. During the periods that Petitioner was assessed an SBT deficiency it had undergone a number of changes in its accounting personnel and it had little continuity on a year-to-year basis with respect to its Michigan government tax reporting compliance.
 6. Also, during the periods at issue, Petitioner changed its certified public accounting firm resulting in a lapse of time before the current CPA could obtain tax files from the former accountant.

7. During the periods at issue, Petitioner filed its federal governmental tax forms including but not limited to federal corporate income tax returns and federal employment tax returns....
8. The individual that is the owner of Petitioner filed federal and Michigan individual income tax returns on a timely basis during the periods at issue.

Additionally, this case points to the fact that Petitioner, in dealing with the appeal referred to above, was aware of issues with regard to improper filing related to SBT returns. This case involved those tax years just prior to 2000, the year involved in the instant appeal. The stipulated facts cited above are the same facts pointed out in the case at issue. The Tribunal pointed out in Docket Number 297849 that "...the facts do not establish that Petitioner exercised ordinary care and prudence...Furthermore, there is no persuasive evidence that Petitioner made reasonable efforts to correct the persistent internal accounting and personnel problems." The Opinion and Judgment went on to state, "The fact that Petitioner complied with other federal and state tax obligations does not support Petitioner's case. Rather, it raises the question as to why only the SBT returns were neglected but other returns were filed despite difficult circumstances."

Petitioner, in its Brief in Support of Petitioner's Response to Respondent's Motion for Summary Disposition, points out the 1999 case and, in fact, reminds the Tribunal of the problems with internal accounting staff and outside CPA firm turnover. However, it appears that this problem seems to go on and on without correction. In fact, knowing that there were compliance problems in 1999, Petitioner seems to have failed to mitigate the risk of future penalties. The turnover in internal accounting and the outside CPA firm seems now to have persisted for over ten years. The Tribunal finds that Petitioner falls short in a convincing argument, again, that this ongoing problem caused an assessment of penalty and interest for failure to file and/or failure to pay.

In fact, while two assessments in the previous case were being issued and discussed, the problem in this current appeal was going on. The Tribunal finds it puzzling that Petitioner did not speak with Respondent regarding a further potential problem based on the situation. Petitioner might have “headed the problem off at the pass” by discussing the underlying internal and external accounting issues before it got to the point of assessment for the year 2000.

The administrative rule imposes a duty to exercise “ordinary care and prudence.” R205.1013(5).

In this case, as in the previous appeal, the facts do not establish that Petitioner exercised ordinary business care and prudence. A reasonably prudent person engaged in business activity in Michigan knows that he/she has a duty to investigate and comply with state and local tax law. Further, there is no evidence, based upon previous appeals and problems, that Petitioner made a reasonable effort to correct the persistent internal accounting and personnel problems.

In Petitioner’s Brief in Support of Petitioner’s Response to Respondent’s Motion for Summary Disposition, it is stated that “Petitioner’s failure to file the applicable Single Business Tax estimated return was attributable to events which were not foreseeable by the company and which Petitioner had little control over; namely, the high turnover in Petitioner’s accounting department. Petitioner submits that it had made an honest mistake and that its actions did not rise to the level of ‘intentional disregard’ within the meaning of the applicable Department rules.” Petitioner did not explain how it was lacking control over the problem. In fact, the Tribunal points out with regard to “intentional disregard,” *Black’s Law Dictionary*, (8th ed rev), p 506, defines disregard as “The action of ignoring or treating without proper respect or consideration.” Further, *Black’s Law Dictionary*, (8th ed rev), p 826, defines intentional as

“Done with the aim of carrying out the act.” Petitioner has not carried the burden of proof that would mitigate the intentional disregard issue with regard to this assessment.

With regard to additional reasonable causes for failure to file, R205.1013(8) , Petitioner does not address or indicate that it falls within the other considerations, i.e., those not already mentioned. Those are the nature of the tax, taxpayer’s financial circumstances, incorrect advice from a tax advisor, death or serious incapacity, lack of funds or reliance on an employee or agent to file the return or make the payment.

The administrative rule imposes a duty to exercise “ordinary business care and prudence.” R205.1013(5). In this case, the facts do not establish that Petitioner exercised ordinary business care and prudence. There is no persuasive evidence that Petitioner made reasonable efforts to correct the persistent internal accounting and personnel problems. Furthermore, the failure of Petitioner to cure the internal accounting and personnel problems long after this same problem was brought to the Tribunal’s attention in previous appeals is clear evidence that Petitioner did not exercise ordinary business care and prudence. Petitioner has had ample time to cure the problem since its origination but has failed to do so.

Another factor under R205.1013(7)(a) is whether the failure to file was due to “the prolonged unavoidable absence of the taxpayer responsible for filing and the taxpayer is precluded, due to *circumstances beyond the taxpayer’s control*, from making alternate arrangements...” [emphasis added]. The Tribunal is not persuaded that the circumstances were entirely beyond the control of the taxpayer. The fact that Petitioner complied with other federal and state tax obligations does

not support Petitioner's case. Rather, it raises the question as to why only the SBT returns were neglected but other returns were filed, more specifically, the federal returns, despite the difficult circumstances.

The administrative rule also considers the "compliance history of the taxpayer."

R205.1013(8)(a). Again, this is the second time Petitioner has brought this type of dispute, claiming the failure to file/pay was due to the internal accounting problems and changes in the outside accounting firm. Petitioner has not shown that the circumstances were beyond the control of Petitioner and that the circumstances could not be overcome by reasonably prudent business practices. Further, Petitioner was denied relief in the previous appeal for the same reason. The problem persisted for over ten years, giving Petitioner ample time to arrange for proper accounting systems. Petitioner has failed to do so and for the Tribunal to allow for the waiver of penalties in this case would be prejudicial to Respondent. Petitioner has not met the required standard.

Additionally, it was pointed out at the prehearing, by Petitioner's representative, that Petitioner anticipated Brownfield credits that would have decreased tax and that this is the reason for failure to pay estimates. It was also indicated that the credits came last year. There was no further mention of such credits as a reason for failure to file/pay estimates. In fact, Petitioner did not even submit support for such credits in any pleadings or exhibits.

There are no "new" factors for reasonable cause included in the pleadings in this appeal. The reasonable cause defense is the same as in previous appeals.

The Tribunal desires to point out that in Petitioner and Respondent's Joint Motion to Reschedule Hearing Date Certain, in reasons enumerated for a rescheduled hearing, number six states that "Mr. Glieberman will be in the State of California on the scheduled hearing date of May 3, 2006 pursuant to a previous scheduled business trip made approximately thirty (30) days ago." The Tribunal notes that the hearing date of May 3, 2006 was set in the Summary of Prehearing Conference and Scheduling Order issued on November 23, 2005. This was five months and twelve days before the date of the hearing, clearly before the thirty day planning by Mr. Glieberman. While the hearing was previously adjourned, the Tribunal believes that this is indicative of Mr. Glieberman's indifference to the Tribunal and lack of ordinary business care and prudence.

It is noted that the same person prepared the "Application for Extension of Time to File Michigan Tax Returns" as prepared the Single Business Tax Annual Return. The extension was filed on or before April 30, 2001 and the tax return was dated by the preparer on January 19, 2002 and by the company president on January 28, 2002. The Tribunal finds that the time elapsed between filing for extension and filing the return is not indicative of prudent business planning.

This Tribunal has considered Respondent's Motion for Summary Disposition and Petitioner's response thereto under the criteria for MCR 2.116(C)(8) and (10), and granting this motion is warranted based on the pleadings and other documentary evidence filed with the Tribunal. The Tribunal has concluded that Respondent's assessment was proper and the levy of the 50%

penalty properly applied. There is no genuine issue of material fact to be decided in this case, and Respondent is entitled to judgment as a matter of law.

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition is GRANTED and that the final assessment L350457 issued against Petitioner is AFFIRMED.

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

MICHIGAN TAX TRIBUNAL

Entered: May 10, 2006

By: Judith R. Trepeck