

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

David Anthony Cusumano and  
Bonnie Fay Cusumano,  
Petitioners,

v

MTT Docket Nos. 338269 and  
343698

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

ORDER DENYING PAYMENT OF RESPONDENT'S BILL OF COSTS

INTRODUCTION

In these consolidated cases, Petitioners appeal Respondent's assessments for unpaid individual income tax, interest, and penalty for tax years 1997, 1999, 2004, and 2005. A hearing was held in the above-captioned matter on February 9, 2009. Petitioners represented themselves. Respondent was represented by Bradley K. Morton, Assistant Attorney General.

BACKGROUND

Petitioners filed their appeal of assessments J229370 and L422780 for unpaid individual income taxes for the 1997 and 1999 tax years on June 9, 2007. Petitioners filed their appeal of assessments O644049 and O611050 for unpaid individual income taxes for the 2004 and 2005 tax years on April 7, 2008. On June 2, 2008, both Petitioners and Respondent filed motions for

summary disposition. On October 10, 2008, the Tribunal denied Petitioners' motion for summary disposition, denied Respondent's motion for summary disposition, and granted Respondent's motion to consolidate the cases. The two cases were consolidated under Docket No. 338269. A prehearing was held on January 8, 2008. The summary of that conference allowed for the filing of motions to compel or motions for summary disposition. The Tribunal outlined the issues of fact and law as follows at the prehearing conference and in the prehearing summary:

- Are the Assessments as issued by Respondent based upon facts that can be substantiated?
- Were Petitioners individuals who received, earned, or otherwise acquired income during the tax periods at issue?
- Is that income subject to taxation under the income tax act?
- How much income was received, earned, or otherwise acquired by Petitioners during the tax years at issue?

The Final Bills for Taxes Due (Final Assessments) herein appealed are as follows:

Assessment	Tax Due	Interest*	Penalty
J229370 (1997)	\$ 8,764.00	\$6,012.17	\$ 2,191.00
L422780 (1999)	\$11,147.00	\$5,580.91	\$ 5,573.50
O611049 (2004)	\$ 5,270.00	\$1,152.41	\$ 1,318.00
O611050 (2005)	\$ 6,530.00	\$1,015.30	\$ 1,633.00

\*Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122

On Friday, February 6, 2009, Petitioners filed a Motion for Summary Disposition. At hearing, convened Monday, February 9, 2010, Petitioners moved to adjourn the hearing pending disposition of their Motion for Summary Disposition. The Tribunal ruled that the motion was not timely filed to provide the opposing party an opportunity to respond and as the purpose of the motion appeared to be an effort to delay the long scheduled hearing, Petitioners' motion to adjourn must be denied. The Tribunal placed Petitioners' Motion for Summary Disposition in abeyance and proceeded with the hearing. On February 19, 2009, Respondent filed an answer to Petitioners' motion and motion for sanctions. In an Order entered March 5, 2009, the Tribunal

denied Petitioners' motion for summary disposition and granted Respondent's motion for sanctions. On March 26, 2009, Petitioners filed a motion for reconsideration of the Tribunal's denial of their February 9, 2009 motion for summary disposition. Respondent filed a response opposing the motion on April 2, 2009. The Tribunal denied Petitioners' motion in an Order entered April 21, 2009.

### PETITIONERS' CONTENTIONS

Petitioners offered the following proposed exhibits:

- P-1 Michigan Public Act No. 226 of 1889
- P-2 Michigan Public Act No. 348 of 2002
- P-3 Michigan Department of Treasury's June 4<sup>th</sup> 2008 response to Petitioners' Freedom of Information Act Request dated May 21, 2008
- P-4 Michigan Department of Treasury's June 4<sup>th</sup> 2008 response to Petitioners' Freedom of Information Act Request dated May 22, 2008
- P-5 *Northern Harvest Furniture, Inc v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided November 30, 2001 (Docket No. 224241).
- P-6 *Vomvolakis v Department of Treasury*, 145 Mich App 238; 377 NW2d 309 (1985)
- P-7 Tax Tribunal Act (1973 PA 186, MCL 205.701 to 205.779)
- P-8 Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328
- P-9 Michigan Department of Treasury's May 16, 2008 response to Petitioners' Second Request for Interrogatories (2004 and 2005)
- P-10 Michigan Department of Treasury's Nov 17, 2008 response to Petitioners' Third Request for Interrogatories (2004 and 2005)

Respondent objected to the admission of Petitioners' proposed exhibits 1 and 2 on the basis of relevance as "[w]e're not here under the act cited by petitioner."<sup>1</sup> The Tribunal allowed the exhibits as public documents noting that relevance to this matter will be for Petitioners to prove. Petitioners' exhibits 3, 4, 5, 6, 7, 8, 9, 10, and 11 were admitted without objection.

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<sup>1</sup> Transcript page 17, ll 18-19

Petitioners contend that Respondent “violated its statutory authority . . . [and has] no substantial evidence to prove . . . adjusted gross income.”<sup>2</sup> Petitioners assert that the “fraudulent failure to file penalty is not sustainable as there is no factual evidence that the department had issued a **NOTICE** prescribed . . . in Public Act 122 of 1941 . . . [and] Final Assessments were constructed upon errors in statement of fact.”<sup>3</sup> (emphasis in original)

In their Motion for Summary Judgment, Petitioners assert that Respondent failed to issue “its estimate for the amount of specific tax due”<sup>4</sup> from them and further that there is no provision in the Income Tax Act “regarding the prima facie correctness of the assessments presented by the Respondent”<sup>5</sup> that are at issue in this case. Petitioners assert that Respondent “admitted . . . that it has willingly, knowingly, and intentionally fabricated its compilation of facts which were then used to issue its Final Bill for Taxes Due.”<sup>6</sup> Petitioners argue that notice signed by the Treasurer “in compliance with Public Act 226 of 1889” was required and that having failed to provide such notice, “there is no FINAL ASSESSMENT for taxes due and payable to the State of Michigan.”<sup>7</sup>

In his opening statement, Mr. Cusumano argued that

the material element here in this case is that respondent cannot substantiate anything that they brought forward during their informal conference proceedings. . . . [t]hey have not shown that they have . . . a notice that is signed and written by the state treasurer, which would show the specific tax imposed.<sup>8</sup>

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<sup>2</sup> Petition, pages 1-2

<sup>3</sup> Petition, page 3

<sup>4</sup> Petition, page 3

<sup>5</sup> Petitioners’ motion for summary disposition filed June 2, 2008, page 1

<sup>6</sup> Petitioners’ motion for summary disposition filed June 2, 2008, page 2

<sup>7</sup> Petitioners’ motion for summary disposition filed June 2, 2008, page 4

<sup>8</sup> Transcript page 13, 123-page 14, 18

Mr. Cusumano further argued that “there is no document on file within the department that would . . . fulfill the requirement of . . . Michigan Compiled Laws 207.443”<sup>9</sup> Mr. Cusumano further argued that Respondent’s actions are contrary to “statutory fact and law”<sup>10</sup> and Petitioners’ exhibits support their contention that the state treasurer is “required to make that signed written notice and send it to me.”<sup>11</sup>

At hearing, Petitioners offered the testimony of David A. Cusumano. Mr. Cusumano testified that by submitting the appeal of the Assessments herein at issue to the Tribunal Petitioners “do not admit that it is a lawful assessment, not does it follow the . . . laws”<sup>12</sup> of this state. Mr. Cusumano read excerpts from 1889 PA 226, MCL 207.441 to 207.447. Mr. Cusumano read the following portion of section 3 of 1889 PA 226, MCL 207.443 into the record as follows:

If a corporation, copartnership, party, or person, doing business in this state, neglects or refuses to make a report as required by law, upon which the amount of specific tax imposed by any law of this state, and due and payable by any corporation, copartnership, party, or person, is computed, the state treasurer shall estimate the amount of specific tax due from and payable by the corporation, copartnership, party, or person, from the best information he or she may be able to obtain, and charge that amount upon the books of his or her office. After making the estimate, the state treasurer shall immediately send by mail or otherwise a written notice signed by him or her to any of the officers or directors of the corporation, or to any member of a copartnership, or to the party or person, of the amount of the specific tax estimated by him or her as due and payable by the corporation, copartnership, party, or person.

Mr. Cusumano argued that the Court of Appeals in *Northern Harvest Furniture, Inc v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided November 30, 2001 (Docket No. 224241) ruled that “[i]f this statute is unambiguous, judicial

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<sup>9</sup> Transcript page 14, ll 10-12

<sup>10</sup> Transcript page 16, l 8

<sup>11</sup> Transcript page 16, ll 9-10

<sup>12</sup> Transcript page 29, ll 7-10

construction is neither required nor permitted and the statute must be enforced as written.”<sup>13</sup> Mr. Cusumano testified that he had “not received this specific notice from the state treasurer.”<sup>14</sup> Mr. Cusumano testified that Petitioners’ exhibits 3 and 4, Respondent’s responses to FOIA requests for any notice as referenced in 1889 PA 226, include the statement by the signor “[t]o the best of the undersigned’s knowledge and information and belief, no such signed documents as you described or by any other name reasonably known to the department exists in the department.” Mr. Cusumano testified that he “specifically asked for a copy of the state treasurer’s original written notice signed by him or her that was sent . . . specifying the amount of the specific tax estimated . . . as due and payable . . . for the years 1997 and 1999.”<sup>15</sup> Petitioners’ exhibit 4 requested the same information for years 2004 and 2005.

Mr. Cusumano, citing *Vomvolakis v Department of Treasury, supra*, in support of his position, testified that he did “not believe that there’s a statutory requirement that I have the burden of proof in this case.”<sup>16</sup> Mr. Cusumano argued that the Court held, at page 243 that “[t]he Michigan Income Tax Act of 1967, MCL 206.1 . . . contains no similar provision<sup>17</sup> regarding burden of proof or prima facie correctness of an assessment.” Mr. Cusumano, offered Petitioners’ exhibit 9, responses by Respondent to D2-9 and D2-10, in support of his “assertion that . . . the lawful required signed written notice by the state treasurer was not made, it was not sent to me.”<sup>18</sup> Mr. Cusumano testified that Petitioners’ exhibit 10 provides similar support at I3-9 and I3-10, and in Petitioners’ exhibit 11. Mr. Cusumano testified that it was his position that Respondent’s answer

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<sup>13</sup> Transcript page 30, ll 18-20

<sup>14</sup> Transcript page 31, ll 2-3

<sup>15</sup> Transcript page 32, ll 2-7

<sup>16</sup> Transcript page 33, l 24-page 34, l 1

<sup>17</sup> The reference here is to section 7 of the General Sales Tax Act and section 83 of the Single Business Tax Act, which provide that an assessment under those acts is deemed prima facie correct and the burden of proof of refuting the assessment is the petitioner’s.

<sup>18</sup> Transcript page 37, l 25-page 38, l 4

to his inquiries, that they were uncertain what Petitioner was asking for and that no other notices, other than those sent, were statutorily required, was evidence that Respondent was answering in bad faith.

Mr. Cusumano argued that as to his claim that Petitioners' ignorance of the true facts voids the assessment, no signed written notice from the state treasurer was provided "for the specific tax due imposed by any law of the State of Michigan,"<sup>19</sup> and therefore Petitioners are ignorant of the facts on which the assessments at issue are based.

Petitioners renewed their request for reconsideration of the Tribunal's decision to take their motion for summary disposition filed the day before hearing under advisement and to continue the hearing. The Tribunal ruled that the motion would be taken under advisement and that the hearing would continue.

Petitioners renewed their argument that they do not have the burden of proof based on the *Vomvolakis* case.

Respondent did not cross examine Mr. Cusumano.

#### MOTION TO DISMISS

Respondent moved for Directed Verdict which the Tribunal determined was a Motion to Dismiss. Respondent argued that Petitioners had failed to meet any burden of proof and provided "no evidence that the individual income tax was a specific tax to which 207.441 and 207.443

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<sup>19</sup> Transcript page 46, 124-page 47, 1 1

would apply.”<sup>20</sup> Respondent argued that the income tax act of 1967 provides that the individual income tax be administered under 1941 PA 122 and that act authorizes the department to obtain information on which to base an assessment if a taxpayer fails or refuses to make a required return or payment. Petitioners argued that the income tax is a specific tax and governed by 1889 PA 226 and that the burden of proof is not theirs as to the validity of the assessments. The Tribunal ruled that as there existed a pending motion for summary disposition in which a heretofore unheard issue of fact may be presented, a motion to dismiss was premature.

### RESPONDENT’S CONTENTIONS

Respondent offered the following proposed exhibits:

- R-1 Final Assessment No. J229370
- R-2 Final Assessment No. L422780
- R-3 Final Assessment No. O611049
- R-4 Final Assessment No. O611050
- R-5 David A. and Bonnie F. Cusumano 1997 Individual Income Tax Return
- R-6 David A. and Bonnie F. Cusumano 1997 U.S. Individual Income Tax Return
- R-7 David A. Cusumano 1997 W-2 forms
- R-8 Form 4549 for 1997 for David A. Cusumano
- R-9 Form 886-A for 1997 for David A. Cusumano
- R-10 Form 4549 for 1999 for David A. Cusumano
- R-11 Form 886-A for 1999 for David A. Cusumano
- R-12 IRS Wage and Income Transcript for David A. Cusumano for 2004 tax year
- R-13 IRS Wage and Income Transcript for David A. Cusumano for 2005 tax year
- R-14 Affidavit of Steve McBride
- R-15 Supplemental Affidavit of Steve McBride with Attachments

Petitioners objected to the admission of exhibits 1 through 4 on the grounds of relevancy and hearsay. Petitioners argued that there was no signature and “I cannot, on their face, tell if these have been verified certified documents.”<sup>21</sup> Respondent asserted the exhibits were “document[s] kept in the regular course of business by the Department of Treasury, . . . exception under 803.5,

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<sup>20</sup> Transcript page 52, ll 7-9

<sup>21</sup> Transcript page 72, ll 5-6

803.6, and 803.8.”<sup>22</sup> Respondent further asserted that these are the documents that Petitioners have challenged. The Tribunal ruled that the documents are identified with the same numbers as the assessments listed in the petition, meet the requirements as exception to the prohibition against hearsay evidence, and are relevant as to the amount of tax, interest, and penalty due that is at issue in Petitioners’ appeal. The Tribunal allowed the exhibits. Petitioners objected to the admission of Respondent’s exhibits 8 through 13 as irrelevant and not authenticated and based on there being no signature or seal. Respondent argued that these exhibits, as the others, were allowed under 803.5 and 803.6, as records of regularly conducted activity. The Tribunal overruled the objections and allowed the exhibits, documents from the Internal Revenue Service, as relevant not requiring signature or seal. Petitioners objected to Respondent’s proposed exhibits 14 and 15 on the grounds that the documents are hearsay and did not “say that [the witness] verified the information other than that he may have seen a document with the information on it. It does not verify the information to be true, accurate and complete.”<sup>23</sup> Respondent’s exhibits 14 and 15 are the affidavits of Mr. Steven McBride to which Respondent was asking Mr. McBride to testify. The affidavits began with Mr. McBride’s statement that he was “duly sworn” and was signed by him. The Tribunal allowed the exhibits to be admitted.

Respondent contends that Petitioners are obligated under the income tax act of 1967, 1967 PA 281, to file a return<sup>24</sup> and pay Michigan individual income tax<sup>25</sup> for the tax years at issue. If Petitioners fail to file or claim no income for a tax year, Respondent is authorized to obtain

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<sup>22</sup> Transcript page 73, ll 14-18

<sup>23</sup> Transcript page 82, ll 15-19

<sup>24</sup> MCL 206.311

<sup>25</sup> MCL 206.315

income information,<sup>26</sup> determine the amount of tax due, and issue assessments. Respondent asserts that for the 1997 tax year, Petitioners claimed to have had no income despite W-2's attached to their return for that year indicating income of \$93,943. Petitioners failed to file returns for the 1999, 2004 and 2005 tax years. Based on information received from the IRS, Respondent calculated Petitioners' income for the 1999, 2004, and 2005 tax years and issued the Bills for Taxes Due, (Final Assessments) herein at issue.

Respondent offered the testimony of Steve McBride, Departmental Specialist with the Department of Treasury who specializes in income tax. Mr. McBride identified Respondent's exhibits 1 through 4, "treasury's final assessment[s]"<sup>27</sup> J229730, L422780, O611049, and 611050. Mr. McBride testified that to the best of his knowledge, information, and belief, these documents were "accurate rendition[s] of the final assessment[s] issued."<sup>28</sup>

On cross examination Mr. McBride testified that Respondent's exhibits 1 through 4 were not signed by the state treasurer or "under seal of the Department."<sup>29</sup> Mr. McBride further testified that he "personally verified the information on the [exhibits] . . . both the number and the documents on which they were based."<sup>30</sup> In response to Petitioners' question, Mr. McBride testified that "[i]t's part of our business to receive documents from the IRS. . . . It's part of our normal business, yes."<sup>31</sup> Mr. McBride testified that if documents from the Internal Revenue Service are provided, someone in the Department reviews them. Mr. McBride personally

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<sup>26</sup> MCL 205.21, 205.23, 205.24

<sup>27</sup> Transcript page 69, l 5

<sup>28</sup> Transcript page 69, ll 22-23

<sup>29</sup> Transcript page 88, ll 21-22

<sup>30</sup> Transcript page 89, ll 22

<sup>31</sup> Transcript page 90, ll 10-19

reviewed the exhibits 8 through 15. Petitioners asked “[a]re those underlying documents verified by anybody?”<sup>32</sup> to which Mr. McBride responded that he presumed that they were verified by the IRS before they were sent. Mr. McBride testified that “[a]nything that comes through the IRS under the disclosure program, you know, the presumption is they’re accurate.”<sup>33</sup>

Mr. McBride testified that, as to Respondent’s exhibits 8 through 13, the documents were not signed and that there was not “anything on any of these documents that would indicate that they have been verified by the state. . . . or certify that the information contained within is timely, accurate and complete.”<sup>34</sup> Mr. McBride further testified that he was not familiar with 1889 PA 226, Petitioners’ exhibit 1, and answered in the negative when asked “[h]ave you used or been familiar with this law in your normal course of business.”<sup>35</sup>

#### FINDINGS OF FACT

Petitioners’ address, as submitted on all pleadings, is 48752 Pine Hill Drive, Plymouth, Michigan. Petitioners used this address on their 1997 Michigan Income Tax Return and provided no evidence or testimony that this was not their residence during all the tax years herein at issue. The Tribunal finds that Petitioners are, and were during the tax years at issue, residents of this state.

Petitioners assert that they received no income that was taxable in this state during the tax years at issue. Petitioners reported “0” on line 7 of their federal 1040, Individual Income Tax Return

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<sup>32</sup> Transcript page 92, l 23

<sup>33</sup> Transcript page 93, ll 6-8

<sup>34</sup> Transcript page 101, ll 5-12

<sup>35</sup> Transcript page 110, ll 10-13

for 1997 and “0” on line 32, adjusted gross income and reported “0” on line 10 of their Michigan Income Tax Return. W-2’s<sup>36</sup> for “David A Cusumano” or “David Cusumano” in the following amounts of “wages” or other taxable income for the 1997 tax year were issued to Petitioners:

Aeroquip Corporation	\$15,335.84
Whistler Auto-mation	\$72,341.07
Applied Intelligent Systems, Inc	\$ 6,322.98
Stanley Home Automation	\$ 4,153.86
Vanguard Fiduciary Trust Company	<u>\$ 1,061.23</u>
TOTAL	\$99,214.98

Petitioners did not file Michigan Income Tax Returns for the 1999, 2004, or 2005 tax years.

Based on copies of the following documents<sup>37</sup> from the Department of the Treasury – Internal Revenue Service listing David Cusumano as “Employee,” Petitioners had income for the 1997 and 1999 tax years as follows:

- Form 4549, Income Tax Examination Changes, indicating adjusted gross income of \$201,675 for 1997 and \$256,150 for 1999.
- Explanation of the Delinquency Penalty form
- Explanation of the Estimated Tax Penalty form
- Personal Exemption Worksheet
- How to Pay your Taxes sheet
- Schedule D - Capital Gains and Losses calculation form
- Tax Year Interest Computation form
- Form 886-A, Explanation of Items

Based on copies of the following documents<sup>38</sup> from the Department of the Treasury – Internal Revenue Service listing David Cusumano as “Employee,” Petitioners had income for the 2004 tax year as follows:

- Form W-2 Wage and Tax Statement totaling income of \$102,566 for the 2004 tax year
- Form 5498, Individual Retirement Arrangement Contribution Information
- Form 1098, Mortgage Interest Statement

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<sup>36</sup> Respondent’s exhibit 5

<sup>37</sup> Respondent’s exhibits 8, 9, 10, and 11

<sup>38</sup> Respondent’s exhibits 12

Based on copies of the following documents<sup>39</sup> from the Department of the Treasury – Internal Revenue Service listing David Cusumano as “Employee,” Petitioners had income for the 2005 tax year as follows:

- Form W-2 Wage and Tax Statement totaling income of \$100,497 for the 2005 tax year
- Form 1099-B Proceeds From Broker and Barter Exchange Transactions
- Form 5498, Individual Retirement Arrangement Contribution Information
- Form 1098, Mortgage Interest Statement
- Form 1099-Respondent Distributions from Pensions, Annuities, Retire or Profit-Sharing Plans, IRAs, Insurance Contracts, etc. indicating a distribution, and taxable amount, of \$53,225

Based on the testimony and evidence presented, the Tribunal finds that Petitioners are residents of this state and were residents of this state for the tax years at issue and that they received, earned, or otherwise acquired income subject to tax under the income tax act of 1967, MCL 206.1 to 206.532 during those years.

#### CONCLUSIONS OF LAW

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735(1).

The Tribunal’s factual findings are to be supported by competent, material, and substantial evidence. *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984); *Dow Chemical Co v Dept of Treasury*, 185 Mich App 458, 462-463; 452 NW2d 765 (1990).

“Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence.” (Citations omitted) *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

The Tribunal finds that it is well established that the burden of proof is Petitioners. Petitioners’ interpretation of *Vomvolakis v Department of Treasury*, 145 Mich App 238, 377 NW2d 309

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<sup>39</sup> Respondent’s exhibits 13

(1985), is incorrect and their reliance on that incorrect interpretation fails. The Court in *Vomvolakis* held that MCL 205.21(1) authorizes the Department of Treasury to obtain information on which to base an assessment in cases where the taxpayer “fails or refuses to make a return or payment as required.” The Department of Treasury may determine that a taxpayer has failed to accurately complete a return, and make the assessment based on the best available information. *Vomvolakis v Department of Treasury*, 145 Mich App 238; 377 NW2d 309 (1985), lv den 424 Mich 887 (1986). The Court further held that,

The state's power to tax would be greatly eroded if the respondent could not make assessments on available information in situations where taxpayers do not maintain proper records. It is our opinion that respondent properly exercised its authority in making the assessments in this case. *Id* at 245.

In *Kostyu v Department of Treasury*, 170 Mich App 123; 427 NW2d 566 (1988), the Court held,

Although the revenue statute at issue here, MCL 205.21, does not state which party has the burden of proof, imposing 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. *See Vomvolakis v. Dep't of Treasury*, 145 Mich App. 238, 377 NW2d 309 (1985), lv den 424 Mich. 887 (1986). Where, as here, the circumstances involve a taxpayer who failed to file a return or disclose information on the amount of his personal income, 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.

At the prehearing conference conducted in this matter and the summary and scheduling order entered subsequent to that conference, the Tribunal outlined the factual and legal issues in this matter,

A. Factual issues:

- i. Whether Petitioners were employed and compensated in the State of Michigan during the tax years at issue;
- ii. Whether Petitioners earned or received income attributable to the State of Michigan during the tax years at issue;

- iii. Whether Respondent's purported administrative failure to manage its public records voids the assessment;
- iv. Whether Respondent's purported "systematic fraud" in managing its records voids the assessment;
- v. Whether Respondent's purported "withholding of exculpatory evidence" voids the assessment.

B. Legal issues:

- i. Whether Respondent's purported "affirmative misconduct" voids the assessment;
- ii. Whether Respondent's "false representations" voids the assessment;
- iii. Whether Petitioners' ignorance of "true facts" voids the assessment;
- iv. Whether Respondent's "unconscionable collection activity" voids the assessment;
- v. Whether Respondent's issuance of a "Naked Assessment" voids the assessment;
- vi. Whether income, purported to be earned by Petitioners for the tax years at issue, is specifically exempted by law.

Section 16 of the income tax act of 1967, MCL 206.16, defines person to include "any individual, firm, association, corporation, receiver, estate, trust or any other group or combination acting as a unit, and the plural as well as the singular number."

Section 18(1) of the income tax act of 1967, MCL 206.18, defines resident as:

[a]n individual domiciled in the state. "Domicile" means a place where a person has his true, fixed and permanent home and principal establishment to which, whenever absent therefrom he intends to return, and domicile continues until another permanent establishment is established.

211.7dd(c) of the general property tax act, 1893 PA 206, defines principal residence as "the 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established."

There is a 100% PRE on the property listed on all documents sent to and submitted by Petitioners as their address. There was no evidence or testimony that this address is not the true residence of Petitioners.

Section 30 of the Income Tax Act of 1967, MCL 206.30, defines taxable income as “for a person other than a corporation, estate, or trust, adjusted gross income as defined in the internal revenue code subject to the following adjustments under this section.” Section 51 of the income tax act of 1967, MCL 206.51, provides the tax rate to be applied to that income is as follows:

(1) For receiving, earning, or otherwise acquiring income from any source whatsoever, there is levied and imposed upon the taxable income of every person other than a corporation a tax at the following rates in the following circumstances:

...

(b) After April 30, 1994 and before January 1, 2000, 4.4%.

(c) For tax years that begin on and after January 1, 2000 and before January 1, 2002, 4.2%.

(d) For tax years that begin on and after January 1, 2002 and before January 1, 2003, 4.1%.

(e) On and after January 1, 2003 and before July 1, 2004, 4.0% . . .

Section 402 of the income tax act of 1967, MCL 206.402 provides,

The tax imposed by this act shall be administered by the department in accordance with Act No. 122 of the Public Acts of 1941, as amended, and this act. In case of conflict between the provisions of Act No. 122 of the Public Acts of 1941, as amended, and this act, the provisions of this act shall prevail.

Section 20 of 122 PA 1941, MCL 205.20, provides “[u]nless otherwise provided by specific authority in a taxing statute administered by the department, all taxes shall be subject to the procedures of administration, audit, assessment, interest, penalty, and appeal provided in sections 21 to 30.”

Section 22(1) of 122 PA 1941, MCL 205.21 provides,

If a taxpayer fails or refuses to make a return or payment as required, in whole or in part, or if the department has reason to believe that a return made or payment does not supply sufficient information for an accurate determination of the amount of tax due, the department 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.

Section 28(1)(f) of 122 PA 1941, MCL 205.28, provides, in pertinent part,

The state treasurer may enter into reciprocal agreements with other departments of state government, the United States department of treasury, local governmental units within this state, or taxing officials of other states for the enforcement, collection, and exchange of data after ascertaining that any information provided will be subject to confidentiality restrictions substantially the same as the provisions of this act.

Section 24(1) of 1941 PA 122, MCL 205.24 provides, "[i]f a taxpayer 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 taxpayer and notify the taxpayer of the amount of the tax."

Section 23 of 1941 PA 122, MCL 205.23 provides:

1) If the department believes, based upon either the examination of a tax return, a payment, or an audit authorized by this act, that a taxpayer has not satisfied a tax liability or that a claim was excessive, the department shall determine the tax liability and notify the taxpayer of that determination. A liability for a tax administered under this act is subject to the interest and penalties prescribed in subsections (2) to (5).

(2) If the amount of a tax paid is less than the amount that should have been paid or an excessive claim has been made, the deficiency and interest on the deficiency at the current monthly interest rate of 1 percentage point above the adjusted prime rate per annum from the time the tax was due, and until paid, are due and payable.

...  
(4) If any part of the deficiency or an excessive claim for credit is due to intentional disregard of the law or of the rules promulgated by the department, but without intent to defraud, a penalty of \$25.00 or 25% of the total amount of the deficiency in the tax, whichever is greater, plus interest as provided in subsection (2), shall be added. . . .

(5) If any part of the deficiency or an excessive claim for credit is due to fraudulent intent to evade a tax, or to obtain a refund for a fraudulent claim, a penalty of 100% of the deficiency, plus interest as provided in subsection (2), shall be added. The penalty becomes due and payable after notice and informal conference as provided in this act.

At the prehearing conference conducted in this matter and the summary and scheduling order entered subsequent to that conference, the Tribunal outlined the factual and legal issues in this matter:

A. Factual issues:

- i. Whether Petitioners were employed and compensated in the State of Michigan during the tax years at issue;
- ii. Whether Petitioners earned or received income attributable to the State of Michigan during the tax years at issue;
- iii. Whether Respondent's purported administrative failure to manage its public records voids the assessment;
- iv. Whether Respondent's purported "systematic fraud" in managing its records voids the assessment;
- v. Whether Respondent's purported "withholding of exculpatory evidence" voids the assessment.

B. Legal issues:

- i. Whether Respondent's purported "affirmative misconduct" voids the assessment;
- ii. Whether Respondent's "false representations" voids the assessment;
- iii. Whether Petitioners' ignorance of "true facts" voids the assessment;
- iv. Whether Respondent's "unconscionable collection activity" voids the assessment;
- v. Whether Respondent's issuance of a "Naked Assessment" voids the assessment;
- vi. Whether income, purported to be earned by Petitioners for the tax years at issue, is specifically exempted by law.<sup>40</sup>

Petitioners entered "0" on the line of the Michigan Income Tax Return designated for the input of federal adjusted gross income. Petitioners provided no credible or reliable evidence or testimony to support their initial assertion that they had no income for the tax years at issue. In

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<sup>40</sup> Prehearing summary and scheduling order entered January 14, 2009

light of Respondent's exhibit 5, which included copies of W-2's issued to Mr. Cusumano by several companies indicating wages he was paid during 1997, and the information provided by the Internal Revenue Service to Respondent related to Petitioners' income for the 1999, 2004, and 2005 tax years, the truth and veracity of the information Petitioners reported on the return is doubtful. Further, Petitioners offered no testimony in support of their position that they had no taxable income for any of the years at issue. Petitioners offered no testimony at all related to wages or earnings by either Petitioner for any of the tax years at issue. Petitioners filing of a zero income return for 1997 and filing no returns for 1999, 2004, and 2005 support Respondent's determination that Petitioners' did "not supply sufficient information for an accurate determination of the amount of tax due,"<sup>41</sup> and that Respondent was authorized to "examine the books, records, and papers and audit the accounts of [Petitioners] . . . or any other records pertaining to the tax."<sup>42</sup> Respondent's exchange of data with the United States Department of Treasury was clearly authorized by MCL 205.28, and Respondent's reliance on all information regarding Petitioners' income provided by Petitioners and the Internal Revenue Service in determining that Petitioners had an unpaid tax liability and the amount of that liability was reasonable and authorized by the applicable statutory provisions. Respondent is authorized to assess interest on the unpaid amount of tax and to add penalties to the final bills for tax due when the department determined that Petitioners' actions met the statutory criteria for imposing such penalties.

Based upon the evidence and testimony presented, the case file, and brief, the Tribunal concludes all of the following:

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<sup>41</sup> MCL 205.22

<sup>42</sup> MCL 205.21

1. Petitioners are persons as that term is defined in MCL 206.16.
2. Petitioners received, earned, or otherwise acquired income during the tax years at issue and that income is subject to tax at the rate levied and imposed upon the taxable income of every person other than a corporation pursuant to MCL 206.51.
3. That Petitioners put “0” on line 10 of their MI-1040, Michigan Income Tax Return, for 1997, is not dispositive as to the determination of the amount of income or wages Petitioners earned or received for that tax year. Respondent had the authority pursuant to MCL 205.21 to go beyond Petitioners’ documents to determine Petitioners’ income for the 1997 tax year.
4. That Petitioners did not file a MI-1040, Michigan Income Tax Return, for tax years 1999, 2004, or 2005, is not dispositive as to the determination of the amount of income or wages Petitioners earned or received for those tax years. Respondent had the authority pursuant to MCL 205.21 to take necessary steps to determine Petitioners’ income for those years.
5. The income tax act of 1967<sup>43</sup> is subject to the administration, audit, and assessment procedures of 1941 PA 122.
6. If a taxpayer fails or refuses to file a return or pay a tax, section 23 of 1941 PA 122, MCL 205. 23, authorizes the issuance of an assessment.
7. The Final Bills for Taxes Due (Final Assessments) issued under 1941 PA 122, are not required to be signed or under seal.
8. The Final Bills for Taxes Due (Final Assessments) at issue in this case, Nos. J229370, L422780, O611049, and O611050 are valid. Petitioners received them in a timely manner and were given information as to their rights to appeal.
9. Petitioners did not provide any evidence of income to refute the amounts as assessed by Respondent for the tax years at issue.
10. Petitioners failed to provide any reliable or credible evidence that the documentation used by Respondent to support the assessments at issue was not valid or was inaccurate.
11. Petitioners failed to provide any reliable or credible evidence of any administrative failure by Respondent to manage its public records.
12. Petitioners failed to provide any reliable or credible evidence of any systematic fraud by Respondent in managing its records.
13. Petitioners failed to provide any reliable or credible evidence of any exculpatory evidence withheld by Respondent.
14. Petitioners failed to provide any reliable or credible evidence of any affirmative misconduct by Respondent.
15. Petitioners provided no credible or reliable testimony or evidence of any false representation made by Respondent.
16. Petitioners provided no credible or reliable testimony or evidence of any true facts of which they were ignorant.
17. Petitioners provided no credible or reliable testimony or evidence of any unconscionable collection activity by Respondent.
18. Petitioners provided no evidence or testimony as to what a “naked assessment” was or how that status impacts the validity of the assessments at issue.

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<sup>43</sup> MCL 206.402

19. Petitioners provided no credible or reliable testimony or evidence in support of an assertion that the income earned, as represented by W-2's and Internal Revenue Service documents, was exempt from taxation in this state.

Petitioners' belief that 1889 PA 226, MCL 207.441 to 207.447, applies to the assessments at issue is mistaken. 1889 PA 226 applies to specific taxes. The phrase "specific tax" refers to a distinctive type of tax "imposed as a fixed sum on each article or item of property of a given class or kind without regard to its value."<sup>44</sup> When enacting a specific tax, the Legislature labels the tax using the phrase "specific tax" in the legislation enacting the tax. The income tax is not a specific tax. It is a tax on income. The income tax act of 1967 authorizes the levy of the tax and the procedures under which the tax is administered. An assessment of taxes due under the income tax act of 1967 is governed by 1941 PA 122, which has no requirement that a final assessment be signed by the state treasurer. The lack of a signature that is not required does not invalidate the assessment.

Notwithstanding the above, even if the Tribunal were to find that both 1889 PA 226 and the income tax act of 1967 could apply in this case, which the Tribunal does not, under principles of statutory interpretation, a specific statute, here the income tax act of 1967, enacted contemporaneously or subsequent to a more general statute, here 1889 PA 226, arguably encompassing the same subject matter, takes precedence if the two are in conflict. *In re Cole Estate*, 120 Mich App 539, 548; 328 NW2d 76 (1982). In the instant case, the provisions of the income tax act of 1967, as the subsequently enacted and more specific act, prevails over the general, previously enacted statute. 1889 PA 226 does not apply to the assessments at issue in this case and the assessments are valid without signature. Petitioners' reliance on a statute that is not applicable to the assessments at issue does not void those assessments.

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<sup>44</sup> Black's Law Dictionary, abridged seventh edition, 2000

The Tribunal concludes that Petitioners have not met their burden of proof to establish that they did not earn wages, income, or other compensation for the tax years at issue or that such wages, income, or compensation were not subject to tax pursuant to the income tax act of 1967.

Petitioner have not met their burden of proof to establish that the income reported on the W-2's presented as evidence and the income as reported by the Internal Revenue Service is exempt from taxation under the income tax act of 1967. Petitioners have failed to meet their burden to establish that the assessments at issue were not valid. Petitioners have not met their burden of proof to establish any act or omission by Respondent that would render the subject assessments void. Petitioners' individual income tax liabilities as assessed are affirmed as follows:

Assessment	Tax Due	Interest*	Penalty
J229370 (1997)	\$ 8,764.00	\$	\$ 2,191.00
L422780 (1999)	\$11,147.00	\$	\$ 5,573.50
O611049 (2004)	\$ 5,270.00	\$	\$ 1,318.00
O611050 (2005)	\$ 6,530.00	\$	\$ 1,633.00
TOTAL	\$31,711.00	*	\$10,715.50

\*Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122

#### RESPONDENT'S BILL OF COSTS

On March 19, 2009, Respondent filed a bill of costs, and affidavit in support of that bill, pursuant to the Tribunal's Order of March 5, 2009. In its statement and bill of costs, Respondent states, in pertinent part,

4. Respondent incurred no actual costs in responding to Petitioners' Second Motion;
5. Respondent did expend time in responding to Petitioners' Second Motion;
- ...
7. Respondent's attorney expended approximately 1 hour preparing the response and brief . . . which time was necessary to defend against Petitioners' frivolous Second Motion for Summary Disposition.

On April 7, 2009, Petitioners filed an Objection to Respondent's Statement and Bill for Costs.

Petitioners assert that Respondent's attorney is "a salaried officer of the State, and as such has no outside attorney costs." Petitioners further assert that Respondent's request "constructively stands as punitive fees," which are prohibited under MCR 2.114(E) and (F).

While TTR 145 permits a party before the Tribunal to request costs, there is currently no Tribunal rule authorizing the Tribunal to award attorney's fees to the prevailing party. Since there is currently no applicable Tribunal rule, the Tribunal must rely on the Michigan Court Rules and applicable case law for guidance on whether to allow Respondent to recover attorney's fees in this matter. *See* TTR 111.

"Generally, attorney fees are not recoverable in litigation, either as costs or as an item of damages unless expressly allowed by statute or court rule." 7 Mich Civ Jur Damages § 8 (citing *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986); *Attorney General v Piller*, 204 Mich App 228; 514 NW2d 210 (1994); *Bonner v Chicago Title Ins Co*, 194 Mich App 462; 487 NW2d 807 (1992); *DeWald v Isola*, 188 Mich App 697; 470 NW2d 505 (1991)).

Respondent admits that it incurred no actual costs. Respondent's sole basis for costs was its attorney fees to prepare necessary documents in response to motions filed by Petitioners.

Respondent has not shown that the preparation time was other than time for which the attorney received compensation. Respondent has not shown good cause in support of its bill for attorney's fees. As such, the bill for costs as submitted by Respondent should be denied.

JUDGMENT

IT IS ORDERED that Respondent's Final Bills for Taxes Due (Final Assessments) J229370,

L422780, O611049, and O611050 are AFFIRMED.

IT IS FURTHER ORDERED that Respondent's Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that Respondent's Bill for Costs is DENIED.

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

MICHIGAN TAX TRIBUNAL

Entered: June 24, 2010

By: Rachel Asbury