

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

ESI Mail Pharmacy Service, Inc.,
Petitioner,

MTT Docket No. 441766
Assessment No. TJ60234

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
B. D. Copping

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY
DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY
DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

Although the petition filed on May 31, 2012, stated that Petitioner is appealing Respondent's denial of Petitioner's Michigan Single Business Tax ("SBT") Amnesty Appeal and the assessment of penalties for the tax periods at issue, Petitioner is actually seeking a waiver of penalties under MCL 205.24(4) "due to reasonable cause and not to willful neglect." In its petition, Petitioner also stated:

- a. "On June 29, 2011, Petitioner submitted its Michigan Tax Amnesty Application, Michigan Single Business Tax . . . returns for all tax periods ending from 12/31/2001 to 12/31/2007, and payment of applicable tax and interest due for those tax periods as Petitioner believed to be due."

- b. “On or about September 6, 2011 Respondent issued a Single Business Tax Annual Return Notice of Adjustment for each of the tax periods ending from 12/31/2001 to 12/31/2007, denying Petitioner’s amnesty application citing as its reason that full payment of tax and interest was not received by June 30, 2011 and assessing Petitioner additional interest and penalty.”
- c. “On or about April 26, 2012, Respondent issued a Final Bill for Taxes Due related to the denial of Petitioner’s amnesty application.”

Said Final Bill for Taxes Due, Final Assessment number TJ60234, for tax years 2001 through 2007, was issued on April 26, 2012, and reflected additional interest due on the underpayment of quarterly estimated payments of SBT of \$40,916.69 and penalties for late payment and underpayment of quarterly estimated payments of SBT of \$260,285.50.

On April 8, 2013, Petitioner filed a Motion requesting that the Tribunal render summary judgment in its favor pursuant to MCR 2.116(C)(10). Petitioner filed a supplement to its Motion for Summary Disposition on April 26, 2013, at the Tribunal’s request, to address three questions raised during the April 22, 2013 prehearing conference conducted in this case.

On May 8, 2013, Respondent filed a response to Petitioner’s Motion for Summary Disposition and a Motion requesting that the Tribunal render summary judgment in its favor pursuant to MCR 2.116(I)(2) (i.e., “[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”).

Prior to any of the above actions, Petitioner had received a notice from Respondent, dated March 11, 2011, that an assignment had been issued to conduct a routine audit of its records for SBT and all other taxes administered by the Department.

The Tribunal finds that there are no genuine issues of material fact and a judgment on the merits granting Petitioner’s Motion for Summary Disposition and denying Respondent’s Motion for Summary Disposition is warranted under MCR 2.116(C)(10). More specifically, Petitioner’s failure to timely remit the interest due on its underpayment of quarterly estimated taxes by June 30, 2011, as part of Petitioner’s request for amnesty under MCL 205.31(2), was due to reasonable cause and not willful neglect under the provisions of MCL 205.24(4), which provides:

If a . . . remittance is paid after the time specified and it is shown . . . that the failure was due to reasonable cause and not to willful neglect, the state treasurer . . . shall waive the penalty prescribed by subsection (2).

Further, the penalties to be waived are those being imposed on Petitioner under MCL 205.24(2) for its late payment of its SBT liability and the quarterly estimated tax payments related thereto for tax years 2001 through 2007.

PETITIONER'S CONTENTIONS

In its Motion for Summary Disposition, Petitioner stated:

During the Tax Periods at Issue, Petitioner was a non-filer for SBT purposes. The Michigan Tax Amnesty Program allowed non-filing taxpayers to file overdue tax returns without having to pay penalties associated with failure to file. To remedy its non-filer status for the Tax Periods at Issue, Petitioner applied for the 2011 Michigan Tax Amnesty Program under Public Act 198 of 2010 (hereinafter, the "Act"). Pursuant to the Act, all criminal and civil penalties provided by law for failing to or refusing to file a return or failing to pay a tax administered by Respondent were waived for a taxpayer who submitted a Michigan Tax Amnesty Application, filed a return and made full payment of the tax and interest due prior to June 30, 2011. (Petitioner's Brief in Support, p 1)

On June 24, 2011, Petitioner submitted its Michigan Tax Amnesty Application, Michigan SBT returns for all tax periods at issue, and payments of applicable tax and interest due for these tax periods at issue. Petitioner calculated what it believed to be the interest it owed on this liability by using the Michigan Department of Treasury's Tax Amnesty Interest Calculator ("Calculator"). This Calculator was provided by Respondent on its website. Petitioner argues that it reasonably relied on Respondent's Calculator to compute all interest due and payable when filing its Tax Amnesty Application. Respondent's webpage, where the Calculator was located, had only one disclaimer, which stated, "[t]his estimator

is to be used to assist with the 2011 Tax Amnesty Program and is not intended for other uses.” (Petitioner’s Brief in Support, p 2) Nowhere else in this part of Respondent’s webpage did Respondent’s Calculator give any indication of the limitations of its tool pertaining to its stated purpose – the proper computation of interest associated with taxes paid under the 2011 Tax Amnesty Program.

On September 6, 2011, Respondent issued a SBT Annual Return Notice of Adjustment for each of the tax periods at issue, denying Petitioner’s Tax Amnesty Application, citing as its reason that full payment of tax and interest was not received by June 30, 2011, and assessing Petitioner additional interest and penalty. On October 4, 2011, Petitioner submitted a written protest of this denial to Respondent and requested abatement of the assessed penalties. Petitioner received a denial of its written protest from the Department, dated March 7, 2012. Respondent issued a Final Bill for Taxes Due (“Notice”), dated April 26, 2012, related to the denial of Petitioner’s Tax Amnesty Application for the tax periods at issue.

After reviewing Respondent’s above Notice, Petitioner engaged PricewaterhouseCoopers, LLC (hereinafter “PwC”) to assist with contesting Respondent’s denial of Petitioner’s Michigan Tax Amnesty Application. PwC determined that the Calculator provided on Respondent’s website did not calculate

interest related to underpayment of estimated quarterly tax payments, but rather, calculated interest only from the original due date of the returns until the date of payment of the tax. Petitioner concluded that the additional interest of \$40,916.69 assessed by Respondent was due and submitted payment to Respondent on May 29, 2012. In its Notice, Respondent assessed Petitioner penalty of \$260,285.50.

“Pursuant to MCL 205.24(4) and Revenue Administrative Bulletin 2005-3, if a taxpayer establishes that a failure to file or pay was due to reasonable cause and not to willful neglect, Respondent *shall* waive the penalty.” (Petitioner’s Brief in Support, p 5) Petitioner alleges that its:

. . . reliance on Respondent’s . . . Calculator to compute the correct amount of interest due for payment with [its] Tax Amnesty Application represents a good faith effort on its part to comply with the Tax Amnesty Program and establishes that the failure to pay was due to reasonable cause and not willful neglect. (Petitioner’s Brief in Support, pp 5-6)

In its Supplement to its Motion for Summary Disposition, Petitioner stated:

Petitioner’s Michigan Tax Amnesty Application was prepared Jack Rodriguez, the Director of State and Local Tax at Petitioner. Petitioner did not obtain any outside professional advice prior to filing its Michigan Tax Amnesty Application. (Petitioner’s Supplemental Brief, p 2)

In its Supplement, Petitioner also stated:

The holding by the Court of Claims in *Kheder Davis [& Associates, Inc v Dep’t of Treasury*, Mich Ct Cl No. 12-89-MT (April 10, 2013),]

that the Michigan Department of Treasury “properly denied Kheder Davis’ amnesty requests because taxpayers were required to pay the full amount of interest due on both annual and estimated payments [. . .] in order to qualify for amnesty” is not in contention in this matter. Petitioner does not deny that interest was due on both annual and estimated payments when it filed its Michigan Tax Amnesty Application. Rather, Petitioner in this matter argues that it detrimentally relied on Respondent’s Tax Amnesty Interest Calculator and that Petitioner’s reliance on Respondent’s Tax Amnesty Interest Calculator constitutes reasonable cause for waiver of the penalty imposed by Respondent pursuant to MCL 205.24(4) and RAB 2005-3 and does not rise to the level of willful neglect. This argument is not raised in *Kheder Davis*. (Petitioner’s Supplemental Brief, p 3)

RESPONDENT’S CONTENTIONS

In its Response and Cross-Motion for Summary Disposition, Respondent states:

The Petitioner, who has the burden of proof in this case, failed to support its dispositive motion with admissible evidence. Therefore, the Tribunal cannot dispose of this case in the Petitioner’s favor. But the Tribunal need not hold a hearing before disposing of this case. Even if the Petitioner *had* submitted admissible evidence to substantiate its claim regarding Mr. Rodriguez’s actions, the Tribunal would still be required to rule in the Department’s favor because the Petitioner’s actions fail to satisfy the penalty waiver requirements in Rule 13. . . .

* * *

Line 56 on each of the returns the Petitioner filed says “Underpaid estimate penalty and interest from C-8020, line 28 or 38, whichever applies.” . . . Line 56 exists because the Single Business Tax Act requires taxpayers to make estimated payments. MCL 208.71. The

instruction sheet for Line 56 that accompanied the returns says the following:

Line 56, Underpaid Estimate Penalty and Interest. If penalty and interest are owed for not filing estimated returns or for underestimating tax, complete Form C-8020, SBT Penalty and Interest Computation for Underpaid Estimated Tax, on page 67, to compute penalty and interest due. If a taxpayer chooses not to file this form, Treasury will compute penalty and interest and bill for payment. . . .

The form C-8020 contains four separate calculations for computing any interest or penalty due on the underpaid estimates. . . . The Department collects penalties and interest on underpaid estimated payments because the Revenue Act requires the Department to treat a “deficiency in an estimated payment [. . .] in the same manner as a tax due [. . . .]” MCL 205.23(2).

The Petitioner left each Line 56 blank on the SBT returns it filed. The Petitioner did not complete form C-8020s for any of the years for which it submitted a return. . . . As promised in the instructions accompanying Line 56, since the Petitioner did not complete form C-8020, the Department calculated the interest and penalties due on the Petitioner’s failure to make estimated payments for seven years, and billed the Petitioner, accordingly. . . .

The person who filled out the returns with Petitioner’s amnesty application was Jack Rodriguez. Mr. Rodriguez’s title was “Director, State and Local Tax.” Mr. Rodriguez was also one of the Petitioner’s officers and held the additional title of Assistant Secretary. . . . The Petitioner did not submit an affidavit from Mr. Rodriguez. However, based on his LinkedIn profile, Mr. Rodriguez has spent at least 15 years advising companies how to negotiate state and local tax obligations. He earned a Bachelor in Business Administration and a Master’s degree in Accounting, and has been a tax professional for 22 years. . . .

Mr. Rodriguez apparently calculated the amount of interest to submit with the Petitioner’s SBT returns by typing the amount on Line 55 into a calculator the Department maintained on its amnesty website. . . . The calculator determined how much interest would accrue on a tax debt between two dates based on RAB 2010-6 – which indicated the statutory interest rate on tax debts and refunds at the time. As the simplicity of the calculator indicates, the calculator did not automatically calculate the interest due on underpaid estimated payments. Calculating the interest due on underpaid estimated payments for a full tax year is more complex and requires at least four separate calculations. . . . As the Petitioner points out, the Department does not maintain a calculator that is meant to replace the complex calculations on C-8020. . . . Accordingly, the calculator at issue in this case includes a disclaimer indicating the following: “This estimator is to be used to assist with the 2011 Tax Amnesty Program and is not intended for other uses.” . . . Nothing about the simple calculator indicates that it is meant to replace the complex calculations on form C-8020 or relieve the taxpayer from calculating the appropriate amount of interest due as required by statute.

The issue in this case is whether Mr. Rodriguez’s decision to ignore the Single Business Tax Act, the Revenue Act, Line 56 on the form C-8000, the instructions to Line 56, and form C-8020 nonetheless satisfies the penalty waiver requirements in 2013 AC, R 205.2013. (Respondent’s Motion and Brief, pp 2-5)

APPLICABLE LAW

Where there is no applicable Tax Tribunal Rule (“TTR”), the Michigan Court Rules govern. TTR 215; *Occidental Dev, LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004). “The Tribunal has . . . concluded that MCR 2.116 governs dispositive motions because the TTRs contain no similar rule,

notwithstanding a general rule regarding motions contained in TTR 230.” *Id.* at 4.

Petitioner moved for summary disposition under MCR 2.116(C)(10). MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

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

Globe Furniture Rentals, Inc, 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. See *McCart v J Walter Thompson USA, Inc*, 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. See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Respondent moved for summary disposition under MCR 2.116(I)(2). MCR 2.116(I)(2) asks that “if it appears to the court that the opposing party (the Respondent in this case), rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.” As Petitioner’s motion for summary disposition was granted, Respondent’s motion is denied.

Note: Any “facts” presented in this Order are stated solely for purposes of deciding the motion and are not findings of fact for this case. See MCL 205.751; MCL 24.285; *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117;

532 NW2d 866 (1995) (stating that a court may not make findings of fact when deciding a summary disposition motion).

CONCLUSIONS OF LAW

There are three issues before the Tribunal. The first is whether or not Petitioner meets the “reasonable cause” requirement for a penalty waiver under MCL 205.24(4), which states as follows:

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 state treasurer or an authorized representative of the state treasurer shall waive the penalty prescribed by subsection (2).

As stated on page 4 of Petitioner’s Supplemental Brief in Support:

Petitioner utilized Respondent’s website and detrimentally relied on Respondent’s Tax Amnesty Interest Calculator at: <https://treas-secure.state.mi.us/apps/vircalc/AmnestyCalc.asp> to determine the interest payable to Respondent. Petitioner’s belief was well founded in that there was no cautionary disclaimer or other notice on the Tax Amnesty Interest Calculator or elsewhere that put Petitioner on notice that any other tool or calculation was necessary to calculate interest due to properly comply with the requirements of the 2011 Tax Amnesty Program. Nowhere did Respondent’s Tax Amnesty Interest Calculator give any indication of the limitations of its tool pertaining to its stated purpose,

Respondent’s amnesty website admittedly stated that the Calculator was “to be used to assist with the 2011 Tax Amnesty Program and is not intended for other

uses.” (Respondent’s Motion and Brief, p 4) The website did not state or, more appropriately, warn taxpayers that use of the Calculator was not “meant to replace the complex calculations on form C-8020.” (Respondent’s Motion and Brief, p 4)

Respondent was remiss in not providing a warning of the need for or at least a reference to where additional guidance with respect to the more complex calculation of interest on the underpayment of estimated tax could be found. The Respondent’s duty was to provide complete, competent guidance upon which taxpayers complying for Amnesty could rely. Respondent failed to do so in the case.

More importantly, Petitioner’s reliance on the information (or in this case the lack thereof) provided by Respondent, exclusively for use in applying for a program whose goal was designed to be a win/win for the taxpayer and the State, was not only warranted, but also justified. More specifically, the decision made by Petitioner, an out-of-state business or, as contended by Respondent, Mr. Rodriguez, a non-resident “tax professional,” to ignore the Single Business Tax Act, the Revenue Act, Line 56 on the form C-8000, the instructions to Line 56, and form C-8020, was due to reasonable cause because Petitioner relied upon the incomplete information provided by Respondent on a website specifically designed

to assist taxpayers in applying for tax amnesty and the related calculation of interest resulting from the underpayment of the interest by June 30, 2011.

The second issue, which consists of two parts, is whether or not Petitioner committed an act of “willful neglect” by not including the interest due on the underpayment of quarterly estimated tax payments in its amnesty payment. In summary, to be denied a waiver of penalty, which is required if the Petitioner otherwise qualifies for a “reasonable cause” exception, Petitioner must also not have demonstrated “willful neglect”. Thus, in order for Petitioner to be denied a penalty waiver due to reasonable cause, Petitioner must not only be negligent, but the negligence must be “willful”, e.g., demonstrate a conscious or intentional failure or reckless indifference to perform a duty due to negligence.

As to the first part of the second issue, Petitioner was negligent with respect to the fact that a prudent person, who exercised due care in making a determination of tax liability, should have read and followed the tax return instructions provided by the Respondent that were available to all taxpayers. Had Petitioner done so, it would have learned that when it completed the SBT returns it filed as a part of its amnesty request, interest on unpaid quarterly estimated tax payments, as well as

interest on the overall underpayment of tax, should have been calculated and paid as a part of its amnesty request.

Rule 12, Rule 205.1012, section (3), provides illustrative examples, that when clearly established, are generally considered to constitute negligence.

Example No. 1 states:

The income tax and single business tax instructions clearly require the prepayment of the annual tax, but the taxpayer remits estimated tax payments of less than the required amount.

Thus, failure to read and follow SBT instructions, which require not only the payment of quarterly estimated tax payments, but also interest (and penalty) on underpayment of same, constitutes negligence.

The second part of the second issue relates to whether said negligence, e.g., neglect, was willful or not. The definition of “willful neglect” found in Black’s Law Dictionary, Eighth Edition is an “[i]ntentional or reckless failure to carry out a legal duty” The online legal-dictionary, found at <http://legal-dictionary.thefreedictionary.com/willful>, defines “willful” as follows:

There is no precise definition of the term *willful* because its meaning largely depends on the context in which it appears. It generally signifies a sense of the intentional as opposed to the inadvertent, the deliberate as opposed to the unplanned, and the voluntary as opposed to the compelled. After centuries of court cases, it has no single meaning,

whether as an adjective (*willful*) or an adverb (*willfully*). [Emphasis added.]

Statutes and case law have adapted the term *willful* to the particular circumstances of action and inaction peculiar to specific areas of the law, including tort law, criminal law, worker's compensation, and unemployment compensation. A willful violation, for example, may mean a deliberate intent to violate the law, an intent to perform an act that the law forbids, an intent to refrain from performing an act that the law requires, an indifference to whether or not action or inaction violates the law, or some other variant. [Emphasis added.]

Respondent's own definition of "intentional disregard" found in RAB 2005-

3 states:

The determining factor for intentional disregard is the taxpayer's intent. When applying this penalty, the issue is whether the taxpayer has intentionally disregarded the tax laws, rules or instructions. While the intent of a taxpayer is difficult to discern, such intent will be presumed when a taxpayer has received specific instructions from the department as to the proper reporting of an item of income or deduction, but fails to do so.

Examples of intentional disregard include:

1. Taxpayer has been advised of correct reporting by either an office review or audit, but fails to report correctly in a subsequent filing.
2. Taxpayer has been advised of filing requirements for installments of estimated tax under the Income Tax Act by office review or audit, but fails to make quarterly estimated tax payments.

As to whether Petitioner acted intentionally or willfully with respect to its failure to remit interest on its underpayment of estimated tax payments, the only

specific instructions received by the Petitioner from Respondent with respect to its amnesty request, as to the proper reporting of interest, was to use the Calculator on Treasury's website. This so-called Calculator specified that it was only to be used for amnesty and made no mention of the need to separately calculate interest on the underpayment quarterly estimated payments. Thus, according to Treasury's own RAB, in order to presume intent, a taxpayer has to have received specific instructions from the department as to the proper reporting of an item of income or deduction and then fail to follow such guidance. To be considered willful, the Petitioner must have acted with intent to deliberately ignore the requirement to pay interest on the underpayment of SBT quarterly estimated payments.

In fact, the last thing Petitioner wanted was to fail to qualify for amnesty. It did everything it could to qualify, so that it would qualify for a penalty waiver. It was faced with an impending SBT audit by Respondent, which presumably would have required Petitioner to pay the full amount of its SBT liability, plus interest and all applicable penalties for the period of the audit. Respondent usually uses a ten-year look-back period for its audits of non-filers, so it would have presumably have gone back to calendar year 2001. Thus, the Tribunal finds that while Petitioner was negligent, that negligence was not willful, and it did not willfully or

intentionally fail to make the payment of interest on the underpayment of quarterly estimated tax payments when it applied for amnesty.

That being determined, the last issue is how specifically should the reasonable cause waiver be applied. Is it even possible for the Tribunal to waive the penalties imposed by Respondent when Petitioner failed to qualify for amnesty because it didn't pay interest on the underpayment of quarterly estimated tax payments in a timely fashion?

MCL 205.31(2) states:

For the period beginning May 15, 2011 and ending June 30, 2011, there shall be an amnesty period during which the state treasurer shall waive all criminal and civil penalties provided by law for failing or refusing to file a return, for failing to pay a tax, or for making an excessive claim for a refund for a tax administered by the department of treasury under this act if the taxpayer makes a written request for a waiver on a form prescribed by the department, submits any unfiled returns or amended returns, and makes full payment of the tax and interest due for any prior period not later than the last day of the amnesty period. This subsection does not apply to taxes due after December 31, 2009.

Under this statute, the Treasurer was required to waive penalties in situations where certain criteria were met. These criteria included:

1. Taxpayer must make a written request for a waiver on a form prescribed by the department,
2. The taxpayer must submit any unfiled returns or amended returns,

3. The taxpayer makes full payment of the tax and interest due for any prior period not later than the last day of the amnesty period, June 30, 2011, and
4. This subsection does not apply to taxes due after December 31, 2009.

Petitioner filed the written request for amnesty on the form prescribed by Respondent and completed and filed its SBT returns for 2001 through 2007 by the June 30, 2011 due date. Thus, it met criteria numbers 1, 2, and 4 above.

Petitioner, however, failed to meet the statutory requirement found in number 3 above, which required Petitioner to pay “all” of the interest (*and tax*) due no later than June 30, 2011. The amnesty statute does not have any exceptions included in it. You either meet the four criteria or you do not. Because Petitioner failed to meet the third criteria, payment of all interest by June 30, 2011, it was specifically precluded by statute from qualifying for a penalty waiver under MCL 205.31(2).

Given that the Tribunal has determined that the failure to timely file a return or pay a remittance after the time specified was due to reasonable cause and not to willful neglect under MCL 205.24(4), is there any basis other than under amnesty for Petitioner to receive a penalty waiver? Under this subsection, MCL 205.24(4), if the criteria are met “the state treasurer . . . shall waive the penalty prescribed by subsection (2).”

As to the original assessment of the penalty imposed on Petitioner for its failure to pay a tax or file a required return, MCL 205.24(2) states:

Except as provided in subsections (3), (6), and (7), if a taxpayer fails or refuses to file a return or pay a tax within the time specified for notices of intent to assess issued on or before February 28, 2003, 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%. Except as provided in subsections (3), (6), and (7) [Note: none of these three sub-sections are applicable], if a taxpayer fails or refuses to file a return or pay a tax within the time specified for notices of intent to assess issued after February 28, 2003, a penalty of 5% of the tax shall be added if the failure is for not more than 2 months, 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 25%. In addition to the penalty, interest at the rate provided in section 23 for deficiencies in tax payments shall be added on the tax from the time the tax was due, until paid. After June 30, 1994, the penalty prescribed by this subsection shall not be imposed until the department submits for public hearing pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, a rule defining what constitutes reasonable cause for waiver of the penalty under subsection (4), which definition shall include illustrative examples. [Emphasis added.]

Does the broad language of 205.24(4), which states, in part, that “[i]f a . . . remittance is paid after the time specified,” permit the waiver of a penalty assessed under MCL 205.24(2), if waiver of the penalty was not allowed under amnesty due to Petitioner’s failure to timely make the required payment of interest on Petitioner’s underpayment of quarterly estimated tax payments?

Regarding whether a penalty waiver is warranted with respect to Petitioner's failure to file and pay its SBT liabilities, based on when the returns and payments were originally due for the tax years 2001 through 2007, the answer is clear that there is no basis for such a waiver. The Tribunal's finding of reasonable cause does not relate to the non-filing or non-payment of tax with respect to the original SBT returns, but to the failure to pay interest on underpaid quarterly estimated tax payments at the time amnesty was being requested.

As to this possibility, does the statutory language found in MCL 205.24(4) support the argument that, since the failure to qualify for amnesty was due to reasonable cause, Petitioner may qualify for a penalty waiver, not under the amnesty statute, but under MCL 205.24(4)? As cited above, MCL 205.24(4) states, in part, that "[i]f a . . . 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 state treasurer . . . shall waive the penalty prescribed by subsection (2)." Thus, if Petitioner failed to remit the interest, which was due to Petitioner's underpayment of quarterly estimated tax, by the time specified by the amnesty statute, June 30, 2011, and the failure was due to reasonable cause and not willful neglect, should Petitioner be granted a waiver of

penalty? Is this the case if the waiver penalty does not directly relate to the penalty forgiveness found in the amnesty statute, but instead due to Petitioner's failure to remit the interest due under amnesty by the time specified in the amnesty provisions?

Given that the Tribunal has already found that reasonable cause exists for failure pay the interest on the underpayment of quarterly estimated tax payments under amnesty, the language to review is what does the term "remittance is paid after the time specified" mean, and are the penalties Petitioner is requesting to be waived ones covered by MCL 205.24(2)?

First, as to what "remittance is paid after the time specified" means, Dictionary.com defines "remittance" as "money or its equivalent sent from one place to another." Again, per Dictionary.com, "paid" means "to transfer money, goods, etc., as in making a purchase or settling a debt" or "to discharge a debt or obligation." Finally, the Tribunal concludes that "after the time specified" means some time after the statutorily mandated due date.

The Tribunal determines that Petitioner's failure to timely remit the interest due on its underpayment of quarterly estimated taxes, as part of Petitioner's request

for amnesty under MCL 205.31(2), was due to reasonable cause and not willful neglect under the provisions of MCL 205.24(4).

The Tribunal's basis for the determination that Petitioner qualifies for a waiver of penalty under this provision is that Petitioner's failure to pay the interest (*on the quarterly estimated tax payments that it failed to pay for the tax periods at issue*) by the time specified, e.g., the statutory due date for amnesty of June 30, 2011, was due to reasonable cause and not willful neglect. Penalties to be waived are those being imposed on Petitioner under MCL 205.24(2) for its late payment of its SBT liability and the quarterly estimated tax payments related thereto for tax years 2001 through 2007. Therefore,

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that the penalties provided on Assessment No. TJ60234 will be WAIVED in their entirety.

IT IS FURTHER ORDERED that Respondent's Cross-Motion for Summary Disposition is DENIED.

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

MICHIGAN TAX TRIBUNAL

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By: B.D. Copping

Entered: June 12, 2013