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

Four G Construction, Inc.
d/b/a Geeding Construction, Inc.,
Petitioner,

v — MTT Docket No. 456420

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

On May 12, 2014, Administrative Law Judge Thomas A. Halick issued a Proposed Order partially granting Respondent's Motion for Summary Disposition and also partially granting summary disposition in favor of Petitioner. The Proposed Order states, in pertinent part, "The parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing and by mail** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions). There is no fee for filing exceptions." [Emphasis in original.]

On May 30, 2014, Respondent filed exceptions to the Proposed Order. In the exceptions, Respondent states:

1. "The Proposed Order makes factual findings and credibility assessments, neither of which is permitted in ruling on a motion for summary disposition."

2. "Four G is not entitled to the relief it seeks in this matter, and . . . even if Four G met its burden of establishing a genuine issue of material fact in response to Treasury's motion, the proper resolution would be to hold an evidentiary hearing on the factual issues in the case."

3. "While there are certain factual issues that are not in dispute, the Proposed Order relied only on facts that are in dispute . . . ."

4. "For example, the Proposed Order finds that 'Petitioner is a taxpayer that calculates and pays estimated payments for federal income tax purposes pursuant to section 6655(e) of the Internal Revenue Code,' and that 'Petitioner has indicated that it had no federal estimate for the second quarter.' These facts are purportedly based on the Affidavit of David Warmbrodt . . . and were not facts that Petitioner had previously raised in its Petition. Accepting these facts as true without giving Treasury the opportunity to cross-examine the witness is improper at the summary disposition stage."

5. "Four G's 2011 MBT annual return does not support the affiant's claim that Four G calculates its estimated payments pursuant to Section 6655(e). Four G left Form 4582 blank, on which the calculation would be recorded."

6. "The Proposed Order also finds it 'apparent that Petitioner was furnished incorrect advice from its CPA or other tax advisor…' This again is a factual allegation outside the undisputed facts of the case, and it is improper to accept this fact as true . . . . [This finding was made] without determining what documents Petitioner provided to the tax advisor, and disregarding the admitted fact that the tax advisor was not familiar with Michigan tax laws."

7. "The Proposed Order fails to address the burdens of the moving and non-moving party. As the moving party, Treasury had the initial burden to establish that no genuine issue of material fact exists for trial . . . . The burden then shifted to the opposing party, Four G, to establish that a genuine issue of disputed fact exists . . . . Without discussing the shifting burdens, the Proposed Order discusses in detail, and accepts as true, the factual allegations of the party opposing summary disposition . . . ."

8. The Proposed Order does not address Petitioner's heightened burden to establish it is entitled to a penalty waiver.

9. "[T]he Proposed Order also makes inconsistent factual findings. For instance, in the final sentence on page 16, the Proposed Order states, 'In any event, it can be determined that Petitioner did attempt to make its 2011 estimated payments under the safe harbor provision at that time.' In the following paragraph, it states, 'It is clear from the Affidavit of David J. Warmbrodt . . . that Petitioner did not base its estimated payments on the safe harbor provision, but rather sought to file using the same methodology as permitted by IRC 6655(e), as allowed by MCL 208.1501(3).'"

10. "The Proposed Order's acceptance of Four G's factual allegations in response to Treasury's motion for summary disposition is an error of law. The documentary evidence submitted by Four G in response to Treasury's motion created, at most, an ambiguity in the facts of the case."

11. "[U]nexpected income is not a factor enumerated for consideration of reasonable cause in Rule 205.1013 [to waive the penalty]. Rather, the Rule requires taxpayers to exercise ordinary business care and prudence . . . [which Four G failed to do] when it failed to account for the income from the Enbridge work orders when it submitted its MBT estimated payments to Treasury."

12. "[T]here is no discussion regarding *why* it was difficult for Petitioner to estimate its tax base, rather the Proposed Order simply accepted Petitioner's version of the facts as true." [Emphasis in original.]

13. "[T]he Proposed Order also determined that Petitioner received incorrect tax advice, disregarding the language of Rule 205.1013(d) requiring a consideration of whether the tax advisor was competent in Michigan tax laws. Here, Four G's tax advisor, under its own admission, was not familiar with the MBTA."

14. The Proposed Order made an incorrect factual finding and legal conclusion that Petitioner had complied with IRC 6655(e) as "Petitioner has argued it experienced an increase in income in the third and fourth quarter of 2011, but has stated nothing about its federal liability under IRC 6655(e) for these quarters."

15. "The Proposed Order's legal analysis of penalty waiver is inconsistent with case law, including recent Tribunal rulings." [referencing *DHG Associates, LP v Dep't of Treasury*, MTT Docket No. 449632, (March 7, 2014); *Glieberman Aviation LLC v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2006 (Docket No. 261599).]

Petitioner has not filed exceptions to the Proposed Order or a response to Respondent's exceptions.

The Tribunal has considered the exceptions and the case file and finds that the Proposed Order did not contain findings of fact as alleged by Respondent. Actual findings of fact are prohibited in deciding summary disposition motions[1]. The Proposed Order contains a Conclusions of Law section that analyzes the applicable statutes, case law, and administrative guidance in relation to the arguments raised by the parties and the exhibits submitted in support of the Motion and Response. This analysis includes a determination by the ALJ that there was <u>no genuine issue with respect to any material fact</u>, thereby allowing for summary disposition. The ALJ further granted summary disposition in Respondent's favor with respect to the assessment of interest. The ALJ, however, found that judgment should be granted in favor of Petitioner, as the non-moving party, with respect to waiver of the penalty. The granting of summary disposition in favor of the non-moving party is expressly allowed under MCR 2.116(I)(2) which states "[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." Again, having determined that there was no genuine issue of material fact, the ALJ found that Petitioner, not Respondent, was entitled to judgment in its favor on the penalty assessment only. In doing so, the ALJ properly

[1] *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005); *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).

considered the "affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party." *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

With regard to the legal analysis contained in the Proposed Order, the Tribunal finds that the ALJ correctly determined that Petitioner was liable for the interest assessed, based on the undisputed facts, and Respondent was properly granted summary disposition in its favor on that issue. The Tribunal further finds that the ALJ correctly determined that it was Petitioner, and not Respondent, that was entitled to summary disposition with respect to the penalty waiver. Respondent argues that unexpected income is not a factor under Administrative Rule 205.1013 for a determination of reasonable cause. This argument, however, ignores the explicit language of R 205.1013, which provides eight non-determinative factors which "**may be considered with other facts and circumstances** and may constitute reasonable cause." [Emphasis added.] While unexpected income is not a specific factor listed in the Rule, it is another fact and circumstance that may be considered in determining if reasonable cause exists for a penalty waiver. Similarly, while the Rule provides in subsection (d) that the taxpayer received incorrect advice from a tax advisor competent in Michigan state tax matters, the fact that Petitioner's tax advisor was experienced in multistate tax matters and reviewed the MBTA, and it was believed that they could follow 26 USC 6655(e) filing requirements are additional facts and circumstances that may be considered and may constitute reasonable cause. The ALJ analyzed in detail all facts and circumstances, including why it was difficult for Petitioner to estimate its tax base, in making his decision. Based on the pleadings, affidavits, and documentary evidence, the ALJ's determination that there was no genuine issue of material fact, and that when all factors are considered, reasonable cause existed to waive the penalty assessed against Petitioner is supported.

Respondent's exceptions fail to establish any error on the part of the ALJ in finding that there was no genuine issue of material fact and that Petitioner, as the non-moving party, was entitled to judgment in its favor under MCR 2.116(I)(2) with respect to a waiver of the penalty only. Respondent has failed to show good cause to justify the modifying of the Proposed Order. See MCL 205.762. As such, the Tribunal adopts the Proposed Order as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Conclusions of Law contained in the Proposed Order, in this Final Opinion and Judgment. As a result:

IT IS ORDERED that Respondent's Motion for Summary Disposition is PARTIALLY GRANTED with respect to the assessment of interest in Final Assessment TO94337. Petitioner remains liable for the interest assessed in the amount of $5,242.

IT IS FURTHER ORDERED that Summary Disposition shall be PARTIALLY GRANTED in favor of Petitioner under MCR 2.116(I)(2) and that the penalty in Final Assessment TO94337 in the amount of $47,328 is waived and that portion of the assessment is CANCELLED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the

taxes, interest, and penalties, as finally shown in the Proposed Opinion and Judgment within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Order within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

By: Steven H. Lasher

Entered: Sept 18, 2014
klm