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

Henry and Janet Nino,
Petitioner,

v

MTT Docket No. 329877

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

ORDER PARTIALLY GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Petitioners appeal Respondent's Final Assessments O505852 and O505853 for unpaid individual income tax, interest, and penalty for tax years 2004 and 2005. Petitioners did not file Michigan Individual Income Tax Annual Returns for tax years 2004 and 2005. Respondent computed the amount of tax due and issued the Intents to Assess O505853 and O505853. On November 24, 2006, Respondent issued Final Assessments O505852 and O505853, which Petitioners timely appealed to the Tribunal.

BACKGROUND

A Prehearing Conference was held in this matter on February 8, 2008 at which time the parties requested that this matter be resolved on cross motions for summary disposition. Petitioners' Motion for Summary Disposition was filed on February 12, 2008. Respondent's Response to Petitioners' Motion for Summary Disposition and Respondent's Motion for Summary Disposition were filed on February 22, 2008. Petitioners filed a supplemental brief on March 4,

2008. On October 21, 2009, the Tribunal entered an Order denying Petitioners' Motion for Summary Disposition, placing Respondent's Motion for Summary Disposition in Abeyance, and requiring Respondent to provide additional information.

Petitioners have not paid the assessments, which are as follows,

Assessment	Tax Due	Interest*	Penalty
O505852 (2004)	$ 17,934.00	$1,987.28	$ 4,484.00
O505853 (2005)	$ 22,186.00	$1,056.54	$ 5,547.00
TOTAL	$ 40,120.00	Interest continues to accrue*	$10,031

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

PETITIONERS' CONTENTIONS

Petitioners moved for Summary Disposition under MCR 2.116(8) and MCR 2.116(10) asserting that:

> Respondent has failed to state a claim on which relief can be granted and that Respondent has failed to substantiate that there exists genuine issues as to any material fact, for it has failed to statutorily construct a valid signed estimate of specific taxes due and payable under the signature of the Treasurer.

Petitioners' Motion for Summary Disposition was denied. [1]

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioners failed to file individual income tax annual returns for tax years 2004 and 2005. Petitioners are persons as defined in the income tax act and are required to file annual returns and pay the tax imposed pursuant to that act. Respondent contends that it has the authority to estimate a tax liability and issue an assessment if a taxpayer does not file a required return. Respondent further asserts that the Intents to Assess were properly based upon

[1] See Tribunal Order in this matter entered October 21, 2009

the best information available to the Department of Treasury and the Intents were properly issued. Petitioners were given an opportunity to file actual returns or to provide other information to Respondent to support an adjustment in the tax liability as assessed, which they did not do.

Respondent contends that it is well established that Petitioners have "the burden of proof of refuting the assessment and demonstrating assessments' invalidity or inaccuracy."[2] Respondent further contends that "an assessment is deemed to be prima facie correct."[3]

STANDARD OF REVIEW UNDER MCR 2.116(C)(8) and (10)

Motions for summary disposition are governed by MCR 2.116. 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. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. *Spiek v Dep't of Transportation*, 456 Mich 331, 337 (1998). *Beaudrie . Henderson* 465 Mich 124 (2001).

[2] Respondent's brief in support of motion for summary disposition, page 6
[3] Respondent's brief in support of motion for summary disposition, page 6

A motion for summary disposition under 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. In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745, March 4, 2004, the Tribunal stated the standards governing Motions for Summary Disposition. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). *JW Hobbs Corp v Mich Dep't of Treasury*, Court of Claims Docket No. 02-166-MT (January 14, 2004). This particular motion has had a longstanding history in the Tribunal. *Kern v Pontiac Twp, supra*; *Beerbower v Dep't of Treasury*, MTT Docket No. 73736 (November 1, 1985); *Lichnovsky v Mich Dep't of Treasury, supra; Charfoos v Mich Dep't of Treasury*, MTT Docket No. 120510 (May 3, 1989); *Kivela v Mich Dep't of Treasury*, MTT Docket No. 131823.

Under MCR 2.116(C)(10), a Motion for Summary Disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins*, 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. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

In presenting a Motion for Summary Disposition, the moving party bears the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the

nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the Motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992). The trier of fact evaluates the motion in a light most favorable to the nonmoving party by considering the substantively admissible evidence actually proffered in opposition to the motion. *Maiden, supra* at 121. The mere possibility that the claim might be supported by evidence produced at trial may not be considered. *Id*. *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745, March 4, 2004.

FINDINGS OF FACT

In its Order entered October 21, 2009, the Tribunal found that Petitioners did not file Individual Income Tax Annual Returns for tax years 2004 and 2005. Respondent computed the amount of tax due and issued the Intents to Assess O505852 and O505853.

The Tribunal found that MCL 205.21(1), gives Respondent the authority to obtain information on which to base the assessments at issue:

> 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.

Further Respondent's authority to assess a tax against a taxpayer is found in section 24(1) of 1941 PA 122, "[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." MCL 205.24

The Tribunal found that the notices and assessments sent to Petitioners by Respondent were valid. The Tribunal finds that Petitioners provided the Tribunal with evidence of wages earned by Mr. Nino for the 2004 and 2005 tax years. Petitioners attached to their motion for summary judgment a document labeled Exhibit P-6, "documents maintained in the Information Return Master File which pertains to Henry Nino, Social Security Number. . . , tax years 2001, 2002, 2003, 2004, and 2005."[4] At page 13, is the Internal Revenue Service's wage information from Ford Motor Company for Mr. Nino for tax year 2004. At page 15 is the same information for tax year 2005. The Tribunal accepts this as reliable and credible, documentary evidence that Petitioners earned or received income that could properly be assessed individual income tax by Respondent for the 2004 and 2005 tax years and the amount of that income. No evidence was provided in support of Petitioners' contention that these documents are invalid.

Notwithstanding the above, Respondent's assessments were based on federal forms 4549-CG for tax years 1996 and 1997, attached to Respondent's brief in support of its motion for summary disposition. The Tribunal found that the mere assertion by Respondent's affiant that he used the 1996 and 1997 tax information to determine Petitioners' tax liability for 2004 and 2005, was

[4] Petitioners' exhibit 6, page 1

insufficient to support the specific tax, interest, and penalty amounts as assessed. The Tribunal entered an Order requiring Respondent to

> provide to the Tribunal documentation that shows how Respondent determined the income on which Assessments O505852 and O505853 were calculated and the sources of that income and information within 35 days of the entry of this Order.[5]

On November 4, 2009, Respondent filed its Response to Tribunal Order Dated October 21, 2009 with an attached affidavit of Steve McBride, Department Specialist, Tax Policy Division, Michigan Department of Treasury. Mr. McBride asserts that the

> methodology used by the Department to project the adjusted gross income ("AGI") for an unfiled tax year is to multiply the AGI from the immediately preceding tax year(s) by multiples of 1.25. The Department then subtracts the exemption allowance for the unfiled year from the projected AGI and applies the tax rate in effect for the unfiled year against the difference.[6]

Utilizing the formula, based upon Petitioners' AGI of $96,516 as reported in 1997, Mr. McBride calculated that Petitioners' AGI for 2004 was $460,232 and for 2005 was $575,279. This projection is based upon an assumption that Petitioners' earnings increased by 25% each year between 1997 and the tax year at issue. Although Respondent explained that this was the formula used, Respondent did not provide any support for an increase in earnings of 25% per year. This is especially problematic as the Department of Treasury's published annual cost of living multipliers ranged from 1.5% for 2003 to a high of 3.2% in 2001 and 2002 during the years used in Mr. McBride's calculations.

The Tribunal finds that Respondent had in its possession the Internal Revenue Service information of actual income and that this information, not the mathematical projections of Mr.

[5] See Tribunal Order entered October 21, 2009
[6] Affidavit of Steve McBride, page 3, paragraph 10

McBride, is the best information available and is credible and reliable evidence of the income earned during those years. Petitioners are liable for taxes, interest, and penalties on that income for the 2004 and 2005 tax years based on their actual income as reported by their employer and provided by the Internal Revenue Service.

CONCLUSIONS OF LAW

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether Petitioners have stated a claim upon which relief can be granted. Respondent, pursuant to its statutory authority, issued Intents to Assess and Final Bills for Taxes Due, the validity of which are unquestioned.

A motion for summary disposition under 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. Respondent has provided facts and evidence that support the assessment of Petitioners for unpaid individual income tax liability for tax years 2004 and 2005. Based upon those facts, Respondent should be granted the relief it seeks. Petitioners are liable for individual income tax for the 2004 and 2005 tax years.

However, the Tribunal concludes that Respondent has not met its burden of proving that the amounts assessed are based on the best information available or based upon a reliable or credible calculation. The Tribunal finds that Respondent's use of a 25% per year upward adjustment of Petitioners' 1996 adjusted gross income information to determine Petitioners' 2004 and 2005

income, without any rationalization for or explanation of that percentage, cannot be justified. It is simply inconceivable, and not supported by Respondent, that Petitioners' income increased at that rate for the years at issue. Further, the Tribunal finds that the use of that information and formula does not constitute the best available information. Respondent had available to it the actual income amounts for Petitioners for the tax years at issue.

The Tribunal concludes that the assessment of Petitioners for income tax due for tax years 2004 and 2005 should be based upon the income as reported to the Internal Revenue Service for the tax years at issue. The Tribunal used Petitioners' actual income in Respondent's formula, to calculate the amount of tax due.[7] Further, as Respondent applied a 25% intentional disregard penalty in the original assessments, the Tribunal applied the same penalty percentage. The Assessments at issue herein are modified and affirmed as modified as follows:

Assessment	Tax Due	Interest*	Penalty
O505852 (2004)	$ 5,409.00		$ 1,352.15
O505853 (2005)	$ 4,500.00		$ 1,124.96
TOTAL	$ 9,909.00	Amount to be determined*	$ 2,477.11

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

JUDGMENT

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is PARTIALLY GRANTED.

[7] For 2004, the Tribunal used Petitioner's income of $143,126, subtracted the personal exemption for the two spouses of $6,200 and multiplied the result by the tax rate for the 2004 tax year of 3.95%. For 2005, the Tribunal used Petitioner's income of $121,780, subtracted the personal exemption for the two spouses of $6,400 and multiplied the result by the tax rate for the 2004 tax year of 3.9%.

IT IS ORDERED that Respondent's Final Bill for Taxes Due (Final Assessment) O505852 and O505853, as set forth in the *Conclusions of Law* portion of this Opinion and Judgment are AFFIRMED AS MODIFIED.

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

MICHIGAN TAX TRIBUNAL

Entered: November 30, 2009

By: Rachel J. Asbury