

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

Alan L. and Kathryn L. Wisne,
Petitioners,

v

MTT Docket No. 297661

Michigan Department of Treasury,
Respondent.

TRIBUNAL JUDGE PRESIDING
Steven H. Lasher

OPINION AND JUDGMENT

Petitioners sold their interest in Progressive Tool and Industries Company in 1999, after they became residents of Florida. Based on the advice of their attorneys and accountants, Petitioner took the position that their gain on the sale of Progressive Tool was not subject to Michigan income tax. As a result, Petitioners paid only a nominal amount of estimated taxes when they filed their Application for Extension of Time to file their 1999 Michigan income tax return. In October 2000, Petitioners filed their 1999 Michigan income tax return, which reported the gain on the sale of Progressive Tool, and paid the indicated amount of income tax and interest due. Because Petitioners only paid \$100 with their estimated tax return, Respondent imposed the 25% “intentional disregard” penalty on Petitioners pursuant to MCL 205.23(4). Petitioners contend that they did not intentionally disregard a law or a rule. Instead, they relied upon the advice of tax experts and had a good faith belief that they did not have an income tax liability for the 1999 tax year.

The Tribunal allowed the parties to file pre-hearing and post-hearing briefs on this issue and also held a hearing in this matter in July 2004. On December 20, 2005, the Tribunal issued

its Opinion and Judgment, concluding that Petitioners intentionally disregarded both Michigan law and Department of Treasury rules by not paying the appropriate amount of estimated taxes in April 2000, and affirmed the “intentional disregard” penalty assessed against Petitioners. In an unpublished opinion dated May 20, 2008, the Michigan Court of Appeals, stated that “our attention has not been directed to anything in the record relied on by the tax tribunal or urged by respondent that would support a finding of intentional disregard of the law,” reversed the Tribunal’s decision and remanded this matter to the Tribunal “for further proceedings consistent with this opinion.” *Alan L. Wisne and Kathryn L. Wisne v Michigan Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2008 (Docket No. 270633).

The Court of Appeals set aside the Tribunal’s decision for various reasons:

1. The Tribunal erroneously relied on Respondent’s RAB 1995-4, which provides that if a taxpayer objects to a discretionary penalty, the burden of proof is on the taxpayer to show that there was no intent in failing to pay the appropriate amount of estimated tax. Noting that the Michigan Income Tax Act, unlike the Single Business Tax Act and the General Sales Tax Act, does not treat an assessment as prima facie correct which would impose the burden of proof on the taxpayer, the Court determined that the Tribunal incorrectly allocated that burden based on the RAB.
2. The Tribunal erroneously found that “Petitioners’ intentional disregard of respondent’s instructions for preparing the 1999 Michigan Income Tax Return constituted intentional disregard of a rule.” Specifically, the Court held that “RABs are not rules and do not have the force of law.” Further, Petitioners actually did follow the instructions in preparing their 1999 income tax return.

3. The Tribunal erroneously found that “Petitioners intentionally disregarded the law” because Petitioner Alan Wisne’s father had litigated the same issue, had employed the same tax professionals and had chosen to timely pay the tax due rather than waiting to pay the tax upon filing the tax return.
4. The Tribunal erroneously failed to take into consideration Petitioners’ good-faith reliance on professional tax advice. Stating that “[t]here is no indication in the record that petitioners in any way misrepresented the facts to the law professionals, or that they ignored admonitions that their position was contrary to a rule or law,” the Court found that the tribunal’s reliance on *Druker v Commissioner*, 697 F2d 46 (CA 2, 1982) and *Cramer v Commissioner*, 64 F3d 1406 (CA 9, 1995) was misplaced. Finally, the Court stated that “[i]f petitioners fully and fairly disclosed the underlying transactions to the tax professionals, and the tax professionals gave the advice Wisne and Davis testified they gave, it is difficult to understand why the advice is not subject to criticism, but petitioners’ intent in following that advice is, and why their following that advice would justify imposition of a penalty for intentional disregard of the law.”

Consistent with the remand from the Court of Appeals, the Tribunal, as the finder of fact in this matter, has reviewed the testimony of Alan Wisne and James Davis, as well as the Stipulation of Uncontested Facts filed by the parties, and finds that the record supports the Court of Appeals determination that the imposition of the “intentional disregard” penalty on Petitioners by Respondent was inappropriate. Therefore, after considering the findings of fact, the testimony and evidence presented, and the conclusions of law, the Tribunal finds that Petitioners have met their burden of proof to

establish facts to negate a finding of intent. The Tribunal finds that Petitioners did not intentionally disregard MCL 206.110(2)(b), MCL 206.311(2) and the Department's rules. The assessment of the penalty for intentional disregard of the law or of the rules promulgated by the Department pursuant to MCL 205.23(4) is CANCELLED.

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

MICHIGAN TAX TRIBUNAL

Entered: June 28, 2011

By: Steven H. Lasher