

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

Patrick R. Turner,
Petitioner,

v

MTT Docket No. 410957

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY
DISPOSITION PURSUANT TO MCR 2.116(C)(8) IN LIEU OF ANSWER

ORDER GRANTING RESPONDENT'S MOTION FOR COSTS

ORDER OF DISMISSAL

INTRODUCTION

Respondent filed a Motion for Summary Disposition on August 5, 2011, requesting that the Tribunal dismiss the above-captioned case pursuant to MCR 2.116(C)(8), in addition to awarding costs. This is in response to Petitioner's request for the Tribunal to reverse the Decision and Order of Determination, dated August 11, 2010, assessing taxes owed for the 1999 and 2000 tax years as adjusted with interest¹ and penalties, and issued by the Discovery and Tax Enforcement Division of the Michigan Department of Treasury. The petition, filed on September 20, 2010, claimed that these assessments were improper, as Michigan's

¹ Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122.

imposition of a state income tax is unconstitutional and filing MI-1040's is in violation of the Paperwork Reduction Act. In the alternative, Petitioner requests that the Tribunal apply the refund owed under assessment number Q738824, attributable to the 2002 tax year and assessed upon Petitioner's wife, towards any taxes owed for the 1999 and 2000 tax years. On August 25, 2011, Petitioner filed a response to Respondent's Motion, requesting that the Tribunal: (1) deny Respondent's Motion, (2) deny Respondent's request for costs and sanctions, and (3) require Respondent to "timely file and answer . . . Petitioner's Petition with specificity to each fact, claim and legal argument." It is now for the Tribunal's determination whether Petitioner has adequately stated a claim upon which relief may be granted or if summary disposition is appropriate pursuant to MCR 2.116(C)(8), with costs for Respondent.

RESPONDENT'S CONTENTIONS

On August 5, 2011, Respondent filed a motion requesting that the Tribunal dismiss the appeal because Petitioner "has failed to state a claim on which relief can be granted" pursuant to MCR 2.116(C)(8). Respondent also requests that the Tribunal award costs to Respondent. Respondent contends that Petitioner's claims are frivolous, as similar arguments have continuously been denied at the state and federal level. Respondent states that Petitioner "cites no legal authority as to why he should not be subject to Michigan Income Tax," but challenges instead the

constitutionality of the Michigan Income Tax Act. Respondent further states, “[t]he general power of taxation has been and is inherent in state government. . . . Concluding that Michigan Income Tax violates Article VI Section 2 and the 10th Amendment of the United States Constitution goes against the plain meaning of the United States Constitution, the Constitution of the State of Michigan, well-established Michigan Supreme Court precedent, and general logic.” Petitioner’s argument that requiring filing of a MI-1040, in addition to a federal 1040, violates the Paperwork Reduction Act “is also baseless” as “[t]his argument has been universally rejected as meritless.”

Michigan law requires filing of Michigan income tax returns if a taxpayer’s “federal adjusted gross income (AGI) is greater than the personal exemption amount on the Michigan income tax return (MI-1040).” MCL 206.315. Petitioner willfully failed to file a Michigan income tax return, even though Petitioner’s adjusted gross income was \$225,338.00 for the 1999 tax year and \$310,665.00 for the 2000 tax year. Similarly, Petitioner’s wife failed to file a Michigan income tax return for the 2002 tax year. Therefore, the willful failure by Petitioner and his wife to file Michigan income tax returns should subject them to penalty under MCL 205.23(5).

Even if factual allegations asserted by Petitioner in the pleadings are accepted as true, summary disposition is appropriate under MCR 2.116(C)(8)

because Petitioner has failed to state a legally sufficient claim in his allegations.

As a result of Petitioner's failure to plead a legally sufficient claim, Respondent

labels Petitioner as a tax protester based on Petitioner's willful failure to file

Michigan income tax returns for the tax years at issue; therefore, Petitioner should

be sanctioned for the filing of a frivolous appeal. MCL 600.2591 authorizes a

court "to award sanctions in the form of attorney fees and costs to the prevailing

party if an action or defense is deemed 'frivolous.'" An action is frivolous if: "(1)

[t]he party's primary purpose in initiating the account was to harass, embarrass, or

injure the prevailing party," (2) "[t]he party had no reasonable basis to believe the

facts underlying the party's legal position were in fact true," and (3) "[t]he party's

legal position was devoid of arguable legal merit." Respondent contends that

Petitioner's claims meet all three of the above conditions, and therefore, this court

should award Respondent attorney fees and costs if summary disposition is

granted.

In addition, Respondent contends that Petitioner may only make claims

against assessment numbers Q737667 and Q737668 because Respondent issued

assessment number Q738824 to Petitioner's wife, Patricia Turner, who is not a

named Petitioner in the above-captioned case. "[T]he Tribunal's determination of

whether or not Respondent's assessment number Q638824 was, in fact, legitimate

will not impact any rights of Petitioner. As such, Petitioner's appeal of

Respondent's Assessment number Q738824 should be properly dismissed as Petitioner is not a party in interest and lacks standing to file a petition with the Tribunal regarding the assessment." Further, "[e]ven if the Tribunal determines that Petitioner has authority to file an appeal of an assessment issued by Treasury to an unnamed party, the appeal should be dismissed for the same reasons the 1999 and 2000 appeals should be dismissed."

PETITIONER'S CONTENTIONS

On August 25, 2011, Petitioner filed a response to Respondent's Motion, requesting that the Tribunal deny Respondent's Motion, and subsequently, require Respondent to file an answer to Petitioner's Petition. Respondent failed to file an answer to Petitioner's Petition, filed on September 20, 2010, and now requests the Tribunal to allow a Motion for Summary Disposition in lieu of an answer. However, Petitioner contends that Respondent's Motion for Summary Disposition should be denied based on Respondent's failure to file a timely answer to the Petition. Petitioner also contends that if the Tribunal enters an Order for Summary Disposition, any penalty additions to assessed taxes should be excluded from a determination of amount owed, if any, by Petitioner.

Petitioner contends that he was not required to pay Michigan income taxes for the 1999, 2000, and 2002 tax years, which is supported by "State and Federal law, State and Federal Case law, the U.S. Supreme Court, and the United States

Constitution.” Further, Petitioner contends that Respondent only relies on Michigan State Case law, which is not binding as Petitioner’s claims are different from prior case law. Petitioner argues that the cases cited in support of Respondent’s contentions either discuss the State of Michigan Constitution, as opposed to the U.S. Constitution, were decided prior to “Michigan’s surrender of the power to tax income” with the ratification of the 16th Amendment to the U.S. Constitution, or involve property taxation. In addition, Petitioner contends that “no court of competent jurisdiction has ever analyzed the complete test of the two page Federal Form 1040, OMB # 1545-0074 or the MI-1040 and compared them to the exact requirements of the PRA at 44 USC §§ 3506 and 3507.” Therefore, should the Tribunal decide that requiring a MI-1040 is in violation of the Paperwork Reduction Act, penalties associated with Petitioner’s failure to initially file Michigan income taxes should be removed from the assessment amount owed. Petitioner contends that the cases cited by Respondent deal with the statutory requirement to file, rather than compliance with the Paperwork Reduction Act after forms are filed.

In addition, Petitioner believes he was erroneously labeled as a tax protester by Respondent. Petitioner contends his claims were not frivolous, as Petitioner has argued the legal sufficiency and merit of the claims asserted in belief that they were in fact true. Therefore, an award of sanctions and costs should be denied.

Regarding the 2002 Michigan Income Tax Return, Petitioner contends that there is standing to appeal assessment number Q738824, as Petitioner and his wife filed a joint Michigan income tax return and letters were addressed to Petitioner and his wife, jointly, regarding denial of the refund associated with assessment number Q738824 on the basis of timeliness. A letter attached to Petitioner's objection to Respondent's Motion for Summary Disposition requests that Patricia Turner be joined as a Petitioner in the above-captioned case. Petitioner also requests that any refund owed on assessment number Q738824 reduce the amount owed, if any, in regards to assessment numbers Q737667 and Q737668.

FINDINGS OF FACT

On January 23, 2009, Respondent issued Intents to Assess for assessment numbers Q737667, Q737668, and Q738824, which are attributable the 1999, 2000, and 2002 tax years, respectively. In response, Petitioner filed a 1999 MI-1040 and a 2000 Amended MI-1040 and requested an informal hearing. Although Petitioner only filed an amended return for the 2000 tax year, Respondent accepted Petitioner's filed returns for both tax years, 1999 and 2000. The MI-1040s filed by Petitioner listed income subject to Michigan tax as \$225,338 for the 1999 tax year and \$310,665 for the 2000 tax year. During the informal conference, held on July 15, 2010, Respondent agreed to waive the twenty-five percent failure to file/pay penalty included in the Intents to Assess because Petitioner indicated that he would

agree to pay any legally assessed taxes against him. However, Petitioner has still failed to pay any of the taxes assessed against him by Respondent. After the informal conference, Respondent issued a Final Bill for Taxes Due for assessment number Q737668, indicating Petitioner's tax liability, with interest and penalties, for the 1999 tax year is \$13,275.39, and a Final Bill for Taxes Due for assessment number Q737667, indicating Petitioner's tax liability, with interest and penalties, for the 2000 tax year is \$23,500.62.

The refund owed under assessment number Q738824, attributable to the 2002 tax year, was assessed upon Petitioner's wife, Patricia Turner, unlike the other assessments contended for the 1999 and 2000 tax years, which were assessed upon Petitioner himself. After an informal conference, Respondent issued a "Final Bill for Taxes Due" for assessment number Q738824, indicating Patricia Turner's tax liability, with interest and penalties, for the 2002 tax year is the same as assessed. However, Respondent never issued the refund as it later determined that filing of state income taxes was not timely, and therefore, Petitioner's wife was not entitled the refund amount.

APPLICABLE LAW

Respondent moves for summary disposition pursuant to MCR 2.116(C)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed to state a claim on which relief can be granted.

Summary disposition should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery. *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion for summary disposition under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts. *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

CONCLUSIONS OF LAW

This Tribunal has carefully considered Respondent's Motion for Summary Disposition in Lieu of an Answer and Costs under the criteria for MCR 2.116(C)(8), and based on the pleadings and other documentary evidence filed with the Tribunal, determines that granting Respondent's Motion is appropriate as Petitioner's contentions are frivolous and without merit.

Although Petitioner contends that Michigan income taxing laws are in violation of the 10th Amendment and Article VI, Clause 2 of the United States Constitution, "there is no restriction on Michigan's power to tax imposed by the Supremacy Clause, the Tenth Amendment, or any other provision of the United States Constitution." *Burt v Dept of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2010 (Docket No. 290868). Although

Petitioner argues that with ratification of the 16th Amendment the states lost their power to tax, *Burt v Department of Treasury* establishes that there is no legally valid constitutional argument against the ability of the states to impose an income tax. Therefore, pursuant to the U.S. Constitution, Respondent may lawfully impose state income tax upon Petitioner for the 1999 and 2000 tax years, assuming there is no other legally valid argument against imposition of state income tax. In the above-captioned case, Petitioner did not assert any argument against imposition of state income tax, other than the already refuted Constitutional arguments.

Petitioner's additional contention that the requirement to submit a MI-1040, in addition to a federal individual tax return, is in violation of the Paperwork Reduction Act, 44 U.S.C. §§ 3501 et seq., is also without merit as Petitioner eventually filed MI-1040s and Respondent waived the fees attributable to Petitioner's failure to initially file MI-1040s for the tax years at issue at the informal conference held on July 15, 2010. The State of Michigan is in compliance with the Paperwork Reduction Act, which "forbids any penalty for failing to comply with an information collection request that does not bear a valid control number issued by the Office of Management and Budget (OMB)," to the extent a MI-1040 has a valid control number. *Id.* Also, Respondent waived the penalties imposed for failure to initially file, so there is no need to address the imposition of penalties upon Petitioner under the Act. "[T]he [Paperwork

Reduction Act] applies to agency regulations.” See *US v Bennett*, 341 Fed Appx 776, 779 (3rd Cir 2009). “[T]he requirement to file a tax return is mandated by statute, not by regulation, and the PRA does not apply to the statutory requirement,” so Petitioner is liable for taxes assessed regardless of the MI-1040’s compliance with the Paperwork Reduction Act. *US v Schwartz*, unpublished opinion per curiam of the District Court, issued May 14, 2008 (Docket No. 1:08–CR–10). Therefore, compliance with the Paperwork Reduction Act is not at issue in the assessment of taxes upon Petitioner for the tax years involved in the above-captioned case.

Petitioner’s wife, and not Petitioner himself, was subject to the assessment for the 2002 tax year. Although Petitioner and his wife jointly filed returns, the Tribunal does not have jurisdiction over the assessment for the 2002 tax year, unless Petitioner files a motion to join his wife as a Co-Petitioner pursuant to TTR 220(4). However, Petitioner has failed to file such a motion and the addition of the wife as a Co-Petitioner by the Tribunal itself would be of no consequence as Petitioner’s case is frivolous and without merit regardless of the addition of the 2002 tax year. Respondent also correctly denied a refund for the 2002 tax year due to Petitioner’s failure to timely file.

Petitioner has failed to show any legally sufficient claim upon which Petitioner may recover, even if everything asserted in the Petition were true. The

claims asserted by Petitioner have been acknowledged and determined insufficient by many prior state and federal courts. As Petitioner has failed to assert a claim aside from those already determined insufficient by prior courts, Respondent correctly labeled Petitioner as a tax protester. Therefore, Petitioner's claim is frivolous, as defined under MCL 600.2591, and Respondent's Motion is granted, dismissing Petitioner's case.

Petitioner is required to pay the amounts owed, subject to interest and frivolous protest penalties, in assessment numbers Q737668 and Q737667, for the tax years 1999 and 2000, respectively. In addition, Petitioner may not offset taxes owed with the refund owed in assessment number Q738824, as this assessment is subject to Petitioner's wife who was correctly denied a refund based on a failure to timely file. Petitioner's argument that the MI-1040 is not in compliance with the Paperwork Reduction Act is also not valid, as the MI-1040 bears a valid OMB number and all the penalties assessed on Petitioner for failure to file a state income tax return were waived by Respondent.

Respondent requests that the Tribunal award costs to Respondent, in addition to imposing sanctions upon Petitioner. TTR 145(1) allows the Tribunal to order costs be remunerated to a prevailing party in an appeal before the Tribunal. The rule itself, however, provides no guidelines or criteria by which the Tribunal is to measure whether costs should be awarded. While MCR 2.625 provides courts

with some criteria in determining whether an award of costs is appropriate, such direction is only applicable where an action or defense was frivolous, as provided by MCL 600.2591. MCR 2.625(A)(2). Thus, the decision to award costs is solely within the discretion of the Tribunal judge.

As provided above, MCL 600.2591 states:

if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

The statute defines “frivolous” as any one of the following: [t]he party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure; the party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true; or the party’s legal position was devoid of arguable legal merit. MCL 600.2591(3)(a)(i)-(iii); see also *Carpenter v Consumers Power Co*, 230 Mich App 547, 556; 584 NW2d 375 (1998).

Petitioner’s claims that the assessment of Michigan state income tax is in violation of the 10th Amendment and Article VI, Clause 2 of the United States Constitution are frivolous as they are devoid of legal merit based on the numerous state and federal court opinions upholding the State of Michigan’s power to collect a state income tax.

While TTR 145 permits a party before the Tribunal to request costs, there is currently not a Tribunal rule authorizing it to award attorney's fees to the prevailing party. Since there is 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.

Attorney fees are generally not recoverable as costs in the absence of a statute or court rule authorizing an award of attorney's fees. MCL 600.2405(6). See also 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)). Pursuant to MCL 600.2591, attorney's fees are recoverable when the claims asserted by Petitioner are frivolous. Therefore, as Petitioner willfully failed to initially file state income tax returns and now questions the ability of the State of Michigan to lawfully impose a state income tax despite numerous state and federal judgments to the contrary, Respondent correctly labeled Petitioner as a tax protestor asserting frivolous claims and the Tribunal imposes, as a sanction, payment of Respondent's reasonable attorney's fees, in addition to costs.

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) in Lieu of Answer is GRANTED.

IT IS FURTHER ORDERED that this case is DISMISSED.

IT IS FURTHER ORDERED that Respondent's Motion for Costs is GRANTED.

IT IS FURTHER ORDERED Respondent shall file a bill of costs and reasonable attorney's fees with the clerk within 14 days of the entry of this order and furnish a copy to Petitioner. Petitioner may file a response objecting to the bill of costs or any item in the bill within 14 days after service of the copy of the bill. Failure to file an objection to the bill of costs and reasonable attorney's fees within the 14-day period constitutes a waiver of any right to object to the bill. See TTR 145.

MICHIGAN TAX TRIBUNAL

Entered: October 5, 2011
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By: Kimbal R. Smith III