

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

Richard M Goodman,  
Petitioner,

v

MTT Docket No. 16-005560

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Richard M. Goodman, appeals Final Assessment Nos. UO76355 and UI46781 levied by Respondent, Michigan Department of Treasury, on November 17, 2016. The Final Assessments establish that Petitioner owes income tax in the amount of \$12,143.00, plus interest in the amount of 2,348.20<sup>1</sup> and penalties in the amount of 5,643.72 for the 2011 taxable period.

On May 15, 2017, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Respondent contends that Petitioner's untimely 2011 income tax return improperly "subtracted a theft-loss recovery from his federal adjusted gross income when computing his Michigan taxable income."<sup>2</sup> Because Michigan law does not permit this credit, Petitioner was assessed the tax due and assessed a late-filing penalty because the tax return was not filed until October 2012.

On June 2, 2017, Petitioner filed a response to the Motion. Petitioner argues that he did not file an application for an extension because he relied on the advice of his CPA and further

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<sup>1</sup> Interest is calculated in accordance with Public Act 122 of 1941 and is current as of the date of the issuance of the Final Assessment and continues to accrue.

<sup>2</sup> Respondent's Prehearing Statement.

argues that the credit was correctly claimed despite the Court of Appeals' decision *Sturrus v Dep't of Treasury*,<sup>3</sup> holding to the contrary.

The Tribunal has reviewed the Motion, response, and the evidence submitted and finds that granting Respondent's Motion for Summary Disposition is warranted as there are no genuine issues of material fact outstanding.

#### RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner improperly claimed a theft-loss recovery credit against his adjusted gross income on his 2011 Michigan income tax return. In 2011, Petitioner included recovered funds, in the amount of \$279,167 that he lost in a Ponzi scheme, in his federal adjusted gross income. He also claimed a credit for the theft-loss recovery against his adjusted gross income on his 2011 Michigan income tax return, even though Michigan law does not allow this credit. Respondent states Petitioner cannot invoke the tax-benefit rule, codified in 26 USC 111(a), because the "Michigan Income Tax Act does not include an adjustment for theft-losses taken as a deduction on the federal return."<sup>4</sup> The Income Tax Act's definition of "taxable income" is "federal adjusted gross income" and it does not include a deduction for theft-losses taken as an itemized deduction on a federal tax return.

Respondent cites *Sturrus* where the "Court of Appeals addressed the tax-benefit rule in relation to theft-loss recovery."<sup>5</sup> Respondent argues this case is directly on point and held that though the Michigan Income Tax Act recognizes the tax-benefit rule, the "rule did not apply under the facts of the case."<sup>6</sup> The *Sturrus* Court determined that "[b]ecause the taxpayers did not previously deduct their loss on an earlier Michigan return, by its very terms the tax-benefit rule

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<sup>3</sup> *Sturrus v Dep't of Treasury*, 292 Mich App 639; 809 NW2d 208 (2011).

<sup>4</sup> Respondent's Brief at 6.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.*

did not apply.”<sup>7</sup> Respondent claims the *Sturrus* decision controls in this case; thus, it correctly disallowed the credit and assessed tax and interest as a result.

Finally, Respondent contends the late-filing penalty was properly assessed because Petitioner filed his 2011 Michigan income tax return six months late and did not request an extension to file late. Respondent argues, “Petitioner did not establish reasonable cause to waive the penalty,” because incorrect advice from a tax advisor is not considered reasonable cause under Michigan Admin. Code, R 205.1013(8)(d).

#### PETITIONER’S CONTENTIONS

Petitioner recognizes the controlling case law in this case, the *Sturrus* decision; however, Petitioner cites to the prior decision by the Court of Claims in the *Sturrus* case which concluded that “the Michigan income tax incorporated the Federal tax benefit rule, allowing a taxpayer to exclude from gross income amounts recovered during a taxable year, as long as that previous deduction did not reduce the taxpayer’s Michigan tax liability in the previous year.”<sup>8</sup> Petitioner admits the Court of Appeals rejected this rationale on appeal “notwithstanding the obvious unfairness of the outcome.”<sup>9</sup> Petitioner further states “it is unlikely that the Michigan Tax Tribunal will reject the authority of the decision of the Court of Appeals, the Petitioner in this case is compelled to raise the issue so that he will have the ability to appeal this matter and seek a more fair and reasonable outcome before a different panel of the Court of Appeals.”

Regarding the late-filing penalty, Petitioner argues that relying on improper advice from his CPA is reasonable cause and his late-filing was not due to willful neglect; thus, the penalties should not have been assessed. Petitioner further contends that this issue cannot be resolved by a

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<sup>7</sup> *Id.* (citing *Sturrus* at 650-651.)

<sup>8</sup> Petitioner’s Brief at 5.

<sup>9</sup> *Id.*

motion for summary disposition; but, must be resolved “after hearing the testimony of the Petitioner and his CPA, Eugene Bell.”<sup>10</sup>

#### STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions. In this case, Respondent moves for summary disposition under MCL 2.116(C)(10).

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. 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.<sup>11</sup> In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.<sup>12</sup>

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.<sup>13</sup> The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.<sup>14</sup> The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.<sup>15</sup> Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings but must go beyond the

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<sup>10</sup> *Id.* at 4.

<sup>11</sup> See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

<sup>12</sup> See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

<sup>13</sup> See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

<sup>14</sup> See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

<sup>15</sup> *Id.*

pleadings to set forth specific facts showing that a genuine issue of material fact exists.<sup>16</sup> If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.<sup>17</sup>

#### CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under MCR 2.116(C)(10) and finds that no genuine issues of material fact remain outstanding regarding whether Petitioner is liable for the late-filing penalty or whether Respondent properly assessed additional income tax against Petitioner. The Tribunal finds that the *Sturrus* case disallows Petitioner's claimed credit and the Taxpayer's Bill of Rights specifically excludes incorrect advice by a tax advisor as a reasonable cause for failure to file. As such, granting Respondent's Motion is warranted.

Petitioner invested in a Ponzi scheme which resulted in the filing of a 2009 Federal income tax return where a loss of \$4,008,737.00 was reported. However, Petitioner's Michigan income tax return was not reduced by the amount of this loss as the law does not provide for this deduction. In 2011, Petitioner recovered \$279,167.00 as a result of a criminal proceeding and related civil suit. This amount was reported on his 2011 Federal income tax return as income and Petitioner claimed this amount as a reduction to his 2011 Michigan adjusted gross income. Respondent disallowed this credit which resulted in the issuance of the Final Assessments at issue.

Petitioner filed his 2011 Michigan income tax return on October 15, 2012, even though it was due on or before April 16, 2012. Petitioner explains that he relied on the advice of his CPA, Eugene Bell, "who explained to him that no tax would be owed, and therefore, an extension was

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<sup>16</sup> See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

<sup>17</sup> See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

unnecessary.”<sup>18</sup> Petitioner argues that this reliance is reasonable and the penalty should be waived; however, Petitioner also argues that this issue cannot be resolved by a motion for summary disposition because a trier of fact must hear testimony regarding this issue.

The Tribunal disagrees; the fact that Petitioner relied on his CPA’s advice that an extension of time to file his income tax return was not necessary is not disputed. Thus, there are no issues of outstanding fact and summary disposition is appropriate. Instead, the parties disagree whether these facts can be considered “reasonable cause.” The Taxpayer’s Bill of Rights states that it is Petitioner’s burden to “affirmatively establish[, by clear and convincing evidence, that the failure to file . . . was due to reasonable cause.”<sup>19</sup> Though Petitioner was, unfortunately, provided with erroneous advice, the Taxpayer’s Bill of Rights specifically references this scenario in identifying what does *not* constitute “reasonable cause” for failure to file a tax return.<sup>20</sup> Petitioner has provided no other rationale for his failure to timely file the tax return; therefore, the Tribunal finds that Petitioner has failed to meet his burden. As such, Respondent properly assessed the late-filing penalty and the Tribunal finds no reasonable cause to waive it.

Regarding the theft-loss recovery credit, Respondent argues that Michigan law does not provide “an adjustment for theft-losses taken as a deduction on the federal return.”<sup>21</sup> Both parties cite to the *Sturrus*<sup>22</sup> case and agree the facts are substantially similar to the facts in this case. In *Sturrus*, the Michigan Court of Appeals held that Michigan’s Income Tax Act incorporates the federal tax benefit rule, but the rule did not apply to the taxpayer’s tax return. As in this case,

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<sup>18</sup> Petitioner’s Brief at 2.

<sup>19</sup> Michigan Admin. Code, R 205.1013(4).

<sup>20</sup> See Michigan Admin. Code, R 205.1013(8)(d).

<sup>21</sup> Respondent’s Brief at 6.

<sup>22</sup> *Sturrus*, supra.

Sturrus discovered he loaned money and collected interest from a company involved in a Ponzi scheme. The Sturrus's claimed a theft-loss deduction against their adjusted gross income and claimed a tax refund. The lower court, the Court of Claims, held there was an ambiguity in Michigan law, recognized the tax benefit rule, and allowed the theft-loss recovery credit. The Court of Appeals overturned the Court of Claims decision holding that because the Sturrus's did not deduct their lost investment on a prior Michigan tax return, they could not deduct their theft-loss recovery from their Michigan tax return.

Petitioner, recognizing the application of the *Sturrus* decision to this case, asks this Tribunal to rule in equity by applying the Court of Claims decision and not the Court of Appeals' decision, given the Court of Appeals' recognition that its ruling meant the Sturrus's received "no Michigan tax benefit for their losses in a Ponzi scheme and, in fact, must pay additional taxes because of their theft-loss recovery."<sup>23</sup> Further, the Court of Appeals recognized this disparity and stated the "proper forum to address this problem . . . is the Legislature and not this Court."<sup>24</sup> Unfortunately, the Tribunal cannot rule in equity and must apply the precedential *Sturrus* decision to this case.<sup>25</sup> As in *Sturrus*, Petitioner did not previously deduct the theft-loss recovery on a prior Michigan tax return; therefore, the tax-benefit rule does not permit the deduction sought.

Finally, Respondent argues that Petitioner's assertion that he is entitled to claim a credit under the "claim of right" doctrine is misplaced. Under the claim of right doctrine, Petitioner can "claim a credit against Michigan income tax if in one year [he] reported income – and believes

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<sup>23</sup> *Sturrus* at 653.

<sup>24</sup> *Id.*

<sup>25</sup> See *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 547-548 (2002).

he has a right to the income-only to have to repay that income in a subsequent year.”<sup>26</sup> As Respondent asserts, the opposite is true here; Petitioner lost money in one year and later recovered some of it. Petitioner was not required to repay any income; therefore, the claim of right doctrine does not apply.

For the foregoing reasons, the Tribunal finds that Respondent correctly determined Petitioner improperly took a theft-loss recovery claim against his 2011 adjusted gross income. Further, Respondent properly imposed a late-filing penalty and Petitioner has not met his burden in proving, by clear and convincing evidence, that the late filing was a result of reasonable cause and not to willful neglect. Therefore, the Tribunal finds that Final Assessment Nos. UO76355 and UI46781 shall be affirmed.

#### JUDGMENT

IT IS ORDERED that Respondent’s Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Final Assessment Nos. UO76355 and UI46781 are AFFIRMED.

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

#### APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.<sup>27</sup> Because the final decision closes the case, the motion cannot be filed through the Tribunal’s web-based e-filing system; it must be filed by mail

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<sup>26</sup> Respondent’s Brief at 9.

<sup>27</sup> See TTR 261 and 257.

