STATE OF MICHIGAN

COURT OF APPEALS

DAVID RIGGLE and SHELLY SCHELLENBERG,

Petitioners-Appellants,

v

TOWNSHIP OF SUTTONS BAY,

Respondent-Appellee.

UNPUBLISHED
February 27, 2014

No. 312562
Tax Tribunal
LC No. 00-423187

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Petitioners appeal as of right a final opinion and order of the Michigan Tax Tribunal, asserting that the Tribunal erred by denying petitioners' motion for costs. Because the Tribunal's application of its costs rule and its finding that respondent's defense was not frivolous were supported by competent, material, and substantial evidence, we affirm.

This appeal arises from a property-tax dispute in the Tribunal's small-claims division. For the 2011 tax year, respondent determined that the true cash value (TCV) of the subject property was $356,800. Petitioner contended that the TCV was $320,000. After accepting evidence and holding a hearing, a hearing referee issued a proposed opinion and judgment that determined the TCV of the subject property was $327,000. Petitioners filed exceptions to the proposed opinion and requested $172.45 in costs, asserting that they were entitled to costs as the "prevailing party" under R 205.1145.

In its final opinion, the Tribunal denied petitioners' request, noting that R 205.1145 "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. . . . Thus, the decision to award costs is solely within the discretion of the Tribunal judge." The Tribunal acknowledged that, upon filing of the final opinion and judgment, petitioners became the "prevailing party." However, the Tribunal refused to grant petitioners' request for costs, stating that

> . . . after the issuing of this Final Opinion and Judgment, which shall cause Petitioner to become the prevailing party, the Tribunal finds that Respondent's defense was not frivolous to justify an award of costs. The Tribunal does not find that Respondent's defense was to harass, embarrass, or injure. As such, an award

> of costs is not warranted in this case. Therefore, the Hearing Referee properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment.
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> Given the above, Petitioner has failed to show good cause to justify the modification of the Proposed Opinion and Judgment or the granting of a rehearing.
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> * * *
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> Furthermore, Petitioner has failed to show good cause to justify the granting of his Motion for Costs.
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> IT IS ORDERED that Petitioner's Motion for Costs shall be DENIED.

In general, "[t]his Court reviews for an abuse of discretion a court's ruling on a motion for costs to the prevailing party." *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 437; 830 NW2d 785 (2013). However, "[t]his Court's ability to review decisions of the Tax Tribunal is very limited." *President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 630; 806 NW2d 342 (2011). "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28.

> While this Court is bound by the Tax Tribunal's factual determinations and may properly consider only questions of law under this section, a Tax Tribunal decision that is not supported by competent, material, and substantial evidence on the whole record is an "error of law" within the meaning of Const 1963, art 6, § 28. *Oldenburg v Dryden Twp*, 198 Mich App 696, 698; 499 NW2d 416 (1993); *Kern v Pontiac Twp*, 93 Mich App 612, 620; 287 NW2d 603 (1979). Substantial evidence must be more than a scintilla of the evidence, although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). "Substantial" means evidence that a reasonable mind would accept as sufficient to support the conclusion. *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1994). [*Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 388-389; 576 NW2d 667 (1998).]

We "must affirm the Tribunal's finding concerning whether a claim was frivolous unless competent, material, and substantial evidence does not support the finding." *Pontiac Country Club*, 299 Mich App at 439.

As a preliminary matter, petitioners' position that the Tribunal erred by failing to justify its refusal to award costs is without merit. First, the Tribunal justified its decision, noting that petitioners had not shown good cause for an award of costs and that respondent's defense was not frivolous. Second, petitioners' argument is based on an incorrect reading of applicable law. Petitioners cite *Blue Cross & Blue Shield of Mich v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997), where this Court stated that "[t]axation of costs under

MCR 2.625(A) is within the discretion of the trial court. A trial court is not required to justify awarding costs to a prevailing party; rather, the court must justify the failure to award costs." Petitioners fail to acknowledge that this passage applies only to MCR 2.625(A), the court rule pertaining to costs. This Court has ruled that "[t]he [Tax Tribunal], by its own rule, is bound by the Michigan Rules of Court, as well as by §§ 71-87 of the Administrative Procedures Act (APA), MCL 24.201 *et seq*., in all cases and proceedings before it *whenever an applicable tax tribunal rule does not exist on the subject*." *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 88; 669 NW2d 862 (2003) (emphasis added). As discussed below, the Tribunal has its own rule regarding awards of costs. Accordingly, MCR 2.625(A) and accompanying caselaw interpretations are irrelevant here.

"During the period relevant to this case, the applicable subset of the Michigan Administrative Code provided that '[t]he Tribunal may, upon motion or upon its own initiative, allow a prevailing party in a decision or order to request costs[]' . . . ." *Pontiac Country Club*, 299 Mich App at 437, quoting R 205.1145.[1] It is a well-established rule of statutory interpretation that "[w]hile the word 'shall' is generally used to designate a mandatory provision, 'may' designates discretion." *Port Huron v Amoco Oil, Inc*, 229 Mich App 616, 631; 583 NW2d 215 (1998).

Respondent does not dispute that petitioners were the "prevailing party" in the underlying action. Rather, respondent notes that the Tribunal rule provides no guidance or criteria concerning the Tribunal's exercise of discretion in awarding costs. Although not required, the Tribunal analyzed whether respondent's position was frivolous, determined that it was not, and used that finding as a basis to deny petitioners costs. Given the lack of statutory criteria for awarding costs in a Tribunal proceeding, combined with the Tribunal's explanation of its decision, it cannot be said that the Tribunal abused its discretion by denying petitioners' motion, and the Tribunal's decision was "supported by competent, material, and substantial evidence on the whole record," *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 388.

Petitioners next argue that the Tribunal erred in finding that respondent's position was not frivolous. MCL 600.2591 provides, in relevant part:

> (1) Upon motion of any party, 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.
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> * * *

[1] On March 20, 2013, the administrative rules governing Tribunal procedure were revised. The new rules contain substantive changes and possess different numerical codification. At all relevant times in this case, the costs rule was codified as R 205.1145. See *Pontiac Country Club*, 299 Mich App at 437.

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

(*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(*iii*) The party's legal position was devoid of arguable legal merit.

These definitions of frivolity have been applied to appeals from the Tribunal. See *Pontiac Country Club*, 299 Mich App at 439.

Petitioners' arguments rely on the assertion that respondent presented insufficient evidence to support its contended TCV of $356,800. This argument is without merit. Respondent presented ample evidence, including a property-tax-appeal answer form, a letter, petitioner's appraisal, a tax map, a 2011 assessment-change notice, a 2011 March Board of Review petition and decision, tax-bill information, and property-record-card information. Petitioners incorrectly argue that such evidence was insufficient to establish a factual basis for respondent's contended value.

In a property-tax appeal, the Tribunal "has a duty to make its own independent determination of true cash value." *Great Lakes Div of Nat'l Steep Corp*, 227 Mich App at 389. "The Tax Tribunal is not bound to accept the parties' theories of valuation. It may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination of true cash value." *Id*. at 389-390. "In the Tax Tribunal, a property's assessed valuation on the tax rolls carries no presumption of validity." *President Inn Props*, 291 Mich App at 640. While the Tribunal has a duty to make its own determination of true cash value, it "may adopt the assessed valuation on the tax rolls as its independent finding of TCV when competent and substantial evidence supports doing so." *President Inn Props*, 291 Mich App at 640.

Although the assessed value of the property is not presumptively valid, the Tribunal was free to adopt that value in rendering its decision. Respondent could have prevailed below, solely on the evidence provided, had the Tribunal been persuaded by that value. Because the Tribunal was fully entitled to find for respondent based on the evidence submitted, it cannot be said that respondent's position was "devoid of arguable legal merit." MCL 600.2591(3)(a)(*iii*).

MCL 211.24(b) provides that "[t]he assessor shall estimate, according to his or her best information and judgment, the true cash value and assessed value of every parcel of real property and set the assessed value down opposite the parcel." Petitioners have provided no evidence or argument that respondent's assessor shirked this duty to attempt to assess accurately the subject property. Thus, respondent had a "reasonable basis to believe that the facts underlying [its] . . . legal position were in fact true." MCL 600.2591(3)(a)(*ii*). Lastly, petitioners have provided no evidence that respondent's "primary purpose in . . . asserting the defense was to harass, embarrass, or injure" petitioners. As discussed above, respondent did not fail to support its

contended TCV. Simply because respondent's position was unsuccessful does not mean it was frivolous.

We decline to address petitioners' due-process argument as unpreserved, because we do not believe that the "interest of justice and judicial economy" support disregarding the preservation requirements in this instance. *Great Lakes Div of Nat'l Steep Corp*, 227 Mich App at 426.[2]

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan

[2] Respondent makes a brief argument for appellate sanctions under MCR 7.216(C). We decline to grant such sanctions because we do not believe the requirements of the court rule have been satisfied. We cannot say that petitioners' appeal, although unsuccessful, was vexatious, given the vague wording of R 205.1145.