

STATE OF MICHIGAN
COURT OF APPEALS

SCHOENECKERS, INC.,

Petitioner-Appellee,

v

DEPARTMENT OF TREASURY,

Respondent-Appellant.

UNPUBLISHED

January 28, 2014

No. 313311

Michigan Tax Tribunal

LC No. 00-418284

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals by right the final opinion and judgment of the Michigan Tax Tribunal granting petitioner's request for a tax refund and also awarding petitioner costs and attorney fees. We affirm in part, reverse in part and remand.

Petitioner is a Minnesota corporation engaged in business improvement. Business theater and travel comprise a large amount of petitioner's revenue, with the costs of performance usually corresponding to the location of the event. Petitioner has approximately 20 sales offices around the country employing 900 to 1,000 people. There was a location in Troy, Michigan, with the number of employees ranging "from the low 20s to the low 30s" during the tax period in question.

In 2007, respondent initiated an audit of petitioner covering the company's tax years ending June 30, 2004, June 30, 2005, June 30, 2006, and June 30, 2007. Audit field work began in 2007. During the course of the audit, petitioner came to believe it should have utilized a cost-of-performance method in apportioning income rather than the bill-to method originally employed. Petitioner notified respondent of its belief after the audit field work was completed but before a final assessment, hoping to receive an audit adjustment rather than having to file amended returns. Respondent rejected the cost-of-performance method as insufficiently documented and utilized the bill-to method in the audit determination. Petitioner filed amended returns in January 2009, using the cost-of-performance method for non-tangible personal property. Petitioner calculated the 2005-2007 amended returns from corporate records for those periods. However, the 2004 fiscal year amended return was not based on original calculations from petitioner's 2004 fiscal year data. Rather, the 2004 return was an estimate from the data for 2005 through 2007. Petitioner twice updated the amended returns during the course of the tribunal hearing, with further updates made following the hearing. Respondent and petitioner

held an informal conference on March 21, 2011. At that conference, the final assessment of \$13,015 plus statutory interest was approved and the refund claims were denied because “Petitioner failed to carry its burden that it was entitled to the SBT refunds as requested.”

Respondent argues on appeal that petitioner failed to satisfy its burden of proof because it did not offer any documents that substantiated the figures on the amended return. Because the petitioner failed to supply the required documentation, respondent argues, it is allowed to rely on the best information available, which it asserts substantiates the assessment. “Review of a decision by the [Michigan Tax Tribunal] is very limited.” *Drew v Cass Co*, 299 Mich App 495, 498; 830 NW2d 832 (2013). Decisions of the tax tribunal are reviewed to determine whether the tribunal made an error of law or adopted a wrong legal principle. *Credit Acceptance Corp v Dep’t of Treasury*, 236 Mich App 478, 482; 601 NW2d 109 (1999). Findings of fact are reviewed on the whole record for support by competent, material, and substantial evidence. Const 1963, art 6, § 28; *Dow Chemical Co v Dep’t of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990). Substantial evidence must be more than a scintilla of the evidence, but it may be substantially less than a preponderance of the evidence. *Dow*, 185 Mich App at 463.

Although the Single Business Tax Act (SBTA), MCL 208.1 *et seq.*, was repealed effective January 1, 2008, it applies to the questions presented because they involve tax years ending June 30 for the years 2004 through 2007. MCL 208.151-208.153. In 2007, MCL 208.53(b) provided as follows:

Sales, other than sales of tangible personal property, are in this state if:

* * *

(b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.

Respondent admits that petitioner must apply a cost-of-performance analysis and that petitioner is a service provider who must use MCL 208.53(b) to calculate sales apportionment.

As appellant, respondent “bears the burden of proof in an appeal from an assessment, decision, or order of the Tax Tribunal.” *Drew*, 299 Mich App at 499 (internal quotation marks and citation omitted). Respondent has not met this burden. The tribunal heard sufficient evidence to support the amended returns. It heard testimony from two witnesses and examined admitted evidence consisting of the reapportionment based on cost of performance for years 2005 through 2007, petitioner’s original SBT annual returns covering fiscal years ending 2004-2007, and petitioner’s amended returns 2004-2007. The reapportionment tables showed the Michigan cost-of-performance figures for each department that fiscal year. Respondent did not object to any of this evidence. Petitioner’s controller was competent to testify to the facts and circumstances in issue given his role. Respondent has not objected to the controller’s testimony or offered any evidence that his testimony or other documents admitted contained material error. Although petitioner did update the amended returns on three occasions, the tribunal was aware of all changes and reviewed the final amended return, without objection from respondent, before

issuing its final order. In sum, petitioner presented competent, material, and substantial evidence in favor of its amended returns and resulting tax refund.

Respondent next argues that the tribunal does not have the power to assess attorney fees because it is a quasi-judicial administrative agency rather than a judicial body. The tribunal cited four grounds for awarding attorney fees and costs:

Respondent's (i) inability to work with Petitioner to verify the corrected calculations during the course of the audit; (ii) failure to follow MCL 205.83b; (iii) disregard of its own guidance, IPD 2006-8; and (iv) violation of MCR 2.114, warrants awarding Petitioner costs and reasonable attorney's fees.

An award for attorney fees and costs is reviewed for an abuse of discretion, which occurs when the award is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

Tax Tribunal Rule (TTR) 145 (2012) (subsequently amended and renumbered TTR 209) provided that the "tribunal may, upon motion or upon its own initiative, allow a prevailing party in a decision or order to request costs." Further, MCL 205.752(1) provides that "[c]osts may be awarded in the discretion of the tribunal." TTR 145 does not provide guidance regarding when costs are appropriate, but we conclude that given the many and serial failures of respondent during the course of this audit, it was not unreasonable for the tribunal to award costs to petitioner. The main question is whether the award of attorney fees as a sanction was authorized and warranted. MCL 205.732(c) provides that the tribunal may grant "other relief or [issue] writs, orders, or directives that it deems necessary or appropriate in the process of disposition of a matter over which it may acquire jurisdiction." However, neither TTR 145 nor MCL 205.752(1) specifically indicates whether attorney fees or other sanctions may be awarded.

MCR 2.625(A)(2) directs that costs for frivolous claims are awarded under MCL 600.2591. That statute provides for awarding "costs and fees," which include "reasonable attorney fees." MCL 600.2591(1)-(2). The intersection of this court rule and statute indicate that the term "costs" may be construed to include attorney fees.

MCR 2.114 reads, in part:

(A) This rule applies to all pleadings, motions, affidavits, and other papers provided for by these rules. See MCR 2.113(A). In this rule, the term "document" refers to all such papers.

* * *

(D) The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted

by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include . . . the reasonable expenses incurred . . . , including reasonable attorney fees. . . .

There is no tribunal rule that mirrors MCR 2.114. However, the rules of the tribunal provide that it may follow any Michigan Court Rule if there is not a tribunal rule on point. We conclude that the tribunal has authority to award attorney fees as a sanction under MCR 2.114.

Respondent contends that the award under MCR 2.114 is not supported by the facts of the case. The tribunal was most concerned with actions occurring at the audit level and not specifically with identified conduct that occurred before the tribunal. Respondent asserts that they complied with the requirements of the court rule because they prepared documents based on their knowledge and belief of petitioner's books and records at the time of the audit, and did not attempt to harass, delay, or increase the costs of litigation.

The hearing referee indicated respondent failed to submit a document "well grounded in fact," MCR 2.114(D)(2), because respondent "had no basis to believe its interpretation of the facts was correct and it failed to follow the clear language of the statute, MCL 208.53(b), and its own guidance found in IPD 2006-8." Respondent was further faulted for not realizing "the auditor's obvious error in interpreting the statute and error in judgment in failing to resolve the issue" with petitioner. These failures justify costs, but they do not amount to a violation under MCR 2.114, which applies to "documents" subject to the court rules. MCR 2.114(A). Whatever respondent's audit actions may have been, the hearing referee does not cite any document filed by respondent before the tribunal that fails under the rule. The inability to identify the correct sourcing method or respondent's failure to follow their internal guidance cannot underpin a violation of the rules relating to "documents," as defined by the rule. Because no document was found by the tribunal to be in violation of the court rule, the tribunal's award under MCR 2.114 fell outside the range of principled outcomes.

Affirmed in part, reversed in part, and remanded for further proceedings to determine appropriate costs in accordance with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro