

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

ALAN L. WISNE and KATHRYN L. WISNE,

Petitioners-Appellants,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.

---

UNPUBLISHED

May 20, 2008

No. 270633

Michigan Tax Tribunal

LC No. 00-297661

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Petitioners were assessed a 25 percent penalty by respondent for intentional disregard of the law, MCL 205.23(4). Petitioners appeal as of right the tax tribunal's order affirming respondent's assessment. We reverse and remand for further proceedings consistent with this opinion.

I

Petitioners were Michigan residents through March 31, 1999, and Florida residents thereafter. Petitioners sold their interest in Progressive Tool and Industries Company ("PICO"), a subchapter S Corporation, in 1999 after becoming residents of Florida. After consulting with tax specialists and attorneys, petitioners took the position on the basis of their advice, that MCL 206.110(2)(b), which allocates to this state all taxable income received as a distributive share of the net profits of a business conducted in Michigan, did not apply to the gain on the sale of PICO. Petitioners paid only \$100 in estimated taxes when they applied for an extension of time to file their 1999 Michigan income taxes on April 12, 2000. Under Michigan's Income Tax Act (ITA), MCL 206.311(2), taxpayers are required to "remit with an application for extension the estimated tax due." When petitioners filed their Michigan income tax return on October 15, 2000, at the conclusion of the extension period, they paid the \$2,416,950 tax due on the gain under MCL 206.110(2), plus interest. However, believing that petitioners intentionally disregarded the law, rules and instructions when they failed to pay an estimated tax with their request for extension in the amount of the tax that would be due under MCL 206.110(2) when they filed their return, respondent imposed a 25% penalty of \$604,238 under MCL 205.23(4). The tax tribunal affirmed the imposition of the penalty, and petitioners appeal from that decision as of right.

Petitioners argue that the tribunal erred in finding that petitioners intentionally disregarded MCL 206.110(2)(b) and MCL 206.311(2). In the absence of fraud, this Court reviews the decisions of the tax tribunal to determine whether the tribunal erred in applying the law or adopted a wrong principle. *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994); *Alma Piston Co v Dep't of Treasury*, 236 Mich App 365, 367; 600 NW2d 144 (1999). The tribunal's findings of fact are conclusive if they are "supported by competent, material, and substantial evidence on the whole record." *Alma Piston Co, supra* at 368.

Petitioners first argue that the "intentional disregard" penalty, MCL 205.23(4), cannot be sustained because the requisite intent was not present. Petitioners contend that respondent failed to present any evidence establishing intent, and that both Jim Davis, petitioners' accountant, and Alan Wisne ("petitioner" in individual capacity), testified that they did not intend to disregard any tax law. Respondent relies on Revenue Administrative Bulletin (RAB) 1995-4, which provides that if a taxpayer objects to a discretionary penalty, "the taxpayer bears the burden of establishing facts which will negate a finding of intent." RAB 1995-4, p 8. RAB 1995-4 also states, "While the intent of a taxpayer is difficult to discern, such intent will be presumed when a taxpayer has received specific instructions from the department as to the proper reporting of an item of income or deduction, but fails to do so." RAB 1995-4, p 5. RAB 1995-4, p 2, defines intentional disregard as "knowingly and willfully disregarding the laws, rules and instructions published and/or administered by the department without the intent to commit fraud or evade payment of tax."

Respondent argues that Davis testified that petitioners were provided with instructions with the 1999 Michigan Income Tax Return, but Davis and petitioners chose to disregard them, claiming that they were instructed by "the law and . . . current statute," and that while petitioner claimed that he did not have to pay the taxes because he disagreed with respondent's assertion that tax was due pursuant to MCL 206.110(2)(b), petitioner gave no explanation regarding why he chose to pay the taxes on October 15, 2000, except to say he did not want to pay interest in the event he was wrong about the statute. In addition, Anthony Wisne ("the elder Wisne"), petitioner's father, used the same tax accountants and tax attorneys as petitioners, yet the elder Wisne chose to pay the tax as though he owed it, even though he was litigating the tax statute at issue. The tribunal rejected the argument that petitioners' reliance on tax professionals negated the intent to intentionally disregard the law, concluding that such reliance is relevant to the reasonable cause defense to mandatory penalties or negligent failures, but is not relevant to discretionary penalties for intentional disregard. The tribunal concluded that petitioners did not carry their burden of negating the tax tribunal's finding that they intentionally disregarded the law.

We conclude the tribunal's decision must be set aside for several reasons. The tribunal relied on RAB 1995-4, which provides that if a taxpayer objects to a discretionary penalty, "the taxpayer bears the burden of establishing facts which will negate a finding of intent." Unlike the Single Business Tax Act, MCL 208.83, and the General Sales Tax Act, MCL 205.67, the Michigan Income Tax Act of 1967 does not declare that an assessment is prima facie correct and that the burden of proof is on the tax payer. Also, although MCL 205.23(3), which deals with the penalty for negligence, provides "[i]f a taxpayer subject to a penalty under this subsection

demonstrates to the satisfaction of the department that the deficiency or excess claim for credit was due to reasonable cause, the department shall waive the penalty,” MCL205.23(4), at issue here, places no such burden on the taxpayer. The Tax Tribunal has the authority to allocate the burden of proof in a manner consistent with the legislative scheme, *Kostyu v Treasury Dept*, 170 Mich App 123, 130; 427 NW2d 586 (1988),<sup>1</sup> but here the tribunal allocated the burden based on respondent’s RAB. The Michigan Income Tax act does not grant respondent the authority to determine the burden of proof.

Similarly, the tribunal relied on provisions of RAB 1995-4 that declare that “[w]hile the intent of a taxpayer is difficult to discern, such intent will be presumed when a taxpayer has received specific instructions from the department as to the proper reporting of an item of income or deduction, but fails to do so,” and define “intentional disregard” as “knowingly and willfully disregarding the laws, rules and instructions published and/or administered by the department without the intent to commit fraud or evade payment of tax.” The statute, however, authorizes the imposition of a penalty where there has been intentional disregard of a law or rule, and does not authorize the imposition of a penalty for intentional disregard of instructions.

Relying on various RABs concerning the purpose and effect of respondent’s RABs, and on RAB 1995-4, the tribunal found that petitioners’ intentional disregard of respondent’s instructions for preparing the 1999 Michigan Income Tax Return,<sup>2</sup> constituted intentional disregard of a rule. This too was error. MCL 205.3(b) grants respondent the authority to promulgate rules in accordance with the Administrative Procedures Act, MCL 24.201 *et seq.* However, RABs are not adopted under the APA, but rather are “bulletins that explain the current department interpretations of current state tax laws,” authorized by MCL 205.3(f). RABs are not rules and do not have the force of law. *Catalina v Dep’t of Treasury*, 470 Mich 13, 21; 678 NW2d 619 (2004). Moreover, petitioners, in fact, followed the instructions for preparing a tax return when they reported the PICO gain on the return itself, and paid the tax in full, plus interest.

The tribunal also found that petitioners intentionally disregarded the law. In this regard, the tribunal found significant that the elder Wisne employed the same tax professionals, had litigated the matter, and still chose to pay the tax as if it were due. The tribunal also found significant that petitioners paid the tax, plus interest, when they filed their return. We fail to see the significance of these observations. The elder Wisne presumably paid the tax for the same reason petitioners paid the tax when filing their return - - to avoid paying considerable further interest on any amounts eventually found to be due. We fail to see why petitioners’ decision to

---

<sup>1</sup> Petitioners provided full information with their tax return, distinguishing this case from the circumstances that justified the imposition of the burden of proof on the taxpayer in *Kostyu*.

<sup>2</sup> Respondent’s instructions for preparing the 1999 Michigan Income Tax Return state for nonresidents, “You must pay Michigan income tax on the following types of income: . . . Income (including dividend and interest income) from an S corporation . . . or other business activity in Michigan.”

pay the tax when the return was filed undermines their position. Rather, it can be seen as supporting their claim that they did not intend to disregard the law.<sup>3</sup>

The tribunal also concluded that Alan Wisne's good-faith reliance on the advice of tax professionals would be irrelevant because the penalty at issue here is neither a mandatory penalty nor a discretionary penalty imposed for negligence, but rather a discretionary penalty for intentional disregard. In reaching its conclusion the tribunal analogized to federal law. Section 6653(a) of the Internal Revenue Code makes taxpayers subject to a 5% penalty for "intentional disregard of tax rules or regulations." The cases relied on by the tribunal, *Druker v Commissioner*, 697 F2d 46 (CA 2, 1982), and *Cramer v Commissioner*, 64 F3d 1406 (CA 9, 1995), stand in sharp contrast to the instant case. In those cases, the taxpayers intentionally disregarded pertinent IRS regulations, believing them to be either unconstitutional (*Druker*) or invalid interpretations of the Internal Revenue Code (*Cramer*). In *Druker*, the taxpayers were aware that their position was directly contrary to the Internal Revenue Code. In *Cramer*, the taxpayers were informed by tax professionals that "they had a plausible position . . . , but that Treasury regulations were to the contrary. Further, in reporting the gain at issue, the *Cramer* taxpayers misreported their basis in the asset. Here, it is undisputed that petitioners correctly reported the income when they filed their actual return. Further, it is undisputed that they neither violated nor intentionally regarded any rule. There were no pertinent rules regarding the issue.<sup>4</sup> Unlike the taxpayers in *Cramer*, respondents did not "play the audit lottery." They filed their return in accordance with respondent's instructions.

The tribunal determined that petitioner's reliance on professional advice is irrelevant as a matter of law because intentional disregard, rather than negligence, is at issue. The tribunal refused to consider that petitioners relied on the advice of tax professionals who advised them that there were no rules or appellate cases addressing the specific issue, and that the elder Wisne had a good chance of prevailing on appeal. Such reliance is, indeed, relevant to the underlying question whether petitioners, in fact, intentionally disregarded the law. We see no reason why good-faith reliance on professional tax advice should not be considered in deciding whether a taxpayer's intentional disregard of *instructions* constituted an intentional disregard of the *law*. There is no indication in the record that petitioners in any way misrepresented the facts to the tax professionals, or that they ignored admonitions that their position was contrary to a rule or law. All that can be said is the obvious; petitioners were on notice that respondent and the tax tribunal disagreed with their and the elder Wisne's position, but that the matter was before the Court of Appeals. Under these circumstances, we find the tribunal's analogy to *Druker* and *Cramer* misplaced.

The tribunal also concluded that petitioners intentionally disregarded the clear meaning of MCL 206.110(2)(b). The tribunal found *Gillette v Dep't of Treasury*, 5 MTT 839 (1989), aff'd 198 Mich App 303; 497 NW2d 595 (1993), inapposite, noting that § 110(2)(b) was amended in 1990, and petitioners' taxes at issue were for tax year 1999; that while there was no

---

<sup>3</sup> We also do not understand the relevance of a finding that Alan Wisne is a "sophisticated" businessman where Michigan tax law is at issue and tax professionals were consulted.

<sup>4</sup> Respondent concedes that it also had issued no RAB addressing the underlying issue.

appellate precedent directly on point in 2000, there was dicta supporting respondent's position in both *Alma Piston Co v Dep't of Treasury*, 236 Mich App 365, 366-367; 600 NW2d 144 (1999) (“[A]s amended, subsection 110(2)(b) clearly imposes tax liability on petitioner's nonresident shareholders for their distributive shares.”), and *Bachman v Dep't of Treasury*, 215 Mich App 174, 180 n 2; 544 NW2d 733 (1996) (“The legislative analysis for this bill stated that this change was to make it clear that nonresidents could be taxed on their share of the net profits from a subchapter S corporation.”); and that petitioners were aware of respondent's position, which was apparent in respondent's defense of the elder Wisne's challenge and in the income tax instructions for preparation of tax returns. The tribunal concluded that the law was sufficiently established to preclude an “honest difference of opinion,” regarding the law's meaning.

It is undisputed that at the time petitioners filed their request for extension, there was no promulgated rule or appellate precedent addressing the effect of the 1990 amendment of § 110(2)(b) on tax years after 1990, and the issue was in litigation. The first appellate case to address the 1990 amendment's effect on tax years after 1990, *Anthony Wisne v Dep't of Treasury*, 244 Mich App 342; 625 NW2d 401 (2001), was decided well after petitioners filed for an extension of time to file their return. The tribunal specifically noted that its summary of the state of the law on the underlying tax issue was not intended to criticize the advice given by the tax professionals, but only to shed light on petitioners' intent. We fail to see the distinction. If 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. In this connection, it is significant that this Court in *Wisne* characterized the taxpayer's argument as “misplaced,” and explained why in a careful discussion of statutory history. There is no suggestion in *Wisne* that the taxpayer's argument was not in good faith or was frivolous.

Many of the above points were made by petitioners in their motion for rehearing and were rejected by the tribunal, which, in essence, repeated its determination that it is up to respondent whether to impose a penalty, and once imposed, it was petitioners' burden to show that they did not intentionally disregard the law, a position that could not be sustained under the circumstances that respondent's position on the matter was clear given the instructions and its litigation position. For the reasons stated above, we conclude that the tribunal came to this conclusion by deciding this case in an incorrect legal framework.

In conclusion, 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. Nevertheless, in deference to the role of the tax tribunal as finder of fact, we reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Donald S. Owens