S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

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UNPUBLISHED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.

MURRAY, J. (*dissenting*).

With due respect to my esteemed colleagues, I would affirm the Michigan Tax Tribunal's decision to impose a 25% penalty on petitioners for the intentional disregard of the law. MCL 205.23(4).

As the majority recognizes, petitioners had a responsibility under the law to pay an estimated tax due when seeking an extension. MCL 206.311(2). A deficiency in the estimated tax payment "is characterized as a 'tax due' or present obligation, and a taxpayer is held accountable for any tax deficiency, interest, and penalties even though the deficiency is not realized until completion of the final return." *STC Inc v Dep't of Treasury*, 257 Mich App 528, 535; 669 NW2d 594 (2003).

The Tribunal's decision that petitioners intentionally disregarded the law was based on the fact that petitioners submitted $100 for their estimated tax, taking the position that non-residents did not have to pay tax on the net profits on the sale of their S corporation. The Tribunal's decision was not based on an error of law, and its factual finding was supported by substantial evidence. *STC Ins, supra* at 533. Consequently, it should be affirmed.

"Intentional disregard" is not defined by statute, so resort to a dictionary definition is appropriate. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). "Disregard" means to "treat as unworthy of regard or notice." Webster's New Collegiate Dictionary (1980). Thus, "intentional disregard" of the law means to intentionally treat a law as unworthy of regard or notice. As the Tribunal noted, at the time the petitioners filed their request for extension in 1999, the following legal landscape existed regarding a non-resident being subject to taxation on the net profit from the sale of an S corporation:

1. The 1990 amendment to MCL 206.110, passed nine years earlier, which eliminated "unincorporated" from the statute, thus including S corporations within its provisions.

2. A 1990 legislative analysis of the bill that was to become the 1990 amendment indicated that the amendment's purpose was to make clear that a non-resident's net profit from an S corporation was taxable to Michigan.

3. In both *Bachman v Dep't of Treasury*, 215 Mich App 174, 180-182; 544 NW2d 733 (1996) and *Alma Piston Co v Dep't of Treasury*, 236 Mich App 365, 366-367; 600 NW2d 144 (1999), this Court indicated in dicta that "as amended, § 110(2)(b) clearly imposes tax liability on petitioners non-resident shareholders for their distributive shares."[1]

4. On May 4, 1998, the Tribunal rejected petitioner Alan Wisne's father's argument that non-residents were exempt even after adoption of the 1990 amendment.

Hence, at the time of their filing, petitioners had to (A) disregard (1) clear statutory language and legislative history, (2) statements in published cases from our Court, and (3) a ruling from the Tribunal, all of which indicated that petitioner's position was incorrect, and (B) instead proceed with the view that no estimated tax was owed because the amended statute did not apply to non-residents' profits from S corporations. In my view, however, the writing was on the wall as to the taxation issue, and the tribunal's conclusion that petitioners' decision making constituted an intentional disregard of the law was not in error. Consequently, I would affirm the Tribunal's position of a penalty.

/s/ Christopher M. Murray

[1] Although the statements in both cases were dicta, the statements should have been considered persuasive. *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003). Additionally, because the language and intent behind the amendment were so clear, petitioners cannot argue that the law was sufficiently uncertain until a published case decided the issue.