

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES T. MALONEY,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

UNPUBLISHED

March 26, 1999

No. 202680

Michigan Tax Tribunal

LC No. 162571

AFTER REMAND

IMAD G. SAMOUNA a/k/a IMAD G. SAMONA,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

No. 202681

Michigan Tax Tribunal

LC No. 162577

AFTER REMAND

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Petitioners appeal as of right a Michigan Tax Tribunal opinion and judgment on remand that increased the income tax and single business tax in three jeopardy assessments issued against petitioners by respondent. We affirm.

We remanded this case originally so that the Tax Tribunal could make additional findings with regard to petitioners' estimated income from an illegal gambling establishment known as the Tiger Club. On appeal from the Tax Tribunal's opinion and judgment on remand, petitioners argue that the tribunal's findings with regard to their income from the Tiger Club and the resulting increases in the jeopardy assessments determined by the tribunal were not based on competent, material, and substantial evidence. We disagree.

There are no records documenting the illegal activities of the Tiger Club from which a determination of gross profits from the club could be made. The Tax Tribunal based the increases in the tax assessments on testimony provided at the hearing before the tribunal. Petitioners' expert estimated the profits from the Tiger Club using a formula that included five variables: the average amount of money on the table for each bet, the number of "come-out" rolls per hour, the number of hours per day that the club operated, the daily gross profit ratio, and the number of days per year that the club operated. Based on testimony provided at the hearing, the expert assigned values to each of the variables to determine the profits from the club. The tribunal adopted petitioners' expert's formula, but used different values for the variables, based on hearing testimony that it deemed credible, and arrived at a much larger estimate of profits than petitioners' expert. On appeal, petitioners specifically challenge the tribunal's use of a \$5,000 figure as the average amount of money on the table with each bet. Petitioners contend that such a figure is not supported by the evidence; rather, the evidence shows that the average amount of money on the table with each bet was \$500, the amount used by their expert in calculating the profits from the club.

Under the Michigan Constitution, a Tax Tribunal decision not supported by competent, material, and substantial evidence on the whole record is an error of law. *Great Lakes Division of National Steel Corp v City of Ecorse*, 227 Mich App 379, 388; 576 NW2d 667 (1998). This Court has defined "substantial evidence" as evidence which a reasonable person would recognize as sufficient to support a decision. *McBride v Pontiac School Dist (On Remand)*, 218 Mich App 113, 123; 553 NW2d 646 (1996). Such evidence is more than a mere scintilla but less than a preponderance of the evidence. *Id.* Accordingly, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn. *Id.* Thus, the question in this case is not whether the hearing testimony supported the \$500 amount relied upon by petitioners more fully than the \$5,000 amount relied upon by respondent, but whether the testimony was sufficient to support the \$5,000 amount.

Witnesses provided conflicting testimony concerning the average amount of money on the table with each bet. Of the two undercover detectives assigned to investigate the Tiger Club to determine if illegal gambling was occurring there, one testified that the average amount on the table was \$500 and the other that the amount was \$4,000 to \$5,000. In its opinion and judgment, the tribunal stated that it relied on the higher amount, as the detective making that estimate had some training in various games of chance prior to his work in this case and he was the one who actually participated in the gambling as part of the undercover operation, while the other detective simply provided backup, had no training in games of chance, and did not necessarily have the tableside vantage point of the first detective. Although an employee of the club also stated that the average amount was about \$500, the tribunal did not credit his testimony. This Court has found that great deference must be given to an agency's choice between two reasonable differing views as a reflection of the exercise of administrative expertise. *McBride, supra* at 123. Where there is sufficient evidence to support a finding of an administrative tribunal, this Court will not

substitute its judgment. *Id.* We find that the evidence upon which the tribunal based its findings was sufficient to support its decision. Therefore, the tribunal did not err as a matter of law in calculating petitioners' tax liability.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Roman S. Gibbs

/s/ Kurtis T. Wilder