

STATE OF MICHIGAN  
COURT OF APPEALS

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EDMUND J. BAPRAWski, JR., Trustee of the  
Estate of CHARLOTTE D. BAPRAWski,

UNPUBLISHED  
December 11, 2007

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

No. 273078  
Tax Tribunal  
LC No. 00-320915

Respondent-Appellee.

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Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Petitioner appeals as of right from a Tax Tribunal decision upholding a penalty assessment of \$121,856, reduced to \$115,081 because of the overpayment of interest, imposed against petitioner because he failed to timely file a tax return and pay estate taxes in connection with his mother's estate. We affirm.

This Court's review of a Tax Tribunal decision is very limited. In the absence of an allegation of fraud, this Court's review is limited to deciding whether the tribunal committed an error of law or adopted a wrong legal principle. *Pheasant Ring v Waterford Twp*, 272 Mich App 436, 438; 726 NW2d 741 (2006). Factual findings made by the tribunal will not be disturbed if they are supported by competent, material, and substantial evidence on the whole record. *Id.*

The underlying facts are not in dispute. Petitioner failed to timely file the estate's tax return or pay the taxes due. As a result, a penalty of \$121,856 was imposed pursuant to MCL 205.24(2), which provides:

Except as provided in subsections (3), (6), and (7), if a taxpayer fails or refuses to file a return or pay a tax within the time specified for notices of intent to assess issued on or before February 28, 2003, a penalty of \$10.00 or 5% of the tax, whichever is greater, *shall* be added if the failure is not for more than 1 month, with an additional 5% penalty for each additional month or fraction of a month during which the failure continues or the tax and penalty is not paid, to a maximum of 50%. Except as provided in subsections (3), (6), and (7), if a taxpayer fails or refuses to file a return or pay a tax within the time specified for notices of intent to assess issued after February 28, 2003, a penalty of 5% of the tax *shall* be added if the failure is for not more than 2 months, with an additional

5% penalty for each additional month or fraction of a month during which the failure continues or the tax and penalty is not paid, to a maximum of 25%. In addition to the penalty, interest at the rate provided in section 23 for deficiencies in tax payments shall be added on the tax from the time the tax was due, until paid. After June 30, 1994, the penalty prescribed by this subsection shall not be imposed until the department submits for public hearing pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, a rule defining what constitutes reasonable cause for waiver of the penalty under subsection (4), which definition shall include illustrative examples. [Emphasis supplied.]

We disagree with petitioner's argument that the decision whether to impose a penalty under MCL 205.24(2) is discretionary. The statute states that a penalty "shall be added." The term "shall" indicates a mandatory directive. *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006). Petitioner does not contest the calculation of the penalty under MCL 205.24(2). Because it is undisputed that the tax return was not timely filed and the estate taxes were not timely paid, a penalty was mandatory under MCL 205.24(2), except as otherwise provided in the statute.

Petitioner argues that waiver of the penalty was appropriate under MCL 205.24(4),<sup>1</sup> which provides:

If a return is filed or remittance is paid after the time specified and it is shown to the satisfaction of the department that the failure was due to reasonable cause and not to willful neglect, the state treasurer or an authorized representative of the state treasurer *shall* waive the penalty prescribed by subsection (2). [Emphasis added.]

Because subsection (4) uses the term "shall," waiver of the penalty prescribed by subsection (2) is mandatory if the requirements of subsection (4) are satisfied. Under subsection (4), petitioner must show to the "satisfaction of the department that the failure was due to reasonable cause and not to willful neglect." Thus, upon an appropriate showing of reasonable cause, any penalty prescribed by subsection (2) must be waived. 1999 AC, R 205.1013(4) provides that the taxpayer has the burden of affirmatively establishing, by clear and convincing evidence, that the failure to pay the tax was due to reasonable cause. See *J W Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 53; 706 NW2d 460 (2005).

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<sup>1</sup> Although petitioner also refers to MCL 205.23, the penalty in this case was based only on MCL 205.24, for failure to timely file a return or pay taxes. MCL 205.23 allows penalties to be imposed in situations where the amount of the tax actually paid is less than owed (deficiency) or where there is an excessive claim for credit. See *Schubert v Dep't of Treasury*, 212 Mich App 555, 563-564; 538 NW2d 447 (1995). Because the penalty in this case was not based on MCL 205.23, it is unnecessary to consider that statute.

Petitioner argues that he established reasonable cause because (1) he received inaccurate tax advice from his tax preparer, (2) there were insufficient assets to pay the taxes, and (3) the estate was granted an extension by the federal government.

The Tax Tribunal relied on 1999 AC, R 205.1013 to determine what constitutes reasonable cause for failing to timely pay a tax or file a return.<sup>2</sup> Rule 205.1013(7) provides examples of situations where a penalty should be waived for reasonable cause. However, those situations generally involve circumstances beyond the control of the taxpayer and are not applicable to the circumstances at issue in this case. Additional circumstances that may support a finding of reasonable cause are set forth in Rule 205.1013(8), which provides:

The following factors alone do not constitute reasonable cause for failure to file or pay. However, these factors may be considered with other facts and circumstances and may constitute reasonable cause. The following factors are for illustration only and are not an exclusive listing of factors:

- (a) The compliance history of the taxpayer.
- (b) The nature of the tax.
- (c) The taxpayer's financial circumstances, including the amount and nature of the taxpayer's expenditures in light of the income the taxpayer, at the time of the expenditures, could reasonably expect to receive before the due date prescribed for paying the tax.
- (d) The taxpayer was incorrectly advised by a tax advisor who is competent in Michigan state tax matters after furnishing the advisor with all necessary and relevant information and the taxpayer acted reasonably in not securing further advice.
- (e) The taxpayer's accounting and financial system that is designed to ensure timely filing breaks down due to unavoidable circumstances and, upon discovery, the taxpayer promptly complies.
- (f) The death or serious incapacitating illness of the taxpayer or the person responsible for filing the return or making the payment or a member of his or her immediate family.
- (g) Lack of funds to make timely payment.

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<sup>2</sup> Although the parties also refer to Revenue Administrative Bulletin 2005-3 in discussing the concept of reasonable cause, the hearing referee relied on Rule 205.1013, which provides a more comprehensive view of reasonable cause.

(h) A taxpayer's reliance on an employee or agent to file the return or make the payment.

Subsection (8)(d) recognizes that waiver may be appropriate if the taxpayer received inaccurate advice from his accountant. The hearing referee considered this factor, but found that it was not established because petitioner did not affirmatively testify that his accountant did not tell him that the taxes were due when he requested an extension and that any extension would not delay the payment of taxes owed. The hearing referee also noted that petitioner did not call his accountant as a witnesses, thus preventing the referee from determining what tax advice petitioner may have been given. Under the circumstances, the referee did not err in finding that petitioner failed to satisfy his burden of demonstrating that waiver of the penalty was appropriate under subsection (8)(d).

Subsection (8)(g) recognizes that waiver may be appropriate if the estate lacked the funds to pay the taxes when due. In this case, however, the referee found that, according to the estate's federal return, the estate held over \$3 million in cash and marketable securities, and that petitioner failed to satisfactorily explain why those assets could not have been used to pay the estate's state taxes on time. Therefore, the referee properly concluded that subsection (8)(g) did not support a finding of reasonable cause in this case.

Petitioner also argues that because he obtained an extension for the federal taxes, this constitutes "reasonable cause" pursuant to Revenue Administrative Bulletin (RAB) 1999-12, which provides:

III. If a federal extension to *pay* the tax under IRC [Internal Revenue Code] § 6163 or 6166 is not approved at the time the Michigan Estate Tax becomes due and payable, the obligation to file the return and pay the tax remains on the original due date. Therefore, in situations where an estate has applied for a federal extension under either IRC § 6163 or 6166, the Department will assess the failure to pay penalty if the tax is not paid by the original due date. *However, evidence that the Internal Revenue Service has granted the taxpayer an extension of time to pay the tax under IRC § 6163 or 6166 will be accepted as reasonable cause for waiver of the failure to pay penalty.* Interest will be assessed on all payments received after the original due date. [Emphasis added.]

The record discloses that petitioner only obtained an extension from the federal government of the time for *filing* the estate's federal return, not for *paying* the federal taxes owed. In fact, a payment of those taxes was included with the request for an extension of the federal filing deadline. Because petitioner did not submit an application to the IRS for an extension to *pay* the federal estate taxes, the foregoing exception does not apply. Petitioner was still obligated to pay the estate's state taxes to respondent on the original due date. Moreover, the federal government's extension of time appears to have been approved in September 2002 after being received August 26, 2002, and the tax at issue here was due August 23, 2002.

For these reasons, the Tax Tribunal did not err in determining that petitioner failed to establish reasonable cause for failing to timely file the estate's tax return and pay the taxes due. Therefore, the Tax Tribunal properly upheld the penalty assessed against petitioner.

Affirmed.

/s/ Alton T. Davis

/s/ William B. Murphy

/s/ Deborah A. Servitto