STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL BURT, Petitioner-Appellant,	UNPUBLISHED July 1, 2010
v	No. 290868 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee.	LC No. 00-313389

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Petitioner appeals as of right the decision of the Tax Tribunal denying his motion for summary disposition and granting respondent's motion for summary disposition. We affirm.

I

Although petitioner filed Michigan income tax returns, he failed to pay the balance due and owing. Respondent issued assessments to petitioner for the unpaid taxes, plus penalties and interest. Petitioner filed his petition in the Tax Tribunal's Small Claims Division, contesting the assessments. On petitioner's motion, the petition was transferred to the Entire Tribunal. The parties submitted motions for summary disposition, and the Tax Tribunal granted respondent's motion and denied petitioner's motion. This appeal followed.

II

Petitioner first advances several arguments attacking the legitimacy of Michigan's power to tax and of the procedures by which that power is exercised. First, petitioner contends that, because the Sixteenth Amendment to the United States Constitution granted the federal government the power to tax, the Tenth Amendment takes the same power away from the states. Next, he contends that, because the individual exemption amount is not listed in the Internal Revenue Code (IRC),[1] he has no way of knowing what it is and consequently no duty to pay taxes. Third, he alleges that the federal 1040 form is not in compliance with the Paperwork

[1] 26 USC 1 *et seq.*

Reduction Act,[2] and, again, that he consequently has no duty to pay taxes. Finally, he claims that the uniform commercial code[3] protects his statements of income from being used by respondent in determining his income tax liability.

III

The Tenth Amendment does not operate to restrict state power. Although by its terms it reserves to the states powers not granted to the federal government, US Const Am X, the converse, that it denies to the states those powers granted to the federal government, is not stated and may not be inferred. The only limitations the US Constitution imposes on state sovereignty are imposed by the Supremacy Clause.[4] *Gregory v Ashcroft*, 501 US 452, 457; 111 S Ct 2395; 115 L Ed 2d 410 (1991). Restrictions on state sovereignty are governed by the doctrine of preemption. *Gade v Nat'l Solid Wastes Mgt Ass'n*, 505 US 88, 108; 112 S Ct 2374; 120 L Ed 2d 73 (1992). Preemption may be found explicitly, or implicitly when (a) it is reasonable to infer that Congress has intended to exclude states from the field or (b) state law and federal law are in direct conflict. *Id.* at 108-109. None of these conditions apply here, and there is no restriction on Michigan's power to tax imposed by the Supremacy Clause, the Tenth Amendment, or any other provision of the United States Constitution.

IV

Although the exemption amount is not explicitly provided in the IRC, the formula by which it is calculated is found there. 26 USC 151(d), 1(f). The base exemption amount is $2,000, and that amount is adjusted each year for inflation. 26 USC 151(d). The adjustment is based on the Consumer Price Index, calculated and published by the United States Department of Labor. 26 USC 1(f). Petitioner himself notes that the exemption amounts are provided by the IRS on the back of the federal 1040 forms, and in the 1040 instructions. Petitioner also could have referred to the formula for calculating the exemption amount and the published information, and calculated it himself. Petitioner's argument that he could not have been aware of the exemption amount and thus had no duty to pay taxes is frivolous.

V

The Paperwork Reduction Act (PRA) forbids any penalty for failing to comply with an information collection request that does not bear a valid control number issued by the Office of Management and Budget (OMB). 44 USC 3512. Petitioner argues that the federal 1040 form bears an expired—and thus invalid—OMB number, and that it is therefore an illegal form. Because the Michigan tax return relies on information on the federal return, petitioner asserts that his adjusted gross income may not be calculated, and he need not file a Michigan tax return.

---

[2] 44 USC 3501 *et seq.*

[3] MCL 440.1101 *et seq.*

[4] US Const art VI, cl 2.

This argument is frivolous for several reasons. First, the federal 1040 contains a valid OMB control number. *United States v Partridge*, 507 F3d 1092, 1094 (CA 7, 2008). Although OMB approval of a control number is only valid for at most three years, a new number is not required every three years; only renewed approval is. *Id*. Thus the OMB control number on the federal 1040, though nearly 30 years old, remains valid.

Second, the US Courts of Appeals have roundly rejected the argument that the PRA could operate to relieve a taxpayer's duty to pay tax. See, e.g., *United States v Wunder*, 919 F2d 34, 38; (CA 6, 1990); *Partridge*, 507 F3d at 1094-1095; *United States v Hicks*, 947 F2d 1356, 1358-1360 (CA 9, 1991); *Lonsdale v United States*, 919 F2d 1440, 1444-1445 (CA 10, 1990). In fact, the US District Court for the Eastern District of Michigan rejected this argument in petitioner's own criminal trial for federal tax evasion. *United States v Burt*, unpublished order of the United States District Court for the Eastern District of Michigan, entered July 28, 2008 (Docket No. 06-20582). Although we are not bound by federal courts of appeals decisions, we find these persuasive and adopt their holding. See *Abela v GMC*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

Third, the obligation to pay Michigan taxes is independent from any obligation to pay federal taxes. Even if the most convenient way for a taxpayer to obtain his or her adjusted gross income for use on the MI-1040 form is by copying it from the federal 1040 form, this is not required. A taxpayer may look directly at the IRC in order to discover the process by which adjusted gross income is calculated, and calculate it that way. Thus any alleged defect in the federal 1040 form can have no effect on petitioner's duty to pay Michigan taxes.

VI

Petitioner next argues that, by using the words "without prejudice" and invoking "UCC 1-207" in signing his MI-1040 forms, the amounts on those forms were not "sworn testimony" and respondent was precluded from using them in calculating petitioner's tax liability. Section 1207 of the uniform commercial code provides, "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient." MCL 440.1207. Petitioner contends that when respondent used the information provided by petitioner "without prejudice," respondent impermissibly "converted the information to voluntary with prejudice." This argument has no basis in law. Section 1207, like the rest of the uniform commercial code, applies to commercial transactions and contractual relationships. The obligation to pay taxes is not contractual.

Nor does respondent require "sworn testimony" in order to determine petitioner's tax liability. Respondent is empowered to base tax liability assessments on the best information it can gather. *Vomvolakis v Dep't of Treasury*, 145 Mich App 238, 244; 377 NW2d 309 (1985). Even if petitioner's invocation of "UCC 1-207" deprived his MI-1040 forms of any testimonial nature they might have had, respondent may still rely on them as the best information to use to calculate petitioner's tax liability. Where a taxpayer refuses to file a return or disclose information, respondent may base its assessment on the best information at hand, and the burden of proof falls on the taxpayer to "come forward with positive proof of his income." *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988). Petitioner brought no such positive proof.

VII

Finally, petitioner claims that the tribunal erred in dismissing the petition without an evidentiary hearing. We decline to address this issue because petitioner failed to preserve the issue by requesting an evidentiary hearing, *In re Dihle Estate*, 161 Mich App 150, 159-160; 410 NW2d 303 (1987), because he abandoned the issue on review by failing to cite any authority in support of his proposition that the tribunal was required to hold an evidentiary hearing, *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), and because we find that our refusal to address the issue will not result in manifest injustice, *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005). We do note, however, that "the trial court itself is best equipped to decide whether the positions of the parties . . . mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process." *Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens