STATE OF MICHIGAN

COURT OF APPEALS

WENDELL C. FLYNN and MARGARET A. FLYNN, Petitioners-Appellants, v MICHIGAN DEPARTMENT OF TREASURY, Respondent-Appellee.	UNPUBLISHED December 27, 2002 No. 231475 Tax Tribunal LC Nos. 00-249443 00-263826

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Petitioners appeal as of right from a judgment of the Michigan Tax Tribunal affirming respondent's assessment of individual income tax, including interest and penalties, for tax years 1985 through 1991. We affirm.

Petitioners' federal income tax returns were audited by the Internal Revenue Service for tax years 1985 through 1991. During the settlement process both the IRS and petitioners conceded various issues in order to reach a final settlement. One issue conceded by petitioners was that petitioner Wendell Flynn (hereinafter "Flynn") was an employee of the various businesses with which he was associated and that his income should be treated as W-2 wage income. Petitioners' settlement with the IRS resulted in changed adjusted gross income numbers for all of the audited tax years. Petitioners did not file amended Michigan tax returns, despite the adjusted federal numbers. Respondent became aware of the revised federal numbers through notices from the IRS. Respondent issued state tax assessments based on the revised federal adjusted gross income numbers. Petitioners challenged the assessments before the Tax Tribunal. The Tax Tribunal affirmed respondent's assessments as well as a ten percent penalty assessed by respondent. This appeal followed.

On appeal, petitioners first argue that the Tax Tribunal erred when it found petitioners' settlement with the IRS to be determinative of their Michigan tax liability. We disagree. "In the absence of an allegation of fraud, this Court's review of a Tax Tribunal decision is limited to determining whether the tribunal committed an error of law or adopted a wrong legal principle. The tribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record." *Michigan Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 490; 618 NW2d 917 (2000) (Citations omitted). Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is

more than a mere scintilla but less than a preponderance of the evidence. *Sweepster, Inc v Scio Twp*, 225 Mich App 497, 502; 571 NW2d 553 (1997). When there is sufficient evidence, a reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). It does not matter that alternative findings also could have been supported by substantial evidence on the record. *Sweepster, supra*.

Issues of statutory interpretation, however, present a question of law reviewed de novo on appeal. *Stege v Dep't of Treasury*, 242 Mich App 486, 490; 618 NW2d 917 (2002). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Id*.

The Michigan Income Tax Act of 1967, MCL 206.1 *et seq*., provides that "[t]axable income means . . . adjusted gross income as defined in the internal revenue code . . . ." MCL 206.30(1); see also MCL 206.2(3) ("[i]t is the intention of this act that the income subject to tax be the same as taxable income as defined and applicable to the subject taxpayer in the internal revenue code"). The plain meaning of the statutory language of MCL 206.30(1) and MCL 206.2(3) is that the starting point for Michigan taxable income is federal adjusted gross income. Indeed, as this Court noted in *Maxitrol Co v Dep't of Treasury*, 217 Mich App 366, 372; 551 NW2d 471 (1996), "because . . . Michigan tax returns depend on the computations in their federal tax returns and statements, . . . Michigan and federal tax returns are inextricably intertwined." Here, because the tax computations contained in petitioners' Michigan returns depend upon the validity of the federal tax returns, specifically the federal taxable income, we find that respondent properly relied on the IRS adjustments to petitioners' federal taxable income to determine the basis for petitioners' Michigan individual income tax. *Id*.

Pursuant to MCL 205.21(1), respondent has the statutory authority to "obtain information on which to base an assessment of the tax."[1] MCL 205.21(1) further states that, in doing so, respondent "may examine the books, records, and papers and audit the accounts of a person or any other records pertaining to the tax." In *Maxitrol*, *supra* at 372, this Court held that respondent "has the express authority to audit Michigan tax returns, and that express authority necessarily includes the authority to assess the validity of the federal tax statements upon which Michigan tax computations depend."

Our review of statutory authority and case law supports the proposition that respondent may review a taxpayer's federal returns and statements, and make its own determinations of the validity of the income and deductions claimed by the taxpayer on his federal income statements and returns. MCL 205.21(1); *Maxitrol*, *supra*. We have not found, and petitioners have not provided, any rule of law stating that, in making its determination, respondent is obligated to review all information available to it. Contrary to petitioners' argument, respondent need only review that information which it deems relevant. MCL 205.21(1); *Maxitrol*, *supra*. Also,

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[1] MCL 205.1 *et seq*. governs the conduct of the Revenue Division of the Department of Treasury.

contrary to petitioners' assertions, the Tax Tribunal did not simply affirm respondent's tax assessment. Rather, our review of the record reveals that the Tax Tribunal engaged in an independent review of the IRS' numbers and then agreed with its findings.

Petitioners also argue that the Tax Tribunal violated MRE 408 when it relied upon petitioners' settlement with the IRS as the starting point for determining the Michigan tax. MRE 408 governs the admissibility of an offer in compromise to prove liability for a claim. Petitioners have not, however, demonstrated how this evidentiary rule is applicable to the facts of the instant case. As discussed above, respondent properly engaged in a review of petitioners' final revised federal tax returns in order to provide a starting point for Michigan taxable income. MCL 205.21(1); *Maxitrol, supra*. Accordingly, we find this argument unpersuasive.

Next, petitioners argue that the Tax Tribunal erred in failing to conclude that Flynn was engaged in a trade or business. As we concluded above, respondent properly reviewed petitioners' revised federal tax returns to provide a starting point for petitioners' Michigan taxable income. MCL 205.21(1); *Maxitrol, supra*. Moreover, Michigan case law has recognized that respondent has the ability to base its assessments on the best information available. See *Vomvolakis v Dep't of Treasury*, 145 Mich App 238, 244-245; 377 NW2d 309 (1985). Here, the record reveals that the IRS calculated the revised federal income tax numbers based on several assumptions with the ultimate goal of achieving the most accurate numbers. One important factor in the IRS' determination of federal taxable income was petitioners' concession that Flynn was not involved in a trade or business but was rather an employee, and that, accordingly, his income should be treated as W-2 wage income. The IRS relied on this information when it arrived at the final federal taxable income number for petitioners, which was properly used as the starting point for Michigan taxable income. MCL 206.30(1).

The Tax Tribunal also stated that it had engaged in an independent examination of the IRS' numbers and, after examining these, agreed with the findings of the IRS. Implicit in the IRS' findings, and also a factor included in the determination of federal taxable income, is petitioners' concession that Flynn was an employee. The Tax Tribunal recognized that petitioners provided evidence supporting their factual allegation that Flynn was involved in a trade or business, but chose instead to uphold the IRS' taxable income finding which is, in part, based on the assertion that Flynn was an employee. Although there may be evidence on the record that could support either factual finding, i.e., that Flynn was engaged in a trade or business or was an employee, we will not substitute our discretion for that of the Tax Tribunal even if we might have reached a different result. *Black*, *supra* at 30; see also *Sweepster*, *supra*. Accordingly, because the Tax Tribunal's factual findings are supported by competent, material, and substantial evidence on the record, we find that the Tax Tribunal did not err when it found that Flynn was not engaged in a trade or business and was an employee. Const 1963, art 6, § 28; *Sweepster*, *supra*.

Petitioners next argue that the Tax Tribunal erred when it found that the assessments issued against petitioners were not time barred by the statute of limitations. Again, we do not agree. Pursuant to MCL 206.325(2), unless federal tax liability is increased by less than $500, Michigan taxpayers must file an amended Michigan tax return if the taxpayer's federal income tax return has been changed or modified. Here, as a result of the federal audit, petitioners' federal tax returns were modified for the years 1985 through 1991. Because the resulting change in federal tax liability for each of these years was greater $500, petitioners were required,

pursuant to MCL 206.325(2), to file amended state tax returns for the years in question. Petitioners, however, failed to do so.

Generally, respondent must assess a taxpayer for a deficiency within four years from the later of the date a return was actually filed or should have been filed. MCL 205.27a(2). However, where a taxpayer fails to notify respondent of a modified federal tax liability, respondent has two years from its discovery of the failure to notify in which to assess the tax, along with penalties and interest. MCL 205.27a(2). Respondent relied on this latter period in determining that the assessments against petitioners were not time barred.

Petitioners, however, allege that MCL 206.411, which would require respondent to assess the deficiency within one year of petitioners' settlement with the IRS, should be applied to this case. [2] See MCL 206.402. We disagree. It is well settled that when two statutes or provisions may be applicable to a matter, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994); *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998). As the Tax Tribunal correctly noted, MCL 205.27a(2) deals particularly with those cases where taxpayers have failed to file tax returns and, as a consequence, have not notified respondent of their modified federal taxable income. Because MCL 205.27a(2) applies much more specifically to the instant facts, we find that it controls in this case. *Gebhardt, supra*; *Brown, supra*.

Lastly, petitioners argue that the Tax Tribunal erred when it did not waive the penalties assessed by respondent pursuant to MCL 205.23. MCL 205.23(3) requires the addition of a penalty of ten percent of the total amount of the deficiency in the tax due if any part of the deficiency is "due to negligence, but without intent to defraud." However, where a taxpayer demonstrates to the satisfaction of respondent that the deficiency "was due to reasonable cause," respondent must waive the penalty. *Id*.

Petitioners argue on appeal that the Tax Tribunal erred when it failed to waive the penalty provided for under MCL 205.23(3) because petitioners relied on their tax advisor, Henry Mitchell, who they claim advised them against filing amended state returns. Our review of the record reveals that petitioners' allegations concerning Mitchell's advice are less than truthful. Flynn testified as follows when questioned about whether he was advised to file amended Michigan returns:

> I said: Hank, what is the effect. He told me and I said: What the hell, we've already filed that with the state, we haven't changed our position, we made an agreement with Uncle Sam, I think we've been truthful with the state and we're going to ride with it the way it is. Don't amend it, don't do a damn thing. I feel the return was truthful, and that's it.

This testimony shows that Mitchell advised petitioners to file amended returns for the subject tax years, but that petitioners consciously chose not to amend, and instead advised their accountant to "ride with it." In light of this evidence, petitioners have not demonstrated that their tax

[2] Although in effect during this matter, MCL 206.411 was repealed by 1996 PA 484, § 2, effective January 1, 1996.

deficiency was due to reasonable cause and, because they have not met their burden, petitioners' argument that they should be excused from the penalty due to reasonable cause fails. MCL 205.23(3).

We affirm.[3]

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter

[3] At oral argument, petitioners waived their argument regarding the 1991 assessment upon respondent's concession that the parties' stipulation disposed of the issue.