STATE OF MICHIGAN

COURT OF APPEALS

HOSPITAL PURCHASING SERVICE OF MICHIGAN, Petitioner-Appellant,	UNPUBLISHED August 26, 2010
v	No. 291071 Michigan Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee.	LC No. 339543

Before: M.J. KELLY, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Petitioner appeals as of right from the order of the Michigan Tax Tribunal (MTT), granting respondent's motion for summary disposition and imposing the statutory penalty for failure to pay taxes owed, MCL 205.24. We affirm.

The facts are not here in dispute. Petitioner is registered in Michigan as a non-profit corporation, formed of members that are non-profit entities under Internal Revenue Code, 26 USC 501(c). Petitioner purchases equipment and supplies in large quantities, thus enabling its members to take advantage of bulk prices. Non-member, for-profit entities can also purchase equipment and supplies through petitioner. According to petitioner, 16 percent of its total revenue comes from for-profit participants.

Petitioner claimed it was exempt from tax liability under the Single Business Tax Act (SBTA), MCL 208.1 *et seq*.,[1] and so did not pay any Single Business Tax (SBT) from June 1995 through June 2004. Respondent audited petitioner, and assessed SBT for those years. An informal conference was held, and the MTT ultimately agreed with the recommendation to hold petitioner liable for the tax and to assess penalties for late payment. The amounts were $288,609 tax, $72,154 penalty, and $142,782 interest. Specifically, the MTT found that the only way petitioner could qualify as exempt was if it were an "other group or combination of entities acting as a unit." The tribunal answered in the negative, noting that petitioner was without question a corporation, and the statute defining "person" listed "corporation" separately from

[1] Repealed effective for tax years beginning 2010 by 2002 PA 531, § 1.

"other group or combination of entities acting as a unit"; therefore, the latter phrase did not include corporations. The MTT also found that petitioner had no reasonable cause for failing to file SBT returns "because Petitioner knew that it was a corporation and paid federal income taxes."

In the absence of fraud, our review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Continental Cablevision v Roseville*, 430 Mich 727, 735; 425 NW2d 53 (1988). Where, as here, a legal question of statutory interpretation is presented, review is de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

Section 35(1)(c) of the SBTA provides the following exemption:

> A person who is exempt from federal income tax under the internal revenue code, and, for tax years that begin after December 31, 1995, a partnership, limited liability company, joint venture, general partnership, limited partnership, unincorporated association, or other group or combination of entities acting as a unit if the activities of the entity are exclusively related to the charitable, educational, or other purpose or function that is the basis for the exemption under the internal revenue code from federal income taxation of the partners or members and if all of the partners or members of the entity are exempt from federal income tax under the internal revenue code . . . . [MCL 208.35(1)(c).]

"Person" is defined to "mean[] an individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture, association, corporation, receiver, estate, trust, or any other group or combination acting as a unit." MCL 208.6(1).

Petitioner claims to be exempt under the second clause of § 35(1)(c). We disagree. Standing by itself, the language "other group or combination of entities acting as a unit" might be seen to include corporations such as petitioner. However, read in the context of the other sections, including MCL 208.6, it is apparent that the phrase is meant as a catch-all, and is different from the named entities. *State Bd of Ed v Houghton Lake Community Schs*, 430 Mich 658, 671; 425 NW2d 80 (1988) ("A statute must be read in its entirety, and meaning given to one section arrived at after due consideration of other sections so as to produce, if possible, an harmonious and consistent enactment as a whole."). From the definition of "person" in MCL 208.6, it is clear that a "corporation" is not the same thing as an "other group or combination of entities acting as a unit" because they are listed as separate items. If they were synonymous, the statute would have language that was surplusage or nugatory. As a matter of statutory construction, we avoid any such interpretation. *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Further, the second clause expressly does not include "person" or "corporation" among the listed entities. Instead, it includes some of the entities included in the definition of "person," excludes others, and adds some other entities not included in that definition, including

"unincorporated association." From that, we conclude that the Legislature did not intend corporations to be among those eligible for exemption under the second clause. If "other group or combination acting as a unit" includes a corporation, none of the specific types of entities would need to be named because partnerships, limited liability companies, joint ventures, etc., are all groups or combinations of entities acting as a unit. Rather than being a broadly inclusive list, it is a much more selective list than petitioner reads it.

Petitioner next argues that it had a reasonable basis for believing it was exempt from the SBT. The MTT gave, as reasons for imposing the penalty, the facts that petitioner is a corporation and that it pays some federal income tax. It is permissible for entities that are tax-exempt to incur some taxable business income as long as the amount is "insubstantial" and furthers the exempt purposes of the entities.

Respondent is required to waive the penalty for failing to file a return if "it is shown to the satisfaction of [respondent] that the failure was due to reasonable cause and not to willful neglect." MCL 205.24(4). The taxpayer bears the burden of affirmatively establishing, by clear and convincing evidence, that the failure to pay the tax was due to reasonable cause. 1999 AC, R 205.1013(4); see also *J W Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 53; 706 NW2d 460 (2005). If the taxpayer meets its burden, respondent *must* waive the penalty. Contrary to respondent's assertions, it is not a discretionary decision. See *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006) (the Legislature's use of the word "shall" denotes a mandatory act).

As respondent explains, its administrative rules set forth examples of when reasonable cause does and does not exist. Rule 205.1013(7) provides examples of situations where a penalty should be waived for reasonable cause. Those situations generally involve circumstances beyond the control of the taxpayer that are not applicable to the circumstances at issue in this case. Additional circumstances that are insufficient alone but may support a finding of reasonable cause when considered with other facts are set forth in R 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.

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

A review of these factors shows that the decision of the tribunal was factually and legally sound. Notably absent among the factors listed is anything about the taxpayer's reliance on its own interpretation of the law. Similarly, nothing in the record indicates petitioner ever sought any professional advice about whether it was liable to pay the SBT, or ever sought a ruling from respondent. Instead, it apparently relied on the fact that none of its members pays SBT. Making tax decisions of this magnitude without either consulting a tax professional or seeking guidance from respondent is not exercising ordinary business care and prudence. R 205.1013(5).

Affirmed.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Donald S. Owens