

STATE OF MICHIGAN
COURT OF APPEALS

PLUM HOLLOW MARKET, INC,

Petitioner-Appellant,

UNPUBLISHED
October 16, 2012

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

No. 305505
Tax Tribunal
LC No. 00-348020

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

PER CURIAM.

Petitioner appeals by right from the final opinion and judgment of the Michigan Tax Tribunal granting judgment in favor of respondent and affirming respondent's assessment of additional sales tax, interest, and penalties for the audit period of July 1, 2004, through August 31, 2007. We affirm.

Petitioner is a retail business that sells groceries, liquor, beer and wine, and miscellaneous taxable merchandise. In addition to food sold as groceries, petitioner sold food for immediate consumption. Petitioner did not keep records of inventory items that were made into prepared foods. Petitioner also admitted that it did not keep its daily cash register receipts (Z-rings). Instead, it recorded the sales reported on the daily receipts onto a worksheet and then discarded the receipts. Monthly sales summaries that broke sales down into general taxable and non-taxable categories, without further specification, were provided to petitioner's accountant.

The auditor determined that petitioner's record-keeping was inadequate. The auditor therefore referred to supplier invoices to determine which items were used in prepared food, based on her visual inspection of prepared foods sold in the store. She then determined the average "markup" of those items based on the reports of petitioner of sale price versus the price petitioner paid for the item. This amount did not match petitioner's federal tax return. The auditor ultimately determined that a portion of petitioner's gross receipts reported were mischaracterized as nontaxable income and assessed an additional tax liability of \$17,387 for the audit period. Petitioner also was assessed a \$1,740 negligence penalty and \$4,218.27 interest as accrued through December 17, 2008.

I. STANDARD OF REVIEW

Appellate review of Tax Tribunal decisions is constitutionally limited. *Meadowlanes Ltd*

Dividend Housing Ass'n v City of Holland, 437 Mich 473, 482, 473 NW2d 636 (1991). “All factual findings are final if supported by competent and substantial evidence.” *Id.* Absent an allegation of fraud, appellate review is limited to determining whether the tribunal made an error of law or adopted a wrong principle. *Id.*

II. PETITIONER’S RECORD-KEEPING

Section 7(1) of the General Sales Tax Act,¹ MCL 205.51 *et seq.*, provided in relevant part as follows:

A person liable for any tax imposed under this act shall keep accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. . . . If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on information that is available or that may become available to the department. That assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer. [MCL 205.67(1).]

Additionally, the Michigan Administrative Code provides that “[i]t is the duty of every person engaging in any business subject to the [sales] tax to keep and preserve suitable and adequate records of his business to enable such person, as well as the state, to determine the correct amount of tax for which he is liable.” 1999 AC, R 205.23(2).

This Court has determined that § 7(1) allows respondent “to assess taxes upon such information as is available or comes into its possession in situations where the taxpayer has not maintained proper records or where the department has reason to believe that the records are inaccurate or incomplete.” *Vomvolakis v Dep’t of Treasury*, 145 Mich App 238, 242, 377 NW2d 309 (1985). If the tribunal’s decision that records are incomplete or inaccurate is supported by substantial evidence, we will affirm that decision. *Id.* at 245.

We conclude that the tribunal’s determination that petitioner’s record-keeping did not comply with MCL 205.67(1) is supported by substantial evidence. The record demonstrates that respondent’s auditor could not verify from petitioner’s records if the proper amount of sales tax had been collected to satisfy the liability imposed on petitioner. Section 7(1) plainly provides that “[a] person liable for any tax imposed under this act shall keep . . . receipts.” The Z-rings were the receipts of daily sales and should have been maintained. Nor was the auditor able to calculate from petitioner’s records how much of petitioner’s inventory purchases were used in

¹ MCL 205.67 was repealed by 2008 PA 438, § 1, effective January 9, 2009. But MCL 205.67 was in effect during the audit period at issue.

the production of prepared food. Respondent was thus unable to calculate from petitioner's records the amount of sales tax owed.

Petitioner makes much of the fact that the tribunal noted that "the auditor stated that she found that the amount of sales tax collected was properly reported and remitted." That the amount of sales tax collected was properly reported and remitted does not establish that petitioner had actually met its responsibility to remit its "annual tax for the privilege of engaging in [the business of making sales at retail] equal to 6% of the gross proceeds of the business." MCL 205.52(1). In other words, the fact that petitioner properly reported and remitted the amount it collected from its customers to satisfy the tax imposed on petitioner is not proof that it collected sales tax on *all* taxable purchases.

If respondent determined that a taxpayer has failed to maintain proper records or has reason to believe the records provided are incomplete or inaccurate, MCL 205.67(1) provided that it may assess sales tax owed "based on information that is available or that may become available to the department. That assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer."

This Court has approved the use of supplier invoices as the basis for an assessment in situations where the taxpayers did not maintain proper records. *Vomvolakis*, 145 Mich App at 244. Although that method has its limitations, this Court has held that "the Legislature has granted [respondent] wide discretion in the selection of auditing methods." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 42, 703 NW2d 822 (2005). The fact that a particular audit method used is not the most reliable does not refute the prima facie correctness of the audit; a showing of actual inaccuracy in the result is required. *Id.*

Here, as in *Vomvolakis*, petitioner presented no evidence, other than testimony (which the tribunal found contradictory) that some of the invoice items were erroneously classified as prepared food items by respondent's auditor. This testimony did not allow the tribunal to determine, in the absence of original business records, what modifications, if any, should have been made to respondent's assessment.

III. NEGLIGENCE PENALTY

MCL 205.23(3) provides in relevant part that "if any part of the deficiency or excessive claim for credit is due to negligence, but without intent to defraud, a penalty of \$10.00 or 10% of the total amount of the deficiency of the tax, whichever is greater, plus interest as provided in subsection (2), shall be added."

The Michigan Administrative Code defines "negligence" in this context as follows:

Negligence is the lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances. The standard for determining negligence is whether the taxpayer exercised ordinary care and prudence in preparing and filing a return and paying the applicable tax in accordance with the statute. The facts and circumstances of each case will be considered. [1999 AC, R 205.1012(1).]

As stated above, the tribunal correctly found that petitioner's system of record-keeping did not allow the state to determine the correct amount of sales tax for which petitioner was liable. Petitioner's own accountant admitted that he had no way of determining if the amount of sales tax collected was correct. Therefore, the tribunal's finding of negligence was supported by substantial evidence, and we will not disturb it.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan