STATE OF MICHIGAN

COURT OF APPEALS

BEACON ENTERPRISES, INC., Petitioner-Appellant/Cross-Appellee,	UNPUBLISHED December 3, 2013
v	No. 308170 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee/Cross-Appellant,	LC No. 00-371782

BEACON INDUSTRIAL STAFFING, INC., Petitioner-Appellant/Cross-Appellee,	
v	No. 308171 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee/Cross-Appellant,	LC No. 00-409419

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Petitioners appeal as of right from a decision of the Tax Tribunal that granted, in part, respondent's motion for summary disposition and thereby affirmed the assessment of certain taxes. Respondent cross-appeals, arguing that the Tribunal erred in waiving penalties and assessing certain attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

Petitioners are two companies that perform human-resources services for a number of Midwest trucking companies. The crux of the main appeal involves whether petitioners were payroll service companies (PSCs) or professional employer organizations (PEOs) for purposes of

the (now defunct) Single Business Tax Act (SBTA), former MCL 208.1 *et seq*. This distinction is crucial because, under the SBTA, PSCs were not required to include the compensation paid to serviced employees in the PSCs' single business tax base, whereas PEOs *were* required to do so. Respondent audited petitioners for various periods preceding December 31, 2007, and concluded that petitioners were PEOs. As a result, respondent assessed $785,794, plus interest, against petitioner Beacon Industrial Staffing, Inc. (Industrial), and assessed $437,551, plus interest, against petitioner Beacon Enterprises, Inc. (Enterprises).[1] Petitioners eventually appealed the assessments in the Tax Tribunal, and the parties filed cross-motions for summary disposition. The legal issues raised by respondent and petitioners were similar, and thus the Tribunal considered the motions together.

Respondent relied on statutory language and on the client service agreements (CSAs) between petitioners and their clients in arguing that petitioners were PEOs. Petitioners filed affidavits in which they attempted to demonstrate that they were not "employers" of persons working for their clients (i.e., they were not PEOs), but that they merely handled limited human-resources functions for the clients. The Tax Tribunal issued two separate orders for the two petitioners, but the orders, for purposes of this appeal, were materially similar. The Tribunal initially noted that, under the CSAs, petitioners were required to withhold federal income taxes for the trucking employees and, therefore, were "prima facie" to be deemed employers under the SBTA. See *Mid America Management Corp v Dep't of Treasury*, 153 Mich App 446, 462; 395 NW2d 702 (1986), and former MCL 208.5(1). The Tribunal then concluded that petitioners could not rebut this presumption of being employers because the CSAs clearly and unambiguously identified petitioners as "employers" and indicated that petitioners were to perform human-resources functions. The Tribunal also noted that the CSAs contained integration clauses. Thus, the Tribunal stated that it refused to use parol or extrinsic evidence to look outside the four corners of the CSAs and concluded that petitioners were PEOs. Petitioners now challenge this decision on appeal.

We review a decision of the Tax Tribunal to determine "whether [it was] authorized by law and whether the factual findings [were] supported by competent, material, and substantial evidence on the whole record. *Id*. at 460.

As noted, the crux of this appeal involves whether petitioners were PEOs. Former MCL 208.4(4) stated:

> For tax years that begin after December 31, 2003, for purposes of determining compensation of a professional employer organization, compensation includes payments by the professional employer organization to the officers and employees of an entity whose employment operations are managed by the professional employer organization. Compensation of the entity whose employment operations are managed by a professional employer organization

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[1] Certain other actions took place and will be discussed later in this opinion in conjunction with the analysis of the cross-appeals.

does not include compensation paid by the professional employer organization to the officers and employees of the entity whose employment operations are managed by the professional employer organization. As used in this subsection, "professional employer organization" means an organization that provides the management and administration of the human resources and employer risk of another entity by contractually assuming substantial employer rights, responsibilities, and risk through a professional employer agreement that establishes an employer relationship with the leased officers or employees assigned to the other entity by doing all of the following:

(a) Maintaining the right of direction and control of employees' work, although this responsibility may be shared with the other entity.

(b) Paying wages and employment taxes of the employees out of its own accounts.

(c) Reporting, collecting, and depositing state and federal employment taxes for the employees.

(d) Retaining the right to hire and fire employees.

Respondent cites various provisions of the CSAs to indicate that petitioners fell within this definition. Specifically, respondent cites the following provisions:

SUPERVISION, EMPLOYER agrees to designate supervisors to perform any and all administrative and personnel matters on CLIENT's premises during the normal business hours.

. . . CONTROL OF EMPLOYER EMPLOYEES. The EMPLOYER supervisor shall determine the procedures to be followed by EMPLOYER employees regarding the performance of their duties. CLIENT agrees to permit EMPLOYER to implement EMPLOYER's policies and procedures relating to EMPLOYER employees. CLIENT shall make all non-routine directives only through the designated EMPLOYER supervisor.

* * *

The following, without limitation, shall constitute a material breach of this Agreement by CLIENT:

* * *

Committing any act that usurps EMPLOYER's rights as the employer of EMPLOYER employees[.]

* * *

EMPLOYER AS THE EMPLOYER. All EMPLOYER personnel assigned to CLIENT to fulfill job function positions are and shall remain the

> employees of EMPLOYER. EMPLOYER is and shall remain responsible for such administrative employment matters as the payment of all federal, state and local employment taxes, providing worker's compensation coverage as well as non-obligatory fringe benefit programs for its employees. EMPLOYER agrees that CLIENT shall not be held responsible for Employer[']s failure to withhold those taxes or failure to conduct itself in accordance with applicable federal, state and local laws. In no event, however, shall EMPLOYER be liable for Client[']s loss of profits, business goodwill or other consequential, special or incidental damages.
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> EMPLOYER shall provide employees who are duly qualified and skilled in the area in which their services are to be utilized. EMPLOYER will consult with CLIENT in filling its Job Function Positions, but EMPLOYER shall retain the sole and exclusive right to determine which of EMPLOYER[']S employees shall be designated to fill Client[']s Job Function Positions. CLIENT has no right to approve such determination, but nonetheless possesses the right to recommend replacement or substitution of any employee so furnished, if dissatisfied with such employee's qualifications and/or performance. . . .
>
> EMPLOYER shall have the sole responsibility of hiring, evaluating, supervising, disciplining and firing individuals assigned to fill Client[']s Job Function Positions. Under no circumstances shall CLIENT have the right to terminate an EMPLOYER employee. It is understood and agreed that EMPLOYER shall retain full control over all personnel decisions.

Respondent argues (and the Tribunal agreed) that under the CSAs, petitioners were PEOs. However, petitioners submitted several affidavits below. Marcel Thirman, a certified public accountant, stated that an individual, Vincent Manzo, purchased petitioners (and one additional company) and that the three entities constituted "a payroll services company, staffed with four clerical workers who processed and handled payroll and insurance matters for clients." Thirman stated that the office had never had more than five employees, that he had "never seen supervisory persons at the office" and that he had "never seen anyone at the office conduct interviews for clients." He opined that the entities were PSCs, not PEOs. He stated that "[a]ll payments are made with client funds as the payroll services entities bill client companies for the amount of the paycheck and the taxes and receive reimbursement from the client companies for the paychecks, taxes, plus a service fee for each check issued." Vitalba Ahee stated that she worked for the three entities and that her duties involved "inputting hour and salary reports from client companies, processing the payroll, and issuing paychecks to the client companies' employees." She stated that "[w]e also process insurance and 401K for client companies' employees." Ahee indicated that "[t]he client companies take care of their own employees by hiring, training, and firing them." She stated, "Neither I nor any other employee of the three payroll services entities has ever interviewed persons for employment at any of our client companies," and "[n]one of the payroll services entities hire, train, evaluate, or fire any of persons [sic] working at my clients' job sites." Elizabeth Dimkoski averred that she, too, worked for the three entities and that she had "never seen or heard of any direct hire of employees by these entities, other than the employees in my office." She stated that "[t]he payroll services

companies handle payroll and unemployment claims and do not direct the work of our client's employees." Two other employees provided similar information. Manzo averred that "[d]uring the . . . audit, I was advised by my accountant, Marcel Thirman, that the client service agreements should be revised because my companies do not lease employees but are the employers only for the purpose of payroll servicing."[2]

Petitioners clearly provided evidence that they operate as PSCs, not PEOs, and that the terms of the CSAs did not represent the true nature of the relationship between petitioners and their clients. Respondent claims that this evidence is irrelevant because of the parol-evidence rule, which dictates that extrinsic evidence cannot be used to change or contradict an integrated, complete agreement. See *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 409-410; 285 NW2d 770 (1979). However, petitioners cite *Denha v Jacobs*, 179 Mich App 545, 550; 446 NW2d 303 (1989), in which the Court stated, "We agree with the majority of courts which hold that the parol evidence rule cannot be invoked either by or against a stranger to the contract." Respondent has provided no controlling authority for concluding that this holding does not apply in the present situation.[3] As such, we find that the Tribunal erred as a matter of law in focusing solely on the CSAs and rejecting any other, extrinsic evidence in determining whether petitioners were PEOs. In other words, extrinsic evidence may indeed demonstrate that the agreements between petitioners and their clients were, in fact and in substance, different from those suggested by the language employed in the CSAs and advocated by respondent. We thus reverse the decision of the Tribunal in the main appeal and remand for further proceedings.

On cross-appeal, respondent argues that the Tribunal erred in rejecting respondent's assessment of a ten-percent "negligence penalty" against Industrial under MCL 205.23(3). We acknowledge that, depending on the Tribunal's resolution of the main issue, this issue may be rendered moot. However, we will address the issue regardless, in case the Tribunal upholds the main assessment. MCL 205.23(3) states, in part:

> if any part of the deficiency or an 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 in the tax, whichever is greater, plus interest . . . shall be added.

The Tribunal found that Industrial exercised due care in determining its tax liability because it "reasonably believed" that it did not "manage" the human resources for the trucking companies.

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[2] We note that petitioners consist of a very small number of individuals. By contrast, the trucking companies have hundreds of workers; the audit reports show that they perform tens of millions of dollars' worth of business in most years.

[3] It is true that in *Mid America*, 153 Mich App at 458-460, the Court analyzed the parol-evidence rule in relation to a contract in a tax case. However, and significantly, the *Mid America* decision preceded *Denha*. We also note that while the CSAs contained integration clauses, it is difficult to interpret the CSAs as "complete" documents covering the subject matter when, as noted by petitioners, they contained no specific provisions regarding wages, overtime, work hours, etc.; the CSAs explicitly left these types of matters to the clients.

Accordingly, the Tribunal refused to allow imposition of the negligence penalty. Respondent again relies on the CSAs in arguing that Industrial was negligent. However, as discussed above, the CSAs in themselves were not dispositive, and, in light of the affidavits filed, the Tribunal correctly concluded that Industrial did not, as a matter of law, act negligently in reporting its taxes because it had a reasonable basis for concluding that it was not a PEO. Respondent additionally argues that the Tribunal erred in vacating the assessed penalty because Industrial did not adequately raise the issue in its petition. We disagree. Although Industrial, in the petition, did not go into *detail* concerning the negligence penalty, it explicitly requested the Tribunal to cancel the "penalty . . . ." Industrial then went into detail about the penalty issue in its prehearing statement on August 9, 2011, and argued it extensively in its summary-disposition brief on September 9, 2011. Respondent has not cited sufficient authority indicating that this factual scenario prevented the Tribunal from ruling upon the penalty issue. See, e.g., MCL 205.732(c) (Tribunal may "grant[] other relief or issu[e] writs, orders, or directives that it deems necessary or appropriate in the process of disposition of a matter over which it may acquire jurisdiction").

Respondent next argues on cross-appeal that the Tribunal erred in vacating a "fraud penalty" imposed by respondent on Enterprises. We again acknowledge that this issue could become moot on remand, but we address it in case the assessment in the main appeal is upheld. MCL 205.23(5) states:

> If any part of the deficiency or an excessive claim for credit is due to fraudulent intent to evade a tax, or to obtain a refund for a fraudulent claim, a penalty of 100% of the deficiency, plus interest as provided in subsection (2), shall be added. The penalty becomes due and payable after notice and informal conference as provided in this act.

Respondent assessed this penalty below, arguing that, in the course of its audit, Enterprises submitted a CSA that was signed by Enterprises but not by its client Rush Trucking, and that omitted key provisions allegedly indicating that Enterprises was a PEO. Respondent thereafter obtained a signed CSA from Rush Trucking containing the material provisions. Respondent contended that the unsigned CSA evidenced fraud. The Tribunal stated:

> The Tribunal further finds that a waiver of the fraud penalty imposed by Respondent on Petitioner is warranted. Here, Petitioner reasonably believed that because it did not "manage" human resources for Rush Trucking, it was not a PEO under the statute. Further, the testimony of Mr. Manzo regarding the contracts provided to Respondent's auditor establishes that Petitioner was in the process of revising all client service agreements to delete language suggesting that Petitioner was something more than a payroll processor and inadvertently provided Respondent's auditor with one of the "revised" agreements. The Tribunal finds that Petitioner did not "knowingly and willfully act in a matter to commit fraud". . . .

Unambiguous statutes are to be enforced as written. *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 246-247; 801 NW2d 629 (2010). As noted, MCL 205.23(5) states that a fraud penalty shall be added "[i]f any part of the deficiency or an excessive claim for credit is due to fraudulent intent to evade a tax . . . ." The alleged "deficiency" in this case arose before the audit

and before the submission of the CSA that respondent claims was fraudulent. Accordingly, the statute was simply not applicable. Even if it had been, we find no basis upon which to disturb the Tribunal's findings. See, generally, *Mid America*, 153 Mich App at 460 (discussing the standard of review).

Respondent also argues that Enterprises failed to raise the fraud issue adequately. However, the Enterprises petition asked the Tribunal to award "such other or further relief as this Tribunal deems just and appropriate," and Enterprises discussed the fraud issue extensively in its summary-disposition brief. Under the circumstances, we find no basis upon which to disturb the Tribunal's decision to address the fraud issue. See, e.g., MCL 205.732(c).

Respondent next argues that the Tribunal erred in granting attorney fees and costs to Enterprises in connection with an earlier summary-disposition ruling concerning jurisdiction. Below, Enterprises argued that it received a final audit determination letter on April 9, 2009, indicating that a Notice of Intent to Assess would be forthcoming and that this Notice of Intent would explain how to request an informal conference. However, it turns out that the Notice of Intent to Assess had actually been sent weeks before, to a by-then-defunct Nevada address that had not been used in any dealings with respondent except for one time in August 2008, when it was listed as a "legal address" along with an accompanying "mailing address" in Michigan. Respondent also sent the Final Assessment to the Nevada address. Respondent denied the request for an informal conference because the request was made beyond 60 days after the alleged receipt of the Notice of Intent to Assess. In its petition, Enterprises stated, in part, that respondent erred in failing to send the Notice of Intent to Assess to Enterprises at its last known address and failing to provide Enterprises' designated representative with the Notice of Intent to Assess. Enterprises asked the Tribunal, among other things, to order respondent to cease collection activities.

Respondent filed a motion for summary disposition, arguing that the Tribunal lacked subject-matter jurisdiction over the appeal because it was not filed within the requisite 35-day period and arguing that the Tribunal lacked authority to grant the requested relief. Enterprises also filed a motion for summary disposition, arguing that the Tribunal did have subject-matter jurisdiction because Enterprises never received proper notice of the final assessment. The Tribunal ruled that "Petitioner's appeal is properly pending before this Tribunal as Respondent failed to properly issue and send Petitioner the Notice of Intent to Assess and Final Assessment." The Tribunal found that respondent was aware, by virtue of various correspondence and documents, of Enterprises' last-known mailing address and knew that Enterprises had a representative, yet failed to send proper notice. See MCL 205.8 and 205.28(1)(a). The Tribunal's findings were extensive and very detailed and based on adequate evidence, and we find no basis upon which to disturb them. *Mid America*, 153 Mich App at 460. The Tribunal found that, given the factual situation, it would use its equitable powers to take jurisdiction and evaluate the contested assessment. It stated that "Petitioner was stripped of its ability to timely file its appeal with the Tribunal due to Respondent's negligence in improperly sending the Notice of Intent to Assess and Final Assessment to Petitioner."

The Tribunal concluded that it would award costs and attorney fees to Enterprises. The Tribunal looked in part to MCL 600.2591(1), which states:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

The Tribunal also looked to MCR 2.114, which allows for attorney fees if a frivolous document is signed. The Tribunal found that respondent's legal position was frivolous because respondent had relied on an old, undeliverable address and respondent "should have known that the Shelby Twp [Michigan] address was the appropriate address for Petitioner and Respondent should have provided a copy of the Final Assessment to Petitioner's representative as well." The Tribunal stated, "Respondent simply had no reasonable legal basis upon which to file its Motion for Summary Disposition."

Respondent contends that the Tribunal erred in awarding attorney fees because Enterprises was not the "prevailing party." Respondent cites MCL 600.2591(3)(b), which states that "'[p]revailing party' means a party who wins on the entire record." Respondent contends that Enterprises won the argument about jurisdiction but did not win its argument pertaining to the tax assessment. However, even if it could be argued that the summary-disposition actions pertaining to jurisdiction should not be considered a distinct proceeding for purposes of determining the "prevailing party" under MCL 600.2591, the Tribunal simply did not base its decision exclusively on MCL 600.2591. Indeed, the Tribunal discussed MCR 2.114 extensively in reaching its conclusions. This court rule makes no reference to a party who prevails "on the entire record." Respondent's argument, therefore, is without merit.[4]

Respondent lastly argues that the Tribunal erred in granting $15,803.75 in attorney fees and $430.40 in costs in connection with the jurisdictional motion, without first holding an evidentiary hearing. Quoting *Smith v Khouri*, 481 Mich 519, 532; 751 NW2d 472 (2008), respondent argues that "'[i]f a dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence.'" However, respondent's "dispute" consisted of the following arguments:

> 1. Petitioner has failed to provide sufficient evidence that the time expended by counsel in this matter is reasonable.
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> 2. Petitioner spends ample time describing the experience, reputation and ability of the lawyers who performed the services involved in this matter. The

[4] We reiterate that we find no basis upon which to disturb the Tribunal's findings concerning respondent's knowledge or imputed knowledge about the address and the representative, and we also find no basis upon which to disturb the Tribunal's finding of frivolity. It based its decision on adequate documentation. *Mid America*, 153 Mich App at 460.

> vast experience and ability of the lawyers involved seems to indicate that the time expended in this matter was excessive. Given Mr. Van Coevering's 20 years of experience litigating state and local tax matters before the Michigan Tax Tribunal and the fact that the subject matter jurisdiction of the Tribunal is not a new or novel area of law, 39 hours is not reasonable. The reasonableness of the hours expended seems especially suspect when Mr. Van Coevering has had 20 years to develop "canned" briefs or brief segments on an issue that is not new or novel.

The Tribunal concluded that Enterprises had adequately established that the claimed rates and hours were reasonable under applicable standards. It further stated, "Although Respondent alleges the 39.55 hours attributable to Mr. Van Coevering is unreasonable, Respondent fails to make any specific indications that a factual dispute exists over the reasonableness of the hours billed by Mr. Van Coevering." We agree with this conclusion by the Tribunal. Respondent's conclusory, nonspecific statements were insufficient to rise to the level of a dispute necessitating an evidentiary hearing.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ /Michael J. Riordan