STATE OF MICHIGAN

COURT OF APPEALS

AMER-CAN SHOP, INC., and THOMAS SALAMEY

Petitioners-Appellants,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.

UNPUBLISHED
January 17, 1997

No. 186472
LC No. 221440

Before: Gribbs, P.J., and Saad and J.P. Adair,* JJ.

PER CURIAM.

Petitioners appeal as of right from a May 18, 1995, order of the Michigan Tax Tribunal which granted respondent's motion for summary disposition. Petitioners were before the Tax Tribunal to appeal a jeopardy assessment issued by respondent. The tribunal granted summary disposition on grounds that the tribunal lacked jurisdiction to hear petitioners' claim because they filed their petition more than thirty-five days after the jeopardy assessment was issued. We affirm.

On December 1, 1994, respondent's agents executed search warrants and seized from petitioners' business and home certain records, business equipment, a red 1994 cargo van, approximately 1,124 cartons of cigarettes, a safe, and approximately $231,000 in cash.[1] On December 5, 1994, respondent issued to petitioners a jeopardy tax assessment. That assessment notified petitioners that the commissioner found that they were liable for taxes and a penalty due under a "cigarette" tax." The jeopardy assessment demanded an immediate filing of returns for payment of the tax and penalty. On February 1, 1995, petitioners mailed respondent a Michigan Tobacco Products Tax Return and other documents. In that return, petitioners claimed they owed no taxes. On February 9, 1995, respondent returned petitioners' documents without acting on them.

On March 3, 1995, petitioners filed a petition with the Michigan Tax tribunal in which they requested that the tribunal order respondent to cancel any imposition of tax and/or penalty imposed on

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* Circuit judge, sitting on the Court of Appeals by assignment.

petitioners. On May 18, 1995, the tribunal granted respondent's motion for summary disposition, ruling that it lacked jurisdiction to hear the petition because it was filed more than thirty-five days after the jeopardy assessment was issued. This appeal followed.

Our review of Tax Tribunal decisions, absent fraud, is limited to whether the tribunal made an error of law or adopted a wrong principle. We accept the factual findings of the tribunal as final, provided they are supported by competent, material, and substantial evidence. *Dow Chemical Co v Treasury Dep't*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990).

The Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*.; MSA 7.411(31) *et seq*., provides for a tax upon the sale and distribution of tobacco products and prescribes penalties and remedies for the violation of the act. Those penalties and remedies include criminal sanctions, MCL 205.428(2); MSA 7.411(38)(2), forfeiture of any tobacco product possessed in violation of the act, MCL 205.429; MSA 7.411(39), and a tax and penalty, MCL 205.428(1); MSA 7.411(38)(1). With respect to the tax and penalty, the act provides that a non-licensed person who possesses a tobacco product contrary to the act "shall be personally liable for the tax imposed by the act, plus a penalty of 100% of the amount of tax due under this act." MCL 205.428(1); MSA 7.411(38)(1).

The TPTA also provides that "the tax imposed by this act shall be administered by the revenue commissioner pursuant to [MCL] 205.1 to 205.31 [;MSA 7.657(1) to 7.657(31)]." MCL 205.433(1); MSA 7.411(43). One method for doing so is to issue a "jeopardy assessment" under MCL 205.26; MSA 7.657(26) (section 26). That procedure is available if the revenue commissioner finds that a person liable for a tax "intends quickly to depart from the state or to remove property from this state . . . or to do any other act tending to render wholly or partly ineffectual proceedings to collect the tax." In that situation, the commissioner "shall give notice of the findings to the person, together with a demand for an immediate return and immediate payment of the tax." At that point, the tax becomes "immediately due and payable." MCL 205.26; MSA 7.657(26). This procedure enables the Department of Treasury to simultaneously demand that taxes be paid and seize taxpayer's property to satisfy that demand. See *Craig v Detroit Police Dep't*, 397 Mich 185, 189; 243 NW2d 536 (1976). It is this procedure which respondent followed in issuing the December 5, 1995, assessment.

A taxpayer aggrieved by an assessment has a right to appeal under MCL 205.22; MSA 7.657(22) (section 22). Under subsection (1) of section 22, "[a] taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment . . . to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision or order." However, "[t]he assessment, decision, or order of the department, if not appealed in accordance with this section, is final and not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack." MCL 205.22(4); MSA 7.657(22)(4).

On appeal, petitioners argue that the thirty-five day time limit started to run on February 9, 1995, the day respondent returned petitioners' February 1, 1995, tax return. We disagree. Under section 26, "the tax shall become immediately due and payable" when the commissioner "give[s] notice of the findings to the person, together with a demand for an immediate return and immediate payment of

the tax." Furthermore, under section 26, there are no provisions for further proceedings or decisions once the assessment is made; a person aggrieved by the assessment must turn to the appellate procedures of section 22 for relief. Under subsection (1) of section 22, the thirty-five day time limit starts to run from the date of the respondent's "assessment, decision, or order." Thus, in this case, the "assessment, decision, or order" for purposes of section 22 can only be respondent's "notice of findings" and "demand for an immediate return and immediate payment of the tax," i.e., the jeopardy assessment. If so, the thirty-five-day time limit began to run on December 5, 1994, the date respondent issued the assessment.

Petitioners also argue that the jeopardy assessment itself was deficient because it listed "cigarette tax" as the type of tax being enforced, instead of the TPTA. We disagree. The tax imposed by the TPTA can fairly be described as a type of "cigarette tax." Therefore, petitioners were sufficiently apprised of the provisions under which the tax was enforced.

Next, petitioners argue that they were denied an opportunity to challenge jeopardy assessment because the statute "fails to provide for any prompt post-seizure hearing to determine whether the [assessment] has any basis in fact." We disagree. Providing an opportunity to challenge a jeopardy assessment is precisely the function of the section 22 appellate procedures. Moreover, we have recognized that the provisions of the revenue act provide a taxpayer with an adequate remedy to challenge a jeopardy assessment. See *Hawkins v State Treasurer*, 200 Mich App 453, 455; 505 NW2d 10 (1993). Therefore, petitioners are not entitled to relief on this basis.

Petitioners also argue that the tax tribunal should have addressed the merits of their petition because they "followed a reasonable procedure designed to notify the department promptly of the dispute over the amount due and the desire to pursue the issue in the tax tribunal." This is essentially an argument that the tribunal has equitable power to hear a delayed petition and should have exercised that power in this case. We disagree. The tribunal has no such power, nor does this Court have authority to order the tribunal to consider an untimely petition on equitable grounds. *Curis Big Boy v Treasury Dep't*, 206 Mich App 139, 142-143; 520 NW2d 369 (1994).

Finally, petitioners present another argument that the jeopardy assessment was deficient. Specifically, petitioners note that the assessment indicated that they had thirty days, instead of thirty-five days, in which to appeal pursuant to section 22; that the assessment listed the appeals information on the back of the form instead of on the front; and that the assessment was misleading regarding the nature of the tax involved. Thus, petitioners conclude, the assessment was insufficient to apprise them of their opportunity to be heard. We disagree.

Petitioners are correct that a tax assessment which does not apprise the taxpayer of the decision and afford him an opportunity to be heard is unenforceable on due process grounds. *Bickler v Treasury Dep't*, 180 Mich App 205, 211; 446 NW2d 644 (1989). However, we have examined the assessment issued in this case and conclude that it informed petitioners of the decision in a manner reasonably calculated to apprise them of the decision and to afford them an opportunity to be heard. Therefore, petitioners are not entitled to relief on this basis.

Affirmed.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ James P. Adair

[1] Petitioners have also challenged the legality of this seizure in another action. See *Global Imports, Inc v Michigan Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 183497).