STATE OF MICHIGAN

COURT OF APPEALS

WAKEFIELD LEASING CORP., PORT CITY AUDIO & VIDEO, INC., PORT CITY CAB COMPANY, and THOMAS L. WAKEFIELD, Petitioners-Appellants,	UNPUBLISHED August 12, 2004
v	No. 245554 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee.	LC Nos. 00-262357 00-262358

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Petitioners appeal by right the Tax Tribunal's judgment granting respondent's motion for summary disposition, denying petitioners' motion for summary disposition, affirming two tax assessments against petitioners along with interest and penalties, and denying petitioners' requests for additional refunds. We affirm in part, reverse in part, and remand for further proceedings.

I. Facts

The assessments at issue in this appeal concern petitioner Wakefield individually, his corporations, Wakefield Leasing Corporation, and apparently the latter's successor corporation, Port City Cab Company.[1] Assessment No. I014431 covers the period February 1, 1991, through April 30, 1994, and Assessment No. I014440 covers the period May 1, 1994, through March 31, 1995. In both cases, petitioners submitted claims for gasoline tax refunds, respondent paid the claims, then respondent determined that they were improperly paid and demanded repayment of the taxes. Petitioners also submitted claims for such refunds covering the period April 1, 1995, through July 31, 1997, at an informal conference on October 30, 1997.

[1] Petitioner Port City Audio & Video, Inc., appears to have no involvement with the cab leasing business, and thus with this case as it comes to this Court. For convenience, in this opinion the term "petitioners" will refer collectively to Thomas Wakefield and his cab leasing corporations.

The facts underlying this case are not in dispute. Petitioners owned motor vehicles to be used as taxicabs, which they leased to drivers, whom they were careful to classify as independent contractors. The drivers paid petitioners flat rates per shift and mile, with no guaranteed income for themselves. Petitioners, however, had no claim on the fees the drivers collected from their customers. Additionally, the agreements between petitioners and their drivers provided that the drivers furnish all the gasoline they used.

Petitioners used a written lease until 1995, then put the same terms into effect through oral agreements. Petitioners obtained no written assignment of rights to the statutory refunds available for the taxes paid to operate the taxicabs, but nonetheless submitted such claims on behalf of the drivers. Petitioners returned sixty percent of the refunds received to the drivers and retained the remainder. Petitioners maintained that this arrangement followed from an oral agreement with the drivers at all times.

Respondent audited petitioners and concluded that they were neither purchasers of gasoline nor operators of taxicabs for purposes of eligibility for the tax refunds. To recover refunds thus improperly paid, respondent assessed petitioners $121,355 for the period February 1991 through April 1994 (Assessment No. I013321), and $20,121 for May 1994 through March 1995 (Assessment No. I014440).

A referee opined that according to two Tax Tribunal cases, petitioners should be considered purchasers of gasoline and operators of cabs, but still recommended against canceling the assessments because no adequate records to substantiate the refund claims were made available to auditors. The referee recommended against the imposition of penalties, however. The Commissioner of Revenue authorized the assessments, interest, and penalties.

II. "Purchaser"

Petitioners argue that one need not be a purchaser of gasoline to be eligible for the tax refunds in question, and, alternatively, that they were in fact purchasers for purposes of the refund. We disagree with both positions.

In reviewing a decision of the Tax Tribunal where fraud is not alleged, this Court "is limited to the question whether the tribunal committed an error of law or adopted a wrong principle." *William Mueller & Sons, Inc v Dep't of Treasury*, 189 Mich App 570, 572; 473 NW2d 783 (1991). This Court reviews a tribunal's decision on a motion for summary disposition de novo as a question of law. See *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Statutory interpretation likewise warrants review de novo. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

The statutory scheme at issue has been repealed, 2000 PA 403, § 169, and substantially recast, see MCL 207.1041. At the time in question, MCL 207.112 governed this issue. Subsection 2 of that statute provided, in pertinent part:

> The purchaser of gasoline used for a purpose other than the operation of a motor vehicle on the public roads, streets, and highways of this state, *a person operating a passenger vehicle of a capacity of 5 or more under a municipal franchise, license, permit, agreement, or grant, respectively*, a person operating a

> passenger vehicle for the transportation of school students under a certificate of authority issued by the state transportation department . . . , and community action agencies . . . , which are not a part or division of a political subdivision of this state shall be entitled to a *refund* of the tax on the gasoline. . . . [Emphases added.]

The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Haworth, supra* at 227. "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v General Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995).

"Tax exemptions are the antithesis of tax equality." *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 31; 558 NW2d 444 (1996). Accordingly, the general rule is that "tax exemptions are strictly construed in favor of the taxing authority." *Id.*

Petitioners ably point out that the subsection in question describes four classes of persons who are entitled to the refund, but that only the first of the four includes the description "purchaser." If read alone, the part that describes cab operators, refers only to "a person" who is "operating" an automobile "under a municipal franchise, license, permit, agreement, or grant."

But, at issue is the entitlement to a "refund" of gasoline taxes paid. If the failure to reiterate the word "purchaser" after the first provision otherwise left that requirement in doubt for the three that followed, use of the word "refund" in connection with all four indicates that the tax benefit described is available only to purchasers. A refund is not just a payment; it is a "repayment of funds," or "amount repaid." *American Heritage Dictionary* (2d college ed, 1985), p 1040. The word derives from a middle English term meaning "pour back." *Id.* The verb form of the word means "[t]o return or give back." *Id.* Because the statute provides for *refunds* of gasoline taxes paid, it is inherent that this benefit is available only to purchasers (or their agents or assigns).

Comporting with this analysis is that 1999 AC, R 207.11(1) announces that "[t]he following purchasers of gasoline are entitled to a refund of the state gasoline tax paid," subsection (1)(c) in turn indicating "[p]ersons operating passenger vehicles . . . under a municipal franchise, license, permit, or agreement."

For these reasons, the Tax Tribunal correctly concluded that the refunds in question were available only to purchasers.

Petitioners' argument that they should be considered purchasers for present purposes is a strained one.

The agreements between petitioners and their drivers who leased their cabs provided that the drivers furnish all their own gasoline. In arguing this issue, petitioners admit that they "did not physically pay the gas station attendant for each gallon of gas pumped into each taxicab." Instead, they suggest they are de facto purchasers because they bore that expense as a function of what they charged their lessees for the use of their cabs. Petitioners elaborate that the mileage

rate they charged would have been greater if petitioners had advanced the money for the gasoline used. This argument is artful, but without merit.

Petitioners and their contractors were free to structure their business arrangements in any number of ways. A result of petitioners' having insulated themselves from making any gasoline transactions on their contractors' behalf is that they themselves never attained the status of gasoline purchasers for purposes of claiming the tax refunds.

Petitioners' attempt to portray themselves as purchasers because the price of the gasoline involved ultimately factored into the financial arrangements with their contractors is only the same as observing that compensation arrangements often reflect some balance between monetary payments and other benefits provided. By this circular reasoning, anyone who in some direct or indirect way experiences, or otherwise takes into account, an expense borne by another becomes a purchaser in connection with that expense. Interpreting the term "purchaser" so broadly would not comport with our duty to construe tax exemptions strictly in favor of the taxing authority. *Canterbury Health Care, supra.*

For these reasons, the Tax Tribunal correctly concluded that petitioners were not purchasers of the gasoline for which they claimed tax refunds.

Because we conclude that petitioners did not qualify as purchasers of gasoline for purposes of the refunds at issue, we need not reach the questions whether they qualified as "operators" for that purpose, whether the Tax Tribunal should have excused petitioners' delay in submitting certain refund claims, or whether the doctrine of unjust enrichment bears on these questions.[2]

III. Penalties

Petitioners argue that the Tax Tribunal erred in including interest and penalties in the assessments. We conclude that interest was proper, but that penalties were not.

The assessments in dispute date from July 1998, and included ten percent interest penalties for negligence, plus fifty percent penalties for failure to file returns or pay taxes. In affirming those assessments, the hearing referee recited that they included penalties, but otherwise did not disclose his reasoning. In a footnote in its brief on appeal, respondent flatly

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[2] Nor is it necessary to decide whether the Tax Tribunal is obliged to afford its earlier decisions deference under the principle of stare decisis. The tribunal treated the two cases upon which petitioners rely as binding authority and correctly distinguished them on their facts. See *Shamrock Cab Co v Dep't of Treasury*, 10 MTTR 142 (Docket No. 230820, September 5, 1997) (the cab company obtained written assignments of refund rights from its drivers, claimed the refunds on their behalf, and paid the entire refund amounts to the drivers); *Spartan Cab Co v Dep't of Treasury*, 10 MTTR 147 (Docket No. 237500, September 11, 1997) (the cab company variously sold gasoline directly to its drivers, did so through a company account maintained with a selected vendor, or allowed the drivers to buy gasoline out of fares collected which would otherwise have been tendered to the company).

states that the penalty-waiver issue is moot "as the Department waived penalties in July and September of 1998." Respondent provides no record citation for this assertion, however, and the documentation before this Court includes nothing to indicate a waiver was granted in 1998 or since. Accordingly, we will address this question with the assumption that the penalties have remained as part of the assessments.

The ten percent negligence penalty stems from MCL 205.23(3), which provides that "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 . . . shall be added." The fifty percent penalty stems from MCL 205.24(2), which provides that if a taxpayer "fails or refuses to file a return or pay a tax within the time specified," a five percent penalty accrues each month "to a maximum of 50%."

The hearing referee who first considered these issues recommended against imposition of these penalties on the grounds that petitioners were not negligent in filing for refunds on a mistaken understanding of the law, and that a penalty for failure to file or pay is inapplicable to a claim for a refund that was not in fact due. The referee's reasoning was sound.

Concerning the negligence penalty, it is clear that petitioners misapprehended the law by regarding themselves as eligible to claim the refunds, and by relying on alleged oral assignments of the drivers' refund rights instead of obtaining written authorizations. This may be culpable error, but it was not inadvertence or oversight, or, in other words, negligence.

Next, respondent never disputed that the taxes were initially paid, or that the necessary returns had not been filed. This case involves petitioner's erroneous receipt of tax refunds, not payments or filings withheld.

For these reasons, we hold that the two penalties were improperly imposed, so the judgment below must be corrected.

Petitioners additionally argue that they should not pay any accrued interest on the tax assessments; however, they do not set forth this issue in the statement of the questions presented. An issue that is not raised within the statement of questions in the brief on appeal is not properly presented for purposes of appellate review. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). Moreover, petitioners fail to show that they raised this issue below. This Court will not entertain challenges to interest awards when raised for the first time on appeal. See *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 293-294; 590 NW2d 612 (1998); *Montanez v Chrysler Corp*, 145 Mich App 551, 558; 378 NW2d 546 (1985). Petitioners' argument is without merit in any event.

Interest is not a penalty; it is part of the judgment: "Where the level of assessment is held in favor of the taxing authority, from that date forward, the money belongs to the taxing authority, and the taxpayer is justly held liable to make good the lost time-value of the money while judicial proceedings ran their course." *Xerox Corp v Oakland Co*, 191 Mich App 433, 441; 478 NW2d 702 (1991). Because we concluded above that the taxes assessed belong to respondent, we conclude here that interest on those amounts also belongs to respondent. Petitioners' assertion, presented without record citation, that an agent of respondent had earlier expressed approval of petitioners' methodology does not bear on the question.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell