

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHAEL P. HOLTZ,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

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UNPUBLISHED  
March 1, 2012

No. 301703  
Tax Tribunal  
LC No. 00-383259

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Petitioner appeals as of right from the September 2, 2010 order of the Michigan Tax Tribunal (“Tribunal”) dismissing his petition for lack of jurisdiction. For the reasons set forth in this opinion, we affirm.

Petitioner was president, CEO and Chairman of the Board of Arlington Hospitality, Inc. (“Arlington”), until he resigned in December 2002. By letter dated February 23, 2006, respondent informed petitioner that he was personally liable as a corporate officer for unpaid use taxes incurred by Arlington between January 1, 1995 and December 31, 2002. See MCL 205.27a. By reply letter dated March 1, 2006, petitioner informed respondent that he had resigned from his position on December 11, 2002, and that, to the best of his knowledge at the time he left the company, Arlington’s taxes were paid in full. Respondent replied, by letter dated March 10, 2006, that while petitioner was not liable for the 2003 use tax assessment, he was responsible for the 2002 use tax assessment. In a letter dated March 29, 2006, petitioner requested further information from respondent regarding the taxes in question. On April 5, 2006, respondent sent a reply letter to petitioner directing him to send his inquiry to a specific office. On April 14, 2006, respondent sent its “Intent to Assess” tax statement to petitioner via first-class mail. Then on May 18, 2006, respondent sent its “Final Bill for Taxes Due” (i.e., final assessment) to petitioner via certified. Each letter was sent to or from petitioner using petitioner’s home address in Barrington, Illinois. Respondent contends that it did not receive a reply to the Intent to Assess or the final assessment, and that it has no record that the final assessment was returned as undeliverable. Petitioner claims that he never received the final assessment and that he sent a reply letter to respondent’s Intent to Assess.

Respondent sent a letter, dated November 14, 2009, to petitioner’s Barrington address via first-class mail, advising that petitioner had not paid the taxes as declared in the final assessment

and that the debt had been referred to the Michigan Accounts Receivable Collection System for enforcement of the tax obligation. On December 30, 2009, 46 days after the November 14, 2009 letter, petitioner filed an appeal with the Tribunal denying liability for the taxes in question. On September 2, 2010, the Tribunal dismissed petitioner's appeal because it was not timely filed, stating in relevant part:

7. Pursuant to MCL 205.22(1) and MCL 205.735(a)(6), Petitioner was required to file his Petition within 35 days of issuance of the assessment. Petitioner received **actual** notice of the assessment, at the very latest, on November 14, 2009; Petitioner filed his Petition on December 30, 2009. Because the Petition was filed in excess of 35 days of actual notice of the assessment, dismissal of the appeal is appropriate. (Emphasis in original).

On appeal, petitioner first argues that the Tribunal erroneously dismissed his petition for lack of jurisdiction because respondent did not comply with the notice provisions of MCL 205.28(1)(a). "Whether the [Michigan Tax Tribunal] has jurisdiction is a question of law that we review de novo." *Kasberg v Ypsilanti Twp*, 287 Mich App 563, 566; 792 NW2d 1 (2010). "This Court's review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, material, and substantial evidence on the whole record." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008), quoting *JC Penney Co, Inc v Dep't of Treasury*, 171 Mich App 30, 37; 429 NW2d 631 (1988); see also Const 1963, art 6, § 28. "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision." *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994).

MCL 205.22 governs appeals from tax assessments. MCL 205.22(1) provides that "[a] taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days . . . ." An assessment that is not appealed in accordance with this provision is deemed final and is not subject to further challenge. MCL 205.22(4). MCL 205.22 is a jurisdictional statute, and failure to comply with the statutory period for filing an appeal divests the Tribunal of jurisdiction over the appeal. *Curis Big Boy, Inc v Dep't of Treasury*, 206 Mich App 139, 142-143; 520 NW2d 369 (1994); see also *Electronic Data Sys Corp v Twp of Flint*, 253 Mich App 538, 542-544; 656 NW2d 215 (2002). In order for the Tribunal to dismiss an appeal for lack of jurisdiction, however, the Treasury Department must have given the taxpayer notice of the assessment. MCL 205.28(1)(a). MCL 205.28(1)(a) provides that "[n]otice, if required, shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer."

Interpretation and application of a statute present questions of law that we review de novo. *Toaz*, 280 Mich App at 459. When the statutory language is clear and unambiguous, the language must be enforced as plainly written. *Id.* at 461. A court may only interpret or construct a statute when the language of the statute is ambiguous. *Michigan Dep't of Transportation v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008).

The Tribunal found that respondent complied with the notice provisions of MCL 205.28(1)(a) by sending the final assessment via certified mail to petitioner's home address in Barrington, Illinois. Respondent's certified mail log indicates that the final assessment was

mailed via certified mail on May 18, 2006,<sup>1</sup> to petitioner's home address. No evidence indicates that the final assessment was returned as undeliverable. Consequently, the record establishes that respondent provided notice of the final assessment to petitioner by certified mail addressed to petitioner's last known address. Thus, respondent complied with MCL 205.28(1)(a).

This Court was faced with a virtually identical factual situation in *PIC Maintenance, Inc v Dep't of Treasury*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 298358, issued June 16, 2011). In *PIC Maintenance*, this Court stated:

The statute that governs the manner in which respondent was required to provide notice regarding the collection of taxes is MCL 205.28. The statute provides in relevant part that notice "shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer." MCL 205.28(1)(a). The uncontroverted evidence demonstrates that respondent complied with the statute and sent the final assessments to petitioner by certified mail. Petitioner then had 35 days to appeal the assessed taxes to the Tax Tribunal pursuant to MCL 205.22 . . . . Even if we assume petitioner never received the final assessments, the Tax Tribunal did not err when it granted summary disposition to respondent. The statute does not require proof of delivery or actual receipt; it requires only personal service or service by certified mail addressed to the last known address of the taxpayer. MCL 205.28(1)(a). When a statute's language is clear and unambiguous we must apply the terms of the statute to the circumstances of the particular case . . . . In this case, the statutory language does not reference or imply that proof of receipt is necessary, and we will not read words into the plain language of the statute . . . . [*Id.*, slip op at 4 (internal citations omitted).]

Petitioner had 35 days from May 25, 2006, to appeal the final assessment. MCL 205.22(1). Petitioner's 35-day period ended June 29, 2006. Petitioner filed his untimely appeal on December 23, 2009. The Tribunal correctly dismissed the appeal for lack of jurisdiction. *PIC Maintenance*, slip op at 3-4.

Next, petitioner argues that the Tribunal erroneously found that the November 14, 2009, enforcement letter sent via first-class mail provided him with actual notice of the final assessment. Implicit in this finding is the proposition that actual notice excuses a failure to comply with MCL 205.28(1)(a). Petitioner first raised this issue before the Tribunal in his motion for reconsideration. This was insufficient to preserve the issue for appellate review.

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<sup>1</sup> The final assessment was issued and dated May 25, 2006, pursuant to respondent's policy to post-date final assessments by one week.

*Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 519; 773 NW2d 758 (2009). We therefore decline to address this issue on appeal.<sup>2</sup>

Finally, petitioner argues that respondent's notice was constitutionally defective. This issue was also decided by this Court in *PIC Maintenance*, slip op at 6, when we stated:

. . . we note that due process itself does not require proof of actual receipt; rather, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509, 751 NW2d 453 (2008). Sending notice by certified mail is reasonably calculated to apprise interested parties of the pendency of the action when the correspondence is not returned to the government as "unclaimed." *Id.* at 509-511. There is no contention that the final assessments were returned to respondent. "Due process does not require that a property owner receive actual notice before the government may take his property." *Id.* at 509. Thus, respondent properly provided petitioner with the notice due process requires. Therefore, petitioner was required to appeal the assessment within 35 days of respondent's notice. MCL 205.22(1). The Tax Tribunal did not err when it granted summary disposition in favor of respondent due to the fact that petitioner failed to timely appeal the assessment.

See also, *Dow v Michigan*, 396 Mich 192, 205-206; 240 NW2d 450 (1976), (holding that due process requires notice that is reasonably certain to inform the interested party of the proceedings and to afford that party an opportunity to be heard), and *Sidun*, 481 Mich at 509-510 (holding that due process does not require proof of actual notice). Petitioner's right to due process was not violated. *PIC Maintenance*, slip op at 6.

In conclusion, based on our recent ruling in *PIC Maintenance*, as cited herein, we hold that the Tribunal's finding that respondent complied with the notice provisions of MCL 205.28(1)(a) was supported by competent, material, and substantial evidence. We further hold that the Tribunal correctly dismissed petitioner's appeal for lack of jurisdiction pursuant to MCL 205.22, and that respondent's notice did not violate petitioner's right to due process.

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<sup>2</sup> Petitioner's argument is without merit in any event. Petitioner's opportunity to file an appeal expired on June 29, 2006. Therefore, whether petitioner received actual notice from the November 14, 2009, letter is irrelevant to our analysis.

Affirmed. Respondent, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra  
/s/ Mark J. Cavanagh  
/s/ Stephen L. Borrello