STATE OF MICHIGAN

COURT OF APPEALS

THUMB MOTORSPORTS, LLC, Petitioner-Appellant,	UNPUBLISHED November 17, 2016
v	No. 329121 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee.	LC No. 14-003375-TT

Before: BECKERING, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Petitioner Thumb Motorsports, LLC ("TMS") filed a petition in the Tax Tribunal, claiming that, due to miscalculation of sales tax, TMS was entitled to (1) credits for overpayment in the 2010 and 2011 tax years, (2) a re-determination of its sales tax liability for 2012, and (3) application of the 2010 and 2011 credits to its 2012 tax liability. The Tax Tribunal granted summary disposition to respondent Department of the Treasury ("the Department") under MCR 2.116(C)(7) based on its conclusion that this action was an impermissible collateral attack on 15 final assessments issued by the Department and not appealed within the appropriate statutory time frame by TMS. For the reasons explained in this opinion, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

TMS's business consists of the sale and service of motorsport vehicles, including motorcycles, all-terrain vehicles, and snowmobiles. Part of this business involves the sale of vehicle parts. Specifically, TMS sells parts over-the-counter directly to customers or, alternatively, incident to the maintenance and repair of vehicles, TMS installs replacement parts.

The present dispute centers on TMS's failure to file a return for sales and withholding taxes for 15 months between October of 2011 and December of 2012. The Department notified TMS of its failure to file returns, providing TMS with an opportunity to file the necessary documents. When TMS still failed to file its monthly returns, the Department sent TMS final assessments for each of these months, notifying TMS of the tax owing for each of the individual 15 months in question. TMS made no effort to appeal any of these final assessments.

Nevertheless, substantively, TMS now wishes to dispute its outstanding tax liability based on the contention that it had been improperly calculating sales tax for the 2010, 2011, and 2012 tax years. In particular, TMS asserts that the parts sold and installed incident to the repair and maintenance of vehicles are considered "service parts" that are exempt from sales tax. However, due to purported bookkeeping errors, TMS maintains that it had been erroneously including these service parts in its gross sales for purposes of the calculation of sales tax, leading to overpayment in 2010 and 2011 and overassessment of its sales tax for 2012. TMS contends that its 2012 tax liability should be reduced, that the overpayments for 2010 and 2011 should be carried forward as a credit and that, when the carryforward is applied to tax liability owing for 2012, TMS's total outstanding tax liability is only $2,043.58.

In April of 2014, TMS filed amended returns for 2010 and 2011. The Department accepted TMS's amended return for 2010 and agreed that TMS should receive a credit. However, the Department applied the resulting 2010 credit to TMS's 2014 tax liability. In addition, the Department denied the credit and carryforward request for 2011, stating that the "amount of payments claimed does not match the amount of payments received." In June of 2014, TMS sought to file an amended return for 2012 to reduce the amount of sales tax owing for 2012. Shortly thereafter, TMS filed the present action in the Tax Tribunal, claiming that it was entitled to credits for 2010 and 2011 as well as a reduction of tax liability for 2012 and application of any credits to its 2012 liability.

In the Tax Tribunal, the Department moved for summary disposition. According to the Department, TMS's tax liability for 2011 and 2012 became final and conclusive when TMS failed to timely appeal the final assessments as required by MCL 205.22. As a result, the Department argued that, pursuant to MCL 205.22(4), TMS could not directly or collaterally attack its tax liability for the 2011 and 2012 tax years, meaning that there was no existing overpayment for 2011 and TMS was not entitled to the recalculation of its 2012 liability. The Department conceded that the TMS properly received a credit for the 2010 tax year, but it maintained that the credit for any overpayment in 2010 was properly applied to TMS's 2014 tax liability and that any request to adjust TMS's 2012 tax liability constituted an impermissible collateral attack.

In opposition to the Department's motion for summary disposition, TMS asserted that MCL 205.22 did not preclude its claims and that its arguments regarding its tax liability for 2010, 2011, and 2012 were properly before the Tax Tribunal under MCL 205.30 and MCL 205.27a. The Tax Tribunal rejected TMS's arguments and agreed with the Department, concluding that MCL 205.22 prevented TMS from bringing claims relating to its 2011 and 2012 tax liability. The Tax Tribunal granted the Department summary disposition in full, dismissing the petition.[1] TMS now appeals as of right.

[1] TMS later moved for reconsideration, arguing for the first time that, although TMS had given its counsel power of attorney, its attorney had not received notice of the last five final assessments for tax year 2012 as required by MCL 205.8. The Tax Tribunal initially agreed and partially granted TMS's motion for reconsideration, stating that a question of fact remained

II. ANALYSIS

On appeal, TMS argues that, despite its failure to challenge the 15 final assessments issued by the Department, it may seek reassessment of its tax liability for the 2011 and 2012 years as well as the application of the 2010 and 2011 credits to any 2012 tax liability. First, TMS maintains that MCL 205.22(4) does not preclude TMS's claims because the phrase "collateral attack" as used MCL 205.22(4) should be likened to the judicial doctrine of "collateral estoppel," such that TMS may pursue its claims because they have not been previously decided by a court.

Second, in the alternative, TMS contends that an appeal pursuant to MCL 205.22 is just one avenue of obtaining relief from an incorrect assessment and that, even if relief pursuant to MCL 205.22 is foreclosed, TMS has four years to claim a refund under MCL 205.30 and MCL 205.27a(2). According to TMS, these tax laws should be construed in favor of the taxpayer and due process concerns weigh in favor of allowing a taxpayer to obtain a refund, even if a taxpayer has failed to abide by the strictures of MCL 205.22.

Third, TMS contends that 5 of the 15 final assessments (August to December of 2012) may be challenged because, contrary to MCL 205.8, these assessments were not sent to TMS's attorney. Finally, TMS argues that, regardless of whether its 2011 and 2012 taxes may be recalculated, TMS has the right to application of its 2010 refund to its 2012 tax liability.

A. STANDARD OF REVIEW

On appeal, review of the Tax Tribunal's decisions is limited. *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 112; 845 NW2d 81 (2014). "In the absence of fraud, we review a Tax Tribunal decision for a misapplication of the law or the adoption of a wrong principle." *Id.* "The Tax Tribunal's factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 19; 678 NW2d 619 (2004).

Questions of statutory interpretation are reviewed de novo. *Bukowski v Detroit*, 478 Mich 268, 273; 732 NW2d 75 (2007). "The overriding goal of statutory interpretation is the determination of legislative intent and the implementation of that intent once discerned." *Kelly Servs, Inc v Treasury Dep't*, 296 Mich App 306, 311; 818 NW2d 482 (2012). "In order to accomplish this goal, this Court interprets every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage." *Bukowski*, 478 Mich at 273-274. "Further, courts should construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Mason v Menominee*, 282 Mich App 525, 528; 766 NW2d 888 (2009). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Ford Motor Co v Treasury Dep't*, 496 Mich 382, 389; 852 NW2d 786 (2014).

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regarding these last five final assessments. However, following a motion from the Department, the tribunal later reinstated its decision to grant summary disposition in full.

B. OCTOBER 2011 THROUGH JULY 2012

Insofar as TMS's efforts to obtain a redetermination of its sales tax liability rest on the assertion that its sales tax was improperly calculated during the months of October 2011 through July 2012 due to inclusion of "service parts" in TMS's gross sales, any such argument constitutes a collateral attack on final assessments which is foreclosed by MCL 205.22(4) and (5).

In particular, generally, sales tax reporting is to be done monthly. See MCL 205.56(1). If a taxpayer fails to file a return or make payment in the required time frame, the Department may obtain any necessary information and issue an assessment, notifying the taxpayer of the amount of the tax. MCL 205.21(1); MCL 205.24(1). A taxpayer aggrieved by an assessment may appeal the Department's decision in accordance with MCL 205.22, which states in relevant part:

> (1) 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 60 days, or to the court of claims within 90 days after the assessment, decision, or order. The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal. . . .
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> (4) The assessment, decision, or order of the department, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.
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> (5) An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order of the department, and a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the aggrieved person has appealed the assessment in the manner provided by this section.

The language of MCL 205.22(4) and (5) is clear and unambiguous. Quite simply, a taxpayer may appeal an assessment, but the taxpayer must do so in the time period required by MCL 205.22. If a taxpayer fails to appeal an assessment with the required time period, the assessment becomes final and conclusive as to that specific assessment. See *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 691; 741 NW2d 579 (2007). After expiration of the time for an appeal, review of the assessment is then foreclosed "by any court by mandamus, appeal, or other method of direct or collateral[2] attack," MCL 205.22(4), and the taxpayer may not receive a refund of any tax paid pursuant to the assessment, MCL 205.22(5).

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[2] In this context, "collateral" simply means "indirect," *Merriam-Webster's Collegiate Dictionary* (11th ed), as in "[a]n attack on a judgment in a proceeding other than a direct appeal," *Black's Law Dictionary* (10th ed). See also *In re Hatcher*, 443 Mich 426, 439; 505 NW2d 834 (1993). In contrast, "collateral estoppel" is a judicial doctrine with a peculiar meaning in the law. See

It follows that, in the present case, because TMS did not appeal its assessments, the final assessments sent to TMS for October 2011 through July 2012 are final and conclusive. Thus, the amounts reported in the assessments are conclusively established, and TMS may not seek to have its tax liability reduced for the 2011 and 2012 tax years based on the contention that it had been erroneously reporting service parts in its gross sales from October 2011 to July 2012.[3] In other words, those final assessments are not subject to an indirect attack by TMS through the filing of amended returns that seek to alter the amount due as stated in those assessments. The Tax Tribunal did not err by concluding MCL 205.22 foreclosed TMS's arguments in this regard.

Further, the Tax Tribunal correctly concluded that TMS's efforts to circumvent MCL 205.22 by reliance on MCL 205.30 and MCL 205.27a are without merit. Under MCL 205.30,

> (1) The department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest . . . .
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> (2) A taxpayer who paid a tax that the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified as the statute of limitations [MCL 205.27a] . . . .

Under MCL 205.27a(2), "[t]he taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set for the filing of the original return."

While these provisions set forth a general time frame and the process by which a taxpayer may obtain a refund, they do not purport to address the question of whether a refund is available when an assessment has become final and conclusive because a taxpayer failed to challenge the assessment in the time period set forth in MCL 205.22. That specific question is unequivocally addressed in MCL 205.22(5), which, as noted, states: "An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment . . . and *a person is not entitled to a refund of any tax . . . paid pursuant to an assessment unless the aggrieved person has appealed the assessment in the manner provided by this section*" (emphasis added). Accordingly, MCL 205.22(5), being the more specific rule, controls whether a refund is available to a taxpayer who fails to challenge an assessment as required under MCL 205.22, and the general four-year time period for requesting a refund as set forth in MCL 205.30

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generally *Monat v State Farm Ins Co*, 469 Mich 679, 692; 677 NW2d 843 (2004). TMS's efforts to conflate "collateral estoppel" and "collateral attack" are wholly unpersuasive and ultimately unhelpful to its position considering that MCL 205.22(4) also prohibits "direct" attacks.

[3] To the extent TMS asserts on appeal that "service parts" are exempt from sales tax, we do not reach this substantive question and we offer no opinion on whether the so-called "service parts" in question must be included for purposes of calculating sales tax. See generally *Catalina Mktg Sales Corp*, 470 Mich at 24 (describing "incidental to service" test applicable to a business that involves both the provision of services and the transfer of tangible personal property).

and MCL 205.27a(2) does not allow collateral attacks of final assessments.[4] See generally *Detroit Pub Sch v Conn*, 308 Mich App 234, 251; 863 NW2d 373 (2014). Indeed, to read the refund mechanisms in MCL 205.30 and MCL 205.27a as an end-run around the requirements for appealing an assessment under MCL 205.22 would be to impermissibly render MCL 205.22 nugatory or, in other words, as the Tax Tribunal aptly recognized, to construe these provisions "as a second avenue to challenge an assessment is to ignore the prohibition against collateral attack" set forth in MCL 205.22. Instead, construing the provisions harmoniously, we apply MCL 205.22 as written, and we hold that the Tax Tribunal did not err by determining that the final assessments for October 2011 through July 2012 were not subject to collateral attack in the course of TMS's request for a refund.

C. AUGUST 2012 THROUGH DECEMBER 2012

TMS failed to timely challenge the August 2012 through December 2012 final assessments and thus, for the same reasons that TMS may not collaterally attack the October 2011 through July 2012 final assessments, TMS is also precluded from collaterally attacking the August 2012 through December 2012 final assessments. See MCL 205.22(4), (5).

However, we briefly address these assessments separately in light of TMS's contention that it should be allowed to challenge the last five final assessments for 2012 because those assessments were issued after it executed an Authorized Representative Declaration, giving TMS's attorney, Wayne Smith, a power of attorney to deal with the Department on tax matters, and yet Smith never received those final assessments.[5] This argument implicates MCL 205.8, which states:

> If a taxpayer files with the department a written request that copies of letters and notices regarding a dispute with that taxpayer be sent to the taxpayer's official representative, the department shall send the official representative, at the address designated by the taxpayer in the written request, a copy of each letter or notice

[4] Given that there is no ambiguity in these provisions, there is also no reason to attempt to construe these provisions in favor of the taxpayer. See *Auto-Owners Ins Co v Dep't of Treasury*, 313 Mich App 56, 69; 880 NW2d 337 (2015). Contrary to TMS's arguments, there is also nothing violative of due process in the requirements or time periods imposed for appealing an assessment. Cf. *Electronic Data Sys Corp v Twp of Flint*, 253 Mich App 538, 550; 656 NW2d 215 (2002); *Am States Ins Co v State Dep't of Treasury*, 220 Mich App 586, 591; 560 NW2d 644 (1996).

[5] The Department argues on appeal that these five assessments are simply not at issue in this case because TMS's petition did not seek to directly challenge any of the final assessments for 2011 or 2012. While it may be true that TMS did not reference any of the final assessments in its petition, the Department in fact raised the significance of these assessments by arguing in the Tax Tribunal that TMS's efforts to have its 2011 and 2012 tax liability altered in actuality constituted an impermissible collateral attack on the final assessments. To now suggest that these five assessments—or any of the final assessments—are not "at issue" is disingenuous.

> sent to that taxpayer. A taxpayer shall not designate more than 1 official representative under this section for a single dispute.

The requirements under this provision are mandatory and, if the Department fails to comply with MCL 205.8, there is no "issuance of the assessment." *Fradco, Inc*, 495 Mich at 116. Because the time for an appeal under MCL 205.22(5) does not begin to run until "after the issuance of the assessment," the appeals period does not begin to run until the issuance of the assessment to the taxpayer's representative. *Id.* at 116-117.

Relevant to this provision, TMS designated its attorney, Wayne Smith, as an authorized representative under MCL 205.8. However, in describing the scope of Smith's authorization on the Authorized Representative Declaration, TMS indicated that it was giving Smith "limited authorization" and specifically limited Smith to contact with the Department in relation to the assessments issued from October 2011 until June 2012. See Mich Admin Code R 205.1006(5). Absent specific authorization relating to the time period for August 2012 through December 2012, the Department was precluded from disclosing confidential information, including assessments, to a third party such as Smith. See Mich Admin Code R 205.1006(10). Therefore, contrary to TMS's assertion, the Department was not required to provide the last five final assessments to Smith, and the time period for filing an appeal began to run upon issuance of these assessments to TMS. See MCL 205.22(5).

Consequently, as with the 10 previous final assessments, because these last five final assessments were not properly appealed in the manner provided by MCL 205.22(1), they were not subject to collateral attack and TMS's tax liability for these last five months of 2012 in the amount set by the final assessments was final and conclusive. MCL 205.22(4), (5). The Tax Tribunal did not err in granting the Department summary disposition to the extent TMS sought to challenge its tax liability as reported in these final assessments.

D. JANUARY 2011 THROUGH SEPTEMBER 2011

Because TMS is precluded from collaterally attacking the 15 final assessments issued for October, November, and December of 2011 as well as all of 2012, the Tax Tribunal was correct in granting the Department summary disposition to the extent TMS's petition sought to change the amounts owed for those months. However, this same reasoning does not apply to the first nine months 2011 and thus TMS's claims in relation to 2011 are not entirely foreclosed by MCL 205.22. That is, the final assessments for October 2011 through December 2012 are final and conclusive only with respect to the final assessments issued for October 2011 through December 2012. See *Tyson Foods, Inc*, 276 Mich App at 691. These final assessments are *not* final and conclusive with respect to TMS tax liability for any other time period, including January through September of 2011. See *id.*

It follows that, because there were not final assessments for these months and TMS properly made a demand for a refund, TMS may challenge its 2011 tax liability to the extent TMS's claims rest on miscalculation of its sales tax for the months of January through September of 2011. In particular, the record indicates that TMS made monthly payments for January through September of 2011, and there is no indication that final assessments were issued for these months. TMS later filed an amended return for 2011, to which TMS attached amended

monthly Form 160s for January through September of 2011. There being no final and conclusive assessment for these months, there was nothing to prevent TMS from seeking to amend its return and claim a refund for alleged overpayment for these months. See MCL 205.30; MCL 205.27a(2). This was a proper demand by TMS for a refund and credit carryforward for taxes that it believed it had erroneously paid for the first nine months of 2011.[6] See MCL 205.30(2); see also *Ford Motor Co*, 496 Mich at 393-394. When the Department denied this demand, TMS then filed a timely appeal in the Tax Tribunal.

On these facts, TMS may pursue its claims for a refund credit for 2011 to the extent that claim involves the purported miscalculation of sales tax for the months of January through September 2011. The Tax Tribunal erred by granting summary disposition in this regard and we therefore remand to the Tax Tribunal to determine what, if any, credit TMS is entitled to for the first nine months of 2011.

E. PETITIONER'S 2010 CREDIT CARRYFORWARD

Finally, we conclude that TMS's efforts to have its 2010 credit applied to its 2012 liability is not a collateral attack on the 2012 final assessments and, on remand, the Tax Tribunal should consider the parties' substantive arguments regarding whether the 2010 credit should be applied to TMS's liability for 2012 or 2014. In particular, the Department granted TMS the credit carryforward it requested in its amended 2010 return. However, the Department applied the credit carryforward against TMS's 2014 sales and withholding tax liability. The Tax Tribunal did not make a substantive ruling on this issue but simply dismissed the claim based on the conclusion that TMS's 2012 tax liability was established by the final assessments and thus not subject to a collateral attack.

As we have discussed, the final assessments issued to TMS for 2012 are conclusive and the Tax Tribunal correctly foreclosed all attacks on the calculation of TMS's tax liability for this time period as reported in the final assessments. However, while the amounts in the particular assessments are final and no longer subject to challenge, *Tyson Foods, Inc*, 276 Mich App at 691, we see no reason why this should prevent TMS from seeking to apply an approved 2010 overpayment credit to its outstanding tax liability. See MCL 205.30(2); MCL 205.30a. That is, the final assessments for 2012 provided the details of the tax liability arising for each month in question. *Tyson Foods, Inc*, 276 Mich App at 690-691. Applying an approved credit for overpayment in an earlier year will not change the extent of TMS's liability for 2012 as reported in the final assessments. Rather, as set forth in MCL 205.30(2) and MCL 205.30a, the overpayment credit for 2010 is simply applied to the conclusively established 2012 tax liability

[6] The Department argues on appeal that TMS may not challenge its tax liability for 2011 because it has not paid the disputed tax in full. See MCL 205.30; *Ford Motor Co*, 496 Mich at 391. In contrast, TMS asserts that it paid—and in fact overpaid—for 2011. The Tax Tribunal did not rule on this issue and we leave it to the Tax Tribunal to decide this issue in the first instance.

to satisfy the amount owed.[7] Because the application of valid credits for overpayment in 2010 will not alter TMS's tax liability for 2012 as detailed in the final assessments, the application of these credits to existing tax liability is not an attack, direct or collateral, on the 2012 tax liability reported in the final assessments. Because the application of these credits is not a collateral attack, the Tax Tribunal erred by dismissing TMS's claims regarding the application of its 2010 credits. On remand, the Tax Tribunal should consider the parties' substantive arguments in light of MCL 205.30(2) and MCL 205.30a to determine whether credit for 2010 is properly applied to TMS's 2012 or 2014 tax liability.

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

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

[7] Under MCL 205.30(2), "If the department agrees the claim [for a refund] is valid, the amount of overpayment . . . shall be first applied to any known liability as provided in [MCL 205.30a] and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability." In part, MCL 205.30a states:

> (1) If a taxpayer claims a refund that the department determines is valid as provided in [MCL 205.30(2)], and the department identifies a liability of the taxpayer described in subsection (2), the department shall first apply the amount of the refund as provided in subsections (2) and (3), and the excess, if any, shall be refunded or credited as provided in [MCL 205.30].
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> (2) The amount of a refund described in subsection (1) shall be applied to the following in the order of priority stated:
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> (a) Any other known tax liability of the taxpayer to this state.