

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT EBERHART,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.

UNPUBLISHED

March 8, 2012

No. 299532

Michigan Tax Tribunal

LC No. 00-357863

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

PER CURIAM.

Petitioner Robert Eberhart appeals as of right from the Tax Tribunal's order granting summary disposition under MCR 2.116(C)(4) in favor of respondent Michigan Department of Treasury on the basis of lack of subject matter jurisdiction. We affirm.

Petitioner is the sole shareholder and the responsible corporate officer of Wholesale Spa Network, Inc. ("WSN"), a retailer of spas and related supplies. Petitioner operated the company, which was located in Mishawaka, Indiana, from 1993 to 2006. In May 2004, respondent conducted a use tax audit of WSN and determined that Michigan use tax was due on sales of personal property to Michigan residents. Respondent issued an assessment against WSN on June 29, 2006. WSN did not appeal the assessment.

On April 6, 2007, respondent issued an intent to assess petitioner in the amount of \$152,602 for use taxes, plus \$75,041.75 in interest. The assessment was based on corporate officer liability for taxes owed by WSN.

An informal conference was held, and the hearing officer concluded that the tax assessment was proper. Respondent issued a decision and order of determination on July 23, 2008, accepting the hearing officer's recommendation and ordering that petitioner be held liable for the use taxes as the responsible officer of WSN.

Petitioner appealed the order to the Tax Tribunal on September 9, 2008. Respondent moved for summary disposition under MCR 2.116(C)(4), (8), and (10), and petitioner likewise moved under MCR 2.116(C)(4). The Tax Tribunal denied petitioner's motion and granted respondent's motion pursuant to MCR 2.116(C)(4). The Tax Tribunal concluded that it lacked jurisdiction to review the validity of the final assessment because MCL 205.22 precluded review of an uncontested assessment.

On appeal, petitioner argues that the assessment was void because respondent lacked subject matter jurisdiction over WSN, as an insufficient nexus existed between WSN and the state of Michigan.¹ Thus, petitioner insists that the Tax Tribunal should have determined that the assessment was void, regardless of MCL 205.22. We disagree.

Our review of a Tax Tribunal decision is generally limited to determining whether the Tax Tribunal erred in applying the law or adopted a wrong principle. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). The Tax Tribunal's factual findings are final if they are supported by competent and substantial evidence. *Id.* We review questions of statutory construction de novo. See *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007). Whether the Tax Tribunal has jurisdiction to hear an appeal is an issue of law that we review de novo. *Kasberg v Ypsilanti Twp*, 287 Mich App 563, 566; 792 NW2d 1 (2010).

Under MCL 205.22, the Tax Tribunal and the Court of Claims have exclusive jurisdiction over the appeal of a final assessment. *Ammex, Inc v Dep't of Treasury*, 272 Mich App 486, 494; 726 NW2d 755 (2006). Such an appeal is exclusive because "an appeal from either forum is made directly to this Court [; therefore], the circuit court never acquires jurisdiction over such determinations." *Id.* (quotations and citation omitted).

The Tax Tribunal lacks subject matter jurisdiction over an appeal that is untimely. See *Kelser v Dep't of Treasury*, 167 Mich App 18, 20-21; 421 NW2d 558 (1988). To invoke the Tax Tribunal's jurisdiction, "MCL 205.22(1) requires a taxpayer to appeal any assessment within 35 days of the issuing of that assessment."² *PIC Maintenance, Inc v Dep't of Treasury*, ___ Mich App___; ___NW2d___ (2011), slip op at 3; see also *Toaz v Dep't of Treasury*, 280 Mich App 457, 462; 760 NW2d 325 (2008) ("[An] aggrieved taxpayer must pay the uncontested debt and file the written petition required in MCL 205.735 within 35 days to invoke the Tax Tribunal's jurisdiction."). "MCL 205.22(4) provides that an assessment of the department, if not appealed in accordance with MCL 205.22(1), 'is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.'" *PIC Maintenance*, slip op at 3. "When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void." *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992). "The Tax Tribunal does not have authority to grant a delayed appeal." *Toaz*, 280 Mich App at 462.

We conclude that the Tax Tribunal lacked subject matter jurisdiction to hear petitioner's appeal of the use tax assessment. WSN did not appeal the use tax assessed on June 29, 2006, under the deadlines imposed by MCL 205.22; therefore, petitioner's appeal from this assessment

¹ We consider petitioner's argument to be more appropriately characterized as an argument regarding personal jurisdiction.

² Under MCL 205.22(1), a taxpayer has 35 days when appealing to the tax tribunal and 90 days when appealing to the court of claims (unless the claim is associated with the former single business tax act, which is inapplicable here).

was untimely. See *PIC Maintenance*, slip op at 3-7. MCL 205.22(4) precludes petitioner from collaterally attacking the use tax assessment. See *id.*

Petitioner attempts to avoid the time requirements of MCL 205.22 by arguing that respondent lacked personal jurisdiction over WSN because WSN did not have sufficient minimum contacts with the state of Michigan; thus, petitioner argues that any use tax would be ultra vires and void. We acknowledge that “[w]here there is jurisdiction neither to person nor property, the imposition of a tax would be ultra vires and void.” *Miller Bros Co v Maryland*, 347 US 340, 342; 74 S Ct 535; 98 L Ed 744 (1954). However, petitioner raised the issue of personal jurisdiction for the first time when he filed his petition for review on November 17, 2008. Although petitioner had the opportunity to do so, he chose not to raise this issue in an appeal of the assessment within 35 days of its issuance as required by MCL 205.22. MCL 205.22(4) explicitly precludes a collateral attack on a use tax assessment following an untimely appeal, and petitioner’s challenge is clearly such an attack on the underlying assessment.

Petitioner relies on *Abbott v Howard*, 182 Mich App 243; 451 NW2d 597 (1990), for the proposition that a court may vacate an award of an administrative agency that was secured in violation of a party’s right to procedural due process. However, the present case is not such a case; petitioner does not assert that he was deprived of notice of the assessment, and MCL 205.22(1) provided WSN and, thus, petitioner an opportunity to challenge the assessment.³ See MCL 205.22(1) (providing that a taxpayer aggrieved by an assessment may appeal to the Tax Tribunal or the Court of Claims within 35 days of the assessment’s issuance); cf. *Bickler v Dep’t of Treasury*, 180 Mich App 205, 208-211; 446 NW2d 644 (1989) (permitting an otherwise prohibited collateral attack after an untimely appeal where petitioner was not provided sufficient notice of the Tax Tribunal’s decision and, thus, deprived of procedural due process); *Abbott*, 182 Mich App at 244-251 (allowing an otherwise prohibited collateral attack of a workers’ compensation award where the award is voidable due to a lack of notice to afford the defendant his fundamental right to be heard).

Finally, petitioner argues that Michigan residents should be responsible for the use tax assessed upon WSN. However, this argument is likewise an improper collateral attack on the

³ We note that corporate-officer liability under MCL 205.27a(5) is derivative and not separate and distinct from the liability of the corporation. See *Livingstone v Dep’t of Treasury*, 434 Mich 771, 782-783, 795; 456 NW2d 684 (1990). Thus, “the Department of Treasury is not required to provide individual notice of personal liability to derivatively liable officers.” *Id.* at 800. A corporate officer who is derivatively liable for a use tax under MCL 205.27a(5) “must have necessarily been intimately involved in the corporation’s failure to pay taxes and consequently does not need formal notice of such liability to be able to defend in a subsequent action.” See *id.* at 799. “The service of notice to derivatively liable corporate officers would simply add an additional formalistic requirement upon which parties liable under [MCL 205.27a(5)] could rely for the purpose of thwarting the Legislature’s intent to recover the unpaid use taxes from such person.” See *id.*

final assessment, which the Tax Tribunal did not have jurisdiction to consider. See MCL 205.22; see also *PIC Maintenance*, slip op at 3-7.

Accordingly, we conclude that the Tax Tribunal properly granted respondent's motion for summary disposition for lack of subject matter jurisdiction because petitioner's appeal of the use tax assessment to the Tax Tribunal was untimely.

Affirmed.

/s/ Jane M. Beckering

/s/ Donald S. Owens

/s/ Douglas B. Shapiro