STATE OF MICHIGAN

COURT OF APPEALS

ELIAN 2 CORPORATION, Petitioner-Appellant,	UNPUBLISHED July 24, 2012
v	No. 304353 Michigan Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee.	LC No. 00-410935

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Petitioner Elian 2 Corporation appeals as of right from the Michigan Tax Tribunal's (MTT's) dismissal of its petition contesting several tax assessments, plus penalty and interest, for failure to file or pay taxes. The MTT held that it lacked jurisdiction in this matter because petitioner did not file its petition within the time provided by statute. The issue before us is whether the MTT erred by failing to hold an evidentiary hearing to establish a factual basis for its dismissal of petitioner's claims based on lack of jurisdiction. We conclude that it did not err and, therefore, affirm the MTT's dismissal.

I

In September 2010, respondent Department of Treasury issued to petitioner numerous final tax assessments for failure to file or pay Other Tobacco Wholesaler Product Tax from December 2007 to April 2009.[1] The formal issuance date printed on each final assessment was September 29, 2010.[2] The assessments provided the relevant taxable period, the tax amount due,

[1] The Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq.*, levies a tax on the wholesale price of cigars, noncigarette smoking tobacco, and smokeless tobacco. See MCL 205.427.

[2] Respondent provided evidence indicating that the final assessments were actually sent by certified mail on September 22, 2010, and received by petitioner on September 24, 2010. According to respondent, it has a "longstanding policy" of mailing final assessments one week to ten days before the issuance date to allow petitioners their full 35 days from receipt of the final assessments within which to appeal to the MTT.

penalty and interest amounts due for "failure to file or pay," and the penalty amount due for "late payment of tax." The assessment stated as the reason for the tax bill:

> BILLING BASED ON AVAILABLE INFORMATION, YOU FAILED TO RESPOND TO OUR LETTERS. PENALTY AND/OR INTEREST DUE FOR LATE FILING OF RETURN AND/OR LATE PAYMENT OF TAX DUE. FOR ADDITIONAL INFORMATION VISIT WWW.MICHIGAN.GOV/TREASURY. REFER TO LETTER DATED 07/06/2010.

Each assessment provided that payment was due within 35 days and that "appeal information" could be found on "page 2."

On November 8, 2010, forty days after issuance of the final assessments, petitioner filed a petition with the MTT contesting the assessments; the MTT dismissed the petition on the basis of lack of jurisdiction. Relying on the MTT's decision in *Winget v Dep't of Treasury*, MTT Docket No. 319852 (issued April 4, 2007), petitioner moved the MTT to set aside the dismissal, claiming that respondent failed to provide it with due process because the information in the assessments precluded it from making a meaningful decision whether to appeal and that the MTT failed to provide it with due process because it dismissed the petition without holding a hearing to determine whether its petition was in fact untimely. The MTT denied the motion.

II

"The standard of review for Tax Tribunal cases is multifaceted." *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). If fraud is not claimed, the tribunal's decision is reviewed "for misapplication of the law or adoption of a wrong principle." *Id.* The tribunal's factual findings are "conclusive if they are supported by 'competent, material, and substantial evidence on the whole record.'" *Id.* If statutory interpretation is involved, the tribunal's decision is reviewed de novo. *Id.* at 202. The determination whether a party has been afforded due process is a question of law subject to de novo review on appeal. *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009).

III

On appeal, petitioner contends that it was denied due process because the MTT failed to hold an evidentiary hearing to establish a factual basis for its dismissal based on lack of jurisdiction. Under the circumstances presented, we disagree.

"Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "The essence of due process is 'fundamental fairness.'" *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003). The fundamental requirements of procedural due process are notice and a meaningful opportunity to be heard by an impartial decision-maker. *Reed*, 265 Mich App at 159; *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). The opportunity to be heard requires only a hearing at which a party may know and respond to the evidence. *Hanlon v Civil Serv Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002). It does not require a full trial-like evidentiary hearing on the record, *York v Civil Serv Comm*, 263 Mich App 694, 704 n 7; 689

NW2d 533 (2004), or even an oral hearing. *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 460; 688 NW2d 523 (2004).

If a taxpayer does not make a return or payment as required, "the department may obtain information on which to base an assessment of the tax." MCL 205.21(1). The assessment of the tax is based on the following procedure: (1) subject to certain exceptions, the department sends the taxpayer a letter of inquiry indicating that "the taxpayer needs to furnish further information or owes taxes to the state, and the reasons for that opinion," MCL 205.21(2)(a); (2) if the dispute is not resolved within 30 days after the letter is sent to the taxpayer or if a letter of inquiry is not required, the department determines the amount of tax due and gives the taxpayer a notice of intent to assess the tax, MCL 205.21(2)(b)[3]; (3) if an informal conference is requested, certain procedures apply, see MCL 205.21(2)(c), (d), and (e); (4) "[i]f the taxpayer does not protest the notice of intent to assess within" the 60-day time limit, "the department may assess the tax and the interest and penalty on the tax that the department believes are due and payable,"[4] MCL 205.21(2)(f); and (5) an appeal to the MTT must be taken within 35 days. MCL 205.22(1)[5]. The appeal must be perfected as provided under the tax tribunal act, MCL 205.701 *et seq*. MCL 205.22(2). The tax tribunal act also refers to the 35-day appeal period for nonproperty taxes. MCL 205.735a(6). Generally, the appeal is perfected within the relevant time period if it is given to a delivery service, postmarked, or delivered on or before the expiration of that time period. MCL 205.735a(7). The time requirements for taking an appeal are jurisdictional, and the MTT lacks jurisdiction to consider an untimely petition. *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 543-544; 656 NW2d 215 (2002).

The law is clear that the petition must be filed within 35 days. See MCL 205.22(1); MCL 205.735a(6). Here, each of the final assessments issued to petitioner—which petitioner attached to its appeal—had an issuance date of September 29, 2010. Petitioner did not contend in its petition that it did not timely receive the assessments. Petitioner did not file its appeal until November 8, 2010, more than 35 days after issuance of the assessments. Therefore, on its face, the petition was untimely, and the MTT lacked jurisdiction. Because the petition established that petitioner was not entitled to relief as a matter of law, having failed to properly invoke the MTT's jurisdiction, the MTT could dismiss the petition sua sponte. *Ford Motor Co v Bruce*

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[3] "The notice shall include the amount of the tax the department believes the taxpayer owes, the reason for that deficiency, and a statement advising the taxpayer of a right to an informal conference, the requirement of a written request by the taxpayer for the informal conference . . . , and the 60-day time limit for that request." MCL 205.21(2)(b).

[4] An assessment issued after an informal hearing or without an informal hearing "is final and subject to appeal as provided in [MCL 205.22]. The final notice of assessment shall include a statement advising the person of a right to appeal." MCL 205.21(2)(f).

[5] "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, or to the court of claims within 90 days after the assessment, decision, or order." MCL 205.22(1).

Twp, 264 Mich App 1, 15; 689 NW2d 764 (2004), rev'd on other grounds 475 Mich 425 (2006); see also *Herald Co v Tax Tribunal*, 258 Mich App 78, 88; 669 NW2d 862 (2003) (tax tribunal is bound by Michigan Rules of Court where a rule of the tax tribunal does not exist on a subject); MCR 2.116(I)(1) (court shall render judgment without delay where pleadings show that a party is entitled to judgment as a matter of law or where the documentary evidence shows no genuine issue of material fact).

Petitioner argues, without further explanation, that its "files do not indicate that the [p]etitioner was granted 35 days in which to file an appeal." It argues that, instead of relying on the mail logs supplied by respondent, the MTT should have held an evidentiary hearing to examine the logs, the accuracy and methodology used in keeping them, and separate U.S. Postal Service records. Petitioner does not dispute that it received the assessments (which it attached to the petition) and does not affirmatively assert that it received them late such that it was deprived of adequate time in which to appeal. The purpose of an evidentiary hearing is to resolve a disputed issue of fact. *Swickard v Wayne Co Med Examiner*, 184 Mich App 662, 668; 459 NW2d 92 (1990). Petitioner has presented no evidence that would create an issue of fact as to whether it had sufficient time to exercise its right of appeal. As such, petitioner was not denied due process by the MTT's failure to hold an evidentiary hearing with regard to the sufficiency of the notice period.

Petitioner further argues, in reliance on *Winget*, that the final assessments were not truly final and, thus, did not give rise to an appeal because they "failed to include sufficient information of the set of facts causing the deficiency." As such, petitioner contends that the MTT should have conducted an evidentiary hearing on the material issue of fact of their adequacy so as to qualify as final assessments for jurisdictional purposes. In *Winget,* the petitioners were issued assessments relating to income taxes for the years 2001 and 2002. *Winget*, unpub op at 2-3. The final assessments bore a "date issued" of September 20, 2004. *Id.* at 2. After additional information was provided by the petitioner, the respondent issued and mailed "corrected" final assessments some time in May 2005, but they too bore a "date issued" of September 20, 2004. *Id*. In other words, they were backdated. They also contained errors regarding the penalties. *Id*. at 3. When the petitioners appealed to the MTT, the respondent moved to dismiss on the ground that the petition was filed more than 35 days after September 20, 2004. *Id*. at 4. The petitioners claimed, among other things, that respondent had denied them due process because they "did not receive adequate notice of [their] appeal rights" in that the corrected final assessments issued in May 2005 were backdated to September 2004. *Id*. at 5. The MTT determined that the procedure outlined in MCL 205.21 for assessing a tax "serve[d] to provide the taxpayer with notice that satisfies the demands of the Due Process Clause." *Id*. at 10. However, it held that the final assessment itself must also contain sufficient information on its face to "enable the taxpayer to make a reasonably informed decision" whether to challenge the assessment. *Id*. at 10-12. Thus, in order to enable a taxpayer to make a "meaningfully informed decision" whether to appeal, the final assessment must contain the following: "1) sufficient information of the set of facts and reasons causing the deficiency; 2) the amounts of the deficiencies, sufficient to allow a reasonable estimate of liability from those facts; 3) a reliable means of determining the taxpayer's appeal period[;] and 4) an explanation of the right to appeal." *Id*. at 12.

In this case, each of the final assessments provided the month in which petitioner failed to file or pay taxes for tobacco wholesaler products, the amount of tax due, and the amount of penalty and interest due. The stated reason for the tax bill indicated that petitioner had failed to pay the taxes and that the assessments were "based on available information." Petitioner was also referred to a July 16, 2010, letter and respondent's website for additional information.

In *Winget*, the initial final assessments stated, "Your return was adjusted from available information. You failed to respond to our request for additional information or failed to provide all information. MI-1040." *Id.* The MTT deemed this explanation to be "of no consequence" because it did "not state the reasons for calculating the specific 'taxes due' and provides no basis for Petitioners to 'challenge the *accuracy and legal validity* of their tax obligation.'" *Id.* (emphasis in original, citation omitted). Apart from the fact that the *Winget* decision is not binding on this Court, see *Electronic Data Sys*, 253 Mich App at 544, the case is distinguishable. In *Winget*, the petitioners had filed tax returns for the years in question, and thus, the payment amounts and accuracy of the calculations were at issue. *Winget*, unpub op at 2. In this case, the assessments were timely dated and indicated that they were issued because petitioner had failed to file or pay taxes for tobacco wholesaler products for the months in question. Petitioner was able to make a meaningful decision whether to appeal from that information because it filed an appeal in which it claimed that it had "timely filed all tobacco wholesaler tax returns with the Department and remitted the correct amount of tax." Petitioner contends that the assessments do not indicate the reason for the deficiency, but from the face of the assessment, it is clear that the reason for the assessment is a failure to file or pay the tax, not a dispute over the content of the filing and accuracy of the calculations. Petitioner does not indicate what information it was deprived of that would have influenced its decision to appeal on a timely basis. Accordingly, we reject petitioner's due-process claim based on the content of the assessments.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering