STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Jeffrey P. Rosen,
Petitioner,

v MTT Docket No. 370993

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

CORRECTED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

CORRECTED ORDER OF DISMISSAL

INTRODUCTION

Petitioner, Jeffrey P. Rosen, is appealing Assessment No. Q691928 issued by Respondent, Michigan Department of Treasury, assessing Single Business Tax associated with Petitioner's operation of his occupation as a trader of securities and investments. On March 18, 2010, Respondent filed its Motion for Summary Disposition and Brief in Support of Motion for Summary Disposition, arguing that the Tribunal lacks authority over the assessment at issue due the untimely filing of Petitioner's petition. On May 4, 2010, Petitioner filed a response, arguing that Respondent failed to follow statutory requirements for notification of final assessment and therefore he should not be denied a hearing. The Tribunal finds Petitioner's argument unpersuasive and dismisses this case.

FINDINGS OF FACT

Assessment No. Q691928 was issued by Respondent on March 24, 2009, and sent by certified mail to Petitioner at 4896 Loch Lomond Drive, Bloomfield, Michigan, 48301. Respondent's Assessment Certified Mail Log indicates a mailing was made to Petitioner on March 17, 2009.[1] The certified mail number was 7008-3230-0000-9087-3899 and the United States Postal Service "Track & Confirm" search shows that the item was delivered at 1:42 pm on March 27, 2009, in West Bloomfield, Michigan, 48232. A copy of an inquiry response by the

[1] The Tribunal notes that it is common practice by Respondent to mail notices in advance of the date of issue.

Postal Service shows the signature of recipient "Jeff Rosen" at the address "2065 Lakeshire WB 48323." The same communication indicates delivery was made on March 27, 2009.

Prior to June 15, 2008, Petitioner lived at 4896 Loch Lomond Drive, Bloomfield, Michigan, 48301. On or around June 15, 2008, Petitioner moved to 2065 Lakeshire, West Bloomfield, Michigan, 48323. Respondent issued a refund check to Julie Sarah Rosen on August 28, 2008, indicating the 2065 Lakeshire address.

According to the post-marked date, Petitioner filed his Petition with the Tribunal appealing Assessment No. Q691928 on June 12, 2009, i.e., 80 days after March 24, 2009.

EVIDENCE SUBMITTED

Respondent's evidence:

1. Affidavit of Glenn R. White
2. Affidavit of Ann Luepnitz
3. Michigan Department of Treasury Collections Division – State Treasury Accounts Receivable, Assessment Certified Mail Log for 03/17/08
4. United States Postal Service Track & Confirm search results
5. United States Postal Service Fax Transmission

Petitioner's evidence:

1. Residential Lease
2. Cancelled Check issued by Michigan State Treasurer on 08/28/2008 to Julie Sarah Rosen 2065 Lakeshire, West Bloomfield, MI 48323
3. Page one of Federal form 1040 for 2008 and 2009
4. Affidavit of Gary S. Moore
5. Notice of Hold on Income Tax Refund or Credit issued 12/26/2007, addressed to Petitioner and Sarah Rosen at 4096 Loch Lomond Dr., Bloomfield, Mi 48301
6. Letter issued by Respondent's Collection Division dated 5/16/2009, to Petitioner at 4096 Loch Lomond Dr.

RESPONDENT'S CONTENTIONS

Respondent moves for summary disposition pursuant to MCR 2.116(C)(4) claiming that the Tribunal does not have subject matter jurisdiction to hear this appeal, and, as a result, the Tribunal should dismiss the action. Respondent contends that "Petitioner did receive the final assessment, and given that he was informed of his appeal rights, the question then becomes

whether he exercised his appeal rights in a timely manner. The answer is no."[2] More specifically, Respondent points to the fact that "Petitioner initiated its appeal to this Tribunal more than 35 days after the issuance of the assessment at issue [thus] the Tribunal does not have jurisdiction over this appeal." *Id.*

PETITIONER'S CONTENTIONS

Petitioner requests that the Tribunal deny Respondent's dispositive motion, and either dismiss the case for Respondent's failure to comply with MCL 205.28(1)(a), or otherwise find the Tribunal with jurisdiction and proceed to a hearing.

Petitioner contends that Respondent failed to comply with Section 28(1)(a), which requires that notice of a final assessment, including a statement advising the taxpayer of its right to appeal the assessment, "shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer."[3] Petitioner asserts that Respondent was aware that Petitioner and his wife had moved from their prior address "as evidenced by a refund of tax payment sent by Treasury to Petitioner's new address."[4] Petitioner points to the fact that "[p]rior to and during August, 2008, the Rosens were in discussions with Treasury seeking payment of a prior refund due [and] [d]uring that time, Treasury was advised that the Rosens had moved from the Loch Lomond Address to the Lakeshire Address. The issue of a prior refund was ultimately resolved in favor of the Rosens and Treasury sent the Rosens the refund check on August 29, 2008. The front of the check specifically states the Lakeshire Address." *Id.* p. 2 Petitioner also attempts to support its position by stating "the Rosen's 2008 and 2009 Michigan Income Tax Returns identified the Lakeshire Address."

Petitioner looks to *Bickler v Department of Treasury*, 180 Mich App 205, 446 NW2d 644 (1989), stating that "the Michigan Court of Appeals rejected Treasury's claim that a deficiency notice was properly mailed when it was sent to an address that was not the address most recently provided by the taxpayer to Treasury."[5] Petitioner contends that "[t] Court patently rejected

[2] Respondent's Brief in Support of Motion for Summary Disposition, p. 3.
[3] MCL 205.28(1)(a)
[4] Petitioner's Brief in Response to Respondent's Motion for Summary Disposition, p. 1
[5] Petitioner's Brief in Response to Respondent's Motion for Summary Disposition, p. 3

Treasury's argument, found the mailing deficient when mailed to an old address, and imposed a duty upon Treasury to search its records:

> A mailing of notice by a revenue commissioner to an old and inaccurate address does not constitute compliance with a statute requiring a mailing to the "last known address" where a current address exists in the department's files as a result of the subsequent filing of a tax return. *McPartlin v Comm'r of the Internal Revenue Service*, 653 F.2d 1185, 1190 (CA 7, 1981) and cases cited therein. In these days of instantaneous computer searches, respondent's arguments that the imposition of a duty to verify the accuracy of an address is too burdensome is unimpressive…"[6]

Petitioner also cites *Altman Management Company v Department of Treasury* (unpublished Michigan Court of Appeals, Docket No. 216912, April 10, 2001). In that case, the Court of Appeals found that Treasury properly mailed a notice to an address that was indicated by the taxpayer as a change of address on a Single Business Tax return.

> We agree with the Tax Tribunal that the *Bickler* opinion supports defendant's actions in the present case. If defendant had followed the procedure that plaintiff advocates, i.e. ignoring the change of address marked on plaintiff's tax return, then defendant[] would have violated the *Bickler* rule. Instead, defendant examined its files, updated its records to reflect a change of address marked on a properly filed tax return, and mailed the final assessment to the new address. Defendant can not be faulted for promptly recognizing a change of address marked on a state return. *Altman, supra*.

In this case, Petitioner argues that "[d]espite being provided with the Lakeshire address as far back as August 2008, and again being provided with the Lakeshire address in April of 2009 as reflected on the Rosen's 2008 Income Tax Return, Treasury continues to breach its duty to update its records and send notices to the Loch Lomond Address."[7] Further, in regards to Treasury's certified mail receipt which "purports a delivery at 1:42 pm on Friday[,] March 27, 2009 at the Loch Lomond Address, [t]his is during working hours and Mr. Rosen would not have been at a residential house, which he was a prior tenant, never owned and vacated almost one year prior. Nor does Mr. Rosen recall executing any certified receipt." *Id.*

APPLICABLE LAW

[6] Petitioner's Brief in Response to Respondent's Motion for Summary Disposition, p. 3
[7] Petitioner's Brief in Response to Respondent's Motion for Summary Disposition, p. 4

Respondent moves for summary disposition pursuant to MCR 2.116(C)(4). This statute states that a Motion for Summary Disposition is appropriate where the ". . . court lacks jurisdiction of the subject matter."[8] When presented with a motion for summary disposition pursuant to MCR 2.116(C)(4), the Tribunal must consider any and all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties.[9] In addition, the evidence offered in support of or in opposition to a party's motion will only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.[10] A motion for summary disposition pursuant to MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust administrative remedies. *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43; 620 NW2d 546 (2000). Furthermore:

> A motion under MCR 2.116(C)(4), alleging that the court lacks subject matter jurisdiction, raises an issue of law. The issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal. *McCleese v Todd*, 232 Mich App 623, 627; 591 NW2d 375 (1998) ("Lack of subject matter jurisdiction may be raised at any time."); *Phinney v Perlmutter*, 222 Mich App 513, 521; 564 NW2d 532 (1997) ("Although the jurisdictional issue here was never resolved by the trial court, a challenge to subject-matter jurisdiction may be raised at any time, even for the first time on appeal."). When a court lacks jurisdiction over the subject matter, any action it takes, other than to dismiss the case, is absolutely void. *McCleese*, 232 Mich App at 628; 591 NW2d at 377. The trial court's determination will be reviewed de novo by the appellate court to determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether affidavits and other proofs show that there was no genuine issue of material fact. *See Cork v Applebee's of Michigan, Inc*, 239 Mich App 311; 608 NW2d 62 (2000) ("When reviewing a motion for summary disposition under MCR 2.116(C)(4), we must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show that there was no genuine issue of material fact."); *Walker v Johnson & Johnson Vision Products, Inc*, 217 Mich App 705; 552 NW2d 679 (1996); *Faulkner v Flowers*, 206 Mich App 562; 522 NW2d 700 (1994); *Department of Natural Resources v Holloway Construction Co*, 191 Mich App 704, 478 NW2d 677 (1991).
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> 1 Longhofer, Michigan Court Rules Practice § 2116.12, p 246A.

[8] MCR 2.116(C)(4)
[9] MCR 2.116(G)(5)
[10] MCR 2.116(G)(6)

MCL 205.28(1) provides, in pertinent part:

> (a) [n]otice. . .shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the department may be made in the same manner.

Per MCL 205.22

> (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 35 days.

MCL 205.735a provides, in pertinent part:

> (6) In all other matters, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, or determination.

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion for Summary Disposition under the criteria for MCR 2.116(C)(4) and based on the pleadings and other documentary evidence filed with the Tribunal, determines that granting Respondent's Motion is appropriate.

Petitioner does not dispute that his appeal of a Single Business Tax assessment was submitted to the Tribunal more than 35 days after the date the notice of assessment was issued. Rather, his argument is simply that Respondent violated the statute when it failed to issue the notice to his purported last known address. The issue is one of due process of law. Respondent is seeking to deprive Petitioner of his property. As pointed out by the Supreme Court in *Dow v Michigan*, 396 Mich 192, 205-206; 240 NW2d 450 (1976):

> "'The fundamental requisite of due process of ***211*** law is the opportunity to be heard.' *Grannis v. Ordean*, 234 US 385, 394 [34 S.Ct. 779, 783, 58 L.Ed. 1363] (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v Manzo*, 380 US 545, 552 [85 S.Ct. 1187, 1191, 14 L.Ed.2d 62] (1965)." *Goldberg v Kelly*, 397 US 254, 267; 90 S Ct 1011 [1020] 25 L Ed 2d 287 (1970). The "opportunity to be heard" includes the right to notice of that opportunity. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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." *Mullane v. Central Hanover Bank & Trust Co* [339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).][11]

Petitioner argues that Respondent was aware of his address change as early as August, 2008, when it issued a tax refund to Julie Sarah Rosen at the 2065 Lakeshire, West Bloomfield address. Based on this knowledge, Petitioner argues that Respondent had an obligation to send the notice of assessment to that same address because it was his last known address. However, the Tribunal notes that despite being his spouse, Julie Sarah Rosen is not the Petitioner. Further, there is no proof or indication that the first page of the 2008 and 2009 federal income tax returns submitted as evidence by Petitioner were ever filed with Respondent.

Regardless, the Tribunal finds that the discrepancy over what Petitioner's last known address is moot as the evidence demonstrates that the March 24, 2009, final notice was personally served on Petitioner by Respondent via the United States Postal Service on March 27, 2009. Respondent submitted evidence showing that Petitioner signed for and received the notice. Petitioner does not deny that it is his signature, only that he does not recall signing it. Furthermore, Petitioner is disingenuous in his argument that the time of delivery was "during working hours and [he] would not have been at a residential house, which he was a prior tenant, never owned and vacated almost one year prior." The Tribunal points out that the address written on the receipt as recipient's address is 2065 Lakeshire, WB 48323 and the tracker indicates that the certified mail was received in West Bloomfield, 48323 and not Bloomfield, 48301.

Petitioner's reliance on *Bickler, supra* is not persuasive. In that case, the decision and order was sent by certified mail, return receipt requested, to the petitioner at his address on file. The petitioner's copy of the decision and order was returned to the respondent marked "undeliverable." The respondent was made aware that the petitioner did not receive the notice. This is a significant distinction from the case at bar where the notice not only was not returned, Petitioner actually signed for receipt of the notice. Clearly, Respondent informed Petitioner of the final assessment in a manner reasonably calculated to apprise him of the decision and to afford him an opportunity to present his opposition, which he failed to do in a timely fashion.

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[11] *Bickler v Department of Treasury*, 180 Mich App 205; 446 NW2d 644 (1989)

As such, the Tribunal has no authority over Petitioner's appeal under MCL 205.22 and 205.735a, as Petitioner's June 12, 2009 initial pleading (i.e., petition) was filed more than 35 days after the issuance of the March 24, 2009 final notice and is untimely. See also *Electronic Data Systems Corporation v Township of Flint*, 253 Mich App 538; 656 NW2d 215 (2002). As such, the Tribunal concludes that it lacks authority over the assessment at issue and granting Respondent's Motion, pursuant to MCL 2.116(C)(4), is appropriate.

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that the case is DISMISSED.

MICHIGAN TAX TRIBUNAL

Entered: March 4, 2011 By: Cynthia J. Knoll