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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

ORLENE HAWKS
DIRECTOR

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Dear Tax Tribunal Practitioner:

As we endure what we can only hope to be winter's last gasp, we present the following items of interest.

Reminder Regarding Appearances

The Tribunal has had several instances of attorneys or representatives entering a case at the prehearing stage or at the stipulation for entry of consent judgment stage without previously filing an appearance. While appearances in this manner are allowed under MCR 2.117(2), that rule requires a written appearance to be promptly filed and served after an act indicating an appearance. However, a written appearance filed beforehand will make it less confusing for the Tribunal as to whether a representative is substituting for another representative or acting as co-counsel. It will also assure that copies of all pleadings and orders will be received. As mentioned on our last GovDelivery, an appearance can be e-mailed to taxtrib@michigan.gov. As to the requirements of what a written appearance must contain, see TTR 223(3).

Resignation of Tribunal Member

In our last GovDelivery, the Tribunal announced the appointment of Michelle Lange of East Lansing to the Tribunal as a General Member. As of February 20, Ms. Lange resigned from the Tribunal in order to take another position in state government. We wish her well in her new endeavor.

Filing Deadline Reminders

Per MCL 205.735a, the filing deadline for filing assessment disputes for property classified as commercial real property, industrial real property, developmental real property, commercial personal property, industrial personal property, or utility personal property is May 31. Appeals must be e-filed by 11:59 pm. Submissions by mail are considered filed by the date indicated by the U.S. Postal Service postmark on the envelope. Submissions by a commercial delivery service are considered filed on the date the submissions were given to the commercial service for delivery to the tribunal as indicated by the receipt date on the package containing the submissions. The Tribunal has designated DHL Express (DHL), Federal Express (FedEx) and United Parcel Service (UPS). For property classified as agricultural real property, residential real property, timber-cutover real property, or agricultural personal property, the filing deadline is July 31.

Automatic Addition of Tax Year
Per MCL 205.737(5), small claims appeals pending in the Tribunal will automatically have 2019 added to the appeal if the hearing occurs on or after April 1. A party may however, request that 2019 be excluded from appeal at the time of the hearing.

Immediate Consideration of Dispositive Motions As a general practice, the Tribunal will NOT grant immediate consideration of motions for summary disposition. Immediate consideration is frowned upon in this circumstance, as giving an unfair advantage to the moving party. While it is possible that a situation may arise which would justify the truncated reply period for a dispositive motion, the granting of such motions is frowned upon.

Court of Appeals Decisions

Below are case briefs for the four recent cases that have come from the Court of Appeals concerning tax matters.

Filing Deadline
Centerpoint Owner LLC v City of Grand Rapids, unpublished per curiam opinion of the Court of Appeals, issued January 22, 2019 (Docket No 340710).

Petitioner appealed the Tribunal's order dismissing its petition as untimely. Petitioner's agent attempted to e-file 189 petitions with the Tribunal beginning 12:30 p.m. on May 31, 2017, the last day to timely file petitions for commercial property. Petitioner's agent successfully e-filed 80 petitions. The agent used a single credit card to pay the filing fees, and received a number of rejections because CEPAS, the credit card processing system, rejected credit card payments made with a single credit card within five minutes. Petitioner argued that its due process rights were violated because it had no notice of the five-minute rejection feature and because the error messages it received did not provide notice of the reason for the rejection. The Court explained that Petitioner had notice of the assessment and the opportunity to file an appeal. In addition, it was Petitioner's agent's "choices and conduct" that caused the untimely filing. Those choices and conduct included filing other petitions before Petitioner's and opting to e-file rather than filing by mail. The Court also stated that the Tribunal did not have an obligation to notify the public of the five-minute rejection feature because the issue rarely occurred and because the Tribunal had faced other e-filing glitches and had taken action depending on "its knowledge, the frequency, and severity of the issue." The Tribunal, according to the Court, had no "fiscal or administrative burden" to notify Petitioner of the five-minute rejection feature because the Department of Treasury actually controlled it. Petitioner argued that the Tribunal erred when it refused to extend the filing deadline. The Court stated that, because Petitioner filed its petition untimely

and failed to identify a statutory provision granting an extension, the Tribunal lacked jurisdiction over the petition and could take no action other than to dismiss it. Petitioner argued that the Tribunal erred by not ruling that it timely filed the petition because each delay from the five-minute blocking feature was a "system-wide outage," which gave Petitioner the right to file after the deadline. The Court concluded that the Tribunal's determination that a "system-wide outage" was one that prevented the system from being available to all taxpayers was a reasonable one. In addition, the Court explained that the Tribunal rationally interpreted its rules to require that a petitioner must attempt to file prior to a deadline in order to establish a right to e-file after the deadline. Petitioner also argued that the e-filing system was a "designated delivery system" and that it attempted to use it before the deadline by logging on and commencing the filing of petitions. The Court stated that the record did not indicate that Tribunal considered the e-filing system a designated delivery service, and that the Tribunal's factual finding that it was not a designated delivery service was supported by competent, material, and substantial evidence.

Use Tax

Emery Electronics, Inc v Dep't of Treasury, unpublished per curiam opinion of the Court of Appeals, issued February 12, 2019 (Docket No. 342250).

Plaintiff appealed an order of the Court of Claims granting summary disposition to defendant under CMR 2.116(C)(10). Plaintiff sold cell-phones and service contracts for those phones, purchasing the cell-phones from Verizon. After purchase, plaintiff would give the cell-phones to customers for no consideration when the customer entered into an agreement for Verizon service. Verizon paid plaintiff a fixed commission for new wireless service activations. Defendant audited plaintiff and issued a final assessment for use tax, using the amount plaintiff paid for the cell-phones, or "purchase price" as its tax base for the use tax. Plaintiff argued that there was a question of fact concerning the "purchase price" of the phones because Verizon reimbursed it for the phones. The Court held that there was no genuine issue of material fact because plaintiff purchased the phones and gave them away for no consideration. The remuneration received from Verizon was commissions on sales of service contracts, and plaintiff's self-serving and conclusory statements otherwise did not create a genuine issue of material fact. The Court declined to read the agreement between plaintiff and Verizon using the substance-over-form doctrine because the case relied upon by plaintiff dealt with federal income tax law and the doctrine had not been applied recently in a precedential case. Further, there was no indication that the agreement was shaped simply to avoid taxes. Plaintiff also argued that Verizon controlled every aspect of an iPhone transaction. The court stated that this was not relevant to whether Verizon reimbursed plaintiff for the cost of the phones or Verizon paid plaintiff commissions for the sale of service contracts.

North American Bancard, Inc v Dep't of Treasury, unpublished per curiam opinion of the Court of Appeals, issued February 28, 2019 (Docket No. 344241).

Petitioner appealed the Tribunal's determination that it was not entitled to a use tax refund. Petitioner provided credit card processing services. It provided credit card readers to merchants, either by placing them for free or selling them outright. There was no evidence that a merchant had used the credit card processing services with their own equipment. There was also no evidence that a merchant had ever purchased a terminal without a service agreement. The Tribunal concluded that, although Petitioner sold some terminals, those sales were intertwined with the sale of services, and thus Petitioner was not engaged in sales at retail. Petitioner argued that it should not owe use tax on all its terminals because some would eventually be sold. The terminals were all "purchased for resale" until they were removed from inventory and placed with a customer. The Court concluded that the Tribunal's finding that Petitioner did not engage in retail sales was supported by competent, material, and substantial evidence because testimony established that there was no reason to purchase a terminal without a service agreement. In addition, Petitioner advertised itself as a provider of services and free equipment. Therefore, the Tribunal properly used the "incidental to service" test. The Court held that the Tribunal's findings that customers sought Petitioner's credit card services as the object of the transactions, that Petitioner held itself out as a provider of services, that Petitioner's business model was designed to profit from the sales of services, that Petitioner did not sell terminals in its normal course of business, that terminals were of minimal value compared to services, and that Petitioner had non-sales reasons for having separate transactions for terminals and services, were supported by competent, material, and substantial evidence. Petitioner's argument that the Tribunal should not have "lumped together" its sold terminals with its placed-for-free terminals was disingenuous, stated the Court, because Petitioner attempted to defer use tax on all its terminals because it was possible to sell some of the terminals. Petitioner argued that the majority of its terminals are deployed outside Michigan and thus not subject to use tax, citing *Brunswick Bowling & Billiard Corp v Dep't of Treasury*, 267 Mich App 682; 706 NW2d 30 (2005). In *Brunswick*, however, there was no question whether items were subject to use tax based on being stored in Michigan, and thus it is inapplicable.

<u>Charitable Exemption</u>
Dearborn Hts Montessori Ctr, Inc v City of Livonia, unpublished per curiam opinion of the Court of Appeals, issued February 14, 2019 (Docket No. 341920).

Petitioner appealed the Tribunal's determination that it did not qualify for a nonprofit charitable institution under MCL 211.7o. Petitioner operates a school that educates children through the Montessori method and charges tuition. Petitioner argued that the

Tribunal erred when it determined Petitioner was not a charitable institution because the Tribunal improperly required a certain threshold to be met in order to be considered organized chiefly for charity. The Court stated that providing education is not, by itself, charity when tuition is being charged. It distinguished the facts of *Wexford Med Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), stating that Petitioner did not "provide unrestricted tuition assistance," noting that it does not grant full scholarships. In addition, the organization in *Wexford* provided many more charitable services than Petitioner. Petitioner argued that the Tribunal should have analyzed the organization as a whole, not just the Livonia site. The Court stated that the exemption at issue pertained only to the Livonia campus and that the policies and programs are essentially the same across the other campuses. Petitioner also argued that the Tribunal improperly relied on the determination that the Livonia campus only granted one scholarship. The Court stated that the Tribunal considered evidence concerning other discounts available and reasoned that these additional discounts "do not tip the scales in favor of the school's claim for a charitable institution exemption." Petitioner last argued that the Tribunal improperly relied on the finding that the school raises tuition in an effort to remain profitable. The Court concluded that there was no error in the finding that Petitioner raised tuition in an effort to cover costs because testimony showed that tuition was connected to costs.