STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

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GOVERNOR

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Dear Tax Tribunal Practitioner:

We have several updates to share with you.

Updated Small Claims Forms

The Tribunal has published new forms for use by parties in the Residential and Small Claims division, effective on June 3, 2019. The Petition and Answer forms for all Small Claims case types have been updated. The Tribunal anticipates that these new forms are streamlined, easier to complete, and will result in fewer defaults. Identical versions of the forms have been introduced at the Tribunal's website, www.michigan.gov/taxtrib, under the Small Claims Forms tab, as well as integrated into the Tribunal's e-filing system. The instructions included with the paper version of the forms also includes new and relevant information that will facilitate correct completion of these forms.

Parties should immediately begin utilizing the new forms for Small Claims filings.

Non-sufficient Fund Checks

The Tribunal's new practice concerning bounced checks is to place the offending party in default.

Small Claims Decision as Precedent

MCL 205.765 provides that a small claims decision is not precedent unless the Tribunal designates it as such. Tribunal records indicate Small Claims cases are rarely designated as precedent, as the Tribunal has only exercised this option 18 times since 1992. However, the Tribunal found that the question of whether the Tribunal has the authority to waive a penalty under MCL 211.7cc(3)(a) is one of first impression. Further, the decision in this case is well-reasoned and sets forth guidelines for the Tribunal to review this specific penalty. In instances where future cases present the same facts, the Tribunal will rule according to the binding decision.

The Small Claims decision designated as precedent by the Tribunal on May 2, 2019 is:

Nicholas J Kumke v Van Buren County, MTT Docket No. 18-003625.
The Tribunal held that it has the authority to waive the $500.00 penalty imposed upon certain disqualified principal residence exemption claimants under MCL 211.7cc(3)(a).

The Tribunal relied upon the facts in this case in its decision to waive the penalty imposed upon Petitioner, as the record indicated that Petitioner claimed the exemption in error, that Petitioner never held himself out to occupy the subject property but for the exemption affidavit, that Petitioner identified for the auditor the existence of the substantially similar claim at an out-of-state property, and that the amount of the penalty was excessive compared to the tax owed as a result of the denial.

Recent Appellate Opinions

The Michigan Court of Appeals and the Supreme Court have issued several opinions which a tax practitioner may find relevant.

Tenbusch v Dep't of Treasury, unpublished per curiam opinion of the Court of Appeals, issued March 5, 2019 (Docket No. 344239).

Petitioner appealed the Tribunal's Final Opinion and Judgment, which concluded that Petitioner was not entitled to a Principal Residence Exemption ("PRE") for the tax years at issue. The Tribunal excluded evidence that Petitioner submitted prior to the hearing, but inadvertently failed to send to Respondent. Petitioner's claim for a PRE was rejected because she did not occupy the parcel. Petitioner argued that the Tribunal erred when it excluded evidence that Petitioner inadvertently failed to serve on Respondent. The Court found no error in the Tribunal's exclusion of the evidence because TTR 287 is in place to prevent unfair surprise to the opposing party and Respondent had no opportunity to review the evidence prior to the hearing. Petitioner next argued that the Tribunal erred when it failed to consider evidence presented through her testimony. The Court found no merit in Petitioner's contention because the recitation of Petitioner's contentions referred to statements made by Petitioner at the hearing. Petitioner also argued that the Tribunal erroneously denied the PRE. The Court held that the Tribunal's determination was supported by competent, material, and substantial evidence because Petitioner indicated that she was only at the subject property for part of the year and spends the rest of the time at her friend's home. Petitioner's income tax returns, driver's license, and vehicle registrations all showed a different address. Although there was some evidence to support Petitioner's claim, the weight accorded that evidence is within the Tribunal's discretion, and the Court of Appeals may not second-guess that decision.

Komarnicki v Kenockee Twp, unpublished per curiam opinion of the Court of Appeals, issued March 5, 2019 (Docket No. 341402).

Petitioner appealed the Tribunal's order dismissing his petition for lack of jurisdiction. The March Board of Review issued a revised Notice of Assessment increasing Petitioner's taxable value for the 2016 tax year. According to Petitioner, he did not receive notice of this increase until receiving his summer tax bill in July 2016. Petitioner's counsel sent a letter to Respondent in July 2016, but did not receive a response until December 2016, which explained that Petitioner could appeal at the December Board of Review and then to the Tribunal if he wished. The December Board of Review upheld the March Board of Review's decision and Petitioner appealed to the Tribunal. The Hearing Referee issued a proposed opinion and judgment concluding that the Tribunal lacked jurisdiction over the appeal because it was not filed by July 31, 2016. The Tribunal issued a final opinion and judgment that found the Hearing Referee erred when she concluded that the appeal should be dismissed because it was not filed before the July 31, 2016 deadline. Nonetheless, the Tribunal dismissed the case because Petitioner was required to file the appeal within 35 days of the July notice and did not do so. The Court stated that, despite not receiving the revised notice until July 2016, Petitioner was required to file his appeal by the July 31, 2016 deadline. In addition, Petitioner presented no claim of violation of due process, and thus could not be awarded relief on that basis. The Court stated that it could not address Petitioner's argument that his taxable value was improperly uncapped because the Tribunal did not address it given it lacked jurisdiction. The Court held that the Tribunal erred in relying on the 35 day provision in MCL 205.735a, but that Petitioner still failed to timely file because he missed the July 31, 2016 deadline.

EBI-Detroit, Inc v Dep't of Treasury, unpublished per curiam opinion of the Court of Appeals, issued March 7, 2019 (Docket No. 343932).

Plaintiff appealed the Court of Claims order granting summary disposition to defendant. Defendant assessed use tax to plaintiff after auditing plaintiff's tax returns and finding several million dollars of goods sold with remittance of sales or use tax. Plaintiff's job records were incomplete and thus defendant utilized an indirect audit method by assessing use tax on expenditures that plaintiff could not show were exempt. The Court stated that it was undisputed that plaintiff had failed to remit sales and use tax during the years at issue. The results of defendant's audit are "prima facie correct." Despite plaintiff's attempt to refute the assessment by showing that, in general, its subcontractors were required to pay the sales tax, plaintiff provided no evidence that a subcontractor actually paid the tax. Because plaintiff failed to set forth any evidence refuting the assessment, summary disposition was proper.
ITT Ed Servs, Inc v Flint Twp, unpublished per curiam opinion of the Court of Appeals, issued March 12, 2019 (Docket No. 342290).

Petitioner appealed the Tribunal's order granting summary disposition to Respondent, denying petitioner's claim for a tax exemption under MCL 211.7n. Petitioner was a for-profit education institution. The Court explained that the outcome of the case was determined by the Supreme Court's ruling in *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65; 894 NW2d 535 (2017). In *SBC Health,* the Supreme Court read MCL 211.9(1)(a) and MCL 211.7n *in pari materia.* It concluded that educational institutions were subject to a non-profit requirement under MCL 211.7n and that the omission of the same requirement in MCL 211.9(1)(a) led to the conclusion that MCL 211.9(1)(a) did not require non-profit status. The Court explained that it "cannot logically separate our Supreme Court's conclusion that MCL 211.7n excludes for-profit educational institutions from its conclusion that MCL 211.9(1)(a) does not." Thus, it concluded it was bound by *stare decisis* and that petitioner could not claim the exemption under MCL 211.7n because it was a for-profit educational institution.

Dorsey Sch of Business, Inc v Charter Twp of Saginaw, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2019 (Docket No. 344414).

Petitioner appealed the Tribunal's order granting summary disposition to Respondent. Petitioner is a for-profit education institution. Following the Supreme Court's ruling in *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65; 894 NW2d 535 (2017), which held that MCL 211.9(1)(a) could not be limited to nonprofit educational institutions, Petitioner filed a petition with the STC seeking a retroactive exemption for the 2015, 2016, and 2017 tax years. The STC dismissed the petition for lack of jurisdiction, and Petitioner filed a petition with the Tribunal. Petitioner argued that the Tribunal erred in granting summary disposition to Respondent on its claim under MCL 211.154 and 211.53a. The Court held that the Tribunal properly granted summary disposition to Respondent on the MCL 211.154 claim because the case relied upon by Petitioner, *Detroit v Norman Allan & Co*, 107 Mich App 186; 309 NW2d 198 (1981), was based on language in MCL 211.154 that was no longer present. The Court stated that the decision in *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621; 765 NW2d 31 (2009) "does not grant the STC the authority to revisit previous tax years in order to reclassify property as exempt that had been reported as taxable." Petitioner argued that when it reported its property as taxable and Respondent accepted it that the actions constituted a mutual mistake of fact under MCL 211.53a. The Court reasoned that any mistake was one of law because it was a mistake concerning whether the tax was valid, not a factual error such as reporting the same property twice. In addition, there was no evidence that the mistaken belief was mutual because the assessor did not "possess an independent duty to determine what exemptions, if any, petitioner was entitled to in the absence of petitioner claiming those exemptions."

Smith v Forester Twp, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2019 (Docket No. 344587).

Petitioner appealed the Tribunal's denial of his Poverty Exemption for the 2017 tax year. It had previously denied Petitioner's Poverty Exemption for the 2015 tax year because his reverse-mortgage payments were income that exceeded the income test. That decision was upheld in *Smith v Forester Twp*, 323 Mich App 146; 913 NW2d 662 (2018). The Board of Review did not consider the reverse-mortgage payments when it denied the 2017 exemption, instead relying on a calculation of business income. At the hearing before the Tribunal, Respondent relied, in part, on the Court of Appeals decision in *Smith*. The Tribunal's Final Opinion and Judgment determined that the inclusion of the business income was improper, but denied the exemption based on the reverse-mortgage amounts. Petitioner argued that the Tribunal erred when it considered an issue other than the business income and that it violated his constitutional rights by deciding his appeal based on the reverse-mortgage payments. The Court concluded that the Tribunal did not err in denying Petitioner a Poverty Exemption. *Smith* determined that reverse-mortgage payments count against the landowner. The Tribunal did not deny Petitioner due process when it considered the reverse-mortgage payments because the exemption had previously been denied on that basis, and he himself argued at the 2017 Board of Review that they should not count against him. The Tribunal did not err when it accepted Petitioner's 2017 Poverty Exemption application because he bore the burden of proof and this information was necessary for it to make a determination. The Tribunal also did not err when it considered *Smith* because the opinion was not evidence, it was precedential opinion, and "[c]onsideration of and reliance on recent, relevant, binding authority cannot constitute error." Petitioner argued that he would have been able to decide what evidence and argument was relevant had he known that the reverse-mortgage payments were an issue. The Court explained that, in light of *Smith*, Petitioner could have presented nothing to show that the reverse-mortgage payments were not relevant.

HC Investment Holdings LLC v Scio Twp, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2019 (Docket No. 342324).

Petitioner appealed the Tribunal's granting of partial summary disposition in Respondent's favor concerning whether the taxable value ("TV") was properly set to be equal to the state equalized value ("SEV"). Petitioner purchased the property in 2015 and in that tax year the TV was $591,300. Respondent "uncapped" the TV of the parcel

in 2016 and set the TV and SEV at $1,159,400. Petitioner argued that the Tribunal erred when it held that Respondent properly set the 2016 TV at the 2016 SEV instead of the 2015 SEV. The Court explained that nothing in Const 1963, art 9, § 3 "implies any relation back to the time before the transfer." Petitioner also argued that the STC's Guide to Basic Assessing supports its position. Although the section of the Guide cited by Petitioner is arguably ambiguous, the Court explained, it states elsewhere that "[w]hen a property sells it is uncapped and the state equalized value and the taxable value are the same for the next year." The Legislature enacted MCL 211.27a to implement Const 1963, art 9, § 3's requirements and "[t]he statute could not be clearer in stating that the TV in the year following a transfer is the same as the SEV in that post-transfer year." A conclusion that the 2015 assessed value must become the 2016 TV would result in a property never uncapping.

Esquire Dev & Constr, Inc v City of Mason, unpublished per curiam opinion of the Court of Appeals, issued March 26, 2019 (Docket No. 343173).

Petitioner appealed the Tribunal's Final Opinion and Judgment determining the taxable value of the subject properties as well as the order holding that the Tribunal lacked jurisdiction to hear claims for years outside those appealed to the Board of Review. Petitioner acquired property in 1999 and began subdividing it into condominiums and single family homes. Petitioner appealed the assessment of the parcels to the Tribunal in 2009 and 2012, actions which resulted in Respondent agreeing to consent judgments. Petitioner filed another action with the Tribunal in 2014, which was later amended to include 2015 through 2017. Petitioner subsequently filed a third Tribunal case in 2015 alleging fraud. Petitioner's argument in the assessment cases was that the taxable value for improvements and the land should be calculated separately then added together for a total taxable value. Petitioner argued that the Tribunal erred when it determined that it lacked jurisdiction over Petitioner's fraud claim. The Court held that the Tribunal did not have jurisdiction over Petitioner's fraud claims because it received notice of the assessment and exhausting administrative remedies was not futile because Petitioner had appealed prior assessments and Respondent had agreed to a consent judgment. Further, the Tribunal could not hear a constructive fraud claim because it was an equitable claim and it lacked equitable authority. Even if the Tribunal could have heard the fraud claim, the statute of limitations in MCL 211.735a applied and Petitioner failed to timely file it within 35 days of the final decision, ruling, or determination. Petitioner also failed to plead any facts that Respondent attempted to conceal an error. The Court rejected Petitioner's theory that the taxable value of the land must be calculated separately from the taxable value of improvements. Petitioner lacked support for this assertion and the Tribunal could not have committed an error of law when there was no authority supporting Petitioner's

position. Respondent did not improperly calculate "additions" to the property because it simply multiplied each year's taxable value by the statutory formula. Despite Petitioner's assertions, taxable value and assessed value are calculated separately from each other aside from the first tax year after an uncapping event.

Iris LLC v City of Royal Oak, unpublished per curiam opinion of the Court of Appeals, issued April 4, 2019 (Docket No. 342812) (AFFIRMED).

Petitioner appealed the Tribunal's corrected opinion and order concerning the value of the subject property. The Tribunal had issued a scheduling order directing the parties to file their valuation disclosures by August 4, 2017 and thereafter extended the deadline to September 5, 2017 by stipulation of the parties. The order extending the deadline stated that no further extension would be granted except with a showing of good cause. Respondent timely filed its valuation disclosure, but Petitioner filed its valuation disclosure late. The Tribunal concluded that no good cause could be shown for the late filing and precluded Petitioner from filing a valuation disclosure or calling witnesses at the hearing. In its motion for reconsideration, Petitioner asserted that its counsel had suffered a stroke in June 2017 and that its valuation disclosure included sensitive information that could not be released until it completed lease negotiations. Petitioner argued that the legal standard in *Grimm v Dep't of Treasury*, 291 Mich App 140; 810NW2d 65 (2010) should be applied. The Court stated that the Grimm analysis only applies when a case is being dismissed and because the case was not dismissed, the analysis did not apply. The Tribunal therefore had to determine whether there was good cause for the late filings and properly considered counsel's health and the lease negotiations, but that Petitioner "had other means of protecting its interests, including simply apprising the tribunal of what was happening, having the valuations filed under seal, or taking other actions beyond simply refusing to comply with the tribunal's order." Petitioner argued that the Tribunal erred when it refused to allow it to make an offer of proof of a valuation disclosure. The Court explained that offers of proof are unnecessary when the substance of the evidence is apparent from the context, and in this case it was apparent that the evidence would have been a valuation disclosure. Petitioner argued that the Tribunal erred when it prevented Petitioner's rebuttal witness from testifying. The Court stated that the Tribunal did, in fact, allow Petitioner's rebuttal witness to testify and contradict the testimony of Respondent's expert. As the Court stated, "Petitioner has framed the issue in a way that makes it appear as though the tribunal violated its own rules of procedure in limiting [the expert's] testimony, but the record reveals that the opposite occurred." Petitioner also argued that the Tribunal failed to make an independent determination of value. The Court explained that the Tribunal fully analyzed the evidence and did not "blindly accept" the

testimony of Respondent's expert. It therefore applied its expertise and arrived at a supportable conclusion of true cash value.

Craig v Grand Traverse County, unpublished per curiam opinion of the Court of Appeals, issued April 16, 2019 (Docket No. 342780).

Petitioners appealed the Tribunal's dismissal of their case. Petitioners received a notice of denial of their Principal Residence Exemption ("PRE") on September 6, 2016. Petitioners contacted the Grand Traverse County Equalization Department and an appraiser informed them that setting aside the denial would be easy and that he would facilitate that action. This apparently did not occur and Petitioners filed an untimely appeal with the Tribunal on May 22, 2017. Petitioners argued that the Tribunal erred by failing to exercise its equitable powers. The Court explained that, under *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538; 656 NW2d 215 (2002), the Tribunal has no equitable powers. The case cited by Petitioners, *In re Quality of Serv Stds for Regulated Telecom Servs*, 204 Mich App 607; 516 NW2d 142 (1994), did not apply to the Tribunal because that case involved the Public Service Commission ("PSC") and, contrary to the PSC, equitable powers are not "reasonably necessary" to the Tribunal's jurisdiction.

Damghani v City of Kentwood, unpublished per curiam opinion of the Court of Appeals, issued April 16, 2019 (Docket No. 341213).

Plaintiff acquired property through a foreclosure auction. Prior to foreclosure, the prior owner had entered into a Voluntary Special Assessment/Development Agreement ("VSADA") in 2004. Defendant thereafter passed a resolution to confirm a special assessment roll, which funded the improvements in the VSADA. The parties stipulated at trial to "trigger dates" for a balloon payment for a certain phase of the improvements, which would have been extinguished had it occurred prior to foreclosure. The trial court concluded that some of the triggering events had not occurred but the stipulation was factually incorrect. Plaintiff argued that the trial court erred when it refused to apply the stipulation. The Court agreed, explaining that stipulations are "sacrosanct." The Court remanded for proceedings on which events occurred and in what phase. Plaintiff also argued that the trial court erred when it concluded that the obligation at issue arose from a special assessment. The Court held that it did not arise from a special assessment, explaining that defendant had passed a resolution confirming the special assessment roll. And despite plaintiff's assertion that the special assessment was recorded and thus a lien, there was no evidence that it had been recorded. The Court also rejected plaintiff's arguments that certain other triggering events had occurred prior to the

foreclosure. It remanded for the trial court to consider whether plaintiff was entitled to a refund for certain payments under MCL 211.53a.

Jim's Body Shop, Inc v Dep't of Treasury, ___ Mich App ___; ___ NW2d ___ (Docket No. 343459 (AFFIRMED – Court of Claims).

Plaintiff appealed from an order of the Court of Claims granting summary disposition to defendant. Defendant performed an audit resulting in use tax liability for plaintiff, using an indirect method. The liability was reduced after plaintiff provided documentation of its purchases on which it had paid sales tax. Plaintiff argued that defendant failed to comply with MCL 205.104a(4)(a) through (d) and therefore was not entitled to a presumption that the assessment was correct. The Court explained that plaintiff misconstrued the statute and that when an assessment is set using an indirect method it is prima facie correct and that the taxpayer has the burden to prove that it is incorrect. The subparagraphs provide procedural requirements to performing an indirect audit but does not render an assessment void for failure to follow the procedures. Rather, those subparagraphs are "relevant to a taxpayer's burden if the taxpayer can show that as a result of the Department's failure to abide by those procedural requirements, the assessment was not correct . . . ." The Court also stated that it was not unreasonable for defendant to determine an overall markup rate by averaging three accounts because if defendant uses an indirect audit method it "has wide discretion in the selection of the method and the taxpayer has no right to choose the method ultimately applied." Plaintiff also argued that the industrial processing exemption should apply to it. Although plaintiff's activities altered tangible personal property under MCL 205.94o(7)(a), it is not an "industrial processor" because its business did not constitute a "sale at retail." Its auto-body work consisted of the sale of tangible personal property and the sale of the service of repairing the automobile parts. Analyzing the facts of the case under the "incidental to service test," the Court concluded that under the totality of the transaction, the paint and other supplies plaintiff used were not available without the service, and thus the sale of the paints were incidental to the sale of the auto-body repair. Plaintiff also argued that the Court of Claims misapplied the summary disposition standard under MCR 2.116(C)(10) concerning capital assets. The Court stated that plaintiff had failed to produce any evidence creating a genuine issue of material fact whether it had paid sales tax on certain items. Last, plaintiff argued that it was at least arguable eligible for the industrial processing exemption and thus the negligence penalty should be waived. The Court stated that plaintiff had failed to exercise ordinary care because it did not remit any use tax, left its returns relating to sales and use taxes blank, and did not raise the issue of the industrial processing exemption until litigation.

Northport Creek Golf Course LLC v Leelanau Township (On Remand), unpublished per curiam opinion of the Court of Appeals, issued May 30, 2019 (Docket No. 337374).

On remand, the Court considered the Tribunal's findings on whether Petitioner used the golf course in connection with a for-profit business. The Court concluded that the Tribunal did not err when it reasoned that Petitioner was a "user" under MCL 211.181. The Tribunal found that Petitioner reported profits and losses on his personal income tax return. This finding reinforced the conclusion that Petitioner operated the golf course as a business rather than operating a property management business. The Court stated that the Tribunal also did not err when it concluded that the concession exemption did not apply. As opposed to the management agreement in *Kalamazoo v Richland Twp*, 221 Mich App 531; 562 NW2d 237 (1997), the agreement here "left too much operational control in the hands of petitioner in privatizing the entire golf course operation." In other words, the Court stated, "petitioner operated a golf course on the village's property rather than operating a concession at the village's golf course.

Apex Laboratories Int'l Inc v City of Detroit, ___ Mich ___; ___ NW2d ___ (2019) (Docket No. 157996).

The Supreme Court vacated the judgment of the Court of Appeals and remanded for reconsideration in light of the decision in *S Dakota v Wayfair, Inc*, ___ US ___; 138 S Ct 2080, 2099; 201 L Ed 2d 403 (2018).