STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Ronayne Krause, P.J., and Borrello and Riordan, JJ.

FRADCO, INC,

Petitioner-Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant,

/

Supreme Court No. 146333

Court of Appeals No. 306617

Michigan Tax Tribunal No. 0409506

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

REPLY BRIEF OF APPELLANT MICHIGAN DEPARTMENT OF TREASURY

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Scott L. Damich (P74126)
Assistant Attorney General
Attorneys for Respondent–Appellant
Michigan Department of Treasury
Revenue & Collections Division
P.O. Box 30754
Lansing, MI 48909
(517) 373-3203

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INTRODUCTION

Fradco's merits brief narrows the parties' dispute in three significant ways. First, Fradco concedes that the tax-appeal period begins to run—and due process is satisfied—when Treasury *issues* a final assessment. (Fradco Br 16 n 3, 27-30.) That position is contrary to the Court of Appeals' conclusion that the appeal-period "begins to run only once a copy of the final assessment *has been received.*" (App. 33a (emphasis added).) So the parties agree that the answer to the second question presented is "yes": MCL 205.22 does not include a receipt-based tolling rule.

Second, Fradco does not dispute that Treasury sent the final assessment by certified mail to Fradco's business address. (Fradco Br 5, citing App 51a.) So there is no question that Treasury complied both with the statutory notice provision, MCL 205.28(1)(a), and with due process.

Third, Fradco does not contest that the tax-appeal period runs from the "assessment, decision, or order," *not* from a document's service on a (properly designated) party representative. MCL 205.22(1). The copy-my-representative provision, MCL 205.8, says nothing about its effect on the appeal period, a strange silence indeed if what the Legislature actually intended was to start the appeal clock based on Treasury's transmission of a final assessment to the representative.

That leaves only one small disagreement: Treasury contends that the appeal period runs from the "issue" date, i.e., the date on the final assessment; Fradco contends that the period runs from the date Treasury sends the document. Either way, Fradco's appeal was untimely. Accordingly, this Court should reverse and dismiss Fradco's action.

REPLY ARGUMENT

I. The notice Treasury provided Fradco satisfied the Revenue Act and due process.

Nothing supports Fradco's allegation that Treasury conspired to deprive Fradco of due process. To the contrary, the record shows that Treasury properly sent the final assessment by certified mail to Fradco's business address, as MCL 205.22 and 205.28(1)(a) contemplate. The problem is that Fradco apparently failed to take any responsive action, including sending the assessment to its accountant.

A. Treasury issued a valid notice of final assessment.

As explained in Treasury's initial brief, when a taxpayer does not contest the intent to assess, Treasury issues a "final notice of assessment," which assesses the tax, interest, and penalty for the tax the Department contends is due and payable from the taxpayer. MCL 205.21(2)(f). The notice of final assessment becomes "final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment." MCL 205.22(5)

Treasury must provide procedural safeguards during the collection of tax to satisfy procedural due process concerns "because exaction of a tax constitutes a deprivation of property." *McKesson Corp v Div of Alcoholic Beverages and Tobacco,* 496 US 18, 36 (1990). Due process requires that taxpayers have "a fair opportunity to challenge the accuracy and legal validity of their tax obligations." *Id.* And the Legislature enacted procedural requirements that fulfill due process requirements.

For example, the final notice of assessment "shall include a statement advising the person of a right to appeal." MCL 205.21(2)(f). Also, Treasury must send the

notice of final assessment "either by personal service or by certified mail addressed to the last known address of the taxpayer." MCL 205.28(1)(a). And finally, the notice of final assessment must include the date of issuance because MCL 205.22(5) deems the assessment final "90 days after the issuance of the assessment, decision, or order of the Department."

Here, Treasury's notice of final assessment provided Fradco the information necessary to make a reasonably informed decision regarding an appeal under section 22. The notice was printed on Treasury's standard form C-4541F. (App. 59a.) It identified the type of tax assessed including applicable interest and penalty. The notice also conspicuously listed September 17, 2009 as the issuance date. Moreover, immediately beneath the title is a capitalized statement: "SEE BACK FOR APPEAL, PHONE AND CORRESPONDENCE INFORMATION." (*Id.*) And finally, the back side of the notice contains the statutorily-required statement that Fradco must file its appeal in the Michigan Tax Tribunal within 35 days of the Final Assessment's date. MCL 205.21(f); MCL 205.22. (App. 64a ("you may appeal . . . to the Tax Tribunal within 35 days *of the date on this bill*") (emphasis added).) Fradco cannot (and, quite frankly, does not) dispute that it had sufficient information from which it could make a reasonable and a "meaningfully informed decision respecting the right" to challenge the notice of final assessment. *Alan v Wayne County,* 388 Mich 210,352; 200 NW2d 628 (1972).

Fradco was also provided a reasonable amount of time to appeal. Treasury physically mailed the assessment on September 10, 2009, to Fradco's last known address at 6650 East Fulton, Ada, Michigan 49301 by certified mail number 7008

3230 0000 9225 5099. (App. 60a.) Treasury actually *postdates* final assessments to ensure that a taxpayer actually receives the full 35- or 90-day appellate period to make a reasonable and informed decision to challenge the assessment.

B. Fradco failed to file a timely appeal.

Fradco physically received the notice of final assessment by certified mail on September 16, 2009 (App.61a), placing Fradco on notice that it had 35 days from the date of issuance listed on the notice of final assessment to appeal to the Michigan Tax Tribunal or 90 days to appeal to the Court of Claims. MCL 205.22(1). But Fradco did not appeal until nearly a year later. (Fradco Br 11.) Under the statutory scheme, Fradco's lack of diligence barred the appeal.

C. The copy-my-representative provision, MCL 205.8, does not purport to affect a taxpayer's appeal period.

Fradco's position is that the appeal period did not begin until Treasury sent Fradco's designated representative a copy of the final assessment. But there are no words in the statutory scheme which say that. Anywhere. MCL 205.28(1)(a) is the Revenue Act's only "notice" provision. As Treasury explained in its principal brief, MCL 205.8 is a courtesy statute, not an additional notice requirement. This is confirmed by MCL 205.28(1)(a), which references the taxpayer, not the taxpayer's representative.

What's more, MCL 205.28(1)(a) is mandatory, *Manistee, etc., R. Co. v. Auditor General*, 115 Mich. 291; 73 NW 240 (1897), because it has a consequence for non-compliance: if Treasury does not issue the final assessment, the appeal clock does not

begin to run. In contrast, the copy-my-representative provision, MCL 205.8, is merely directory, i.e., a statute is "designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected." *French v Edwards*, 80 US 506; 30 LEd 702 (1871). If the Legislature had intended the appeal period to toll pending Treasury's sending of notice to a taxpayer's representative, MCL 205.8 would say that. It does not. And Fradco cannot read such a change into the legislative silence.

D. The cases cited by Fradco interpreting the General Property Tax Act's notice provision adds further support to the conclusion that MCL 205.8 is not a notice provision.

Fradco cites *Republic Bank v Genesee County Treasurer*, 471 Mich 732; 690 NW2d 917 (2005), in support of its allegation that Treasury intentionally deprives taxpayers of their due process rights. (Fradco Br 37.) In *Republic Bank*, this Court interpreted the General Property Tax Act's notice requirement, which requires a county treasurer to send certain *parties* notice of the date on which property will be forfeited to the county treasurer for unpaid delinquent taxes. MCL 211.78f(1) provides, in relevant part, that:

> the county treasurer shall send a notice by certified mail, return receipt requested, to the person to whom a tax bill for property returned for delinquent taxes was last sent *and*, if different, to the person identified as the owner of property returned for delinquent taxes as shown on the current records of the county treasurer *and* to those persons identified under section 78e(2). [MCL 211.78f(1)]

MCL 211.78e(2) lists a variety of persons entitled to notice.

Again, if the Legislature intended MCL 205.8 to be an additional "parallel" notice provision, the Legislature would have referenced MCL 205.28(1)(a), just as the

Legislature did with the notice provisions in the General Property Tax Act. The legislative silence demonstrates that MCL 205.8 is not intended to be an additional notice requirement.

II. The "tolling ruling" adopted by the Tax Tribunal and the Court of Appeals is contrary to the finality language of MCL 205.22(4) and (5).

As noted above, Fradco now agrees with Treasury that the Court of Appeals erred in creating a tolling-until-receipt rule. That agreement is well founded. MCL 205.22(5) unambiguously provides that a notice of final assessment becomes final "90 days after the *issuance* of the assessment, decision, or order of the Department. MCL 205.22(5) (emphasis added). Once the notice of final assessment is issued, the 90-day finality date is set in stone. There is no other trigger for the beginning of the 90 days.

Fradco's position in the Tribunal and the Court of Appeals was predicated on replacing "issuance" in MCL 205.22(5) with "sent" or "mailing." This unwarranted word transplant is necessary for Fradco's argument to prevail. In Fradco's view the finality of a notice of final assessment is contingent upon Treasury sending a copy of the notice to Fradco's power of attorney holder. This is wrong because no statutory language in the Revenue Act provides for a situation where a notice of final assessment is properly issued by Treasury to the aggrieved taxpayer, but the 90-day finality period is tolled until Treasury sends a copy of the notice to the power of attorney holder.

Indeed, the Revenue Act does not contain a single provision that would allow tolling the statutory appeal periods and finality language contained within section 22. The Legislature has made a policy decision that bases the finality-clock trigger on

when Treasury "issues" the final assessment to the taxpayer, rather than on when or if Treasury sends the taxpayer-representative a copy of the notice of final assessment. Fradco's attempt to graft an extension into the finality language of MCL 205.22(4) and (5) must fail. In any event, Fradco's failure to file its appeal until nearly a year after Treasury sent the notice to Fradco is fatal.

CONCLUSION AND RELIEF REQUESTED

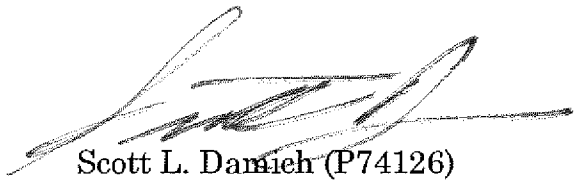
This Court should enforce the plain statutory text and hold that a taxpayer must file an appeal to the Michigan Tax Tribunal within 35 days (or to the Court of Claims within 90 days) after the date that appears on Treasury's final assessment.

Accordingly, Treasury respectfully asks that this Court reverse the Court of Appeals opinion and enter summary disposition in favor of Treasury.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record



Scott L. Damich (P74126)
Assistant Attorney General
Attorneys for Respondent–Appellant
Michigan Department of Treasury
Revenue & Collections Division
P.O. Box 30754
Lansing, MI 48909
(517) 373-3203

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