

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GELDHOF ENTERPRISES, INC.,  
Petitioner-Appellant,

UNPUBLISHED  
December 10, 2013

v

DEPARTMENT OF TREASURY,  
Respondent-Appellee.

No. 313142  
Tax Tribunal  
LC No. 00-431374

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Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Petitioner, Geldhof Enterprises, Inc. (Geldhof), appeals as of right the order of the Tax Tribunal granting summary disposition in favor of respondent, Department of Treasury (the Department). We conclude that the Department did not sufficiently notify Geldhof of its final assessment and deprived Geldhof of its opportunity to timely appeal to the Tribunal. Because the Tribunal erred by determining that the Department sufficiently notified Geldhof of its final assessment, we reverse and remand for further proceedings.

**I. FACTS**

Geldhof is located at 420 Lansing Street, Charlotte MI 48813. In 2010, the Department sent notices of its intent to assess use taxes of \$3,221.70 and sales taxes of \$145,800.96 to Geldhof at “430 Lansing Avenue.” On February 26, 2010, in a letter advising the Department that it had retained counsel and was seeking an informal conference, Geldhof informed the Department that its correct address was 420 Lansing Street. After the informal conference, the Department accepted the referee’s recommendation to issue the assessments, and it issued an order of determination on May 31, 2011. The Department mailed its order of determination to Geldhof at 420 Lansing Street. However, the Department subsequently mailed its final assessments to “430 Lansing Ave.”

On August 29, 2011, Geldhof filed a complaint in the Court of Claims, asserting in part that the Department had failed to provide it with final assessments, which were “controlling for the purposes of determining the timeliness of [Geldhof’s] appeal.” The Department responded that the Court of Claims lacked jurisdiction to hear Geldhof’s appeal because Geldhof had not paid the taxes due. The Court of Claims granted the Department’s motion for summary disposition on the basis that it lacked jurisdiction.

On November 18, 2011, Geldhof filed a petition with the Tribunal, asserting in part that the Department had failed to mail it copies of the final assessments at its last known address and thus deprived it of due process. On August 1, 2012, the Department moved for summary disposition, asserting that Geldhof's petition was untimely and that it had not denied Geldhof due process because Geldhof had actual notice of the assessments.

On August 12, 2012, the Tribunal granted the Department's motion for summary disposition. The Tribunal found that the Department did not comply with either MCL 205.28(1) or MCL 205.8 because it neither mailed the assessment to its last known address nor provided a copy of the assessments to Geldhof's counsel. The Tribunal also found that "[t]he Final Assessments were returned to [the Department] as undeliverable." On that basis, the Tribunal concluded that Geldhof's 35-day appeal period did not begin to run when the Department issued the assessments.

However, the Tribunal found that Geldhof's filing in the Court of Claims showed that it was "aware of the finality of the assessments . . ." The Tribunal concluded that, at that time, Geldhof did not have "actual notice" of the final assessments, but did have "constructive notice." The Tribunal dismissed Geldhof's petition on the basis that Geldhof had filed it more than 35 days after it had constructive notice of the Department's assessments.

## II. DEPRIVATION OF RIGHT TO APPEAL

### A. STANDARD OF REVIEW

This Court's review of a decision by the Tax Tribunal is limited.<sup>1</sup> We must accept the Tax Tribunal's factual findings if "competent, material, and substantial evidence on the record" supports them.<sup>2</sup> When a party does not dispute the facts or allege fraud, we review whether the Tribunal "made an error of law or adopted a wrong principle."<sup>3</sup> This Court reviews de novo issues of constitutional law and statutory interpretation.<sup>4</sup>

### B. LEGAL STANDARDS

The due process clauses of both the Michigan and United States constitutions prohibit the government from depriving a person of property without due process of law.<sup>5</sup> The essential elements of procedural due process are "adequate notice, an opportunity to be heard, and a fair

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<sup>1</sup> *Michigan Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012).

<sup>2</sup> Const 1963, art 6, § 28; *Michigan Props, LLC*, 491 Mich at 527.

<sup>3</sup> *Michigan Props, LLC*, 491 Mich at 527-528.

<sup>4</sup> *Id.* at 528; *Sidun v Wayne Co Treas*, 481 Mich 503, 508; 751 NW2d 453 (2008).

<sup>5</sup> *Sidun*, 481 Mich at 508-509; *Dow v Michigan*, 396 Mich 192, 210; 240 NW2d 450 (1976). See Const 1963, art 1, § 17; US Const, Am V; US Const, Am XIV.

and impartial Tribunal.”<sup>6</sup> “The ‘opportunity to be heard’ includes the right to notice of that opportunity.”<sup>7</sup> When the State does not sufficiently notify a taxpayer of his or her opportunity to be heard, the taxpayer has been deprived due process.<sup>8</sup>

MCL 205.28(1)(a) provides that the Department shall provide a taxpayer notice “by certified mail addressed to the last known address of the taxpayer.” MCL 205.8 provides that the Department shall also send copies of letters and notices to the taxpayer’s official representative, if the taxpayer so requests.

MCL 205.22(1) provides that

[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.

To appeal in the Court of Claims, the taxpayer must first pay the taxes due.<sup>9</sup>

### C. REASONABLY CALCULATED NOTICE

Geldhof contends that the Tribunal erroneously concluded that the Department sufficiently notified Geldhof of the assessments, thus rendering the November 18, 2011 petition untimely and depriving the Tribunal of jurisdiction. We conclude that the Tribunal erroneously concluded that the Department sufficiently apprised Geldhof of its right to be heard concerning the assessments.

A party is not necessarily deprived of due process simply because it does not receive actual notice of an action.<sup>10</sup> Due process requires a party to receive “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.”<sup>11</sup> When the State fails to actually notify a taxpayer of proceedings, the question becomes whether the methods that the State used were sufficient to satisfy due-process requirements.<sup>12</sup> When the Department complies with MCL

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<sup>6</sup> *Hughes v Almena Twp*, 284 Mich App 50, 69; 771 NW2d 453 (2009).

<sup>7</sup> *Bickler v Dep’t of Treas*, 180 Mich App 205, 211; 446 NW2d 644 (1989), quoting *Dow*, 396 Mich at 205-206.

<sup>8</sup> See *In re Petition by Wayne Co Treas*, 478 Mich 1, 5, 11; 732 NW2d 458 (2007).

<sup>9</sup> MCL 205.22(1) and (2).

<sup>10</sup> *Wayne Co Treas v Perfecting Church*, 478 Mich 1, 9; 732 NW2d 458 (2007).

<sup>11</sup> *Id.*, quoting *Jones v Flowers*, 547 US 220, 226; 126 S Ct 1708; 164 L Ed 2d 415 (2006) (additional quotation marks and citations omitted).

<sup>12</sup> *Sidun*, 481 Mich at 510.

205.28(1) and the certified mail is not returned unclaimed, it has sufficiently apprised the taxpayer and provided it an opportunity to present its objections.<sup>13</sup>

Here, the Tribunal found that the Department failed to comply with MCL 205.28(1), but concluded that Department sufficiently notified Geldhof on the basis of its finding that Geldhof was “aware of the finality of the assessments at issue due at a minimum to its receipt of Respondent’s Intent to Assess and the adverse findings as articulated in Respondent’s Decision and Order from the Informal Conference.” We conclude that this finding does not support the Tribunal’s conclusion that the Department sufficiently notified Geldhof of its opportunity to appeal the assessments.

The Tribunal failed to make a crucial distinction between whether Geldhof was apprised of the adverse decision and whether Geldhof was apprised of the opportunity to present its objections. The parties do not dispute the Tribunal’s finding that Geldhof was aware of the Department’s adverse findings—they dispute whether Geldhof was afforded a right to present its objections to those findings.

Here, the Department’s order notified Geldhof that it would issue the assessments within 30 days, and that Geldhof had a right to appeal them. Geldhof wanted to appeal the final assessments, not the order, and MCL 205.22(1) provides Geldhof with that right.<sup>14</sup> Geldhof’s 35-day period to appeal the final assessments to the Tribunal depended on when the Department issued them.<sup>15</sup> But because Geldhof never received the assessment and was unaware that the Department had issued them, its 35-day period to appeal the assessments passed without its knowledge. Thus, the Department’s failure to notify Geldhof of the assessments failed to afford Geldhof its opportunity to present objections.

Had the Department complied with MCL 205.28(1) by sending the final assessments to Geldhof’s last known address, its notice would have been reasonably calculated to apprise Geldhof of its right to appeal.<sup>16</sup> But it did not. In other words, the Department deprived Geldhof of its opportunity to be heard because Geldhof was waiting to receive the final assessments in order to appeal them, but the final assessments never arrived since the Department did not comply with the relevant statutes.<sup>17</sup>

Thus, we conclude that the Tribunal’s finding that Geldhof was aware of the finality of the *order* may support its conclusion that Geldhof was apprised of the pendency of the action, but it does not support its conclusion that the Department provided Geldhof with an opportunity to present its objections to the *assessments*.

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<sup>13</sup> *PIC Maint, Inc v Dep’t of Treas*, 293 Mich App 403, 410; 809 NW2d 669 (2011).

<sup>14</sup> See MCL 205.22(1).

<sup>15</sup> See MCL 205.22(1).

<sup>16</sup> See *PIC Maint, Inc*, 293 Mich App at 410.

<sup>17</sup> See *In re Petition by Wayne Co Treas*, 478 Mich at 5, 11.

Further, the remaining circumstances of this case do not support a conclusion that the Department's notification method was reasonable and constitutional. Courts consider the circumstances of the specific case to determine whether the State's notification method was reasonable and constitutional.<sup>18</sup> "The government's knowledge that its attempt at notice has failed is a 'circumstance and condition that varies the notice required.'"<sup>19</sup> When a mailed notice is returned unclaimed, the State must take additional reasonable follow-up measures aimed at informing the taxpayer.<sup>20</sup> "[D]ue process requires more than a perfunctory mailing to an address which is undeliverable."<sup>21</sup>

Here, the Tribunal found that the Department contacted the postal service and confirmed that the mail was undeliverable because Geldhof had moved. However, the record is devoid of any indication that the Department took other follow-up measures to attempt to inform Geldhof of the final assessment. For instance, reasonable follow-up measures may have included (1) ascertaining whether it had actually sent notice to Geldhof's last known address—420 Lansing Street—the address to which the Department had previously mailed its May 13, 2011 order of determination, (2) contacting Geldhof's counsel, to whom the Department also should have sent a copy of the final assessment, or (3) engaging in a computer search.<sup>22</sup>

We conclude that, under the circumstances in this case, the Department's failure to provide Geldhof with the final assessments denied Geldhof its opportunity to object to those assessments. Because Geldhof never received the assessments, it was unaware that its time to appeal them was passing. Thus, we conclude that the Department's failure to notify Geldhof off the assessments deprived Geldhof of its right to timely appeal.

#### D. ACTUAL NOTICE

As an alternative ground for affirmance, the Department asserts that the correctness of the Tribunal's finding concerning constructive notice does not control the outcome of this case because Geldhof had *actual* notice of the assessments. We conclude that the record is not sufficient to allow us to affirm on this basis.

First, the Department asserts that Geldhof had actual notice of the assessments when it filed its complaint in the Court of Claims on August 29, 2011. We reject this assertion.

"Fundamental requirements of due process are satisfied if a party received actual notice."<sup>23</sup> Here, the Tribunal found that Geldhof did not have actual notice of the final

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<sup>18</sup> *Sidun*, 481 Mich at 510-511; *Jones*, 547 US at 230.

<sup>19</sup> *Sidun*, 481 Mich at 511, quoting *Jones*, 547 US at 227 (additional quotation marks omitted).

<sup>20</sup> *Sidun*, 481 Mich at 511-512.

<sup>21</sup> *Bickler*, 180 Mich App at 210.

<sup>22</sup> See *Id.* at 210.

<sup>23</sup> *Gillie v Genesee Co Treas*, 277 Mich App 333, 356 n 12; 745 NW2d 137 (2007).

assessment when it filed its complaint in the Court of Claims. We must accept this finding if competent, material, and substantial evidence in the record supports it.<sup>24</sup> Geldhof's complaint claimed that the Department had not issued the final assessments. We conclude that this supports the Tribunal's finding because it indicates that Geldhof was unaware that the Department had issued the assessments, and thus did not have actual notice of them.

Further, we may not affirm on the basis that Geldhof did not file its appeal in the Tribunal within 35 days of receiving actual notice of the assessments because the Tribunal made no finding concerning when Geldhof did have actual notice of the assessments. The State does not deprive a taxpayer of due process if the taxpayer appealed to the Tribunal more than 35 days after it had actual notice of an assessment.<sup>25</sup>

Geldhof asserted below and asserts on appeal that the first time it had actual notice of the assessments was when the Department attached them to its brief supporting summary disposition in the Court of Claims case on October 24, 2011. Geldhof filed its appeal in the Tax Tribunal on November 18, 2011—within 35 days of receiving the Department's brief. However, the Tribunal made no finding concerning when Geldhof received actual notice of the assessments.

Thus, we conclude that the evidence in this case supported the Tribunal's finding that Geldhof did not have actual notice of the assessments when it filed its complaint in the Court of Claims, and the record is not sufficient for us to determine when Geldhof had actual notice at some earlier date than October 24, 2011.

#### E. RELIEF

As part of its request for relief, Geldhof asks that this Court nullify the Department's final assessment. We decline to do so.

The essential purpose of due process is to ensure fundamental fairness.<sup>26</sup> When the State has deprived a party of an opportunity for a hearing, "the remedy is to remand for additional proceedings conforming with due process requirements."<sup>27</sup>

Here, the Department's failure to provide Geldhof with the final assessments deprived it of the opportunity to appeal to the Tribunal. Therefore, we conclude that if Geldhof lacked actual notice, the proper remedy is to provide Geldhof with that opportunity.

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<sup>24</sup> *Michigan Props, LLC*, 491 Mich at 427.

<sup>25</sup> *PIC Maint, Inc*, 293 Mich App at 411.

<sup>26</sup> *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005); *Lassiter v Dep't of Social Servs of Durham Co*, 452 US 18, 24; 101 S Ct 2153; 68 L Ed 2d 640 (1981).

<sup>27</sup> *Bldg Owners & Managers Ass'n of Metro Detroit v Pub Serv Comm*, 131 Mich App 504, 512; 346 NW2d 581 (1984). See *Lawrence v Dep't of Corrections*, 81 Mich App 234, 239-240; 265 NW2d 104 (1978).

### III. DEPRIVATION OF RIGHT TO RESPOND TO MOTION

Because we are remanding on Geldhof's first issue, we decline to address whether the Tribunal deprived Geldhof of due process by issuing its decision before the expiration of Geldhof's time to respond to the Department's motion for summary disposition.

### IV. CONCLUSION

We reverse the Tribunal's grant of summary disposition in favor of the Department because the Department did not sufficiently notify Geldhof of its final assessment and, therefore, deprived Geldhof of its opportunity to appeal to the Tribunal. On remand, the Tribunal shall determine when the Department provided Geldhof with actual notice of the final assessment. If that date is within 35 days of November 18, 2011—the date on which Geldhof appealed the final assessment in the Tribunal—the Tribunal shall hear Geldhof's appeal.

We reverse and remand. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kurtis T. Wilder

/s/ Amy Ronayne Krause