S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

FRADCO, INC, Petitioner-Appellee,	FOR PUBLICATION October 30, 2012 9:05 a.m.
v	No. 306617 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellant.	LC No. 00-409506

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Respondent appeals as of right the Tax Tribunal's order cancelling an assessment against petitioner. This appeal is being considered concurrently with *SMK, LLC v Dep't of Treasury*, Docket No. 306639, where the same issue is presented for our consideration. The sole issue before us is whether the Tax Tribunal had the jurisdiction to hear the petitioner's appeal from its tax assessment. We conclude that it did, and affirm.

As long as fraud has not been alleged, this Court's review of a Tax Tribunal decision is limited to determining whether an error of law was committed or the wrong legal principle applied. Const 1963, art 6, § 28; *Schultz v Denton Twp*, 252 Mich App 528, 529; 652 NW2d 692 (2002). When the resolution involves statutory interpretation, de novo review is appropriate. *AERC of Michigan*, *LLC v Grand Rapids*, 266 Mich App 717, 722; 702 NW2d 692 (2005). "The purpose of statutory interpretation is to discover and give effect to the Legislature's intentions, and unambiguous statutory language should be enforced as written." *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008). "In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory[, and] the statute must be read as a whole [with] individual words and phrases [being] read in the context of the entire legislative scheme." *Michigan Properties*, *LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012) (citations omitted).

In the instant case, an audit revealed that petitioner had understated its taxable sales. Based on the result of this audit, respondent confirmed that petitioner had understated its taxable sales and issued a final assessment against petitioner requiring it to pay unpaid sales taxes, penalties, and interest. Despite petitioner's request for respondent to send copies of all letters and notices to petitioner's representative, the final assessment was initially sent only to petitioner, on or about September 16, 2009. Petitioner's representative did not receive the final

assessment from respondent until July 20, 2010. Petitioner then filed its appeal with the Tax Tribunal on July 28, 2010. Rather than responding to the petition before the Tax Tribunal, respondent moved for summary disposition under MCR 2.116(C)(4), arguing that the Tax Tribunal did not have jurisdiction over the appeal because it was not filed within 35 days of the final assessment. MCL 205.22.

The Tax Tribunal concluded that MCL 205.8 adds a parallel notice requirement whenever a taxpayer has filed proper written request for notices to be sent to a representative. The Tax Tribunal further concluded that because respondent did not initially issue notice to the appointed representative of petitioner, the time period for petitioner's appeal did not begin to run until the first representative of petitioner was notified. Thus, the appeal was timely, and the Tax Tribunal had jurisdiction. After concluding that the "source documents were well-maintained and adequate to allow the Tribunal to determine the proper sales tax due," the burden shifted to respondent to show that the amount paid was incorrect. Because respondent failed to satisfy that burden, the Tax Tribunal cancelled the final assessment against petitioner. The correctness of the amount paid is not at issue before us at this time.

It appears that respondent is concerned that the Tax Tribunal's decision invalidated 1999 AC, R 205.1011(5), which provides that "after the decision and order have been issued [following an informal conference], a notice of final assessment shall be sent to the taxpayer." However, "[a]n agency's interpretation of a statute is not binding on the courts, and that interpretation cannot conflict with the Legislature's intent as expressed in the plain language of the statute." *Pontiac School Dist v Pontiac Ed Ass'n*, 295 Mich App 147, 152; 811 NW2d 64 (2012). This Court can overrule an agency's interpretation as long as it gives "respectful consideration to the agency's construction of the statute and provide[s] cogent reasons" for doing so. *Id.* (internal quotations and citation omitted). Accordingly, the state regulation at issue is not binding precedent, and this Court can overrule a regulation if it is inconsistent with the applicable statutes.

The issue before us today is when the 35-day period under MCL 205.22 begins to run if the taxpayer has previously filed a written request with the Tribunal to send copies of all letters and notices to the taxpayer's representatives. This case presents an issue of first impression as this Court has not previously considered the effect of MCL 205.8 on MCL 205.22 in a published opinion.[1] Petitioner argues that the 35-day period begins to run only once a copy of the final assessment has been received by petitioner's representative. We agree.

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[1] Although respondent implies that *Altman Mgt Co v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2001 (Docket No. 216912), p 3, should be persuasive authority in determining the outcome of the instant case, the Tax Tribunal found in *Altman* that the petitioner had not filed a valid written request for an official representative. Thus, this Court did not consider whether respondent is required to give a copy of the final assessment to a taxpayer's official representative if a request is on file, and *Altman* cannot be considered persuasive, nor binding. See *Grimm v Dep't of Treasury*, 291 Mich App 140, 149 n 4; 810 NW2d 65; MCR 7.215(C)(1).

Under MCL 205.22, a taxpayer "may appeal the contested portion of [an] 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." MCL 205.22(1). If an appeal is not initiated during these time frames, the assessment, decision, or order "is final and is not reviewable by any court by mandamus, appeal, or other method of direct or collateral attack." MCL 205.22(4). The assessments in this case was based on the failure to pay taxes that respondent believed petitioner owed under the General Sales Tax Act, MCL 205.51 *et seq*. When imposing taxes under that act, respondent is required by MCL 205.59 to follow provisions of the Revenue Act, MCL 205.1 *et seq*. Because the sections at issue—MCL 205.8, 205.22, and 205.28—are part of that act, the plain language of MCL 205.59 indicates that respondent is required to follow all of these sections.

MCL 205.28(1) provides in relevant part that:

> The following conditions apply to all taxes administered under this act unless otherwise provided for in the specific tax statute:
>
> (a) Notice, if required, 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."

And MCL 205.8 provides:

> If a taxpayer files with the department a written request that copies of letters and notices regarding a dispute with that taxpayer be sent to the taxpayer's official representative, the department shall send the official representative, at the address designated by the taxpayer in the written request, a copy of each letter or notice sent to that taxpayer. A taxpayer shall not designate more than 1 official representative under this section for a single dispute.

The Tax Tribunal found that MCL 205.8 was a "more specific requirement" and that respondent was required to send all "letters and notices regarding a dispute with a taxpayer" to petitioner's representative as long as petitioner had made a proper written request.

MCL 205.8 imposes an affirmative and mandatory duty on respondent to send "copies of letters and notices regarding a dispute" to taxpayers' official representatives. See *Granger v Naegele Advertising Cos*, *Inc*, 46 Mich App 509, 512; 208 NW2d 575 (1973) ("'Shall' is equivalent to the word 'must.'"). However, MCL 205.8 is not the kind of other "specific tax statute" contemplated by MCL 205.28(1). By its plain terms, MCL 205.28(1) applies to "this act," of which MCL 205.8 is a part. The proper interpretation of the statute is that the reference MCL 205.28(1) is to *other* discrete statutes that themselves impose a tax, such as the General Property Tax Act, MCL 211.1 *et seq*., the Michigan Income Tax Act, MCL 206.1 *et seq*., or the Use Tax Act, MCL 205.91 *et seq*. The Tax Tribunal's interpretation of the statute would expand this reference to the entire tax code, rather than any particular notice requirements specific to each individual tax statue. Notably, the General Sales Tax Act, under which the taxes here were allegedly owed, does not have its own notice requirements. Nevertheless, as noted, the Tax Tribunal correctly found MCL 205.8 to be applicable and binding, and MCL 205.28 must be

interpreted in parallel with MCL 205.8 whenever a taxpayer files a valid written notice appointing an official representative.

Respondent argues that the Legislature would have specifically referenced MCL 205.28 in MCL 205.8 if it intended to elevate the level of notice required. Respondent's interpretation would require us to undermine the plain language of a statute on the basis of an impermissible guess at the Legislature's intent. Statutory interpretation requires an holistic approach. *Robinson v City of Lansing*, 486 Mich App 1, 15, 782 N.W.2d 171 (2010). A provision that may seem ambiguous in isolation often is clarified by the remainder of the statutory scheme. *Id*. It is a tenant of statutory interpretation that "[c]onflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). In reading the provisions of MCL 205.8 and MCL 205.28 together, it is clear that these sections should be interpreted as imposing parallel notice requirements whenever a taxpayer has a valid written request on file for respondent to send copies to an official representative. This interpretation gives meaning to both statutory sections' plain language and produces "an harmonious whole." *Id.* Thus, the 35-day period of MCL 205.22 does not begin to run until notice has been given under both MCL 205.8 and MCL 205.28.

Respondent finally argues that a final assessment is not a letter or notice, thus avoiding application of MCL 205.8 to these proceedings. "Notice" is defined as "[l]egal notification required by law or agreement, or imparted by operation of law as a result of some fact[.]" Black's Law Dictionary (9th ed). Respondent defines the final assessments as final bills for taxes due, but however respondent wishes to describe them, they nevertheless function as legal notifications to taxpayers that taxes are due. It was previously the practice of respondent to use the phrasing "notice of final assessment" when it issued assessments. *Livingstone v Dep't of Treasury*, 434 Mich 771, 826; 456 NW2d 684 (1990); *Stackpoole v Dep't of Treasury*, 194 Mich App 112, 114; 486 NW2d 322 (1992); *Dow Chem Co v Dep't of Treasury*, 185 Mich App 458, 461-462; 462 NW2d 765 (1990). Furthermore, the plain language of MCL 205.28 uses the word "notice" to refer to final assessments. Thus, a final assessment is a "notice" for the purposes of interpreting MCL 205.8, and that statute imposes a duty on respondent to send a copy of that notice to one of petitioner's official representatives.

Although respondent sent a letter dated April 21, 2010 to one of petitioner's representatives that indicated a final assessment was issued on September 17, 2009, this letter only gave the representative notice of the *issuance*. The letter was not the final assessment, and the plain language of MCL 205.8 requires respondent to send "a copy of" the notice, i.e. the final assessment, not just notice of it. Or, put another way, notice of the notice is not, itself, the "notice" contemplated by statute. Thus, the letter did not satisfy the requirements under MCL 205.8.

We conclude that MCL 205.8 must be interpreted in tandem with MCL 205.28 as creating parallel notice requirements. If a taxpayer has filed a proper written notice that appoints an official representative, then respondent must give notice to both the taxpayer and the taxpayer's representative before the 35-day period under MCL 205.22 begins to accrue. Because petitioner filed its appeal within 35 days after its representative received notice from respondent, the Tax Tribunal retained jurisdiction. Therefore, we affirm.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello
/s/ Michael J. Riordan