

COA Opinion: Tax Tribunal erroneously determined that petition was untimely filed and abused its discretion in dismissing the petition

17. December 2010 By Nicole Mazzocco

On December 16, 2010, the Michigan Court of Appeals published its opinion in *Grimm v. Department of Treasury, No. 293457*. The Court held that (1) a petition contesting a final tax assessment under MCL 205.735a is timely when it is given to a designated delivery service within 35 days after the final determination; and (2) the Tax Tribunal must consider the same factors as the Circuit Courts before imposing dismissal as a sanction for noncompliance with a court order.

Petitioner Robert Grimm is a corporate officer of Affiliated Insurance Agency. When the Michigan Department of Treasury found that the insurance agency failed to pay its taxes, it issued an assessment against Mr. Grimm personally because he was an officer who had “control or supervision of, or responsibility for” paying the corporation’s taxes, under MCL 205.27a(5).

Mr. Grimm received notice of the Treasury’s final assessment by letter dated July 22, 2008. According to MCL 205.735a(6), he had 35 days to file a petition challenging the assessment. Mr. Grimm mailed his petition with Federal Express on August 5, 2008, the 35th day after he received the letter. The Department of Treasury argued that because it did not receive Mr. Grimm’s petition until the 36th day, it was one day late and thus untimely filed. The Court of Appeals noted that MCL 205.735a(7) governs: a petition is timely if it “is given to a designated delivery service for delivery on or before the expiration of that time period and the petition is delivered by that designated delivery service.” The Court held that because Mr. Grimm delivered his petition to Federal Express, a designated delivery service under the statute, within the allotted 35 days and Federal Express actually delivered it to the Department of the Treasury, the petition was timely even though the Treasury did not receive it within the allotted 35 days.

Timing issues were not Mr. Grimm’s only problems. In addition, his petition failed to include the assessment numbers being appealed, as required by statute. The Tax Tribunal issued an order placing Mr. Grimm in default on December 16, 2008 for failing to include those assessment numbers and directed him to provide the assessment numbers within 21 days of that order. Mr. Grimm failed to do so, and the Tribunal dismissed his petition on January 8, 2009. The Court of Appeals reviewed this dismissal for abuse of discretion and reversed it.

The Court noted that dismissal is a “drastic” sanction, particularly since the record did not show that Mr. Grimm even had access to the assessment numbers that the Tax Tribunal ordered him to produce. It looked to *Viceno v. Ramirez*, 201 Mich. App. 501, 507; 536 N.W.2d 280 (1995), which lists factors that a trial court applying the Michigan Court Rules should consider before imposing dismissal as a sanction, and held that the Tax Tribunal must also consider these factors before dismissing a petition as a sanction for noncompliance with a court order:

- (1) whether the violation was willful or accidental;
- (2) the party's history of refusing to comply with previous court orders;
- (3) the prejudice to the opposing party;
- (4) whether there exists a history of deliberate delay;
- (5) the degree of compliance with other parts of the court's orders;
- (6) attempts to cure the defect; and
- (7) whether a lesser sanction would serve the interests of justice.

The Court evaluated these factors individually and found that the Tax Tribunal abused its discretion when it dismissed Mr. Grimm's petition. It further noted that if the Tax Tribunal dismisses cases as a sanction, the record must show that the Tribunal carefully considered the factors and "considered all its options in determining what sanction was just and proper in the context of the case before it." *Bass v. Combs*, 238 Mich. App. 16, 26; 604 N.W.2d 727 (1999), *rev'd on other grounds*, 481 Mich 618 (2008). The Court reversed and remanded the case for proceedings consistent with its opinion.