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No. A12-1342

STATE OF MINNESOTA

IN SUPREME COURT

Kevin Harbaugh,

Relator,

vs.

Commissioner of Revenue,

Respondent.

BRIEF OF RESPONDENT COMMISSIONER OF REVENUE

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LEGAL ISSUES

I. Did the Tax Court lack subject matter jurisdiction over Relator's appeal because Relator's appeal was filed one day after the appeal deadline?

The Tax Court held that it lacked subject matter jurisdiction because Relator's appeal was untimely.

Apposite Authorities:

Minn. Stat. § 271.06, subd. 2 (2010)

Langer v. Comm'r of Revenue, 773 N.W.2d 77 (Minn. 2009)

Acton Construction Co. v. Comm'r of Revenue, 391 N.W.2d 828 (Minn. 1986)

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Point Rejuvenate of Minnesota v. County of St. Louis, No. C2-01-100656, 2002 WL 31651161 (Minn. T.C. Nov. 14, 2002)

II. Did the Tax Court commit clear error in finding that Relator's appeal was filed on December 28, 2011?

The Tax Court found that the Realtor's appeal was filed on December 28, 2011 because the Tax Court's date-stamp indicated that the Tax Court received the notice of appeal on that day and because Relator did not present evidence to the contrary.

Apposite Authorities:

Byers v. Comm'r of Revenue, 741 N.W.2d 101 (Minn. 2007)

STATEMENT OF THE CASE

The issue in this case is whether the best evidence of the date on which the appeal of Relator Kevin Harbaugh ("Relator") was filed with the Tax Court is (1) the Tax Court's date-stamp on the appeal or (2) the date on which Relator mailed the appeal. The Tax Court found that it actually received Relator's appeal on the date indicated on the Tax Court's date-stamp. Because the date-stamp indicated that Relator's appeal was filed one day after the appeal deadline had expired, the Tax Court dismissed Relator's appeal for lack of subject matter jurisdiction. Relator appeals and argues that the date the Tax Court received Relator's appeal should be inferred from the date Relator mailed the notice of appeal and that the Tax Court committed clear error in finding that the appeal was untimely.

STATEMENT OF FACTS

On September 28, 2011, the Commissioner issued an order ("Commissioner's Order") assessing Relator additional tax and interest in the amount of $5,821, which he owed because he claimed two of his children as dependents while the children's mother had also claimed them as dependents. (Relator's Appendix ("Rel. App.") A-13–21.) On November 23, 2011, the Tax Court extended the 60-day period to appeal from the Commissioner's Order for an additional 30 days. (Rel. App. A-10.) Given the 90-day appeal period, the last day for Relator to file his appeal was December 27, 2011. (Rel. App. A-79.) Appellant mailed his appeal to the Tax Court and sent a copy to the Commissioner by first-class mail on December 22, 2011. (Rel. App. A-42–43.) The Commissioner received Relator's appeal on December 27, 2011, which was the last day to file an appeal. (Rel. App. A-52.) The Tax Court received Relator's appeal on December 28, 2011, when it was stamped "FILED." (Rel. App. A-34, A-88). December 28, 2011 was 91 days after the Notice Date of the Commissioner's Order, and one day after the appeal period had expired.

The Commissioner brought a motion to dismiss Relator's appeal based on the Tax Court's lack of jurisdiction due to the untimely filing of the appeal. (Rel. App. A-24–32.) Relator responded and argued that the appeal was timely filed because it was mailed on December 22, 2011. (Rel. App. A-36–41.) Relator also argued that the Tax Court had actually received the appeal on December 27, 2011, but had inadvertently applied a date-stamp of December 28, 2011. (*Id.*) The Tax Court ruled in favor of the Commissioner and held that (1) the Tax Court must actually receive the Notice of Appeal on or before

the filing deadline for the appeal to be timely filed, (2) mailing the Notice of Appeal within the appeal period does not extend the deadline by which Relator must file his appeal, and (3) the Tax Court received Relator's notice of appeal on December 28, 2011, and therefore lacked jurisdiction over the appeal. (Rel. App. A-75–82.) Relator then filed this appeal to the Supreme Court.

STANDARD OF REVIEW

The Supreme Court's review of Tax Court's decision is limited and deferential. *Singer v. Comm'r of Revenue*, 817 N.W.2d 670, 674 (Minn. 2012) (citing *Cont'l Retail LLC v. Cnty. of Hennepin*, 801 N.W.2d 395, 398 (Minn. 2011)). In reviewing the Tax Court's decisions, the Supreme Court determines whether (1) the Tax Court had jurisdiction, (2) the Tax Court decision was supported by the evidence and was in conformity with the law, and (3) the Tax Court committed any other error of law. Minn. Stat. § 271.10, subd. 1 (2010); *McLane Minn., Inc. v. Comm'r of Revenue* 773 N.W.2d 289, 292–93 (Minn. 2009). The Supreme Court reviews the Tax Court's conclusions of law and interpretation of statutes de novo. *Id.* at 293. It reviews the Tax Court's findings of fact for clear error. *Byers v. Comm'r of Revenue*, 741 N.W.2d 101, 105 (Minn. 2007).

ARGUMENT

I. THE TAX COURT LACKS SUBJECT MATTER JURISDICTION OVER THE APPEAL BECAUSE THE APPEAL IS UNTIMELY.

It is undisputed that the Tax Court only had jurisdiction to hear this appeal if Relator filed his appeal by December 27, 2011. The right to appeal from an order of the

Commissioner is purely statutory. *See Point Rejuvenate of Minnesota v. County of St. Louis*, No. C2-01-100656, 2002 WL 31651161, at *2 (Minn. T.C. Nov. 14, 2002) (stating that "the right to and methods of challenging [state] taxes are statutorily granted by the legislature"). That right is set forth in section 271.06, which provides in pertinent part:

> Except as otherwise provided by law, within 60 days after notice of the making and filing of an order of the commissioner of revenue, the appellant ... shall serve a notice of appeal upon the commissioner and file the original ... with the tax court administrator ... ; provided, that a tax court judge, for cause shown, may by written order extend the time for appealing for an additional period **not exceeding 30 days**.

Minn. Stat. § 271.06, subd. 2 (2010) (emphasis added).

It is well settled that "when the legislature creates a right not existing at common law, it has the power to impose any restrictions it sees fit." *Acton Construction Co. v. Comm'r of Revenue*, 391 N.W.2d 828, 835 (Minn. 1986) (internal quotation marks and citation omitted). A restriction limiting a statutory right constitutes a *substantive* part of that right: "[T]he conditions imposed [by the Legislature] qualify the right and are an integral part thereof; they are conditions precedent which must be fully complied with, *or the right does not exist*." *Id.* (emphasis added); *see also Point Rejuvenate,* 2002 WL 31651161, at *3 (recognizing same). A statutory time limitation is just such a condition precedent to a substantive right:

> [W]here a statute gives a new right of action ... and prescribes the time within which it may be enforced, the time so prescribed is a condition of its enforcement, an element in the right itself, and the right falls with the failure to apply for relief within the allotted time.

State v. Bies, 258 Minn. 139, 147, 103 N.W.2d 228, 235 (1960) (quoting *Kannellos v. Great N. Ry.*, 151 Minn. 157, 159-60, 186 N.W. 389, 390 (1922)).

Under these principles, when a Tax Court appeal is not timely filed, the statutory right to appeal passes out of existence. *Wiebesick v. Comm'r of Revenue,* No. 7864, 2007 WL 329151, at *2 (Minn. T.C. Jan. 31, 2007); *Point Rejuvenate,* 2002 WL 31651161, at *3. Accordingly, the Tax Court has long held that "[c]ompliance with the time limitation within which an appeal may be filed is an 'indispensable prerequisite' to the Court's acquiring jurisdiction thereof." *Scherling v. Comm'r of Revenue*, No. 7632, 2004 WL 1936492, at *1 (Minn. T.C. Sept. 1, 2004); *Dahlquist v. Comm'r of Revenue*, No. 6022, 1992 WL 119867, at *1 (Minn. T.C. May 22, 1992) (citations omitted); *Lyons v. Comm'r of Revenue*, No. 7245-R, 2001 WL 197242, at *1 (Minn. T.C. Feb. 23, 2001). Where an asserted appeal right does not exist, this Court necessarily lacks subject matter jurisdiction because there is no subject matter over which the Court might exercise adjudicatory power.

A. Relator's Notice Of Appeal Must Be Received By The Tax Court Within The Appeal Period For The Notice Of Appeal To Be Timely Filed.

Relator's appeal is untimely because it was not filed until after the statutory deadline for filing an appeal had expired. Filing an appeal with the Tax Court is complete when the Tax Court *receives* the notice of appeal, required certificate of service, and filing fee. The Minnesota Statutes provide that:

> within 60 days after notice of the making and filing of an order of the commissioner of revenue, the appellant ... shall serve a notice of appeal upon the commissioner and *file the original*, with proof of such service, *with the tax court*

> *administrator* or with the court administrator of the district court acting as court administrator of the Tax Court.

Minn. Stat. § 271.06, subd. 2 (2010) (emphasis added).[1] The Tax Court may, however, extend the time for filing the appeal up to 30 days. *Id.*

This Court has interpreted the statute's filing provision require actual receipt by the Tax Court administrator within the statutory period. *Langer v. Comm'r of Revenue*, 773 N.W.2d 77, 80 (Minn. 2009); *see also Mahoney & Foster, P.A. v. Comm'r of Revenue,* Dkt. No. 8108, 2009 WL 5064336 (Minn. Tx. Ct. Dec. 21, 2009) (finding that the filing component of the statute requires *actual receipt* by the Tax Court within the statutorily prescribed 60-day period).

In *Langer*, this Court considered whether an appeal to the Tax Court was timely filed when it is mailed before the expiration of the appeal period, but received after the filing deadline. *Langer*, 773 N.W.2d 77. The Court reasoned that because the Tax Court lacks a statute or rule which specifically authorizes filing by mail, that Tax Court must actually receive the notice of appeal, affidavit of service and filing fee by the filing deadline for the appeal to be timely filed. *Id.* at 81. Therefore, notices of appeal which are mailed before the deadline, but received after the deadline for filing are not timely filed. *Id.* The Tax Court cited *Langer* in *Mahoney*, in which it held that the taxpayer's appeal was not timely filed where it was mailed before the expiration of the appeal period, but received after the appeal period expired. Dkt. No. 8108-R, 2009 WL 5064336.

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[1] The proper filing fee is also required to be paid to the Tax Court administrator with the required documents. Minn. Stat. § 271.06, subd. 4 (2010).

In Relator's case, the Tax Court found that it actually received Relator's appeal on December 28, 2011. Because the notice of appeal was not received until after the deadline for filing an appeal had expired, the appeal was not timely filed and the Tax Court lacks subject matter jurisdiction over it.

B. The Common Law Mailbox Rule Does Not Extend The Deadline For Filing An Appeal.

Although Relator does not dispute that the Tax Court must receive the notice of appeal within the appeal period for it to be considered timely filed, Relator argues that the common law mailbox rule creates a presumption that Relator's appeal was received before the appeal deadline because he mailed the appeal on December 22, 2011. The common law mailbox rule creates a rebuttable presumption that an item mailed at the post office reached its destination within the usual time and was actually received by the person to whom the letter was addressed. *Hagner v. United States*, 285 U.S. 427, 419 (1932). The opposing party may then rebut this presumption with evidence of untimely receipt. *Philadelphia Marine Trade Assoc.-Int'l Longshoremen's Assoc. Pension Fund v. Comm'r of Internal Revenue*, 523 F.3d 140, 147 (3rd Cir. 2008). The common law mailbox rule does not create an exception to a statute requiring the receipt of a document within a specified time. *Id.* at 151.

Even if the common law mailbox rule creates a presumption that Relator's appeal was received within the appeal period, that presumption is rebutted by the Tax Court's actual receipt of Relator's notice of appeal after the appeal deadline. The common law

mailbox rule does not operate to change Relator's untimely filed appeal to a timely filed one.

Furthermore, the common law mailbox rule only creates a presumption that Relator's appeal would be received on December 28, 2011, not December 27, 2011. Relator indicates in his brief that the "ordinary time for mailing" is three business days. (Rel. Brief 10; Rel. App. A-54). However, Relator mailed his notice of appeal only two business days before December 27, 2011 rather than three business days. December 26 is a legal holiday when December 25 falls on a Sunday. Minn. Stat. § 645.44, subd. 5 (2010). Relator's appeal was due to be filed on Tuesday, December 27, 2011. Relator mailed the appeal on Thursday, December 22, 2011. Friday, December 23, 2011, was a business day, but December 24-26 consisted of a Saturday, Sunday, and legal holiday. Thus, Relator mailed his appeal only two business days before December 27, 2011 rather than three days. Accordingly, the common law mailbox rule, if applied, creates a presumption that the Tax Court would receive Relator's appeal on December 28, 2011, which was the day that the Tax Court received the appeal and which was one day late.

II. THE TAX COURT CORRECTLY FOUND THAT IT RECEIVED RELATOR'S NOTICE OF APPEAL ON DECEMBER 28, 2011.

The Tax Court committed no clear error in finding that it received Relator's appeal on December 28, 2011. The best evidence presented in this case of the date Relator's appeal was filed is the date-stamped notice of appeal, which indicates that the Tax Court received the appeal on December 28, 2011. Besides this date-stamp, there is no other direct evidence of when the Tax Court actually received Relator's notice of appeal.

Although Relator argues that mailing the notice of appeal on December 22, 2011 is sufficient to show that the appeal was timely filed, the date an item was mailed only provides direct evidence of the day it was sent, not the day it was received.

Relator also claims that because the Commissioner received the notice of appeal on the appeal deadline, and the Tax Court and the Commissioner's office are situated near one another, that the Tax Court should have received the notice of appeal at the same time as the Commissioner. Relator does not provide any authority that would indicate that letters mailed at the same time are presumed delivered at the same time. Furthermore, in *Langer,* this Court found that the Tax Court lacked jurisdiction over an untimely appeal where the Commissioner received service of an appeal before the expiration of the deadline to file an appeal, but the appeal was not filed with the Tax Court until after the deadline. 773 N.W.2d at 79. Accordingly, the Commissioner's receipt of Relator's notice of appeal does not create a presumption that Tax Court received the item at the same time.

Finally, Relator claims that because the Tax Court found in *Lehman* that a notice of appeal that was date-stamped December 28, 2011 was actually received on December 27, 2011, that this indicated a system-wide failure in the Tax Court which occurred on December 27, 2011. In *Lehman*, however, the taxpayer produced a delivery confirmation that indicates the appeal was delivered to the Tax Court on December 27, 2011. Dkt. No. 8415-R, 2012 WL 1850725 (Minn. T.C. May 16, 2012). Relator has not produced anything similar, despite multiple opportunities. Furthermore, the Tax Court is in the best position to ascertain whether any delay or negligence occurred on

December 27, 2011. It declined to find any. Accordingly, the date-stamp on Relator's appeal is the best evidence and presumptive date on which the notice of appeal was received by the Tax Court. The Tax Court committed no clear error in finding that Relator's appeal was untimely. The Court should find that the Tax Court lacked jurisdiction over the appeal because the appeal was untimely and uphold the decision of the Tax Court.

CONCLUSION

For the reasons stated above, the Commissioner requests that this Court affirm the decision of the Tax Court.

Dated: October 18, 2012

Respectfully submitted,

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