

A12-1342

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STATE OF MINNESOTA
IN SUPREME COURT

Kevin Harbaugh,
Relator

vs.

Commissioner of Revenue,
Respondent.

RELATOR'S BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

1. Whether the Tax Court was without subject matter jurisdiction to hear Relator's appeal because Relator failed to timely file his Notice of Appeal when the Notice of Appeal was "stamped" one day past the filing deadline?

Tax Court Held: In the affirmative. Where an appeal is not timely filed, Relator's statutory right to appeal passes out of existence, therefore the Tax Court lacks subject matter jurisdiction. (Appendix: page A-81, 82)

Wiebesick v. Commissioner of Revenue, No. 7864 (Minn. Tax Ct. Jan. 31, 2007)
Point Rejuvenate of Minnesota v. County of St. Louis, No. C2-01-100656 (Minn. Tax Ct. Nov. 14, 2002)
Piney Ridge Lodge, Inc. v. Commissioner of Revenue, 718 N.W.2d 861 (Minn.2006)

2. Whether the Relator's Notice of Appeal was timely because it was mailed at least three business days prior to the appeal deadline?

Tax Court Held: In the negative. The Tax Court found Minn. R. Civ. P. 6.05 does not extend the filing period under the three day "mailbox rule". (Appendix: page A-79, 80)

Mahoney and Emerson, P.S. v. Commissioner of Revenue, No. 8110-R (Minn. Tax Ct. Dec. 21, 2009)
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3. Whether the Relator presented sufficient evidence to show he timely filed his Notice of Appeal with the Tax Court clerk?

Tax Court Held: In the negative. The Tax Court found there was no evidence in this case to establish that the Notice of Appeal was actually delivered to the Tax Court prior to the filing deadline. (Appendix: page A-81)

Hohnmann v. Commissioner of Revenue, 781 N.W.2d 156 (Minn.2010)
Lehmann Brothers Holdings, Inc. and Subsidiaries v. Commissioner of Revenue, No. 8415-R (Minn. Tax Ct. May 16, 2012)
Minn. Stat. Sec. §271.06

STATEMENT OF THE CASE

This is a review by certiorari of an Order of the Tax Court, Honorable Sheryl A. Ramstad, which granted Respondent Commissioner of Revenue's Motion to Dismiss for Lack of Subject Matter Jurisdiction of Relator's Appeal of the Order of Commissioner. Minn. Stat. Sec. §271.10. The Tax Court found that Relator had not made a timely filing because the Relator's Notice of Appeal was "stamped" by the Tax Court clerk as being actually received on December 28, 2011, one day past the filing deadline. (Appendix: page A-81). The Tax Court dismissed Relator's Appeal by Order dated May 16, 2012 and entered and filed on June 5, 2012. (Appendix: page 74-75).

STATEMENT OF THE FACTS

On September 28, 2011, the Commissioner of Revenue issued an Individual Income Tax Audit Report and Tax Order assessing Relator Income Tax Credit and Penalties and Property Refund Credit and Penalties for tax years 2007, 2008 and 2009 on account of Relator claiming his two children as dependents during those years.

(Appendix: page A-1). Relator's ex-wife also claimed the two children as dependents during those years on the theory that the Relator's divorce decree awards the ex-wife primary physical custody of the children. (Appendix: page A-3). Relator alleges that the children resided with him on a full-time basis during the years in question, maintained their primary residence at his home and thus, he was entitled to the dependency exemptions. (Appendix: page A-3).

At Relator's request, the Tax Court granted Relator an additional thirty (30) days to appeal the Order. (Appendix: page A-10). The final day to appeal the entry of the Commissioner's Order was December 27, 2011. (Appendix: page A-78).

On December 22, 2011, the Relator, by U.S. Mail, First Class, mailed the Notice of Appeal, Affidavit of Service and proper filing fee to the Tax Court. (Appendix: page A-34, A-42). On the same day, Relator also mailed the same documents to the Commissioner of Revenue, by U.S. Mail, First Class. (Appendix: page A-12, A-43). Both packets of mail were deposited with the U.S. Post Office service in Zumbrota, Minnesota. (Appendix: page A-43). Mail sent from Rockne Law Office is sent via United States Postal Service, First Class Mail. (Appendix; Page A-43),

The Relator properly served the Commissioner of Revenue and they received their Notice on December 27, 2011. (Appendix: page A-52). The Tax Court claims to

have received the Notice of Appeal, Affidavit of Service and filing fee on December 28, 2011. The Tax Court 'stamped' Relator's documents as being received on December 28, 2011, which would have been one day late for a timely filing. (Appendix: page A-33, A-34).

Respondent brought a Motion to Dismiss for Lack of Subject Matter Jurisdiction because the Relator's Notice of Appeal was allegedly not timely filed. (Appendix: page A-24). At the hearing held via telephone conference, the Court instructed the parties to submit additional briefs on the issue of mailbox rule, if there is a presumption for arrival and whether there was any case authority to distinguish the date of delivery to the court from the date of actually filing it. (Transcript: Page 13, Lines 13-18). By order dated May 21, 2012 and filed and entered on June 5, 2012, the Tax Court granted Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction. (Appendix: page A-74-A-82).

Nearly simultaneous with this case, the Tax Court also decided *Lehman Brothers Holdings, Inc., and Subsidiaries v. Commissioner of Revenue* (Tax Court Docket No. 8415-R, May 16, 2012). In that case, the taxpayer also had a filing deadline of December 27, 2011 to timely file its Notice of Appeal. *Id* at 2. The taxpayer sent its Notice of Appeal via FedEx on December 23 and it was received by the Commissioner on December 27th. *Id* at 2. FedEx records show the Tax Court filing was signed for and received on December 27, 2011 by the Tax Court, however, it was not stamped "filed" by the Tax Court until December 28, 2011. *Id* at 2-3. The Tax Court found a timely filing was made by the taxpayer. *Id* at 5-6.

ARGUMENT

I. THE TAX COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED RESPONDENT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

In order for Relator to preserve his right to appeal an Order of the Commissioner of Revenue, a timely appeal must be taken. *See Wiebesick v. Commissioner of Revenue*, No. 7864 (Minn. Tax Ct. Jan. 31, 2007); *Point Rejuvenate of Minnesota v. County of St. Louis*, No. C2-01-100656 (Minn. Tax Ct. Nov. 14, 2002). If a timely appeal is not taken, the appropriate remedy is dismissal for lack of subject matter jurisdiction. *Piney Ridge Lodge, Inc. v. Commissioner of Revenue*, 718 N.W.2d 861 (Minn.2006).

The Tax Court found that it lacked subject matter jurisdiction in this case as Relator had not timely filed its appeal and therefore the statutory right passed. (Appendix: Page A-81). However, Relator has presented direct evidence that the Notice of Appeal was timely filed. If the Notice of Appeal was timely filed, the Tax Court would be with proper subject matter jurisdiction to afford Relator the appeal procedure available to him.

II. THE COMMON LAW MAILBOX RULE CREATES A PRESUMPTION OF TIMELY FILING WHEN IT IS HANDED OVER FOR DELIVERY AT LEAST THREE DAYS PRIOR TO THE FILING DEADLINE.

The common law "mailbox rule" is a general principle of contract law and provides that a properly stamped and addressed letter that is placed into a mailbox or handed over to the United States Postal Service raises a rebuttable presumption that it

will be received. *See Butts v. Bysiewicz*, 298 Conn. 665, 5 A.3d 932, (Conn., 2010); *Rosenthal v. Walker*, 111 U.S. 185, 193-194 (1884); *Smith v. Commissioner* (Dec. 49, 903(M)), T.C. Memo. 1994-270, *affd.* without published opinion 81 F.3d 170 (9th Cir 1996); *Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 76 L.Ed. 861 (1932). If a document is properly mailed, it must be presumed that the United States Postal Service delivered the document to the addressee in the usual time, i.e. three business days. *United States v. Kiger* (W.D. Pa., 2011), also *See Philadelphia Marine Trade Association-International Longshoremen's Ass'n Pension Fund v. C.I.R.*, 523 F.3d 140, 147 (3d Cir. 2008) (citing *Rosenthal v. Walker*, 111 U.S. 185, 193, 4 S.Ct. 382, 28 L.Ed. 395 (1884); *Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 76 L.Ed. 861 (1932)). (See also Appendix: Page A-54, USPS.com First Class Mailing). Whether the Commissioner is able to rebut such presumption of receipt is a credibility determination. *Smith v. Commissioner*, *supra*.

Minn. Stat. §271.06 subd. 2 states “within 60 days after notice of the making and filing of an order of the commissioner of revenue, the appellant, or the appellant's attorney, shall serve a notice of appeal upon the commissioner and *file* (emphasis added) the original, with proof of such service, with the Tax Court administrator or with the court administrator of district court acting as court administrator of the Tax Court”. Minnesota Statutes Chapter 271 does not define the term “file” or “filed”. In legal usage, to “file” generally means “to deliver a legal document to the court clerk or record custodian for placement in to the official record. *Black's Law Dictionary*, 704 (9th ed. 2009).

The Minnesota Tax Court also follows the Rules of Civil Procedure for the district court. Minn. Stat. Sec. §271.06 subd. 7. Service of any of the pleadings may be made by mail. See Minn. R. Civ. P. 5.02 (service; how made). There is no requirement that service or filing must be made in person or by a certain method. Thus, Relator could properly mail his Notice of Appeal by U.S. First Class Mail in order to timely file his appeal.

Minnesota courts have consistently interpreted the filing requirements of Minn. Stat. §271.06 subd. 2 as meaning the documents must be “actually received” by the Tax Court clerk. *Langer v. Commissioner of Revenue*, 773 N.W.2d 77 (Minn.2009); *Piney Ridge Lodge v. Commissioner of Revenue*, 718 N.W.2d 861 (Minn.2006); *State v. Parker*, 278 Minn. 53, 153 N.W.2d 264 (1967). Actual physical delivery may sometimes be required by statute to meet filing requirements. See *United States v. Lombardo*, 241 U.S. 73, 76, 78, 36 S.Ct. 508, 60 L.Ed. 897 (1916); *Heard v. Comm'r of Internal Revenue*, 269 F.2d 911, 913 (3d Cir.1959). To help determine when the pertinent document was physically delivered, courts developed and looked to the common-law mailbox rule. If a document is properly mailed, the court will presume the United States Postal Service delivered the document to the addressee in the usual time. The opposing party then has the opportunity to rebut this presumption with evidence of untimely receipt. See *Hagner*, 285 U.S. at 430, 52 S.Ct. at 417.

The mailbox rule is intended to assist with determining the date of actual physical delivery. It doesn't substitute the actual receipt or physical delivery requirement, but creates the presumption of timely physical delivery when a document is mailed in the

ordinary course. *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir.1992); *Estate of Wood v. Comm'r of Internal Revenue*, 909 F.2d 1155, 1159-61 (8th Cir.1990)

Relator mailed his Notice of Appeal on December 22, 2011, five (5) days prior to the filing deadline. (Appendix: page A-34, A-42). The Notice of Appeal wasn't mailed too close to the filing deadline where the mailbox rule would have been of little use to Relator. It was logical for Relator to assume the Notice of Appeal would arrive timely *before* the deadline. Relator is entitled to the presumption of timely delivery.

The language of Minn. Stat. Sec. §271.06 subd. 2 does not abrogate the mailbox rule. "It is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983) (internal quotations, brackets, and ellipses omitted). If the legislature sought to abrogate the common law mailbox rule, it could have certainly done so by explicitly requiring a physical delivery within the language of the statute. By contrast, Minn. Stat. Sec. §271.06 was intended to *protect* taxpayers by offering an appeals process, not to simultaneously roll back protections that already exist at common law. By its terms, the statute requires a timely "filing" which can be shown by the presumption of the common law mailbox rule. Here, neither party is disputing that Relator mailed its Notice of Appeal on December 22, 2011. If that is true, the Notice of Appeal would presumably have arrived well before the December 27, 2011 deadline.

Relator is entitled to the presumption of timely delivery of his Notice of Appeal in the ordinary time after mailing. By timely filing his appeal by mail, a presumption of

actual receipt by mail is created. The legislature, by enacting Minn. Stat. Sec. §271.06, intended to supplement the common law mailbox rule by requiring filed documents to be filed with actual receipt, but also that taxpayers be allowed to demonstrate receipt by means other than just the Tax Court clerk's own date stamp, such as proof of mailing in affidavit form.

III. THE TAX COURT MADE FINDINGS CONTRARY TO THE EVIDENCE IN THAT RELATOR HAS PRESENTED SUFFICIENT EVIDENCE TO DEMONSTRATE THAT HIS NOTICE OF APPEAL WAS TIMELY FILED AND ACTUALLY RECEIVED BY THE FILING DEADLINE.

The trial court held that "There is no evidence in this case to establish that the Notice of Appeal was actually delivered to the Tax Court prior to the filing deadline." (Appendix: Page A-81). However, Relator contends there is ample evidence within the record to document that the Notice of Appeal was timely filed, regardless of when it was actually date stamped by the Tax Court. Relator concedes that more than a mere allegation that a document was mailed is needed to prove actual receipt. To support that the Notice of Appeal was actually received on or prior to the deadline of December 27th, 2011, the following direct evidence must be considered:

- 1.) Relator properly mailed the Notice of Appeal, Affidavit of Service and proper filing fee by First Class Mail, U.S. Postal Service in Zumbrota, Minnesota on December 22, 2011, five (5) mailing days prior to the filing deadline. (Appendix: page A-34, A-42).

- 2.) The Commissioner of Revenue received Relator's Notice of Appeal on December 27th, 2011. (Appendix: Page A-52).
- 3.) The offices of the Tax Court and Commissioner of Revenue are less than one (1) mile apart.
- 4.) In *Lehman Brothers Holdings, Inc., and Subsidiaries v. Commissioner of Revenue* (Tax Court Docket No. 8415-R, May 16, 2012), the Tax Court stamped the Notice of Appeal on December 28th, even though it was later shown to have been actually received on December 27th. *Id.* at 5. This indicates there was a delay or neglect within the clerk's office on that day.

Based on the above, it would be reasonable to presume that the Tax Court actually received the Notice of Appeal and Relator should be entitled to proceed on the merits of his Appeal.

Similar to this case is *Cederberg v. City of Inver Grove Heights*, 686 N.W.2d 853 (Minn.App.2004). Here, the taxpayers sought judicial review of a special assessment. *Id.* at 855. The district court received the taxpayers' notice on the same day it was served on the city, but the district court did not stamp the document as having been "filed" until 15 days later. It was held that the action was timely because the "papers were received by the district court" within the applicable limitations period. The court relied in part on the definition of "filed" in Black's Law Dictionary and on caselaw from other states to the effect that the "date of filing is the date upon which a pleading or a document is delivered or handed to the clerk to be filed". *Id.* at 856. Because the taxpayers could show that the city received theirs on the same day it was delivered to the district court, it was deemed timely filed.

The case at issue is factually similar to that of *Cederberg*. Relator was required to take two steps in order to preserve its appeal: 1.) Serve notice upon the Commissioner of Revenue and 2.) File it with the Tax the Court. Minn. Stat. Sec. §271.06 subd. 2. Relator has shown that the Commissioner received their copy on December 27th. (Appendix; page A-52). It would be logical to assume that the Tax Court received theirs on that day as well if they were both placed for deposit with the U.S. Post Office on the same day. For reasons unknown, the Relator's Notice of Appeal was not stamped until the next day.

It is apparent from the record that there was a 'glitch' within the Tax Court around the time Relator attempted to file his Notice of Appeal. By way of the Court's holding in *Lehman Brothers Holdings, Inc., and Subsidiaries v. Commissioner of Revenue* (Tax Court Docket No. 8415-R, May 16, 2012) the Court found there was administrative error within the Tax Court clerk's office on December 27, 2011 and the Relator's Notice of Appeal in that case was actually received and signed for by a Tax Court employee on December 27th. *Id* at 5. There were at least two (2) separate Notices of Appeals received by the Tax Court that day and they were both date stamped a day late.

Simply looking at the Tax Court's delayed date stamp is not enough and unfairly prejudices the taxpayer. The clerk's endorsement as to the date of filing is merely the best evidence of the date of filing and is presumed correct so long as it is not challenged. *Lavan v. Philips*, 184 Ga.App. 573, 362 S.E.2d 138, 139 (1987); see also *Valio v. Bd. of Fire & Police Comm'rs*, 311 Ill.App.3d 321, 244 Ill.Dec. 136, 724 N.E.2d 1024, 1029 (2000) (stating that a document is filed when it is delivered to proper officer with intent of having document kept on file by such officer in proper place, and that "ministerial

tasks such as stamping a pleading 'Filed' are unnecessary to perfect a filing"); *Wallace v. Wallace*, 708 So.2d 1190, 1191 (La. App.1998) (stating that a pleading is filed when it is delivered to clerk of court for that purpose and that clerk's failure to endorse and file pleading is not imputable to litigant). These jurisdictions further hold that the "critical date is the date the document is received; and, once the document is delivered, the person filing the document is not responsible for the disposition of the document by the clerk's office." *Euge v. Golden*, 551 S.W.2d 928, 931 (Mo.App.1977); see also *NCD, Inc. v. Kemel*, 308 Ill.App.3d 814, 242 Ill.Dec. 419, 721 N.E.2d 698, 701 (1999) (disagreeing with the argument that litigant has duty to ensure that clerk file-stamps pleading and places it in court file).

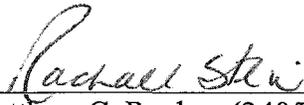
Relator was forced to entrust the clerk within the Tax Court to timely stamp the Notices of Appeal as "filed" and entrusted the clerk's process for stamping incoming papers. Relator should not be penalized for a late date stamp by the clerk. An injustice is created if this is the only evidence that is considered. Clerks may have incentive to delay the stamping. Due to a possible busy holiday season, shortage of staff, slow processing time or other factors, Relators may have difficulty gaining access to the tax court clerk to ensure a timely stamp.

CONCLUSION

Because there is credible direct evidence contained within the record to indicate Relator timely filed his Notice of Appeal and that it was actually received by the filing deadline, the Tax Court's decision should be reversed and the matter remanded for consideration on the merits of Relator's Appeal.

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