

STATE OF MICHIGAN
COURT OF APPEALS

GARTER BELT, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED

April 24, 2007

No. 273517

Court of Claims

LC No. 06-000023-MT

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiff appeals from a Court of Claims' order granting summary disposition to defendant pursuant MCR 2.116(C)(4), based on lack of jurisdiction on plaintiff's claim seeking a declaratory judgment on the validity of a tax assessment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff is a bar offering alcoholic beverages and adult entertainment. Plaintiff advised customers that 50% of each charge was for entertainment, and each receipt stated that 50% of the beverage charge was for entertainment. In calculating its beverage sales, plaintiff deducted 50% of its registered beverage sales as an entertainment charge. Plaintiff claimed that it was permitted to calculate its tax liability based on R 205.116(2), which provides:

The [sales] tax applies to the cover or minimum charge and all other charges, except to those charges for entertainment and dancing, separately listed on the bill or collected as an admission fee or fixed charge.

As background to the present dispute, the Department previously audited plaintiff for the tax period January 1, 1998, through August 31, 2001, and determined that plaintiff's reported gross sales for the audit period were only 50% of the actual amount of its beverage sales. Plaintiff maintained that 50% of the beverage sales were tax-exempt as "entertainment charges." The Department assessed additional sales tax, statutory interest, and 10% negligence penalty. Plaintiff paid the final assessment under protest and filed suit in the

Court of Claims requesting a refund under MCL 205.22.¹ This Court affirmed the Court of Claims' grant of summary disposition. *Hamilton's Henry the VIII Lounge v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued July 20, 2006 (Docket Nos. 267537, 267538, 267539, and 267540). Our Supreme Court denied leave to appeal. 477 Mich 1004 (2007).

For the tax periods December 2001, through June 2005, plaintiff continued to pay sales tax on only 50% of its beverage sales. The Department issued an assessment on 100% of plaintiff's beverage sales in a final notice. The Department based this assessment on information obtained from the previous audit and from plaintiff's returns for the relevant tax periods.

Plaintiff did not pay the assessment and filed suit in the Court of Claims alleging that assessment was procedurally invalid. The Department moved for summary disposition pursuant to MCR 2.116(C)(4), arguing that the Court of Claims lacked subject matter jurisdiction because plaintiff did not pay the assessed tax, penalty, and statutory interest before filing suit as required by MCL 205.22(2). The Court of Claims granted summary disposition in favor of the Department.

This appeal raises issues of law that we review de novo. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002).

Plaintiff claims that the Court of Claims has jurisdiction to hear its action for a declaratory judgment, and that the Department was not allowed to assess and collect a tax liability without an audit. We disagree.

The goal of statutory interpretation is to discern and give effect to the intent of the Legislature from the statute's plain language. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). If the meaning of a statute is clear and unambiguous, then judicial construction to vary the statute's plain meaning is not permitted. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 499-500; 628 NW2d 491 (2001); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

The Court of Claims is a legislatively created court of limited jurisdiction. *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 272; 583 NW2d 512 (1998). The jurisdictional process for appealing a tax assessment issued by the Department is established by statute. MCL 205.22(1), (2), (4), and (5) provide:

- (1) 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

¹ The Court of Claims consolidated the refund action with three other cases involving adult establishments under the same ownership.

assessment, decision, or order. The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal....

(2) An appeal under this section shall be perfected as provided under the tax tribunal act [MCL 205.701 to 205.779], and rules promulgated under that act for the tax tribunal, or [under] the revised judiciary act, [MCL 600.6401 to 600.6475], and rules adopted under that chapter for the court of claims. In an appeal to the court of claims, the appellant shall first pay the tax, including any applicable penalties and interest, under protest and claim a refund as part of the appeal.

....

(4) The assessment, decision, or order of the department, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.

(5) An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order of the department, and a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the aggrieved person has appealed the assessment in the manner provided by this section.

This plain and unambiguous statutory language requires a taxpayer to “first pay the tax, including any applicable penalties and interest, under protest and claim a refund as part of the appeal” in an appeal to the Court of Claims. Further, if the taxpayer does not perfect the appeal to the Court of Claims in accordance with the prescribed procedure, then “the assessment, decision, or order of the department . . . is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.” MCL 205.20(4). *Kostyu v Dep’t of Treasury*, 170 Mich App 123, 128; 427 NW2d 566 (1988) (the Court of Claims’ jurisdiction is contingent on the taxpayer’s first paying the tax.)

Because plaintiff did not pay the assessed tax, interest, or penalties, it did not meet the unambiguous jurisdictional requirement in MCL 205.20(2) and (4) of 22(2) to appeal a tax assessment to the Court of Claims. Accordingly, the Court of Claims properly determined that it lacked subject matter jurisdiction and granted summary disposition in the Department’s favor.

Nevertheless, even if the Court of Claims had subject matter jurisdiction, plaintiff’s claim that the assessment was invalid because the Department did not conduct an audit would lack merit. The Department is permitted to render an assessment without an audit based on available information. MCL 205.21(1) states:

If a taxpayer fails or refuses to make a return or payment as required, in whole or in part, or if the department has reason to believe that a return made or payment does not supply sufficient information for an accurate determination of the amount of tax due, the department may obtain information on which to base an assessment of the tax.

Similarly, MCL 205.23(1) provides:

If the department believes, based upon either the examination of a tax return, a payment, or an audit authorized by this act, that a taxpayer has not satisfied a tax liability or that a claim was excessive, the department shall determine the tax liability and notify the taxpayer of that determination.

Based on the plain language of these two provisions, the Department may obtain information on which to base an assessment of the tax and determine the tax liability without an audit if a taxpayer does not make a return or a payment, or does not supply sufficient information for an accurate assessment.

From a previous audit, the Department was aware that plaintiff remitted tax payments based on its position that it considered 50% of a beverage sale to be an entertainment charge. After plaintiff did not supply the Department with the requested information to calculate its actual tax liability, the Department based an assessment of plaintiff's liability on an estimate from tax payments that plaintiff had remitted.

Finally, plaintiff's argument that the Court of Claims had subject matter jurisdiction of its appeal because it was requesting a "declaratory judgment" and not challenging the tax assessment also lacks merit. Merely characterizing a complaint as an action for "declaratory judgment" does not eliminate the statutory jurisdictional requirement imposed on the taxpayer to first pay the tax assessment and any interest and penalties before challenging the validity of a tax assessment in the Court of Claims.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello