MOAHR Rules
2021-84 LR
Written Comments

From:	MOAHR-GA
To:	Sonneborn, Suzanne (LARA); Pascoe, DJ (LARA)
Subject:	FW: Comment on Proposed Rule Changes - Rule Set 2021-84 LR
Date:	Thursday, October 27, 2022 4:25:59 PM

SA

From: Wease, Joshua <wease@law.msu.edu>
Sent: Wednesday, October 26, 2022 8:34 AM
To: MOAHR-GA <MOAHR-GA@michigan.gov>
Cc: Welton, Samantha (LARA) <WeltonS@michigan.gov>
Subject: Comment on Proposed Rule Changes - Rule Set 2021-84 LR

Ms. Sonneborn:
I support the rule change to R 792.10205 (Tax Tribunal Rule 205) that allows the Tribunal to waive filing fees for indigent parties. Taxpayers may not have the capacity to participate in Treasury's informal conference procedures and by the time they find a legal clinic or pro bono program, their matter has progressed procedurally to the final assessment. The filing fee can be an insurmountable financial barrier to resolving an incorrect tax assessment. The amendment is sound policy and advances fairness and access to our justice system.

Regards,

Josh

Joshua Wease, JD, LLM
Clinical Professor of Law,
Director, Alvin L. Storrs Low-Income Taxpayer Clinic
Michigan State University College of Law
648 N. Shaw Lane, Rm 215
East Lansing, MI 48824
Direct: (517) 432-6803
taxclinic.law.msu.edu

From: MOAHR-GA
To: Sonneborn, Suzanne (LARA)
Cc: Pascoe, DJ (LARA)
Subject: FW: Honigman LLP Comments on Proposed Tribunal Rules
Date: Wednesday, November 16, 2022 3:33:25 PM

---

ds

From: Schneider, Steven P. <SSchneider@honigman.com>
Sent: Wednesday, November 16, 2022 3:32 PM
To: MOAHR-GA <MOAHR-GA@michigan.gov>
Cc: Welton, Samantha (LARA) <WeltonS@michigan.gov>
Subject: Honigman LLP Comments on Proposed Tribunal Rules

Dear Ms. Sonneborn:

I am writing on behalf of Honigman LLP, a law firm that represents parties in disputes pending before the Michigan Tax Tribunal. We welcome the opportunity to comment upon the proposed revisions to the tribunal's rules set forth in the Notice of Public Hearing dated October 25, 2022 and contained in Tribunal Notice MTT 2022-11.

The vast majority of the proposed changes reflect or clarify existing practice and require no comment. However, we would appreciate your consideration of the below issues:

Motions to Amend to Add a Subsequent Tax Year to a Typical Valuation Case

The Proposed Rules seek to add a requirement to Rule 792.10221 in subsection (3) that would require a motion to amend to include an amended petition. We see no basis for such a requirement. It would create additional paperwork for parties and does not provide any useful information to the Tribunal that would not be provided by the motion to amend. Specifically, a motion to amend to add an additional tax year provides the new information relevant for the subsequent tax year, namely, the new original and new requested assessed and taxable values. Finally, an amended petition is not be required for an amendment under the amendment provisions of MCL 205.727(4) when only a new tax year is added.

Motions for Immediate Consideration

The proposed rules seek to change a threshold requirement for motions for immediate consideration. The tribunal would consider a motion for immediate consideration only if it would include a statement verifying that the moving party has "spoken with"-- not just "notified"-- all of the other parties regarding the filing of the motion, as is now required. See R. 792.10225(4). The "spoken with" requirement is impractical. Caller ID is now ubiquitous. Unfortunately, if attorneys are aware that a motion for immediate consideration may be sought and seek to delay the requested relief, however justified, they may not return phone calls. In such a case, the current notification requirement is met by sending an email and/or leaving a

voicemail. If a simple statement indicating notification is not sufficient, we would suggest requiring a statement to the effect of: "the moving party has made good faith efforts to contact opposing counsel via both telephone and email, but has neither reached opposing counsel, nor received a reply."

Personal Property Petitions to Include Parcel Number of Underlying Real Property

The proposed rule seeks to add a requirement that a personal property protest include the parcel number of the underlying real property. R 792.10227(3)(c)(i). This requirement is burdensome, impractical, and provides no useful information for a substantial number of personal property taxpayers. The vast majority of utility personal property (electric distribution lines, gas distribution pipes), renewable energy property (wind turbines or solar parks) are on easements or in public right-of-way. Because the real property tax parcel numbers of underlying real estate that is owned by others is not relevant to the individuals or departments typically managing the personal property review function, they may not be readily available. We suggest instead that only if a personal property petitioner seeks to have various parcels of property consolidated in one petition and thereby pay a reduced filing fee (see R. 792.10227 (b) and (d), then and only then must the petitioner specify the real property parcel upon which its personal property is located. Such personal property taxpayers benefit from an exception from the Tribunal's typical petition rules allowing for a lower filing fee. They would also typically know the real property parcel number since it is more likely they would also own the real property parcel. Otherwise, we are not aware of how a identifying a real property parcel number would be relevant to a personal property valuation protest.

Standards For Dismissal Upon Uncured Default

The proposed R 792.10231(2) seeks to clarify the entire tribunal default procedures and standards. It should reflect Michigan law considerations before the severe sanction of dismissal upon default would occur. The following language added to subsection (2) would do so:

"In determining whether petitioner's default is sufficient to warrant dismissal, the tribunal should consider:

(1) whether the violation was willful or accidental;

(2) the party's history of refusing to comply with previous tribunal 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 tribunal's orders;

(6) attempts to cure the defect; and

(7) whether a lesser sanction would better serve the interests of justice."

See for reference, *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995) and *North v Dep't of Mental Health*, 427 Mich. 659, 662; 397 N.W.2d 793 (1986) ("our legal system favors disposition of litigation on the merits").

Rebuttal Exhibits

The existing tribunal rules do not address rebuttal exhibits, but the proposed rules do with a rebuttal evidence definition added in proposed R. 792.10203(k).

Proposed General Rule 792.10126(1), concerning evidence, adds to the existing rule, a requirement for the filing and exchange of documentary evidence at various times, all of which are prior to the hearing. The proposed addition does not provide any explicit exception from the pre-exchange requirement for rebuttal documents. However, it does allow the administrative law judge to make exceptions from the exchange deadlines for good cause shown.

We believe the rule should explicitly NOT require pre-exchange of rebuttal exhibits since the relevance and materiality of such exhibits will in many cases be known only after a witness testifies.

Subpart C, Matters Before the (Tribunal) Small Claims Division, proposed R. 792.10287 does address rebuttal exhibits but should be clarified. Subsection (1) adds a general exception to prehearing exchange for rebuttal evidence but then Subsection (3) requires pre-exchange of rebuttal exhibits for telephonic or video hearings and implies exhibits can be introduced at an in-person hearing without pre-exchange, since they need only be brought to the hearing. We understand the increased difficulty of offering documents into evidence in a virtual or telephonic hearing, but nevertheless believe any pre-exchange requirement should not apply to rebuttal exhibits.

The rules in Subpart B, Matters Before the Entire Tribunal, do not address rebuttal evidence at all, creating risk that the general rule's pre-exchange requirement would be applied to the entire tribunal by implication. We propose that the entire tribunal rule explicitly exclude rebuttal exhibits from the pre-exchange requirement just as we propose for the general rule, R. 792.10126(1). Language similar to small claim proposed R. 790.10287(1) excepting rebuttal exhibits from the pre-exchange requirement should be used, without the complications created by subsection (3). Otherwise as an alternative, we propose that pre-exchange requirements for rebuttal exhibits be addressed at the prehearing conference as one of the "other matters to be discussed in aid of the disposition of the case" under rule 792.10247(3)(f) or addressed by the tribunal when a rebuttal exhibit is offered, as is the current practice.

Thank you for your consideration of our comments.

Steven P. Schneider

HONIGMAN LLP
O 313.465.7544
M 313.570.1887
sschneider@honigman.com

please delete it and notify the sender of the error.

MEMORANDUM

TO: Susanne Sonneborn, Michigan Office of Administrative Hearings and Rules
FROM: Leah Robinson, Michigan Chamber
SUBJECT: MI Chamber Strongly Urges Reconsideration on Proposed Rules (MTT 2022-11)
DATE: November 16, 2022

On behalf of the Michigan Chamber of Commerce and our 5,000+ member businesses and organizations from across all 83 counties, we strongly urge the Michigan Office of Administrative Rules and Hearings to reconsider the key items outlined below to the Michigan Tax Tribunal's (MTT) proposed rules, MTT 2022-11. We thank the Office for their dedication to simplifying and streamlining the MTT process for businesses across the state and offering the opportunity to voice constructive feedback.

MTT's processes, structure and efficiency are of high interest to Michigan job providers. Michigan must remain competitive with other states by ensuring that Michigan statutes and subsequent implementation and practices do not negatively impact or impede business activity, but instead create a fair, reasonable climate and that positively foster current and future business activity that benefits our communities and Michiganders. Unfortunately, the below proposed rules, will likely have a damaging effect on the efficiency of the Tribunal and inadvertently create more hurdles for businesses with cases before the Tribunal:

- Rule 22/R792.10221 (3) – Requiring a motion to amend in order to subsequently file an amended petition creates unnecessary and time-consuming redundancies.
- Rule 225 (4)/R 792.10225(4) – Requiring a moving party issuing a motion of immediate consideration to coordinate with an opposing party for a motion to be considered, and without inclusion, would extend a potentially granted motion three calendar weeks for opposition to the motion to be filed. Those kind of delays are unacceptable and costly.

For these reasons, we urge the Michigan Office of Administrative Hearings and Rules to take a closer look at the above changes and help streamline – rather than add burdensome red tape. Such changes will help ensure both the Tribunal and businesses with cases before the MTT, can be handled in an efficient, timely manner. Thank you for your time and consideration. If you have any questions, please do not hesitate to reach out. I can be reached at lrobinson@michamber.com or 517-371-7669.

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

RACHAEL EUBANKS
STATE TREASURER

November 16, 2022

Suzanne Sonneborn
Executive Director
MOAHR
611 W. Ottawa Street
P.O. Box 30695
Lansing, MI 48909

Re: Proposed Revisions to the Tribunal's Rules of Practice and Procedure

Dear Ms. Sonneborn:

In response to the *Notice of Public Hearing Regarding Proposed Revisions to the Tribunal's Rules of Practice and Procedure*, dated October 25, 2022, issued by the Michigan Office of Administrative Hearings and Rules, the Michigan Department of Treasury submits the following comments:

1. Rule 109(1): This subrule refers to filings submitted "electronically using a hearing system-approved electronic filing system" but does not refer expressly to submission by "email" even though subrule (3) expressly refers to documents and pleadings "submitted by email."

2. Rule 109(5): This subrule describes the acceptable formats for an electronic signature. Please consider incorporating that language into a new definition of "electronic signature" under Rule 103 instead.

3. Rule 126(1): Multiple comments:
   - Change "the" to "each" before "opposing party" in the newly added language as there may be more than one opposing party.
   - The proposed period of "not later than" 7 days is confusing and can be misinterpreted. Please consider changing to "not less than" as used in other Rules (e.g., Rule 253(2), Rule 275(1)-(2), and Rule 287(1)).

4. Rule 134(2): Should the reference to "failing to attend" be changed to "failing to participate" to be consistent to the Tribunal's proposed changes to subrule (1) which strike the word "attend"?

5. Rule 203: Please consider moving the second sentence, "For purposes of this subrule, an electronic signature includes …" as part of a definition in Rule 103 for a new term "electronic signature" (see comment 1).

6. Rule 207: The heading for this rule includes "and electronic signatures" even though the rule does not contain an explicit reference to an "electronic" signature and the definition of "signed" includes electronic signatures so just having the heading refer to "signatures" is sufficient.

7. Rule 217(1): Multiple comments:
   - This subrule refers to filings of petitions and motions "by mail, delivery, or through the tribunal's e-filing system" but does not reference "facsimile" which appears to conflict with Rule 109.
   - This subrule refers to "delivery," but in Rule 109 the reference is to "personal delivery" making this ambiguous.

- This subrule refers to the tribunal's "e-filing system." It is unclear what this means because in Rule 109, there is reference to the "hearing system-approved electronic filing system" and not the "e-filing system."

8. Rule 219: Multiple comments:
    - Subrules (1)-(2), (4) and (6): These subrules refer to the tribunal's "e-filing system." It is unclear what this means because in Rule 109, there is reference to the "hearing system-approved electronic filing system" and not the "e-filing system."
    - Subrule (4): This subrule provides that for an electronic filing, it is considered filed when received by the Tribunal, but does not provide a mechanism for notifying the filing party when the Tribunal has received it.
    - Subrule (6) provides, "If the required filing fee is paid within 14 days after the issuance of the notice of no action, action shall be taken on the motion based on the date that the motion was originally submitted to the tribunal." This provision is problematic because the respondent will likely not know that the petitioner has cured the defect (e.g., paid the fee) and it appears that these rules would require the respondent to file its response based on the date of the *original* submission.
    - Subrule (6) refers to "delivery," but in Rule 109 the reference is to "personal delivery" making this ambiguous.
    - Subrule (7) states, "If the required proof of service is filed within 14 days after the issuance of the notice of no action, action shall be taken on the motion or document based on the date the motion or document was originally submitted to the tribunal." Similar to the concerns regarding subrule (6), the respondent may not even have received notice of a filing but would still be required to respond based on the date of the *original* submission. This appears to require that the respondent maintain constant surveillance of the docket rather than being able to rely on notice.
    - Subrule (8): This subrule appears to automatically insert into the procedure an additional 14 days to file (plus the time it takes for the Tribunal to issue the Notice of No Action) for a petitioner who does not timely file its motions or responses.

9. Rule 221: Multiple comments:
    - Subrule (2): This subrule states, "If the tribunal determines that an amendment addresses more than typographical or transpositional errors, the tribunal shall issue a notice of no action." Because this subrule appears to leave the question of whether an amendment is merely typographical solely within the discretion of the Tribunal, without input by (or recourse for) the opposing party, this could be misused as a vehicle to attempt to change legal positions/theories under the guise of "typographical errors." At the very least there should be a mechanism for the opposing party to respond.
    - Subrule (11): The proof of service requirement in the second sentence is confusing as it seems to provide that the person signing the proof of serve (on behalf of the filing party) may be the same person who acknowledges service on behalf of the receiving party.
    - Subrule (12): In the second sentence, add "and/or appearances" after the word "pleadings" to address other scenarios such as if new counsel is assigned to the case after the petition is filed and enters a Notice of Appearance. The opposing party should be able to rely on the information contained in the appearance.

10. Rule 225(4): This subrule imposes a requirement that the filer of a motion for immediate consideration actually speak with all other parties. This could be problematic as the other representatives may not be available or where opposing representatives refuse to speak with the other party's representatives.

11. Rule 227: The ***elimination*** of the requirement in subrule (5) that the petition include a copy of the "assessment or other notice" being appealed from is problematic, unfair, and could lead to unintended consequences. For example, this runs afoul of the concept of "notice pleading" (and may impair due process) as the respondent may not be able to ascertain the full extent

of the matters intended to be appealed; particularly if the petitioner fails to list or otherwise describe all of the assessments or orders in its petition. This could create undue burdens on the respondent as they may have to determine what the appeal entails and prepare for the broadest potential scope of the potential issues on appeal and/or tax period or tax type. In addition, removing this requirement on the petitioner could jeopardize the petitioner's appeal under MCL 205.22, and the Tribunal may, likewise, lack jurisdiction as a result if the petitioner did not list or otherwise describe the assessment in its petition. It is strongly recommended that the current requirement be maintained and that it be expanded to also reference an "order" and "decision" as provided in MCL 205.22(1) and consistent with Rule 227(3).

12. Rule 229: Multiple comments:
    - Strike the proposed subrule (5) as this requirement should be one for the petitioner as it remains concerning matters under the Small Claims rules under Part C. See e.g., Rule 227(3). See also comment #11.
    - Add new subrule that ***suspends*** (tolls) the respondent's obligation to file an Answer during any period that petitioner is held in default (i.e., the 28-days period described in subule (1) to file the answer would **not** begin until the Tribunal issues an order that the default has been cured).

13. Rule 231: There are numerous references to the failure to "appear" but in other rules the reference to "appear" has been replaced by "participate." is unclear if a different meaning is intended and what that would be if so.

14. Rule 243(6): The proposed rules strike this entire subrule but there does not appear to be a parallel provision in the revised rules; thus making this procedure no longer available. It is not clear if that was truly intended.

15. Rule 247: Multiple comments:
    - Subrule (1): Replace "submit" with "submit and serve"; especially given that the word "exchange" is being stricken.
    - Subrule (8): When coupled with the elimination of subrule (9), this subrule is problematic; particularly given that it does not address the situation where the noncompliance is the failure to appear for the prehearing conference.
    - Subrule (10): Striking this subrule is problematic as it appears to conflict with the purpose of the prehearing conference (i.e., striking the language implies that discovery can take place after the prehearing conference).

16. Rule 249: Multiple comments:
    - Subrule (1): This subrule, under (a), requires that an answer be filed prior to a stipulation. This is problematic as there are circumstances in which it is prudent and efficient to resolve a matter before filing a stipulation. This rule appears to foreclose that possibility even though the opposing parties may agree to resolve the case without further expenditure of time/resources or delay. This subrule, under (c), requires that the stipulation "address issues over which the Tribunal's authority has been invoked." Not only does this appear as if the Tribunal is attempting to look behind the parties' intent, but no standard is provided in the subrule to govern how the Tribunal will evaluate the stipulation in this regard.
    - Subrule (2): Amend as follows (added text in bold and capitalized and see strikeout):

"(2) If a party submits a stipulation by email, the party shall pay the fee required for the filing of the stipulation within 14 days after the date the stipulation was emailed. If a party submits the stipulation at the hearing and the hearing is conducted at a site other than the tribunal's office, the party shall pay the fee required for the filing of the stipulation within 14 days after the hearing date. **IF A PARTY SUBMITS THE STIPULATION AT THE HEARING, AND** ~~if~~ the hearing is conducted at the tribunal's office, the party shall pay the required filing fee upon submission of the stipulation. Failure to pay the required filing fee may result in the issuance of a notice of no action, an order holding the party in default, or the denial of the stipulation."

17. Rule 267(3): This subrule refers to "delivery," but in Rule 109 the reference is to "personal delivery" making this ambiguous and refers to the tribunal's "e-filing system." It is unclear what this means because in Rule 109, there is reference to the "hearing system-approved electronic filing system" and not the "e-filing system."

18. Rule 275(1)-(2): The removal of the singular "party" and all references being to the plural "parties" does not make sense in all instances. Please consider revising the proposed rule as follows (added text in bold and capitalized and see strikeouts):

    "(1) The tribunal may, upon a motion filed with the tribunal and served on **EACH** ~~the~~ opposing **PARTY** ~~parties~~ not less than 28 days before the hearing scheduled in a contested case, conduct the hearing on the file for the moving party. If the motion is granted, the tribunal shall render a decision based on the testimony provided by the opposing parties at the hearing, if any, and all pleadings and written evidence properly submitted by all parties not less than 21 days before the date of the scheduled hearing or as otherwise ordered by the tribunal.

    (2) The tribunal may, upon motion filed with the tribunal and served on **EACH** ~~the~~ opposing **PARTY** ~~parties~~ not less than 28 days before the hearing scheduled in a contested case, conduct a hearing by telephone, by video conference, or in-person for the moving party."

19. Rule 277(3): Add reference to a "decision" being appealed from to be consistent with MCL 205.22.

20. Rule 279: Add new subrule that ***suspends*** (tolls) the respondent's obligation to file an Answer during any period that petitioner is held in default (i.e., the 28-days period described in subule (1) to file the answer would **not** begin until the Tribunal issues an order that the default has been cured).

21. Rule 281(2): Amend as follows (added text in bold and capitalized):

    "(2) If a party submits a stipulation by email, the party shall pay the fee required for the filing of the stipulation within 14 days after the date the stipulation is emailed. If **A PARTY SUBMITS A STIPULATION AT THE HEARING AND** the hearing is conducted at a site other than the tribunal's office, the party shall pay the fee required for the filing of the stipulation within 14 days after the hearing date. If a party submits a stipulation at the hearing and the hearing is conducted at the tribunal's office, the party shall pay the required filing fee upon submission. Failure to pay the required filing fee may result in the issuance of a notice of no action, an order holding the party in default, or the denial of the stipulation."

22. Rule 287: Multiple comments:
    - Subrule (1): The removal of the singular "party" and all references being to the plural "parties" does not make sense in all instances. Please consider revising the proposed rule as follows (added text in bold and capitalized and see strikeouts):

      "(1) A copy of all evidence, other than rebuttal evidence, to be offered in support of a party's contentions must be filed with the tribunal and served on **EACH** ~~the~~ opposing **PARTY** ~~parties~~ not less than 21 days before the date of the scheduled hearing, unless otherwise ordered by the tribunal. Failure to comply with this subrule may result in the exclusion of the valuation disclosure or other written evidence at the time of the hearing because **AN** ~~the~~ opposing **PARTY** ~~parties~~ may have been denied the opportunity to adequately consider and evaluate the valuation disclosure or other written evidence before the date of the scheduled hearing. If a valuation disclosure or other written evidence is excluded, the tribunal shall indicate the basis of the exclusion in the decision."

    - Subrule (3): Fails to address a party that is represented by an attorney or otherwise has an authorized representative which has filed an appearance. The provision in subrule (2) may be read to only address the evidence described in subrule (1).

Consider either amending this subrule or clarifying that subrule (2) applies to the entire Rule. In addition, this subrule is too vague and is prejudicial because it is an exception to subrule (1) which provides that failure to submit evidence within 21 days "may result in exclusion." Under this subrule, it does not appear to be at the discretion of the Tribunal but automatically allowed. As a result, the rebuttal evidence may be provided at the date of the hearing which may not be adequate for an opposing party to address it. Also, if the hearing is by telephone or video conference, the rule requires submission "in advance" without any timeframe. This is ambiguous and, potentially, prejudicial.

23. Rule 289: The reference to the parties (singular or plural) does not always make sense given the context. Please consider revising as follows (added text in bold and capitalized and see strikeouts):

"(1) A party may submit exceptions to a decision by a referee or an administrative law judge, other than a tribunal member, by filing with the tribunal and serving on **EACH** ~~the~~ opposing **PARTY** ~~parties~~ the exceptions within 20 days ~~of~~ after the entry of the decision. The exceptions must be signed and are limited to the evidence submitted before or otherwise admitted at the hearing and any matter addressed in the proposed opinion and judgment and demonstrate good cause as to why the decision should be adopted, modified, or a rehearing held. As used in this subrule, "good cause" means error of law, mistake of fact, fraud, or any other reason the tribunal considers sufficient and material.
(2) The opposing parties may file with the tribunal and serve on all other parties a response to the exceptions within 14 days after the service of the exceptions on those parties. The response must be signed.
(3) Service of the exceptions or a response must be made on **EACH** ~~the~~ opposing **PARTY** ~~parties~~. If an attorney or authorized representative has entered an appearance in the contested case on behalf of **AN** ~~the~~ opposing **PARTY** ~~parties~~, service must be made on the attorney or authorized representative for **THAT** ~~the~~ opposing **PARTY** ~~parties~~.
(4) The party that files exceptions or a response shall also file a proof of service or statement attesting to the service of the exceptions or response on all other parties or their attorney or authorized representative. The statement must specify who was served with the exceptions or response and the date and method by which the exceptions or response was served. If no statement attesting to the service of the exceptions or response is filed, the tribunal shall issue a notice of no action. If the statement is filed within the time period provided in the notice of no action described in R 792.10221(11), action shall be taken on the exceptions or response.
(5) A rehearing, if held, shall be conducted by a tribunal member in a manner to be determined by the tribunal and may be limited to the evidence considered at the hearing."

Sincerely,

/s/ Lance Wilkinson

Lance R. Wilkinson
Director, Bureau of Tax Policy