STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Thumb Motorsports LLC,
Petitioner,

v

MTT Docket No. 14-003375

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
David B. Marmon

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

This matter involves Petitioner's request for a refund or credit for sales taxes incurred in 2011and 2012 pursuant to an amended return filed in 2014. Specifically at issue is the interplay between MCL 205.22, which sets forth when as assessment may be challenged, and MCL 205.27a(2), which allows a taxpayer to amend a tax return and claim a refund within four years. On February 9, 2015, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case under MCR 2.116(C)(10). More specifically, Respondent contends that Petitioner is collaterally attacking a final assessment for sales taxes incurred for tax years 2011 and 2012, and that because the 35 day appeal period expired prior to the filing of the Petition, the Tribunal is without jurisdiction to hear this matter.

On March 6, 2015, Petitioner filed a response to the Motion. Petitioner argues that it was entitled to file an amended sales tax return under MCL 205.27a within four years from the date the return was due, and that those returns show that Petitioner is entitled to a credit to offset the liability determined by Treasury in 2011 and 2012, which Treasury must adjust per MCL 211.30.

The Tribunal has reviewed the Motion, response, and the evidence submitted and finds that granting Respondent's Motion for Summary Disposition is required under Michigan law.

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that Petitioner's appeal in 2014, which was filed within 35 days of Respondent's refusal to apply an overpayment credit for 2010 sales taxes to 2012, was in reality a collateral attack on the 2011 and 2012 sales tax assessments, which were not timely appealed, and thus final, conclusive and not subject to further challenge, per MCL 205.22(4) and (5). Respondent also contends that Petitioner would not otherwise be entitled to a refund or credit for sales taxes assessed in 2011 or 2012 because its sales of replacement parts while repairing off road vehicles was not exempt.[1] Finally, Respondent argues that Petitioner is not entitled to relief because it failed to pay the uncontested portion of tax liability owed for 2011 and 2012, as required prerequisite to appeal under MCL 205.22(1).

PETITIONER' CONTENTIONS

In support of its response, Petitioner contends that through a series of unfortunate events which include what can only be described as misfeasance and malfeasance by a former book keeper and the appointment of a receiver, Petitioner's principal, Galen Faith, was unaware that sales tax returns for 2011 and 2012 were never filed; was unaware that sales taxes for those years were not paid; was unaware at the time that Petitioner calculated its sales taxes in a manner that resulted in overpayment; and most importantly, did not learn of Respondent's issuance of assessment notices until well after 35 days had expired to contest any these notices for tax years 2011 and 2012. Nevertheless, Petitioner argues that it is entitled to a credit for overpayment of taxes in 2010, which it believes should be applied to 2011, and that 2011 and 2012 sales taxes

[1] The Tribunal does not need to decide the merits of this argument.

should be recalculated pursuant to Petitioner's amended returns, which remove from the sales tax formula the cost of parts used in repairing off road vehicles serviced by Petitioner. Petitioner further contends that the four year statute of limitations for refunds found in MCL 205.27a(2) allows Petitioner to submit a claim for refund or credit from Respondent, which is required under MCL 211.30 to issue a credit to Petitioner, and thus recalculate its liability for 2011 and 2012 pursuant to those returns. Moreover, pursuant to Section 30, the Tribunal may review Respondent's failure to recalculate the assessments for 2011 and 2012. Finally, implicit in Petitioner's argument is that a recalculation of sales tax liability pursuant to the amended returns results in no liability for an uncontested amount of tax in 2011 and 2012, thus meeting the requirement of paying the uncontested portion under MCL 25.22(1).

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[2] In this case, Respondent moves for summary disposition under MCR 2.116(C)(10). Although an argument could be made that granting Respondent's Motion for Summary Disposition under MCR 2.116(C)(10) may be appropriate given the above, the Tribunal finds that a motion for summary disposition under MCR 2.116(C)(7) is more suitable as applied to the facts before us. See *Bonar v Dep't of Treasury*,[3] wherein the Court of Appeals, when addressing an untimely appeal, stated that "respondent should have moved for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations) because the failure to timely file an appeal with the MTT merely results in the failure to *invoke* the MTT's jurisdiction.

[2] See TTR 215.
[3] unpublished opinion per curiam of the Court of Appeals, issued May 30, 2013 (Docket No. 310707), p 2 n 1,,

MCR 2.116(C)(7)

Under MCR 2.116(C)(7), the claim is barred because of "release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of action."

In *RDM Holdings, LTD v Continental Plastics Co*,[4] the Michigan Court of Appeals addressed a motion for summary disposition filed under MCR 2.116(C)(7). In *RDM, supra* at 687, the court stated:

> [T]his Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under the standards appropriate under MCR 2.116 (C)(7) and finds that granting the Motion is warranted. Petitioner does not contest that it was properly sent fifteen Final Assessment notices for sales tax liability for monthly periods commencing in October 2011, through December 2012, and those notices were dated from June 12, 2012 through July 1, 2013. The present matter was not commenced until June 25, 2014. The issue raised in this case is whether or not the Tribunal's subject matter jurisdiction was timely invoked to recalculate those assessments, by appealing Respondent's failure to apply a $2,963.90 overpayment credit for 2010 to its liability for 2012.

[4] 281 Mich App 678; 762 NW2d 529 (2008).

MCL 205.22(1) sets forth the time limit in which an aggrieved taxpayer may appeal a contested assessment to the Tribunal. Subsection (1) states in relevant part:

> (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 assessment, decision, or order.

Here, the last of the fifteen monthly assessments was dated July 1, 2013, six days shy of a year prior to the filing of Petitioner's Petition.

Subsections 4 and 5 of §22 set forth in no uncertain terms, the finality of an uncontested assessment:

> (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*. [Emphasis added].
>
> (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.

Petitioner did not appeal the fifteen sales tax assessments in accordance with MCL 205.22(1), and does not contest that it failed to meet the requirements of appealing within 35 days of the issuance of each Notice of Assessment. Rather, Petitioner contends that it is afforded a second avenue of relief by filing an amended return, to which it is ordinarily entitled to do so, within four years after the date set for filing the original return, per MCL 205.27(a)(2). Petitioner urges that a *pari materia* reading of Sections 22, 27 and 30 does not preclude a final assessment from being modified by the filing of an amended return, as was done in the present case. Further, Petitioner argues that under MCL 205.30 Respondent has a duty to modify those final assessments. Section 30 states in relevant part:

> (1) The department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under section 23 for deficiencies in tax payments.
>
> (2) A taxpayer who paid a tax that the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified as the statute of limitations in section 27a. If a tax return reflects an overpayment or credits in excess of the tax, the declaration of that fact on the return constitutes a claim for refund. If the department agrees the claim is valid, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in section 30a, and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability. Claims for refunds, other than those made under part 1 of the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.532, that have not been approved, denied, or adjusted within 1 year of the date received may be treated as denied at the election of the taxpayer, and may be appealed by the taxpayer in accordance with section 22.

Arguably, the failure by Respondent to recalculate liability pursuant to an amended return is appealable to the Michigan Tax Tribunal. The problem is that such an appeal is a collateral attack on the earlier, unappealed assessments, prohibited by Section 22(4). Recently, the Michigan Court of Appeals visited this issue, and held under this same scenario, an appeal of Respondent's failure to adjust a tax pursuant to an amended return is beyond the Tribunal's jurisdiction. In *Martin Sprocket & Gear Inc. v. Dep't of Treasury*,[5] the Court of Appeals held:

> Plaintiff's claim for a refund, if successful, would set aside the final assessments by reducing its BTA tax liability as previously established by the final assessments. This constitutes a collateral attack prohibited by MCL 205.22(4). See *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc*, 305 Mich App 460, 474; ___NW2d ___ (2014) (defining collateral attack). Summary disposition was therefore warranted under MCR 2.116(C)(4) because the trial court did not have jurisdiction to consider plaintiff's collateral attack to its BTA tax liability for the tax years ending in June 2008 and June 2009.

The published decision in *Workers' Compensation Agency Dir* cited above held in relevant part:

[5] unpublished opinion per curiam of the Court of Appeals, issued October 21, 2014 (Docket No. 317760).

> We start with the proposition that a wrong decision is not void; it is merely voidable. And only void decisions are subject to collateral attack. Again, as we have outlined, we conclude that the Commission's and the trial court's retroactivity decisions were wrong. But this conclusion does not directly address the contention that the Commission's decision was void (and subject to collateral attack at any time), rather than merely voidable (and therefore subject to attack only by direct appeal). [Citations omitted].[6]

While *Martin Sprocket* is an unpublished decision,[7] and not stare decisis per MCR 7.215(C)(2), it is the only appellate authority directly on point. In any case, the Tribunal agrees that a subsequent proceeding which indirectly determines the validity of a prior attack is by definition a collateral attack on that decision, and thus prohibited by MCL 205.22(4). Contrary to Petitioner's argument, the only way in which the appeal rights under Section 30 can be reconciled with the prohibition against a collateral attack for a prior assessment is to limit the applicability of amended returns to situations where Respondent has not issued "an assessment, decision or order."

Tax law is riddled with short deadlines, appeal periods, statutes of limitations, and statutes of repose. Failing to meet these deadlines usually results in losing a remedy to correct an erroneous assessment. While Petitioner may in fact have been over-assessed, MCL 205.22(4) prevents the fifteen Final Assessments sent by Respondent from being challenged before the Tribunal, unless done so within 35 days. Even if the Tribunal accepts as true Petitioner's claim that a former book keeper hid these notices out of sight in a drawer, MCL 205.29 only requires that the notice be sent, and not received to trigger the 35 day appeal period. *PIC Maintenance v. Dep't of Treasury.*[8] To construe MCL 205.30 as a second avenue to challenge an assessment is to ignore the prohibition against collateral attack. Further, MCL 205.22(5) specifically states that a

[6] *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc*, 305 Mich App 460, 476; ___NW2d ___ (2014).
[7] The Court of Appeals declined to direct publication of this opinion on December 3, 2014.
[8] 293 Mich App 403, 410 (2011).

Petitioner is not entitled to a refund unless the assessment is timely challenged. Accordingly, while MCL 205.30 sets forth a requirement on Respondent to refund or credit taxes that are "found unjustly assessed, excessive in amount, or wrongfully collected with interest . . .", Petitioner is without a remedy in the present case, as the Tribunal's jurisdiction was not timely invoked. As the Tribunal is of limited jurisdiction, and is not a court of equity,[9] it must abide by the legislative strictures on what it may hear or remedy.

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that the case is DISMISSED.

This Opinion resolves the last pending claim and closes the case.

By: David B. Marmon

Entered: April 27, 2015

[9] The Tribunal's powers are limited to those authorized by statute and do not include powers of equity. See *Elec Data Sys Corp v Flint Twp*, 253 Mich App 538; 656 NW2d 215 (2002), *VanderWerp v Plainfield Twp*, 278 Mich App 624; 752 NW2d 479 (2008).