STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Larry and Alice Smith,
Petitioners,

v

MTT Docket No. 326504

Township of Sanilac,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION

The issue in this case involves a water project special assessment levied by Respondent, Township of Sanilac, on property owned by Petitioners, Larry and Alice Smith. On June 29, 2006, Petitioners filed a letter appealing the installation of the water main on Route 25 North of Port Sanilac, Michigan. On March 21, 2007, Respondent filed this Motion to Dismiss for Lack of Jurisdiction. On April 4, 2007, Petitioners filed their response to Respondent's Motion to Dismiss.

II. FINDINGS OF FACT

The subject property is located at 1173 N. Lakeshore Rd., Port Sanilac, Michigan, 48469. The subject property's parcel identification number is 76-211-022-400-200. Petitioners own the subject property.

In 2005, Respondent formed the Sanilac Township Water System Special Assessment District ("District") for the purpose of construing the Sanilac Township Water System. Respondent published notices of the special assessment proceedings on November 2, 2005; November 9, 2005; March 29, 2006; and April 5, 2006 pursuant to the statute in such case made

and provided in the Sanilac County News. Additionally, Respondent mailed a Notice of Public Hearing to Petitioners on November 1, 2005 and March 30, 2006 (Respondent's Motion exhibit Two and Four). Petitioners failed to attend the special assessment hearing held to confirm the special assessment roll. Petitioners were aware of the special assessment proposal and the pendency of the construction of the Sanilac Township Water System project.

III. RESPONDENT'S CONTENTIONS

Respondent contends that: (i) pursuant to MCL 205.735(2), for the Tribunal to acquire jurisdiction over this dispute, Petitioners were required to protest the special assessment at the hearing held for the purposes of confirming the special assessment roll; (ii) the Sanilac Township Board confirmed the Sanilac Township Water Special Assessment District assessment roll at a hearing held on May 30, 2006; (iii) Petitioners failed to protest the special assessment at the hearing or anytime prior to the hearing; (iv) Respondent complied with all statutory notice requirements by mailing notices of the public hearings to Petitioners and publishing the notices in the Sanilac County News. Respondent filed affidavits from the Township Clerk attesting to compliance with these notice requirements and also filed copies of the published notices; (v) "...57 taxpayers ... protested their assessment at or before the May 30, 2006 hearing"; and (vi) Petitioners filed their small claims Petition on July 24, 2006.

IV. PETITIONERS' CONTENTIONS

In support of their position, Petitioners contend that: (i) whether the Tribunal has jurisdiction over this appeal is a question of fact and it is not an appropriate matter for summary disposition; (ii) any obligation to protest the special assessment is contingent upon Petitioners receiving notice of the special assessment under MCL 211.744; (iii) Petitioners contend that they never received actual, personal notice of the proposed special assessment; (iv) while there is a

presumption that mailed notices were received, the fact that Petitioners are contending lack of receipt means that the issue is a fact question; (v) the mailed notices were insufficient to apprise Petitioners of any obligation imposed on them and failed to satisfy MCL 211.741; (vi) the notices failed their essential purpose: they failed to reasonably convey necessary information and did not give fair notice to the recipient; (vii) notices mailed by Respondent describe the assessment district as a 12-inch water main along M-25 and an 8-inch water main on side roads east of M-25, the descriptions of the properties included within the special assessment district amount to four pages of metes-and-bounds descriptions, and only those parcels not included in the district are identified by the tax identification numbers; (viii) both parties were aware that the subject property was not located along Michigan Highway 25 (hereinafter "M-25") and hence Petitioners were reasonable and justified in their belief that the special assessment district would not affect them; (ix) the special assessment district zig-zags along and around the boundaries of various parcels without a clear delineation of what areas are included within the special assessment district; (x) it would not be reasonable for Petitioners to assume that the subject property was included within the special assessment district; (xi) even if the notices were properly mailed, the notices were insufficient to apprise Petitioners of any obligation; (xii) even if the notices were received, there was nothing contained within them to grab Petitioners' attention; (xiii) "[t]he Petitioners were aware and cognizant of the earlier gas-line project, and it influenced their perception also of the proposed and pending District Project...The gas-line project was a utility project. The District Project is a utility project. Both were installed or to be installed along M-25. The costs of the gas-line project did not result in a special assessment against [the subject] Property. Should, then, the costs of the District Property have been anticipated by the Petitioners to result in a special assessment against [the subject] Property? To

the undersigned, it most certainly does not seem so."; and (xiv) Petitioners paid little attention to the special assessment project because they did not perceive any benefit to them.

V. APPLICABLE LAW

A. Motion for Summary Disposition pursuant to MCR 2.116(C)(4).

While Respondent's motion is captioned a motion to dismiss, the Tribunal will treat it as a Motion for Summary Disposition pursuant to MCR 2.116(C)(4). This Rule states that a Motion for Summary Disposition is appropriate where the "...court lacks jurisdiction of the subject matter." MCR 2.116(C)(4). When presented with a motion for summary disposition pursuant to MCR 2.116(C)(4), the Tribunal must consider any and all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties. MCR 2.116(G)(5). In addition, the evidence offered in support of or in opposition to a party's motion will only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion. MCR 2.116(G)(6). A motion for summary disposition pursuant to MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust administrative remedies. *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43; 620 NW2d 546 (2000). Furthermore:

> A motion under MCR 2.116(C)(4), alleging that the court lacks subject matter jurisdiction, raises an issue of law. The issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal. *McCleese v Todd*, 232 Mich App 623, 627; 591 NW2d 375 (1998) ("Lack of subject matter jurisdiction may be raised at any time."); *Phinney v Perlmutter*, 222 Mich App 513, 521; 564 NW2d 532 (1997) ("Although the jurisdictional issue here was never resolved by the trial court, a challenge to subject-matter jurisdiction may be raised at any time, even for the first time on appeal."). When a court lacks jurisdiction over the subject matter, any action it takes, other than to dismiss the case, is absolutely void. *McCleese*, 232 Mich App at 628; 591 NW2d at 377. The trial court's determination will be reviewed de novo by the appellate court to determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether affidavits and other proofs show that there was no

> genuine issue of material fact. *See Cork v Applebee's of Michigan, Inc*, 239 Mich App 311; 608 NW2d 62 (2000) ("When reviewing a motion for summary disposition under MCR 2.116(C)(4), we must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show that there was no genuine issue of material fact."); *Walker v Johnson & Johnson Vision Products, Inc*, 217 Mich App 705; 552 NW2d 679 (1996); *Faulkner v Flowers*, 206 Mich App 562; 522 NW2d 700 (1994); *Department of Natural Resources v Holloway Construction Co*, 191 Mich App 704, 478 NW2d 677 (1991).
>
> 1 Longhofer, Michigan Court Rules Practice § 2116.12, p 246A.

B. Special Assessments are Distinct from Other Local Assessments.

In *Kadzban v City of Grandville*, 442 Mich 495; 502 NW2d 299 (1993), the Michigan Court of Appeals provided the following definition of what is meant by the term "special assessment":

> A special assessment is a levy upon property within a specified district. Although it resembles a tax, a special assessment is not a tax. In contrast to a tax, a special assessment is imposed to defray the costs of specific local improvements, rather than to raise revenue for general governmental purposes.

Id. at 500 (internal citations omitted). The distinction between a special assessment and other taxes is further described in the Michigan Civil Jurisprudence entry dealing with local improvements and assessments.

> Special assessments are a species of taxation to pay for local improvements for public purposes on real property, which recognizes the general public interest, but rests on the theory that such property, by reason of locality, is specially benefited by the improvement. *Woodmere Cemetery Ass'n v City of Detroit*, 192 Mich 553; 159 NW 383 (1916). They are to be distinguished from general taxes, *Graham v City of Saginaw*, 317 Mich 427; 27 NW2d 42 (1947); *City of Detroit v Weil*, 180 Mich 593; 147 NW 550 (1914), within the meaning of that term as used in tax laws, *Doane v Pere Marquette Ry Co*, 247 Mich 542; 226 NW 245 (1929), because they represent an enhancement of value or benefit to the land. *Woodmere Cemetery Ass'n v City of Detroit*, 192 Mich 553; 159 NW 383 (1916). That is, since the benefit from a local improvement almost always accrues exclusively to lands, usually real estate alone is subject to the special assessment. *City of Detroit v Weil*, 180 Mich 593; 147 NW 550 (1914).

16 Mich Civ Jur, Local Improvements and Assessments § 33, p 421. In other words, a special assessment should be viewed as a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area. *Kadzban, supra* at 500; *see also Graham v Kochville Twp,* 236 Mich App 141, 150; 599 NW2d 793 (1999).

C. MCL 211.741 and MCL 41.724a Govern Special Assessment Notices.

The interrelationship between MCL 211.741 and MCL 41.724a govern Respondent's Motion. MCL 211.741(1) states, "notice of all hearings in the special assessment proceedings shall be given as provided in this act in addition to any notice of hearings to be given by publication or posting as required by statute, charter, or ordinance." The statute further provides that notice of special assessment must be given to each owner or party in interest in property to be assessed "whose name appears upon the last local tax assessment records by mailing by first class mail addressed to that owner or party at the address shown on the tax records at least 10 days before the date of the hearing." MCL 211.741(1).

MCL 41.724a(2) governs the public notice requirements for special assessments. The statute requires that a notice of hearing in special assessment proceedings must be published twice before the hearing in a newspaper circulating in the township. Furthermore, MCL 41.724a(2) permits, but does not require, parcels affected by the special assessment to be listed by property identification numbers.

If a taxing authority satisfies the personal notice requirements of MCL 211.741 and the public notice requirements of MCL 41.724(a), "one owning land within the district must be presumed to have received notice." 16 Mich Civ Jur, Local Improvements and Assessments, § 24, p 412 (citing *Van Zanten v City of Grand Haven,* 174 Mich 282; 140 NW 471 (1913)).

Respondent submitted the following affidavits to support its claim that it satisfied the

notice provisions contained within the pertinent statutes: two affidavits from Jane Vanderpoel stating that she published notice concerning the water special assessment district on November 2, 2005 and November 9, 2005, as well as on March 29, 2006 and April 5, 2006; two affidavits from Shirly Sibilia, Sanilac Township Clerk, proclaiming that she sent notice of the hearing to each owner assessed for the improvement by way of first-class mail on November 1, 2005 and March 30, 2006.

Petitioners, on the other hand, failed to submit any evidence to contradict Respondent's assertions that it satisfied the statutory notice requirements. Instead, Petitioners' relevant evidence amounted to affidavits from Wayne A. Smith, attorney for Petitioners, and Alice M. Smith. Ms. Smith avers that they never received actual, personal notice of the special assessment.

Based on the evidence, the Tribunal finds that Respondent has satisfied the notice requirements contained within MCL 211.741 and MCL 41.724a, with regard to the special assessment at issue in this matter. Respondent's uncontroverted evidence indicates that Respondent mailed two notices to Petitioners and published four notices in a local newspaper. As such, Respondent has satisfied its statutory duty to provide notice to those within the special assessment district.

Respondent's evidence establishes that it has satisfied the special assessment notice requirements as set forth in MCL 211.741, and case law on the issue of public versus actual notice further supports the Tribunal's conclusions. In *Ferguson v Township of Hamburg*, unpublished opinion per curiam of the Court of Appeals, issued April 13, 2004 (Docket No. 243852), available at 2004 WL 790426, a taxpayer appealed the Tribunal's dismissal of the special assessment appeal with regard to a sanitary sewer project for lack of subject matter

jurisdiction. Among other things, the taxpayer in *Ferguson* alleged that the special assessment was invalid because she never received written notice of the two public hearings held prior to the approval of the special assessment roll, as required by statute. The Tribunal rejected these claims after Respondent provided an affidavit in which a Hamburg Township engineer stated that he met with Ferguson and her husband and informed them of the public hearing, told her of her ability to object at that hearing, and informed her about the opportunity to appeal the special assessment with the Tribunal. The Tribunal understands *Ferguson* as an indication that the failure to receive written notice is not enough to overturn a special assessment.

In the case of *Anderson v Selma Twp, Wexford County*, 95 Mich App 112; 290 NW2d 97 (1980)(Danhof, C.J., dissenting),[1] Chief Judge Danhof read the special assessment notice requirements, as described in MCL 41.726, as being discharged upon the act of the Township mailing the personal notice. *Id*. at 119. Chief Judge Danhof stressed that the section did not explicitly require receipt of the notice. Specifically, his dissent expressed a concern that requiring actual receipt of notice by a taxpayer "would place an impossible burden upon an assessing township: no special assessment could ever be final unless a township could prove that each affected individual received 'personal notice.'" *Id*. Chief Judge Danhof suggested that the

[1] In *Anderson v Selma Twp, Wexford County*, 95 Mich App 112; 290 NW2d 97 (1980), the majority remanded the case back to the Tribunal for a determination on the issue of whether the petitioners received personal notice of the special assessment hearing. Specifically, the court stated, "In the present case, plaintiffs' claim that they never received personal notice of the special assessment hearing, if believed, is sufficient to challenge their individual assessments." *Id*. at 117. Unfortunately, after conducting a strenuous search, the Tribunal was unable to find any record of the proceedings occurring after the case was remanded to the Tribunal. Nevertheless, the Tribunal recognizes that such an order by the Michigan Court of Appeals could be construed as an indication that if a taxpayer did not receive actual notice of the special assessment hearing, the special assessment may be invalid. However, the Tribunal views these words to mean that the taxpayer must still present some evidence suggesting that the notice was never received. Furthermore, in light of the legal treatises and case law concerning public notice described in the balance of this Order, merely claiming no notice was received is an ineffective way to avoid a special assessment.

majority's holding would provide a blueprint for a taxpayer to escape the special assessment liability by simply claiming a lack of personal notice. *Id*.

In further support of his conclusion, Chief Judge Danhof looked at the complementary statutory language in MCL 41.724a(4). Significantly, MCL 41.724a(4) provides that "[t]he method of giving notice by mail as provided in this section is declared to be the method that is reasonably certain to inform those to be assessed of the special assessment proceedings." Under Danhof's view, if the Legislature intended to require actual notice, it would not follow that a method considered that was only "reasonably certain" to effect those with an interest in the special assessment.

Chief Judge Danhof's dissent in *Anderson v Selma Twp, Wexford County* is in agreement with the Michigan legal encyclopedia's annotation on the issue.

> If notice is required by ordinance, it need not necessarily be personally served on the owners but may often be given constructively, such as by posting it. In fact, any method of informing interested property owners tending to satisfy the constitutional requirement that property not be taken without due process of law usually will be upheld where no denial of justice results.

16 Mich Civ Jur, Local Improvements and Assessments, § 70, p 463 (internal citations omitted).

The case of *Wortelboer v Benzie County*, 212 Mich App 208; 537 NW2d 603 (1995), can also be read to sustain the Tribunal's decision to grant Respondent's Motion for Summary Disposition. In *Wortelboer*, the court of appeals stated,

> Due process is satisfied when interested parties are given notice through a method that is reasonably calculated under the circumstances to apprise them of proceedings that may directly and adversely affect their legally protected interests and afford them an opportunity to respond. *Int'l Salt Co v Wayne Cty Drain Comm'r*, 367 Mich 160, 167-169; 116 NW2d 328 (1962), citing *Mullane v Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950), and *Walker v City of Hutchinson*, 352 US 112, 77 S Ct 200, 1 LEd2d 178 (1956). Notice by publication is sufficient to satisfy the due process requirement of notice when, under the circumstances, it is not reasonably possible or

> practicable to provide more adequate notice. *Harter v City of Swartz Creek (On Rehearing)*, 68 Mich App 403, 406; 242 NW2d 792 (1976), citing *Mullane*, *supra*.

Wortelboer, *supra* at 218. Here, in addition to notice by publication, Respondent mailed multiple notices to Petitioners regarding the public hearing concerning the special assessment. As noted above, Respondent has supported its claims with affidavits from the Sanilac Township Clerk indicating that personal notices regarding the special assessment were mailed to Petitioners and public notices regarding the special assessment were posted in the local newspaper. Clearly, Respondent has comported with the notice requirements found within MCL 211.741 and MCL 41.724a.

VI. CONCLUSIONS OF LAW

The above discussion concerning the notice requirements associated with a special assessment only tangentially addresses the ultimate issue of this case: Whether Petitioners' appeal of the special assessment is properly before the Tribunal. The Tribunal has carefully considered Respondent's Motion for Summary Disposition under the criteria for MCR 2.116(C)(4), and based on the pleadings and other documentary evidence filed with the Tribunal, determines that granting Respondent's Motion is appropriate.

In the above-captioned matter, Respondent's motion for summary disposition contends that Petitioners are precluded from seeking redress at the Tribunal for the special assessment that is the subject of this appeal because they never protested the special assessment to the Board of Review. Petitioners counter with the argument that their obligation to protest an assessment before the Board of Review is contingent upon them receiving personal notice of the assessment.

While such a claim seems intuitively sound in reasoning, the express language of the statute undermines Petitioners' assertions. No safe harbor provisions exist within MCL 211.741

allowing a taxpayer to avoid paying a special assessment because a lack of actual, personal notice prevented the taxpayer from attending the hearing designated to confirm the special assessment. Petitioners have cited no case law that would suggest otherwise. The fact that Petitioners allege a lack of personal or actual notice is not enough to defeat the requirement that they must protest the special assessment at the public hearing.

Petitioners focus only on the personal notices mailed to each taxpayer affected by the special assessment and do not address the gravamen of Respondent's Motion: Petitioners failed to protest the special assessment on or before the hearing confirming the special assessment district. In any event, it is clear that Petitioners failed to protest the special assessment before the review board designated to hear the taxpayer complaints. While Petitioners' brief indicates that whether they protested the special assessment at the designated hearing constitutes a genuine issue of material fact. Based upon the pleadings filed in this matter, Petitioners at no time contend that they appeared at any hearing to protest the establishment of the special assessment district, their inclusion in it, or the special assessment itself. There is no indication that Petitioners appeared before the hearing to protest the special assessment. Petitioners' pro forma Petition erroneously indicates they were asserting jurisdiction of the basis of filing a Petition with the Tribunal within 30 days of the Certification of the Special Assessment Roll. Furthermore, Petitioners' Amended Petition states "Petitioners were of the opinion that attendance at any meetings was for the purpose of inducement of the Board of Respondent to take contrary action, but that such an outcome was not a viable eventuality and therefore would be nugatory." Both statements signify a failure by Petitioners to protest the special assessment at the hearing designated to address taxpayers' concerns. As such, Petitioners have failed to satisfy the jurisdictional requirements of MCL 211.741.

The Tribunal is confident in its ruling that Respondent's Motion for Summary Disposition is appropriate in spite of Petitioners' claim that the issue of whether the Tribunal has jurisdiction over this matter is a question of fact. Petitioners' answer to Respondent's Motion for Summary Disposition incorrectly states a fundamental legal principle: the question of whether a court or a tribunal has subject-matter jurisdiction over a dispute is a question of law and not a question of fact. (Emphasis added.) *WA Foote Memorial Hosp v Department of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995); *see also Ballard Power Systems, Inc v City of Dearborn*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2007 (Docket No. 268458), available at 2007 WL 1719924, *1 (2007). As such, disposing of this matter via an order granting summary disposition in favor of Respondent is appropriate.

VII. JUDGMENT

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

IT IS FURTHER ORDERED that this case is DISMISSED.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected special assessment, interest, and penalties shall collect the special assessment, interest, and penalties or issue a refund as required by this Opinion and Judgment within 90 days of the entry of this Opinion and Judgment.

IT IS FURTHER ORDERED that this Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: August 25, 2008 By: Kimbal R. Smith III, Tribunal Member
smm/sms