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

Summit Development,
Petitioner,

v

MTT Docket No. 355793
consolidated with 375830

City of Battle Creek
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER AFFIRMING THE 2008 AND 2009 TAXABLE VALUES OF THE SUBJECT PROPERTIES

ORDER DENYING RESPONDENT'S MOTION TO STRIKE

FINAL OPINION AND JUDGMENT

INTRODUCTION

Respondent filed a Motion for Summary Disposition in this matter on August 3, 2011, pursuant to MCR 2.116(C)(4) and MCR 2.116 (C)(10), contending that the Tribunal lacks jurisdiction over taxable value issues relating to tax years prior to 2008.

Petitioner filed its "Objection to Respondent's Motion for Summary Disposition" on August 31, 2011, contending that no authority exists that would allow Respondent to file such motion.

On September 6, 2011, Petitioner filed its "Motion for Summary Disposition" in this matter pursuant to MCR 2.116(C)(10), contending that (a) the Tribunal has jurisdiction over Petitioner's taxable value appeal, (b) that Respondent was required to follow the Court of

Appeals decision in *Toll Northville LTD v Township of Northville*, 272 Mich App 352; 726 NW2d 57 (2006), and (c) that Respondent has committed a qualified error under MCL 211.53b(8)(f). Petitioner claims, therefore, that Respondent incorrectly calculated the taxable value of the subject properties for 2007.

Respondent filed its response to "Petitioner's Motion for Summary Disposition" on September 26, 2011, which included "Respondent's Motion to Strike Petitioner's 34 Page Brief," pursuant to MCL 2.119(A)(2) and MCR 2.115(B).

Oral argument on the parties' respective Motions was held on October 10, 2011. Petitioner was represented by Fred Gordon, attorney, and Respondent was represented by Ian D. Wright, attorney.

Based upon the Findings of Fact and Conclusions of Law set forth herein, the Tribunal finds that there is no genuine issue with respect to any material fact with regard to whether the Tribunal has jurisdiction over this appeal. Specifically, although Petitioner timely filed an appeal for the 2008 and 2009 tax years, Petitioner's appeal of the 2007 tax year is not properly pending before this Tribunal as Respondent properly issued and sent Petitioner the Notices of Assessment and Petitioner failed to timely appeal pursuant to MCL 205.735a, and because Petitioner has failed to prove that a "qualified error" under MCL 211.53b has occurred. The Tribunal finds it appropriate to deny Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10), to deny Respondent's Motion to Strike under MCR 2.115(B), and to grant Respondent's Motion for Summary Disposition under MCR 2.116(C)(10) (for all tax years at issue) and under MCR 2.116(C(4) for the 2007 tax year only. Therefore, the taxable values for the subject property for the 2008 and 2009 tax years for the subject properties shall remain as reflected on the assessment rolls, as follows:

Taxable Values:

Parcel No.	2008[1]	2009
002-0	$21,302	$22,239
003-0	$21,302	$22,239
004-0	$21,302	$22,239
005-0	$156,721	N/A - Sold
006-0	N/A - Sold	N/A - Sold
007-0	$21,302	$22,239
008-0	$21,302	$22,239
009-0	$21,302	$22,239
010-0	$21,302	$22,239
011-0	$21,302	$22,239
012-0	$21,302	$22,239
013-0	$21,302	$22,239
014-0	N/A - Sold	N/A - Sold
015-0	$21,302	$22,239
017-0	$21,302	$22,239
018-0	$21,302	$22,239
019-0	$21,302	$22,239
020-0	$21,302	$22,239
021-0	$21,302	$22,239
022-0	$21,302	$22,239
023-0	$21,302	$22,239
024-0	$21,302	$22,239
025-0	$21,302	$22,239
026-0	$21,302	$22,239
027-0	$21,302	$22,239

RESPONDENT'S ARGUMENT

In support of its Motion, Respondent contends that it accurately calculated the taxable value on Petitioner's parcels by including public service improvements in its 2007 assessment. Respondent further contends that the Tribunal lacks jurisdiction over the 2007 assessed and taxable values of the subject properties. Specifically, Respondent argues that the Tribunal correctly recognized its lack of jurisdiction over the 2007 tax year in its November 26, 2008, Order dismissing Petitioner's appeal of that tax year.

[1] The taxable values for each parcel for 2007 were $20,824. For 2008, the taxable value of each parcel was calculated pursuant to MCL 211.27a.

Respondent disputes Petitioner's contention of the facts of the case. Respondent asserts that Petitioner did not notify Respondent of a change of address. Therefore, Respondent states that Petitioner incorrectly contended that "it is 'undisputed' that it 'did not receive, and Respondent did not send any Notices of Assessment,' for the 2007 tax year, and that 'Petitioner had previously notified Respondent of a change of address.'" Respondent's Brief ("Res Brief"), p. 2, quoting Petitioner's Motion, p. 2. In support, Respondent stated in its oral argument that "there is documentation in the briefs that respondent has provided that shows that the petitioner didn't change their address until July 11, 2008 when Jamie Messenger from Summit Development sent a fax to the City and says as of May 2, 2008 we have moved to a new location." Transcript, p. 13. Respondent contends that the Notices of Assessment were timely sent in 2007 to the address on record. *Id*. at 2.

Respondent further contends that Petitioner's argument that the Tribunal can "reach back" to prior years when the statute at issue has been declared unconstitutional is not supported by recent case law. Res Brief, p. 4. Respondent relies on *MJC/Lotus Group v Township of Brownstown,* ___ Mich App ___; ___NW2d ___ (2011), which specifically held that "the Tribunal lacks jurisdiction to indirectly review the accuracy of a property's taxable value in a year not under appeal notwithstanding that such value is used as a starting point to calculate the property's taxable value in a year properly under appeal." Respondent argues that Petitioner did not appeal the assessed and taxable values for the 2007 tax year, therefore, Petitioner cannot "reach back" and recalculate the 2007 taxable value even though the provision allowing Respondent to calculate the 2007 taxable value to include public service improvements as additions has been held unconstitutional. *Id*. at 3-4.

In its oral argument, Respondent further stated that "the *MJC/Lotus Group* case in this instance is dispositive . . . the fact that it did not deal with a qualified error is not material, given that the key holding . . . involve[d] a jurisdictional issue for a year that is no longer in front of the Tribunal . . . ." Transcript, p. 9. Further, Respondent asserted that even though the Supreme Court has stated that it would review the *MJC/Lotus Group* case, the Tribunal is "bound at this point to rely on the . . . *MJC Lotus* case, until there is some contrary rule." *Id.* at 16. Respondent concludes that *MJC/Lotus Group* parallels this case, has not been overruled, and therefore, any argument related to taxable years not timely appealed is waived and cannot be revisited.

Respondent further contends that Petitioner's reliance upon *Ryzyi v Township of Bagley*, 2011 Mich App Lexis 716, unpublished opinion of the Court of Appeals, issued April 19, 2011 (Docket No. 295759) is incorrect as it is an unpublished opinion, which is not binding on the Tribunal. Res Brief, p. 4. More importantly, Respondent asserts that the facts in *Ryzyi* are "clearly distinguishable" from the facts in this case because *Ryzyi* involves an analysis of MCL 211.29 and 211.30, statutory provisions which are not at issue in the present case. *Id*. Further, during oral argument, Respondent stated that the *Ryzyi* case "dealt with very specific statutes that apply to uncapping, and we don't have that particular instance here." Transcript, p. 14. Respondent next contends that *Briggs Tax Service, LLC v Detroit Public School*, 485 Mich 69; 780 NW2d 753 (2010), does not apply because Petitioner cites to a decision that has been overruled by the Michigan Supreme Court due to the fact that the Court of Appeals erroneously held that a mistake made by one party was a mutual mistake. Res Brief, pp. 6-7. Conversely, Respondent argues that *MJC/Lotus Group* is on point and presents binding authority on the Tribunal. *Id.* 4.

Respondent also asserts that the Supreme Court's decision in *Toll Northville Limited and Biltmore Wineman LLC v Township of Northville*, 480 Mich 6; 743 NW2d 902 (2008), does not apply retroactively because the court "never addressed the retroactive or prospective application of its decision invalidating MCL 211.34d(1)(b)(viii)." *Id.* at 8-9. Respondent also disputes that it increased the values on the 2007 tax assessment after the *Toll Northville* case was published. *Id.* at 2-3. Respondent contends that it could not "refuse to comply" with the case law before it was decided. *Id*. Further, Respondent contends that in *Auge v Township of Delta*, 2011 Mich App LEXIS 1398, 1-2, the Court of Appeals affirmed that the Tribunal did not have jurisdiction to review a past assessment which could potentially change the values for future tax years under appeal. *Id.* at 9.

Respondent also contends that, contrary to Petitioner's argument, the Tribunal does not have authority to "correct" the taxable values under either MCL 211.53a or 211.53b. *Id*. at 6. Respondent states that MCL 211.53a is inapplicable because it provides for the recovery of excess taxes paid due to "mutual mistake of fact" or "clerical error," neither of which applies to this matter. *Id*.

Respondent further contends that because it did not treat any public service improvements as "additions" for purposes of calculating the 2008 taxable values of the subject properties, its calculations of the 2008 taxable values were correct as they were determined by simply increasing the 2007 taxable values by the applicable inflation rate pursuant to MCL 211.27a. *Id*. at 3. For 2009, Respondent admits that it initially made a clerical error when it erroneously calculated the 2009 taxable values based on a proposed settlement and reflected those errors on its 2009 assessment notices. *Id.* However, Respondent contends that it properly

corrected those clerical errors at the July 2009 Board of Review pursuant to MCL 211.53b and MCL 211.27a. *Id*.

Respondent further disputes Petitioner's contention that the public service improvements may be deducted as a loss pursuant to MCL 211.34d(1)(h)(i) because the improvements were not "destroyed" or "removed" as required by the statute. *Id*. at 5-6.

Respondent further contends that Petitioner fails to provide any support for its contention that Respondent's calculation of assessed and taxable values of the subject properties for the 2008 and 2009 tax years constituted a "qualified error" pursuant to MCL 211.53b. *Id*. at 3-4. Specifically, Respondent contends that Petitioner has failed to explain how Respondent's calculation of the assessed and taxable values of the subject property in 2008 (or 2009) constitutes either a clerical error or mutual mistake of fact as contemplated by statute or case law. *Id*. at 6. In its oral argument, Respondent stated that "[t]he reference to a qualified error in the 2008 petition had to do with how the respondent corrected its own or when it erroneously calculated the taxable values back down based on this proposed settlement agreement that was never signed and never made good." Transcript, p. 12. Finally, Respondent contends that Petitioner waived its right to bring the "qualified error" argument because the error wasn't brought in the Petition nor was any amendment filed to correct the Petition. *Id*. at 12-13.

Finally, Respondent contends that because Petitioner's 34-page Motion for Summary Disposition exceeds the 20-page limit imposed by MCL 2.119(A)(2), Petitioner's Motion should be stricken under MCR 2.115(B) as it fails to conform to the Court Rules. Res Brief, pp. 1-2.

PETITIONER'S ARGUMENT

In support of its Motion, Petitioner contends that (1) the Tribunal has jurisdiction to review taxable values in years not under appeal where a "qualified error" has occurred, (2) lack

of jurisdiction does not bar the Tribunal from considering evidence from prior tax years where the applicable statute is declared unconstitutional, (3) because Respondent included public service improvements as "additions" in calculating the 2007 taxable values of the subject properties, the Tribunal is constitutionally and statutorily required to adjust taxable values for losses, (4) the decision in *Toll Northville* constitutes a "loss" of property within the meaning of MCL 211.34d(1)(h)(i), (5) the Tribunal has statutory authority to correct the error under MCL 211.53a and 211.53b, (6) for 2009, Respondent increased taxable values by greater than the inflation rate and did not follow proper procedures under MCL 211.27a and 211.53b to correct the admitted qualified error, (7) Respondent failed to provide proper notice of the increased valuations, including additions, for the 2007 tax year, and (8) the Michigan Supreme Court has already determined that *Toll Northville* applies retroactively. Petitioner specifically contends that the taxable values, assessed values and state equalized values for the 2007 and 2008 tax years for each of the subject parcels should be reduced to $4,701 and the taxes for 2009 and all subsequent years should be reduced to an amount calculated based on a taxable value of $5,189 for 2009.

In oral argument, Petitioner limited its argument to two issues: (a) that pursuant to MCR 7.215(C)(2), Respondent was required to follow the Court of Appeals 2006 decision in *Toll Northville* in calculating the 2007 taxable values of the subject properties, and (b) that Respondent committed a qualified error under MCL 211.53b(8)(f) by including public service improvements as "additions" in calculating 2007 taxable values, which would allow the Tribunal to recalculate 2007 taxable values to exclude public service improvements as additions.

In support of its Motion, Petitioner contends that "Article 9, Section 3 of the Michigan Constitution specifically states that taxable value shall be 'adjusted for additions and losses,'"

and because *Toll Northville* "declar[ed] that public service improvements are not 'additions' within the meaning of Proposal A, the Michigan courts 'removed' such additions . . . from existing taxable value within the meaning of MCL 211.34d(1)(h)(i)." *Id*. at 16-17. Petitioner goes on to argue that such "omitted real property" is defined as an "addition" under Section 34d(I)(b)(i) of the GPTA and that

> [o]mitted real property is added to taxable value 'for the current and the 2 immediately preceding tax years,' meaning that taxpayers not only have to pay the tax going forward but also for the preceding two years. . . . If an assessor failed to include omitted property in 2000, even through the assessor's own mistake, the assessor can still add the omitted property in 2010.

Pet Brief, p. 17. Petitioner concludes that taxing units only face limitations regarding the length of time they can retroactively collect taxes and are not bound by *res judicata* and collateral estoppel. *Id*.

Petitioner asserts that Respondent was required to follow the decision of the Michigan Supreme Court in *Toll Northville*, which held that MCL 211.34d(1)(b)(viii) was unconstitutional. Petitioner then contends that "Respondent knew about *Toll Brothers* [sic] before it included the additions in the assessments." Pet Brief, p. 2. Petitioner argues that the memorandum that Respondent received from the State Tax Commission, dated February 21, 2008, stated that "[w]e believe this decision applies to all open appeals and should be considered in the development of the 2008 assessment rolls," and Respondent refused to comply with this memorandum. *Id*. at 3. Petitioner also contends that "MCL 205.735(3) permits the Tax Tribunal to consider a tax year properly appealed in any assessment dispute, plus any other prior years." *Id*. at 8. Petitioner further contends that "[a]t the time of the 2007 taxable value assessment of the subject property, it was a qualified error for the respondent to include the public service improvements as an addition to the 2007 taxable value." Transcript, p. 4.

Petitioner further asserts that "[t]he Michigan Supreme Court has stated that 'resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." Pet Brief, p. 30. Petitioner concludes that "certainly fairness dictates that the determination in *Toll Northville* be applied retroactively." *Id*. Petitioner contends that *Bolt v City of Lansing*, 238 Mich App 37; 604 NW2d 745 (1999), applies a "fairness/burden" test to determine whether the court should apply a rule retroactively or prospectively. *Id*. at 31. Petitioner goes on to contend that "it would be inequitable to allow Respondent to retain money illegally collected through an unconstitutional tax. . . . [therefore] prospective application would definitely impair Petitioner's interests, and, equally important, retroactive application would significantly improve Petitioner's position." *Id.* Petitioner also asserts that public policy arguments require that *Toll Northville* be applied retroactively because the public service improvements are "donated" to the public by the developers and

> [n]ot only is housing now less affordable, but the homeowners are paying for these 'improvements' twice – once before they ever own the property and second when they buy the property and the property taxes are 'uncapped.' And homeowners are paying for these 'improvements' at such time as they have no real value to anyone.

Id. at 32. Petitioner then contends that "Public Service Improvements are required in order to develop and sell residential housing." *Id*. at 33.

Petitioner further contends that it did not receive any 2007 Notices of Assessment from Respondent on the 25 vacant parcels of real property owned by Petitioner. *Id*. at 2. Petitioner also contends that, although it notified Respondent of a change of address, Respondent did not send the notices and this fact is "undisputed." *Id*. Petitioner also states that "it is unclear whether Respondent ever attempted to mail notice to Petitioner." *Id.* at 28. Citing several cases, including *Mullance v Cent Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652 (1950) and *Jones v*

Flowers, 547 US 220 (2006), Petitioner contends that Respondent sent the Notices of Assessment to the wrong address and, thus, violated Petitioner's Right to Due Process. *Id.* at 23. Petitioner further contends that "[i]f Respondent did send any notice to Petitioner for the year 2007, then it was sent to the old address and returned to Respondent as undeliverable." [2] *Id*. at 2. Petitioner concludes that Respondent failed to "satisfy the minimum requirements of due process required," which is a constitutional violation. *Id*. at 28. Petitioner goes on to state that it obtained copies of the 2008 Notices of Assessment, at which time it also obtained the Notices of Assessment for the 2007 tax year. *Id*. at 2.

Petitioner also contends that Respondent's "Notice of Assessment is unconstitutional because it does not provide Petitioner with any information necessary to be informed of its rights to properly protest the assessment for 2007 when the Notice of Assessment is sent to the wrong address." [3] Pet Brief, p. 22. Petitioner further contends that MCL 205.5 was enacted to address said issue and requires "[t]he department [to] prepare a brochure that lists and explains . . . a taxpayer's protections and recourses in regard to a departmental action administering or enforcing a tax statute . . . ." *Id*. quoting MCL 205.5.

Petitioner further contends that Respondent's argument that *Leahy v Orion Township*, 269 Mich App 527; 711 NW2d 438 (2006), is similar to *MJC/Lotus Group* is misplaced because "issues and arguments raised in *Leahy* were not raised in *MJC/Lotus Group*." Pet Brief, p. 6. Petitioner also states that "*Leahy* stands for the proposition that a taxpayer can't protest the immediately preceding taxable year [if] it didn't protest to the board of review. However, it had

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[2] The Notices of Assessment for the 2007 tax year were sent to Summit Development Group Inc., 1050 Columbia Ave W, Ste B, Battle Creek, MI 49015-3058. The Notices of Assessment for the 2008 tax year were sent to Summit Development Group Inc., 2943 Dickman Rd W, Battle Creek, MI 49037-7939.

[3] Although, Petitioner neglected to submit copies of the Notices of Assessment in its Motion for Summary Disposition, Respondent submitted copies of the Notices of Assessment in its Motion for Summary Disposition. See Exhibit I. Upon review of the Notices of Assessment, the Tribunal finds that Respondent has included the requisite information regarding appeal rights.

nothing to do with a qualified error." *Id*. During its oral argument, Petitioner contended that "[t]he *MJC* case, which was decided during the Court of Appeals during 2011, does not relate to qualified error as the assessment made was appealed prior to the *Toll Northville*, which was decided on October 3rd, 2006." Transcript, pp. 5-6.

Petitioner also contends that this case is "conceptually identical" to *Ryzyi v Township of Bagley* in that a "qualified error" was made by an "addition" and a "timely protest made for 2008 allows the petitioner to contest the current year 'addition,' 2008, along with the prior year, 2007, under MCL 211.53b(1) and MCL 211.53b(8)(f)." Pet Brief, p. 7. Petitioner further contends that, under MCL 211.53b(1), a "qualified" error can be corrected for the current year and the immediately preceding years and "[t]herefore, the 'qualified error' of adding in the unconstitutional additions in 2007 must be corrected[,] which is within the authority of this Tribunal in reviewing the 2008 Petition." *Id*. at 7-8.

Petitioner states that "Respondent is apparently arguing that the inclusion of public service improvements in 2006 taxable value constitutes *res judicata* and/or collateral estoppel for purposes of the 2007 assessment." *Id*. at 15. Petitioner then states:

> the Tribunal's position is that a new and previously unknown species of *res judicata* and/or collateral estoppel should apply to all taxpayers in Petitioner's position. According to this new doctrine, each and every taxpayer in the State of Michigan aggrieved by unconstitutional property taxes must undertake the enormous expense of <u>both</u> filing a timely appeal with the Tribunal (by July 31 of the assessment year in Petitioner's case) and simultaneously commencing an original action in Circuit Court to remedy the constitutional violation, or else forever waive its future constitutional rights in perpetuity for all future tax years until the property is sold.

Pet Brief, p. 16. (Emphasis in original.) Petitioner concludes that *res judicata* and collateral estoppel cannot apply because the Tribunal lacks jurisdiction to declare a statute unconstitutional. *Id.* at 15.

Finally, Petitioner asserts that, in 2009, Respondent increased the taxable value on parcel 7330-00-025-0 from $5,206 to $22,239 and on others parcels from $5,205 to $22,239 and that "[t]hese changes were made on July 28, 2009 due to a clerical error." *Id*. at 3. Petitioner claims that Respondent failed to follow the proper procedure under MCL 211.27a and 211.53b in correcting the "admitted qualified error" and further, that "Respondent has never disputed the fact that it did not follow the proper procedures," and that "Respondent has never provided any evidence that it complied with MCL 211.27a and 211.53b." *Id*. at 3-4. Petitioner concludes Respondent "apparently agreed" with the $5,206 and $5,205 values when it set the taxable values and that statute prevents Respondent from revising or correcting the error and, therefore, has resulted in Petitioner's "costs, penalties, and other expenses." *Id*. at 4. Further, Petitioner contends that by not correcting the "qualified error" under MCL 211.27a and 211.53b, the resulting taxable values exceeded the inflation rate (of 1.05). *Id.*

FINDINGS OF FACT

1. The subject property was a single parcel of vacant real property that was split into 25 vacant residential parcels during 2006.
2. Petitioner constructed public service improvements to the subject property in 2006 consisting of water, sewer and utilities.
3. The 2007 taxable values of the subject parcels were determined by allocating the 2006 taxable value of the single parcel proportionately to the 25 newly created parcels and then reflecting the assessed value of public service improvements as "additions."

4. The taxable values for the subject parcels on the assessment rolls for the 2007, 2008, and 2009 tax years are as follows:

Parcel No.	2007	2008	2009
002-0	$20,824	$21,302	$22,239
003-0	$20,824	$21,302	$22,239
004-0	$20,824	$21,302	$22,239
005-0	$20,824	$156,721	N/A – Sold
006-0	$20,824	N/A – Sold	N/A – Sold
007-0	$20,824	$21,302	$22,239
008-0	$20,824	$21,302	$22,239
009-0	$20,824	$21,302	$22,239
010-0	$20,824	$21,302	$22,239
011-0	$20,824	$21,302	$22,239
012-0	$20,824	$21,302	$22,239
013-0	$20,824	$21,302	$22,239
014-0	$20,824	N/A – Sold	N/A – Sold
015-0	$20,824	$21,302	$22,239
017-0	$20,824	$21,302	$22,239
018-0	$20,824	$21,302	$22,239
019-0	$20,824	$21,302	$22,239
020-0	$20,824	$21,302	$22,239
021-0	$20,824	$21,302	$22,239
022-0	$20,824	$21,302	$22,239
023-0	$20,824	$21,302	$22,239
024-0	$20,824	$21,302	$22,239
025-0	$20,824	$21,302	$22,239
026-0	$20,824	$21,302	$22,239
027-0	$20,824	$21,302	$22,239

5. Pursuant to MCL 211.34d(1)(b)(viii), Respondent increased the assessed and taxable values of the subject parcels in 2007 due, in part, to public infrastructure improvements made by Petitioner during 2006.

6. Respondent mailed the 2007 assessment notices for the subject properties to the address on record for Petitioner. Petitioner's notice of a change of address was not provided to Respondent until after the 2007 Notices of Assessment had been mailed.

7. Petitioner filed an untimely appeal for the 2007 tax year. The Tribunal issued its Order of Dismissal dated November 26, 2008, concluding that the Tribunal did not have jurisdiction over the subject property's true cash and taxable values for the 2007 tax year because Petitioner did not appeal to the March 2007 Board of Review and did not file an appeal with the Tribunal for the 2007 tax year by the July 31, 2007, due date.
8. Petitioner did not file an appeal or motion for reconsideration of the Tribunal Order dismissing Petitioner's appeal of the 2007 tax year.
9. Petitioner timely appealed the taxable values of the subject property for the tax years 2008 and 2009.[4]
10. In an Opinion dated February 5, 2008, the Michigan Supreme Court held MCL 211.34d(1)(b)(viii) unconstitutional. See *Toll Northville Ltd v Twp of Northville, supra.* On February 21, 2008, the State Tax Commission informed assessing units of the *Toll Northville* decision.
11. Petitioner filed its appeal on July 31, 2008.
12. In January 2009, the parties discussed possible settlement of the subject appeal. Although no settlement was achieved, Respondent erroneously recalculated the taxable values of the subject property using the proposed settlement values and accordingly issued incorrect 2009 assessment notices for the subject properties.
13. Respondent determined said error to be a clerical error pursuant to MCL 211.53b and corrected this error at the July 2009 Board of Review.
14. The taxable values for the subject properties for the 2008 and 2009 tax years were calculated by increasing the prior year taxable value by the applicable rate of inflation.

[4] Because Petitioner filed separate petitions for 2008 and 2009, the Tribunal issued separate docket numbers for these appeals. In its Order dated August 31, 2011, the Tribunal consolidated these appeals into Docket No. 355793.

No "additions" were included in calculating the 2008 and 2009 taxable values of the subject properties, except for parcel 005-0, which included as additions the partial construction of a house.

STANDARD OF REVIEW

Respondent moves for summary disposition pursuant to MCR 2.116(C)(4). This Court 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.

Petitioner and Respondent move for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated "[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact." Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.

McCart v J Walter Thompson, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion for Summary Disposition under MCR 2.116(C)(4) and (10), and Respondent's Motion to Strike Petitioner's Brief, as well as Petitioner's Motion for Summary Disposition under MCR 2.116(C)(10) and finds that Petitioner's Motion for Summary Disposition should be denied, Respondent's Motion for Summary Disposition should be granted, and Respondent's Motion to Strike should be denied.

Although Petitioner's Brief in support of its Motion for Summary Disposition generally lacks organization and is often duplicative, the Tribunal finds that Petitioner has essentially presented four separate and distinct issues to the Tribunal, most of which have been addressed by the Court of Appeals in *MJC/Lotus Group, supra*:

1. Is Respondent's Motion for Summary Disposition "misguided and unauthorized," such that the Tribunal should not allow Respondent's filing of said Motion?

In its Response to Respondent's Motion, Petitioner asserts that Respondent's Motion for Summary Disposition is "misguided and unauthorized," and that "there is no authority under the Michigan Tax Tribunal Rules that permits the filing of such a motion." Petitioner's Response, p. 1. Petitioner's contention is not supported by any statute, case law or rules and is, therefore, without merit. TTR 111(1) clearly provides that Tribunal rules "govern the practice and procedure in all cases and proceedings before the Tribunal." TTR 111(4) provides that the Michigan Court Rules apply only if an applicable entire tribunal rule does not exist. TTR 230

clearly provides for the filing of motions and supporting briefs, for the filing of briefs in opposition to motions, and for oral argument on such motions upon order of the Tribunal. Here, the parties filed respective summary disposition motions, and the Tribunal, by Order dated September 8, 2011, allowed oral argument on the motions. The Tribunal finds that Petitioner's contentions are not supported by Tribunal rules and that Respondent's Motion for Summary Disposition was timely and properly filed.

2. Does the Tribunal have jurisdiction over the 2007 tax year?

a. Petitioner failed to timely file an appeal of the 2007 taxable values of the subject properties pursuant to MCL 205.735a.

Based on the case file and arguments presented by the parties, the Tribunal finds that Petitioner filed an appeal on July 31, 2008 for tax years 2007 and 2008 (and later separately appealed the 2009 assessed and taxable values of the subject properties). On November 26, 2008, the Tribunal dismissed Petitioner's appeal of the 2007 tax year, holding that "Petitioner received notice of an assessment increase for the 2007 tax year by virtue of the properties' 2007 ad valorem tax bills . . . and failed to appeal those values within 35 days of the issuance of such notices." Order of Partial Dismissal, p. 1.

The Tribunal further finds that, pursuant to MCL 205.735a, it has no jurisdiction over the 2007 tax year. MCL 205.735a provides, in pertinent part:

> (6) . . . .[t]he jurisdiction of the tribunal in an assessment dispute as to property classified under section 34c of the general property tax act, 1893 PA 206, MCL 211.34c, as agricultural real property, residential real property, timber-cutover real property, or agricultural personal property is invoked by a party in interest, as petitioner, filing a written petition on or before July 31 *of the tax year involved*. In all other matters, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, or determination. (Emphasis added).

Petitioner filed its Petition on July 31, 2008. Because the subject properties are classified as residential, the Petition filed by Petitioner was timely filed for the 2008 tax year, but was untimely filed for the 2007 tax year.

Petitioner further seems to contend that the Tribunal "is permitted to review of the accuracy of the taxable value for a prior year not properly under appeal," based on its understanding that "MCL 205.735(3) permits the Tax Tribunal to consider a tax year properly appealed in any assessment dispute, plus any other prior years." Pet Brief, p. 8. The Tribunal finds Petitioner's argument lacking in even a basic understanding of the Tribunal's authority to review property tax appeals. Although Petitioner relies on MCL 205.735(3), Petitioner fails to recognize that this statutory provision applies only to Tribunal proceedings commenced prior to January 1, 2007. Further, as discussed above, MCL 205.735a, the statutory replacement for MCL 205.735, clearly requires the filing of a petition to the Tribunal by July 31 of the tax year involved. The Tribunal finds that Petitioner's attempt to invoke the Tribunal's jurisdiction over the 2007 tax year under a theory that this is an evidentiary issue and not a jurisdictional issue is simply without merit. Pet Brief, p. 11. Furthermore, the Tribunal finds no authority to support Petitioner's contentions that "consideration of a prior year's assessment is . . . proper for purposes of curing the amount of taxable value based on an unconstitutional statute moving forward."

b. Did Respondent fail to properly notify Petitioner of the assessments of the subject properties for 2007?

Petitioner contends that Respondent did not provide proper Notice of Assessments due to the fact that Notices were sent to Petitioner's old address. However, Exhibit 3 within Exhibit G to Respondent's Motion for Summary Judgment shows that the Notices were sent to the address on record. Respondent has established that the Notices of Assessment were sent according to

proper procedure under MCL 211.24c(4), which states that "[t]he assessment notice shall be addressed to the owner according to the records of the assessor. . . . The failure to send or receive an assessment notice does not invalidate an assessment roll or an assessment on that property." If any error was made, it was Petitioner's failure to notify Respondent of its change of address prior to Respondent's mailing of the 2007 Notices of Assessment.

c. Does the Tribunal gain jurisdiction over the 2007 tax year because Respondent's failure to follow the Court of Appeals decision in *Toll Northville* is a "qualified error" under MCL 211.53a or MCL 211.53b?

At various points in its brief in support of its summary disposition motion, Petitioner contends that, where the Tribunal does not have jurisdiction over the 2007 tax year under MCL 205.735a, it does gain jurisdiction over the 2007 tax year and subsequent tax years because of the occurrence of a clerical error or mutual mistake of fact under MCL 211.53a or a "qualified error" under MCL 211.53b.

MCL 211.53a provides that

> [a]ny taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest.

Citing *Briggs Tax Service, LLC v Detroit Public Schools*, 282 Mich App 29, 38-39; 761 NW2d 816 (2008), Petitioner contends that "this statute permits the Tribunal to correct past errors in assessments and is available to the Tribunal to correct the unconstitutional inclusion of public service improvements in Petitioner's taxable value." Pet. Brief, p. 19. Ignoring Petitioner's failure to correctly cite the *Briggs* decision (see *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69; 780 NW2d 753 (2010)), nowhere in Petitioner's argument on this issue

does Petitioner provide any substantive analysis of *Briggs* or how *Briggs* applies to the facts in this case. In *Briggs*, the Court held that for a "mutual mistake of fact" to exist, "the mistake of fact must be mutual; that is, it must be shared and relied on by the assessing officer and the taxpayer." Similarly, in *Ford Motor Company v City of Woodhaven,* 475 Mich 425; 716 NW2d 247 (2006), the Supreme Court defined a "mutual mistake of fact" to mean an "erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." Here, Respondent determined the taxable value of the subject properties for the 2007 tax year based on its understanding of the statute. While Respondent may have erred in its understanding of the law, Petitioner has failed to show any mistake of fact, much less a mutual mistake of fact.

Petitioner also argues that Respondent made a "qualified error" in calculating the taxable values of the subject properties for 2007 under MCL 211.53b, which would allow Respondent to correct the current year and the prior year. Petitioner rejects Respondent's argument that the Court of Appeals in *MJC/Lotus Group v Township of Brownstone,* ___ ____Mich App ___; NW2d___ (2011), denied a taxpayer the right to "correct" incorrectly calculated taxable values of prior years based on the unconstitutionality of a statute. Petitioner distinguishes the decision in *MJC/Lotus Group* because the issue of "qualified error" was not raised in that case. Here, Petitioner contends in its Brief and at oral argument that MCL 211.53b(8)(f), which includes in the definition of qualified error, "an error regarding the correct taxable status of the real property being assessed" applies to this case.

Although Petitioner states its reliance on MCL 211.53b(8)(f) in both its Brief and in oral argument, Petitioner fails to provide any analysis or argument that would assist the Tribunal in concluding that this statutory language can be so broadly interpreted. The Tribunal finds that

this particular section of the statute focuses on an error made by Respondent in determining the "correct taxable status" of the property, rather than an incorrect mathematical calculation of taxable value. For example, should the property have been held to be exempt rather than taxable? Or, is the classification of the subject property correct? The Tribunal finds no support for Petitioner's contention that this provision should be so broadly interpreted as to include as "taxable status of property" those instances where a statutory provision regarding the inclusion of certain "additions" for purposes of calculating taxable value has been held unconstitutional.

d. Does the Tribunal gain jurisdiction over the 2007 tax year because Respondent was required to follow the 2006 Court of Appeals decision in *Toll Northville* pursuant to MCR 7.215(C)(2)?

Although not argued in its Brief, Petitioner raised an argument at oral argument that MCR 7.215(C)(2) specifically required Respondent to follow the Court of Appeals decision in *Toll Northville* in late 2006 (published January 5, 2007) when preparing its assessment roll for 2007. MCR 7.215(C)(2) provides that:

> [a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

While the Tribunal would agree that it is required by this court rule to abide by published decisions of the Court of Appeals, the Tribunal finds no authority which would similarly bind assessors or municipalities. As is clearly stated in MCR 1.103, "the Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan." The Tribunal finds that if Petitioner had properly filed its appeal of the 2007 tax year, *the Tribunal* would have been bound by the Court of Appeals published decision in *Toll Northville.* Because Petitioner failed to timely appeal the taxable value calculation of the subject properties for 2007, the

Tribunal reiterates that it lacks jurisdiction over that tax year. Finally, Petitioner's attempt to somehow link requirements of the Court Rule and the "qualified error" provisions in the statute so that the Tribunal obtains jurisdiction over the 2007 tax year is void of analysis, legal support or logic, and is without merit.

3. Even if the Tribunal does not have jurisdiction over the 2007 tax year under MCL 205.735a, does the Tribunal have jurisdiction as a result of the Michigan Supreme Court decision in *Toll Northville*?

a. Where a statute is held unconstitutional, does public policy require that decision to be applied retroactively?

It is well settled that the Tax Tribunal does not have jurisdiction to grant equitable relief. In *Superior Plastics, Inc v State Tax Commission*, unpublished opinion per curiam of the Court of Appeals, decided June 3, 2008, (Docket No. 275588), the court stated that:

> Our Supreme Court has long recognized that "[t]he cognizance of equitable questions belongs to the judiciary as a part of the judicial power," and that "[t]he constitution limits the Legislature's power to transfer judicial power to administrative agencies." Unless expressly authorized by statute, a legislative tribunal does not have equitable jurisdiction, and we will not extend that power by implication.
>
> Because the Tax Tribunal's powers are limited to those authorized by statute and the Legislature did not expressly grant the Tax Tribunal jurisdiction over equitable claims, "the Tax Tribunal does not have powers of equity." Accordingly, petitioner's assertion that the Tax Tribunal should have exercised its equitable authority lacks merit, because the Tribunal has no equitable power to exercise. (Citations omitted.) *Id*.

See also *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 634; 752 NW2d 479 (2008), *Federal-Mogul Corp v Dep't of Treasury*, 161 Mich App 346, 359; 411 NW2d 169 (1987), *Wikman v City of Novi*, 413 Mich 617, 646-649; 322 NW2d 103 (1982), and *EDS v Flint Twp*, 253 Mich App 538, 545; 656 NW2d 215 (2002). Therefore, Petitioner's argument that "fairness

dictates that the determination in *Toll Northville* be applied retroactively," is ineffective as the Tribunal is not a court of equity.

b. Where the inclusion of public service improvements as "additions" in calculating taxable value has been held to be unconstitutional, should those public service improvements be deemed to constitute a "loss" pursuant to MCL 211.34d(1)(h)?

Petitioner further argues that "[u]nder Section 34d(1)(h), taxable value must be adjusted downward for a 'loss' if some portion of the property has been 'removed.'" Pet Brief, p. 13. Petitioner also argues that "remove" is the same as "take away" and when *Toll Northville* held that MCL 211.34d(1)(b)(viii) was unconstitutional, the value of the public service improvements on its property were therefore "removed," which would constitute a "loss" under MCL 211.34d(1)(h). There are two flaws with Petitioner's argument: (1) as Respondent points out, "[t]he public service improvements were never physically on the subject properties and, therefore, were not 'destroyed or removed,'" (Res Response, p. 6) and, (2) *Toll Northville* cannot apply retroactively. Thus, even if *Toll Northville* did apply, there was no physical loss to the property and nothing was destroyed or removed; therefore, MCL 211.34d(1)(h) does not apply. See *MJC/Lotus Group, supra* and *Auge, supra*, which held under facts similar to this case, that Petitioner's "loss" argument is without merit.

c. Did the Michigan Supreme Court in *Toll Northville* hold that its decision should be applied retroactively?

Petitioner repeatedly urges (albeit without reasonable supporting legal authority or analysis) that the decision in *Toll Northville* (holding that MCL 211.34d(1)(b)(viii) is unconstitutional and public service improvements are not additions in calculating taxable value) is retroactive and, therefore, the public service improvements on Petitioner's parcels are not taxable under MCL 211.27a(2)(a). The Court of Appeals, however, held that "the Tribunal lacks jurisdiction to indirectly review the accuracy of a property's taxable value in a year not under

appeal. . . ." *MJC/Lotus Group v Twp of Brownstown*. Until directed otherwise, the Tribunal finds that the Court of Appeals has clearly held that the Tribunal lacks authority to correct a prior year taxable value to reflect the Supreme Court's decision in *Toll Northville.*

4. Did Respondent's 2009 July Board of Review incorrectly change the taxable values of the subject properties as a result of a "qualified error"?

Petitioner claims that there was a qualified error as a result of a mutual mistake of fact or clerical error, which occurred when Respondent valued the properties for 2009 based on the values set forth in a proposed settlement agreement, which was never executed. Clerical errors and mutual mistakes of fact are governed by MCL 211.53a, which states:

> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest.

Petitioner erroneously claims that Respondent, when it lowered the taxable values for 2009 to $5,205 and $5,206 to reflect a settlement that was never executed, it must have accepted Petitioner's contentions of the taxable value of the parcels. Respondent acknowledges, however, that it made a clerical error in the calculation of the taxable values and wrote to Petitioner to inform it that the values would be corrected at the July Board of Review. Res Brief, p. 5. This clerical error was then properly verified by the local assessor and approved by the July Board of Review within 30 days relative to the clerical error as required under MCL 211.53b. Therefore, Petitioner is incorrect in claiming that Respondent accepted the lower values just by the presence of the clerical error. The Tribunal finds that Respondent's 2009 Board of Review properly corrected the 2009 taxable values of the subject properties.

Finally, the Tribunal finds that Respondent's motion to strike Petitioner's Brief in support of its Motion for Summary Disposition because its length exceeds the page limit established by the court rules should be denied.

There can be no dispute that Petitioner's Brief substantially exceeds the 20-page limitation established by MCR 2.119, which provides that, "**[e]xcept as permitted by the court**, the combined length of any motion and brief, or of response and brief, **may not exceed 20 pages** double spaced, exclusive of attachments and exhibits." (Emphasis added.) Courts have upheld the 20-page maximum. See *People v Leonard*, 224 Mich App 569; 569 NW2d 663 (1997). Here, Petitioner blatantly disregarded the court rule by filing a 34-page brief (not including exhibits or the motion itself) without requesting, or receiving, permission from the Tribunal to exceed such limits. Petitioner also failed to provide any reason why it felt it should be exempted from the page limitation found in the court rules. The Tribunal finds that this disregard for the court rules does not substantially impact the outcome of this case and Petitioner's Brief has been considered in its entirety.

Therefore,

IT IS ORDERED that Petitioner's Motion for Summary Disposition is DENIED.

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

IT IS FURTHER ORDERED that the 2008 and 2009 Taxable Values of the Subject Properties are AFFIRMED.

IT IS FURTHER ORDERED that Respondent's Motion to Strike Petitioner's Brief is DENIED.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: December 1, 2011 By Steven H. Lasher