

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

Irish Construction Company,
Petitioners,

v

MTT Docket No. 432282

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR
SUMMARY DISPOSITION

ORDER OF DISMISSAL

I. INTRODUCTION

Petitioner, Irish Construction Company, filed its initial pleading (i.e. a letter of appeal) on March 12, 2012. Petitioner is appealing Final Assessment No. TG21329 issued by Respondent, Michigan Department of Treasury, on October 11, 2011. The Final Assessment established that Petitioner owes use tax in the amount of \$57,929.00, plus penalty of \$346.00, and interest. The assessment is the result of a use tax audit of Petitioner for the period of January 1, 2007, through December 31, 2010, which determined a deficiency in use tax. Petitioner filed its Entire Tribunal Petition on April 12, 2012, asserting that “[w]e in agreement of the

Sales and Use tax liability in the amount of \$21,116. . . . The taxes in controversy are Sales and Use tax in the amount of \$36,813. . . .”

On May 10, 2012, Respondent filed a Motion for Summary Disposition requesting the Tribunal enter summary disposition under MCR 2.116(C)(1) and (C)(8). Petitioner filed a response to Respondent’s Motion for Summary Disposition on May 30, 2012.

The Tribunal has reviewed the Motion, response, and the evidence submitted and finds that Petitioner failed to invoke the jurisdiction of the Tribunal, and as such Respondent’s Motion for Summary Disposition shall be granted under MCR 2.116(C)(4).

II. RESPONDENT’S CONTENTIONS

Respondent contends that the above captioned case must be dismissed under MCR 2.116(C)(1) or (C)(8) as Petitioner failed to satisfy the jurisdictional requirements prior to filing its appeal. Respondent states that Petitioner failed to pay the uncontested portion of the assessment prior to filing its appeal. See MCL 205.22. Respondent relies upon the ruling in *Toaz v Department of Treasury*, 280 Mich App 457; 760 NW2d 325 (2008), where the Michigan Court of Appeals upheld the Tribunal’s determination that the taxpayer’s failure to pay the

uncontested debt resulted in the Tribunal having no jurisdiction to consider her tax assessment challenge.

Further, Respondent contends that the Tribunal has no jurisdiction to consider Petitioner's appeal as it failed to file its appeal within 35 days of the issuance of the Final Assessment.

III. PETITIONER'S CONTENTIONS

Petitioner contends it believed that the 35-day period for filing with the Tribunal was placed on hold. More specifically, Petitioner states "a written response was sent to the Collection Division with supporting documentation to support the items that were being contested. At this time it was our understanding that the account had been placed on hold (the 35 day period for filing to the tax tribunal was not running) pending the State's review of the documents."

Petitioner's Response, p. 1.

Further, Petitioner contends that its subsequent correspondence with the collection division indicated that a letter should be sent to the Tribunal requesting a hearing, which Petitioner contends supports the finding that the 35 day filing period had not yet begun. Thus, Petitioner filed a letter with the Tribunal and on March 20, 2012, Petitioner received a letter from the Tribunal stating the petition

was due by April 16, 2012. Petitioner contends the correspondence from the Tribunal further demonstrates that the time period for filing did not begin when the Final Assessment was issued.

With regard to the payment of the uncontested taxes, Petitioner contends that it submitted the installment agreement to the State of Michigan on March 2, 2012, and paid the first payment on the installment agreement on March 19, 2012.

“Upon receiving a copy of the State’s Motion for Disposition . . . another installment payment in the amount of \$4,000 was paid on May 23, 2012. . . . The total payments to date are 24,162, which exceeds the uncontested amount of \$21,116.” Petitioner’s response, p. 2.

IV. FINDINGS OF FACTS

1. Respondent conducted a use tax audit for the period January 1, 2007, through December 31, 2010.
2. The Final Assessment, issued on October 11, 2011, established that Petitioner owes use of \$57,929.00, plus penalty of \$346.00, and interest.
3. On March 12, 2012, Petitioner filed its initial pleading and its Entire Tribunal Petition on April 12, 2012, which states “[w]e are in

agreement of the Sales and Use tax liability in the amount of \$21,116.”

4. On May 10, 2012, Respondent filed its Motion for Summary Disposition contending that Petitioner untimely filed and failed to pay the uncontested amount of taxes and Petitioner filed its response to the Motion on May 30, 2012.

V. APPLICABLE LAW

Respondent moves for summary disposition under MCR 2.116(C)(1) and (C)(8); however, the Tribunal finds that the applicable rule is 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.

VI. CONCLUSIONS OF LAW

This Tribunal has carefully considered Respondent’s Motion for Summary Disposition and, based on the pleadings and other documentary evidence filed with the Tribunal, determines that Respondent’s Motion for Summary Disposition is appropriate under MCR 2.116(C)(4) rather than (C)(1) or (C)(8).

The Tribunal's jurisdiction is governed by MCL 205.22, which states that "taxpayer aggrieved by an assessment . . . of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days. . . . The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal." The Final Assessment was issued on October 11, 2011. As such, Petitioner was required to file on or before November 15, 2012; however, Petitioner did not file its initial pleading until March 12, 2012. As such Petitioner's appeal was untimely and failed to properly invoke the jurisdiction of the Tribunal.

Petitioner contends that it believed the 35 day period was "placed on hold" due to its communication with the Collection Division; however, the proper forum for the "written response . . . with supporting documentation to support the items being contested" was the Tribunal not the Collections Division. See MCL 205.22. The Court of Appeals in *Curtis Big Boy Inc v Dep't of Treasury*, 206 Mich App 139; 520 NW2d 369 (1994), held that the Tribunal had no authority to grant a delayed appeal and the Tribunal was divested of jurisdiction when the statutory period for filing expired. As such, the Tribunal cannot find that Petitioner's filing outside of the 35 day period was proper as the deadline for filing is governed by unambiguous statutory provisions. Further, the Tribunal's jurisdiction was

divested due to Petitioner's failure to file within the statutory period under MCL 205.22. See also *Electronic Data Systems Corp v Twp of Flint*, 253 Mich App 538; 656 NW2d 215 (2002).

Furthermore, even if Petitioner had timely appealed, the uncontested tax liability was not paid prior to filing and thus, Petitioner failed to invoke the jurisdiction of the Tribunal. As indicated above, MCL 205.22(1) unambiguously states that payment is a prerequisite to appeal. This is further supported in the *Toaz* case,

Examined in context, the statutory phrase "uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal" is susceptible to only one reasonable interpretation. An aggrieved taxpayer must actually discharge the uncontested tax debt, by full payment, before appealing the contested portion of the tax assessment. *Id.* at 458-459.

In *Toaz*, Petitioner failed to file accurate income tax forms with the State of Michigan and claimed an inability to pay the entire portion of the uncontested assessments before appealing to the Tribunal. The Court in *Toaz* indicated that a taxpayer must pay the entire amount of the uncontested assessment as a *condition precedent* to entering the Tribunal. "An aggrieved taxpayer must actually discharge the uncontested tax debt, by full payment, before appealing the contested portion of the tax assessment." *Id.* at 462. As such, Petitioner's failure to pay the uncontested assessment amount in full, *prior to filing its appeal*, precludes

Petitioner from maintaining its appeal at the Tribunal as the Tribunal lacks jurisdiction.

The Court in *Toaz* also stated, “partial payment does not satisfy the statute, even when coupled with an allegation in the petition that the taxpayer lacks the financial resources to pay the full debt. Nor is a promise to pay the uncontested balance after the expiration of the 35 days sufficient to satisfy the statute. The Tax Tribunal does not have authority to grant a delayed appeal.” *Id* at 462. As such, Petitioner’s installment agreement and payments subsequent to the filing of the appeal were also insufficient to invoke the jurisdiction of the Tribunal. It is irrelevant that the amount paid to date exceeds the uncontested portion of the tax liability because payments were made *after* the filing of the above captioned case.

Thus, the Tribunal finds that Petitioner failed to invoke the Tribunal’s jurisdiction with its initial pleading filed on March 12, 2012, because Petitioner failed to timely appeal to the Tribunal within 35 days of the issuance of the Final Assessment and failed to pay the uncontested tax liability prior to filing its appeal. As such, the Tribunal does not have subject matter jurisdiction to hear Petitioner’s appeal. “Once a court concludes that it lacks subject matter jurisdiction, it is powerless to do more than dismiss the action.” *Board of Co Road Comm’rs of Eaton Co v Schultz*, 205 Mich App 371, 375 n 2; 521 NW2d 847 (1994), citing

Altman v Nelson, 197 Mich App 467, 472-473; 495 NW2d 826 (1992). As such, granting Respondent's Motion for Summary Disposition pursuant to MCR 2.116(C)(4) is appropriate.

VII. JUDGMENT

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

IT IS FURTHER ORDERED that the above-captioned case shall be DISMISSED.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: June 26, 2012 By: Steven H. Lasher