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

PIC Maintenance, Inc.
Petitioner,

v

MTT Docket No. 373123
Assessment Nos. P791488, P791489, P791490

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION TO STRIKE PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION AND PETITIONER'S BRIEF IN SUPPORT OF ITS RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY

ORDER OF DISMISSAL

I. INTRODUCTION

Petitioner, PCI Maintenance, Inc., is appealing three assessments for withholding taxes, interest, and penalties imposed by Respondent, Michigan Department of Treasury, based upon the results of an audit conducted by the Michigan Unemployment Insurance Agency (UIA) in a separate and independent investigation. UIA determined that Petitioner employed workers who qualified as employees, not independent contractors as claimed by Petitioner. Having learned of UIA's findings, Respondent issued Final Assessments for unpaid withholding taxes for said employees. Petitioner appealed UIA's determination, a final resolution of which is still outstanding. In the interim, Petitioner contends that it properly appealed the withholding tax assessments issued by Respondent and requests the Tribunal stay all collection activities by Respondent pending resolution of the underlying issue by UIA. Respondent, on the other hand, contends that Petitioner's Petition to the Tribunal was submitted untimely, i.e., more than 35

days after the issuance of the Final Assessments; in which case the Tribunal lacks subject matter jurisdiction to hear this case pursuant to MCL 205.22. The Tribunal agrees with Respondent and find that the assessments are final, conclusive and not subject to further challenge.

II. BACKGROUND

Petitioner appeals three Final Assessments, Assessment Nos. P791488, P791489 and P791490, issued by Respondent on April 28, 2008, in regard to the nonpayment of withholding taxes from tax years 2004, 2005, and 2006. Petitioner purports to have received a letter of final demand issued by Respondent on July 16, 2009, indicating an outstanding liability of $654,435.99. Petitioner filed a Petition with the Tribunal on July 29, 2009, disputing the tax, including interest and penalties. On October 6, 2009, Respondent filed a Motion for Summary Disposition requesting the Tribunal dismiss the case pursuant to MCR 2.116(C)(4) and 2.116(C)(8). Petitioner filed its Response in Opposition to said Motion on October 22, 2009. On November 3, 2009, Respondent filed a Motion to Strike Petitioner's Response in Opposition to Respondent's Motion for Summary Disposition. On November 13, 2009, Petitioner filed its Response to Respondent's Motion to Strike.

III. RESPONDENT'S CONTENTIONS

In support of Respondent's Motion for Summary Disposition, under MCR 2.116(C)(4), Respondent relies on MCL 205.22, which governs jurisdiction for the Tribunal. MCL 205.22 states that ". . . [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." Respondent contends that Petitioner filed its Petition challenging the assessments at issue after the statutory period allowed had elapsed. Respondent alleges the final assessments and associated penalties and interest for withholding taxes were issued as follows:

a. Assessment No. P791488: Issued April 28, 2008 for Tax year 2004,
b. Assessment No. P791489: Issued April 28, 2008 for Tax year 2005; and
c. Assessment No. P791490: Issued April 28, 2008 for Tax year 2006.

Respondent contends that, in order for the Tribunal to have jurisdiction, Petitioner was required to file its Petition on or before June 2, 2008. Being that Petitioner mailed its Petition on July 27, 2009, Respondent contends Petitioner did not properly vest jurisdiction with this Tribunal; as such, Petitioner's appeal should be barred pursuant to MCL 205.22.

In support of Respondent's Motion for Summary Disposition under MCR 2.116(C)(8), Respondent contends that Petitioner failed to state a claim in which relief may be granted. Respondent states that MCL 205.28(1)(b) specifically prohibits the action in which Petitioner seeks relief. Respondent relies on the position affirmed by the Michigan Court of Appeals in the case of *Curis Big Boy, Inc v Department of Treasury*, 206 Mich App 139, 141, &142 (July 5, 1994) and the unpublished case of *Department of Treasury v Escanaba Flying Services,* 2001 Mich App LEXIS 2361 (November 6, 2001), wherein the Court of Appeals stated:

> *MCL 205.22* unambiguously states that an uncontested assessment is not reviewable by method of direct or collateral attack. In light of the statute, the trial court correctly concluded that defendant waived its right to challenge the validity of the assessments when it failed to appeal them.

As such, Respondent requests the Tribunal grant its Motion for Summary Disposition, and dismiss Petitioner's Petition with prejudice.

After Petitioner filed its Response in Opposition to the Motion for Summary Disposition, Respondent filed a Motion to Strike Petitioner's Response in Opposition to same. In support of Respondent's Motion to Strike, Respondent contends that Petitioner did not timely file the Response pursuant to TTR 230. Respondent contends that the Response was due on October 20, 2009, whereas Petitioner filed it on October 22, 2009. Respondent also contends that affidavits

contained in Petitioner's Response are inadmissible because they are not sworn to, and that they contain hearsay prohibited by MCR 2.116(G)(6).

IV. PETITIONER'S CONTENTIONS

Petitioner filed its Response in Opposition to Respondent's Motion for Summary Disposition on October 22, 2009. In response to Respondent's claims, asserted under MCR 2.116(C)(4), Petitioner contends that the Tribunal does have jurisdiction to hear Petitioner's claim as it is not barred by MCL 205.22. Petitioner contends that the Final Assessments were not "properly sent" to Petitioner because it did not receive the notices by personal service or certified mail. Further, Petitioner contends that the time for appeal started when Respondent issued its "final decision" on July 16, 2009, the date of Respondent's letter enforcing the collection of the April 28, 2008, Final Assessments.

In response to Respondent's claims, asserted under MCR 2.116(C)(8), Petitioner contends it did not ask for an injunction, allegedly characterized by Respondent as a "stay" prohibited under MCL 205.28(1)(b). Instead, Petitioner requests to be granted a plea in abatement as defined by MCR 2.116(C)(6). Petitioner contends it "should not be subject to litigating the exact same claims with the exact same party." Petitioner asserts UIA and Respondent are both divisions of this State, and that both entities are "raising the same claim that Petitioner's employees are independent contractors."[1]

Petitioner contends that Respondent, an entity of the State, relied solely upon the results of an audit made by UIA, and assessed withholding tax based on UIA's initial determination. Petitioner argues that Respondent never made its own independent inquiry as to the status of the workers. Petitioner also states that it had been previously advised by Respondent that collection

[1] Petitioner's Response in Opposition to Respondent's Motion for Summary Disposition, p. 2. The Tribunal assumes Petitioner meant to say that both UIA and Respondent are "raising the same claim that Petitioner's" independent contractors are employees.

activities would be stayed through the scheduled UIA hearing of May 6, 2009. As such, Petitioner contends that allowing the collection of taxes, penalties, and interest on an issue that is under litigation in another State forum is in violation of Due Process. Petitioner respectfully requests that the Tribunal deny Respondent's Motion for Summary Disposition in this action.

On November 13, 2009, after Respondent filed the above-mentioned Motion to Strike, Petitioner filed its Response to Respondent's Motion to Strike Petitioner's Response in Opposition to Respondent's Motion for Summary Disposition. Petitioner states that its Response was timely filed and should be considered by the Tribunal. Petitioner asserts that its attorney called the Clerk of the Tribunal to clarify the time period as to when its Response was due; Petitioner was advised that a response was to be filed within twenty-one (21) days of service. Petitioner contends that its response was filed October 22, 2009, well within the (21) days of Respondent's October 6, 2009, date of service. Petitioner also corrected the invalidity of the affidavits Respondent asserts contain hearsay by providing affidavits that are properly sworn to and notarized.

V. FINDINGS OF FACT

On July 16, 2007, the UIA issued a determination concluding that certain purported workers performing cleaning and maintenance services for Petitioner were in fact employees of Petitioner, rather than independent contractors. Petitioner appealed this determination and a hearing commenced on May 6, 2009.

As a result of UIA's determination, Respondent, on April 28, 2008, issued Final Assessments for withholding taxes for tax years 2004, 2005 and 2006. Respondent offered its

certified mail log as evidence that the Final Assessments were properly served upon Petitioner to Petitioner's last known address.

Petitioner submitted a letter, dated April 28, 2009, between Petitioner's representative, Erwin A. Rubenstein, and employees of Petitioner. The letter indicated that ". . . Mike Reynolds, representative of the State of Michigan . . . indicated that no collection activities would be taken at this time." Subsequently, Petitioner sent Respondent letters, dated May 19, June 4, and June 11, 2009, each attempting to advise Respondent of the status of Petitioner's appeal with UIA. Petitioner's June 4, 2009, also thanks Respondent for its continued forbearance and the June 11, 2009, letter states that the Employment Security Board of Review issued an Order Staying Proceedings before the Referee.

On July 16, 2009, Respondent sent Petitioner a letter seeking to enforce the collection of the Final Assessments issued April 28, 2008. Petitioner acknowledges receipt of Respondent's July 16, 2009, letter indicating Petitioner had an outstanding liability with the State of Michigan. Consequently, Respondent's July 16, 2009, letter is addressed to and was sent to the same address as the Final Assessments. Petitioner filed the instant appeal on July 27, 2009, "for review of the decision by [Respondent] to reinstate collection activities as set forth in the July 16, 2009, [l]etter."[2]

VI. APPLICABLE LAW

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

[2] Petitioner's Petition, Page 3.

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).
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> 1 Longhofer, Michigan Court Rules Practice § 2116.12, p 246A.

Respondent further moves for summary disposition pursuant to MCR 2.116(C)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed to state a claim on which relief can be granted. Summary disposition should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual

development could possibly justify a right to recovery. *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion for summary disposition under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts. *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

The statute that governs the Tribunal's jurisdiction over matters appealed form the Michigan Department of Treasury is MCL 205.22, which 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. . .
>
> (2) An appeal under this section shall be perfected as provided under the tax tribunal act, 1973 PA 186, MCL 205.701 to 205.779, and rules promulgated under that act for the tax tribunal.
>
> (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.
>
> (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.

The statute that governs the manner in which Respondent is to process and serve Required Notices relative to the administration of taxes is MCL 205.28, which states in relative part:

> (1) The following conditions apply to all taxes administered under this act unless otherwise provided for in the specific tax statute:
>
> (a) Notice, if required, shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the department may be made in the same manner.
>
> (b) An injunction shall not issue to stay proceedings for the assessment and collection of a tax.

VII. CONCLUSIONS OF LAW

Respondent's Motion to Strike Petitioner's Response in Opposition to Respondent's Motion for Summary Disposition shall be denied because Respondent was not prejudiced by Petitioner's late response. The Michigan Tax Tribunal's Rules of Practice and Procedure were revised in 2009 and took effect on October 19, 2009. The former TTR 230 required that a response to a Motion shall be filed within 14 days of service of the Motion. Pursuant to the revised TTR 230, "[w]ritten opposition, if any, to motions shall be filed within 21 days after service of the motion. . . ." Here, Respondent's Motion for Summary Disposition was filed on October 6, 2009 and was filed before the new rules went into effect. As such, Petitioner was required to file its response by October 20, 2009, pursuant to the old version of TTR 230. However, because Petitioner's October 22, 2009, filing deadline was close in time to when the Tribunal adopted new rules modifying the applicable deadlines, it is feasible that Petitioner did obtain information from the Tribunal that the response was due within 21 days, rather than 14. Any confusion caused in the instant matter resulting from the adoption of the revised Rules of Practice and Procedure did not prejudice Respondent in this case and therefore denial of Respondent's Motion is appropriate.

The Tribunal has carefully considered Respondent's Motion for Summary Disposition and finds that, based on the pleadings and other documentary evidence filed with the Tribunal, granting Respondent's Motion for Summary Disposition, under MCR 2.116(C)(4), is appropriate.

Petitioner's argument that the notices of Final Assessments issued on April 28, 2008, were never received is not persuasive. Respondent offered its certified mail log as support to prove the notices were served via certified mail to Petitioner's last known address. Being that

Respondent is required by MCL 205.28 to send certain types of notices via certified mail, the Tribunal finds Respondent's certified mail log adequately proves that Respondent did in fact send the Final Notices, issued on April 28, 2008, to Petitioner's address as indicated on its mail log. Additionally, the address reflected on Respondent's mail log matches the address listed on Respondent's July 16, 2009 letter, of which Petitioner admits receipt. As such, Petitioner did not timely file its appeal as it was required to have filed within 35 days of the April 28, 2008, Final Assessments. Because Petitioner failed to perfect its appeal by filing within the statutory period, the Tribunal cannot retain jurisdiction over this matter. Furthermore, MCL 205.22, provides that if an assessment is not appealed within the statutory period, the assessment is final, and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.

The Tribunal also finds that Petitioner's argument that the Tribunal's jurisdiction is proper because it filed an appeal within thirty-five (35) days from the date Respondent "reinstated collection activities" is not persuasive. The Tribunal concludes that the action to which Petitioner was aggrieved, under MCL 205.22(1), was Respondent's decision to assess the withholding tax, interest, and penalties, not Respondent's decision to enforce payment for same. If the Tribunal's jurisdiction vested upon Respondent's enforcement of tax collections, the State of Michigan's ability to effectively assess and collect taxes would be undermined because taxpayers would have the ability to arbitrarily protest collections. As the Tribunal finds that Respondent properly sent the Final Assessments on April 28, 2008, and that Petitioner was corresponding with Respondent regarding the disputed tax liability well before Respondent's July 16, 2009, letter reinstating collections, there is no question that Petitioner was on notice it was aggrieved far before it filed its appeal with the Tribunal.

Further, Petitioner's argument in response to Respondent's Motion filed under MCR 2.116(C)(8) is also not persuasive. Petitioner argues that Respondent improperly characterized the relief in which Petitioner seeks. The Petition clearly states, "Petitioner requests that the Tribunal stay all collection activities by the Respondent with regard to the assessment for withholding tax pending resolution of the underlying issue by the UIA."[3] The Tribunal finds that Petitioner's request to stay all collection activities is injunctive in nature and specifically precluded by MCL 205.22. Petitioner's attempt to characterize the relief as a plea for abatement under MCR 2.116(C)(6) is improper. MCR 2.116(C)(6) relates to a motion for dismissal of a claim involving the same parties and same issue. Granting Petitioner relief under MCR 2.116(C)(6) would result in dismissal of this case, the same relief requested by Respondent.

Further, Petitioner's argument asserting the collection of taxes is in violation of due process is also not persuasive. Petitioner first states that it "should not be subject to litigating the exact same claim with the exact same party,"[4] asserting that Respondent and UIA are the same party by virtue of both being divisions of this State. That being the case, it would be against Petitioner's interest to allow a proceeding to commence at the Tribunal. However, Petitioner proceeds to argue that Respondent improperly relied on UIA's audit and investigation, and further contends Respondent should have conducted its own independent inquiry. As both agencies are divisions of this State, as argued by Petitioner, requiring each agency to conduct its own independent inquiry in regard to the same matter would be against interests of administrative and judicial economy. Moreover, Petitioner is not subject to litigating the "exact same claim with the exact same party." UIA and the Department of Treasury are separate and distinct entities that made separate and distinct determinations on two individual issues.

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[3] Id.
[4] Petitioner's Response to Respondent's Motion for summary Disposition, Page 2.

Petitioner's arguments are contradicting and insufficient to support a ruling in its favor under MCR 2.116(C)(8). Because Respondent is allowed to rely on the information obtained from UIA, under MCL 421.11, Respondent was not required to make its own determination. Accordingly, the Tribunal finds that Respondent's Assessments were properly based on the UIA's investigation and findings, and due process has not been violated.

The Tribunal concludes that it does not have proper jurisdiction over the above-captioned appeal. Respondent has put forth sufficient and reliable evidence proving it properly sent the Final Assessments for Assessment Nos. P791488, P791489 and P791490 on April 28, 2008. Petitioner failed to file its appeal with the Tribunal within 35 days of the issuance and therefore, the Tribunal finds that dismissal of this appeal is appropriate.

VIII. JUDGMENT

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

IT IS FURTHER ORDERED that Respondent's Motion to Strike Petitioner's Response in Opposition to Respondent's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that this case is DISMISSED.

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

MICHIGAN TAX TRIBUNAL

Entered: May 13, 2010 By: Cynthia J Knoll