

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

Cendant Corp,
Petitioner,

v

MTT Docket No. 449066

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY
DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On September 24, 2013, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case, and requesting Oral Argument on its Motion. More specifically, Respondent contends that there is no genuine issue of material fact with regard to the three substantive adjustments Respondent made that resulted in the remaining liability for penalties and interest.

On October 15, 2013, Petitioner filed a response to the Motion, stating that genuine issues of material fact exist with respect to Petitioner's Investment Tax Credit and expense add back. Petitioner further contends that a genuine issue exists with respect to its liability for the penalty imposed, which is related to Petitioner's correct tax liability for 2009.

Oral Argument was held on October 29, 2013. Respondent was represented by Nathan Gambill, Assistant Attorney General, and Petitioner was represented by

Daniel L. Stanley, attorney. The Tribunal has reviewed the Motion, response, and the evidence submitted and finds that granting Respondent's Motion for Summary Disposition is warranted at this time.

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that Petitioner's 2009 MBT return was adjusted to (i) remove the claimed overpayment from 2008, (ii) add back expenses that individual members reported on the Form 4580s that were not reported on Petitioner's return, and (iii) calculate penalties and interest for failure to make estimated payments during 2009. After all adjustments, including an \$850,000 credit, the remaining amount of penalty and interest owed is \$92,435. Respondent contends there is no genuine issue of material fact and Respondent properly relied on the information provided by Petitioner on its 2009 MBT return.

In response to Petitioner's statements, Respondent contends that the purpose of the Tribunal is to review a determination made by the Department. The Department contends that it did not make a determination to deny Petitioner's ITC; instead, Petitioner is attempting to now claim additional ITC through the Tribunal's hearing process, rather than filing an amended tax return to claim additional ITC. Respondent further contends that the Tribunal has no authority to amend Petitioner's return through these proceedings. Respondent argues that the Tribunal is not an alternative return processing unit, but is a neutral body with the purpose of resolving legal disputes. Respondent states that this is supported by the separation of powers doctrine and Section 22 of the Revenue Act, which provides that a taxpayer aggrieved by an assessment of the Department may appeal the contested portion of that assessment to the Tribunal. Respondent states that "[i]f the Department never made a determination there's nothing for the Tribunal to

review, and the Tribunal would essentially be acting in the Department's shoes and processing an amended return through the course of a hearing." [Transcript at 24 – 25.]

PETITIONER'S CONTENTIONS

Petitioner is not disputing the denial of the overpayment credit from 2008. Petitioner is also not disputing that Respondent allowed the ITC Petitioner claimed on the 2009 MBT return. Instead, Petitioner is contesting "the basis upon which the penalty is calculated." [Transcript at 23.] Petitioner contends that during 2009 it purchased rental vehicles eligible for the ITC, however, the return filed "erroneously understated Petitioner's proper ITC for the year in issue." As a result, Petitioner contends that Respondent's assessment of penalties is based an erroneous amount. With regard to the expense add back, Petitioner contends that the Form 4580s filed with the 2009 MBT return "erroneously mischaracterized some expenses paid to unrelated third parties as expenses paid to related companies." Petitioner states that this information was relied on by Respondent in computing the assessment and penalties. Lastly, Petitioner argues that any liability for penalties is related to a determination of its total MBT liability for 2009, which "is dependent upon the decision of the Tribunal concerning the ITC issue and the expense add back issue." Petitioner asserts that the amount of penalty (if any) can only be determined after a decision is rendered on the ITC and expense add back issues.

In response to Respondent's argument that the Tribunal only has jurisdiction over a determination made by the Department, Petitioner contends that it was aggrieved because the basis of the liability for penalties was erroneous. Petitioner further contends that the problems with filing an amended return are a timing issue,

since Respondent has no timeline to act on an amended return and the current final assessment still exists, and if the penalty is paid and an amended return is filed, there is no certainty that Petitioner will get a credit for the penalty paid if it is later determined that the amended return is accepted.

APPLICABLE LAW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions. See TTR 215. In this case, Respondent moves for summary disposition under MCR 2.116(C)(10). 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. See *Smith v Globe Life Ins Co*, 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 (C)(10) will be denied. See *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. See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider. See *Neubacher v Globe Furniture Rentals, Inc*, 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 non-moving party, the non-moving 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. See *McCart v J Walter Thompson USA, Inc*, 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. See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent Motion under MCR 2.116(C)(10) and finds that granting the Motion is warranted.

Petitioner is not disputing that the adjustments made by Respondent to its 2009 MBT return were based on the information provided by Petitioner on the return as filed. Instead, Petitioner's basis for appeal is that the return contained "erroneous" information, which may result in no or a reduced amount of penalty and interest if Petitioner is allowed to present evidence at a hearing regarding the correct treatment and amount of its ITC credit and related party expense add back. Respondent asserts that there is no dispute that the assessment determination issued by Respondent was based on the 2009 MBT return as filed by Petitioner (with no amended return ever being submitted).

There was no statutory or case law authority advanced by either party in support of the respective positions regarding the Tribunal's authority to take the action requested by Petitioner in conducting a hearing and taking testimony with respect to what Petitioner believes is the correct amount of credits and add backs to

be claimed on its 2009 MBT return¹. Under MCL 205.22(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” [Emphasis added.] Petitioner asserts that it was aggrieved by the assessment decision, as the remaining \$92,435 in penalty and interest is based on the total 2009 MBT liability, which Petitioner contends was based on erroneous information provided on its return as originally filed. Petitioner further asserts, and the affidavit from the tax preparer supports the position that the MBT return “erroneously understated Petitioner’s proper ITC for 2009” and that “Form 4580s filed with Petitioner’s MBT return for 2009 erroneously mischaracterized some expenses paid to unrelated third parties as expenses paid to related companies.” [Petitioner’s Exhibit 1.] Petitioner has not provided the Tribunal with what it believes the specific errors on its return were or what it believes the correct amount of tax or corresponding penalty would be, if any. Respondent asserts that such a determination by the Tribunal is not appropriate under the separation of powers doctrine, as the Tribunal does not have the authority to process an amended return through these proceedings, which is within the authority of the Department.

Under the Michigan Constitution, Article 3, § 2, “[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Respondent’s separation of powers argument simply asserts that the Tribunal may not exercise powers properly belonging to the Department of Treasury, except as expressly

¹ Respondent indicated during Oral Argument that it was not aware of the specifics of Petitioner’s argument until the response to the Motion was filed.

provided. There is no provision in either the Constitution or the statutes for the Tribunal to process or review amended tax returns. However, Petitioner is not technically submitting an amended return to the Tribunal, but is instead relying on the Tribunal to hear testimony and determine the correctness of the adjustments Petitioner believes should be made to its return. The practical effect of what Petitioner is proposing is to amend its return and reduce its liability through the Tribunal proceedings. Petitioner asserts that the Tribunal may do so, as Petitioner was “aggrieved” by the determination of Respondent in assessing penalties and interest. “Aggrieved” is not defined within the statute; the term may be defined as “[t]reated unjustly, as by denial of or infringement upon one's legal rights.” *The American Heritage Dictionary of the English Language* (5th ed. 2011). The Tribunal finds that Petitioner was not treated unjustly under the Final Assessment, as Respondent utilized the information provided by Petitioner in making its determination, and Petitioner does not dispute this. Petitioner is not contesting any of the revisions, either positive or negative, to the MBT return that were identified by Respondent. The Tribunal further finds that it does not have the authority to allow Petitioner to effectively amend its MBT return through the hearing process. Accordingly, there is no genuine issue of material fact with respect to the determination of penalties and interest based on the original MBT return, and Respondent is entitled to summary disposition in its favor.

JUDGMENT

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

IT IS FURTHER ORDERED that Assessment Number TP20010 is
AFFIRMED in the remaining amount of \$92,435, plus any additional interest
accruing under 1941 PA 122.

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

By: Steven H. Lasher

Entered: November 21, 2013