

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

Walter Toebe Construction Co.,
Petitioner,

v.

MTT Docket No. 344354

Michigan Department of Treasury,
Respondent

Tribunal Judge Presiding
Kimbal R. Smith, III

ORDER GRANTING PETITIONER'S MOTION TO AMEND PETITION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER OF DISMISSAL

I. INTRODUCTION

Petitioner, Walter Toebe Construction Co., is appealing a decision by the State of Michigan Department of Treasury denying Petitioner's request for a Single Business Tax (SBT) Act credit for what Petitioner contends is industrial personal property. The property is classified on the assessment rolls as commercial personal property. On January 26, 2009, Petitioner filed a Motion to Amend Petition. On February 6, 2009, Respondent filed a Motion for Summary Disposition and a brief in support requesting that the Tribunal dismiss the above-captioned case pursuant to MCR 2.116(C)(4), (8) and (10). Petitioner filed an answer to and a brief opposing Respondent's Motion on February 19, 2009. Additionally, Petitioner filed supplemental authority to its brief on February 27, 2009.

II. FINDINGS OF FACT

Petitioner is a Michigan corporation in the business of street, highway and bridge construction, in addition to various other construction projects. On its 2006 SBT return, Petitioner applied for a property tax credit totaling \$17,810 for taxes paid on Petitioner's

industrial personal property. On May 25, 2007, Respondent issued a Notice of Adjustment denying Petitioner's SBT credit claim. At Petitioner's request, an informal departmental conference was held. Respondent did not dispute the fact that the subject property was located on an industrial parcel nor that it was in fact industrial personal property, but contended that because the property was classified as commercial personal property rather than industrial, an industrial personal property tax credit could not apply. The Hearing Referee recommended that the Department of Treasury grant Petitioner's refund claim on the basis that, while the property was not classified by the assessor as industrial personal property, it met the statutory definition of such property described in MCL 211.34c. However, citing MCL 205.21(2)(e) and 1979 AC, R 205.101, Respondent rejected this recommendation in its Decision and Order of Determination dated March 13, 2008.

III. RESPONDENT'S CONTENTIONS

Respondent makes two alternative arguments in support of its Motion. First, Respondent argues that the case should be dismissed because the Tribunal does not have subject matter jurisdiction over cases requesting a change of property classification, which must first be presented to the township's board of review. MCL 211.34c. See also *TES Filer City Station v Township of Filer*, MTT Docket No. 192808, 70-71. Respondent thus contends that the true purpose of Petitioner's appeal is to ask the Tribunal to change the classification of the subject property from commercial personal property to industrial personal property.

Second and alternatively, Respondent argues that there are no genuine issues of material fact or that Petitioner has failed to state a claim upon which relief can be granted and therefore the Tribunal should dismiss this case under MCR 2.116(C)(8) or MCR 2.116(C)(10), respectively, and MCR 2.116(C)(4) for lack of jurisdiction.

IV. PETITIONER'S CONTENTIONS

Petitioner, in opposition to Respondent's Motion, contends that the Tribunal does have subject matter jurisdiction over this case because the Tribunal has jurisdiction over State of Michigan Department of Treasury decisions under MCL 205.730 and MCL 205.22.

Second, Petitioner claims that Respondent, who has submitted its Motion based on facts contained in documents attached to its Motion, should be considered solely under MCR 2.116(C)(10) (no genuine issue of material fact) rather than under MCR 2.116(C)(8), which must be decided based on pleadings alone. Petitioner contends that Respondent has framed its Motion so as not to solely consider the pleadings. Petitioner also agrees that there is no genuine issue of material fact concerning the merit of the claims stated and that, pursuant to MCR 2.116(I)(2), the Tribunal may grant judgment to either party.

Additionally, Petitioner had previously submitted an Amended Petition to the Tribunal but did not properly file a Motion to Amend Petition contemporaneously. Petitioner's January 26, 2009 Motion to Amend Petition is an attempt to cure this defect.

V. 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, 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).

Respondent also moves 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). If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party, MCR 2.116(I)(2), *Washburn v Michailoff*, 240 Mich App 669; 613 NW 2d 405 (2000).

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).

Finally, Respondent also 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).

VI. CONCLUSIONS OF LAW

This Tribunal has carefully considered Respondent's Motion for Summary Disposition under the criteria for MCR 2.116(C)(4), (8) and (10) in addition to Petitioner's brief opposing Respondent's Motion and, based on the pleadings and other documentary evidence filed with the Tribunal, determines that Respondent is entitled to summary disposition as a matter of law under MCR 2.116(C)(10). The Tribunal concludes that the pleadings and documentary evidence prove that there is no genuine issue with respect to any material fact, a matter uncontested by both Respondent and Petitioner. Thus, as stated in the Petitioner's brief, ". . . the issue before the

Tribunal is purely one of law, requiring the construction of the SBT credit provision in order to determine an appeal of an SBT decision. Pursuant to MCR 2.116(I)(2), the Tribunal may grant judgment to either party.”

It must be made clear that Respondent’s assertion that this Tribunal does not have the proper jurisdiction to hear this case is misguided. Respondent’s basic contention is that Petitioner has disguised its claim to appear as a refund claim when it is, in reality, a classification appeal.

Relevantly, MCL 205.731 states that the Tribunal has exclusive and original jurisdiction over:

- (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation or equalization under the property tax laws of this state.
- (b) A proceeding for a refund or re-determination of a tax levied under the property tax laws of this state.

Furthermore, MCL 205.22 provides that “[a] taxpayer aggrieved by an assessment, decision, or order of the [Department of Treasury] may appeal the contested portion of the assessment, decision, or order to the tax tribunal”

Respondent suggests that the gravamen of the action is an issue of reclassification, and that the Tribunal must look beyond the procedural labels to determine the exact nature of the claim. *Tipton v William Beaumont Hospital*, 266 Mich App 27, 33; 697 NW2d 552 (2005). Specifically, Respondent claims that “. . . Petitioner really asks this Tribunal to change the classification of the subject personal property from commercial personal property to industrial personal property. That is the only way the Petitioner can get the industrial personal property credit.” However, Petitioner has framed its pleading as an appeal of the Department of Treasury’s decision. Petitioner does not seek reclassification of its property, but rather an application of the SBT Act that would *bypass* an assessor’s erroneous classification. If Petitioner were to be successful, there would be no change of classification, but instead an application of the statutory definition of

industrial personal property to the subject property solely for the purpose of receiving an SBT refund. Clearly then, Petitioner's appeal of the Decision and Order of Determination issued by the State of Michigan Department of Treasury falls within the Tribunal's jurisdiction.

Respondent also argues that, pursuant to MCR 2.116(C)(8), Petitioner has failed to state a claim upon which relief can be granted and consequently this appeal must be dismissed based only on the pleadings. This claim cannot pass muster. All well-pleaded factual allegations are accepted as true, and the Tribunal must construe these allegations in a light favorable to Petitioner. *Maiden v Rozwood*, 461 Mich 109, 119-20; 597 NW2d 917 (1999). Again, MCL 205.731 and MCL 205.22 expressly permit the Tribunal to exercise jurisdiction over decisions of the State of Michigan Department of Treasury. Petitioner's amended petition places great emphasis on the decision made by the Department, and in fact line 15 of the petition states concisely, "The Department's reasons for denying the credit are erroneous." Thus, it is evident that Petitioner is not asking for a new classification of its personal property, but rather appealing a decision within the Tribunal's jurisdiction.

Petitioner is requesting that the Tribunal consider the decision denying the industrial personal property refund and construct the SBT Act in a novel fashion that would effectively ignore the property classification on the assessment rolls. The SBT credit provision states, in pertinent part, that ". . . a person may claim a credit against the tax imposed by this act equal to 15% of the property taxes paid in the tax year by the person on industrial personal property[,]" and that "[i]ndustrial personal property' means personal property *classified as industrial personal property under section 34c of the general property tax act.*" MCL 208.35d. (Emphasis added).

Petitioner correctly notes that the SBT credit provision defines qualifying industrial personal property as property classified as such under MCL 211.34c. However, Petitioner contends that

“Respondent’s position requires one to read into this definition language which is clearly not there[;]” namely, the requirement that industrial personal property defined under the SBT credit provision must be classified as such *by the assessor of the property*. It is uncontested that Petitioner’s personal property meets the definition of industrial personal property under MCL 211.34c(3)(c). However, fatal to Petitioner’s argument is the very first provision of 34c. MCL 211.34c(1) states that “. . . the *assessor* shall classify every item of assessable property according to the definitions contained in this section.” (Emphasis added). In addition, MCL 211.34c(6) contemplates the procedure required to correct an assessor’s incorrect classification, stating that

An owner of any assessable property who disputes the classification of that parcel shall notify the assessor and may protest the assigned classification to the March board of review. An owner or assessor may appeal the decision of the March board of review by filing a petition with the state tax commission not later than June 30 in that tax year.

While Petitioner is correct in asserting that the SBT credit provision at issue is applied via the definitions outlined in MCL 211.34c, Petitioner failed to consider the entirety of that section. Impliedly included in the definition of industrial personal property as defined in MCL 211.34c(3)(c) is the requirement that such property is classified by an assessor pursuant to MCL 211.34c(1). Section 34c of the General Property Tax Act further provides the procedure to correct an erroneous classification through application of MCL 211.34c(6).

Petitioner did not protest to the March board of review for the 2006 tax year. Furthermore, it is appears from documentation in the case file that Petitioner had notice the year prior to the 2006 tax year that at least some of its industrial personal property was classified as commercial personal property. No attempt to correct this error was made. Rather than following the proper channels to correct its classification under MCL 211.34c in order to receive an SBT credit in 2006 and subsequent tax years, Petitioner has attempted to bypass the valid statutory process by

seeking the Tribunal's direct application of the SBT credit provision. If the Tribunal were to do so, not only would it be disregarding MCL 211.34c(1), but it would create a great burden to consider appeals the concerns of which could be easily corrected with timely protest in accordance with MCL 211.34c(6).

Therefore, there is no genuine issue of material fact in this case and, pursuant to MCR 2.116(I)(1), the Tribunal finds that Respondent is entitled to judgment as a matter of law.

Finally, Petitioner's Amended Petition was improperly submitted without the necessary filing of a Motion to Amend Petition. Nevertheless, the Amended Petition was clearly considered by Respondent in its Motion for Summary Disposition and has been duly considered by the Tribunal. Though the Amended Petition was improperly filed, no party has been prejudiced by the error and Petitioner has sufficiently cured the defect with its January 16, 2009 Motion to Amend Petition.

VII. JUDGMENT

IT IS ORDERED that Petitioner's Motion to Amend Petition is GRANTED.

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

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: April 8, 2009
hp

By: Kimbal R. Smith III