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

Micromax, Inc (aka Hove To, Inc),
Petitioner,

v

MTT Docket No. 16-000068

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 March 11, 2016, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Respondent contends that Petitioner failed to timely appeal and that notice was properly issued to Petitioner.

On March 23, 2016, Petitioner filed a response to the Motion. In the response, Petitioner contends that it only received the notices of intent and final assessments upon the filing of the Motion, and as such, its filing was within the 35 day timeframe for timely filing. Petitioner further contends that the notices were issued to the wrong address.

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 this case was filed untimely and, as a result, the Tribunal does not have jurisdiction. Respondent states that the Intents to Assess were issued on May 21, 2013, and the Final Assessments were issued on July 30, 2013. Petitioner requested an Informal Conference on November 25, 2015, which was denied because it was filed

over two years after the Final Assessments were issued. Respondent further contends that Petitioner was required to file its appeal on or before September 3, 2013.

Respondent also contends that Petitioner's argument that its authorized representative, Ms. Carol Soens, did not receive notice is without merit. Although Petitioner filed its Authorized Representative Declaration, the form clearly indicated that the authorization expired December 31, 2012, and as such, Respondent was not required to provide Ms. Soens with copies of the Intents to Assess and Final Assessments given that they were issued in 2013, after the expiration of Ms. Soens authorization.

PETITIONER'S CONTENTIONS

In support of its response, Petitioner contends that it filed this appeal within the statutory 35 day time frame given that it only received a copy of the Final Assessments with the March 11, 2016 Motion. Thus, Petitioner contends its deadline for appeal is not until April 15, 2016. Petitioner states that Respondent's evidence regarding the issuance of the Final Assessment is self-serving and circumstantial. Moreover, Respondent has not provided any evidence demonstrating that the assessments were received by Petitioner.

Petitioner also contends that Respondent issued the Final Assessments to the wrong address. Petitioner stated that it filed a change of address with Respondent and Respondent failed to issue the Final Assessments to the correct, updated address. Petitioner further contends that Respondent should have recognized the expired power of attorney form because it was signed by Petitioner after the expiration date and that Petitioner "would not sign any authorization that was meaningless or unusable."[1]

[1] Brief in Support at 7.

STANDARD OF REVIEW

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.[2] In this case, Respondent moves for summary disposition under MCR 2.116(C)(4).

Dismissal under MCR 2.116(C)(4) is appropriate when the "court lacks jurisdiction of the subject matter." When presented with a motion 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.[3] 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 under MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust its administrative remedies.[4]

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under MCR 2.116 (C)(4) and finds that granting the Motion is warranted.

Petitioner is appealing Assessment Nos. TV22915 and TV22916 which include tax and interest under Michigan Business Tax. Respondent issued the Intents to Assess on May 21, 2013.[5] In response, Petitioner filed an Authorized Representative Declaration listing Carol Soens as Petitioner's representative from "1/1/2009" to "12/31/2012."[6] The Final Assessments were issued July 30, 2013.[7] Respondent contends that Petitioner's appeal is untimely as it was

[2] See TTR 215.
[3] *Id.*
[4] See *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43; 620 NW2d 546 (2000).
[5] Respondent's Exhibit B.
[6] Respondent's Exhibit D and Petitioner's Exhibit 2.
[7] Respondent's Exhibit E.

not filed within 35 days of the issuance of the July 30, 2013 Final Assessments. Petitioner contends, however, that its appeal was filed "well within the 35 day period" given that it did not receive a copy of the Final Assessment until March 11, 2016.[8]

MCL 205.22 (1) sets forth the 35 day appeal timeframe and states, in pertinent part, "[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 . . . after the assessment, decision, or order." As such, the Tribunal finds Petitioner's contention is unsupported given that the statue specifically requires the appeal to be filed *after* the assessment is issued. The Tribunal further finds that Petitioner's contention that the 35 day filing deadline does not begin to accrue until Petitioner receives the Final Assessment is also unsupported. The Court of Appeals addressed this issue in *PIC Maintenance, Inc v Dep't of Treasury*,[9] where the Court held that "the statute clearly provides that a taxpayer has 35 days to appeal an assessment" and "[r]easonable minds cannot differ regarding the meaning of "35 days." Moreover, the Court held that the assessments were issued on the date listed on the Final Assessment and that the 35 day timeframe begins with this issue date.[10]

MCL 205.28(1)(a) states that "[n]otice, if required, shall be given either by personal service or by certified mail to the last known address of the taxpayer." Petitioner contends that the Final Assessments were not issued to its last known address of record as required by the statute as Petitioner provided notice to Respondent of the new address.[11] Petitioner provided, as Exhibit 8 to its Brief in Support, an amendment to its Articles of Incorporation which modified

[8] Response at 3.
[9] *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403; 809 NW2d 669(2011).
[10] See *id*.
[11] In its response, Petitioner states that it attached (as Exhibit A) a form that indicates Treasury was clearly notified of Petitioner's address change. However, Petitioner failed to attach an Exhibit A to its response or Brief in Support of its Response.

the registered office address and the name of the resident agent and is dated March 1, 2012. This form reflects the revised address of 11633 Lorenz Way, Plymouth, MI 48170. However, this form was filed with the Michigan Department of Licensing and Regulatory Affairs Bureau of Commercial Services and Petitioner has provided no documentation to evidence that this document was filed with the Michigan Department of Treasury ("Respondent") as it contends. Further, the Authorized Representative Declaration (Power of Attorney), Form 151, signed and filed with Respondent on May 22, 2013, reflects the address of 39615 Springwater Drive, Northville, MI 48168. Thus, even if the amendment to the Articles of Incorporation was filed with Respondent in 2012, the May 22, 2013 Form 151 listed the original address, and as such, the Tribunal finds that 39615 Springwater Drive, Northville, MI 48168, was the last known address of record prior to the issuance of the July 30, 2013 Final Assessments.

Petitioner further contends that Respondent's evidence demonstrating service is circumstantial and should not be relied upon by the Tribunal. The Tribunal disagrees, and finds that Respondent's certified-mail log along with Mr. Wilkenson's affidavit verify that the Final Assessments at issue were issued to Hove To Inc, 39615 Springwater Dr Northville, MI 48168 on July 30, 2013. Again, this was addressed by the Court of Appeals in *PIC Maintenance*. The Court held the Tribunal's finding that the final assessments were sent by certified mail was supported by Respondent's certified-mail log which was "competent, material, and substantial evidence."[12] In this case, Respondent's certified mail log shows that the Final Assessments were sent to Hove To Inc, 39615 Springwater Dr Northville, MI 48168.[13] Given that the July 30, 2013

[12] *Id*. at 409-10.
[13] Respondent's Exhibit G.

Final Assessments were issued, via certified mail to Petitioner, at its last known address of record, the Tribunal finds that Respondent properly complied with MCL 205.28(1)(a).

With respect to the issue regarding notice to Petitioner's authorized representative, the Tribunal finds that Petitioner signed an Authorized Representative Declaration (Power of Attorney), Form 151, on May 22, 2013, designating Carol Soens, CPA, as Petitioner's authorized representative. The power of attorney had a start date of January 1, 2009, and an expiration date of December 31, 2012. Petitioner also submitted a second power of attorney for Ms. Soens which lists the start date of January 1, 2015 and expiration date of December 31, 2016. The Final Assessments in dispute were issued on July 30, 2013, after the original power of attorney had expired and prior to the start of the second power of attorney. Thus, the Final Assessments were not sent to Ms. Soens. Petitioner has asserted no factual or legal basis for requiring Respondent to notify Petitioner that its submitted power of attorney had expired. Further, this case is factually distinguishable from the Supreme Court's decision in *Fradco, Inc v Dep't of Treasury*.[14] In *Fradco*, a power of attorney existed and was in effect (i.e., not expired) at the time the final assessments were issued. The Supreme Court upheld the determination of the Tribunal and Court of Appeals, and held that "[w]hen notice is required, the department must notify the taxpayer and any representative duly appointed by the taxpayer."[15] In this case, there was not an authorized representative at the time of issuance of the July 30, 2013 Final Assessments because Petitioner's power of attorney clearly listed an expiration date of December 31, 2012.

[14] *Fradco, Inc v Dep't of Treasury*, 495 Mich 104; 845 NW2d 81 (2014).
[15] *Fradco*, 495 Mich at 116.

Petitioner also contends that Respondent should have known Petitioner's intent was to file a power of attorney for the tax year ending on December 31, 2012, and not for it to expire December 31, 2012, given that it was signed on May 22, 2013. This contention is not supported, however, as the original power of attorney lists that Ms. Soen's authority was limited to the Michigan Business Tax for tax years 2009 and 2010 and explicitly states the authorization was expired. Further, the Tribunal finds that Respondent complied precisely with the terms dictated by the taxpayer in the original power of attorney which was in compliance with MCL 205.28(1)(a) and MCL 205.8. Petitioner has not cited any authority that would give Respondent authorization to interpret the expiration date in any other manner. Rather, had Respondent decided to disregard the expiration date on the original power of attorney and serve the Final Assessments on the former authorized representative, it arguably would have violated the taxpayer's confidentiality rights under MCL 205.28(1)(f), which would have constituted a felony punishable by a fine not to exceed $5,000 or imprisonment not to exceed five years.[16] Respondent dutifully complied with Petitioner's instructions by *not* mailing the Final Assessment to the former authorized representative pursuant to an expired power of attorney form. The Tribunal further finds Petitioner's contentions with regard to its communications with Respondent's Collections Division in 2014 to be irrelevant to the matter at hand as the assessments had become final in 2013 when Petitioner failed to request an informal conference within 60 days of the Intent to Assess or otherwise appeal within 35 days of the issuance of the Final Assessments.[17]

[16] See MCL 205.28(2).
[17] MCL 205.21.

In addition, Petitioner filed a request for an informal conference on November 25, 2015. The request states "[n]either the taxpayer nor taxpayer's representative (Carol Soens) who had a valid power of attorney on file with the department that expired *December 31, 2012*, was never formally notified of an Intent to Assess by the Department."[18] The Tribunal finds that in this request, Petitioner acknowledges that its authorized representative's authority was expired. Further, the request was denied by Respondent on December 10, 2015, as the request was made more than 60 days after the notice of the Intent to Assess.[19] The notice further states, "[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 . . . ."[20] Petitioner was clearly notified of its right to appeal within 35 days in the December 10, 2015 Denial; however, Petitioner still failed to timely appeal. More specifically, to timely appeal the December 10, 2015 Denial, Petitioner was required to file its appeal on or before January 14, 2016; yet, Petitioner failed to file its appeal until January 21, 2016.

Petitioner's arguments regarding due process and equitable jurisdiction are also unsupported. Respondent properly issued the Final Assessments to Petitioner at Petitioner's last known address of record, Petitioner has not demonstrated that a valid power of attorney was in effect at the time of the issuance of the Final Assessments, and there is no authority cited by Petitioner that would support an exercise of equitable jurisdiction for the Tribunal to proceed with Petitioner's appeal when it was not timely filed under MCL 205.22(1). The Tribunal does not have equitable powers to entertain untimely claims or grant delayed appeals.[21] Dismissal of a petition is appropriate when the petitioner fails to properly invoke the jurisdiction of the

[18] Respondent's Exhibit I (emphasis added).
[19] Respondent's Exhibit J and Petitioner's Exhibit 7.
[20] *Id*.
[21] *Electronic Data Sys v Flint Twp*, 253 Mich App 538, 547-548; 656 NW2d 215 (2002).

Tribunal.[22] The time provisions governing the period for filing a claim are jurisdictional, and if the Tribunal lacks jurisdiction, it cannot act except to dismiss the petition.[23] Further, the Tribunal does not have the authority to grant a delayed appeal.[24]

Given the above, summary disposition should be granted, under MCR 2.116(C)(4), as Petitioner has failed to timely file its appeal and properly invoke the Tribunal's jurisdiction under MCL 205.22(1) and MCL 205.735a.

JUDGMENT

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

IT IS FURTHER ORDERED that the case is DISMISSED.

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

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[25] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[26] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[27] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[28]

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[22] *Id.*
[23] *Id.* at 544.
[24] See *Curtis Big Boy, Inc v Dep't of Treasury*, 206 Mich App 139, 142; 520 NW2d 369 (1994); *Toaz v Dep't of Treasury*, 280 Mich App 457, 462; 760 NW2d 325 (2008).
[25] See TTR 261 and 257.
[26] See TTR 217 and 267.
[27] See TTR 261 and 225.
[28] See TTR 261 and 257.

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[29] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[30] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[31]

By: Steven H. Lasher

Entered: April 4, 2016
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[29] See MCL 205.753 and MCR 7.204.
[30] See TTR 213.
[31] See TTR 217 and 267.