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

William S Jenks,
Petitioner,

v

MTT Docket No. 15-004522

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER OF PARTIAL DISMISSAL

FINAL OPINION AND JUDGMENT

**INTRODUCTION**

This matter involves Petitioner's Claim for Refund pertaining to employment withholding tax and sales tax liability. Specifically at issue is the interplay between MCL 205.22, which sets forth when an assessment may be challenged, and MCL 205.30, which sets forth the claim for refund procedures. Petitioner initiated an appeal before the Tribunal on August 13, 2015, which stemmed from Respondent's denial of Petitioner's Claim for Refund.

On September 21, 2015, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in accordance with MCR 2.116(C)(4), (C)(7), (C)(8), and (C)(10). More specifically, Respondent contends that Petitioner's appeal of the claim for refund is actually a collateral attack on the final assessments at issue, which were not timely appealed, since the 35 day appeal period expired prior to the filing of the Petition. Thus, Respondent argues the Tax Tribunal is without jurisdiction in this matter.

On October 12, 2015, Petitioner filed a response contending that its appeal is a claim for refund under MCL 205.30(2) and MCL 205.21a and that Petitioner's appeal "is a proper means

by which Petitioner may challenge the underlying assessments." Petitioner contends "that the denial of his Claim for Refund is improper and that the assessments are unjust for the reason that he is not a responsible person under MCL 205.27a."

Oral Argument on Respondent's Motion was held on January 27, 2016. Respondent was represented by Eric Jamison, Assistant Attorney General, and Petitioner was represented by Thomas Klug, attorney. The Tribunal has reviewed the Motion, response, and the evidence submitted and finds that granting Respondent's Motion for Summary Disposition is warranted. Namely, Petitioner cannot collaterally attack the underlying final assessments at issue; therefore, Petitioner's appeal shall be dismissed with respect to this claim. Petitioner is also not entitled to a refund of taxes paid as the underlying assessments cannot be found to be unjustly assessed and Petitioner has failed to establish the withholding taxes were "excessive in amount, or wrongfully collected," as required by MCL 205.30.

## RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that Petitioner cannot collaterally attack the final assessments by seeking a refund, and therefore, the jurisdiction of the Tribunal was not invoked. Respondent argues that the "tax liability is final, conclusive and not subject to further challenge." Respondent cites to MCL 205.22(4) and MCL 205.22(5) and argues that "[i]f a final assessment is not timely appealed it cannot be challenged and is conclusive as to the taxpayer's liability." Specifically, Respondent states that MCL 205.22(4) "bars both 'direct' and 'collateral' attacks upon the assessment," and MCL 205.22(5) "reaffirms that the assessment becomes 'final,' 'conclusive,' and 'not subject to further challenge' after 90 days after the issuance of the assessment if it is not challenged by a lawsuit . . . ." Respondent claims Petitioner is "trying to

re-open the issue of whether he can be held liable as a corporate officer of a company for which he is the only officer."

Respondent argues that Petitioner's appeal was "extremely untimely." Respondent states that "[a]ll the final assessments in controversy are dated April 24, 2014, or October 19, 2012" and the petition was filed on August 13, 2015. As such, Respondent contends that Petitioner "did not timely challenge the assessments and the determination of tax is finalized and cannot be attacked." Respondent argues that the Tribunal's jurisdiction was not invoked because the 16 assessments that were part of the refund claim were not appealed within 35 days of being issued. As to the assessments that were not part of the refund claim, those assessments have been final for some time and it is too late to challenge them. Therefore, the statute of limitations has expired, and thus, the Tribunal's jurisdiction cannot be invoked.

Moreover, Respondent argues that the refund claims are limited to the amount of tax paid under MCL 205.30(2). Petitioner did not pay the entire tax liability for the 16 assessments, "but made a demand for refund of taxes paid, and requested abatement of the remainder of the assessments." As such, if Petitioner was entitled to a refund, it would be limited to the amount of tax he actually paid.

Respondent cites two factually-similar cases in support of its argument: *Thumb Motorsports LLC v Dept of Treasury*,[1] and *Martin Sprocket & Gear, Inc v. Dept of Treasury*.[2] Respondent notes that the Tribunal's decision held that "final assessments that were not challenged within the statutory deadlines, cannot be collaterally attacked by filing a refund

[1] *Thumb Motorsports LLC*, MTT Docket No. 14-003375 (August 13, 2015).
[2] *Martin Sprocket & Gear, Inc. v. Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2014 (Docket No. 317760).

claim." Respondent also notes that the decision of the Court of Appeals "[discussed] the prohibition against collaterally attacking final assessments."

## PETITIONER'S CONTENTIONS

In support of his response, Petitioner contends that this appeal "is a claim for refund case under MCL 205.30(2) and MCL 205.21a . . . ." (Emphasis omitted.) Petitioner contends that "[Respondent's] argument ignores Michigan's Claim (Demand) for refund procedures and fails to distinguish[] the difference between assessment appeals and claim for refund procedures." Petitioner argues that the "Claim for Refund is a proper means" to challenge the underlying assessments.

Petitioner contends that the Michigan Revenue Act provides four statutory provisions for taxpayers to appeal assessments: MCL 205.21(a), MCL 205.21a, MCL 205.30, and MCL 205.23a(1)(a). Petitioner believes Respondent's argument is that Petitioner can only appeal under MCL 205.21(a), but Petitioner argues that he "submitted his claim under the Claim for Refund provisions of the Michigan Revenue Act . . . ."[3] Petitioner argues that the "above claim for refund procedure has taken place in this case."

Petitioner also cites MCL 205.30(1) and MCL 205.30(2) as support for his Claim for Refund. Petitioner contends that the claim for refund should be granted because the taxes were never considered due for Petitioner. The relevant part of MCL 205.30(1) states that "[t]he department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest. . . ." Additionally, the pertinent portion of MCL 205.30(2) states that "[i]f a tax return reflects an overpayment or

[3]See MCL 205.21a, MCL 205.22, and MCL 205.30.

credits in excess of the tax, the declaration of that fact on the return constitutes a claim for refund." (Emphasis Omitted.)

Petitioner claims that this case is factually distinguishable from both *Martin Sprocket* and *Thumb Motorsports*. Petitioner argues that "Sprocket failed to first pay the taxes at issue before filing its claim for refund[,]" where Petitioner "paid the divisible tax first before filing its claim for refund with the Treasury." Second, Petitioner states that he "timely filed a request for an informal conference . . ." while Sprocket failed to file a request for informal conference. Petitioner contends that in *Thumb Motorsports* "the taxes at issue were sales taxes" while this case deals with employment withholding taxes. Also, Petitioner claims that similar to *Martin Sprocket*, *Thumb Motorsports* never paid the taxes before claiming a refund, while Petitioner did pay the tax before claiming a refund.

Furthermore, Petitioner argues that his Petition, filed on August 13, 2015, "was clearly [filed] within 35 days from the date of the decision and order in compliance with both MCL 205.22(1) and 205.735a(6)." Finally, Petitioner contends that he "timely invoked the jurisdiction of the Tribunal . . . well within any statute of limitations." Petitioner argues Respondent's Motion should be denied because "numerous issues of material fact clearly exist with respect to Petitioner's Claim of Refund," and "factual developments are likely to provide further support for Petitioner's right to recovery."

## 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.[4] In this case, Respondent moves for summary disposition under MCR 2.116(C)(4), MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10).

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.[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 under MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust its administrative remedies.[6]

Under MCR 2.116(C)(7), the claim is barred because of "release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of action."

In *RDM Holdings, LTD v Continental Plastics Co*,[7] the Michigan Court of Appeals addressed a motion for summary disposition filed under MCR 2.116(C)(7). In *RDM*, the court stated:

> [T]his Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7)

[4] See TTR 215.
[5] *Id.*
[6] See *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43; 620 NW2d 546 (2000).
[7] *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678; 762 NW2d 529 (2008).

> is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.][8]

Motions under MCR 2.116(C)(8) are appropriate when "[t]he opposing party has failed to state a claim on which relief can be granted." Dismissal 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.[9] In reviewing a motion 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.[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.[11] 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.[12]

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.[13] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[14] The

---

[8] *Supra* at 687.
[9] See *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993).
[10] See *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).
[11] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).
[12] See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[13] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[14] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[15] 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.[16] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[17]

## CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under MCR 2.116(C)(4), MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10) and finds that granting the Motion is warranted under MCR 2.116(C)(4), MCR 2.116(C)(7), and MCR 2.116(C)(10). For the reasons explained below, the Tribunal concludes that Petitioner is precluded from collaterally attacking the underlying final assessments that were assessed against him personally and Petitioner has not proven he is entitled to a refund of taxes paid, under MCL 205.30(2).

The facts involving the underlying final assessments are not at issue. Petitioner does not contest that Respondent properly sent him final assessments for employment withholding tax and sales tax. Petitioner also concedes that he assumed the business "took care of the IRS' notices" and the final assessments were issued against him and he did not appeal the final assessments to the Tribunal within 35 days. Subsequently, Petitioner paid a divisible portion of the employment taxes due and timely filed a claim for refund with Respondent. Petitioner timely appealed the refund denial and this appeal ensued. Although Petitioner timely appealed the withholding tax refund denial, the basis of Petitioner's case is the abatement of the final assessments in their

[15] *Id.*
[16] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[17] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

entirety. The issue in this case is twofold: (1) whether an appeal of the refund denial opens the door to an appeal of the underlying final assessments and (2) whether Petitioner is entitled to a refund of withholding taxes paid.

The Tribunal's jurisdiction was timely invoked regarding Petitioner's refund claim under MCL 205.30. This statute states that "[t]he department shall . . . refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest . . . ."[18] Petitioner has not established that the final assessments were erroneously assessed, erroneously collected, are excessive in amount, or were wrongfully collected. Petitioner contends that the underlying assessment is unjustly assessed which justifies the Tribunal's review of the underlying assessments.

MCL 205.22(1) 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 . . . after the assessment, decision, or order." MCL 205.22 also sets forth the finality of an uncontested assessment:

> (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 statutory language plainly states that if an assessment is not appealed it is **final** and is **not reviewable by appeal** or other method of direct or **collateral attack**. Further, a taxpayer is

[18] MCL 205.30.

**not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment**, unless the underlying assessment was appealed pursuant to statute. Here, the original assessments were not appealed; thus, a subsequent refund claim is a collateral attack on the earlier, un-appealed final assessments, which is prohibited under MCL 205.22(4). The Tribunal finds this conclusion is supported by *Martin Sprocket* and *Thumb Motorsports.* In *Martin Sprocket*, the Court of Appeals held:

> Plaintiff's claim for a refund, if successful, would set aside the final assessments by reducing its BTA tax liability as previously established by the final assessments. This constitutes a collateral attack prohibited by MCL 205.22(4). Summary disposition was therefore warranted under MCR 2.116(C)(4) because the trial court did not have jurisdiction to consider plaintiff's collateral attack to its BTA tax liability for the tax years ending in June 2008 and June 2009.[19]

While *Martin Sprocket* is an unpublished decision, it is relevant to the case at hand. The Tribunal agrees that a subsequent proceeding which indirectly determines the validity of a prior attack is by definition a collateral attack on that decision, and thus prohibited by MCL 205.22(4). Contrary to Petitioner's argument, the only way in which the appeal rights under MCL 205.30 can be reconciled with the prohibition against a collateral attack for a prior assessment is to limit the applicability of claim for refunds to situations where Petitioner has properly challenged the assessment. Petitioner attempts to distinguish *Martin Sprocket* with the following arguments: (i) "the procedure used by Sprocket . . . [was] completely different than the Petitioner's case," because "Sprocket failed to first pay the taxes at issue before filing its claim for refund," (ii) "Sprocket failed to request an informal conference as required in claims for refund cases under MCL 205.21a," and (iii) "Treasury's Hearing Division did not render a written decision and order as required in claims for refund cases . . . ." The Tribunal does not find Petitioner's attempt

[19] *Martin Sprocket*, supra.

to distinguish *Martin Sprocket* from the current appeal successful. Even though Petitioner first paid a portion of the divisible withholding tax before filing its appeal, this fact does not render *Martin Sprocket* nugatory. The Court's decision in *Martin Sprocket* was not rendered because the petitioner failed to pay the tax at issue. The Court admitted the analysis regarding the unpaid tax was "not needed," and clarified the analysis was just an "additional reason supporting the trial court's dismissal."[20] Further, a request for an informal conference is not required under MCL 205.21a, as alleged by Petitioner. Rather, MCL 205.21a merely states that "the taxpayer is *entitled* to an informal conference." Finally, because no informal conference was conducted, a decision and order was not required to be issued by Respondent.

The holding in *Martin Sprocket* directly relates to the facts of this case; the *Martin Sprocket* Court held that "Plaintiff's claim for a refund, if successful, would set aside the final assessments by reducing its [Business Tax Act] tax liability as previously established by the final assessment."[21] The Court determined this is a prohibited collateral attack and found that summary disposition was warranted because the Court of Claims "did not have jurisdiction to consider plaintiff's collateral attack to its BTA tax liability for the tax years . . . ."[22]

Similarly, in *Thumb Motorsports*, the Tribunal held:

> To construe MCL 205.30 as a second avenue to challenge an assessment is to ignore the prohibition against collateral attack. Further, MCL 205.22(5) specifically states that a Petitioner is not entitled to a refund unless the assessment is timely challenged. Accordingly, while MCL 205.30 sets forth a requirement on Respondent to refund or credit taxes that are "found unjustly assessed, excessive in amount, or wrongfully collected with interest . . . ." Petitioner is without a remedy in the present case, as the Tribunal's jurisdiction was not timely invoked. As the Tribunal is of limited jurisdiction, and is not a court of equity, it must abide by the legislative strictures on what it may hear or remedy.[23]

---

[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Thumb Motorsports LLC*, supra. (citing *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc*, 305 Mich App 460, 474; ___NW2d ___ (2014) (defining collateral attack).

*Thumb Motorsports* involved a request for a refund pursuant to an amended sales tax return filed in 2014. Petitioner argues that it is requesting refund of withholding taxes and *Thumb Motorsports* involved sales taxes which are non-divisible taxes. While *Thumb Motorsports* deals with an amended return regarding sales tax, Petitioner's attempt to distinguish the facts has again failed. Thumb Motorsports and Petitioner utilized different avenues of appeal to request a refund of taxes paid; however, both methods are allowed by law and the issue in both cases was the same: whether an underlying assessment can be challenged pursuant to a refund claim. This Tribunal Member agrees with Judge Marmon, the Presiding Judge in *Thumb Motorsports,* "that a subsequent proceeding which indirectly determines the validity of a prior attack is by definition a collateral attack on that decision, and thus prohibited by MCL 205.22(4)."[24]

Considering the evidence in the light most favorable to Petitioner, there is no factual dispute that Petitioner's time to challenge the underlying assessments has expired. Thus, the underlying assessments are final and the statute of limitations has run. The Tribunal concludes that dismissal of Petitioner's claims relating to the underlying final assessments under MCR 2.116(C)(4) and (C)(7) is appropriate. Further, there is no genuine issue of material fact that Petitioner is not entitled to a refund of an overpayment of taxes. The underlying taxes are final and, thus, cannot be "found unjustly assessed," under MCL 205.30. Further, Petitioner has not proven a refund is warranted because the taxes paid were erroneously assessed, erroneously collected, are excessive in amount, or were wrongfully collected. As such, the Tribunal shall grant Respondent's Motion under MCR 2.116(C)(10).

[24] *Id.*

**JUDGMENT**

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

IT IS FURTHER ORDERED that the case is PARTIALLY DISMISSED with regard to Petitioner's appeal relative to the underlying final assessments.

IT IS FURTHER ORDERED that Petitioner's refund request is DENIED.

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]

[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: March 11, 2016
sms

[29] See MCL 205.753 and MCR 7.204.
[30] See TTR 213.
[31] See TTR 217 and 267.