

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

Eagle Land Development Company,
Petitioner,

v.

MTT Docket No. 312504

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith, III

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER OF DISMISSAL

I. INTRODUCTION

Petitioner, Eagle Land Development Company, is appealing Assessment Number L372253, which imposed use tax for purchases made by Petitioner from a supplier who the auditor contends failed to collect the sales tax. On March 15, 2007, Respondent filed a Motion for Summary Disposition requesting the Tribunal to dismiss the above-captioned case pursuant to MCR 2.116(C)(4) and MCR 2.116(C)(10). Petitioner has not filed a response to the Motion.

II. FINDINGS OF FACT

Petitioner is a residential home builder in the business of affixing tangible personal property to the real estate of others. Respondent audited Petitioner for tax periods October 1998 through May 2002. A use tax deficiency of \$77,000 was determined. Respondent claims the deficiency was due to Petitioner's failure to pay sales or use tax on trusses purchased from the Delta Truss Company. Petitioner admitted in its Answer to Respondent's First Request for Admissions that the invoices from the purchase of the trusses did not reflect a charge for sales or use tax. However, Petitioner claims that the sales tax was embedded in the total sales price shown on the invoices.

Respondent issued Final Assessment L372253 against Petitioner on December 13, 2004.

The Assessment included assessments of \$77,000 use tax, \$19,251 penalty, and statutory interest. Petitioner admits to owing \$12,139 of the use tax assessed in Final Assessment L372253. On February 3, 2005, Petitioner made a payment of \$3,943.05 on the Final Assessment L372253.

III. RESPONDENT'S CONTENTIONS

Respondent makes two alternative arguments in support of its Motion. First, Respondent argues that the Tribunal lacks subject matter jurisdiction and should dismiss this case pursuant to MCR 2.116(C)(4) because Petitioner did not pay the uncontested portion of its tax assessment prior to filing its petition, as required under MCL 205.22(1). Second, Respondent argues that there are no genuine issues of material fact, and therefore the Tribunal should dismiss this case under MCR 2.116(C)(10).

IV. 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).

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

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).

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).

V. CONCLUSIONS OF LAW

This Tribunal has carefully considered Respondent's Motion for Summary Disposition under the criteria for MCR 2.116(C)(4) and (10), and based on the pleadings and other documentary evidence filed with the Tribunal, determines that granting Respondent's Motion is appropriate.

With respect to Respondent's first argument, Petitioner has admitted that \$12,139.00 of the \$77,000.00 assessment at issue is valid and uncontested. MCL 205.22(1) requires that “[t]he uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to

appeal.” The Michigan Court of Appeals upheld this statute in *Heraud v Department of Treasury*, 118 Mich App 65, 70; 324 NW2d 535, 537 (1982). The Court noted that “if a taxpayer chooses to proceed in the tax tribunal, only that part of the assessment which is undisputed need be paid in order to contest the assessment.”

Petitioner filed a letter of appeal on December 23, 2004 and a Petition on January 26, 2005. According to tax records provided by Respondent, Petitioner made a partial payment of \$3,943.05 on February 4, 2005. The remaining uncontested amount of tax was not paid prior to the letter of appeal or petition being filed with the Tribunal. Therefore, the issue is whether the payment of the undisputed amount of tax is a jurisdictional requirement. The Tribunal finds that this is a jurisdictional requirement and the Tribunal does not have subject matter jurisdiction over the matter.

The Tribunal’s conclusion is supported by a recent Court of Appeals decision in *April D Toaz v Department of Treasury*, ___ Mich App ___, ___ NW2d ___ (2008). In *Toaz*, the petitioner paid only a portion of an uncontested amount of income tax, owed for tax year 2001, when she filed her petition for review of the final assessment with the Tribunal. Respondent moved for summary disposition, pursuant to MCR 2.118(C)(4), arguing the Tribunal lacked jurisdiction over the matter because petitioner failed to pay the undisputed portion of the tax under MCL 205.22. *Id.* The Court of Appeals affirmed the Tribunal’s conclusion that it lacked subject matter jurisdiction over the matter since the petitioner failed to pay the undisputed amount of income tax prior to appeal.

Therefore, the Tribunal concludes that it lacks subject matter jurisdiction over the above-captioned case and granting Respondent’s Motion, pursuant to MCL 2.116(C)(4), is appropriate.

VI. JUDGMENT

IT IS 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: September 10, 2008

pdm/sms

By: Kimbal R. Smith III