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

AEV, Inc.,
Petitioner,

v

MTT Docket No. 320983
(Consolidated with MTT Docket No. 330138)
MTT Docket No. 326485

City of Flint,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith, III

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER OF DISMISSAL

I. INTRODUCTION

Petitioner, AEV Incorporated, is appealing the denial of Renaissance Zone Tax Exemption for subject properties by Respondent, City of Flint, for tax years 2004, 2005, and 2006. On March 18, 2009, Respondent filed a motion requesting the Tribunal to dismiss the above-captioned case pursuant to MCR 2.116(C)(4), (C)(6) and (C)(10). Petitioner has not filed a response to the Motion.

II. RESPONDENT'S CONTENTIONS

Respondent makes three alternative arguments in support of its Motion. First, Respondent argues that the Tribunal lacks subject matter jurisdiction over MTT Docket Nos. 320983 and 326485 and should be dismissed pursuant to MCR 2.116(C)(4), because Petitioner failed to satisfy the jurisdictional requirement by protesting the taxes assessed on the subject properties before the Board of Review, as required by MCL 205.735. Second, Respondent argues that since MTT Docket Nos. 320983 and 326485 raise the same issues and involve the same parties, dismissal is appropriate under MCR 2.116(C)(6). Lastly, Respondent argues that there are no

genuine issues of material fact, and therefore, the Tribunal should dismiss the above-referenced cases under MCR 2.116(C)(10).

III. FINDINGS OF FACT

The underlying issues in the above-referenced cases relate to whether Petitioner is entitled to the Renaissance Zone Tax Exemption for the subject properties and tax years involved. Petitioner has initiated three separate petitions with the Tribunal that pertain to the Motion. The first Petition was filed on January 20, 2006, in the Small Claims Division of the Tribunal with respect to parcel number 41-07-302-036 for tax year 2004, and assigned MTT No. 320983. After being defected for failing to file in the appropriate forum, Petitioner filed a Petition in the Entire Tribunal on May 2, 2006, curing the defective filing. Petitioner asserts that because the above-referenced parcel number is located in a Renaissance Zone it is exempt from property taxes as provided by MCL 125.2681. Although Petitioner admits that it did not appear at the March 2004 Board of Review, it asserts that since the dispute involves a clerical error or mutual mistake of fact, such jurisdictional prerequisite does not apply. Respondent concedes that the subject property is located in its Renaissance Zoning, but contends that the property fails to satisfy the statutory requirements to receive tax exempt status.

Petitioner filed a second Petition on June 30, 2006, assigned MTT Docket No. 326485. In this appeal, Petitioner raised the same contentions as it did in MTT Docket No. 320983, but only with respect to parcel numbers P-00079-5 and P-00716-1 for the 2006 tax year. In response, Respondent asserts that since Petitioner did not appear before March 2006 Board of Review, the Tribunal lacks jurisdiction over MTT No. 326485.

Petitioner filed its third Petition with the Tribunal on January 31, 2007, docketed as MTT Docket No. 330138, similarly claiming wrongful denial of the Renaissance Zone Tax Exemption

of the subject properties as a result of Respondent's clerical error or a mutual mistake of personal property. Specifically, MTT No. 330138 lists parcel numbers 41-07-302-036, 41-07-302-037, P-00079-5, and P-00716-1 as the subject properties, with 2004, 2005, and 2006 as the tax years at issue. Petitioner states it appeared at the December 2006 Board of Review.

In light of the common issues of fact and law, the Tribunal entered an Order on August 14, 2008, consolidating MTT Nos. 320983 and 330138. On March 18, 2009, Respondent filed this Motion for Summary Disposition pursuant to MCR 2.116(C)(4), (C)(6) and (C)(10), listing all three of the above-referenced docket numbers.

IV. APPLICABLE LAW

MCL 205.735, states, in pertinent part:

> The provisions of this section apply to a proceeding before the tribunal that is commenced before January 1, 2007. . . . A proceeding before the tribunal is original and independent and is considered de novo. For an assessment dispute as to valuation of property of if an exemption is claimed, the assessment must be protested before the board of review before the tribunal acquires jurisdiction of the dispute . . . The jurisdiction of the tribunal in an assessment dispute is invoked by a party in interest, as petitioner, filing a written petition on or before June 30 of the tax year involved. See MCL 205.735(1), (2) and (3).

Where an assessment of property valuation has been contested before the board of review, the jurisdiction of the Tribunal is properly invoked by a party in interest, by filing a written petition within 35 days after the final decision, ruling, or determination has been given. See MCL 205.735a(6).

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

Respondent also moves for summary disposition pursuant to MCR 2.116(C)(6). In that regard:

> Summary disposition under MCR 2.116(C)(6) is properly granted when "'[a]nother action has been initiated between the same parties involving the same claim.'" *Fast Air, Inc v Knight*, 235 Mich App 541, 544; 599 NW2d 489 (1999).

> "The court rule is a codification of the former plea of abatement by prior action." *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666; 341 NW2d 783 (1983) (referring to GCR 1963, 116.1[4]). The plea of abatement protected parties from being harassed by new suits brought by the same plaintiff involving the same questions as those in pending litigation. *Id*.; *Chapple v Nat'l Hardwood Co*, 234 Mich 296, 298; 207 NW 888 (1926). To invoke the plea, complete identity of parties is not necessary as long as the two actions are predicated on substantially the same facts. *Chapple, supra* at 298-299. Thus, "to abate a subsequent action, the two suits must be based on the same or substantially same cause of action, and as a rule the same relief must be sought." *Ross*, *supra* at 666 (citations omitted).

Lastly, Respondent 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), (C)(6) and (C)(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 was first required to protest to the Board of Review prior to filing a petition in order to properly invoke the Tribunal's jurisdiction of the dispute at hand. Specifically, MCL 205.735 provides, in pertinent part, that any action commenced before the Tribunal before January 1, 2007, regarding "an assessment dispute as to the valuation of property or if an exemption is claimed, the assessment must be protested before the board of review before the tribunal acquires jurisdiction of the dispute."

Generally, disputed real property tax assessment must be protested before local board of review before the Tax Tribunal acquires jurisdiction over the dispute. *Covert Twp v Consumers Power Co,* 217 Mich App 352 (1996). Furthermore, it has been long held that a taxpayer's failure to protest an assessment to the local board of review and failure to file a written petition

prior to June 30 of the tax year in question, deprives the Tribunal of jurisdiction over a tax assessment dispute. *Citycorp Info Resources, Inc v City of Troy*, MTT No. 111858, 1992 WL 369543. As such, the Tribunal has no authority over Petitioner's assessment appeal under MCL 205.735, as the property is classified as commercial property and Petitioner admittedly failed to protest the assessment to Respondent's 2004, 2005, and 2006 Boards of Review with respect to parcel numbers 41-07-302-036, P-00079-5, and P-00716-1. See also *Electronic Data Systems Corporation v Township of Flint*, 253 Mich App 538; 656 NW2d 215 (2002).

The Tribunal also has no authority over Petitioner's appeal under MCL 211.53a, as the facts alleged by Petitioner do not establish a *prima facie* case indicating that the assessment was the result of a clerical error (i.e., "an error of a transpositional, typographical, or mathematical nature") or a mutual mistake of fact (i.e., "an erroneous belief, which is shared and relied on by both parties"). See *International Place Apartments – IV v Ypsilanti Township*, 216 Mich App 104, 109; 548 NW2d 668 (1996), *Ford Motor Company v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247, 256 (2006), *Eltel Associates, LLC v City of Pontiac*, 278 Mich App 588; 752 NW2d 492 (2008); and *Briggs Tax Service, LLC v Detroit Public Schools, et al*, ___ Mich App ___; ___ NW2d ____ (2008). Rather, the facts alleged indicate that Petitioner is seeking a reduction to the assessment, claiming a Renaissance Zone Tax Exemption. In that regard, Respondent has conceded that the subject properties are located in its Renaissance Zone, but contends that Petitioner has failed to meet the statutory requirements to receive such tax-exempt status. Similarly, Petitioner has merely contended that it was erroneously denied the Renaissance Zone Tax Exemption, yet it has not provided evidence showing how it qualifies for such exemption.

Notwithstanding Petitioner's appearance at Respondent's December 2006 Board of Review, the Tribunal has no jurisdiction over Petitioner's property tax dispute with respect to parcel number 41-07-302-037. Specifically, Petitioner was required to file its appeal with the Tribunal within 35 days of the board of review's determination. See MCL 205.735a(6). However, Petitioner filed its Petition 56 days after such determination, on January 31, 2007. In that regard, the Michigan Court of Appeals has upheld the dismissal of a taxpayer's property tax dispute when the petition was not filed until 52 days after receipt of the notice of denial by the board of review in *Nomads, Inc v City of Romulus*, 154 Mich App 46 (1986). The petition filed by the petitioner in *Nomads* was affirmed as untimely, despite the fact that notice of the board of review's determination had not been received until one and one-half months after the date of assessment. Therefore, the Court affirmed the Tribunal's ruling that it was without jurisdiction to consider the tax assessment since jurisdictional requirements were not satisfied, as required by MCL 205.735. *Id.* at 211.

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

Furthermore, Petitioner has failed to submit a response to this Motion, and has thus failed to provide documentary evidence in opposition to Respondent's contentions establishing the existence of a material factual dispute. As such, the Tribunal finds that Respondent has shown good cause to justify the granting of its Motion for Summary Disposition, pursuant to MCR 2.116(C)(10).

VI. JUDGMENT

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

GRANTED pursuant to MCL 2.116(C)(4) and (C)(10).

IT IS FURTHER ORDERED that Docket Nos. 320983, 330138 and 326485 are

DISMISSED.

This Order resolves all pending claims in these matters and closes these cases.

MICHIGAN TAX TRIBUNAL

Entered: June 3, 2009
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By: Kimbal R. Smith III