

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

Brian Bolden,
Petitioner,

v

MTT Docket No. 330030

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(4)

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF RESPONDENT
PURSUANT TO MCR 2.116(C)(10)

In this motion, Respondent, the Michigan Department of Treasury, requests that this case be dismissed for lack of subject matter jurisdiction pursuant to MCR 2.116(C)(4). Respondent asserts that Petitioner, Mr. Brian Bolden, did not timely file his Petition and, as such, this case must be dismissed. In response to Respondent's motion, Petitioner asserts that the Petition was timely filed. At issue in this case is an assessment of sales tax levied by Respondent against Petitioner for sales of taxable non-food items, as well as taxable food for immediate consumption, sold from a store owned by Petitioner known as Mr. B's Party Store.

For the reasons set forth herein, the Tribunal finds that Respondent's motion for summary disposition under MCR 2.116(C)(4) must be denied. However, Respondent is entitled to summary disposition under MCR 2.116(C)(10).

RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

On June 2, 2008, Respondent filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and a brief in support thereof. In its brief, Respondent states, *inter alia*, that:

1. “The subject of this case is a sales tax assessment issued against the Petitioner, Brian Bolden.” (Brief, p2)
2. “The final assessment was dated December 7, 2006, under assessment number O540966.” (Brief, p2)
3. “The deadline to file an appeal of the assessment was January 11, 2007. [Petitioner] did not file his appeal of the assessment with the Tribunal until January 12, 2007.” (Brief, p2)
4. “Pursuant to MCR 2.116(C)(4), the Tribunal lacks subject matter jurisdiction over this appeal.” (Brief, p2)
5. “MCR 2.116(D)(4). . .states that “[t]he grounds listed in subrule (C)(4). . .may be raised at any time.” (Brief, p2)
6. “The Tribunal lacks subject matter jurisdiction over an untimely appeal. *Kelser v Dep’t of Treasury*, 167 Mich App 18; 421 NW2d 558 (1988). MCL 205.22(1) provides that a taxpayer may appeal an assessment to the Tribunal within 35 days after the assessment. MCL 205.22(4) further states that an assessment that is not appealed according to the statutory provisions for appeal is final and may not be reviewed by any court.” (Brief, p3)
7. “[T]he final assessment was issued on December 7, 2006. As is [Respondent’s] custom, [Respondent’s] certified mail log shows that the assessment was mailed in time for [Petitioner] to receive the assessment by December 7, 2006. According to the United States Postal Service web site, the assessment was delivered on December 5, 2006.” (Brief, p4)
8. “[Petitioner’s] appeal was due within 35 days of the date of the final assessment. Therefore, the appeal was due by January 11, 2007. [Petitioner] did not file his appeal of the assessment with the Tribunal until January 12, 2007.” (Brief, p4)
9. [Petitioner] could still have paid the assessment under protest and filed a timely appeal with the Court of Claims, but apparently chose not to do so.” (Brief, p4)
10. “[T]he Tribunal should find that it lacks jurisdiction over this appeal and the appeal should be dismissed with prejudice.” (Brief, p5)

In support of its motion, Respondent filed:

1. A copy of the Final Bill for Taxes Due for Assessment No. O540966, dated 12/07/06.
2. A copy of the Proof of Service for the Petition, indicating service on January 12, 2007.
3. A copy of Respondent’s “Assessment Certified Mail Log” for 11/30/06, indicating that Assessment No. O540966 was mailed on that date.

4. A copy of “Track & Confirm” from the United States Postal Service indicating that the Final Notice for Taxes Due for Assessment No. O540966 was delivered to Petitioner on December 5, 2006.

PETITIONER’S RESPONSE

On June 4, 2008, Petitioner filed its response to Respondent’s motion. In its response, Petitioner states, *inter alia*, that:

1. “Petitioner could not have received the Final Assessment (No. O540966) on December 5, 2006, as alleged by Respondent, for the following reasons:
 - a. The Final Assessment was not issued till December 7, 2006.
 - b. The certified letter could not have been mailed on November 30, 2006 since the Final Assessment had not yet been issued; and
 - c. The Petitioner could not have signed for the Final Assessment on December 5, 2006 since the Final Assessment was not issued until two days later.”
(Response, p2)
2. “The earliest date that the Petitioner could have received the Final Assessment would have been December 8, 2006, the day after the Final Assessment was issued.”
(Response, p2)
3. “The appeal filed on January 12, 2007 was within 35 days of receipt of the Final Assessment.” (Response, p2)
4. “While the word ‘issuance’ is generally interpreted as the date of mailing in determining the commencement of the statute of limitations, the date of issuance for purposes of a notice of final assessment is the later of the ‘date issued’ contained on the notice or the actual date of mailing; although a statutory construction of the term ‘issued’ would support the date of mailing, due process requirements would require that a later date contained on the notice of final assessment be used as the date of issuance to the extent that reliance on a later notice date would mislead the taxpayer in miscalculating its appellate rights. *Winget v Michigan Dept of Treasury*, MTT No. 319852, 2007 WL 1175834 (2007).” (Response, p2)
5. “MCR 1.108(1) states that the day of the event after which the designated period of time begins to run is not included in the calculation of the time period. Therefore, the appeal was filed within the allowed time frame.” (Response, p2)

FINDINGS OF FACT

1. Petitioner, Mr. Brian Bolden, is the owner of Mr. B’s Party Store, located at 1216 Kalamazoo, Grand Rapids, Michigan.

2. At issue is Assessment No. O540966 which includes \$9,158.66 in sales tax, \$2,289.66 in penalty, and \$1,100.34 in interest, which continues to accrue pursuant to MCL 205.1 *et seq.* The assessment was issued by Respondent to Petitioner for tax due under the General Sales Tax Act for sales that occurred at Mr. B's Party Store.
3. A Final Bill for Taxes Due for Assessment No. O540966 indicating the "Date Issued" of 12/07/06, was mailed by Respondent via certified mail on November 30, 2006.
4. Petitioner received the Final Bill on December 5, 2006.
5. Petitioner filed the Petition in this case on January 12, 2007.
6. Petitioner filed no affidavits or documentary evidence in support of its response to Respondent's Motion.

CONCLUSIONS OF LAW

There is no specific tribunal rule governing motions for summary disposition. As such, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such a motion. TTR 111(4). In the instant case, Respondent filed a motion for summary disposition under MCR 2.116(C)(4).

MCR 2.116(C)(4) 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). The issue of subject matter jurisdiction may be raised at any time. MCR 2.116(D)(3). When a

court lacks jurisdiction over the subject matter, any action it takes, other than to dismiss the case, is absolutely void. *McCleese v Todd*, 232 Mich App 623, 628; 591 NW2d 375 (1998).

Subject matter jurisdiction is defined as the:

. . . court's competence to hear and determine cases of the general class to which proceedings in general belong; the power to deal with the general subject involved in the action. . . Subject matter jurisdiction deals with the court's competence to hear a particular category of cases. *Black's Law Dictionary*, (5th ed rev), p1278.

Pursuant to MCL 205.22(1):

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, or to the court of claims within 90 days after the assessment, decision, or order.

Thus, MCL 205.22(1) establishes the Tribunal's subject matter jurisdiction in appeals of assessments, decisions or orders issued by Respondent. In this case, Petitioner appealed Respondent's assessment of sales tax. The Tribunal clearly has the competence and the power to hear this particular category of case. Respondent's MCR 2.116(C)(4) Motion is denied.

In its Motion, Respondent argues that, pursuant to MCL 205.22(1), Petitioner was required to file this appeal within 35 days of the date of the final assessment, or Final Bill for Taxes Due. MCL 205.22(1) provides, 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, or to the court of claims within 90 days after the assessment, decision, or order." Respondent asserts that because the date of the Final Bill was December 7, 2006, Petitioner had to file his Petition by January 11, 2007. The Petition was not filed until January 12, 2007. Given this, Respondent argues that the Tribunal does not have jurisdiction in this matter.

In response, Petitioner argues that it could not have received the Final Bill on December 5, 2006, as asserted by Respondent, because the Bill was not issued until December 7, 2006.

Petitioner argues that the earliest it could have received the Bill was December 8, 2006, the day after the bill was issued. The Tribunal finds this argument meritless. Clearly, the documentary evidence submitted by Respondent supports Respondent's statements. Petitioner provided no evidence to the contrary.

Moreover, as Petitioner cites *Winget, supra*, in its Response, Petitioner should have an understanding of how Respondent's mailing system works. In the paragraph following the language cited by Petitioner, the Tribunal states:

[W]e note that the Department's method of issuance has benefits to the Department and the taxpayer and is consistent with one of the purposes of the notice of final assessment, namely, to provide sufficient information for the taxpayer to "reasonably" make a "meaningfully informed decision." First, it may be administratively difficult, if not impossible, for the Department to ensure that each notice is actually mailed on the date of issuance. The volume of mailings is likely considerable. Portions of the mailing process are beyond the Department's control. Second, for the taxpayer, the advance date of issuance ameliorates problems with mail delivery and ensures that the taxpayer actually receives close to the full statutory 35- or 90-day appellate period. The Department's practice substantially eliminates the need for the taxpayer to contact the Department and get internal Departmental records establishing the actual mailing date at a likely cost to the taxpayer. (*Id.*, pp15-16)

As Petitioner states, in *Winget*, the Tribunal held that the date of the assessment, decision, or order from which to measure the 35 day filing period is either the date indicated as the "Date Issued" on the Final Notice (in this case, December 7, 2006), or the postmark date (in this case, November 30, 2006), whichever is later. Because Respondent argues that December 7, 2006, is the date of the assessment, it appears that both parties agree that this is the relevant date.

Petitioner also argues that MCR 1.108(1) requires that the day of the event, *e.g.*, the date of the Final Bill, is not included in calculating the time period. The Tribunal agrees and finds this consistent with MCL 205.22(1), which states that the appeal shall be filed within 35 days "after the assessment, decision, or order." Thus, December 7, 2006, being the date of the Final Bill, is not included in the time period; the count begins on December 8, 2006, and the 35 day

deadline expired January 11, 2007. Therefore, the Tribunal finds that Petitioner failed to file his appeal within 35 days of the assessment and, as such, did not meet the jurisdictional requirements set forth in MCL 205.22.

For this reason, the Tribunal finds that Respondent is entitled to summary disposition pursuant to MCR 2.116(C)(10), which provides the following ground upon which a motion for summary disposition may be based: "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The Tribunal finds that the evidence demonstrates that there is no genuine issue of material fact and Respondent is entitled to judgment as a matter of law.

Therefore,

IT IS ORDERED that Respondent's Motion for Summary Disposition pursuant to MCR 2.116(C)(4) is DENIED.

IT IS FURTHER ORDERED that Respondent is GRANTED Summary Disposition pursuant to MCR 2.116(C)(10).

IT IS FURTHER ORDERED that Assessment No. O450966 is AFFIRMED.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: July 15, 2011

By: Patricia L. Halm