

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

Scotty's Liquor Shoppe,
Petitioner,

v

MTT Docket No. 339849

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION

Petitioner is appealing Respondent's final Assessment No. O295471 which alleges Petitioner owes sales tax, penalties, and interest. The final assessment was issued on May 15, 2007, at which time Petitioner had 35 days to appeal the assessment to the Tribunal. MCL 205.22. Petitioner contends it did not receive the final assessment and maintains that the Tribunal retains jurisdiction over the above-captioned case.

On July 22, 2008, Respondent filed a Motion for Summary Judgment, requesting that the Tribunal render judgment in its favor pursuant to MCR 2.116(C)(4). Petitioner has not filed a response to Respondent's motion.

II. FINDINGS OF FACT

Petitioner, Scotty's Liquor Shoppe, was audited by Respondent, Michigan Department of Treasury, for sales tax for periods March 1, 2000 through December 31, 2005. The Auditor determined a sales tax deficiency and Assessment No. O295471 was issued. Respondent determined that Petitioner owed \$213,104 in sales tax, \$53,277 of penalties and interest. On September 26, 2006, Petitioner requested an informal conference, noting it did not receive the

Letter of Intent to Assess, and provided Respondent with its new mailing address. Petitioner did not appear at the informal conference and the Decision and Order of Determination determined that the Informal Conference Recommendation was supported by authority and ordered that the Intent to Assess O29547 “shall be assessed as originally determined.”

III. RESPONDENT’S CONTENTIONS

In support of its Motion, Respondent contends that “. . . [t]he Tribunal lacks subject matter jurisdiction over an untimely appeal.” Respondent cites MCL 205.22(1); a taxpayer may appeal an assessment to the Tribunal within 30 days after the assessment. Respondent argues that the final assessment was issued on May 17, 2007 and Petitioner did not file any document protesting the assessment with the Tribunal until July 23, 2007. Respondent contends “[t]his is clearly outside the 35-day appeal period provided in MCL 205.22.” Respondent cites *Kelser v Dep’t of Treasury*, 167 Mich App 18; 421 NW2d 558 (1998) and *Curis Big Boy Inc v Dep’t of Treasury* 206 Mich App 139; 520 NW2d 369 (1994). Respondent contends that these cases uphold the restrictions set forth in MCL 205.22 and held that the Tribunal lacks jurisdiction over appeals that were not timely filed.

Respondent further contends that mailing the final assessment by certified mail to the last known address provided Petitioner with sufficient notice. Respondent cited *Altman Management Company v Department of Treasury* for its conclusion that if a notice is sent to a Petitioner’s last known address it constitutes proper notice.

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.

Additionally, 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. . .”

V. CONCLUSIONS OF LAW

The Tribunal has carefully considered the motion for summary disposition, under MCR 2.116(C)(4), and finds that granting this motion is warranted, based on the pleadings and other documentary evidence filed with the Tribunal. Respondent has proven through pleadings and documentary evidence that the Tribunal lacks jurisdiction over the subject matter of this appeal.

The Tribunal finds that Petitioner sent a letter to Respondent, on September 26, 2006, requesting an informal conference regarding Assessment No. O295471. Petitioner provided Respondent with a new mailing address at this time because Petitioner did not receive the original Letter of Intent to Assess. Petitioner also filed a Power of Attorney with Respondent's office citing its new address and the address of its representative.

The Tribunal further finds that Respondent has submitted evidence showing that correspondence sent to Petitioner, subsequent to Petitioner's September 26, 2006 letter, was sent to Petitioner's new address or to Petitioner's representative. Specifically, Respondent sent the notice of informal conference to Petitioner's representative and it was received by Petitioner's representative on February 6, 2007. The Tribunal recognizes that at this point Petitioner's representative withdrew his representation after being unable to communicate with Petitioner. Moreover, Respondent has submitted a copy of its assessment certified mail log for May 10, 2007. This log shows that the final assessment was mailed to the same address Petitioner disclosed in its September 26, 2006 correspondence.

Respondent's reliance on the decision in *Altman Management Company v Department of Treasury* unpublished opinion per curiam of the Court of Appeals, issued April 10, 2001 (Docket No.216912) is appropriate. The Tribunal finds that Petitioner provided Respondent with a new address, which Respondent used for all future correspondence. This was adequate notice to

Respondent and constituted Petitioner's last known address. The Tribunal finds that Petitioner's original letter of appeal, dated July 23, 2007, specifically cites that it did not receive the Notice of Final Assessment and Petitioner assumes the Notice was sent in June 2007 and therefore this appeal is timely. The Tribunal does not find Petitioner's assumption merited. MCL 205.22(1) specifically enumerates that an appeal of the contested portion of the assessment, decision, or order must be made to the Tribunal within 35 days of the contested assessment, decision, or order. Here, the contested assessment was Respondent's final assessment, issued on May 15, 2007. Petitioner had 35 days to file its appeal with the Tribunal. However, Petitioner did not file its appeal until July 23, 2007; this is far beyond the statutory appeal period. As such, Respondent has proven that the Tribunal lacks jurisdiction over the subject matter of this appeal because Petitioner failed to timely file its appeal, pursuant to MCL 205.22.

VII. 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: August 29, 2008
sms

By: Kimbal R. Smith III