

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

Novi Liquor & Wine Inc,
Petitioner,

v

MTT Docket No. 409634

Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J. Knoll

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER OF DISMISSAL

SUMMARY

Petitioner, Novi Liquor & Wine Inc., is appealing the denial of its request to amend the monthly payment under an installment agreement entered into between the parties on April 28, 2010, regarding unpaid sales and withholding taxes. Respondent contends that the Tribunal lacks jurisdiction over the above-captioned appeal as the underlying assessment has been finalized, Petitioner admits in its petition that it does not dispute the assessed taxes, and the Tribunal does not have the authority to revise the installment agreement. The Tribunal agrees and finds that it lacks jurisdiction over Petitioner's claim. As such, the above-captioned appeal is dismissed.

BACKGROUND

Petitioner is a Michigan corporation engaged in the business of purveying liquor, wine, and spirits in Novi, Michigan. Because Petitioner failed to pay sales and withholding tax for multiple years, Respondent, Department of Treasury, filed an objection to the renewal of Petitioner's liquor license with the Liquor Control Commission on February 23, 2009. Petitioner was assessed sales and withholding taxes that were finalized. Respondent released its objection to the liquor license renewal and released liens on Petitioner's property after Petitioner entered into an installment agreement with Respondent. Petitioner agreed to pay 10% of the total \$147,239.52 amount outstanding and remit \$4,600.00 dollars to Respondent on a monthly basis.

Petitioner subsequently sought to revise the installment agreement to amend the monthly payment amount from \$4,600.00 to \$2,000.00. Respondent denied Petitioner's proposed amended installment agreement in a July 21, 2010, letter stating, "[t]here is a signed installment agreement with the State of Michigan and all possible penalty waivers have been granted. Therefore, at this time there is nothing further I can do for your client."

On August 26, 2010, Petitioner filed this appeal with the Tribunal contending that it was under the impression that once it made two such installment payments, Respondent would reduce the monthly payments to a more palatable one. On September 23, 2010, Respondent filed a motion

for summary disposition pursuant to MCR 2.116(C)(4) and (C)(8). Petitioner did not file a response to the motion.

RESPONDENT'S CONTENTIONS

On September 23, 2010, Respondent filed a motion for summary disposition in which it contends that the Tribunal lacks jurisdiction over Petitioner's claims. Specifically, Respondent cites MCL 205.22 which sets forth the jurisdiction of the Tribunal. Respondent claims that, under MCL 205.22, Petitioner is not appealing the contested portion of an assessment, decision or order of the Department of Treasury. Rather, Petitioner is appealing the amount of the monthly installment under the installment agreement. Respondent further argues that Petitioner's petition would be untimely with regard to the underlying assessment as the appeal was filed more than 35 days after the issuance of the most recent Final Assessment covered by the installment agreement.

Respondent argues that ". . . apparently [Petitioner] relies on the July 21, 2010, Treasury letter denying its request for an amended installment agreement as the basis for its appeal."¹ Respondent argues that Petitioner has no appeal right with regard to this letter. Specifically, Respondent cites MCL 205.22(1) and states that ". . . for the Treasury letter to give rise to a right to appeal, it must constitute a 'decision' or 'order' of the Department of Treasury."² Respondent states that:

When Treasury denies a request to amend such an agreement, it is not issuing a decision or order with regard to any legal right the taxpayer arguably may have. It is simply refusing to expand the grace it has already extended. Were a right to appeal allowed to flow from such a denial, there never would be any finality in the assessment and collection of taxes. A taxpayer could buy more time simply by asking Treasury to ease its burden and then appealing Treasury's refusal to do so. Petitioner should not be allowed to use Treasury's [denial of] extension of grace to perpetuate the collections process in this manner.

Respondent also contends that the Tribunal has no equitable powers and thus cannot grant Petitioner's equitable relief ". . . by asserting jurisdiction over a matter it is not statutorily authorized to hear, and second, by rewriting the installment agreement. . . entered into by Petitioner and Treasury."³ Respondent contends that Petitioner chose not to contest the underlying assessments and, therefore, the assessment is final and not subject to review. Because the Tribunal lacks equitable powers it cannot take any action with regard to this case. Respondent argues that even if the Tribunal had the authority to hear Petitioner's claim, it could not grant the relief Petitioner seeks. Petitioner's request to reduce its monthly payment under the installment agreement is essentially a request for an injunction or mandamus ordering Respondent to enter into a modified installment agreement. Respondent states that the Tribunal

¹ Respondent's Motion at 5.

² *Id.*

³ Respondent's Motion at 6.

is expressly prohibited from granting this equitable relief requested and, therefore, Respondent is entitled to judgment as a matter of law or the appeal should be dismissed.

Petitioner did not file a response to Respondent's Motion for Summary Disposition.

FINDINGS OF FACT

Petitioner owns and operates a liquor, wine and spirits establishment in Novi, Michigan. Petitioner failed to remit sales tax to the State of Michigan, arguing that it suffered losses as a result of "severe and irreparable embezzlement for a lengthy eight-year period."⁴ Respondent assessed tax, penalties and interest against Petitioner, which subsequently became Final Assessments. When Petitioner again failed to pay its tax liabilities, Respondent placed lien holds on Petitioner's property and sought to suspend Petitioner's liquor license. The parties then entered into an installment agreement indicating that the total sales and withholding tax outstanding is \$147,239.52. Petitioner paid 10% of the outstanding tax liability with a check dated April 29, 2010, and agreed to pay \$4,600 on or before the 28th of each month under the installment agreement.

In a letter dated June 30, 2010, Petitioner requested Respondent to lower its monthly payments from \$4,600 to \$2,000 as it was ". . . in dire financial straits and is doing its best to repair the past and make good on its obligations."⁵ In a letter dated July 21, 2010, Respondent denied Petitioner's request to amend the installment agreement.

In response to Respondent's denial, Petitioner filed this appeal on August 26, 2010. The petition states that "Petitioner does not disagree or in any way dispute the assessed tax by Respondent."⁶ Petitioner's petition further concedes that "[t]here are no taxes per se in controversy."⁷ Rather, Petitioner is appealing from Respondent's July 21, 2010, letter denying Petitioner's proposed amended installment agreement.

APPLICABLE LAW

Respondent moves for summary disposition pursuant to MCR 2.116(C)(4). This Court Rule 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).

⁴ Petitioner's petition.

⁵ June 30, 2010 Letter to Respondent attached to Petition.

⁶ Petitioner's petition.

⁷ *Id.*

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)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed to state a claim on which relief can be granted. Summary disposition 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. *Transamerica Ins Group v Michigan Catastrophic Claims Ass’n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion for summary disposition 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. *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

CONCLUSIONS OF LAW

This Tribunal has carefully considered Respondent’s Motion for Summary Disposition under the criteria for MCR 2.116(C)(4) and (C)(8) and, based on the pleadings and other documentary evidence filed with the Tribunal, determines that granting Respondent’s Motion for Summary

Disposition under MCR 2.116(C)(4) is appropriate. The Tribunal further finds it appropriate to dismiss the above-captioned appeal.

At issue is whether the Tribunal has jurisdiction to modify an installment agreement entered into between the parties. The underlying sales and withholding tax assessments were finalized by Respondent and are not at issue in this appeal. Rather, Petitioner petitions this Tribunal to lower its monthly payment under the installment agreement.

MCL 205.22 governs the Tribunal's jurisdiction and 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. . . ." MCL 205.22(1). The statute further indicates that "[t]he 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." As such, the Tribunal's jurisdiction is limited to the underlying tax assessment or a decision or order issued by Respondent. For the Tribunal to retain jurisdiction over this appeal, Petitioner would have been required to file its appeal within 35 days of the Final Assessments at issue. However, as Petitioner admits that the underlying taxes are not at issue in this appeal, the Tribunal concludes that this is a nonissue.

The Tribunal does not have the authority to revise or alter the installment agreement at issue in this appeal. The Tribunal's jurisdiction is statutorily limited to the assessment, decision, or orders issued by Respondent. Although Respondent denied Petitioner's proposed revised installment agreement in a letter dated July 21, 2010, Petitioner may not perfect an appeal with the Tribunal by filing within 35 days of the date of the letter. This denial did not create a right of appeal under MCL 205.22. As such, Petitioner's claim is barred as the Tribunal lacks subject matter jurisdiction over the above-captioned appeal. Therefore, granting Respondent's Motion, under MCR 2.116(C)(4), is appropriate.

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: March 4, 2011

By: Cynthia J. Knoll