

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

Saline Equipment Inc.,
Petitioner,

MTT Docket No. 313377

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY
DISPOSITION UNDER MCR 2.116(C)(10)

INTRODUCTION

Petitioner, Saline Equipment Inc., is appealing a Final Assessment issued by Respondent, Michigan Department of Treasury, on June 28, 2005, for sales tax due for the period from August 1, 1999 through December 31, 2002. Petitioner filed this appeal asserting that, in short, the assessment should be zero because Petitioner's sale of farm equipment was exempt from sales tax. The sales tax at issue is based on Petitioner's sale of tractors, bulldozers, skid steers, loaders, and other similar excavation equipment. Respondent asserts that Petitioner failed to collect sales tax on transactions for which an exemption certificate was not completed or, at the very least, proper records of the certificates were not preserved. Petitioner asserts that the sales were exempt pursuant to MCL 205.54a(1)(e) as sales to agricultural users and that, regardless of its lack of

exemption certificate records, sampling percentages and common sense dictate that a significant portion of the sales should be considered exempt.

On September 1, 2006, Respondent filed a Motion for Summary Disposition, under MCL 2.116(C)(10), or in the alternative, a Motion to Dismiss the Appeal. Petitioner filed a response to Respondent's Motions on September 20, 2006. On October 11, 2006, Respondent filed a second Motion for Summary Disposition, under MCL 2.116(C)(4). Petitioner filed a response to Respondent's second Motion for Summary Disposition on October 17, 2006.

Based on Petitioner's admissions and Petitioner's repeated failure to provide any evidence of the required documentation to support its claims, the Tribunal finds Respondent's Motion for Summary Disposition under MCR 2.116(C)(10) to be appropriate. Respondent has shown that no genuine issues of material fact remain with regard to whether the transactions at issue were exempt from sales tax.

RESPONDENT'S CONTENTIONS

Respondent contends, in its August 1, 2006, Motion for Summary Disposition and Motion to Dismiss, that because Respondent's requests to admit have been deemed, by the Tribunal, to be admitted, "Saline cannot meet its burden to prove that it is entitled to the agricultural exemption." Respondent's August 1, 2006, Brief in Support of Motion, p 5. Respondent, in its Motion states that:

- (1) “[O]n June 2, 2005, the Department served requests to admit, interrogatories, and requests for production of documents on [Petitioner].”
(Id. at 2) Despite “two extensions of time to respond . . . [Petitioner] provided responses that were not signed.” *Id. at 2.*
- (2) The lack of “timely, proper answer to the requests” led to Respondent’s filing of its “Motion for Order Deeming Requests to Admit Admitted.” *Id.*
- (3) “The Department’s Request to Admit No. 3 asked Saline to admit that it did not keep the records mandated to be kept by MCL § 205.67. By virtue of the Tribunal’s February 9, 2006, order, Saline has admitted that it did not keep the statutorily required records.” *Id. at 5.*
- (4) “Request to Admit No. 1 asked Saline to admit that it could not provide a valid exemption certificate for each claimed exemption.” *Id.*
- (5) “The Department’s Request to Admit No. 2 asked Saline to admit that it cannot provide any testamentary or documentary evidence that it is entitled to the disputed exemption claims under the agricultural exemption provided by MCL § 205.54a(1)(e).” *Id.*
- (6) “Saline has admitted that it cannot provide a valid exemption certificate for each claimed exemption and that it has no documentary or testamentary evidence to support its claim that it is entitled to the disputed agricultural exemptions.” *Id.*

- (7) “Saline has admitted that it has no evidence whatsoever to support its agricultural exemption claims. It has also admitted that it failed to keep adequate records of exemption claims and cannot provide certificates for the claims that were not granted.” *Id.* at 6.
- (8) “Saline Equipment repeatedly failed to obey both the Rules and Tribunal orders to provide signed copies of its responses to the Department’s discovery requests.” *Id.*
- (9) “Saline has continuously ignored the Tribunal’s February 9, 2006, order, and ignored the Tribunal’s admonition at the pre-hearing conference that it must comply with the order. Moreover, at this point, the Department has been prejudiced by Saline’s refusal to provide proper and complete responses to the Department’s June 2, 2005, interrogatories and other discovery requests.” *Id.* at 8.

Respondent contends, in its October 11, 2006, Motion for Summary Disposition that “Saline’s failure to pay the uncontested portion of the tax prior to filing its appeal precludes the Tribunal from jurisdiction over this case.” (Emphasis omitted) Respondent’s Brief in Support of Motion, p 3. Respondent, in its Motion, states that:

- (1) “Saline admits in its brief in response to the Department’s motion for summary disposition under MCR 2.116(C)(10) that it owes some of the assessed tax.” *Id.*
- (2) “The Ungar report, on which Saline so heavily relies, itself indicates that only 96.5 percent of the contested sales would be exempt. Saline indicates in its brief that its admission to assessed tax due in the amount of \$3,300.00 is based on this report.” *Id.* at 4.
- (3) “[D]ue to Saline’s failure to pay the uncontested portion of the assessment prior to filing its appeal, the Tribunal lacks jurisdiction over this appeal and should dismiss this case.”

PETITIONER’S CONTENTIONS

In response to Respondent’s Motion for Summary Disposition, under MCR 2.116(C)(10), and Motion to Dismiss, Petitioner contends that “[t]he nature of the dispute involves Petitioner’s failure to submit exemption certificates for farm tractor sales due to lost records.” Petitioner’s Brief in Opposition to Respondent’s Motions, p 2. Petitioner contends that:

- (1) “Respondent conveniently ignores that the disputed item is the sale of farm tractors, the use of which is agricultural production.” *Id.* at 4.
- (2) “Petitioner disagrees with respondent’s contention that proper records were not available. Records were available to compute the tax using statistical

sampling, but respondent chooses not to do so nor did it engage petitioner in the discussion of possible use of such techniques.” *Id.*

- (3) “Respondent is quick to assume that the lack of records (no certificates) shifts the burden to petitioner. This also is not correct for a number of reasons. First, the statute does not require certifications. Therefore the lack of certifications does not support the lack of records which respondent is relying upon to lock in the deficiency and shift the burden to the petitioner of agricultural use.” *Id.* at 5.
- (4) “Where there is a strong statistical likelihood that the farm tractor is used for agricultural purposes, the burden of proof shifts to respondent recognizing basic logic as well as the requirement of simple justice.” *Id.*
- (5) “The Court, on its own motion and without the production of further evidence, should recognize the existence and truth that farm tractors and accessories are used by farmers in the agricultural process.” *Id.* at 7.
- (6) “Respondent has asserted a 10% negligence penalty. Petitioner disputes the reasons for the penalty (presumably for failing to keep records for one year).” *Id.* at 7.
- (7) “Petitioner, in the interest of settling the case will admit to taxable sales of \$55,000 and tax of \$3,300 consistent with the Ungar Report averages.” *Id.* at 8.

In response to Respondent's Motion for Summary Disposition, under MCR 2.116(C)(4), Petitioner contends that:

- (1) "The affidavits, proofs and additional trial testimony establish a genuine issue of material fact. This evidence and evidence developed at trial must be viewed so as to afford the benefit of the doubt to Petitioner and, thus, the Respondent's Motion for Summary must be denied." Petitioner's Brief in Opposition to Respondent's Motion, p 3.
- (2) "Respondent's attempt to limit the Maddox Ungar expert report is further inconsistent with the sanctions previously imposed." *Id.*
- (3) "Make no mistake, the Petitioner is contesting the entire assessment. Respondent's ingenious recharacterization of the Offer of the Settlement is not correct. The Petitioner's offer presented is consistent with the Maddox Ungar report. No more, no less." *Id.*

FINDINGS OF FACT

As a result of an audit by Respondent, Petitioner was assessed \$89,165.00 in taxes for the period August 1, 1999, through December 31, 2002. The total amount assessed in the Final Assessment is \$126,491.81, including interest and penalty. The Final Assessment was issued on June 28, 2005 and Petitioner filed this appeal before the Final was issued on March 28, 2005.

Petitioner could not provide complete records for review by the auditor; therefore, the auditor reviewed the records available and based the assessment on those records. The auditor determined that Petitioner erroneously claimed agricultural exemptions during the subject tax period to which it was not entitled. Petitioner subsequently filed this appeal alleging that it is entitled to the agricultural exemptions and the Final Assessment should be cancelled.

During the pendency of this appeal, Respondent served Petitioner with requests to admit, interrogatories, and requests for production of documents on June 2, 2005. Petitioner was granted two extensions of time to respond to the requests and did not provide discovery responses until September 6, 2005. The responses were not signed; thus, Petitioner filed signed responses on August 31, 2006. On February 9, 2006, the Tribunal entered an order granting Respondent's motion to deem its requests to admit admitted. The Tribunal found that "Petitioner's unsigned response to the Requests to Admit on September 6, 2005 was more than 28 days after service of the request on June 2, 2005." The specific admissions are as follows:

- (1) "Please admit that the Petitioner does not have and cannot provide a copy of a valid exemption certificate for each sale at issue in this case."
- (2) "Please admit that the Petitioner cannot provide any documentary or testamentary evidence to sustain its assertion that the equipment

transferred in the subject sales, for which the Petitioner does not have a valid exemption certificate or invoice, was used for agricultural purposes as defined in MCL § 205.54a(1)(e).”

(3) “Please admit that Petitioner does not have complete records, for each sale, of the name and address of the person to whom the sale was made, the date of the sale, the article purchased, the type of exemption claimed, the amount of the sale, and, if that person had a sales tax license, the sales tax license number, as required by MCL § 205.67.”

(4) “Please admit that Respondent accepted and granted Petitioner’s exemption claims for all sales during the period at issue for which Petitioner could provide a valid exemption certificate as required by statute.”

APPLICABLE LAW

There is no specific tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions. TTR 111(4). In the instant case, Respondent moved for summary disposition under MCR 2.116(C)(10).

MCR 2.116(C)(10) provides the following ground upon which a summary disposition motion 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 Michigan Supreme Court, in *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), provided the following explanation of MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. 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. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. (*Id.*, pp361-363) (Citations omitted.)

The Tribunal’s “...task is to review the evidence and all reasonable inferences from it and determine whether a genuine issue of any material fact exists to warrant a trial.” *Muskegon Area Rental Assoc v City of Muskegon*, 244 Mich App 45, 50; 624 NW2d 496 (2000), rev'd in part on other grounds 465 Mich 456; 636 NW2d 751 (2001). “Where the proffered evidence fails to establish a

genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). 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, 18; 469 NW2d 436 (1991).

Respondent also 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). 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.

CONCLUSIONS OF LAW

This Tribunal has considered Respondent’s Motions for Summary Disposition under the criteria for MCR 2.116(C)(4) and (C)(10) and Respondent’s Motion to Dismiss 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)(10) is appropriate.

Petitioner has admitted that it did not keep the records necessary to prove its case and has further admitted that it cannot produce either documentary or testamentary evidence to refute the assessment. Even though Petitioner has produced some scant documentation with its responses to Respondent's Motions that *may* show an issue of fact exists with regard to whether the transactions were exempt from sales tax, Petitioner failed to request, by Motion, the admissions be withdrawn or amended. Pursuant to MCR 2.312(D)(1), "[a] matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission. For good cause the court may allow a party to amend or withdraw an admission." In *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420-421; 551 NW2d 698 (1996), the Michigan Supreme Court addressed the distinction between "judicial" admissions and "evidentiary" admissions. The Court explained that the purpose of a request for admission is to "establish some of the material facts in a case without the necessity of formal proof at trial," and, unlike the evidentiary admission, "the judicial admission, *unless allowed by the court to be withdrawn*, is conclusive in the case." *Id.* at 420-421. Given this, Petitioner's admissions have been conclusively established and cannot be refuted absent the Tribunal's permission on Motion. Further, even if Petitioner formally requested withdrawal or amendment of its admissions, the Tribunal would not find good cause to grant its request. In *Janczyk v Davis*, 125 Mich App 683,

689-694; 337 NW2d 272 (1983), the Michigan Court of Appeals considered the standards by which a trial court should decide a party's motion to file late answers. It characterized the trial court's task as "balanc[ing] between the interests of justice and diligence in litigation." *Id.* at 691. Therefore, it stated, the trial judge is to:

Balance three factors in determining whether or not to allow a party to file late answers. First, whether or not allowing the party to answer late "will aid in the presentation of the action." In other words, the trial judge should consider whether or not refusing the request will eliminate the trial on the merits. . . .Second, the trial court should consider whether or not the other party would be prejudiced if it allowed a late answer. Third, the trial court should consider the reason for the delay: whether or not the delay was inadvertent.

Id. at 692-693 (citations omitted). Petitioner's unsigned responses were served on Respondent well after the 28 day time period enumerated in MCR 2.312(B).

Petitioner's responses were egregiously late and Petitioner was offered multiple opportunities to properly respond to Respondent's requests to admit. As indicated earlier, Petitioner did not file a Motion requesting the Tribunal to allow its withdrawal of the admissions or the late filing of its responses. Rather, Petitioner's responses focus on additional evidence and its belief that Respondent's audit was flawed.

The Tribunal finds that analysis of whether Respondent's Motion to Dismiss and its Motion for Summary Disposition, under MCR 2.116(C)(4), is unnecessary as the granting of Respondent's Motion for Summary Disposition, under MCR

2.116(C)(10), disposes of this appeal. Based on the pleadings and other documentary evidence filed with the Tribunal, Respondent has proven that no genuine issue of material fact exists to be determined by the Tribunal. Petitioner's admissions support Respondent's contention that Petitioner is not entitled to exemption from sales tax under the agricultural processing exemption.

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition, under MCR 2.116(C)(10) is GRANTED.

IT IS FURTHER ORDERED that Final Assessment No. L843236 is AFFIRMED.

IT IS FURTHER ORDERED that the Tribunal shall take no action with respect to Respondent's Motion to Dismiss and Respondent's Motion for Summary Disposition, under MCR 2.116(C)(4).

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

MICHIGAN TAX TRIBUNAL

Entered: September 22, 2011
sms

By: Kimbal R. Smith III