

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

John and Sarah Palazzo,
Petitioner,

v

MTT Docket No. 15-001828

Clearwater Township,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On April 28, 2015, the State Tax Commission ("STC") issued an order pursuant to MCL 211.154¹ increasing the assessed value ("AV") and taxable value ("TV") for parcel number 40-004-225-008-00 for the 2012, 2013 and 2014 tax years. Specifically, the STC increased the subject property's AVs and TVs at the request of Respondent's current assessor to correct a prior assessor's omission of lake front property from the respective assessments.

Petitioner appealed the STC's order to the Tribunal on May 29, 2015, contending that the STC lacked jurisdiction under MCL 211.154 because the subject property was not "incorrectly reported" or "omitted" from the assessment roll.

On August 30, 2016, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor pursuant to MCR 2.116(C)(4), (C)(8) and (C)(10). Petitioner filed a Brief in Response to Respondent's Motion for Summary Disposition and a Cross-Motion for Summary Disposition pursuant to MCR 2.116(C)(10) on September 21, 2016.

Oral Argument on the parties' respective motions was held on October 27, 2016.

The Tribunal has reviewed the motions, responses, and the evidence submitted, and finds that granting Petitioner's Motion for Summary Disposition and denying Respondent's Motion for Summary Disposition is warranted at this time.

¹ STC order 154-14-0515

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that the STC properly revised the subject property's AVs and TVs for the 2012, 2013 and 2014 tax years because Respondent's former assessor failed to assess its lake frontage and building improvements. In this regard, the subject property is comprised of all or parts of six lots that are waterfront lots, and three lots that are back lots separated by a platted alley.² Respondent contends that its former assessor failed to assess the waterfront lots in 2010, 2011 and 2012, and in 2013, erred by moving all building value to land value, thus failing to provide any assessment of the subject building.³ Upon discovering this failure to properly assess the subject property, Respondent's new assessor filed Form 627, Assessor or Equalization Director's Notice of Property Incorrectly Reported or Omitted From Assessment Roll Affidavit with the STC pursuant to MCL 211.154 requesting the STC to revise the AVs and TVs for the subject property for the tax years at issue. Respondent contends that the STC properly invoked its jurisdiction under MCL 211.154 and properly concluded that the failure of Respondent's former assessor to assess the lake frontage constituted an omission of property from assessment.⁴ Respondent disputes Petitioner's contention that the failure of Respondent's former assessor to include a value for the lake frontage constitutes a "clerical error," which should not be considered "omitted property" pursuant to statute.

Respondent further contends that its interpretation of MCL 211.154 is supported by the Court of Appeals decision in *Superior Hotels LLC v Mackinaw Twp*⁵ because in this case the subject real property was "omitted" as it was "previously existing tangible real property not included in the assessment."

PETITIONER'S CONTENTIONS

In support of its Motion, Petitioner contends that although Respondent's former assessor displayed either ineptitude or misconduct in the assessment of the subject property for the tax years at issue, the former assessor did not "omit" any of the subject property in said assessment. Specifically, contrary to representations from Respondent that the "[p]revious assessor removed Torch Lake frontage land value from the record card,"⁶ Petitioner contends that the subject property in its entirety was identified on the applicable property record cards for the 2010, 2011, 2012 and 2013 tax years.⁷ Petitioner further contends that, contrary to the conclusion reached by the State Tax Commission, properly identifying 117 feet of frontage on Torch Lake and then

² Total lake frontage for the subject property is 117 feet.

³ In 2009, the subject land was assessed at \$272,100 and the subject building was assessed at \$151,570. For the years 2010, 2011 and 2012, the assessor determined an AV of \$3,000 for the subject land, and AV's of \$140,000, \$141,750 and \$135,000 for the subject building, respectively. For 2013, the assessor determined an AV for the subject land of \$141,350 and assigned no AV to the subject building.

⁴ MCL 211.34d.

⁵ *Superior Hotels LLC v Mackinaw Twp*, 282 Mich App 621; 765 NW2d 31 (2009).

⁶ Form 627 dated February 12, 2014.

⁷ The property record cards for the subject property for the 2010, 2011, 2012 and 2013 tax years reflect the following property: 117 feet of frontage on Torch Lake, "Ext lot o/w," and a 1.5 story single family residence with porches and carport.

assigning a zero value to that lake frontage clearly shows that said property was not omitted or incorrectly reported; instead, it was simply assigned a wrong value.⁸

Finally, Petitioner distinguishes *Superior Hotels* given that the subject property did not undergo new construction or “other physical changes,” which would have changed the value of the subject land. Instead, Petitioner relies on the Court of Appeals decision in *Autodie, LLC v City of Grand Rapids*,⁹ which distinguished *Superior Hotels* because the assessor “counted all of Autodie’s personal property.” Similarly, in this case, Respondent’s assessor counted or identified all of the subject property, but erred in assigning a zero value to 117 feet of lake frontage.

STANDARD OF REVIEW

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.¹⁰

MCR 2.116(C)(4)

Dismissal under MCR 2.116(C)(4) is appropriate when the “court lacks jurisdiction of the subject matter.” When presented with a motion pursuant to this subsection, the Tribunal must consider any and all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties.¹¹ 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.”¹² A motion under MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust its administrative remedies.¹³

MCR 2.116(C)(8)

Motions under MCR 2.116(C)(8) are appropriate when “[t]he opposing party has failed to state a claim on which relief can be granted.” Dismissal 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.¹⁴ In reviewing a motion under this subsection, the Tribunal must accept as true all factual allegations in support of a claim, as well as all inferences that can fairly be drawn from the facts.¹⁵

⁸ The State Tax Commission’s interpretation of both MCL 211.34d and MCL 211.154 has consistently been that omitted property can result from the failure of the assessor to include in his or her assessment the valuation of a property component, including building square footage or building additions, land acreage or square footage, water frontage (e.g. failure to value all of the frontage), etc. State Tax Commission Memorandum dated October 15, 2014.

⁹ *Autodie, LLC v City of Grand Rapids*, 305 Mich App 423; 852 NW2d 650 (2014).

¹⁰ See TTR 215.

¹¹ *Id.*

¹² MCR 2.116(G)(6).

¹³ See *Citizens for Common Sense in Gov’t v Attorney Gen*, 243 Mich App 43; 620 NW2d 546 (2000).

¹⁴ See *Transamerica Ins Group v Michigan Catastrophic Claims Ass’n*, 202 Mich App 514; 509 NW2d 540 (1993).

¹⁵ See *Meyerhoff v Turner Construction Co*, 202 Mich App 499; 509 NW2d 847 (1993).

MCR 2.116(C)(10)

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. Under this subsection, 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.¹⁶ In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.¹⁷

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.¹⁸ The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.¹⁹ The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.²⁰ Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving 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.²¹ If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.²²

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under MCR 2.116(C)(4), (C)(8) and (C)(10) and Petitioner's Motion under MCR 2.116(C)(10) and finds that granting Petitioner's Motion and denying Respondent's Motion is warranted.

As an initial matter, the Tribunal notes that Respondent's MCR 2.116(C)(4) and (C)(8) motions are without merit. Though Respondent failed to offer any summary of the criteria the Tribunal should consider in granting said motions, and further failed to provide any argument specific to each of those criteria, it appears that the underlying basis of both is Respondent's contention that "Petitioner has not pled anything showing that the STC committed an error of law or applied a wrong principle." As noted above, however, judgment under MCR 2.116(C)(4) is appropriate when the "court lacks jurisdiction of the subject matter."²³ Subject-matter jurisdiction is defined as "jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. — Also termed *jurisdiction of the subject matter*; *jurisdiction of the cause*; *jurisdiction over the action*; *jurisdiction ratione materiae*. Cf. *personal jurisdiction*."²⁴ MCL 205.731 provides that "the tribunal has exclusive and original jurisdiction" over proceedings "for direct review of a final decision, finding, ruling,

¹⁶ See *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).

¹⁷ See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

¹⁸ See *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

¹⁹ See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418; 522 NW2d 335 (1994).

²⁰ *Id.*

²¹ See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109; 469 NW2d 284 (1991).

²² See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233; 507 NW2d 741 (1993).

²³ *Id.*

²⁴ JURISDICTION, Black's Law Dictionary (10th ed. 2014).

determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state,” as well as those “for a refund or redetermination of a tax levied under the property tax laws of this state.”²⁵ The Tribunal also has jurisdiction over “any other proceeding provided by law,”²⁶ and MCL 211.154 specifically states that “a person to whom property is assessed under this section may appeal the state tax commission's order to the Michigan tax tribunal.”²⁷

Whether there is any legal merit to a claim is irrelevant for purposes of a motion for summary disposition under both MCR 2.116(C)(4) and (C)(8), and even if Petitioner had failed to establish that the STC committed an error of law or applied a wrong principle as Respondent contends, the Tribunal would have jurisdiction over the nature of the case and the type of relief sought.²⁸ Respondent acknowledges as much in its brief, aptly noting the Court of Appeals recognition of the Tribunal’s “jurisdiction over matters previously heard by the State Tax Commission”²⁹ Further, MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and the subject petition specifically alleges that the property was not incorrectly reported or omitted, such that the STC had authority to adjust the taxable value. As such, and inasmuch as it cannot be said that no factual development could possibly justify a right to recovery, Petitioner has not failed to state a claim on which relief can be granted.

As for the cross-motion brought pursuant to MCR 2.116(C)(10), the parties agree that the subject property consists of an improved parcel, with 117 feet of frontage on Torch Lake, some additional land, and a 1.5 story single family residence. Further, for the 2007, 2008 and 2009 tax years, the TCV of the subject land was determined to be \$544,200, with building values of \$293,600, \$329,600 and \$303,500. For tax years 2010, 2011 and 2012, the TCV of the subject land was determined to be \$6,000, with building values of \$280,000, \$283,500 and \$270,000. TVs for 2007, 2008 and 2009 were \$403,635, \$412,918 and \$423,850. For tax years 2010, 2011 and 2012, TVs were \$143,000, \$144,750 and \$138,000.

It is clear to the Tribunal that Respondent’s assessor did not correctly determine the TCV of the subject land for the 2010, 2011 and 2012 tax years. The only issue is whether such failure to properly assess the property may be corrected under MCL 211.154.³⁰ The Tribunal disagrees with Petitioner’s interpretation of *Superior Hotels*, and finds its reliance on the *Norman Allen* line of cases misplaced for the reasons discussed therein. The Tribunal is also not persuaded by

²⁵ *Id.*

²⁶ *Id.*

²⁷ MCL 211.154(7).

²⁸ See *Bonar v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 2013 (Docket No. 310707), wherein the Court of Appeals held that “the MTT has subject matter jurisdiction over tax appeals even when that jurisdiction is not properly invoked in a particular case.” *Id.*

²⁹ *Autodie*, 305 Mich App at 428.

³⁰ “If the state tax commission determines that property subject to the collection of taxes under this act . . . has been incorrectly reported or omitted for any previous year, but not to exceed the current assessment year and 2 years immediately preceding the date the incorrect reporting or omission was discovered and disclosed to the state tax commission, the state tax commission shall place the corrected assessment value for the appropriate years on the appropriate assessment roll.” MCL 211.154(1).

Petitioner's clerical error argument.³¹ The Tribunal does, however, agree that the Court of Appeals decision in *Superior Hotels* does not mandate that Respondent must prevail in this matter. The Court in that case held only that the STC had authority to correct both assessed and taxable values under MCL 211.154,³² and that Tribunal erred in finding that the Commission's jurisdiction was limited to "circumstances where the status of property as either taxable or exempt had been incorrectly reported or omitted."³³ It reasoned that the case upon which the Tribunal relied in arriving at that determination, in addition to having been decided more than a decade before the adoption of Proposal A, was seriously undermined by 1982 PA 539.³⁴ Notwithstanding, the Court recognized the limited circumstances to which MCL 211.154 applies: "There must be an 'assessment value' that needs to be corrected as a result of taxable property having been 'incorrectly reported or omitted . . .'"³⁵ The Court observed, "'It is reasonable to conclude that section 154 only applies when the assessment was based upon the incorrect reporting' or omission."³⁶ As such, and inasmuch as "'new construction' completed in 1998 but not included in the determination of the 1999 taxable value became 'omitted real property' as of the 2000 assessment date and assessment dates thereafter because it was 'previously existing tangible real property not included in the assessment,'" it was properly placed on the assessment roll.³⁷

Here there was no new construction, and the subject frontage and building improvements were properly identified on the record cards. Though the lake frontage was improperly valued for the 2010-2012 tax years, it was valued. Consequently, it does not constitute omitted property within the meaning of MCL 211.154. "Property is not omitted when an assessor determines a property's value."³⁸ The same is true of the subject building improvements, which were assigned no value for 2013 as a result of the assessor's manual override. Further, and to the extent that Respondent attempts to validate revision of the assessment under MCL 211.150(3),³⁹ its assessor did not

³¹ The Michigan Court of Appeals has held that a clerical error is one of a "transpositional, typographical, or mathematical nature." *International Place Apartments – IV v Ypsilanti Township*, 216 Mich App 104, 109; 548 NW2d 668 (1996).

³² *Superior Hotels*, 282 Mich App at 633.

³³ *Id.* at 640.

³⁴ "At the time *Norman Allan* was decided, the first sentence of §154 only referred to 'incorrectly reported' property liable to taxation, and the second sentence provided, "If it appears to the commission that no reason in fact or in law exists which would justify an exemption of such property from taxation for those 2 years, it shall immediately place the total aggregate assessment value for the omitted years on the then current assessment roll in the column provided." The Court held that §154 'applies when property has been incorrectly reported as exempt property but is thought to be (*i.e.*, is 'made to appear to be') taxable property.' Although the Court opined that the language of the statute that it emphasized 'reinforced' its conclusion, the Court pointed to no other language in §154 that supported its interpretation that §154 does not apply when property is undervalued because something other than the status of the property has been 'incorrectly reported.' 1982 PA 539 eliminated entirely the language emphasized and relied on by the *Norman Allan* Court and added 'omitted' taxable property to §154." *Id.* at 641-42 (citations omitted).

³⁵ *Id.* at 633.

³⁶ *Id.*

³⁷ *Id.* at 638-39.

³⁸ *Autodie*, 305 Mich App at 433. See also *Orion Twp v State Tax Comm'n*, 195 Mich App 13; 489 NW2d 120 (1992) and *WPW Acquisition Company v City of Troy*, 466 Mich 117; 643 NW2d 564 (2002).

³⁹ "It shall be the duty of the commission: To receive all complaints as to property liable to taxation that has not been assessed or that has been fraudulently or improperly assessed, and to investigate the same, and to take such proceedings as will correct the irregularity complained of, if any is found to exist." MCL 211.150(3).

raise that issue before the Commission, nor did the Commission investigate or render a decision on it. Consequently, the Tribunal has no authority to address the same.⁴⁰

JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED.

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

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally provided in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization.⁴¹ To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, through June 30, 2012, at the rate of 1.09%, (iv) after June 30, 2012, through June 30, 2016, at the rate of 4.25%, and (v) after June 30, 2016, through December 31, 2016, at the rate of 4.40%.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.⁴² Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is \$50.00 in the Entire Tribunal and

⁴⁰ *Autodie*, 305 Mich App at 430.

⁴¹ See MCL 205.755.

⁴² See TTR 261 and 257.

\$25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.⁴³ A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.⁴⁴ Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.⁴⁵

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an “appeal by right.” If the claim is filed more than 21 days after the entry of the final decision, it is an “appeal by leave.”⁴⁶ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.⁴⁷ The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.⁴⁸

By Steven H. Lasher

Date Entered by Tribunal: February 13, 2017
ejg

⁴³ See TTR 217 and 267.

⁴⁴ See TTR 261 and 225.

⁴⁵ See TTR 261 and 257.

⁴⁶ See MCL 205.753 and MCR 7.204.

⁴⁷ See TTR 213.

⁴⁸ See TTR 217 and 267.