

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

Cherry Growers Inc,  
Petitioner,

v

MTT Docket No. 16-005612

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Steven H. Lasher

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DISPOSITION UNDER  
MCR 2.116(C)(8) AND (C)(10)

FINAL OPINION AND JUDGMENT

On February 6, 2017, Respondent filed a Motion for Summary Disposition arguing that: (i) “[w]hile Petitioner timely filed its statement (form 5278), it failed to pay its ESA liability by October 15, 2016 despite prior notice from Treasury,” (ii) “[a]s required by MCL 211.1057(5)(a), Treasury rescinded Petitioner’s EMPP Exemptions on November 23, 2016,” (iii) “Petitioner admits it did not pay the ESA tax but requests equitable relief in the form of reinstatement of the EMPP Exemptions upon payment of its ESA liability,” (iv) “[t]he Tribunal does not have subject matter jurisdiction to hear an assessment dispute about the subject properties’ value for tax year 2016, as the Petition is untimely,” and (v) “the Petition does not allege any legal or factual basis that Treasury’s rescissions were improper. Accordingly, Petitioner fails to state a claim upon which relief may be granted and this case should be dismissed under MCR 2.116(C)(8).”

On February 23, 2017, Petitioner responded to Respondent’s Motion arguing that it timely filed its appeal of the Order of Rescission and “requested a hardship allowance . . . as of the original filing date.” Petitioner further states it “is willing to pay the total amount due of \$10,006, plus any late fees or penalties.”

The Tribunal has considered the Motion, response and the case file and finds that Respondent moves for summary disposition under MCR 2.116(C)(4), (C)(8) and (C)(10). 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 MCR 2.116(C)(4), the Tribunal must consider any and all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties.<sup>1</sup> 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.”<sup>2</sup> A motion under MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust its administrative remedies.<sup>3</sup> Here,

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<sup>1</sup> *Id.*

<sup>2</sup> MCR 2.116(G)(6).

<sup>3</sup> See *Citizens for Common Sense in Gov’t v Attorney Gen.*, 243 Mich App 43; 620 NW2d 546 (2000).

Respondent alleges Petitioner's assessment appeal must be dismissed because it was not timely filed. However, the Tribunal has reviewed the Petition and finds that Petitioner's sole issue is the Orders of Rescission and though Petitioner included the state equalized values in the Petition, Petitioner clearly indicated there is no state equalized value in contention and the only value disputed is the taxable value. As such, Respondent's motion for summary disposition under MCR 2.116(C)(4) shall be denied.

Respondent further argues that summary disposition under MCR 2.116(C)(8) and (C)(10) is appropriate because Petitioner failed to "allege any legal or factual basis that Treasury's rescissions were improper," and "Petitioner's non-payment admission accompanied with the affidavit of David A. Buick prove . . . Petitioner failed to pay the ESA tax in time despite prior notice;" thus, there is no genuine issue of material fact outstanding.

Summary disposition under MCR 2.116(C)(8) is 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.<sup>4</sup> In reviewing a motion 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.<sup>5</sup>

Here, the law provided Petitioner with two opportunities to pay the assessment before rescission of the exemption. MCL 211.1057(3) provides that full payment of the assessment levied shall be made not later than August 15 in each assessment year. The statute further requires the Department of Treasury to "issue a notice to the eligible claimant not later than September 15," if full payment was not made by August 15. MCL 211.1057(4) provides the claimant until October 15 to make full payment of the assessment along with a late payment penalty. Petitioner admits it did not pay the ESA assessment by the statutory deadlines. The Affidavit of David A. Buick confirms Petitioner's admissions and shows Respondent also provided Petitioner multiple reminders including the required Notice of Account Status which was dated August 24, 2016. In light of these facts, the Tribunal agrees that Petitioner has not alleged any legal or factual basis that the rescissions were erroneous; therefore, Petitioner has failed to state a claim upon which relief can be granted.

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>4</sup> See *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993).

<sup>5</sup> See *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

<sup>6</sup> See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

<sup>7</sup> See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

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.<sup>8</sup> The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.<sup>9</sup> The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.<sup>10</sup> 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.<sup>11</sup> If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.<sup>12</sup>

Respondent's Motion under MCR 2.116(C)(10) shall also be granted as there are no genuine issues of material fact. As stated by Respondent, "Petitioner failed to pay the ESA tax in time despite prior notice, and Treasury's rescission of Petitioner's EMPP exemptions was proper."

Most importantly, the State Essential Services Assessment Act ("SESA") unambiguously sets forth the qualification requirements and provides no equitable relief for claimants who fail to certify the statement or fail make full payment of the assessment including the late penalty payment, if required. Further, the Tribunal has no "equitable powers" to waive or otherwise extend the deadlines set forth in the SESA.<sup>13</sup> Petitioner failed to meet the timeframes required by MCL 211.1057 and has presented no other tenable arguments justifying its relief requested. Though Respondent seeks dismissal of this case, the Tribunal finds that dismissal is not warranted as Petitioner properly invoked the Tribunal's jurisdiction and the Tribunal possesses statutory authority over this appeal. However, the Tribunal finds that Respondent properly issued the Orders of Rescission in light of the facts outlined above. As such, Respondent has proven it is entitled to summary disposition, in its favor, under MCR 2.116(C)(8) and (C)(10) and the Orders of Rescission shall be upheld. Therefore,

IT IS ORDERED that Respondent's Motion for Summary Disposition under MCR 2.116(C)(8) and (C)(10) is GRANTED.

IT IS FURTHER ORDERED that the November 23, 2016 Orders of Rescission for the subject properties are UPHeld.

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 revocation of the exemption and the property's assessment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization.<sup>14</sup> 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.

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<sup>8</sup> See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).

<sup>9</sup> See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

<sup>10</sup> *Id.*

<sup>11</sup> See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

<sup>12</sup> See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

<sup>13</sup> See *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 547-548 (2002).

<sup>14</sup> See MCL 205.755.

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%, (v) after June 30, 2016, through December 31, 2016, at the rate of 4.40%, and (vi) after December 31, 2016, through June 30, 2017, at the rate of 4.50%.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this 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.<sup>15</sup> 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 \$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.<sup>16</sup> 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.<sup>17</sup> Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.<sup>18</sup>

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."<sup>19</sup> A copy of the claim

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<sup>15</sup> See TTR 261 and 257.

<sup>16</sup> See TTR 217 and 267.

<sup>17</sup> See TTR 261 and 225.

<sup>18</sup> See TTR 261 and 257.

<sup>19</sup> See MCL 205.753 and MCR 7.204.

must be filed with the Tribunal with the filing fee required for certification of the record on appeal.<sup>20</sup> The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.<sup>21</sup>

By Steven H. Lasher

Entered: March 3, 2017  
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<sup>20</sup> See TTR 213.

<sup>21</sup> See TTR 217 and 267.