

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

David P. Anderson,  
Petitioner,

v

MTT Docket No. 412862

Michigan Department of Treasury,  
Respondent,

Tribunal Judge Presiding  
Kimbal R. Smith III

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY  
DISPOSITION

ORDER DENYING RESPONDENT'S MOTION FOR COSTS

ORDER OF DISMISSAL

**I. INTRODUCTION**

Petitioner petitioned the Tribunal to remove all penalties imposed by the Respondent regarding Final Assessment numbers TC 13447, TC 13448, TC 13449, TC 13450, TC 13451, which assessed income tax liability for 2001, 2002, 2003, 2004, and 2005, respectively. Petitioner has yet to pay any of the taxes due, but is working with Mary Murray of the Traverse City office of the Michigan Department of Treasury to finalize an installment agreement to pay the tax and interest due. On April 6, 2011, Respondent, Michigan Department of Treasury, filed a motion requesting the Tribunal to enter judgment as a matter of law in the

above-captioned case, pursuant to MCR 2.116(C)(4) and (C)(8). Petitioner filed a response to Respondent's Motion on April 22, 2011. In response to the Motion, Petitioner stated that the requirement of paying the uncontested portion of the assessment prior to appeal violates Petitioner's constitutional rights. As such, the above-captioned case is dismissed pursuant to MCR 2.116(C)(4); however, Respondent's request for costs is without merit and must be denied.

## **II. RESPONDENT'S CONTENTIONS**

Respondent contends that the Tribunal lacks jurisdiction over Petitioner's claim. Respondent cites MCL 205.22, which defines the jurisdictional requirements a petitioner must follow to file and pursue an appeal at the Tribunal. Respondent asserts that it is a prerequisite that the taxpayer must pay the uncontested portion of the assessment. Respondent cites *Toaz v Department of Treasury*, 280 Mich App 457; 760 NW2d 325 (2008), where the Michigan Court of Appeals upheld the Tribunal's determination that the taxpayer's failure to pay the uncontested debt resulted in the Tribunal having no jurisdiction to consider her tax assessment challenge. Respondent believes the Tribunal has no jurisdiction to consider Petitioner's appeal as he failed to pay the uncontested portion prior to filing his appeal with the Tribunal.

Respondent also contends that Petitioner has failed to state a claim upon which relief can be granted. Specifically, Petitioner does not dispute his Michigan income tax liability in the petition. Moreover, the only issue at appeal is the penalties imposed for failure to pay, for late filings, and for failure to make estimated payments for tax years ending December 31, 2001, December 31, 2002, December 31, 2003, December 31, 2004, and December 31, 2005. Respondent contends that Petitioner has failed to allege any facts that would entitle him to relief from the mandatory penalty amounts assessed under MCL 205.24.

Respondent also refutes the allegation by Petitioner that the requirement of paying the uncontested portion of an assessment as a prerequisite to appealing the assessment is unconstitutional. Respondent cites *By Lo Oil Company v Department of Treasury et al*, 267 Mich App 19; 703 NW2d 822 (2005), and *McKesson Corporation v Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida et al*, 496 US 18; 110 S Ct 2238; 110 L Ed 2d 17 (1990). Respondent contends that these cases support the statutory requirement that Petitioner must pay the uncontested portion of the assessment for the Tribunal to have authority of the appeal.

Finally, Respondent contends that it is entitled to costs under TTR 145, MCR 2.113(A), MCR 2.114(D)(1)-(D)(2)- (D)(3) and (E). Respondent contends that Petitioner is “again seeking to challenge the contested portions of multiple

assessments despite the failure to pay the uncontested portions of the assessment.”

Respondent’s Brief, pg 9. Respondent believes that allowing Petitioner to continue with his challenge will result in meritless litigation and is not a good-faith argument for the extension, modification, or reversal of existing law.

### **III. PETITIONER’S CONTENTIONS**

Petitioner contends that the Tribunal has jurisdiction over the instant case.

Petitioner contends that Respondent has misinterpreted *Toaz’s* meaning with regard to MCL 205.22 as the court in that case did not address whether MCL 205.22 was constitutional. Petitioner further argues that he should not be expected to give up his right to appeal the penalties if he did not have the funds available to pay the uncontested amount of his income tax liability. Furthermore, Petitioner is working with representatives from the Michigan Department of Treasury regarding a payment plan.

Petitioner contends that he has stated grounds upon which relief can be granted. Petitioner takes offense with Respondent’s characterization that “the amounts in controversy are penalties imposed for the failure to pay, for late filing, and for failure to make estimated payments for the tax periods involved.”

Petitioner’s Brief, pg 5. Petitioner states that “Petitioner’s spouse handled all financial matters, both business and personal, for many years including the tax

years in question herein.” Petitioner’s Brief, pg 5. Further, Petitioner’s spouse was investigated by the Michigan State Police for failure to file tax returns and pay taxes owed. The Michigan State Police determined that Petitioner lacked any knowledge regarding his spouse’s activities and Petitioner was not charged. Furthermore, Petitioner contends the unconstitutional nature of MCL 205.22 has prevented him from having an opportunity to be heard. Petitioner also argues that Respondent has made the unconstitutional argument for him.

Petitioner also contends that requiring payment of the uncontested portion of the assessment as a condition precedent to appeal at the Tribunal is unconstitutional. Petitioner cites the United States and Michigan constitution for authority. Petitioner contends he is only asking for the chance to contest the penalties from the non-payment of taxes and that this question has gone unanswered. Petitioner did not have the funds available to pay the income tax due within the 35 days of the Final Assessment. As a result of not having the ability to be heard Petitioner contends “[h]e will be deprived of valuable property, i.e., the thousands of dollars as imposed penalties.” Petitioner’s Brief, pg 7. Petitioner believes that the *By Lo* case is not on point, and the taxpayer in that case did not allege “they lacked notice or an opportunity for a meaningful hearing . . . .” Petitioner’s Brief, pg 7. Petitioner contends that the *McKesson* case provides no support for Respondent’s position. Petitioner is not alleging that “Michigan does

not provide a pre and post deprivation process.” Petitioner’s Brief, pg 8. Rather, Petitioner is being deprived of an opportunity to contest the penalties imposed on the uncontested portion of the Final Assessment.

Lastly, Petitioner contends that Respondent is not entitled to costs. Petitioner states that upon discovering the unfiled returns he retained an accountant and counsel. Furthermore, it was Respondent who is at fault for the multiple petitions. The Michigan Department of Treasury issued its Final Assessment for 2006, 2007, 2008, and 2009 on December 10, 2010 and the Petitioner filed its petition with 35 days of the Final Assessment. On February 18, 2011 the Michigan Department of Treasury issued its Final Assessment for years 2001, 2002, 2003, 2004 and 2005; Petitioner filed his petition within 35 days of the second Final Assessment. Petitioner contends that “Petitioner is preserving the constitutional issue for all nine years by raising it at the tribunal level.” Petitioner’s Brief, pg 9.

#### **IV. FINDINGS OF FACT**

Petitioner appeals five Final Assessments, TC 13447, TC 13448, TC 13449, TC 13450, TC 13451 with regard to individual income tax liability for the 2001, 2002, 2003, 2004, and 2005 tax years, respectively. Petitioner is not appealing the income tax liability; rather, Petitioner is appealing the penalties imposed for the failure to pay, for late filings, and for failure to make estimated payments.

Petitioner did not have the means to pay the uncontested tax liability before he filed his appeal with the Tribunal. As such, Petitioner filed his appeal on March 23, 2011 and did not pay the admittedly uncontested individual income tax liability as reflected in Final Assessments, TC 13447, TC 13448, TC 13449, TC 13450, and TC 13451.

## **V. 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). 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 further 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).

## VI. 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 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 without costs.

The Tribunal's jurisdiction is governed by MCL 205.22, which states that "A taxpayer aggrieved by an assessment ... of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days ... The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal. MCL 205.22(1). The statute unambiguously states that payment is a prerequisite to appeal. This is further supported in the *Toaz* case, "Examined in context, the statutory phrase [']uncontested portion of an

assessment, order, or decision shall be paid as a prerequisite to appeal['] is susceptible to only one reasonable interpretation. An aggrieved taxpayer must actually discharge the uncontested tax debt, by full payment, before appealing the contested portion of the tax assessment.” *Toaz*, 280 Mich App 457, 458-459; 760 NW2d 325, 326. In *Toaz* and the present case, both Petitioners failed to file accurate income tax forms with the State of Michigan and both Petitioners claimed an inability to pay the entire portion of the uncontested assessments before appealing to the Tribunal, as such *Toaz* is on point. The Court in *Toaz* indicated that a taxpayer must pay the entire amount of the uncontested assessment as a condition precedent to entering the Tribunal. As such, Petitioner’s inability to pay the uncontested assessment amount in full precludes him from maintaining his appeal at the Tribunal. With regard to Petitioner’s standing via the potential installment plan with the Michigan Department of Treasury, the Court in *Toaz* has already rejected that argument, “A partial payment does not satisfy the statute, even when coupled with an allegation in the petition that the taxpayer lacks the financial resources to pay the full debt. Nor is a promise to pay the uncontested balance after the expiration of the 35 days sufficient to satisfy the statute. The Tax Tribunal does not have authority to grant a delayed appeal.” *Id* at 462.

Respondent’s request for the awarding of costs is denied. The instant case is truly a companion case (along with docket number 410952) that only addresses

five of the nine years contested by Petitioner. The original Final Assessment for years 2006, 2007, 2008, and 2009 was issued on December 10, 2010. MCL 205.22(1), which Respondent heavily relies on, requires that an aggrieved party “appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days . . . .” MCL 205.22(1). Petitioner did file before the 35-day deadline, but only addressed years 2006-2009 as per the Final Assessment of December 10, 2010. On February 18, 2011, Petitioner received a second Final Assessment from the Michigan Department of Treasury regarding his income tax liability for years 2001-2005. Again Petitioner filed timely with the Tribunal to appeal the Final Assessment for years 2001-2005. As such, Petitioner was restricted from bringing the action as one complete appeal; furthermore, the 35-day deadline of MCL 205.22(1) made it a legal impossibility for Petitioner to appeal both Final Assessments as more than 35 days exists between December 10, 2010 and February 18, 2011. If Petitioner waited for both Final Assessments to be produced he would have waived any challenge to the interest and penalties from the December 10, 2010 Final Assessment. Furthermore, MCR 2.114D(2) reads in part that a signature certifies that the signer believes “to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law.” MCR 2.114D(2). As stated above, MCL 205.22(1) requires, in this case, the filing of two separate

appeals by Petitioner if he wanted to preserve both appeals and satisfy existing procedural law. As such, Respondent has failed to provide any basis for the Tribunal to grant costs.

## **VII. JUDGMENT**

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

IT IS FURTHER ORDERED that Petitioner's Motion for Costs is DENIED.

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: June 22, 2011

By: Kimbal R. Smith III