STATE OF MICHIGAN

COURT OF CLAIMS

SAV-TIME, INC,

Plaintiff,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant.
_____/

OPINION AND ORDER

Case No. 21-000186-MT

Hon. Brock A. Swartzle

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

At issue in this action is plaintiff's challenge to defendant's assessment of sales-tax liability after an audit of plaintiff's sales-tax returns for years 2015 through 2018. Both parties have brought motions for summary disposition. For the reasons provided below, defendant's motion for summary disposition is GRANTED, and plaintiff's motion is DENIED.

I. BACKGROUND

Plaintiff is a Michigan corporation that operates two vehicle "drive-through" repair facilities providing oil changes and other small repairs. Plaintiff is a licensed seller under the Michigan General Sales Tax Act, MCL 205.51 *et seq*. According to the deposition of David Wojewoda, plaintiff's general manager, approximately 99% of plaintiff's business consists of performing oil changes. Generally, the oil changes are invoiced at a flat fee, with additional or upgraded items, such as synthetic oil, replacement wipers, or air filters, separately listed. Wojewoda stated that the service technicians prepared the invoices using plaintiff's software. Wojewoda then collected the sales information and provided it to plaintiff's accountant.

Notably, the initial invoices, or tickets, did not list a separate item for the "service" or "labor" portion of the work when plaintiff initially provided them to customers. The original invoices did, however, separate what plaintiff called a "taxable amount" from the total charges. Wojewoda acknowledged in his deposition that these initial invoices did not specifically list a labor charge. When asked how the labor amount was calculated, Wojewoda testified that he considered the labor portion of the invoice to be "total sales price less taxable parts."

Plaintiff filed its annual Sales, Use and Withholding (SUW) returns for the periods 2015 through 2018 to report sales, deductions, and tax, on its business operations. In September 2019, plaintiff was audited for the period of August 1, 2015, through December 31, 2018. The auditor subsequently determined that plaintiff had an outstanding sales tax liability of $50,350 for the audit period. The auditor's determination was made on the basis of three adjustments.

The auditor first opined that plaintiff's gross sales figures for the audit period were not correct and adjusted the figures upward by $13,443 for the four tax years at issue. The auditor made the adjustment after he determined that there were "unreconcilable differences" between plaintiff's monthly sales reports, financial statements, detailed general ledger, and federal tax returns. The auditor also adjusted the gross sales receipts because of untaxed sales of used oil. The auditor reported that "the sales reports were the best representation of sales."

The second adjustment the auditor made involved plaintiff's reported exemptions from sales tax for its "labor" charges. After the auditor reviewed a batch of sample invoices within the audit period, he determined that plaintiff had failed to itemize properly nontaxable-labor charges. The auditor therefore reduced plaintiff's exempt-services deduction by $955,287. Finally, the auditor adjusted the tax in gross in plaintiff's favor by $129,577. The auditor determined that the

three adjustments, which totaled $839,153, resulted in a net tax due of $50,350. A final audit determination letter and tax bills for the audit period were sent to plaintiff.

Through its accounting firm, plaintiff challenged the assessments and requested an informal conference. The informal conference occurred on June 2, 2021, following which the referee recommended that defendant assess plaintiff in the amount it had originally determined to be due. Defendant accepted the recommendation and issued a Decision and Order of Determination on July 7, 2021. Defendant issued its final assessments on July 19, 2021, resulting in total tax due of $50,191.29,[1] before interest.

Plaintiff sued defendant to challenge the assessments. Plaintiff argued that its records had properly kept the parts sales separate from the nontaxable-labor charges. Plaintiff maintained that defendant's auditor "chose to only examine sample duplicate invoices which did not show the nontaxable labor line and were not accurate copies of the invoices provided to Plaintiff's customers," and that the auditor arbitrarily rejected the invoices plaintiff subsequently provided that properly itemized the separate line item for nontaxable labor. Plaintiff requested that this Court reverse defendant's assessment of $51,191.29.[2]

Defendant moved for summary disposition under MCR 2.116(C)(4) and (C)(10). Defendant first argues that this Court lacks jurisdiction over the challenged assessments.

[1] There is no explanation in the record for the difference between the $50,350 and $50,191.29 assessment totals. The audit resulted in a finding that plaintiff owed $50,350 in tax liability, plus interest. The intents to assess and final assessments total $50,191.29. Further, the referee recommended defendant assess a total of $50,191.29, and this is what the department ultimately ordered. Plaintiff now challenges the final assessments, which amount to $50,191.29.

[2] Plaintiff's request appears to contain a typographical error, as the assessments totaled $50,191.29.

Defendant maintains that plaintiff has not contested the upward adjustment to plaintiff's gross income of $13,443 for the four tax years at issue, and notes that the assessment portion related to this gross-sales adjustment equals $760.92 in tax. Defendant argues that because plaintiff failed to make any payments for this uncontested portion of the assessment as it was required to do under MCL 205.22(1), the Court does not have jurisdiction over plaintiff's challenge to the assessments. Defendant also argues that, should the Court determine that it has jurisdiction, the assessments should be upheld because defendant correctly adjusted plaintiff's gross sales, tax in gross, and the exempt-services deduction.

Plaintiff responded to defendant's motion for summary disposition, and moved for summary disposition under MCR 2.116(C)(10). With respect to defendant's argument that plaintiff was not challenging the entire adjustment amount and was thus required to pay $760.92 in tax prior to filing suit, plaintiff argues that it is disputing the entire amount. Plaintiff notes that the upward adjustment to its gross sales is flawed because it includes sales of used oil, which plaintiff argues is not taxable because the used oil was sold to a reseller who then sold it to commercial and industrial end users. Plaintiff also argues that its accounting records and sales-tax report filings are accurate and consistent, and the auditor incorrectly concluded that plaintiff used an inconsistent method of reporting gross sales. Finally, plaintiff contends that it correctly separately itemized labor charges.

II. ANALYSIS

Summary disposition is appropriate under MCR 2.116(C)(4) when "[t]he court lacks jurisdiction of the subject matter." In reviewing defendant's challenge to this Court's jurisdiction, the Court "must determine whether the affidavits, together with the pleadings, depositions,

admissions, and documentary evidence, demonstrate a lack of subject matter jurisdiction." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008) (cleaned up).

MCR 2.116(C)(10) provides for dismissal when "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." A party moving for summary disposition under MCR 2.1116(C)(10) may satisfy its burden "by submitting affirmative evidence that negates an essential element of the nonmoving party's claim, or by demonstrating to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) (cleaned up). When deciding a motion under this rule, "a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted).

A. PAYMENT OF UNDISPUTED AMOUNT

In its motion for summary disposition under MCR 2.116(C)(4), defendant argues that the Court does not have jurisdiction to hear plaintiff's challenges to the assessments because plaintiff failed to comply with MCL 205.22 when it did not pay uncontested portions of plaintiff's tax liability. Plaintiff argues that there is no uncontested tax liability.

MCL 205.22(1) provides that a taxpayer aggrieved by an assessment or decision of the Department of Treasury "may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 60 days, or to the court of claims within 90 days after the assessment, decision, or order." The statute continues, directing that "[t]he uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal." *Id*. If an assessment is

not appealed in accordance with the statutory requirements, the assessment "is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack." MCL 205.22(4). In the event a taxpayer contests "the entire amount" of an assessment, the taxpayer need not make a payment to proceed in the chosen forum. *Heraud v Mich Dep't of Treasury*, 118 Mich App 65, 70; 324 NW2d 535 (1982). The Court of Appeals has held that a taxpayer's failure to satisfy the requirement contained in MCL 205.22(1) for payment of the uncontested portion of tax liability deprives a reviewing tribunal of jurisdiction over the tax dispute. *Toaz*, 280 Mich App at 458, 462.

In *Strata Oncology, Inc v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 362431); slip op at 3, the plaintiff contested in the Tax Tribunal the Treasury Department's determination that plaintiff owed taxes for tax years 2015 through 2018. The Treasury Department argued the Tax Tribunal lacked subject-matter jurisdiction because the plaintiff failed to comply with MCL 205.22. *Id*. at __; slip op at 5. When the plaintiff responded to the Treasury Department's motion for summary disposition, the plaintiff conceded on one exemption issue, which represented less than 1% of the total amount of taxes at issue. *Id*. The Treasury Department then moved for summary disposition on the basis that the plaintiff had not paid the uncontested portion. *Id*.

The Tax Tribunal found that the plaintiff did not admit as uncontested any portion of the assessment *when it filed its petition* and, therefore, determined the plaintiff sufficiently pleaded the claim in order to invoke subject-matter jurisdiction. *Id*. The Court of Appeals explained that, with its motion for summary disposition, the defendant asked the Tax Tribunal to look beyond the pleadings and consider facts determined through discovery. *Id*. The Court affirmed the Tax Tribunal's decision. *Id*. at ___; slip op at 5-6.

In the instant case, plaintiff has properly pleaded the claim in order to invoke this Court's subject-matter jurisdiction. See *id*. Defendant argues that "[p]laintiff's claims are strictly tailored to challenge one audit adjustment that Treasury made." In its complaint, plaintiff alleged that defendant's assessment was incorrect and requested "that this Court reverse the Defendant's assessment in the amount of $51,191.29." Plaintiff also specifically asserted it had "paid current all undisputed Sales Tax due on the audit period."

As in *Strata Oncology*, ___ Mich App at ___; slip op at 5, defendant is asking this Court to look beyond the pleadings and consider facts learned through discovery when it, in part, relies on plaintiff's initial disclosures to argue that plaintiff did not comply with the statute. Moreover, defendant acknowledges in its motion for summary disposition that plaintiff "makes a general assertion that it contests Treasury's assessment" in its complaint. Although defendant argues specifically that plaintiff's allegations are "strictly tailored to challenge one audit adjustment that Treasury made," plaintiff contests the Treasury Assessment in full in its requested relief. Because plaintiff did not leave as uncontested any portion of the assessment when filing its petition, this Court has subject-matter jurisdiction to consider plaintiff's claims. See *id*. at 6.

B. SALES TAX ON LABOR

Plaintiff has not, however, met its burden of establishing that the assessment was incorrect, and defendant is entitled to dismissal of plaintiff's claim.

The General Sales Tax Act (GSTA) levies tax on the sale of tangible personal property at the rate of 6% of a business's gross proceeds. MCL 205.52(1). "Gross proceeds" is defined as "sales price," MCL 205.51(1)(c), which is in turn defined, in part, at MCL 205.51(1)(d) as "the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in

money or otherwise, and applies to the measure subject to sales tax." Sales price includes charges for services necessary to complete the sale, subject to certain exclusions, including an exclusion for "[l]abor or service charges involved in maintenance and repair work on tangible personal property of others *if separately itemized*." MCL 205.51(1)(d)(*iii*)(B) (emphasis added).

Under MCL 205.68(4):

> If a taxpayer fails to file a return or to maintain or preserve sufficient records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on an indirect audit procedure or any other information that is available or that may become available to the department.

MCL 205.68(4) further provides that such an assessment "is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer." Michigan Admin Code, R 205.2009(9) similarly provides that when "an audited person does not have sufficient records or fails to provide records, the auditor shall determine the best information available and base the estimated tax liability on that information."

Plaintiff has not shown that there is a question of fact about the Treasury's assessment. See MCL 205.68(4); MCR 2.116(C)(10). First, the auditor found plaintiff used an "inconsistent method of reporting gross sales on their monthly and annual SUW returns." This is an underlying finding that led to the auditor's $13,443 gross sales upward adjustment. The auditor explained, "According to [plaintiff's] SUW returns from 2015-July 2018 the taxpayer did not report sales with tax in gross, except for November 2017. They changed their method to include tax in gross sales in August 2018." The SUW returns and worksheets attached as Exhibits C through H to defendant's motion for summary disposition support the auditor's finding. See *Polania v State Employees' Retirement Sys*, 299 Mich App 322, 328; 830 NW2d 773 (2013) (explaining that a

trial court reviews whether an agency's decision is supported by competent, material, and substantial evidence)

For example, plaintiff's 2015 and 2016 SUW returns do not report any amounts on the lines for reporting "tax included in gross," and the 2017 SUW worksheet only has a recorded "tax included in gross sales amount" for November 2017. In contrast, the 2018 worksheet has recorded "tax included in gross sales amounts" from July through December. Thus, plaintiff's accounting method is inconsistent.

Moreover, plaintiff's accountant testified in her deposition that plaintiff did not have an issue with the gross-sales adjustment, and plaintiff cannot now create a question of fact that this finding is incorrect. See *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 250; 477 NW2d 133 (1991) (quotation marks and citation omitted). Although plaintiff maintains that the auditor's finding was due to the auditor manipulating data, these worksheets and returns were submitted by plaintiff. Plaintiff has submitted an additional worksheet for the 2018 tax year, a "statement of income," and states that it could produce similar exhibits for trial concerning its 2015 through 2017 returns. This would not, however, negate the auditor's observation that plaintiff's accounting or reporting methods for the years at issue were inconsistent. See *Lowrey*, 500 Mich at 7. Plaintiff also acknowledges that the calculation it sets out using the 2018 statement of income contains a small error or deviation of $119.05 from the SUW, which is minimal, but plaintiff has not explained the deviation. To the extent plaintiff uses these calculations to maintain that the auditor is mistaken about the inaccuracies in plaintiff's accounting, they do not support plaintiff's position. See *id*.

Further, plaintiff has not shown that defendant's position concerning the itemization of labor charges was erroneous. The auditor explained that because plaintiff was "not separately itemizing the labor on their invoices the auditor disallowed the exempt services deduction." Wojewoda acknowledged in his deposition that the actual initial invoices to the customers did not specifically list a labor charge, and defendant has included a number of the initial invoices with its motion for summary disposition. Because plaintiff did not separately itemize the labor charges, plaintiff is not entitled to an exclusion of its labor costs. See MCL 205.51(1)(d)(*iii*)(B).

Moreover, a review of the invoices shows that the nontaxable amounts are inconsistent for some of the same services. Plaintiff's argument that the invoices it initially provided and the invoices it later provided to the auditor were merely calculated differently, but reflected the same itemized labor charge, also does not negate the auditor's findings of inconsistencies in plaintiff's reports and returns. For example, some of plaintiff's initial invoices show that plaintiff charged a $.50 "environmental disposal fee," but the bill does not establish whether this is included in the "taxable amount" portion of the invoice. Even in the invoices that plaintiff later provided, the "taxable parts" and "non-taxable labor" do not reconcile with the total bill in some of the invoices– in particular where the environmental disposal fee of $.50 was also assessed.

When reviewing plaintiff's sales reports, financial statements, ledger reports, and federal returns, the auditor found inconsistencies in plaintiff's reporting methods. The auditor properly made three adjustments, resulting in the assessment that plaintiff now contests. The three adjustments, and the Treasury Department's final determination, were supported by the evidence. See *Polania*, 299 Mich App at 328. Plaintiff has not met its burden of refuting the assessments because there are demonstrable errors or inconsistencies in plaintiff's submitted documents and because plaintiff failed to itemize charges separately for labor as required by MCL

205.51(1)(d)(*iii*)(B). Therefore, defendant's motion for summary disposition under MCR 2.116(C)(10) is GRANTED, and plaintiff's motion is DENIED.

III. CONCLUSION

For the reasons stated in this Opinion and Order, IT IS ORDERED that plaintiff's motion for summary disposition is DENIED.

IT IS FURTHER ORDERED that summary disposition is GRANTED to defendant.

IT IS SO ORDERED. This is a final order that resolves the last pending claim and closes the case.

Date: February 14, 2024

Hon. Brock A. Swartzle
Chief Judge, Court of Claims