STATE OF MICHIGAN

COURT OF CLAIMS

ACTIVE AERO GROUP, INC.,

Plaintiff,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant.

OPINION AND ORDER

Case No. 14-000004-MT

Hon. Michael J. Talbot

This case comes before the Court on defendant Michigan Department of Treasury's (Department) motion for summary disposition. MCR 2.116(C)(4) and (C)(8). For the reasons stated below, the motion is GRANTED.

This case arises from claimed overpayments or credits (Credit Amount) under the Single Business Tax (SBT) Act.[1] A motion for summary disposition under MCR 2.116(C)(4) is appropriate where the court lacks subject-matter jurisdiction. MCR 2.116(C)(4). When reviewing a motion challenging subject-matter jurisdiction under that subsection, a court "must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate…[a lack of] subject matter jurisdiction[.]" *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007) (citations and quotation marks omitted); see also MCR 2.116(G)(5).

---

[1] The Single Business Tax (SBT) Act, MCL 208.1, *et seq.*, was repealed by 2006 PA 325 effective January 1, 2008.

Summary disposition under MCR 2.116(C)(8) is appropriate when the plaintiff "has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). A motion brought "under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Summary disposition should be granted "if the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380; 563 NW2d 23 (1997).

The Department successfully argues that this Court lacks jurisdiction because plaintiff Active Aero Group, Inc. (Active Aero) did not timely file an appeal to the October 20, 2011 notice as is required under MCL 205.22(4).

This Court's jurisdiction over tax matters is conferred under the Revenue Act, MCL 205.1, *et seq*. Under the Act, a Department assessment, decision or order can be appealed in one of two ways. First, a taxpayer may appeal to the Tax Tribunal within 35 days. MCL 205.22(1). Alternatively, a taxpayer may appeal to the Court of Claims within 90 days. *Id.* If the taxpayer does not appeal in the time and manner provided under Section 22 of the Revenue Act, the assessment, decision, or order becomes final. *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 415; 809 NW2d 669 (2011) (upholding a dismissal based on untimeliness under the parallel provision of Section 22 for the Tax Tribunal). Per MCL 205.22(4), "[t]he assessment, decision, or order of the department, *if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack*." (Emphasis added.) Additionally, "[a]n assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or

order of the department . . . unless the aggrieved person has appealed the assessment in the manner provided by this section." MCL 205.22(5).

When interpreting a statute, the primary goal "is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248; 833 NW2d 272 (2013) (quotation marks and footnote omitted). When the words of a statute are unambiguous, the provisions must be enforced as written and no further judicial construction is permitted. *Id.* at 249. A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

The plain language of the statute here could not be more clear: an appeal in the Court of Claims must be filed within 90 days of an assessment, decision, or order. MCL 205.22(1). The Department's decision as related to the Credit Amount in question was clearly made on October 20, 2011, when the Department issued its notice. Active Aero failed to appeal this decision within 90 days, at which time the decision became final. MCL 205.22(4). Therefore, this Court lacks jurisdiction over this case.

This Court notes that Active Aero's claim that the Taxpayer Advocate's October 4, 2013 letter is an appealable "decision" under MCL 205.22(1) is without merit. The only relevant "decision" from which Active Aero could have appealed was made on October 20, 2011. As previously stated, Active Aero failed to timely appeal that decision. The Taxpayer Advocate's response to Active Aero's subsequent request to apply the Credit Amount to the 2008-2011

returns, did not equate to an appealable "decision."[2] The relevant, appealable decision had been made well before, on October 20, 2011, and became final 90 days later.

This Court also notes that Active Aero could have received its refund of the Credit Amount if it had simply filed its 2005 SBT return within four years of the statutory due date. Instead, Active Aero waited over five years before filing, well after the statute of limitations had run. Active Aero could also have contested the Department's decision to deny application of the Credit Amount to the 2005-2007 returns by simply appealing the decision within the statutory time period. Instead, Active Aero waited almost 10 months – 7 months after the decision became final – before disputing the Department's decision. By waiting too long, Active Aero lost both its right to a refund or credit of the Credit Amount, as well as its right to contest the Department's denial of the claim.

Finally, this Court notes that Active Aero's attempt to sidestep the statute of limitations by asserting that there is a distinction between a "credit" and a "refund," such that its claim to the Credit Amount is still viable, is without merit.[3] Under the statute, an overpayment or credit in

---

[2] Though not determinative, this Court notes that despite Active Aero's "new" request, the Taxpayer Advocate's letter references only the 2005 SBT return, and makes no reference to other tax years.

[3] On this point, the Court rejects Active Aero's characterization of the credit amount as a form of a cash bond or deposit, rather than payment of tax, and finds that Active Aero's reliance on *Rosenman v United States*, 323 US 658; 65 S Ct 536; 89 L Ed 535 (1945) is misplaced. *Rosenman* was based on the existence of an affirmative arrangement between the taxpayer and the Internal Revenue Service under which money was remitted and held as a deposit in the form of a cash bond. Here, Active Aero can point to no such arrangement with the Department in which an indication was made that the credit amount was to be held as a cash bond or "deposit." In addition, after the Court's decision in *Rosenman*, the U.S. Treasury Department adopted rules that set forth specific conditions under which the government will accept a remittance as a consensual "deposit" rather than as a "payment" of taxes. See Rev. Proc. 2005-18, 2005-1 C.B. 798. These requirements include an express designation of a "deposit" at the time the remittance

excess of tax, whether it is claimed as a refund or a credit, is barred by the statute of limitations after four years from the date that the original return is due. MCL 205.27a(2) ("The taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set for the filing of the original return.") See also MCL 205.30(2) ("If a tax return reflects an overpayment or credits in excess of the tax, the declaration of that fact on the return constitutes a claim for refund."). Assertions by Active Aero that the Credit Amount somehow remained viable and was not extinguished by the four year statute of limitations are rejected.

Because Active Aero did not timely file this appeal, this Court is without jurisdiction to hear this case. Accordingly, the Department's motion for summary disposition is GRANTED. MCR 2.116(C)(4).

This resolves the last pending claim and closes the case.

Dated: **MAY 14 2014**

Hon. Michael J. Talbot
Court of Claims Judge

---

is made. Active Aero made no such designation, and its attempts to re-characterize the credit amount as mere "deposits" not subject to the statute of limitations must fail.