

**STATE OF MICHIGAN**  
**COURT OF CLAIMS**

ALTICOR GLOBAL HOLDINGS, INC.,

Plaintiffs,

v

DEPARTMENT OF TREASURY,

Defendants.

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**OPINION AND ORDER**

Case No. 17-000213-MT

Hon. Colleen A. O'Brien

**OPINION**

Pending before the Court is defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). For the reasons stated herein, the motion is GRANTED.

According to the allegations in plaintiff's complaint, this case involves plaintiff's Michigan Single Business Tax (SBT)<sup>1</sup> returns for the 2006 and 2007 tax years. On or about June 20, 2011, defendant issued a Notice of Audit and informed plaintiff that it was going to conduct an audit for the 2006 and 2007 tax years. The Notice, which is attached to plaintiff's complaint as Exhibit 1, announces that "the audit commencement date" is "07/22/2011[.]" In addition, the

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<sup>1</sup> The SBT was replaced by the Michigan Business Tax (MBT), effective January 2008. See 2006 PA 325. The MBT was replaced by the Corporate Income Tax, effective January 2012. See 2011 PA 39.

Notice informs plaintiff that “[t]he running of the Statute of Limitations will be suspended for the duration of the audit[.]”

Attached to plaintiff’s complaint as Exhibit 2 is a February 21, 2017 Final Audit Determination Letter informing plaintiff that defendant completed its audit for the 2006 and 2007 tax years. The letter indicated an SBT liability of \$1,065,024, plus \$437,425 in interest. In addition, the letter stated that the audit completion date was February 21, 2017, and that the letter “reinstates the running of the statute of limitations that was suspended on 7/22/2011, the audit commencement date. Reinstatement of the running of the statute of limitations is 02/21/2017.” On May 2, 2017, defendant issued a Final Assessment in which it assessed a total of \$1,560,546.36—tax liability plus interest—against plaintiff.

Plaintiff filed a timely complaint in this Court in which it contends that the statute of limitations for defendant to issue a deficiency assessment expired long before the May 2017 Final Assessment. Plaintiff notes that MCL 205.27a(2) sets forth a four-year period of limitations for defendant to assess any tax deficiency, penalties, or interest. Under the version of the statute in effect at the time the audit began, that period of limitations was tolled—or, in the words of the statute, “suspended”—during the pendency of the audit, plus an additional year following the conclusion of the audit. See Former MCL 205.27a(3)(a), as amended by 2014 PA 3. However, in 2014 PA 3, which became effective on February 6, 2014, the Legislature amended the statute. Under the current version of MCL 205.27a(3)(a), the “suspension” of the period of limitations set forth in former MCL 205.27a(3)(a) during the pendency of a state audit was eliminated.

Plaintiff argues that the elimination of the tolling provision in the current version of MCL 205.27a(3)(a) means that there was no event in this case that can be deemed to have tolled or suspended the period of limitations for issuing a deficiency assessment. Plaintiff also argues that, even assuming the tolling provision in former MCL 205.27a(3)(a) applies in this case, summary disposition is inappropriate because there are disputes regarding when defendant commenced the audit and when defendant completed the same. As such, plaintiff contends that there is a factual dispute regarding whether the May 2017 Final Assessment was issued during the limitations period. Plaintiff contends that summary disposition is premature in light of these disputes, and that it is entitled to conduct discovery.

Defendant has moved this Court for summary disposition, arguing that there is no merit to plaintiff's contention regarding whether the former version of MCL 205.27a(3)(a) applies to toll the limitations period in this case, notwithstanding the elimination of this tolling provision in 2014 PA 3. This Court agrees with defendant's position. In *Alticor, Inc v Dep't of Treasury*, \_\_\_ Mich App \_\_; \_\_\_ NW2d \_\_\_ (2018) (Docket Nos. 337404, 337406, and 337463), the Court of Appeals resolved this issue in a published decision. In that case, the Court of Appeals noted that the amended version of MCL 205.27a(3) was silent regarding audits commenced by defendant before September 30, 2014. *Alticor, Inc*, \_\_\_ Mich App at \_\_; slip op at 5-6. This silence, reasoned the Court, reflected the Legislature's intent to allow tolling in cases where defendant commenced an audit prior to September 30, 2014, in a manner that was consistent with former MCL 205.27a(3)(a). *Id.* at 6. In other words, for audits commenced by defendant before September 30, 2014, tolling would continue throughout the pendency of the audit period, and for an additional year thereafter, just as it had under the former version of MCL 205.27a(3)(a). *Id.* at 6-7.

In light of the Court of Appeals' published decision in *Alticor Inc*, the pertinent legal issue in this case has been resolved in favor of defendant. That is, in spite of the amendments effectuated by 2014 PA 3, an audit commenced by defendant before September 30, 2014, tolled the four-year period of limitations for the pendency of the audit, plus one year thereafter. Hence, in this case, if defendant commenced its audit within the original period of limitations, the period of limitations was tolled during the pendency of the audit, and for one year thereafter, consistent with former MCL 205.27a(3)(a).

Here, in spite of plaintiff's contentions, there are no disputes regarding the pertinent dates on which the audit commenced or ended. The documentation attached to plaintiff's own complaint belies any assertion by plaintiff that a factual dispute exists.<sup>2</sup> Plaintiff fails to acknowledge that the June 20, 2011 Notice expressly states that the limitations period for issuing an assessment would be tolled "*beginning on the audit commencement date of 07/22/2011 . . .*" (Emphasis added). Moreover, plaintiff ignores that the February 21, 2017 Final Audit Determination Letter reiterates that July 22, 2011, was the date on which the audit commenced. In that respect, the Letter expressly states that it represents the completion of the audit and that the completion of the audit "*reinstates the running of the statute of limitations that was suspended on 7/22/2011, the audit commencement date.*" (Emphasis added). The February 21,

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<sup>2</sup> Because the pertinent documentation was attached to plaintiff's complaint, the Court may consider the documents as part of the pleadings for purposes of review under MCR 2.116(C)(8). See MCR 2.113(F)(2); *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). In any event, the documents were also attached to defendant's motion for summary disposition, such that the Court, in its discretion to consider defendant's motion under a subrule other than that cited by defendant, see *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 517-518; 847 NW2d 657 (2014), concludes the documents are properly before this Court and that summary disposition is warranted under MCR 2.116(C)(10).

2017 letter also expressly states that the audit completion date was February 21, 2017, and that “Reinstatement of the running of the statute of limitations is 02/21/2017.”

In short, the documentary evidence attached to plaintiff’s complaint plainly indicates when the audit began—July 22, 2011—and when it ended—February 21, 2017. The commencement date was within the original periods of limitation for the tax years at issue—which would have expired in December 2011 and December 2012 for the 2006 and 2007 tax years, respectively. Accordingly, under the prior version of MCL 205.27a(3)(a), the commencement of the audit tolled the limitations period during the pendency of the audit, and for one year thereafter. See *Alticor*, \_\_\_ Mich App at \_\_\_; slip op at 6-7. The audit ended, according to the Final Audit Determination Letter, on February 21, 2017. Hence, the limitations period, under former MCL 205.27a(3)(a), was extended until one year after the audit was completed, i.e., February 2018.<sup>3</sup> The Final Assessment, issued in May 2017, was well within the limitations period. Accordingly, defendant is entitled to summary disposition.

Lastly, the Court rejects plaintiff’s contention that summary disposition is premature because there was no discovery in this case. As a general rule, summary disposition is premature if discovery is not complete. *Caron v Cranbrook Ed Comm*, 298 Mich App 99, 645; 828 NW2d 99 (2012). “However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of

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<sup>3</sup> In addition, approximately five months remained on the limitations period for assessing a deficiency against the 2006 SBT return, and approximately 17 months remained on the limitations period for assessing a deficiency against the 2007 SBT return. Thus, the limitations period for issuing an assessment would have remained open until July 2018 for the 2006 SBT return, and until July 2019 for the 2007 return.

the party opposing the motion.” *Id.* (citation and quotation marks omitted). A party alleging that summary disposition is premature must assert that a factual dispute exists and must support that allegation with some evidence. *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2005). “Mere conjecture does not entitle a party to discovery, because such discovery would be no more than a fishing expedition.” *Id.* at 380.

Here, plaintiff has not provided any evidence to support its position and has done nothing more than speculate that there could be a factual dispute regarding when the audit period commenced and when it ended. Furthermore, plaintiff’s speculation ignores documentation attached to its own complaint. Plaintiff’s speculation and conjecture do not entitle it to discovery in this case. *Id.*

IT IS HEREBY ORDERED that defendant’s motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10).

This order resolves the last pending claim and closes the case.

Dated: June 6, 2018

  
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Colleen A. O'Brien, Judge  
Court of Claims