

STATE OF MICHIGAN
COURT OF CLAIMS

AMWAY CORP v DEP'T OF TREASURY

Case No. **17-000067-MT**

Hon. Michael J. Talbot

ORDER

At a session of said Court held,
Detroit, Wayne, Michigan, on
November 15, 2017.

Defendant having filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10);

IT IS HEREBY ORDERED that Defendant's motion for summary disposition is GRANTED under MCR 2.116(C)(10).

IT IS FURTHER ORDERED that Plaintiff's August 10, 2017 motion to compel is DENIED as moot.

This is a final order that resolves the last pending claim and closes the case.

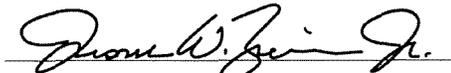


Michael J. Talbot, Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Clerk, on

NOV 15 2017
Date



Clerk

STATE OF MICHIGAN
COURT OF CLAIMS

AMWAY CORP,

Plaintiff,

v

Case No. 17-000067-MT

MICHIGAN DEPARTMENT OF TREASURY,

Hon. Michael J. Talbot

Defendant.

OPINION

This matter is before the Court on defendant Michigan Department of Treasury's (Treasury) Motion for Summary Disposition. In this suit challenging Treasury's assessment of taxes under the Single Business Tax Act, MCL 208.1 *et seq.*,¹ plaintiff Amway Corp (Amway) contends that Treasury's final assessment of tax for the 2003 tax year, dated December 21, 2016, was time-barred by the statute of limitations. Because this Court concludes that the challenged assessment was timely, Treasury's motion is GRANTED.

I. FACTUAL BACKGROUND

This matter arises from a dispute concerning Amway's liability for single business tax (SBT) for the tax year ending August 31, 2003 (Tax Year in Issue). Although the parties disagree about the significance of certain actions, the timeline of events is largely undisputed.

¹ The single business tax act has since been repealed by 2006 PA 325.

Amway² filed its SBT return on September 1, 2004. On January 12, 2005, Treasury notified Amway that a routine audit of its records would be conducted. On February 17, 2010, Treasury mailed a notice of preliminary audit determination to Amway reflecting a credit amount of \$282,522. The tax credit was attributable to certain royalty payments made by Amway to its parent company, Alticor, Inc., which Treasury had determined should be included in Alticor's, rather than Amway's, SBT tax base. Alticor challenged this determination in separate litigation.³ While the audit was pending, the parties executed a series of waivers concerning the statute of limitations applicable to Amway's SBT liability for the period between September 1, 2000, and August 31, 2004. The last of these waivers, dated October 22, 2014 and titled "Consent To The Suspension Of The Running Of the Statute Of Limitations," states:

[Amway], by its duly authorized officer and/or agent or individual, and the State Treasurer of the State of Michigan mutually consent to suspend the Statute of Limitation [sic] for the above tax for the period indicated so that further clarification can be made for the proper tax determination and/or refund, as the case may be.

This waiver expires on: 12/31/2015[.]

On January 26, 2015, Treasury issued a Final Audit Determination, reflecting a \$281,207 tax credit for the Tax Year at Issue. Shortly thereafter, Treasury notified Amway by letter dated February 20, 2015, that the January 26, 2015 Final Audit Determination was sent in error and was being rescinded. Treasury further advised that a corrected Final Audit Determination would be issued "upon completion of a final review by audit management."

² At the time, Amway was known as Quixtar, Inc.

³ See *Alticor Investments, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2015 (Docket No. 322000).

On October 27, 2015, the Court of Appeals affirmed this Court's decision in the *Alticor* litigation, agreeing that Alticor was not liable for taxes attributable to the payments it received from Amway, i.e., the same payments that were disputed in the instant matter. Following the Court of Appeals' opinion, Treasury issued a corrected Final Audit Determination to Amway on December 29, 2015. Treasury's Supplemental Audit Report of Findings dated July 20, 2016, explained that as a result of the *Alticor* litigation, it was reversing its earlier decision to exclude the royalty payments from Amway's tax base. Consequently, Treasury issued an Intent to Assess on October 12, 2016, and a Final Assessment in the amount of \$114,807.01 (including interest) on December 21, 2016.

II. 2014 PA 3

Notably, between the time that the audit was first commenced and the Final Assessment was issued, the Legislature amended the statutory provision concerning the limitations period for tax assessments or refund claims. In pertinent part, the former version of MCL 205.27a states:

(2) A deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, whichever is later. 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 filing of the original return. . . .

(3) The statute of limitations is suspended for the following:

(a) The period pending a final determination of tax, including audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department and for 1 year after that period.

(b) The period for which the taxpayer and the state treasurer have consented to in writing that the period be extended.

While the Legislature left the general four-year limitations period set forth in Subsection 2 unchanged, 2014 PA 3 amended Subsection 3, effective on February 6, 2014. The current version of MCL 205.27a now provides, in pertinent part:

(3) The statute of limitations shall be extended for the following if the period exceeds that described in subsection (2):

(a) The period pending a final determination of tax through audit, conference, hearing, and litigation of liability for federal income tax and for 1 year after that period.

(b) The period for which the taxpayer and the state treasurer have consented to in writing that the period be extended. . . .

The issue before this Court involves the effect 2014 PA 3 had on the assessment at issue in this matter, as well as the effect of the parties October 22, 2014 waiver.

III. ANALYSIS

Treasury moves for summary disposition under MCR 2.116(C)(8) and (10). A motion under MCR 2.116(C)(8) “tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted.”⁴ However, because the parties relied on evidence beyond the pleadings in this matter, this Court must apply the standard of review applicable to summary disposition under MCR 2.116(C)(10).⁵ “Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.”⁶ The Court analyzes the motion by considering “the pleadings, admissions, affidavits, and other

⁴ *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013) (citation omitted).

⁵ *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010).

⁶ *Zaher*, 300 Mich App at 139 (citation omitted).

relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.”⁷ “A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party’s position.”⁸ As it relates to issues involving statutes of limitations, “[i]t has been universally held that statutes of limitation sought to be applied to bar rights of the government must receive a strict construction in favor of the government.”⁹

Citing this Court’s opinion in an unrelated case, *Old Orchard Brands, LLC v Dep’t of Treasury*, Docket No. 16-000114-MT, Treasury asserts that 2014 PA 3 is inapplicable to matters involving audits that commenced before its enactment. It argues that the statute of limitations (1) began to run on September 1, 2004, when Amway filed its SBT return; (2) was suspended 133 days later when Treasury notified Amway on January 12, 2005, that an audit would be conducted; and (3) remained tolled under former MCL 205.27a(3)(a) until the corrected Final Audit Determination was issued on December 29, 2015. Thus, according to Treasury, it had the balance of the original four-year limitations period (1,328 days), plus an extra year pursuant to former MCL 205.27a(3)(a), in which to issue an assessment—making any assessment issued before August 18, 2020, timely. With respect to the parties’ October 22, 2014 waiver, Treasury contends that the December 31, 2015 expiration date identified therein expresses the date on

⁷ *Id.* (citation omitted).

⁸ *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009).

⁹ *Livingston v Dep’t of Treasury*, 434 Mich 771, 785-786; 456 NW2d 684 (1990).

which the waiver itself expires, at which point the unexpired time that existed prior to execution of the agreement would be available for purposes of issuing a timely assessment.

By contrast, Amway takes issue with Treasury's calculations of the audit timeline. It disputes that the January 12, 2005 correspondence—which merely indicated that an audit would be conducted for an unspecified period in the near future—commenced the audit. Instead, Amway points to Treasury's audit diary noting the first audit activity as taking place on October 2005 and a second document identifying the audit start date as October 2006. But more importantly, Amway contends that the initial audit actually concluded in 2010 and that the December 21, 2016 Final Assessment was the product of a second audit, commenced after the effective date of 2014 PA 3, which would not serve to toll the statute of limitations under the current version of MCL 205.27a(3). In support of this position, Amway notes that the last activity entered in the audit diary was on May 20, 2010; Treasury's initial Audit Report of Findings, which was apparently created in 2010,¹⁰ indicates that a final audit determination was made and has a section entitled "Audit Completion"; and Treasury issued a Preliminary Audit Determination on February 17, 2010. Amway also takes a different view of the parties' waiver, arguing that the agreement merely extended the statute of limitations by providing that it expired with the waiver on December 31, 2015. Thus, according to Amway, the December 21, 2016 Final Assessment was untimely.

Additionally, Amway contends that this Court's decision in *Old Orchard* misinterpreted and misconstrued the retroactivity of 2014 PA 3. Although the Court acknowledges Amway's

¹⁰ The Audit Report of Findings is undated, but indicates that interest was calculated through September 30, 2010.

criticisms, the Court will continue to apply the legal conclusion it reached in that case:¹¹ in order to give prospective effect to 2014 PA 3, the revised tolling provisions set forth therein will not be applied to cases in which the statute of limitations was suspended under the former version of MCL 205.27a(3) before the effective date of the amendment.¹² Viewing the evidence in the light most favorable to Amway, Treasury's audit commenced no later than October 2006 (the "audit start date" identified in an audit plan produced by Treasury and cited by Amway), well before the effective date of 2014 PA 3. Accordingly, the statute of limitations set forth under former MCL 205.27a(3)(a) is controlling in this case.

The effect of the parties' waiver must also be taken into account. Valid written agreements between taxpayers and the Department of Treasury, such as the agreement in this case, are enforceable under Michigan law.¹³ Under general principles of contract law, "[w]hen the terms of a contract are unambiguous, their construction is for [the] Court to determine as a matter of law."¹⁴ When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary

¹¹ Old Orchard is currently pending review by the Court of Appeals and this Court will not speculate regarding the outcome of that appeal.

¹² *Old Orchard Brands, LLC*, Docket No. 16-000114-MT, pp 8-9.

¹³ See *Trostel, Ltd v Dep't of Treasury*, 269 Mich App 433, 435-436; 713 NW2d 279 (2006) (holding that a valid contract for payment of tax and waiver of penalty was enforceable).

¹⁴ *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2002).

meaning.¹⁵ If the language of the contract is clear and unambiguous, it must be enforced as written.¹⁶

Here, the parties unequivocally consented to “suspend” the statute of limitations. In general, the term suspend means “[t]o interrupt; postpone; defer,”¹⁷ “to bring to a stop, [usually] for a time,”¹⁸ “to cause to stop temporarily,”¹⁹ or “to set aside or make temporarily inoperative.”²⁰ Thus, the plain meaning of the word “suspend” in the context of a statute of limitations is to temporarily interrupt or stop the running of the limitations period. Because the interruption is only temporary, an agreement to suspend the statute of limitations necessarily implies that the limitations period will resume at some point. Amway’s suggestion to the contrary—that under the terms of the agreement the statute of limitations expired on December 31, 2015—belies not only the express language of the agreement, but a common understanding of the meaning of the words “to suspend the Statute of Limitation[s].” The significance of the expiration date in the parties’ waiver was that it established the date certain that the suspension of the four-year limitations period came to an end and began to run again. Any unexpired portion of the four-year period provided by former MCL 205.27a(2) that remained when the

¹⁵ *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

¹⁶ *Id.*

¹⁷ *Black’s Law Dictionary* (10th ed).

¹⁸ *Random House Webster’s College Dictionary* (1997).

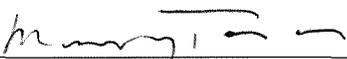
¹⁹ *Merriam Webster’s Collegiate Dictionary* (11th ed).

²⁰ *Id.*

suspension of the limitations period began, was thus available to Treasury for assessment purposes.²¹

Viewing the evidence in the light most favorable to Amway, the four-year statute of limitations began running when Amway filed its SBT return on September 1, 2004. The limitations period was then suspended under former MCL 205.27a(3)(a) when Treasury began the state audit. Although the precise commencement date of the audit is unclear, the documents proffered by Amway suggest that it was commenced no later than October 2006, i.e., 26 months after the four-year state of limitations began to run. While the limitations period was suspended, with a balance of at least 22 months remaining, the parties executed the October 22, 2014 waiver, thereby agreeing that the suspension of the statute of limitations would come to an end on December 31, 2015. On that date, the portion of the limitations period that had yet to lapse when the state audit began—22 months—began to run again. Treasury issued the Final Assessment less than 12 months later, on December 21, 2016, when at least 10 months of the limitations period remained. Accordingly, it was timely under former MCL 205.27a and the terms of the parties' waiver, and Treasury is entitled to judgment as a matter of law.

Dated: November 15, 2017



Michael J. Talbot, Judge

²¹ See *Krueger v Dep't of Treasury*, 296 Mich App 656, 661; 822 NW2d 267 (2012).