STATE OF MICHIGAN

COURT OF CLAIMS

TRUCKNTOW.COM, INC.,

Plaintiff,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendants.
_____/

OPINION AND ORDER

Case No. 19-000005-MT

Hon. Colleen A. O'Brien

Pending before the Court is defendant Department of Treasury's (the Department) motion for summary disposition pursuant to MCR 2.116(C)(4) and (C)(8). The motion is GRANTED pursuant to MCR 2.116(C)(8).

I. BACKGROUND

This case involves sales tax liability. It does not, and cannot, however, involve a challenge to the validity of the assessment giving rise to that liability. According to the allegations in plaintiff's complaint, plaintiff was assessed a sales tax deficiency, and plaintiff—for reasons that are neither apparent nor clear—failed to exercise its right to challenge the assessment under MCL 205.22. As a result, the validity of the deficiency assessment cannot be challenged in this or any other action. See MCL 205.22(4).

Rather than challenging the underlying assessment, plaintiff takes issue with the Department's decision to decline to compromise the tax liability that was conclusively

established by way of the final assessment. Pursuant to MCL 205.23a, plaintiff submitted an offer-in-compromise on or about October 30, 2017, based on what it characterized as doubt as to the amount of its outstanding sales tax liability. The Department rejected the offer and, pursuant to MCL 205.23a(4)(c), plaintiff sought "independent administrative review" of that decision within the Department. Once again, the offer was rejected.

On or about January 3, 2019, plaintiff filed a 15-paragraph complaint in this Court. Without identifying a particular cause of action, plaintiff asserts that this Court should issue an order "requiring the State of Michigan to accept the Doubt as to Liability, Offer in Compromise . . . ." In lieu of filing an answer, defendant moved this Court for summary disposition, contending that judicial review is barred by MCL 205.23a(9).

II. ANALYSIS

The Revenue Act, MCL 205.22(1), provides that a taxpayer "aggrieved by an assessment, decision, or order of the department 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." An assessment "is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment . . . ." MCL 205.22(5). And an assessment 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." MCL 205.22(4) (emphasis added).

Here, the deadline expired for plaintiff to challenge the underlying assessment, meaning that the statutory prohibition on challenging the assessment applies and forecloses any such challenge. However, while plaintiff may not challenge the assessment, a taxpayer in plaintiff's

position has one remaining option. Plaintiff may, as it did in this case, submit an offer-in-compromise. While the Department is generally prohibited from compromising tax liability, see MCL 205.28(1)(e), the Legislature has expressly given taxpayers the ability to submit offers-in-compromise under MCL 205.23a. Pursuant to MCL 205.23a(1), the state treasurer, or authorized representative, in pertinent part:

> *may compromise all or any part of any payment of a tax subject to administration under this act* including any related penalties and interest if 1 or more of the following grounds exist:
>
> (a) A doubt exists as to liability if the department concludes, based on evidence provided by the taxpayer, that the taxpayer would have prevailed in a contested case if the taxpayer's appeal rights had not expired.
>
> (b) A doubt exists as to collectability if the taxpayer establishes both of the following:
>
> (*i*) The amount offered in payment is the most that can be expected to be paid or collected from the taxpayer's present assets or income.
>
> (*ii*) The taxpayer does not have reasonable prospects of acquiring increased income or assets that would enable the taxpayer to satisfy a greater amount of the liability than the amount offered, within a reasonable period of time. [Emphasis added.]

If an offer is rejected, a taxpayer may seek review by what the statute refers to as "independent administrative review" within the Department, subject to guidelines established by the state treasurer. MCL 205.23a(4)(c). However, the statute precludes all other forms of review. See MCL 205.23a(6); MCL 205.23a(9). In particular, MCL 205.23a(9) states that "Except for the independent administrative review available as provided under subsection (4)(c), a rejection of an offer to compromise, in whole or in part, *is final and is not subject to further challenge or appeal under this act*." (Emphasis added).

Plaintiff's attempt at obtaining judicial review of its rejected offer-in-compromise is plainly barred by MCL 205.23a(9). The statute unequivocally bars plaintiff from utilizing the method of seeking judicial review available "under this act," i.e., the method set out in MCL 205.22(1) for challenging an assessment. The unambiguous language of MCL 205.23a(9) bars plaintiff's attempt at securing judicial review, and the statute must be enforced as it is written. See *Wilcoxon v Detroit Election Comm*, 301 Mich App 619, 631; 838 NW2d 183 (2013) ("If the language of the statute is plain and unambiguous, effect must be given to the words used, and judicial construction is neither necessary nor permitted.").

Plaintiff argues that this Court should not give effect to MCL 205.23a(9) because the statute conflicts with MCL 205.22(1)'s allowance of judicial review, and that MCL 205.22(1) should prevail in this conflict. Here, MCL 205.22(1) and MCL 205.23a(9), to an extent, involve the same subject matter—taxation and review of Department determinations. As a result, the Court is to construe the statutes so as to avoid a conflict, if possible. *Van Buren Co Ed Ass'n v Decatur Pub Schs*, 309 Mich App 630, 643, 643; 872 NW2d 710 (2015). And contrary to plaintiff's assertion, the two statutes do not conflict with each other. MCL 205.22(1) generally states the timeframes for taxpayers to seek appeals from decisions, assessments, or orders of the Department. MCL 205.23a(9), meanwhile, exempts from further review a decision by the Department to uphold the denial of an offer-in-compromise. Stated otherwise, MCL 205.23a(9) merely effectuates an exception to the general rule for one category of decision. And this is for good reason, too, because a taxpayer who has submitted an offer-in-compromise has already had the opportunity to challenge the underlying assessment. MCL 205.22(4) precludes further challenge to that assessment. Allowing review of the decision to deny an offer-in-compromise under MCL 205.22(1) would require, to some extent, judicial review of the validity of the

assessment. Hence, adopting plaintiff's position and permitting judicial review of the rejection of an offer-in-compromise would run afoul of the prohibition in MCL 205.22(4) and would fail to read MCL 205.22 as a cohesive whole. See *Robinson v Lansing*, 486 Mich 1, 15-16; 782 NW2d 171 (2010) (statutes are to be read in context with effect given to the entire act). The Court will therefore construe MCL 205.23a(9) as effectuating an exception to the general rule established in MCL 205.22(1).

Plaintiff's next attempt at avoiding the bar to judicial review under MCL 205.23a(9) is to argue that the statute only prohibits "further challenge or appeal *under this act*," i.e., under the Revenue Act, and it does not prohibit judicial review under another statute, such as the APA. The Court rejects this argument. Under the APA, a person who has exhausted all administrative remedies "and is aggrieved by a final decision or order *in a contested case*" is permitted to seek "direct review by the courts as provided by law." MCL 24.301 (emphasis added). A "contested case" under the APA "means a proceeding . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency *after an opportunity for an evidentiary hearing*." MCL 24.203(3) (emphasis added). Unless an evidentiary hearing is required by law, the proceeding is not a "contested case" and the APA does not apply. *In re Parole of Elias*, 294 Mich App 507, 537 n 24; 811 NW2d 541 (2011); *Hopkins v Mich Parole Bd*, 237 Mich App 629, 638; 604 NW2d 686 (1999). In this case, plaintiff cannot point to any authority authorizing a hearing regarding an offer-in-compromise. Neither MCL 205.23a nor the Department's published guidelines provide for the right to a hearing. Because no hearing is involved, the APA does not apply, and plaintiff's attempt to

circumvent the ban in MCL 205.23a(9) by claiming a right to appeal under the APA is meritless.[1]

Plaintiff's final attempt to avoid the effect of MCL 205.23a(9) is to argue that, if the statute prohibits review of the rejection of an offer-in-compromise, the statute is unconstitutional. According to plaintiff, all final agency decisions must be subject to review under Const 1963, art 6, § 28, and MCL 205.23a(9) cannot contravene the mandates of the Constitution. At the outset, the Court notes that plaintiff's complaint is inadequate because it never pled nor referenced a particular cause of action, let alone did it mention or reference art 6, § 28.

Additionally, the Court rejects plaintiff's assertion of a constitutional infirmity. On this point, the Court must begin its analysis with the understanding that "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). The provision of the Constitution at issue in this case, art 6, § 28, provides for judicial review of agency decisions, specifying in pertinent part that:

> *All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law.* [Emphasis added.]

While art 6, § 28 generally provides for judicial review, it "is not an absolute guarantee of judicial review of every administrative decision." *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 91; 803 NW2d 674 (2011). In order for art 6, § 28 to apply,

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[1] Furthermore, as the Department notes, this Court would lack jurisdiction over an APA appeal. *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557, 567-568; 884 NW2d 799 (2015).

"(1) the administrative decision must be a 'final decision' of an administrative agency, (2) the agency must have acted in a 'judicial or quasi-judicial' capacity, and (3) the decision must affect private rights or licenses." *Id.*

Assuming without deciding that the first two prongs of the test can be satisfied, the Court will focus its analysis on whether the decision rendered under MCL 205.23a affects private rights. *Black's Law Dictionary* (10th ed) defines a private right "as a personal right, as opposed to a right of the public or the state." See also *Midland Cogeneration Venture Ltd*, 489 Mich at 93 (invoking the same definition to ascertain the meaning of art 6, § 28). A "public right," which is not within the realm of art 6, § 28, is defined as "[a] right belonging to all citizens" and which is ordinarily "vested in and exercised by a public office or a political entity." *Black's Law Dictionary* (10th ed).

Given these understandings, plaintiff's claim to judicial review under art 6, § 28 fails because the decision to decline to accept an offer-in-compromise under MCL 205.23a does not affect private rights. In short, there are no "private rights" at stake under MCL 205.23a for the reason that the taxpayer's rights, i.e., the validity of the assessment, have already been determined and they are not subject to further appeal or review. In addition, the only decision to be made under MCL 205.23a involves whether the Department will exercise its right to compromise liability.

With respect to the first point above, the Court notes that the taxpayer's private right regarding tax liability is *not*, and cannot be, at issue during the offer-in-compromise stage. The taxpayer's liability has been established conclusively and it is not subject to further review. See MCL 205.22(4). As to the second point, it is apparent that the only decision to be made under

MCL 205.23a involves the Department's rights. In that sense, when a taxpayer makes an offer-in-compromise, the Department has the right to continue to demand full payment of the assessment, or it can decide to waive that right. Stated otherwise, an offer-in-compromise is a request from a taxpayer to have the Department waive or relinquish the Department's right to collect this conclusively established amount. The Revenue Act makes this clear by generally forbidding the Department from accepting a compromise or settlement, except in limited circumstances where the Legislature, such as in MCL 205.23a, has vested in the Department the right to compromise liability. See MCL 205.28(1)(e). The only decision made under MCL 205.23a is one affecting a public right, i.e., one "vested in and exercised by a public office or political entity[.]" See *Black's Law Dictionary* (10th ed). Thus, the right at issue is not a private right, and art 6, § 28 does not entitle plaintiff to judicial review of the rejection of the offer-in-compromise. Plaintiff's claim of a constitutional infirmity fails. See *Morales v Parole Bd*, 260 Mich App 29, 39; 676 NW2d 221 (2002).

The above conclusion is reinforced by examining the remaining provisions of the offer-in-compromise statute. Namely, MCL 205.23a(5) requires the Department to inform the public and permit inspection when it accepts an offer-in-compromise. This subsection provides that the Department "shall disclose return information to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under this section relating to the liability for a tax imposed by this state." *Id.* That the public has a right to inspect any compromise made under the statute reinforces the idea that it is the right of the public at large which is at stake under the statute, rather than the rights of the taxpayer seeking compromise.

III. CONCLUSION

IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(8).

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

Dated: May 3, 2019

Colleen A. O'Brien, Judge
Court of Claims