

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SPE UTILITY CONTRACTORS, LLC,  
  
Petitioner-Appellant,

UNPUBLISHED  
June 25, 2013

v

DEPARTMENT OF TREASURY,  
  
Respondent-Appellee.

No. 310885  
Tax Tribunal  
LC No. 00-432073

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Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Petitioner SPE Utility Contractors, LLC appeals by right the Michigan Tax Tribunal (MTT) order denying its motion to amend, granting respondent Department of Treasury's motion to strike petitioner's first amended petition, granting respondent's motion for summary disposition, and dismissing petitioner's claim. Because we conclude that the MTT did not err by denying petitioner's request to amend or by dismissing petitioner's appeal, we affirm.

Petitioner's appeal concerns a final assessment issued by respondent on January 17, 2012. The assessment was issued after an audit, and states that petitioner owes use tax in the amount of \$163,562, plus a penalty of \$35,272 and interest. On February 6, 2012, petitioner petitioned the MTT for a reassessment of the assessed taxes. Petitioner disputed only \$76,246.20 of the tax deficiency, and conceded to owing the balance. However, petitioner did not pay the uncontested tax liability before petitioning the MTT for reassessment. On April 11, 2012, respondent moved for summary disposition pursuant to MCR 2.116(C)(4), arguing that the MTT could not hear the case because it lacked jurisdiction as a result of petitioner's failure to pay the undisputed taxes under MCL 205.22(1). Petitioner filed an amended petition, dated April 18, 2012, in which it disputed all of the assessed tax liability; however, the amended petition was not accepted because it did not comply with the MTT's procedural rules.<sup>1</sup> Petitioner thereafter moved for

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<sup>1</sup> Mich Admin Code, R 205.1225(2) provides that a party may amend or supplement pleadings as provided by the act or by leave of the MTT. The act does not permit petitioner's supplemental pleadings, nor did petitioner obtain leave from the MTT. Mich Admin Code, R 205.1111(4) provides that the Michigan Court Rules govern proceedings when an applicable MTT rule does not exist.

leave to file an amended petition. In a written order entered on May 31, 2012, the MTT granted respondent's motion for summary disposition, denied petitioner's motion to submit an amended petition, struck the amended petition that was filed, and dismissed petitioner's petition because it concluded that petitioner "failed to invoke the jurisdiction of the Tribunal."

On appeal, petitioner first argues that the MTT erred by denying its motion to amend and by dismissing its petition. Specifically, petitioner argues that the MTT erred by concluding that it failed to invoke the MTT's jurisdiction because if the MTT had properly granted its motion to amend the petition, the relation-back doctrine would have cured the defect in its original petition.

When fraud is not alleged, we review a decision of the MTT to determine "whether the tribunal committed an error of law or applied the wrong legal principles." *AERC of Mich, LLC v Grand Rapids*, 266 Mich App 717, 722; 702 NW2d 692 (2005). We will uphold the MTT's factual findings if there is competent, material, and substantial evidence to support the findings, but issues of statutory interpretation are reviewed de novo. *Wexford Med Group v Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). We will "not reverse a tribunal's decision to deny a party leave to amend a petition unless the decision constituted an abuse of discretion." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 447; 716 NW2d 247 (2006). An abuse of discretion occurs when the decision results in an outcome falling outside the range of reasonable and principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009).

"[A] motion to amend should be granted unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory tactics, (3) repeated failure to cure deficiencies by amendment previously allowed, (4) undue prejudice to the opposing party, or (5) futility." *Ford Motor Co*, 475 Mich at 447, citing *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241(2000).

Appeals to the MTT are governed by MCL 205.22(1), which provides in pertinent part: "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 35 days . . . after the assessment, decision, or order," and "[t]he uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal."

In *Toaz v Dep't of Treasury*, 280 Mich App 457, 462; 760 NW2d 325 (2008), this Court interpreted MCL 205.22(1), and concluded that "the statutory phrase 'uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal' is susceptible to only one reasonable interpretation"; namely that "[a]n aggrieved taxpayer must actually discharge the uncontested tax debt, by full payment, before appealing the contested portion of the tax assessment." Applying this holding, this Court further concluded that only full compliance with this precondition to the filing of a petition will "invoke the Tax Tribunal's jurisdiction." *Id.* Thus, *Toaz* stands for the proposition that the MTT cannot exercise its jurisdiction over an appeal until any uncontested tax liability is paid.

In this case, it is not disputed that petitioner failed to pay any of its assessed tax liability despite the fact that its first petition clearly stated that some of the assessed tax liability was conceded. Ordinarily, failure to fully pay the conceded tax liability would preclude the MTT

from invoking its jurisdiction over petitioner's appeal because the prerequisite to appeal was not satisfied. However, when faced with a motion for summary disposition on this ground, petitioner responded by filing a motion to amend its petition to deny any liability for the disputed assessment, contrary to its concession of some tax liability in the original petition. On the basis of this amended petition, petitioner claimed that respondent's motion to dismiss was now meritless because no tax liability was conceded and the amended petition related back to the filing date of the original petition. The MTT denied petitioner's motion to amend, finding that it was futile and was made in bad faith, and granted respondent's motion to dismiss. Consequently, the issue before us is whether the MTT's denial of petitioner's motion to amend for these reasons was proper.

Regarding futility, we initially note that by the time petitioner sought to amend its original petition to bring it into conformity with the requirement that uncontested liability be paid as a prerequisite to appeal, more than 35 days had elapsed since the assessment; thus, the newly amended petition would not be timely unless the relation-back doctrine cured the defect.

MCR 2.118(D), which sets forth the relation-back doctrine, provides in pertinent part:

An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

Applying the plain language of the court rule, *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011), the relation-back doctrine prevents the statute of limitations from barring later added claims or defenses that arise out of the conduct, transaction, or occurrence set forth in an original pleading or that the original pleading attempted to set forth. MCR 2.118(D). In this case, petitioner did not request to add a claim or defense. Rather, the proposed amendment sought to alter the substance of the petition by changing the original averment that a portion of the tax liability was conceded to one contesting all of the assessed tax liability. Moreover, in its brief in support of the motion to amend the petition, petitioner acknowledges that it "made a mistake in the original pleading," and that it is seeking to amend the petition to avoid summary disposition. Because the amended petition completely altered the substance of the original petition in order to correct a mistake, it does not fall within the plain language of MCR 2.118(D). Consequently, the relation-back doctrine is inapplicable and petitioner's proposed amendment was a futile response to respondent's motion to dismiss for failure to comply with prerequisite condition of MCL 205.22(1). Therefore, we affirm the tribunal's dismissal of petitioner's appeal.<sup>2</sup>

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<sup>2</sup> While we need not reach the issue whether petitioner's request was also in bad faith, we also note that the evidence supports the trial court's finding of bad faith because it is clear from the record that petitioner's request to amend was primarily motivated by its desire to avoid summary disposition without regard to the merit of its proposed amendment.

Petitioner also argues that MCL 205.22(1) is an unconstitutional deprivation of its right to due process provided by the United States and Michigan Constitutions. Petitioner raised this issue in a motion for reconsideration that the MTT ruled on after petitioner filed its claim of appeal. Because the issue was not raised before and addressed by the MTT and, thus, not properly preserved for appeal, we need not address it. *Toaz*, 280 Mich App at 463. Nevertheless, petitioner's argument is without merit. The United States Supreme Court has held that a state may condition the right to a hearing on a taxpayer's prepayment of taxes. *McKesson Corp v Div of Alcoholic Beverages & Tobacco*, 496 US 18, 36-37; 110 S Ct 2238; 110 L Ed 2d 17 (1990).

Affirmed.

/s/ Mark T. Boonstra  
/s/ Henry William Saad  
/s/ Joel P. Hoekstra