

STATE OF MICHIGAN
COURT OF APPEALS

BILLIE PARKER, JR.,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

April 23, 2009

No. 282427

Wayne Circuit Court

LC No. 07-703449-CZ

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals by right from a circuit court order granting summary disposition for defendant, the city of Detroit (“the city”), pursuant to MCR 2.116(C)(4). We affirm.

This action involves a garbage tax levied on commercial and industrial property located in the city of Detroit. Plaintiff, an individual who pays property taxes on commercial property located in the city, is charged an annual garbage tax in the amount of \$2.9928 for each thousand dollars of ad valorem property valuation for the collection of solid waste pursuant to MCL 123.261. In addition to this tax, plaintiff must pay a user fee to the city for the collection of solid waste from his establishment or hire an outside contractor to collect the solid waste. Plaintiff filed this action against the city, alleging that it cannot assess both a garbage tax and a user fee for the same purpose. Plaintiff also alleged that residential properties not classified as commercial establishments are not subject to the garbage tax, creating an impermissible classification under the Equal Protection Clause of the Michigan Constitution. He further asserted that the city is misusing the garbage tax revenue by not using the funds for the collection of commercial and industrial solid waste. The circuit court determined that plaintiff’s action was within the exclusive jurisdiction of the Michigan Tax Tribunal (“MTT”) and, accordingly, granted the city’s motion for summary disposition pursuant to MCR 2.116(C)(4).

We review de novo a trial court’s decision on a motion for summary disposition. *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). A motion for summary disposition under MCR 2.116(C)(4) is properly granted if “[t]he court lacks jurisdiction of the subject matter.” “When reviewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact.” *Bock v Gen Motors Corp*, 247 Mich App 705, 710; 637 NW2d 825 (2001). Further, whether a lower court or tribunal has subject-matter jurisdiction is a question of law that this Court reviews

de novo on appeal. *Calabrese v Tendercare of Michigan, Inc*, 262 Mich App 256, 259; 685 NW2d 313 (2004).

The MTT has original and exclusive jurisdiction over certain matters relating to property taxes. *Beattie v East China Twp*, 157 Mich App 27, 32-33; 403 NW2d 490 (1987). The MTT's jurisdiction is set forth in MCL 205.731, which, at all times relevant to this dispute, provided:

The tribunal's exclusive and original jurisdiction shall be:

(a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, *under property tax laws*.

(b) A proceeding for refund or redetermination of a tax *under the property tax laws*.^[1] [Emphasis added.]

Plaintiff argues that the garbage tax is a special tax levied under the state's police power and, as such, it does not fall under the general property tax laws; therefore, jurisdiction is not proper in the MTT.²

In *Wikman v City of Novi*, 413 Mich 617, 635-636; 322 NW2d 103 (1982), our Supreme Court discussed special assessments under the state's general authority to tax versus special assessments under the state's police power. The Court stated:

In contrast to these special assessments which are levied under the taxing power, some special assessments are clearly not related to property taxes. Such special assessment are exacted through the state's police power as part of the government's efforts to protect society's health and welfare.^[3] Also, special assessments may be collected in connection with a regulatory program to defray the cost of such regulation[.] Such assessments are not ones under the property tax laws and are not within the jurisdiction of the Tax Tribunal.

¹ 2008 PA 125 amended MCL 205.731, effective May 9, 2008, after the circuit court granted summary disposition for the city. The amendment does not apply to this appeal because statutory amendments "are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Tobin v Providence Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001).

² Although the city contends that this issue is not preserved for appellate review because it was not addressed below, appellate consideration of issues raised but not addressed is not precluded where the lower court record provides the necessary facts. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

³ Courts have defined the state's "police power" "as including 'protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public, or any substantial part of the public.'" *Hecht v Niles Twp*, 173 Mich App 453, 460; 434 NW2d 156 (1988), quoting *Cady v Detroit*, 289 Mich 499, 504-505; 286 NW 805 (1939).

However, special assessments levied against property owners for public improvements to realty which especially benefit their property are special assessments under the property tax laws for the purposes of the Tax Tribunal Act. [*Id.* (internal citations omitted).]

Plaintiff relies on *Beattie, supra*, to argue that the garbage assessment is a tax levied under the state's police power. *Beattie* involved a property tax exemption created under § 13 of the Michigan Energy Employment Act, MCL 460.813, which MCL 460.813 provides:

To the extent of ownership by governmental units or joint agencies, projects undertaken pursuant to joint venture agreements authorized by article 2 or joint agency agreements authorized by article 3 of this act are exempt from assessment, collection, and levy of general or special taxes of the state or its political subdivisions. Income produced from municipal ownership in a joint venture or a joint agency shall be exempt from taxation by the state or its political subdivisions. A joint agency corporation formed under article 3 shall not be required to pay taxes upon its income, existence, or franchise. The bonds and notes issued by a municipality in a joint venture agreement or a joint agency corporation, their transfer and the income therefrom, including a profit made on the sale of the bonds or notes, shall be exempt from taxation within this state.

This Court determined that the MTT had jurisdiction over the dispute in *Beattie*, opining:

The underlying issue here is whether the property tax exemption created under § 13 of the Michigan Energy Employment Act was intended by the Legislature to apply where the joint venture agreement negotiated under the act allows the utility full possession, control and use of the facilities in its production of energy. It is readily apparent that this case involves interpretation of the energy act, and not a tax statute. The state's police powers are invoked where legislation is enacted for the purpose of protecting society's health and welfare. *Wikman v Novi, supra*, p. 635. Since the Michigan Energy Employment Act was enacted in an attempt to promote the citizenry's welfare with regard to energy production and use, the property tax exemption created under § 13 of that act does not constitute a property tax law and thus does not fall within the original exclusive jurisdiction of the Tax Tribunal. Jurisdiction thus lies with the circuit court. [*Beattie, supra* at 34-35 (footnotes omitted).]

Therefore, *Beattie* did not involve a statute authorizing the assessment or levy of a tax on real property. Rather, *Beattie* considered whether the tax exemption provided in § 13 applied under the particular circumstances of that case.

Unlike the tax exemption at issue in *Beattie*, the instant case involves a special assessment levied under MCL 123.261 for the establishment and maintenance of garbage disposal systems or plants for the collection of garbage. MCL 123.261 provides:

(1) The city council of a city, whether organized under the general law or special charter, or the president and board of trustees of a village may establish and maintain garbage systems or plants for the collection and disposal of garbage

in the city or village, and may levy a tax not to exceed 3 mills on the taxable value of all taxable property in the city or village according to the valuation of the property, as made for the purpose of state and county taxation by the last assessment in the city or village for these purposes. The annual garbage tax shall be in addition to the amount authorized to be levied for general purposes by the general law or special charter under which the city or village is incorporated. All cities or villages may, for the construction of a garbage disposal plant or system, issue bonds in a sum not to exceed 3 mills on the dollar on all taxable property in the city or village according to the valuation of the property, as made for the purpose of state and county taxation by the last assessment in the city or village. Bonds issued under this section are subject to the revised municipal finance act, 2001 PA 34, MCL 141.2101 to 141.2821.

(2) As used in this act, “garbage” means any putrescible and nonputrescible solid wastes, except body wastes, and includes

MCL 123.261 specifically provides for the levying of a garbage tax based on the taxable value of real property. Accordingly, the garbage tax is authorized under property tax laws.

This Court reached this same conclusion in *Colonial Village Townhouse Coop v City of Riverview*, 142 Mich App 474; 370 NW2d 25 (1985). In that case, the plaintiff paid taxes pursuant to MCL 123.261, but the defendant city refused to pick up trash from retail and commercial businesses and apartment buildings. *Id.* at 475-476. The plaintiff filed suit seeking monetary damages in the circuit court. *Id.* at 476. This Court stated that the tax was levied under the property tax laws:

As noted earlier, the Tax Tribunal has exclusive jurisdiction over orders “relating to assessment * * * under property tax laws”. Thus, whether or not a city may assess an ad valorem garbage tax and not collect the garbage from certain described property owners is a question over which the Tax Tribunal is given exclusive jurisdiction. [*Id.* at 477.]

Thus, this Court’s decision in *Colonial Village Townhouse Coop* is consistent with our conclusion that taxes levied under MCL 123.261 are levied under property tax laws. So, jurisdiction over issues stated in MCL 205.731 regarding such taxes lies with the MTT.

Plaintiff next argues that because the determination regarding which taxpayers upon whom to levy the garbage tax is not a matter concerning assessments, valuation, rates, allocation, or equalization, jurisdiction is not proper in the MTT under MCL 205.731(a). He also contends that the terms “assessment,” “valuation,” and “levy” are not synonymous and may not be used interchangeably. He further argues that although MCL 123.261 provides a city or village the authority to “levy” a tax, MCL 205.731 does not provide the MTT authority to review a determination relating to the levying of a tax. We hold that regardless of whether the garbage tax

is considered a “special assessment” or a general tax levied under the property tax laws, jurisdiction is proper in the MTT.⁴

As previously stated, MCL 205.731(a) grants the MTT exclusive and original jurisdiction to review “[a] proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws.” Our Supreme Court has recognized that the terms “assessment” and “special assessment” in this provision have different meanings.

In the context of taxation, the word “assessment” denotes the determination of the share of the tax to be paid by each taxpayer[.] For the purpose of collecting *ad valorem* taxes, or taxes based on the value of property, the word “assessment” means the determination of the value of property for tax purposes, MCL 211.10; MSA 7.10.

MCL 205.731(a); MSA 7.650(31)(a) also expressly grants the Tax Tribunal jurisdiction over decisions relating to special assessments. These special assessments are different from the assessment decisions discussed above. Special assessments are not special procedures for determining the value of property for tax purposes. The words “special assessments” refer to pecuniary exactions made by the government for a special purpose or local improvement, apportioned according to the benefits received[.] [*Wikman, supra* at 632-633 (citations omitted).]

Thus, the term “special assessment” does not refer to a determination regarding the valuation of property.

Although a special assessment may resemble a tax, a special assessment is not a tax. *Niles Twp v Berrien Co Bd of Comm’rs*, 261 Mich App 308, 323; 683 NW2d 148 (2004). “While the purpose of a tax is to raise revenue for general governmental purposes, the purpose of a special assessment is to defray the costs of specific local improvements.” *Id.* “The differences between a special assessment and a tax are that (1) a special assessment can be levied only on land; (2) a special assessment cannot . . . be made a personal liability of the person assessed; (3) a special assessment is based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality.” *Id.* at 323-324 (quotation marks and citations omitted). Further, the amount of a special assessment generally bears a reasonably proportionate relationship to the benefit that accrues to the property assessed. *Id.* at 324.

Niles Twp involved two special assessments for fire protection under MCL 41.801. *Niles Twp, supra* at 309-312. In determining whether the special assessments constituted special

⁴ We note courts often use the terms “assessment” and “levy” interchangeably. In addition, it appears that plaintiff’s use of the terms “special tax” and “special garbage tax” in his brief on appeal is a tacit admission that the garbage tax at issue in this case qualifies as a special assessment.

assessments or general ad valorem taxes, this Court opined that using a property's value to determine the benefit accrued does not convert a special assessment into a tax. *Id.* at 325. This Court further opined that a special assessment is not converted into a tax merely because the assessment is levied upon all real property within the township. This Court held that "the Legislature intended that townships be authorized to finance fire department general operations through special assessment[.]" *Id.*

The garbage tax in this case arguably constitutes a special assessment because, pursuant to the language of MCL 123.261, the "tax" is for the establishment and maintenance of garbage systems or plants for the collection and disposal of garbage within the city. This purpose constitutes a specific local improvement. Although the statute uses the term "tax" rather than "special assessment," it also states that "[t]he annual garbage tax shall be in addition to the amount authorized to be levied for general purposes by the general law or special charter under which the city or village is incorporated." Thus, this sentence makes clear that the garbage tax is not being levied as a general property tax, but rather as a special assessment in addition to the general property tax. If the garbage tax were itself a general property tax, then this language would be rendered nugatory. Courts should avoid a statutory interpretation that renders nugatory any part of a statute. *Niles Twp, supra* at 320. Further, it is irrelevant that the garbage tax is based on a property's valuation. *Id.* at 325. Therefore, we conclude that the garbage tax constitutes a special assessment and jurisdiction is therefore proper in the MTT because this proceeding reviews a determination of a special assessment under the property tax laws of this state. MCL 205.731(a).

In any event, even if the garbage tax were considered a general tax rather than a special assessment, jurisdiction is nevertheless proper in the MTT pursuant to MCL 205.731(b) because it provides that the MTT has original and exclusive jurisdiction over "[a] proceeding for a refund or redetermination of a tax levied under the property tax laws of this state." As previously discussed, whether considered a special assessment or a tax, the garbage tax is levied under the property tax laws of this state. Further, the relief plaintiff seeks in his second amended complaint properly may be characterized as a request for a refund or redetermination of taxes. In fact, plaintiff specifically requested that all garbage taxes collected under MCL 123.261 be returned to him. Accordingly, even if the garbage tax were considered a general property tax rather than a special assessment, jurisdiction is proper in the MTT under MCL 205.731(b).

Plaintiff further argues that he raises a constitutional equal protection claim which the MTT has no jurisdiction to hear. He argues that his equal protection guarantees are violated because the garbage tax is levied only on commercial and industrial property and not on all taxable property, creating an impermissible classification.

The MTT "does not have jurisdiction over constitutional questions and has no authority to hold statutes invalid." *WPW Acquisition Co v City of Troy (On Remand)*, 254 Mich App 6, 8; 656 NW2d 881 (2002). Here, plaintiff is not alleging that MCL 123.261 is invalid, but rather, that it is being applied to create an impermissible classification. The MTT has jurisdiction over such a claim. As plaintiff alleges in his second amended complaint, MCL 123.261 provides that the city may levy the garbage tax on the taxable value of *all* taxable property in the city. Plaintiff takes issue with the fact that the city is levying the garbage tax against only certain taxable property rather than all taxable property in contravention of MCL 123.261. Therefore, although plaintiff having phrased his claim in constitutional terms, he is essentially claiming that the city

failed to abide by the statute enabling the levying of the garbage tax. As such, jurisdiction is proper with the MTT. See *Johnston v City of Livonia*, 177 Mich App 200, 207-208; 441 NW2d 41 (1989) (“any claim alleged by plaintiff that defendants failed to follow a statutory procedure for assessment falls within the scope of the tribunal’s jurisdiction as set forth in MCL 205.731; MSA 7.650(31) and should have been brought in that forum”). The mere fact that plaintiff couched his allegations in constitutional terms does not render jurisdiction proper in the circuit court. *Id.* at 208.

Plaintiff next argues that his second amended complaint is not a proceeding for a refund under the general property tax laws; it is a proceeding for a refund of taxes paid under the state’s police power. As previously discussed, whether considered a special assessment or a general tax, the garbage tax was levied under the property tax laws. Plaintiff’s argument that the tax was paid under the state’s police power lacks merit.

Finally, plaintiff argues that the city *may* be using the revenue generated from the garbage tax for illegal purposes. In his second amended complaint, plaintiff alleged that the city is not using the revenue generated by the garbage tax for the collection of commercial and industrial solid waste because commercial and industrial establishments must pay the city a user fee in addition to the garbage tax for the pickup of such waste from commercial and industrial establishments or contract with an independent contractor for the pickup of such waste. The trial court correctly determined that this argument does not remove this case from the purview of the MTT. As in *Colonial Village Townhouse Coop*, *supra* at 477, plaintiff is arguing that despite his payment of the garbage tax, the city refuses to collect solid waste from his establishment. As this Court determined in that case, the MTT has exclusive jurisdiction to resolve this issue. *Id.*

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher