

STATE OF MICHIGAN
COURT OF CLAIMS

ALLY BANK,

Plaintiff,

v

NICK A. KHOURI, STATE OF MICHIGAN, and
DEPARTMENT OF TREASURY,

Defendants.
_____ /

OPINION AND ORDER

Case No. 17-000300-MT

Hon. Colleen A. O'Brien

Pending before the Court are defendants' motions for summary disposition, as well as plaintiff's motion for partial summary disposition. Having reviewed the parties' submissions, defendants' motions are GRANTED and plaintiff's competing motion is DENIED.

I. BACKGROUND

Plaintiff (Ally Bank), which offers financing to consumers on automobile purchases, is seeking a refund of sales tax paid on bad debts under MCL 205.54i, the bad-debt statute. In December 2014, Ally Bank's representative sent the Department a one-paragraph letter in which it sought a refund under the bad-debt statute in the amount of \$329,315 for the period of July 1, 2010 through December 31, 2013. Ally Bank did not attach any documentation to the letter.

By way of an August 26, 2015 letter, the Department responded and asked Ally Bank to support its refund request with the following documentation: (1) written election forms indicating that Ally Bank, rather than the pertinent automobile dealers, was permitted to claim a

refund under the bad-debt statute; (2) evidence, such as validated RD-108 forms,¹ indicating that sales tax was paid in this state for each account at issue; (3) documentation to establish the amount claimed on each account; (4) documentation to substantiate that the accounts at issue were found to be worthless and written off as such; (5) documentation showing adjustments were made for repossessed property.

In response, Ally Bank submitted a lengthy spreadsheet prepared by a third party and which contained information related to the 886 customer accounts that made up its refund claim. Ally Bank obtained the information from what its briefing refers to as its “data warehouse” or “information warehouse.” The spreadsheet contained a variety of information about customer accounts which have purportedly been written off as uncollectible, and it includes calculations and estimates² regarding, among other matters, the amount of sales tax paid on the automobiles. The spreadsheet also indicates the year and month Ally Bank purported to charge off an account as uncollectible.

In August 2017, the Department issued a partial refund to Ally Bank in the amount of \$420.96 and denied the remainder of the bad-debt deduction claim. Citing MCL 205.54i(4), which grants the Department discretion to request supporting evidence for a bad-debt deduction claim, the Department stated that Ally Bank failed to provide the requisite evidence.

¹ An RD-108 form is used by automobile dealers and is submitted to the Secretary of State along with sales tax due in exchange for a vehicle title and a validated copy of the form. *Ally Fin Inc v State Treasurer*, 502 Mich 484, 489-490; 918 NW2d 662 (2018).

² At deposition, the employee who prepared the spreadsheet gave testimony regarding how she arrived at the figures contained in the spreadsheet. Notably, she testified that she arrived at a figure which estimated the amount of sales tax paid, and acknowledged that oftentimes this figure was different from the amount of sales tax paid on some of the RD-108 forms submitted to the Secretary of State that purported to show the actual amount of sales tax paid.

Ally Bank initiated this action in November 2017 and challenged the partial refund denial.³ During the course of discovery, Ally Bank submitted documentation, at the Department's request, in an attempt to demonstrate that the accounts at issue had in fact been written off as uncollectible. It did so by submitting federal income tax documents: IRS Form 1120's, to be precise. These forms list amounts claimed by "Ally Financial, Inc. and its Subsidiaries"—which includes Ally Bank—as bad debts from 2010-2013. The amounts are company-wide, total in the hundreds of millions or greater, and they do not specify whether Ally Bank or some other, related entity claimed the bad debts. The bad debts are not broken down by geographic location, i.e., whether they were taken in this state or some other state. At deposition, Jason Binando, an employee of Ally Financial's Sales and Use Tax division, testified that he did not obtain a breakdown of the bad-debt deduction by state, but he was "sure that number can be gotten." Binando also testified that the bad-debt amounts listed on the Form 1120 included bad debts originating from retail sales as well as from lease agreements on which customers defaulted.

II. SUMMARY DISPOSITION

The first motion before the Court is defendant State of Michigan (the State)'s motion for summary disposition pursuant to MCR 2.116(C)(8). In short, the State argues Ally Bank failed to state a claim against it because it is not a proper party to a lawsuit seeking a tax refund under the Revenue Act, and because Ally Bank failed to assert any meaningful allegations against it. The Court agrees that the State is entitled to summary disposition under MCR 2.116(C)(8), as a

³ Ally Bank initially sought refund in the amount of \$328,894.04. Now, after re-calculating certain figures and eliminating some accounts, the amount Ally Bank seeks in this refund claim is \$302,625.56.

review of the complaint reveals scarce—if any—allegations against the State. See *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304-305; 788 NW2d 679 (2010) (discussing (C)(8) review, generally).

Turning to the Department and Khouri’s motion (Department’s motion) under MCR 2.116(C)(10), “[a] trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law.” *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich 1, 5; 890 NW2d 344 (2016).

Ally Bank is seeking a refund or deduction under the bad-debt statute, MCL 205.54i, which “permits retailers and lenders to seek a refund for sales tax paid on a ‘bad debt’ as defined by the statute.” *Ally Fin Inc v State Treasurer*, 502 Mich 484, 492; 918 NW2d 662 (2018). Because taxation is the rule and refunds or deductions are the exception, the taxpayer bears the burden of demonstrating entitlement to a refund or deduction. *Andrie Inc v Dep’t of Treasury*, 496 Mich 161, 171; 853 NW2d 310 (2014). When, as in this case, a taxpayer seeks a refund of sales taxes purportedly paid, the taxpayer’s burden extends to showing that sales tax was in fact paid; this burden is not relieved by the fact that a retail seller has a legal obligation to remit sales tax. *Id.* at 176 (“Although a retail seller has a legal obligation to remit sales tax . . . this does not mean that the tax necessarily was paid by the seller . . .”). Moreover, the bad-debt deduction statute expressly gives the Department discretion to determine the evidence that must be produced by a claimant. *Ally Fin*, 502 Mich at 504, citing MCL 205.54i(4) (specifying that “Any claim for a bad debt deduction under this section shall be supported by that evidence required by

the department.”). In *Ally Fin*, 502 Mich at 504, the Supreme Court held that the Department’s exercise of its discretion under MCL 205.54i(4) “will be upheld if supported by a rational basis.”

The first issue in this case is whether Ally Bank has supported its refund claim with “that evidence required by the department.” In particular, the Department demanded all or a portion of plaintiff’s own accounting records showing that the accounts at issue were charged off as uncollectible by plaintiff. Ally Bank has, by all accounts, not produced its own internal accounting records. Instead, Ally Bank has produced: (1) tax returns for its parent company and all subsidiaries; and (2) spreadsheets compiled by a third party. In accordance with *Ally Fin*, the issue in this case is whether the Department had a rational basis to demand additional accounting records to demonstrate that the accounts had, in fact, been written off as uncollectible.

In light of the documentation Ally Bank submitted to the Department, the Court concludes that the Department had a rational basis to request additional accounting records from Ally Bank, such that the Department is entitled to summary disposition. Turning first to the IRS Form 1120’s Ally Bank submitted, it must be noted that the forms were filed in the name of “Ally Financial Inc. & Subsidiaries,” meaning that they encompassed information for Ally Bank’s parent company and all subsidiaries, not just for Ally Bank. And, as the Department points out—and as admitted by Binando at deposition—the IRS forms do not include a breakdown of the source of the bad debts (e.g., whether the bad debts originated from retail installment contracts written off as uncollectible or from leases), nor do they provide any information as to where the contracts originated. And the lack of geographic location is significant, given that the taxpayer listed on the IRS forms, Ally Financial, conducts business across the country and it is not limited to Michigan. Nor do the IRS forms shed any light on whether the retail installment contracts that are the subject of Ally Bank’s refund claim in the

instant case were even included in the broad category of “bad debts” claimed on its parent company’s, i.e., Ally Financial, federal income tax returns. In sum, the IRS Form 1120’s simply do not establish that the accounts at issue were written off as uncollectible by Ally Bank. MCL 205.54i(2) specifies that, in order to obtain a refund under the bad-debt statute, the amount “deducted *must be charged off as uncollectible on the books and records of the taxpayer . . .*” (emphasis added). See also *Ally Fin*, 502 Mich at 507 (“In order to claim a bad-debt deduction or refund under the statute, the debt must have been charged off as uncollectible in the records of the entity claiming the deduction or refund.”). Here, documents showing what Ally Bank’s parent company claimed as bad-debt amounts, that may or may not correspond to the accounts at issue, falls short of showing that the accounts were written off by Ally Bank as uncollectible.

In addition to the income tax returns, the only other documents in the record that speak to whether Ally Bank charged off the accounts as uncollectible are the spreadsheets submitted in support of the refund claim. Column E on the spreadsheets purports to show a charge-off date, meaning the date that the accounts were written off by Ally Bank. However, the spreadsheets do not offer sufficient clarity. As an initial matter, the Department has demanded Ally Bank’s own accounting records, and the spreadsheets were prepared by a third-party in anticipation of Ally Bank’s pursuit of a refund claim, i.e., they were not what the Department requested. Moreover, it appears that some of the information in the spreadsheets was inaccurate, in the sense that the spreadsheets contained one or more customer accounts arising out of sales that occurred outside of this state and which were not subject to sales tax in this state. Further, although not entirely related to the charge-off date, the reliability of the spreadsheets was undermined by the numerous discrepancies (noted above) between the amounts listed for sales tax paid and the amount of sales tax purported to have been remitted on the available RD-108 forms. In light of

these inaccuracies and inconsistencies, the Department had reason to request additional information as proof that Ally Bank wrote off the accounts at issue as uncollectible on its own books and records. The best evidence of that was Ally Bank's own accounting records, but Ally Bank has not produced the same.

In light of the above, a rational basis exists to support the Department's decision to demand some form of Ally Bank's own accounting records. To that end, the IRS forms submitted are not even specific to this particular taxpayer, and they are too vague to substantiate that Ally Bank wrote off the accounts at issue as uncollectible. As for the spreadsheets, despite containing a purported "charge-off" date, the spreadsheets are not records demonstrating that Ally Bank actually wrote the accounts off as worthless or uncollectible on its own accounting records. Again, MCL 205.54i(2) requires that the bad-debt amounts "must be charged off as uncollectible *on the books and records of the taxpayer*[".] See also *Ally Fin*, 502 Mich at 507. As defendants note, Ally Bank's accounting records would be the primary and best source of evidence to demonstrate that plaintiff had in fact charged off the accounts as uncollectible. And Ally Bank has not, despite requests, produced its own books and records. Moreover, Binando admitted in his deposition that more specific information concerning accounts that were written off could have been obtained by Ally Bank. Where that information could have been obtained, and where the information produced did not demonstrate that Ally Bank in fact wrote off the accounts at issue as uncollectible, the Department's discretionary decision to demand additional documentary evidence was supported by a rational basis. See *Ally Fin*, 502 Mich at 504-505.

In response to the Department's concerns about the lack of documentation, Ally Bank asserts that the Department has "no basis for challenging the accounting data provided by Ally Bank" because other taxing authorities have audited Ally Bank's "data warehouse" or

“information warehouse” and found it to be accurate. This contention is essentially non-responsive to the Department’s position. Consistent with the express authority granted to it by MCL 205.54i(4), the Department has asked Ally Bank for documentation to support its refund claim. In response, Ally Bank has replied that it need not comply with the Department’s requests, but that the Department should instead trust that the information Ally Bank chose to provide is sufficient. This response does not find solace in the pertinent authorities, which give the Department discretion to request documentation, see MCL 205.54i(4), and which place on the taxpayer the burden of demonstrating entitlement to a tax refund, see *Andrie*, 496 Mich at 171.

III. REMAINING ISSUES

Because the above discussion is sufficient to resolve the pending motions for summary disposition, the Court need not address the remaining issues raised in the parties’ briefing. However, the Court will note that it agrees with the Department’s contention regarding Ally Bank’s admission as it concerns Ally Bank’s failure to provide validated RD-108 forms. These forms are required for a valid refund claim, see *Ally Fin*, 502 Mich at 504-505, and Ally Bank offered an unequivocal—and binding—admission that it failed to produce them. In other words, Ally Bank admitted that grounds existed for the Department to deny the refund claim. Ally Bank cannot subsequently contradict or explain that admission. *Radtko v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 421; 551 NW2d 698 (1996). Ally Bank could have moved to amend or withdraw its unequivocal admission regarding its inability to produce the requisite documentation, see MCR 2.312(D)(1), but it failed to do so. Moreover, on the Court’s review of the forms subsequently submitted by Ally Bank, many of the forms are not validated. Ally Bank’s response to the lack of validated forms is to assert that it is attempting to obtain the

validated forms. For purposes of summary disposition review, a promise to find additional documentary evidence is insufficient. *Lowrey*, 500 Mich at 7-8. Moreover, because Ally Bank is seeking a tax refund, it bears the evidentiary burden of proving entitlement to the refund. See *Andrie*, 496 Mich at 171.

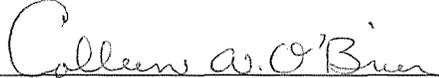
IV. CONCLUSION

IT IS HEREBY ORDERED that defendants' motions for summary disposition are GRANTED under MCR 2.116(C)(8) (as to the State) and under MCR 2.116(C)(10) (as to defendants Khouri and the Department).

IT IS HEREBY FURTHER ORDERED that plaintiff's motion for partial summary disposition is DENIED.

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

Dated: January 14, 2019



Colleen A. O'Brien, Judge
Court of Claims