STATE OF MICHIGAN

COURT OF CLAIMS

FEDERATED FINANCIAL CORPORATION OF AMERICA,

Plaintiff,

v

DEPARTMENT OF TREASURY,

Defendants.
_____/

OPINION AND ORDER

Case No. 16-000257-MT

Hon. Colleen A. O'Brien

Pending before the Court are the parties' competing motions for summary disposition. For the reasons articulated herein, defendant's motion is GRANTED pursuant to MCR 2.116(C)(7) and (C)(10), and plaintiff's motion for the same is DENIED.

In this case involving the validity of credits claimed on plaintiff's 2009 Michigan Business Tax (MBT) return, the parties dispute when plaintiff filed its return. Both parties claim that the limitations period warrants judgment in their respective favors. Their arguments are grounded in their positions regarding when plaintiff filed its 2009 MBT return. For instance, plaintiff cites the first sentence of MCL 205.27a(2), which provides that "[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." MCL 205.27a(2). Plaintiff, contending that it mailed its 2009 MBT return to defendant on November 15, 2010, posits that defendant had, in accordance with MCL 205.27a(2), four years from this date, the date plaintiff claims as having filed its return, to issue an assessment. And, according to

plaintiff, because defendant did not issue a final assessment concerning the 2009 MBT return until July 2016, the assessment is untimely and must be barred.

Taking a slightly different approach, defendant argues that plaintiff is barred from claiming any credits on its 2009 MBT return by operation of the statute of limitations. Defendant cites the second sentence of MCL 205.27a(2), which provides that "[a] taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set for the filing of the original return." MCL 205.27a(2).[1] The "date set for the filing of the original return" is established by MCL 208.1505(1), which provides that:

> An annual or final return shall be filed with the department in the form and content prescribed by the department by the last day of the fourth month after the end of the taxpayer's tax year. Any final liability shall be remitted by the last day of the fourth month after the end of the taxpayer's tax year.

Here, the "last day of the fourth month after the end of the taxpayer's tax year" for plaintiff's 2009 MBT return was April 30, 2010. Four years from this date was April 30, 2014. According to defendant, plaintiff had to claim the credits at issue by April 30, 2014. Defendant contends that plaintiff did not file its 2009 MBT return until December 2014, which is after the limitations period expired. This filing, argues defendant, came only after defendant informed plaintiff that another tax return had not been filed. Moreover, defendant has submitted documentary evidence indicating that it never received plaintiff's 2009 MBT return before December of 2014. Defendant argues that because plaintiff did not file its 2009 MBT return until after the expiration

[1] Although this sentence only mentions refunds, this provision applies to claiming credits as well as refunds. See MCL 205.30(2) (treating a claim for a credit in excess of taxes due as "a claim for a refund" and applying the four-year limitations period set forth in MCL 205.27a(2) to such a claim).

of the limitations period for claiming credits, it cannot claim the credits asserted in the 2009 MBT tax return.

Plaintiff claims that it has submitted sufficient documentary evidence to demonstrate that it mailed the 2009 MBT return on "November 15, 2010."[2] Caselaw recognizes a rebuttable presumption—sometimes referred to as the "mailbox rule"—that "items properly addressed and placed in the mail reach their destination." *Crawford v State*, 208 Mich App 117, 121; 527 NW2d 30 (1994). See also *Long Bell Lumber Co v Nyman*, 145 Mich 477, 482; 108 NW 1019 (1906). This presumption may be rebutted with evidence that the letter was not received. *Goodyear Tire & Rubber Co v City of Roseville*, 468 Mich 947, 947; 664 NW2d 751 (2003). The key to the presumption is that the item in question was *mailed* to the intended recipient. *Crawford*, 208 Mich App at 121. See also *Barstow v Fed Life Ins Co*, 259 Mich 125, 128-129; 242 NW 862 (1932). In *Good v DAIIE*, 67 Mich App 270, 275; 241 NW2d 71 (1976),[3] the Court of Appeals addressed whether evidence of a business custom could be used to establish that a letter or item had been mailed. In that case, the panel adopted what it deemed to be the minority view "that evidence of business custom or usage is sufficient to establish the fact of mailing without further testimony by an employee of compliance with the custom." *Id*. Thus, the Court

[2] As defendant points out, there is no documentary evidence in the record to support that the return was filed on the 15th of November. As will be discussed *infra*, plaintiff relies on supposition and speculation to posit that the return could have been filed *sometime* in November 2010, but plaintiff's documentary evidence fails to mention a specific date, let alone does it mention the 15th.

[3] Although the decision was published before November 1, 1990 and it is not binding on the Court of Appeals, it is binding on this Court. *Doe v Dep't of Transp*, __ Mich App __, __; __ NW2d __ (2018) (Docket No. 338999), slip op at 3 n 2. Moreover, the Supreme Court has cited *Good* for *Good's* recitation of the rule at issue in this case. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 304 n 8; 582 NW2d 776 (1998).

held "that upon proper evidence of business custom and habit of a commercial house as to addressing and mailing, the mere executing of the letter in the usual course of business rebuttably presumes subsequent receipt of the addressee." *Id*. at 276.

Here, plaintiff contends that it mailed its 2009 MBT return in November 2010 and attempts to rely on the mailbox rule to demonstrate that defendant received the return at that time. In support of plaintiff's position that it mailed the 2009 MBT return in 2010, plaintiff submitted two affidavits. The first is from plaintiff's tax professional, Bruce Kaye. Kaye averred at ¶ 6 of his affidavit that he printed plaintiff's 2009 MBT return on November 3, 2010, and that, in accordance with his usual practice, he "would have delivered" the return to plaintiff "within one or two days of that date." Gerard B. Jarboe, plaintiff's Corporate Controller and Vice President of Accounting, averred at ¶ 10 of his affidavit that, upon receipt of the return from Kaye, it was his regular practice to review the return and to obtain a signature for the return. Thereafter, it was Jarboe's "regular business practice to place the signed returns in a sealed envelope properly addressed to the appropriate taxing authority and then place the envelope with [plaintiff's] mail department." Further, Jarboe averred that it was the "regular practice of [plaintiff's] mail department for an employee with knowledge of the act to property [sic] weigh, apply the correct postage, and mail all envelopes transmitted to that department." Jarboe averred that tax returns "were reviewed, signed and mailed at or near the time of their receipt from Mr. Kaye."

On review of the record evidence, the Court concludes that plaintiff failed to submit sufficient, non-speculative evidence that the 2009 MBT return was submitted for mailing in November 2010. In this respect, plaintiff's documentary evidence is not lacking in regard to plaintiff's mailroom practices; rather, the lack of proof in this case occurs at an earlier stage, i.e.,

whether the return made it to the mailroom in the first instance. As a result, plaintiff's ordinary mailing practices, and the presumption created by the mailbox rule, do not become relevant. In this respect, Kaye merely postulated that he *would have* sent the 2009 MBT return to plaintiff. Kaye maintained that he "would have" sent the return shortly after printing it, but he never identified the date on which he sent it to plaintiff. Furthermore, Jarboe never expressly stated that he reviewed the particular return at issue or that he ever prepared the return for mailing. At best, he was able to posit that he thought he would have done so. Nor—although he made general averments regarding the timeframe it typically would have taken him to prepare a return for mailing—could Jarboe identify a particular date on which he would have submitted the 2009 MBT return to plaintiff's mailroom personnel. Based on these deficiencies, plaintiff's documentary evidence is too speculative with regard to whether the 2009 MBT return ever made it to the mailroom in November 2010 as plaintiff claims. See *Southfield Ed Ass'n v Southfield Pub Schs Bd of Ed*, 320 Mich App 353, 369; 909 NW2d 1 (2017) (citation and quotation marks omitted) ("[P]arties opposing summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact."). See also *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994) (explaining that a non-moving party's proofs must support reasonable inferences, "not mere speculation.").

In this respect, the Court of Appeals' decision in *Good*, 67 Mich App at 274-276, is distinguishable. In *Good*, there was no question that the letter at issue, an insurance cancellation notice, actually made it to the mailroom. In *Good*, the defendant, who was the party seeking to rely on the mailbox rule, sought to use the rule to establish that the plaintiff, who was the defendant's insured, received notice of cancellation. *Id.* at 272-273. In order to do so, the

defendant, although lacking copies of the notices sent to the plaintiff, detailed its office mailing procedures in regard to cancellation notices. *Id*. at 274. This process started with a computerized list of notices issued. *Id*. Notices generated from the list were taken to the defendant's mailroom and were "stuffed in picture window envelopes." *Id*. Then, the envelopes were counted and the number of notices on the list were compared; if the totals matched, the notices were mailed. *Id*. In light of such evidence, the Court of Appeals held that, although the record lacked evidence "by the employees who performed these functions as to whether they complied with office mailing procedure on the days in question[,]" the testimony of the normal procedures was nonetheless sufficient to establish that the letter(s) at issue were mailed and received. *Id*. at 274, 276.

Here, in contrast to *Good*, the evidence of whether the tax return ever made it to plaintiff's mailroom is simply too speculative. As a result, the presumption of the mailbox rule does not arise. Thus, the only non-speculative record evidence for the filing date of plaintiff's MBT return is the date asserted by defendant, i.e., December 15, 2014. Plaintiff's 2009 MBT return was due on April 30, 2010. See MCL 208.1505(1). Because December 15, 2014, is more than four years from the date the return was due, plaintiff was barred by operation of the statute of limitations from seeking the credits claimed on its 2009 MBT return. See MCL 205.27a(2); MCL 205.30(2). Accordingly, summary disposition in favor of defendant is warranted under MCR 2.116(C)(7).

The Court notes that, as an alternative to its statute of limitations argument, plaintiff contends that the doctrine of equitable recoupment would allow it to claim the credits at issue even if the limitations period expired. "Recoupment is a creature of the common law. It presents to the court an equitable reason why the amount payable to the plaintiff should be

reduced . . . ." *Mudge v Macomb Co*, 458 Mich 87, 107; 580 NW2d 845 (1998) (citation and quotation marks omitted; emphasis in *Mudge*). The doctrine typically arises in the context of a contractual obligation asserted by a plaintiff against a defendant. *Id*. Furthermore, "[t]he expiration of a limitations period does not prevent the defendant from raising a recoupment defense as long as the plaintiff's action is timely." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 695; 818 NW2d 410 (2012). Although the expiration of the statute of limitations will not bar a claim for recoupment, a party asserting the doctrine must still show that other party to the contract "did not comply with some cross obligation or legal duty . . . in order to seek recoupment." *Mudge*, 458 Mich at 108.

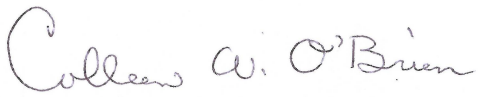
At the outset, plaintiff has not presented this Court with any Michigan authority declaring that the doctrine can be applied in a case such as this one. To that end, plaintiff is seeking to use the equitable doctrine of recoupment in order to claim credits that would otherwise be barred by the statute of limitations. In essence, plaintiff is seeking to use the doctrine as a sword in order to avoid the operation of the period of limitations. Ordinarily, the doctrine is available as a shield to a defendant who is being sued by a plaintiff in a contract action where the plaintiff owes a cross obligation to the defendant. Defendant is not suing plaintiff in order to collect a debt; rather, defendant issued a final assessment, and plaintiff is attempting to use the equitable defense of recoupment on the offensive in order to avoid operation of the limitations period. If this Court were to adopt plaintiff's argument, it could effectively render the period of limitations for claiming refunds or credits meaningless. For that reason alone, plaintiff's invocation of equitable recoupment should fail. Moreover, in order for the doctrine to apply, plaintiff has to show that defendant "did not comply with some cross obligation or legal duty" in order to seek recoupment. *Mudge*, 458 Mich at 108. Here, plaintiff has not established a preexisting debt or

obligation owed to it by defendant. Rather, plaintiff tried to create a debt by claiming entitlement to certain tax credits. Caselaw does not support invocation of the doctrine of recoupment in such a circumstance. Defendant is entitled to summary disposition on this claim under MCR 2.116(C)(10).

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(7) and (C)(10).

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

Dated: May 21, 2018



Colleen A. O'Brien, Judge
Court of Claims