# STATE OF MICHIGAN

# COURT OF CLAIMS

**FORD MOTOR COMPANY v MICHIGAN DEPARTMENT OF TREASURY**

Case No. **16-000216-MT** **Hon. Michael J. Talbot**

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## ORDER

At a session of said Court held,
Detroit, Wayne, Michigan, on
April 18, 2018.

Defendant having filed a motion for summary disposition pursuant to MCR 2.116(C)(10);

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

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

Michael J. Talbot, Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Clerk, on

April 18, 2018
Date

Clerk

# STATE OF MICHIGAN

# COURT OF CLAIMS

FORD MOTOR COMPANY,

Plaintiff,

v

Case No. 16-000216-MT

MICHIGAN DEPARTMENT OF TREASURY,

Hon. Michael J. Talbot

Defendant.

## OPINION

Pending before the Court is defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons articulated in this opinion, the motion is GRANTED. Because of the thorough and adequate briefing submitted by the parties, this matter is being decided without oral argument pursuant to LCR 2.119(A)(5).

## I. BACKGROUND

### A. OVERVIEW

This case involves plaintiff's refund claim for $11,313,391.04[1] in use tax allegedly overpaid to defendant for the tax period of July 1, 1993, through August 31, 1998. The refund request concerns the amount of taxes paid on vehicle leases. According to the allegations in plaintiff's complaint, plaintiff sold vehicles to Ford Motor Credit (FMC), which in turn leased the vehicles back to plaintiff at a yearly lease rate of 28.8% of the wholesale delivered price of

[1] This amount increased to $12,271,396 in plaintiff's responsive briefing.

the vehicles.[2] Thereafter, plaintiff sublet the vehicles to its employees and retirees at a rate of 20.8% of the wholesale delivered price. Plaintiff's complaint alleges that plaintiff erroneously paid use tax based on the lease price paid to FMC, rather than on the sublease price charged to its employees and retirees. The instant case does not involve a dispute about whether tax should have been remitted on the 28.8% price or the 20.8% price. Rather, the dispute concerns the adequacy of plaintiff's documentation submitted in support of its refund claim.

B. PRIOR LITIGATION INVOLVING A SIMILAR REFUND REQUEST

The instant case does not represent the first time that plaintiff and defendant have litigated a refund request of this nature. In a previous action, plaintiff sought a refund for a different time period, i.e., September 1998 through September 2002. This Court denied the refund request, reasoning that the terms of the sublease agreements to employees and retirees required the completion of a survey, which meant that the employees and retirees provided additional value that equaled the difference between the lease price (28.8%) and the sublease price (20.8%). In an unpublished per curiam opinion, the Court of Appeals reversed, holding "the value of the services [i.e., the survey] required of the sublessees under the sublease agreements is a factual question on which reasonable minds might differ."[3] The Court remanded

[2] These vehicles are sometimes referred to as "L-tag vehicles" in the record and the parties' briefing.

[3] *Ford Motor Co v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued February 17, 2011 (Docket No. 294411), pp 4-5.

for the determination of the value of the services required under the sublease agreements.[4] On remand, plaintiff and defendant entered into a stipulated order resolving the dispute.[5]

C. THE INSTANT REFUND REQUEST

On June 2, 2015, plaintiff sent defendant the refund request at issue in the instant case, contending that it overpaid use tax in the amount of "the difference between sales/use taxes paid on the lease amounts paid by Ford to [FMC] on leased vehicles and the value in money of the consideration received by Ford when sub-leasing those vehicles to employees and retirees of Ford and its subsidiaries." The letter did not contain any documentation for the request.

Defendant responded by letter in September 2015, stating that it was in the process of reviewing the refund request and that "additional information is necessary to determine the amount of any refund that may be due." The letter requested specific information, which plaintiff to this date has not provided. In response, plaintiff sent a letter indicating that it would address whether its claim was within the limitations period and, only after doing so, would it "address the data necessary to compute the amount of refunds and interest which are due." The crux of plaintiff's four-page letter was that the refund claim was within the limitations period.

Defendant sent plaintiff a response on or about January 14, 2016, reiterating that plaintiff had "not identified the subleases with sufficient detail to determine the actual refund at issue or the tax periods associated with the various subleases." Because plaintiff had "only provided an

[4] *Id*. at 5.

[5] In passing, plaintiff argues that defendant should be bound by the same or similar terms as were included in the stipulated order. This claim is meritless. The stipulated order involved a different case, a different tax period, a different set of issues, and substantially more documentation to support the claimed refund.

estimated refund request," defendant sought additional information in order to determine the amount—if any—of the refund due.

## D. PLAINTIFF'S COMPLAINT AND DEFENDANT'S FIRST MOTION FOR SUMMARY DISPOSITION

Plaintiff, construing defendant's actions as a denial of the refund request, commenced the instant action by filing a complaint in this Court on August 30, 2016. In February 2017, defendant moved this Court for summary disposition under MCR 2.116(C)(7), contending that plaintiff's refund claim was barred by the doctrine of res judicata. According to defendant, plaintiff should have brought its refund claim in an earlier round of litigation that involved a different issue.[6]

In an opinion and order dated July 19, 2017, this Court rejected defendant's res judicata argument and denied the motion for summary disposition.[7] Thereafter, the parties engaged in discovery. Defendant submitted a request for interrogatories and request for production in which it sought the information plaintiff used to calculate the refund amount requested in this case. In response, plaintiff noted that Adam Smalley, a senior tax associate with Michael James Sales Tax Solutions, LLC, used a "projection method" to estimate the refund amount. This projection method looked to the refund amount claimed in the tax period from 1998 to 2002—which was at issue in the prior litigation—and attempted to extrapolate a refund for the tax period at issue from known figures for the 1998 to 2002 tax period.

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[6] See *Ford Motor Co v Dep't of Treasury*, 313 Mich App 572; 884 NW2d 587 (2015).

[7] *Ford Motor Co v Dep't of Treasury*, unpublished opinion of the Court of Claims, issued July 19, 2017 (Docket No. 16-000216-MT).

According to plaintiff's response, Smalley's "projection method" began with a survey of the data that was deemed to be "available"; this included plaintiff's "General Ledger Data" which stated the amount of tax paid on the leased vehicles at issue, as well as use tax paid on other types of vehicles. Next, after surveying the available data, Smalley—and plaintiff—acknowledged the documentation that plaintiff did not have. That is, plaintiff admitted that it did not have data for the "Sublease amounts (lease from Ford to employee)" in any form, and that it lacked electronic data—but purportedly had the same available on microfiche—for "lease amount[s] between [FMC] and [plaintiff]." From this data, Smalley used a process (explained below) to estimate the refund amount claimed in this case.

As for his estimate, the first step Smalley took in estimating the refund amount in this case was to look back to the prior refund period. Smalley examined the refund period at issue in the prior litigation—May 1998 through September 2002—in order to determine how much tax was overpaid in that period. Utilizing that data, Smalley attempted to "quantify a 'tax against tax' refund percentage to back into revised tax amont [sic] and resulting refund amount for the claim period." This "tax against tax" refund percentage looked at the total amount of overstated tax liability from the 1998 to 2002 period, i.e., $31.8 million, as well as the claimed refund amount of $14.7 million. Smalley divided the refund amount by the total tax remitted to derive what he described as a "refund percentage" of 46.34%.

Next, Smalley looked at the amount of use tax paid for the refund period at issue. This amount was not expressed in plaintiff's general ledger with regard to only the leased vehicles at issue. However, the total amount of tax paid on vehicles—including a commingling of the leased vehicles at issue and all other vehicles on which tax was paid—was purportedly stated in plaintiff's journal entries for its general ledger. Smalley determined that he had to isolate the

journal entry information that only pertained to the "L-tag" or sublet vehicles at issue. To do so, he crafted an "L-Tax percentage" which he derived from taking "a 6 month sample from the refund period (one month from each year)" of " 'L-tag reports" and "Non-L-tag reports" from microfiche data to compare tax remitted on L-tag vehicles versus non-L-tag vehicles. This 6-month sampling "resulted in an L-tag percentage of 97.75%." Plaintiff applied this six-month sampling to its entire request.

Armed with these two percentages—the "refund percentage" estimated from the prior tax year and the "L-tag percentage" derived from a six-month sampling of use tax for the tax period at issue—Smalley estimated the refund amount claimed by plaintiff. He did so by starting with the only known figure, i.e., the total amount of use tax paid on vehicles for the tax period ($27.1 million). He multiplied that number by the purported "L-tag percentage" of 97.75% to determine the amount of use tax paid on the "L-tag" vehicles during the tax period. Then in order to estimate the refund, Smalley took the figure resulting from the calculation noted in the preceding sentence and multiplied it by the "refund percentage" of 46.34%, to arrive at the requested figure of approximately $12.3 million in plaintiff's refund request. This figure is approximately $1 million greater than the amount initially requested in plaintiff's complaint. Plaintiff's response brief seeks the higher amount.

E. THE INSTANT MOTION FOR SUMMARY DISPOSITION

On January 2, 2018, defendant moved this Court for summary disposition once again. Defendant's arguments reflect those made in its September 2015 and January 2016 letters to plaintiff: that is, defendant contests the adequacy—or lack thereof—of the documentation plaintiff provided in support of its refund claim. According to defendant, plaintiff has not supported its refund request with documentation, but instead has extrapolated sublease pricing

data from a different time period and, with little analysis, simply grafted that data into the time period at issue.

## II. ANALYSIS

This matter is before the Court on defendant's motion for summary disposition under MCR 2.116(C)(10). "A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact."[8]

Plaintiff, as the party seeking the refund, bears the burden in this case.[9] Indeed, taxation is the rule, and credit or exemption is the exception.[10] As a result, a party seeking a refund is not permitted to rely on presumptions with regard to amounts paid in order to satisfy its burden of proof.[11] Plaintiff claims a refund pursuant to MCL 205.30(2), which provides that "[a] taxpayer who paid a tax that the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified as the statute of limitations in section 27a."[12] The refund provision set forth in MCL 205.30 only applies to *erroneously* paid taxes, meaning those that were incorrectly paid in the first instance.[13] Hence, the burden is on plaintiff to demonstrate that the tax at issue was erroneously overpaid.

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[8] *Sturrus v Dep't of Treasury*, 292 Mich App 639, 646; 809 NW2d 208 (2011).

[9] *Ally Fin, Inc v State Treasurer*, 317 Mich App 316, 331; 894 NW2d 673 (2016).

[10] *Id.*; *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 473; 838 NW2d 736 (2013).

[11] See *Andrie Inc v Treasury Dep't*, 496 Mich 161, 177-178; 853 NW2d 310 (2014).

[12] The limitations periods are set forth in MCL 205.27a. At least as it pertains to use tax, there is no argument that plaintiff's claim was outside the applicable limitations period.

[13] MCL 205.30(1); *Ford Motor Co v Treasury Dep't*, 496 Mich 382, 391; 852 NW2d 786 (2014).

In this case, there is no meaningful dispute that plaintiff remitted some amount of tax in the first instance. Rather, the dispute concerns whether plaintiff's payment of the tax was an overpayment and the extent, if any, of that overpayment. Thus, while defendant raises a number of issues, its primary contention is that plaintiff lacks the requisite documentation to establish this amount with certainty, and plaintiff's refund claim should be denied as a result.

Based on the documentary evidence presented, the Court agrees with defendant's position. In order to prove entitlement to a refund for overpaid taxes, plaintiff must prove the overpayment. Use tax, which is at issue in this case, is imposed on the "price" of the tangible personal property at issue.[14] Plaintiff claims that it paid taxes on the lease amount with FMC, and contends that it instead should have paid use tax on the amount of the subleases with its employees and retirees. However, the problem for plaintiff is that it lacks any documentation. Plaintiff admits it lacks documentation as to the price of the subleases, i.e., the purported price on which it allegedly should have paid use tax. As to the tax paid on the leases, plaintiff gave only a 6-month sampling without assurances whether the "L-Tag percentage" produced by that sample held true for the entirety of the refund period at issue, and plaintiff declined to produce the entire set of records. Plaintiff needs to show the following in order to be entitled to a refund: Refund = amount paid (lease amount) – purported correct amount (sublease amount). Plaintiff lacks documentation to show either amount in that equation, particularly the sublease amount. Without this documentation, plaintiff cannot show that tax was overpaid, much less the extent of

[14] MCL 205.93(1).

the overpayment. Because plaintiff has not satisfied its burden in this regard, its refund claim must fail.[15]

Recognizing that it lacks documentation, plaintiff has presented this Court with Smalley's estimated calculations. However, the problem with Smalley's estimation is that it is simply that: an estimate. At the heart of Smalley's methodology was the "refund percentage" which he used to calculate the sublease payments by plaintiff's employees and retirees. This "refund percentage" drew entirely from a different tax period and adopting it as a means of shining light on the tax period at issue requires the Court to make critical and unsupported assumptions. For instance, for the "refund percentage" to have any usefulness, one must assume that the number of leases for both periods was the same, the types of vehicles leased were the same, and that the lease rates were the same. Plaintiff has not presented the Court with any documentary evidence to confirm those assumptions. Rather, plaintiff merely cites Smalley's estimate about the amount/price of the subleases despite the fact that the estimate did not draw on any data from the period at issue. Where this refund percentage bears no relation to the tax period at issue, plaintiff cannot satisfy its burden. The methodology by which plaintiff attempted to satisfy its burden contains gaps. Plaintiff cannot fill those gaps with assumptions, nor can plaintiff rely on assumptions to prove entitlement to the claimed refund.[16]

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[15] See *Ally Fin Inc*, 317 Mich App at 331.

[16] See *Andrie Inc*, 496 Mich at 177-178. Although the above is fatal to plaintiff's claim, the method by which plaintiff attempts to show its original tax payment is troubling as well. That is, plaintiff admitted it lacked electronic data regarding the lease amounts paid from plaintiff to FMC. Although it asserts that it has those records available on microfiche, the Court has not been given those records. Moreover, Smalley's calculations selected only a small, six-month sample of the microfiche records in order to approximate the purported "L-tag percentage," i.e.,

In arguing that its methodology was sufficient, plaintiff contends that there is "controlling authority" which states a taxpayer may rely on estimates when claiming an exemption. However, the case plaintiff cites does not support plaintiff's position. Plaintiff cites the Court of Appeals' decision in *Vomvolakis v Dep't of Treasury*,[17] for the proposition that estimates are acceptable in ascertaining tax liability. What plaintiff does not appreciate, however, is that estimates are only available as a tool to the Treasury Department when a taxpayer fails to maintain adequate records to prove the tax owed.[18] This is because "[t]he state's power to tax would be greatly eroded if the [Department] could not make assessments on available information in situations where taxpayers do not maintain proper records."[19] To this end, that the Department can estimate a taxpayer's liability is rather unremarkable and is expressly contemplated by statute.[20] However, that the Department has the authority to estimate the amount of tax owed in situations where a taxpayer fails to maintain adequate records does not absolve a taxpayer of the burden to prove entitlement to a claimed credit or exemption.[21] Hence, there is no merit to plaintiff's contention that defendant's ability to estimate tax owed in the face of inadequate records extends to a taxpayer seeking a refund.

the amount of use tax paid on the leased vehicles. The problem with doing so is that this sample size assumes that the remaining months—nearly a five-year period—had the same percentage of leased vehicles. Plaintiff has presented no documentary evidence to confirm this assumption; it simply relies on the sampling without further explanation. Such assumptions do not satisfy plaintiff's burden.

[17] *Vomvolakis v Dep't of Treasury*, 145 Mich App 238; 377 NW2d 309 (1985).

[18] *Id*. at 243-245 (describing the Department's statutory authority).

[19] *Id*. at 245.

[20] See MCL 205.104a(4) (granting the Department authority, in situations where a taxpayer fails to maintain adequate records, to assess the tax due "based on an indirect audit procedure or any other information that is available or that may become available to the department.").

[21] See *Andrie Inc*, 496 Mich at 178. See also *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 42; 703 NW2d 822 (2005) (explaining the necessity of permitting the Department to estimate the amount of tax owed in situations where a taxpayer fails to maintain adequate records).

Plaintiff also appears to attempt to shift the blame for its failure to produce records to defendant, noting that defendant has repeatedly declined invitations to inspect plaintiff's records at one of plaintiff's facilities. However, such an argument shifts the burden from plaintiff to defendant in regard to the claimed refund, which is contrary to caselaw.[22] Moreover, plaintiff has not actually asserted that it has the requisite records or that it could produce them. Plaintiff cannot rely on speculation and conjecture about what defendant might find if defendant accepted the invitation to parse through what are purportedly legions[23] of microfiche records.[24]

For the reasons stated above, summary disposition in favor of defendant is warranted. As a result, this Court need not address defendant's alternative argument regarding the statute of limitations.

Dated: April 18, 2018

Michael J. Talbot, Judge

[22] See, e.g., *Andrie Inc*, 496 Mich at 171-172.

[23] Indeed, plaintiff's briefing suggests that the 6-month sampling utilized by Smalley "consisted of nearly 9000 pages of microfiche data."

[24] See *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005) ("Speculation and conjecture are insufficient to create an issue of material fact.").