STATE OF MICHIGAN

COURT OF CLAIMS

FORD MOTOR COMPANY v DEPT OF TREASURY **Hon. Michael J. Talbot**

Case No. **16-000216-MT**

ORDER

At a session of said Court held,
Detroit, Wayne, Michigan, on
July 19, 2017.

Defendant having filed a motion for summary disposition pursuant to MCR 2.116(C)(7);

IT IS HEREBY ORDERED that Defendant's motion for summary disposition is DENIED.

This order does not resolve the last pending claim and does not close the case.

Michael J. Talbot
Judge

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

JUL 19 2017
Date

Clerk

STATE OF MICHIGAN

COURT OF CLAIMS

FORD MOTOR COMPANY,

Plaintiff,

v

Case No. 16-000216-MT

DEPARTMENT OF TREASURY,

Hon. Michael J. Talbot

Defendant.

OPINION

This matter is before the Court on defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). For the reasons stated below, the motion is DENIED.

I. PERTINENT FACTS AND BACKGROUND

This tax case involves Plaintiff's claim for a use tax refund under the Use Tax Act, MCL 205.91 *et seq.*, for the tax period July 1, 1993, to August 31, 1998. This is one of several use tax actions filed by Plaintiff over the years that arise from a lengthy general use tax audit (General Audit) conducted by Defendant from November 18, 1999, through May 9, 2003, covering use tax periods from June 1, 1993, through November 30, 2001. Relevant to the resolution of this case are several prior actions involving the Plaintiff and Defendant.

A. FORD I

On January 6, 2006, Plaintiff filed a complaint in the Court of Claims (Docket No. 06-03-MT) seeking a refund of use taxes paid for the periods September 1, 1998, through September 1, 2002 (*Ford I*). The basis of the claim was an alleged overpayment of use tax paid on vehicles

subleased by Plaintiff to employees and retirees. The Court of Claims entered judgment in Defendant's favor. The Court of Appeals subsequently reversed, concluding that the Court of Claims erred in calculating use tax based on 28.8% of the wholesale delivered price, rather than the 20.8% of the wholesale delivered price paid by Plaintiff's employees and retirees.[1] On remand, a stipulated order was entered and Defendant agreed to refund 90% of the claimed use taxes, plus interest.

B. FORD II

As a result of the General Audit, on May 3, 2006, Defendant issued a final assessment for approximately $10.7 million (inclusive of interest) in use taxes allegedly owed in connection with vehicles used for research and testing. Plaintiff paid the final assessment under protest, but filed suit in the Court of Claims (Docket No. 06-000104-MT) on July 25, 2006, seeking a refund of use taxes paid for the period of June 1, 1993, through November 30, 2001 (*Ford II*). The main issue in *Ford II* was whether Plaintiff was entitled to an industrial processing exemption under the former MCL 205.94(g)(*i*) for vehicles purchased from competitors and used for test purposes on public highways. Also at issue in *Ford II* was whether use tax paid on automotive parts sold to consumers under extended service plans was subject to a refund.

In December 2008, while *Ford II* was pending, Defendant issued a second assessment for use taxes in the amount of approximately $44 million (inclusive of interest), which arose from the same General Audit that prompted the 2006 final assessment. Plaintiff filed a complaint in the Court of Appeals on June 16, 2009, challenging Defendant's authority to issue a second

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

assessment involving the same issues and tax years involved in *Ford II*. Plaintiff's declaratory judgment action was eventually consolidated with *Ford II*. After many years of litigation and a series of dispositive motions, the Court of Claims issued a final order on June 25, 2014. On appeal, the Court of Appeals affirmed in part and reversed in part.[2] The parties subsequently filed cross-applications for leave to appeal to the Michigan Supreme Court. Both applications were denied on December 21, 2016.

C. THE INSTANT CASE

On August 30, 2016, Plaintiff filed the instant action claiming a refund of use tax in the amount of approximately $12 million (exclusive of interest) for the tax periods July 1, 1993, through August 31, 1998. Plaintiff claims that it erroneously calculated use tax based on 28.8% of the wholesale delivered price, rather than 20.8% of the wholesale delivered price that charged to employees and retirees. Thus, Plaintiff's refund claim in this action rests on the same argument it pursued in *Ford I*, i.e., that an incorrect tax base resulted in overpayment of use taxes on vehicles it subleased to employees and retirees, and covers tax years that were at issue in *Ford II*.

Relevant to the resolution of this matter is an explanation of why the refund claims in this case were not included in *Ford I* or *Ford II*. According to Plaintiff, it could not challenge the tax period at issue in this action in *Ford I* because it was apparently foreclosed by the four-year state of limitations set forth in MCL 205.27a. However, in the course of discovery in *Ford II*, Plaintiff first learned that the issue of use tax on employee/retiree subleased vehicles had been a

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

subject of the General Audit covering use tax periods from June 1, 1993, through November 30, 2001. Thus, Plaintiff realized that the statute of limitations applicable to these claims had been tolled by the General Audit.[3]

Defendant brings the instant motion claiming that Plaintiff is precluded from pursing a refund claim for use taxes paid for the period of July 1, 1993, through August 31, 1998, because use tax liability for those tax years was previously litigated in *Ford II*. According to Defendant, Plaintiff failed to bring its use tax claims in *Ford II*[4] and is now barred from doing so under the doctrine of res judicata.

II. ANALYSIS

Defendant brings its motion for summary disposition pursuant to MCR 2.116(C)(7) which, in pertinent part, provides for summary disposition when dismissal of an action is appropriate because of a prior judgment. Under MCR 2.116(C)(7), the well-pleaded allegations in the complaint must be accepted as true unless contradicted by the affidavits or other appropriate documentation submitted by the movant.[5] Additionally, the pleadings, affidavits, depositions, admissions, and other documentary evidence proffered by the parties are construed in the light most favorable to the nonmoving party.[6]

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[3] Defendant does not dispute that the statute of limitations was tolled on these issues.

[4] Notably, Defendant does not take issue with Plaintiff's failure to raise these claims in *Ford I*.

[5] *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008).

[6] *Id.*

Under Michigan law, the doctrine of res judicata is applied to preclude "not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not."[7] Under this doctrine, a subsequent action is barred when "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first."[8] To determine whether a claim could have been raised in a previous action, courts apply the "same transaction" test.[9] Under this test, "[w]hether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit . . . ."[10] "If the new claim or claims arise from the same group of operative facts as the previously litigated claim or claims, even if there are variations in the evidence needed to support the theories of recovery, [this Court] will treat the claims as the same and res judicata will apply."[11]

Applying the elements of res judicata, there is no question that the prior litigation in *Ford II* was decided on the merits, and the parties in both *Ford II* and the instant case are the same. Thus, the controlling question is whether Plaintiff's current use tax refund claims could have or should have been litigated in *Ford II* because they arise from the same group of operative facts at issue in that case.

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[7] *Adair v State of Michigan,* 470 Mich 105, 121; 680 NW2d 386 (2004).

[8] *Id.*

[9] *Id.* at 123-125.

[10] *Id.* at 125 (citation omitted).

[11] *Green v Ziegelman*, 310 Mich App 436, 445; 873 NW2d 794 (2015).

Both *Ford II* and the instant case involve use tax for tax periods that include July 1, 1993, through August 31, 1998.[12] However, looking at the context of *Ford II* and its "factual grouping" of transactions, it is clear that the cases do not arise from the same set of operative facts. In *Ford II*, the main issues concerned the industrial processing exemption as it related to purchases of competitor vehicles, and whether use tax properly applied to automotive parts sold under extended warranty plans. Here, Plaintiff's challenge relates solely to the correct use tax base for employee and retiree vehicles. Thus, the group of transactions at issue in *Ford II* are entirely different than the group of transactions in this case. Furthermore, as Plaintiff points out, the proper use tax base of the subleased vehicles were not part of the final assessment from which Plaintiff appealed in *Ford II,* and therefore were not "operative facts" upon which the final assessment in *Ford II* was based. Accordingly, the doctrine of res judicata does not operate to bar the instant action.

This conclusion is also supported by the language of MCL 205.27a, which implicitly suggests that the Legislature intended that a taxpayer could pursue claims like those involved in this matter. In pertinent part, the former version of MCL 205.27a applicable to this action provided:

> (3) The running of the statute of limitations is suspended for the following:
>
> (a) The period pending a final determination of tax, *including audit*, conference, hearing, and *litigation of liability for . . . a tax* administered by the department and for 1 year after that period.
>
> * * *

[12] The tax period at issue herein is limited to this period. *Ford II* dealt with the tax period between June 1, 1993 and November 30, 2001.

> (4) The running of the statute of limitations is suspended only as to *those items that were the subject of the audit*, conference, hearing, or litigation for federal income tax or a tax administered by the department.[13]

From this language, it can be inferred that in certain circumstances taxpayers such as Plaintiff do not lose the opportunity to pursue a judicial remedy for claims related to items in tax years that are suspended by the statute. That is, because the issue of use tax on the subleased vehicles was a subject of the General Audit covering the tax period from June 1, 1993, through November 30, 2001, the statute of limitations applicable to that issue was tolled, despite the fact that Defendant did not pursue such use tax at the time or include it in the final assessment that was the subject of *Ford II*.[14] As Plaintiff correctly points out, there would have been no need for the Legislature to provide that the statute of limitations is suspended with respect to items that are the subject of an audit or litigation, unless such items could rightly be the subject of subsequent actions. The statutory language of MCL 205.27a indicates that the Legislature contemplated situations where multiple refund claims could arise based on the same tax, in the same tax year, but based on different operative facts.

Defendant argues that this interpretation of MCL 205.27a would allow a taxpayer to "file a new lawsuit based on the same operative facts, arguing a slightly different legal theory, any time the taxpayer disagreed with the outcome of litigation. This Court disagrees. MCL 205.27a

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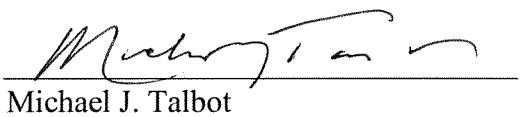
[13] Former MCL 205.27a (emphasis added).

[14] This understanding is reinforced by the current language of MCL 205.27a, as amended by 2014 PA 3, which defines "items that were the subject of the audit" to mean:

> [I]tems that share a common characteristic that were examined by an auditor even if there was no adjustment to the tax as a result of the examination. Items that share a common characteristic include *items that are reported on the same line on a tax return* or items that are grouped by ledger, account, or record or by class or type of asset, liability, income, or expense.[MCL 205.27a(4) (emphasis added).]

does not abrogate the doctrine of res judicata, nor does it authorize a taxpayer to reprise and relitigate what has already been before the Court. However, the merits of Plaintiff's claim for a use tax refund for the period between July 1, 1993, and August 31, 1998, based on the erroneous calculation of use tax imposed on vehicles subleased to employees and retirees, has not previously been before this Court. Therefore, Plaintiff's action is not barred by res judicata and Defendant is not entitled to summary disposition under MCR 2.116(C)(7).

Dated: July 19, 2017



Michael J. Talbot
Judge