STATE OF MICHIGAN

COURT OF CLAIMS

MAPLE MANOR REHAB CENTER, LLC, and MAPLE MANOR REHAB CENTER OF NOVI, INC.,

Plaintiffs,

v

DEPARTMENT OF TREASURY, and DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.
_____/

OPINION AND ORDER

Case No. 18-000271-MT

Hon. Colleen A. O'Brien

Pending before the Court are the respective motions for summary disposition filed by defendants Department of Health and Human Services (DHHS) and Department of Treasury (Treasury). For the reasons that follow, the motions are GRANTED. The motions are being decided without oral argument. See LCR 2.119(A)(5).

I. BACKGROUND

At the core of this case is what is known as a Medicaid Long-Term Care Quality Assurance Assessment (QAA). The QAA at issue in this case is, pursuant to the plain language of the statute authorizing DHHS to collect the same, a "tax." MCL 333.20161(14). Plaintiffs operate nursing homes which participate in the state's Medicaid program and which paid the QAA tax. Plaintiffs allege that they overpaid their respective QAA taxes, and they are seeking a refund of the alleged overpayment.

The QAA is implemented and collected in order to secure matching federal funds. Pursuant to MCL 333.20161 and 42 CFR 433.68, the QAA and matching federal funds are to "be used to finance Medicaid nursing home reimbursement payments." MCL 333.20161(11)(a). The QAA results in greater Medicaid reimbursement for nursing homes because the QAA, along with matching federal funds, are returned to nursing home facilities by way of a supplemental rate known as a Qualified Assurance Supplement (QAS) Medicaid payment. MCL 333.20161(11)(a).

MCL 333.20161 grants DHHS authority to implement and to administer the QAA. In this regard, DHHS has general rulemaking authority and authority to implement policies and procedures. MCL 333.20171; MCL 333.20172. DHHS also has authority to impose penalties if an entity fails to pay the QAA. MCL 333.20161(11)(f). DHHS's broad authority in this sphere is reinforced by pertinent provisions of the state's Medicaid Provider's Manual, which is a binding contract between the state and Medicaid providers. *Rutherford v Dep't of Social Servs*, 193 Mich App 326, 331; 483 NW2d 410 (1991).

The primary constraint on DHHS's authority in regard to the administration of the QAA is that DHHS must administer the tax in accordance with applicable federal law and regulations, and must seek annual approval from the Centers for Medicare and Medicaid Services (CMS), which is a federal agency within the United States Department of Health and Human Services. MCL 333.20161(11)(c); MCL 333.20161(11)(e) (requiring DHHS to "implement this section in a manner that complies with federal requirements necessary to ensure that the [QAA] qualifies for federal matching funds."); 42 CFR 433.68(e).

The QAA rates charged to all providers under MCL 333.20161 are dependent upon information provided in each individual provider's cost reports. As averred by John Donaldson, a director of the Long-Term Care Reimbursement and Audit Division within DHHS, "any changes to an individual provider's cost reports would impact the tax rates for all providers in the state of Michigan to ensure adequate funding for the QAS program . . . ." DHHS sends written notice to each provider of the provider's upcoming QAA tax. The rates are based on information contained in the prior year's cost reports. According to the notices issued by DHHS in the instant case, an entity has "10 calendar days from the date of this notice to notify [DHHS] in writing of a disagreement with the total number of non-Medicare days of care rendered indicated above. Failure to respond within this 10 day time period will result in any changes being made *on a prospective basis only*." (Emphasis added). According to documentary evidence attached to DHHS's motion for summary disposition, the limited time period for challenging the accuracy of a QAA calculation is predicated on the interrelated nature of the QAA. That is, because the amount of federal funding DHHS receives pursuant to the QAA program is predicated on state-wide QAA information, and because DHHS is required to seek an annual waiver from CMS to impose the QAA, DHHS must have accurate, and final, information at the time it seeks the federal waiver. Any changes to an individual provider's QAA amounts would affect the rates for all providers. As a result, DHHS notifies entities that it will only give prospective effect to late QAA challenges.

As plaintiffs in the instant case point out, DHHS is not the only defendant in this case mentioned in MCL 333.20161, which is the statute authorizing the implementation of the QAA. Treasury is also referred to in the statute. However, in contrast to DHHS, the reference to Treasury is brief and limited. Notably, if an entity fails to pay its required QAA tax, DHHS has

authority to "refer for collection to the department of treasury past due amounts consistent with section 13 of 1941 PA 122, MCL 205.13." MCL 333.20161(11)(f). Hence, Treasury may be relied upon to collect the QAA tax, but only at DHHS's invitation. In addition to referencing Treasury's collection authority, MCL 333.20161(11)(g) invokes Treasury by stating that the "Medicaid nursing home [QAA] fund is established in the state treasury" and by requiring revenue raised through the QAA to be deposited "with the state treasurer for deposit in the Medicaid nursing home [QAA]."

II. THE INSTANT DISPUTE AND PLAINTIFFS' REFUND REQUESTS

Plaintiffs allege that they over-reported and overpaid their QAA tax for the 2015, 2016, and 2017 fiscal years. Plaintiffs sought to amend their Medicaid cost reports in December 2017 by submitting amended reports to DHHS. DHHS denied the request in January 2018 and denied plaintiffs' renewed request in March 2018. DHHS stated that the Provider Manual prohibited it from amending the reports retroactively.

After failing to obtain the requested relief from DHHS, plaintiffs sought a refund from Treasury in September 2018. This time, plaintiffs cited MCL 205.30(1), which states that Treasury "shall credit or refund an overpayment of taxes." Plaintiffs argued that Treasury was required to refund the overpayment at issue. Plaintiffs argued that because the QAA was a "tax," MCL 205.20 dictates that the Revenue Code, including the refund provision in MCL 205.30, applied to their claim. Treasury denied the petition in October 2018, concluding that it lacked jurisdiction or authority to refund QAA payments, given that the QAA was not administered by Treasury under the Revenue Act.

Treasury's denial of the refund request led to the filing of plaintiffs' complaint (and amended complaint) in this Court. The amended complaint alleges two counts. Count I is asserted against Treasury under the Revenue Act and alleges that because the QAA is a "tax," it is subject to the provisions of the Revenue Code, including the Revenue Code's refund provisions. Count II, which alleges unjust enrichment, is asserted against DHHS and Treasury.

III. SUMMARY DISPOSITION

A. UNJUST ENRICHMENT AGAINST BOTH DEFENDANTS

Defendants now move this Court for summary disposition on a variety of grounds. At the outset, the Court will address and dispense with the unjust enrichment claim asserted in Count II of the amended complaint. As defendants point out, MCL 600.6431(1) required plaintiffs, within one year of the accrual of their claims, to provide a signed and verified notice of intent to defendants in this Court or to file a claim in this Court within the same timeframe. Compliance with § 6431 is "an unambiguous condition precedent to sue the state," and failure to achieve strict compliance "with this notice provision warrants dismissal of the claim, even if no prejudice resulted[.]" *Rusha v Dep't of Corrections*, 307 Mich App 300, 307; 859 NW2d 735 (2014) (citations and quotation marks omitted). Here, plaintiffs did not file a notice of intent, and they filed their original verified complaint on December 17, 2018. In order to be timely, their claim against DHHS—and against Treasury on an unjust enrichment theory[1]—had to have accrued on

[1] Indeed, the refund claim, if it were viable, would have accrued at a later date. See MCL 205.30(2).

or after December 17, 2017.[2] The problem for plaintiffs is that their allegations concern overpayments that happened in October 2015, October 2016, and October 2017. Indeed, even giving plaintiffs the benefit of the doubt and concluding that the time for giving notice did not begin to run until plaintiffs allegedly discovered the overpayments in October 2017, see *Mays v Snyder*, 323 Mich App 1, 29; 916 NW2d 227 (2018), the claim for unjust enrichment is still untimely because the complaint was filed more than one year after this time. As a result, the claim for unjust enrichment against both defendants must be dismissed pursuant to MCR 2.116(C)(7) for lack of strict compliance with § 6431(1). See *Rusha*, 307 Mich App at 307.

B. PLAINTIFFS' REFUND CLAIM CANNOT BE HEARD BY TREASURY

Treasury has also moved for summary disposition of Count I, which involves the refund request under the Revenue Code. The dispositive issue as it concerns the claim against Treasury is whether the administration of the QAA is within Treasury's authority and subject to the provisions of the Revenue Act. If the QAA is subject to the Revenue Act, Treasury had an obligation to at least review the refund request in accordance with MCL 205.30. Treasury argues that the QAA is administered solely by DHHS pursuant to the Health Code, and that the tax is not subject to the Revenue Act's provisions. On that point, the Court agrees with Treasury, and concludes that summary disposition in favor of Treasury is warranted.

In general, Treasury is responsible for the collection of taxes and for the administration and enforcement of certain taxing statutes. MCL 205.1; MCL 205.13(1). Of particular

[2] The Court accepts, because the parties have not articulated an argument to the contrary, that the longer, one-year notice provision in § 6431(1) applies to the claims, rather than the six-month notice provision in § 6431(3).

significance to this case, MCL 205.30(1) provides that Treasury "shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected . . . ." A refund request that is denied may be appealed to this Court in accordance with MCL 205.22(1). The Revenue Act declares that the above procedures apply to "all taxes," "[u]nless otherwise provided by specific authority in a taxing statute administered by" Treasury. MCL 205.20.

However, while Treasury is given authority to "administer and enforce" certain enumerated statutes, see MCL 205.13(1), the Public Health Code—in which MCL 333.20161 is found—is not listed among those statutes. Caselaw has recognized that a statute that exists outside of the Revenue Act can bestow enforcement and administration authority on Treasury. *K&W Wholesale, LLC v Dep't of Treasury*, 318 Mich App 605, 613; 899 NW2d 432 (2017), citing MCL 205.433 (describing the Tobacco Tax Products Act and how the act expressly states that the "tax" administered thereunder is subject to Revenue Code's provisions). Hence, a "tax" is not subject to the Revenue Code's provisions simply by virtue of being a "tax." See *id*. See also *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 684-685 (2007) (recognizing that the Single Business Tax Act expressly conferred authority on Treasury and incorporated the provisions of the Revenue Act to the administration of the tax).

Returning to the instant case, the question becomes whether the QAA, by virtue of being a "tax" is subject to the refund procedures of the Revenue Act by way of MCL 205.20, or whether the role played by DHHS in the administration and enforcement of the tax compel a different result. In light of the plain language of MCL 333.20161, the Court concludes that the QAA is not subject to the Revenue Code's refund procedures because Treasury has plainly not been given authority over the administration and enforcement of the QAA tax. The unambiguous language of MCL 333.20161 places responsibility for all aspects of administering

the tax squarely with DHHS, not with Treasury. This is exemplified by MCL 333.20161(f), which declares that if a nursing home fails to pay the required QAA tax, DHHS may, at its discretion, "refer for collection to the department of treasury past due amounts consistent with" MCL 205.13. Stated otherwise, Treasury's involvement in the QAA is limited—aside from the state treasury serving as repository QAA funds—and it is invoked only upon DHHS's referring a specific matter to Treasury. The limited role of Treasury under MCL 333.20161 stands in contrast to Treasury's involvement over other tax matters that are otherwise within its authority and over which it need not be invited to act by another agency. See, e.g., MCL 205.1.

Another facet of MCL 333.20161 demonstrating that DHHS alone, and not Treasury, is responsible for the administration of the QAA is the notion that DHHS, in administering the QAA, must remain in compliance with federal law and regulations pertaining to Medicaid. Treasury, however, does not have that same mandate imposed upon it. As a result, granting Treasury authority over the QAA not only runs afoul of DHHS's authority over the tax but it risks running afoul of federal law. For instance, plaintiffs seek a refund in this case from Treasury; however, DHHS is generally prohibited from holding a taxpayer harmless with respect to payment of the QAA. See 42 CFR 433.68. Stated otherwise, while DHHS must ensure compliance with federal law, the same requirement is not imposed on Treasury, and giving Treasury authority over the tax risks hindering DHHS's ability to comply with federal law.

The Court of Appeals' decision in *Teddy 23, LLC v Mich Film Office,* 313 Mich App 557; 884 NW2d 799 (2015), supports the conclusion that the QAA is not subject to the Revenue Code's refund and appellate procedures. Like *Teddy 23*, the instant case involves a matter that, although involving tax, is wholly outside of Treasury's authority under the Revenue Code. See *id*. at 560-561. Like the postproduction certificate of completion at issue in *Teddy 23*, the QAA,

and assessments and adjustments thereto, is administered by a separate entity (DHHS) pursuant to separate statutory authority (MCL 333.20161). See *id.* Hence, any action taken by DHHS with regard to the QAA tax—such as the January 2018 decision to deny adjustment to the cost basis and to deny retroactive changes to plaintiffs' QAA assessments—is not subject to the Revenue Act's procedures. See *id.*

In light of the above, Treasury correctly concluded it lacked authority to hear and decide plaintiffs' refund petition in this case. Summary disposition in favor of Treasury is warranted under MCR 2.116(C)(4) and (C)(8).[3]

IV. CONCLUSION

IT IS HEREBY ORDERED that defendants' respective motions for summary disposition are GRANTED.

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

Dated: May 13, 2019

Colleen A. O'Brien, Judge
Court of Claims

[3] That is not to say plaintiffs lacked the ability to obtain judicial review of their claim. Plaintiffs, after being denied the relief they requested by DHHS, could have sought judicial review of DHHS's decision. See *Teddy 23, LLC*, 313 Mich App at 567 (describing the methods of review available to an agency's decision). However, plaintiffs did not seek review of DHHS's decision, and there is no argument or indication that seeking judicial review of DHHS's decision would be within this Court's jurisdiction. See *id.* at 567-568. Plaintiffs are not permitted to eschew the authorized manner of seeking judicial review of one agency's decision by seeking the same relief before a different agency.