STATE OF MICHIGAN

COURT OF APPEALS

HOME DEPOT USA, INC.,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and STATE TREASURER,

Defendants,

and

DEPARTMENT OF TREASURY,

Defendant-Appellant.

UNPUBLISHED
May 24, 2012

No. 301341
Court of Claims
LC No. 07-000118-MT

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendant Department of Treasury[1] appeals as of right from an order by the Court of Claims that granted plaintiff's motion for summary disposition, denied defendant's motion for summary disposition, and held that plaintiff is entitled to a tax refund from defendant. We affirm.

The operative facts in this case are not in dispute. Plaintiff entered into private label credit card (PLCC) agreements with certain financial institutions whereby the finance companies serviced the accounts but the PLCCs bore the Home Depot name and could be used at Home Depot and affiliated stores. Plaintiff remitted to defendant the sales taxes for certain purchases made by PLCC holders who later failed to pay their credit-card bills. Plaintiff received compensation for the purchases and the tax in accordance with its contracts with the finance companies but nonetheless sought a bad-debt deduction under MCL 205.54i for the taxes paid on

[1] Defendants were listed as three separate parties below, but only the Department of Treasury has appealed. For ease of reference, we will refer to the singular "defendant" in this opinion.

the affected purchases.[2] Defendant denied plaintiff's refund request and plaintiff thus filed the present lawsuit in the Court of Claims. The parties filed cross-motions for summary disposition,[3] with plaintiff arguing that it satisfied all the requirements for a deduction under MCL 205.54i[4] and defendant arguing that the retroactive amendment of MCL 205.54i by 2007 PA 105[5] prevented plaintiff from obtaining the refund. In its brief, defendant did not clearly explain *why* it believed that 2007 PA 105, if applied retroactively, barred plaintiff from obtaining the refund, but at oral argument defendant's attorney emphasized that it was the finance companies, and not plaintiff, who incurred the losses and that therefore plaintiff should not receive a refund.

On May 13, 2009, the Court of Claims granted plaintiff's motion and denied defendant's motion "[f]or the reasons stated on the record . . . ." The order stated that "[p]laintiff is owed a refund for sales taxes paid upon bad debts" under MCL 205.54i. The order also stated: "[P]ursuant to this [c]ourt's power of joinder under MCR 2.205, General Electric Capital Corporation, General Electric Capital Financial, Inc., Monogram Credit Card Bank of Georgia and Citibank USA, N.A.[6] are hereby joined as parties to this action . . . ." The parties later stipulated that the amount of money at issue was $4,989,209.54, and this was incorporated into a later order.[7]

In its oral ruling at the motion hearing, the lower court ruled:

> I'm granting plaintiff's motion for summary disposition. I don't believe the state is entitled to the sales tax. However, pursuant to Michigan court rule 2.205, necessary joinder, I am joining in, because I can, Citibank and GECC [two finance companies]. I don't see any other way to do it and comply. . . . [W]hen I look at what you've presented and I look at what the state has presented and I read the Internal Revenue Code, it appears Citibank and GECC are the ones that really

---

[2] Plaintiff, of course, paid certain fees in exchange for having the finance companies service the PLCCs. There was evidence that the risk of encountering delinquent cardholders that was assumed by the finance companies was factored into the fee structure agreed upon by the contracting parties. Thus, plaintiff argues, it was affected by the bad debt in that this debt essentially forced plaintiff to pay higher fees in the servicing agreements with the finance companies.

[3] Plaintiff relied on MCR 2.116(C)(10) and defendant relied on MCR 2.116(C)(8) and (10).

[4] Plaintiff also claimed that *DaimlerChrysler Services North America, LLC v Dep't of Treasury*, 271 Mich App 625; 723 NW2d 569 (2006), supported its position, while defendant claimed that *DaimlerChrysler* had been effectively overruled by 2007 PA 105. This circumstance is discussed more fully *infra*.

[5] The Legislature *explicitly* gave 2007 PA 105 retroactive effect, as discussed more fully *infra*.

[6] These were certain affected finance companies.

[7] In the meantime, defendant had unsuccessfully filed for leave to appeal in this Court.

took the loss, they have the bad debt, and it goes on, and they are the ones who deducted it and who have to deal with it.

Now, granted, Home Depot may be paying for that in the contract, but I see that separate, although you may all be married. Being married people, you can apportion whatever monies you receive however you choose to. I'm not going to look in your bedroom and make that decision for you.

* * *

. . . I agree in part [with] what treasury . . . [says], but I think it falls into place when we add in Citibank and GECC. I think then the criteria has [sic] clearly been met, and so for that my rationale would rely on Home Depot's argument, although keeping in mind, I don't think it's solely Home Depot. I think that you can't stand alone without Citibank and GECC, and, again, because you're tied, I think that the money goes back to you and you all can determine how that is under your own contract terms and doing business. That's how it started and that's where it should land.

Defendant now appeals, arguing that the trial court erred in its ruling because plaintiff did not suffer a loss on which it could take a deduction.

Because this appeal involves a question of law, our review is de novo even though we are reviewing an agency's determination.[8] *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25; 703 NW2d 822 (2005); see also *DaimlerChrysler Services North America, LLC v Dep't of Treasury*, 271 Mich App 625, 631; 723 NW2d 569 (2006), superseded in part on other grounds by 2007 PA 105. "The primary goal in statutory construction is to ascertain and give effect to the Legislature's intent." *Bureau of Worker's & Unemployment Compensation v Detroit Medical Ctr*, 267 Mich App 500, 504; 705 NW2d 524 (2005).

This case involves taxes paid between September 1, 1999, and January 31, 2007. Before September 1, 2004, MCL 205.54i read, in relevant part:

(1) As used in this section, "bad debt" means any portion of a debt that is related to a sale at retail for which gross proceeds are not otherwise deductible or excludable, that has become worthless or uncollectible in the time period between the date when taxes accrue to the state for the taxpayer's preceding sales tax return and the date when taxes accrue to the state for the present return, and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code. A bad debt shall not include any interest or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in

[8] We also review summary-disposition rulings de novo. *By Lo Oil*, 267 Mich App at 25.

attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to a third party for collection, and repossessed property.

(2) In computing the amount of tax levied under this act for any month, a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax. The amount of gross proceeds deducted must be charged off as uncollectible on the books of the taxpayer. If the business consists of taxable and nontaxable transactions, the deduction shall equal the full amount of the bad debt if the bad debt is documented as a taxable transaction in the taxpayer's records.

Effective September 1, 2004, the statute was amended to read, in relevant part:

(1) As used in this section, "bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. A bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property.

(2) In computing the amount of tax levied under this act for any month, a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax. The amount of gross proceeds deducted must be charged off as uncollectible on the books and records of the taxpayer at the time the debt becomes worthless and deducted on the return for the period during which the bad debt is written off as uncollectible in the claimant's books and records and must be eligible to be deducted for federal income tax purposes.

In *DaimlerChrysler*, 271 Mich App at 626-638, 640, the Court faced an issue similar to that facing us today and analyzed the version of the statute in effect before September 1, 2004. In that case, DaimlerChrysler Services North America, L.L.C., financed consumers' purchases of motor vehicles from its affiliated dealers. *Id*. at 627. Under the contracts between DaimlerChrysler and the dealers, DaimlerChrysler paid the dealers full prices that included sales tax, and the dealers remitted the sales tax to the Department of Treasury. *Id*. After numerous purchasers defaulted on the debts owed to DaimlerChrysler, DaimlerChrysler sought bad-debt deductions under MCL 205.54i. *DaimlerChrysler*, 271 Mich App at 627-629. The Court of Claims ruled in favor of the Department of Treasury. *Id*. at 629. The Court of Appeals summarized the department's arguments as follows:

Defendant argues that because the retailer is ultimately responsible for paying the tax on the proceeds from the sale, the taxpayer envisioned by the

> statute is the retailer—in this case, the dealers. Thus, defendant maintains, only the dealers are entitled to a bad-debt deduction. To support its theory, defendant points to the bad-debt provision of the GSTA, MCL 205.54i(2), which reads in part: "[A] taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax."
>
> Defendant claims this sentence stands for the proposition that a taxpayer must be a retailer because only a single retailer would have gross proceeds from sales. Further, defendant claims that plaintiff was not the retailer of the vehicles, was not subject to be taxed in their sales and, therefore, is ineligible for a bad-debt refund or deduction. On this point, the entire issue may be simply phrased: Can the word "taxpayer" mean more than a single retailer for purposes of the act? [*DaimlerChrysler*, 271 Mich App at 633.]

The Court of Appeals reversed and concluded that DaimlerChrysler was a taxpayer under the act, stating, in part:

> We conclude that, consistent with MCL 492.102(6), plaintiff was a sales finance company "financing installment sale contracts" between the dealers and the purchasers who defaulted on their loans. As noted above, the pre-2004 GSTA defined "taxpayer" as "a person subject to a tax under this act." MCL 205.51(1)(m). A "person" was defined as "an individual, firm, partnership, joint venture . . . *or any other group or combination acting as a unit* . . . . MCL 205.51(1)(a) (emphasis added.)[9] The statute, by its plain language, contemplated a broad array of taxpayers. It also expressly declared that "any other group or combination" of persons may have been "acting as a unit," and, therefore, could have been considered as a single taxpayer.
>
> Defendant concedes and we agree that the dealers, as retailers, fell under the statute—otherwise defendant would be owed no tax in the first place—even though the statute's definition of "person" contained no reference to "retailers" or "motor vehicle dealers." Given the fact that motor vehicle sales frequently require financing, and that plaintiff here was the financing company, we conclude that the dealers and plaintiff were "acting as a unit," i.e., as a single, taxable entity, for the purpose of the retail sales of automobiles. Any other reading would render the language referring to a "combination" of persons "acting as a unit" nugatory. [*DaimlerChrysler*, 271 Mich App at 635-636.]

The Court summarized its holding as follows:

> [We] conclude that plaintiff was a sales finance company that, along with its affiliated dealers, intended to act as one unit to make sales of motor vehicles;

[9] These definitions from MCL 205.51 are still in effect, although MCL 205.54i(1)(e) now provides a more specific definition of "taxpayer" for purposes of that section.

that plaintiff was engaged in business in Michigan; and, for those reasons, was a taxpayer under the GSTA. Further, we determine that plaintiff's bad debt was related to sales at retail because the sales themselves were "transactions by which transfer" of tangible property occurred. Plaintiff is entitled to recover from defendant sales tax overpayments under the bad-debt provision in effect at the time its claim accrued. [*Id*. at 640.]

After the *DaimlerChrysler* decision, the Legislature once again amended MCL 205.54i, by way of 2007 PA 105, which was ordered to take immediate effect and which was approved and filed October 1, 2007. The amendment addressed some of the issues raised in the *DaimlerChrysler* case, and the statute now reads:

(1) As used in this section:

(a) "Bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. A bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property.

(b) Except as provided in subdivision (c), "lender" includes any of the following:

(*i*) Any person who holds or has held an account receivable which that person purchased directly from a taxpayer who reported the tax.

(*ii*) Any person who holds or has held an account receivable pursuant to that person's contract directly with the taxpayer who reported the tax.

(*iii*) The issuer of the private label credit card.

(c) "Lender" does not include the issuer of a credit card or instrument that can be used to make purchases from a person other than the vendor whose name or logo appears on the card or instrument or that vendor's affiliates.

(d) "Private label credit card" means any charge card, credit card, or other instrument serving a similar purpose that carries, refers to, or is branded with the name or logo of a vendor and that can only be used for purchases from the vendor.

(e) "Taxpayer" means a person that has remitted sales tax directly to the department on the specific sales at retail transaction for which the bad debt is

recognized for federal income tax purposes or, after September 30, 2009, a lender holding the account receivable for which the bad debt is recognized, or would be recognized if the claimant were a corporation, for federal income tax purposes.

(2) In computing the amount of tax levied under this act for any month, a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax. The amount of gross proceeds deducted must be charged off as uncollectible on the books and records of the taxpayer at the time the debt becomes worthless and deducted on the return for the period during which the bad debt is written off as uncollectible in the claimant's books and records and must be eligible to be deducted for federal income tax purposes. For purposes of this section, a claimant who is not required to file a federal income tax return may deduct a bad debt on a return filed for the period in which the bad debt becomes worthless and is written off as uncollectible in the claimant's books and records and would be eligible for a bad debt deduction for federal income tax purposes if the claimant was required to file a federal income tax return. If a consumer or other person pays all or part of a bad debt with respect to which a taxpayer claimed a deduction under this section, the taxpayer is liable for the amount of taxes deducted in connection with that portion of the debt for which payment is received and shall remit these taxes in his or her next payment to the department. Any payments made on a bad debt shall be applied proportionally first to the taxable price of the property and the tax on the property and second to any interest, service, or other charge.

(3) After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met:

(a) No deduction or refund was previously claimed or allowed on any portion of the account receivable.

(b) The account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009. [MCL 205.54i.]

In 2007 PA 105, enacting § 1, the Legislature stated:

This amendatory act is curative and shall be retroactively applied, expressing the original intent of the legislature that a deduction for a bad debt for a taxpayer under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, is available exclusively to those persons with the legal liability to remit the tax on the specific sale at retail for which the bad debt deduction is recognized for federal income tax purposes, and correcting any misinterpretation of the meaning of the term "taxpayer" that may have been caused by the Michigan court of appeals decision in [*DaimlerChrysler*]. However, this amendatory act is not

> intended to affect a refund required by a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired if the refund is payable without interest and after September 30, 2009 and before November 1, 2009.

In *GMAC LLC v Treasury Department*, 286 Mich App 365, 380; 781 NW2d 310 (2009), this Court approved of the Legislature's retroactive "correction" of the *DaimlerChrysler* decision.

If the present case involved periods after September 30, 2009, it could be easily resolved in plaintiff's favor under the current version of MCL 205.54i. However, it involves periods before that date and thus implicates only the parts of the current version that apply retroactively to the claims at issue. By reading the statute as it interacts with *DaimlerChrysler*, we find that plaintiff must prevail in this appeal and that reversal is unwarranted.

The debts at issue clearly "related to . . . sale[s] at retail," did not involve "gross proceeds . . . otherwise deductible or excludable," and were "eligible to be claimed" as federal deductions.[10] See MCL 205.54i. The statute does require that the "amount of gross proceeds deducted" be "charged off as uncollectible on the books" of the taxpayer. *Id.* [11] Specifically, MCL 205.54i(2) reads, in part:

> The amount of gross proceeds deducted must be charged off as uncollectible on the books and records of the taxpayer at the time the debt becomes worthless and deducted on the return for the period during which the bad debt is written off as uncollectible in the claimant's books and records and must be eligible to be deducted for federal income tax purposes.[12]

Because it was the finance companies, and not plaintiff, which "wrote off" the debts, an argument could be made that the debts simply do not fall within the parameters of the bad-debt statute and that defendant, through a loophole of sorts, must be allowed to retain the money at issue.

---

[10] Defendant argues that because the finance companies claimed the deductions, MCL 205.54i is not applicable to plaintiff. However, the statute merely states that the debts must be "eligible to be claimed" as deductions and does not specify the party that must meet this eligibility requirement. We also note that although it appears that the current retroactive version of MCL 205.54i applies in this case (as indicated by 2007 PA 105, enacting § 1), the same conclusions are applicable with regard to the prior versions. We note, too, that the debts were "worthless or uncollectible" under the version of MCL 205.54i in effect before September 1, 2004. Finally, we note that although it did so below, defendant does not contend on appeal that the debts were sold to a third party.

[11] This requirement is contained in all three versions of the statute.

[12] We note that the same language is included in the version of the statute that took effect on September 1, 2004.

However, in *DaimlerChrysler*, the Court essentially concluded that parties acting in concert could be viewed as a unit, in some respects, for purposes of the bad-debt statute. The Legislature, in enacting 2007 PA 105, did not specifically disavow this conclusion[13] but merely clarified that *only the retailer* is entitled to the bad-debt deduction for periods on or before September 30, 2009. See, e.g., *GMAC*, 286 Mich App at 380 ("the enacting section contains the statement that amendment was required to express [the Legislature's] original intent regarding the construction of the term 'taxpayer' and to correct the misinterpretation that allowed the bad debt deduction to an entity other than the remitter of the tax"). Again, 2007 PA 105, enacting § 1, states, in part, that "a deduction for a bad debt for a taxpayer . . . is available exclusively to those persons with the legal liability to remit the tax on the specific sale at retail for which the bad debt deduction is recognized for federal income tax purposes . . . ." Here, plaintiff indeed had the legal liability to remit the tax on the specific sale at retail for which the bad-debt deduction is recognized for federal income tax purposes. While it was the finance companies which took the deductions, this does not detract from the fact that plaintiff meets the requirement of the Legislature as specifically set forth in 2007 PA 105, enacting § 1, and in MCL 204.54i(1)(e). In light of the general principles of *DaimlerChrysler*, the fact that the finance companies "wrote off" the bad debts satisfies MCL 204.541(2). Allowing plaintiff to obtain the bad-debt deduction accords with legislative intent, and a reversal of the trial court's decision is unwarranted.[14]

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter

---

[13] We note that the definition of "taxpayer" in the current version of MCL 205.54i employs the word "person." The definition of "person" as discussed in *DaimlerChrysler* is still in effect. See MCL 205.51(1)(a), which states:

> "Person" means an individual, firm, partnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether organized for profit or not, company, estate, trust, receiver, trustee, syndicate, the United States, this state, county, or any other group or combination acting as a unit, and includes the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

[14] We note that defendant does not raise a separate appellate issue challenging the trial court's joinder of the finance companies. Also, given our ruling in plaintiff's favor, we need not address the additional arguments, raised by defendant, that a denial of the deduction to plaintiff would not violate constitutional precepts.