STATE OF MINNESOTA | TAX COURT

COUNTY OF RAMSEY | REGULAR DIVISION

Handi Medical Supply, Inc.,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

ORDER DENYING HANDI'S MOTION TO COMPEL DISCOVERY

Docket No. 8898-R

Filed: February 16, 2018

This matter came before The Honorable Bradford S. Delapena, Chief Judge of the Minnesota Tax Court, on appellant Handi Medical Supply, Inc.'s motion to compel discovery.

Jennifer A. Nodes and Lee A. Lastovich, Jackson Lewis P.C., represent appellant Handi Medical Supply, Inc.

Jennifer A. Kitchak, Assistant Minnesota Attorney General, represents appellee Commissioner of Revenue.[1]

In this sales tax case, appellant Handi Medical Supply, Inc., seeks an order compelling appellee Commissioner of Revenue to disclose information classified as private or nonpublic third-party taxpayer data under the Minnesota Government Data Practices Act. *See* Minn. Stat. ch. 13 (2016). Because we conclude that the requested information is not discoverable for the purposes Handi seeks to pursue, we deny Handi's motion.

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[1] Kyle W. Wislocky, Assistant Minnesota Attorney General, previously represented the Commissioner of Revenue.

The court, upon all the files, records, and proceedings herein, now makes the following:

ORDER

Appellant Handi Medical Supply, Inc.'s motion to compel discovery is denied.

IT IS SO ORDERED.

BY THE COURT,

Bradford S. Delapena, Chief Judge
MINNESOTA TAX COURT

DATED: February 16, 2018

MEMORANDUM

I. BACKGROUND

The issue in this sales tax case is whether numerous products sold by appellant Handi Medical Supply, Inc., are tax exempt because they qualify as "prosthetic devices."[2] *See* Minn. Stat. § 297A.67, subd. 7(a)(4) (2016) (providing that certain "medical devices for human use are exempt" from sales tax, including "prosthetic devices").

The Commissioner determined that the products in dispute do not qualify for the prosthetic device exemption and, consequently, assessed Handi sales tax, penalty, and interest totaling $254,625.29 for the periods January 30, 2009, through August 31, 2012.[3] Handi's Notice of

[2] Notice of Appeal, Ex. C, at 1 (filed Nov. 30, 2015).

[3] Return, Ex. 3, at 1, 4-6 (October 2, 2015 Notice of Determination on Appeal) (filed Jan. 27, 2016).

Appeal alleges, among other things, disparate treatment.[4] Specifically, Handi contends "that the Commissioner refused to apply the Prosthetic Device Exemption to Handi Medical, but allowed the exemption for other similarly situated taxpayers (who were not taxed at all) for sales of the same categories of prosthetic devices." [5] According to Handi, the Commissioner's conduct "violates the protections afforded Handi Medical under the Equal Protection Clause, U.S. Const. amend. XIV, § 1 and/or the Uniformity Clause of the Minnesota Constitution, Minn. Const. art. X, § 1." [6] The Commissioner denies any disparate treatment.[7]

Given its allegation of disparate treatment, Handi believes that "evidence showing that Handi Medical ... was treated differently from others who are similarly situated is pivotal." [8] Hoping to acquire such evidence, Handi served the Commissioner with written discovery.[9] Interrogatory 10 asks whether the Commissioner has "previously evaluated, considered, or litigated the application of the Prosthetic Device exemption ... for taxpayers other than Appellant." [10] Interrogatory 11 reads:

> If the response to Interrogatory No. 10 is "yes," with respect to each such occasion, provide the following information:
>
> A. The date(s) of evaluation, consideration, or litigation;
>
> B. The specific surgical dressing(s) and/or bandage(s) evaluated or considered;
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> C. Identity of the examiner(s) and/or auditor(s) involved;

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[4] Notice of Appeal, Ex. C, at 1.

[5] Appellant's Mem. Supp. Mot. Compel 1-2 (filed Nov. 2, 2017).

[6] Appellant's Mem. Supp. Mot. Compel 2.

[7] Comm'r's Answer ¶ 4 (filed Jan. 27, 2016).

[8] Appellant's Mem. Supp. Mot. Compel 2.

[9] Nodes Decl. ¶ 4 (Nov. 2, 2017), Ex. 2 (Appellant's Interrogatories to Appellee (Set II), dated Aug. 3, 2017).

[10] Nodes Decl., Ex. 2, Interrogatory No. 10.

D. Factors considered by the examiner(s) and/or auditor(s); and

E. The examiner(s) and/or auditor(s) finding(s), determination(s), and/or decision(s) regarding whether the surgical dressing(s) and/or bandage(s) qualified for the Prosthetic Device exemption.

For purposes of Interrogatory No. 11 only, Appellant does not seek information regarding the taxpayer's identity or data in a form that can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.[11]

Interrogatory 12 states: "If the response to Interrogatory No. 10 is 'yes,' with respect to each such occasion, provide the taxpayer identity and, if a business entity, the state taxpayer identifying number." [12] A related document request seeks "[a]ll documents pertaining to the Appellee's evaluation and consideration of the application of the Prosthetic Device exemption as identified in response to Appellant's Interrogatories No. 11 and 12 ...." [13]

On September 5, 2017, the Commissioner responded to Handi's written discovery.[14] With respect to Interrogatory 10, the Commissioner stated that she was "not currently aware of having litigated the application of the Prosthetic Device exemption ... to the types of surgical dressings and/or bandages at issue in this appeal for taxpayers other than Appellant." [15] With respect to Handi's inquiries concerning previous evaluations "for taxpayers other than Appellant," the Commissioner objected in part that these requests (Interrogatories 10-12) sought "information defined as a 'return' and/or 'return information' as provided in Minn. Stat. § 270B.01, subds. 2 and 3. Pursuant to Minn. Stat. Chapter 270B, such returns and return information may not be

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[11] Nodes Decl., Ex. 2, Interrogatory No. 11.

[12] Nodes Decl., Ex. 2, Interrogatory No. 12.

[13] Nodes Decl., Ex. 3 (Appellant's Request for Production of Documents and ESI to Appellee (Set II), dated Aug. 3, 2017), Request No. 9; *see also id.* at Request No. 8 (seeking "[a]ll documents identified or relied upon in answering Appellant's Interrogatories to Appellee (Set II) served concurrently herewith.").

[14] Nodes Decl., Ex. 4 (Answers to Appellant's Interrogatories to Appellee (Set II), served Sept. 5, 2017).

[15] Nodes Decl., Ex. 4, at Interrogatory No. 10.

disclosed." [16] The Commissioner further objected that the requests were "not relevant to any claim or defense related to Appellant's tax liability in this case." [17]

II. MOTION TO COMPEL DISCOVERY

On October 30, 2017, Handi filed its motion to compel discovery.[18] Handi alleges that the Commissioner "summarily refus[ed] to produce information and/or data in part on the grounds that information ... was nonpublic data under the Minnesota Government Data Practices Act" (MGDPA or Act), and complains that the Commissioner "refused to even answer Interrogatory No. 10, which merely asked whether the Commissioner has ever previously considered the Prosthetic Device Exemption." [19] Handi contends that its discovery is narrowly framed and seeks only "files showing how [the Commissioner] interpreted and applied the Prosthetic Device Exemption for other similarly situated taxpayers." [20] According to Handi, this information "is not only relevant, but it is *essential* to Handi Medical's claim." [21]

The Commissioner renews the argument that she is "prohibited from disclosing private and nonpublic taxpayer data, including returns and return information, except as authorized by law." [22] She likewise renews her contention that the evidence Handi requested is not relevant: "The Commissioner's consideration or evaluation of the application of the prosthetic device exemption to other taxpayers is not relevant to the ultimate question of the amount of taxes Handi owes." [23]

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[16] Nodes Decl., Ex. 4, at Interrogatory Nos. 10-12.

[17] Nodes Decl., Ex. 4, at Interrogatory Nos. 10-12.

[18] Appellant's Not. Mot. & Mot. Compel Disc. (filed Oct. 30, 2017).

[19] Appellant's Mem. Supp. Mot. Compel 4.

[20] Appellant's Mem. Supp. Mot. Compel 6.

[21] Appellant's Mem. Supp. Mot. Compel 6.

[22] Comm'r's Mem. Opp'n Mot. Compel 1 (citing Minn. Stat. § 270B.02, subd. 1 (2016)).

[23] Comm'r's Mem. Opp'n Mot. Compel 8.

III. GOVERNING LAW

The Minnesota Rules of Civil Procedure "govern the procedures in the Tax Court, where practicable." Minn. Stat. § 271.06, subd. 7 (2016). Under Rule 26, parties may obtain discovery though written interrogatories and document requests. Minn. R. Civ. P. 26.02(a). In general, "[d]iscovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality ...." Minn. R. Civ. P. 26.02(b). Subject to these limitations, "parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party .... Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* If a party fails to answer or respond to discovery requests, the propounding party may move for an order compelling answers or the production of documents. Minn. R. Civ. P. 37.01(b).

When through discovery a party requests from a state agency information that is not public under the MGDPA and the agency objects, courts use a two-part statutory test to determine whether disclosure is warranted. *EOP-Nicollet Mall, L.L.C. v. Cty. of Hennepin*, 723 N.W.2d 270, 275-77 (Minn. 2006). The court must "first decide whether the data are discoverable or releasable pursuant to the rules of evidence and of criminal, civil, or administrative procedure appropriate to the action." Minn. Stat. § 13.03, subd. 6. Second, if the data are discoverable, the court must

> decide whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the entity maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data. In making the decision, the [court] shall consider whether notice to the subject of the data is warranted and, if warranted, what type of notice must be given.

Id.

The classification of tax data maintained by the Commissioner, and her disclosure of that data, are governed by law. *See* Minn. Stat. ch. 270B (2016) ("Tax Data, Classification and Disclosure"); Minn. Stat. § 13.4963, subd. 1 (indicating that numerous provisions of chapter 270B "classify tax data as other than public"). Generally, "returns[24] and return information[25] are private data on individuals or nonpublic data as defined in section 13.02, subdivisions 9 and 12" of the MGDPA. Minn. Stat. § 270B.02, subd. 1. Accordingly, the Commissioner generally may not disclose "returns" or "return information" to anyone other than the subject of the data. *Id.* ("Except as authorized by this chapter, ... the commissioner ... may not disclose returns or return information."); Minn. Stat. § 270B.03, subd. 1 (authorizing disclosure of returns and return information to the data subject); *see also* Minn. Stat. § 13.02, subd. 9 (" 'Nonpublic data' are data not on individuals made by statute or federal law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data.").

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[24] Section 270B.01, subdivision 2, defines "return" as follows:

> "Return" means a tax or information return, declaration of estimated tax, or claim for refund under Minnesota tax laws that is filed with the commissioner. "Return" includes any amendment or supplement to those documents, including supporting schedules, attachments, or lists that are supplemental to, or part of, the return. "Return" also includes any report, application, or other form required to be filed with the commissioner under Minnesota tax laws.

[25] Section 270B.01, subdivision 3, defines "return information" as follows:

> "Return information" means a taxpayer's identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, given to, or collected by the commissioner with respect to the determination of the existence, possible existence, or amount of liability of any person under Minnesota tax laws for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense. "Return information" includes the failure to file any return required to be filed with the commissioner under Minnesota tax laws. The term does not include data in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

IV. ANALYSIS

It is undisputed that Handi requests from the Commissioner information protected by the MGDPA and, therefore, that the Act's balancing test controls.[26] We apply that test to determine whether Handi is entitled to the requested information to pursue two stated objectives: (1) rebutting the prima facie validity of the Commissioner's assessment; and (2) proving its central claim that the disputed products qualify for the prosthetic device exemption.

A. Rebutting Prima Facie Validity

"[T]he order of the commissioner ... in every case shall be prima facie valid." Minn. Stat. § 271.06, subd. 6 (2016). Presumptive validity "imposes on the taxpayer the burden of going forward with evidence to rebut or meet the presumption." *Conga Corp. v. Comm'r of Revenue*, 868 N.W.2d 41, 53 (Minn. 2015). One way a taxpayer can carry this burden is by "challeng[ing] the methodology by which the Commissioner arrived at the assessment." *More, Inc. v. Comm'r of Revenue*, No. 8395-R, 2016 WL 715004, at *14 (Minn. T.C. Feb. 19, 2016).

Handi's Notice of Appeal alleges disparate treatment.[27] Evidence that the Commissioner has assessed other taxpayers differently for similar products can be relevant to a taxpayer's appeal. Such evidence might show, for example, that the Commissioner's assessment method is unreliable.[28] *See id.* at *14-15, *19-24 (finding taxpayer overcame prima facie validity by presenting substantial evidence that the Commissioner's indirect audit was unreliable).

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[26] *See* Appellant's Mem. Supp. Mot. Compel 5-7 (applying the Act's balancing test); Comm'r's Mem. Opp'n Mot. Compel 7 ("Handi does not contend that the information it seeks is not protected by chapter 270B ....").

[27] Notice of Appeal, Ex. C, at 1.

[28] Appellant's Mem. Supp. Mot. Compel 5 (arguing that Handi is "entitled to a clear understanding ... of the Commissioner's historical taxation methodology"); Tr. 27 (arguing that an inconsistent assessment methodology indicates unreliability).

Shortly after the November 16, 2017 hearing on Handi's motion to compel, however, the Commissioner informed Handi and the court that she would *not* at trial assert the prima facie validity of her assessment.[29] Handi thus has no need to attack "the methodology by which the Commissioner arrived at the assessment" for the purpose of rebutting prima facie validity. *Id.* at *14. We conclude that the requested information is not discoverable to rebut prima facie validity. Accordingly, we need not proceed to the second step of the statutory balancing test.[30]

B. Proving Handi's Exemption Claims

When prima facie validity is overcome—or, as here, not asserted—we decide the case as though "the presumption [of validity] had never existed." *Conga*, 868 N.W.2d at 53. Specifically, we determine the amount of tax owed based on the evidence presented by the parties. *Id.* A taxpayer bears the ultimate burden of persuasion by a preponderance of the evidence. *Id.*; *Red Owl Stores, Inc. v. Comm'r of Taxation*, 264 Minn. 1, 8, 117 N.W.2d 401, 407 (1962).

The Commissioner argues that evidence of disparate treatment cannot assist Handi to prove the disputed products are exempt.[31] We agree. Relevant evidence is "evidence having any tendency to make the existence of any fact that is *of consequence to the determination of the action*

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[29] Letter from Kyle W. Wislocky, Assistant Minnesota Attorney General, to Lisa Pister, Court Administrator (Nov. 22, 2017) (on file with the Minnesota Tax Court).

[30] The parties dispute whether Handi presented more than a naked allegation of disparate treatment vis-à-vis other taxpayers. Tr. 39-47. Although we need not settle that dispute, mere *speculation* that the Commissioner *might possess* data indicating unequal treatment would be a weak basis indeed upon which to request an order compelling the Commissioner to scour her files for such evidence. *See* Minn. Stat. § 13.03, subd. 6 (requiring the court to evaluate, among other things, "the benefit to the party seeking access to the data"); Minn. R. Civ. P. 26.03 (providing that a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); *Erickson v. MacArthur*, 414 N.W.2d 406, 409-10 (Minn. 1987) (indicating that Rule 26.03 applies to disclosures controlled by section 13.03's balancing test).

[31] Comm'r's Mem. Opp'n Mot. Compel 8-10 (arguing that "[o]ther taxpayer information is not relevant to Handi's tax liability.").

more probable or less probable than it would be without the evidence." Minn. R. Evid. 401 (emphasis added). Here, the Commissioner's past treatment of similarly situated taxpayers is not "of consequence" to either our de novo interpretation of the prosthetic device exemption or our application of the exemption to the disputed products to determine the amount of tax owed. *See* Minn. Stat. § 271.06, subd. 6 ("The Tax Court shall hear, consider, and determine ... every appeal de novo."). Nor is such information likely to lead to admissible evidence.

If Handi demonstrates that its products qualify for the prosthetic device exemption, Handi will prevail on that basis, and we will have no occasion to consider the Commissioner's treatment of other taxpayers. If Handi cannot show that its products qualify, even uncontroverted evidence that the Commissioner has previously allowed the exemption to other taxpayers for similar products would not empower us to grant Handi the relief it requests—exemption from taxation. As the court previously explained regarding the merits of a sales tax exemption claim:

> The exemptions granted in the past, whether proper or improper, are not before this Court. Assuming that some exemptions were granted without statutory authority or granted through improper interpretation of the Statute, that does not compel this Court to perpetuate the flaw nor to stretch the meaning of the Statute to accommodate items not meant to be included. The fact that Department [of Revenue] policy has been inconsistent does not act to change the plain meaning of the words of the Statute.

Aspen Med. Grp., P.A. v. Comm'r of Revenue, No. 6786, 1998 WL 761835, at *8 (Minn. T.C. Oct. 28, 1998). We conclude that the requested information is not discoverable to support Handi's exemption claims. Consequently, we do not reach the second step of the balancing test.

V. CONCLUSION

To the extent the information Handi seeks is subject to Minn. Stat. ch. 270B and the MGDPA, the Act's balancing test favors non-disclosure for each of the two purposes discussed above. We therefore deny Handi's motion to compel discovery.

B.S.D.