

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

BRENDA SMITH d/b/a	)	
SUGAR CREEK CARRIAGES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20-0640-I
	)	
DAVID GERREGANO, COMMISSIONER	)	Chancellor Telford E. Forgety, Jr.
OF THE TENNESSEE DEPARTMENT OF	)	Judge Rhynette N. Hurd
REVENUE,	)	Chancellor Patricia Head Moskal,
	)	Presiding Judge
Defendant.	)	

**ORDER**

Before the Court are Plaintiff Brenda Smith d/b/a Sugar Creek Carriages' *Motion to Amend the Scheduling Order and Motion Pursuant to Rule 36.01, T.R.C.P. to Determine Sufficiency of the Answers and Objections and to Enter an Order Either Requiring an Answer or Deem Them Admitted*. The three-judge panel assigned to this case (the "Panel") heard both motions on November 15, 2021. Attorney Gary Blackburn participated in the hearing on behalf of Plaintiff, and Assistant Attorney General R. William Stout participated on behalf of Defendant. Also attending the hearing was Deputy Attorney General C. Larry Lewis.

Plaintiff's *Motion to Amend Scheduling Order* to extend the date to complete depositions is unopposed and should be granted. Plaintiff's *Motion to Determine the Sufficiency of Defendant's Answers and Objections* to the requests for admissions under Rule 36.01 should be denied for the reasons discussed below.

**A. Plaintiff's Requests for Admission and Defendant's Objections**

Plaintiff alleges in her complaint that Defendant Commissioner of the Tennessee Department of Revenue (the "Department") lacks the authority to assess amusement taxes against Plaintiff's business under Tenn. Code Ann. § 67-6-212. Plaintiff also alleges the Department seeks

to unlawfully enforce the amusement tax only against Plaintiff and not against other substantially similar businesses. *See* First Am. Compl., ¶¶ 10–11, 13–18.

Plaintiff served requests for admission on the Department, and the Department served responses on March 3, 2021. Plaintiff moves the Court to determine the sufficiency of the Department’s objections to Requests for Admission Nos. 4–14. *See* Pl.’s Mot., Ex. A.

Request Nos. 4–11 ask the Department to admit eight different companies, located in Memphis, Chattanooga and Nashville, operate horse drawn carriages for hire.

Request No. 12 asks the Department to admit Defendant has not subjected any of the eight carriage companies to the amusement tax.

Request No. 13 asks the Department to admit the business of the eight carriage companies are the same or substantially similar to Plaintiff’s business.

Request No. 14 asks the Department to admit the Department has never before attempted to tax the horse drawn carriage industry in Tennessee prior to the present assessment against Plaintiff.

In response to Request Nos. 4–14, Defendant objected to each request on the grounds the information requested is irrelevant and is prohibited from disclosure by the Tennessee Taxpayer Confidentiality Act, §§ 67-1-1701 *et seq.*

In further response to Request No. 14, the Department objected to the request as vague and ambiguous regarding the phrase “attempted to tax.” The Department denied, “[s]ubject to and without waiving the foregoing objections,” it has never attempted to administer sales tax on amusement tours or attempted to tax the horse drawn carriage industry in Tennessee. The Department further responded it has published “significant guidance” regarding the amusement

tax to assist taxpayers with tax compliance and holds educational events for taxpayers across the State.

Plaintiff moves to determine the sufficiency of the Department's answers and objections. The Department opposes the motion.

### **B. Legal Standards**

Rule 36 of the Tennessee Rules of Civil Procedure is designed to narrow the scope of issues at trial. *Tenn. Dep't of Human Servs. v. Barbee*, 714 S.W.3d 263, 266 (Tenn. 1986). It allows parties to serve written requests for admission of matters relating to "(a) facts, the application of law to fact, or opinions about either; and (b) the genuineness of any described documents." Tenn. R. Civ. P. 36.01. A matter is deemed admitted unless a written answer or objection addressed to the matter is served. *Id.* The party who has requested admissions

may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

*Id.* Like all rules pertaining to discovery, requests for admission under Rule 36 are subject to the permissible scope of discovery set forth in Rule 26.02. "Thus, before a trial court may order matters divulged under this Rule, it must make a threshold determination that the matters sought are (1) not privileged and (2) relevant to the subject matter of the lawsuit." *West v. Schofield*, 460 S.W.3d 113, 121 (Tenn. 2015).

### **C. Analysis**

The Department contends the admissions requested by Plaintiff implicate privileged and confidential taxpayer information and tax administration information prohibited from disclosure under the Taxpayer Confidentiality Act, Tenn. Code Ann. §§ 67-1-1701, -1702. Def.'s Resp., at 2. Defendant also contends the requested admissions relating to Plaintiff's selective tax

enforcement theory are not relevant under the standard set forth in *National Loans, Inc. v. Tenn. Dep't of Financial Institutions*, No. 01A01-9506-CH-00241, 1997 WL 194992 (Tenn. Ct. App. Apr. 23, 1997).

The Taxpayer Confidentiality Act (the “Act”) provides in the pertinent part:

Notwithstanding any law to the contrary, returns, ***tax information and tax administration information shall be confidential*** and, except as authorized by this part,<sup>1</sup> no officer or employee of the department or of any office of a district attorney general or any state or local law enforcement agency, and no other person, or officer or employee of the state, who has or had access to such information shall disclose any such information obtained by such officer or employee in any manner in connection with such officer’s or employee’s service as an officer or employee, or obtained pursuant to this part, or obtained otherwise.

Tenn. Code Ann. § 67-1-1702(a) (emphasis added). “Tax information” is defined as:

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 collected, 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, furnished to, or collected by, the commissioner with respect to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax, penalty, interest, fine, forfeiture, or other penalty, imposition or offense, administered by or collected by the commissioner, either directly or indirectly. “Tax information” does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer . . . .

Tenn. Code Ann. § 67-1-1701(8). “Tax administration information” is defined as “criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards; audit procedures; and any other information relating to tax administration.” Tenn. Code Ann. § 67-1-1701(7). “Tax administration” is defined as

the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes or rules and reciprocity agreements with the several states or federal government to which the

---

<sup>1</sup> None of the exceptions referred to are implicated in this case.

state of Tennessee is a party. “Tax administration” also means the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements and includes assessments, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, rules or reciprocity agreements . . . .

Tenn. Code Ann. § 67-1-1701(6). These definitions are broad.

The appellate courts have considered only a handful of times the Act’s prohibition against disclosure of confidential tax information or tax administration information, and they have construed the Act’s definitions and protections broadly. For example, in *McLane Co. v. State*, 115 S.W.3d 925, 928, 931 (Tenn. Ct. App. 2002), the Court of Appeals rejected a trial court’s decision that the Act was limited to “information such as tax payers [sic] tax return, declaration of estimated tax, request for a refund or waiver of penalty.” Applying well-recognized principles of statutory construction, the court held that by separately including “tax information” and “returns” in the Act as confidential categories of information, the legislature intended the confidentiality prohibition to apply to both categories of information and included “taxpayer identity.” *Id.* at 929.

Similarly, in *Coleman v. Kisber*, 338 S.W.3d 895, 902, 907 (Tenn. Ct. App. 2010), *perm. app. denied* (Tenn. 2011), the Court of Appeals held that documents sought under the Tennessee Public Records Act identifying finalists for a business tax credit program came within the definitions of “tax information” or “tax administration information,” even though the documents were not part of past or current tax reviews by the Department of Revenue. The business tax credit program provided for up to \$120 million in tax credits to be distributed to selected businesses. The appellate court reasoned the program “clearly related to the administration of taxes and the determination of tax liability in Tennessee” and, therefore, came within the purview of the Taxpayer Confidentiality Act. *Id.* at 907–08.

Here, Request for Admissions Nos. 4–11 ask the Department to admit that eight separate companies operate horse drawn carriages for hire in Tennessee. The Panel finds that these requests ask the Department to disclose confidential “tax information” in the form of taxpayer’s identity and the nature or source of taxpayer’s income, which is prohibited by the Act. Tenn. Code Ann. § 67-1-1701(8), § 67-1-1702. Similarly, Request No. 13 asks the Department to admit that the eight companies offer services that are the same as or substantially similar to those offered by Plaintiff and would require disclosure of the same confidential tax information. Such an admission is prohibited by the Act. Tenn. Code Ann. § 67-1-1701(8), § 67-1-1702.

Request No. 12 asks the Department to admit that none of the eight companies have been subjected to an amusement tax by the Department. This request would require the Department to disclose whether any of those companies have or had tax liabilities under the amusement tax and would implicate tax information in terms of “any other data, received by, recorded by, prepared by, furnished to, or collected by, the commissioner . . . with respect to the determination of the existence, or possible existence, of liability . . . of any person for any tax.” Tenn. Code Ann. § 67-1-1701(8). To the extent Plaintiff is seeking the absence of such confidential information, it would implicate “tax administration information” in the form of “any other information relating to” “the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws.” Tenn. Code Ann. § 67-1-1701(6), (7); *Bridgestone v. Chumley*, No. M2007–00813–COA–R9–CV, 2008 WL 2415483, at \*11 (Tenn. Ct. App. June 11, 2008) (explaining that the Department’s consideration or internal discussion of questions of state tax law or policy constitute confidential tax administration information). Whether treated as tax information or tax administration information, its disclosure is prohibited by the Act. Tenn. Code Ann. § 67-1-1702.

Request No. 14 asks the Department to admit directly that which Request No. 12 sought implicitly—that the Department has never before attempted to tax the horse-drawn carriage industry in Tennessee prior to Plaintiff’s assessment. Again, this request seeks tax information prohibited from disclosure in the form of “any other data, received by, recorded by, prepared by, furnished to, or collected by, the commissioner . . . with respect to the determination of the existence, or possible existence, of liability . . . of any person for any tax.” Tenn. Code Ann. § 67-1-1701(8). In addition, this request seeks “tax administration information” in the form of other information relating to “the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws.” Tenn. Code Ann. § 67-1-1701(6), (7); *Bridgestone*, 2008 WL 2415483, at \*11.

The Panel further finds that to the extent Requests No. 12 or 14 is directed to Plaintiff’s efforts to establish a claim of selective enforcement against the Department, Plaintiff must make a threshold showing of discrimination. *See Nat’l Loans, Inc.*, 1997 WL 194992, at \*6. “In order to be entitled to discovery, a party claiming selective enforcement must come forward with some credible evidence tending to show the existence of discriminatory effect and discriminatory intent.” *Id.* at \*6 (citing *United States v. Armstrong*, 116 S. Ct. 1480, 1488 (1996)). Plaintiff has not come forward with credible evidence that would tend to support the existence of either a discriminatory effect or discriminatory intent. The mere failure of the Department previously to have collected the amusement tax has no bearing on the Department’s current efforts now. *Porter Brown Limestone Co. v. Olson*, 648 S.W.2d 242, 244 (Tenn. 1982) (“Taxpayers owe and it is the duty of the Commissioner of Revenue to collect the taxes due the State under the law as written by the Legislature and interpreted by the Courts, not as interpreted or overlooked or otherwise omitted by various field auditors or other individuals in the Department of Revenue.”). Nor has

Plaintiff alleged any discrimination in her First Amended Complaint. She instead makes only the bare allegation that she is the lone horse-drawn carriage company operating in Tennessee that has been subjected to the amusement tax levied by Defendant, which falls short of the required showing.

**D. Conclusion**

Based on Plaintiff's *Motion to Determine Sufficiency of Answers and Objections*, the Department's response, the arguments of counsel, and the record in this case, the Panel concludes that the information Plaintiff asks the Department to admit is confidential information under the Taxpayer Confidentiality Act and its disclosure is prohibited. The Panel further concludes that Plaintiff has failed to make the required showing of relevancy for a selective enforcement claim.

It is, accordingly, ORDERED that Plaintiff's *Motion to Amend the Scheduling Order* is hereby **GRANTED**. The Scheduling Order previously entered on August 26, 2021, is hereby amended to extend the date by which depositions are to be completed for thirty (30) additional days from the date of entry of this Order.

It is further ORDERED that Plaintiff's *Motion to Determine the Sufficiency of Defendant's Answers and Objections* is hereby **DENIED**.

  
\_\_\_\_\_  
CHANCELLOR TELFORD E. FORGETY, JR.

  
\_\_\_\_\_  
JUDGE RHYNETTE N. HURD

  
\_\_\_\_\_  
CHANCELLOR PATRICIA HEAD MOSKAL



cc:

W. Gary Blackburn, Attorney at Law  
Bryant Kroll, Attorney at Law  
THE BLACKBURN FIRM, PLLC  
213 Fifth Avenue North, Suite 300  
Nashville, TN 37219  
[gblackburn@wgaryblackburn.com](mailto:gblackburn@wgaryblackburn.com)  
[bkroll@wgaryblackburn.com](mailto:bkroll@wgaryblackburn.com)

R. William Stout, Asst. Attorney General  
Office of the Tennessee Attorney General  
Tax Division  
P.O. Box 20207  
Nashville, TN 37202-0207  
[Will.Stout@ag.tn.gov](mailto:Will.Stout@ag.tn.gov)