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STATE OF WISCONSIN
TAX APPEALS COMMISSION

STATE OF WISCONSIN
DEPARTMENT OF REVENUE
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LEGAL DIVISION

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EDWARD DAVID
4003 N. Downer Avenue
Milwaukee, WI 53211,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,

Respondent.

* * * * *

DOCKET NO. I-11897

RULING AND ORDER
(Attorney Fees)

(Drafted by
Commissioner Junceau)

Pursuant to respondent's notice of motion to dismiss the petition for review and this Commission's notice of hearing thereon, the parties convened at Milwaukee, Wisconsin on September 16, 1986, with Commissioner Robert C. Junceau, presiding. The petitioner appeared in person, acting as his own attorney, and respondent appeared by Sheree Robertson, its duly authorized attorney. Based on the entire record before us the Commission rules and orders as follows:

FINDINGS OF FACT

1. On or about April 7, 1985 petitioner filed an amended Wisconsin Income Tax Return for the year ended December 31, 1981 claiming a refund of \$245 based on a claim of educational expense deduction for law courses taken at a law school which was not approved by the American Bar Association, and a degree from which would not satisfy Wisconsin standards for admission to the bar.

2. On August 16, 1985 respondent denied the claim for refund.

3. On October 2, 1985 petitioner timely filed with respondent a petition for redetermination of the refund denial, which was received by respondent on October 3, 1985.

4. On April 17, 1986, before this respondent acted on his petition for redetermination, but after expiration of the 6 month period in which respondent is directed to act thereon by Wis. Stats. § 71.12(1)(a), petitioner filed a petition for review with this Commission. In the petition he stated that he had not received and had no knowledge that respondent had issued its notice of action on the petition for redetermination, and in his prayer for relief asked this Commission to "order Respondent to issue a refund in the amount of \$245.00 together with interest from April 15, 1982 and attorney's fees."

5. Under date of May 13, 1986 respondent issued its notice of action granting the petition for redetermination in full.

6. There is no evidence that petitioner inquired of respondent as to the status of his petition for redetermination at or about the time the period within which it is directed to act thereon.

7. On May 16, 1986 respondent filed with this Commission a notice of motion to dismiss the petition on the grounds that respondent had not acted on the petition for redetermination or issued a notice of action letter thereon, and

that, accordingly, petitioner was not aggrieved by the redetermination as required under § 73.01(5)(a), Stats., and therefore, that this Commission lacks jurisdiction to review petitioner's grievances. By way of attached affidavit in support of its motion respondent opposed the award of attorney fees and costs on the grounds that petitioner was not involved in any "contested case" with respondent, as that term is defined in § 227.01(2), Stats., and that petitioner has not prevailed in an action against the respondent.

8. On May 20, 1986 petitioner filed with this Commission an amended petition for review adding to his petition the statement that he received on May 15, 1986 by ordinary mail respondent's notice of action dated May 13, 1986. Petitioner prayed that this Commission award attorney's fees on the grounds that he had "substantially prevailed" in this action, thereby effectively withdrawing his petition for review as to the claim for refund.

9. By notice dated July 9, 1986 this Commission scheduled the matter for hearing on September 16, 1986 on respondent's motion dated May 16, 1986.

10. At hearing the parties agreed that the claim for refund having been granted, the tax refund issue was "moot" and that the only remaining issue for this Commission to decide was petitioner's motion for attorney fees. The parties waived notice of hearing on the record as to the attorney fee issue.

11. Respondent offered no evidence or explanation for

its failure to act within 6 months on the petition for redetermination as directed by § 71.12(1)(a), Stats.

12. Petitioner spent 5 hours preparing and researching for the petition for review, amended petition, and the hearing. An attorney, he valued his services at \$50 an hour.

APPLICABLE LAW

Ch. 227, Wis. Stats., as amended by 1985 Wisconsin Act 52, provides, in relevant part, as follows:

"227.01 Definitions. In this chapter:

(1) 'Agency' means any board, commission, committee, department or officer in the state government, except the governor or any military or judicial officer of this state.

(2) 'Contested case' means a proceeding before an agency in which, after hearing required by law, substantial interests of any party to such proceeding are determined or adversely affected by a decision or order in such proceeding and in which the assertion by one part of any such substantial interest is denied or controverted by another party to such proceeding. There are 3 classes of contested cases as follows:

(a) A 'class 1 proceeding' is a proceeding in which an agency acts under standards conferring substantial discretionary authority upon the agency. Class 1 proceedings include, but are not restricted to: rate making; price setting; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; and the grant or denial of licenses.

(b) A 'class 2 proceeding' is a proceeding in which an agency determines whether to impose a sanction or penalty against one or more parties. Class 2 proceedings include, but are not restricted to, suspensions of, revocations of, and refusals to renew licenses because of an alleged violation of law. Any proceeding which could be construed to be both a class 1 and 2 proceeding.

(c) A 'class 3 proceeding' is any contested case not included in class 1 or 2."

* * *

"227.115 Costs to certain prevailing parties. (1) The legislature intends that hearing examiners and courts in this state, when interpreting this section, be guided by federal case law, as of the effective date of this subsection...[revisor inserts date], interpreting substantially similar provisions under the federal equal access to justice act, P.L. 96-481.

(2) In this section:

(a) 'Hearing examiner' means the agency or hearing examiner conducting the hearing.

* * *

"(e) 'State agency' does not include the public intervenor or citizens utility board.

(f) 'Substantially justified' means having a reasonable basis in law and fact.

(3) In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

(4) In determining the prevailing party in cases in which more than one issue is contested, the examiner shall take into account the relative importance of each issue. The examiner shall provide for partial awards of costs under this section based on determinations made under this subsection.

(5) If the hearing examiner awards costs under sub.(3), he or she shall determine the costs under this subsection, except as modified under sub.(4). The decision on the merits of the case shall be placed in a proposed decision and submitted under ss.227.10 and 227.11. The prevailing party shall submit, within 30 days after service of

the proposed decision, to the hearing examiner and to the state agency which is the losing party an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The state agency which is the losing party has 15 working days from the date of receipt of the application to respond in writing to the hearing examiner. The hearing examiner shall determine the amount of costs using the criteria specified in s. 814.245(5) and include an order for payment of costs in the final decision.

(6) A final decision under sub. (5) is subject to judicial review under s. 227.15. If the individual, small nonprofit corporation or small business is the prevailing party in the proceeding for judicial review, the court shall make the findings applicable under s. 814.245 and, if appropriate, award costs related to that proceeding under s. 814.245, regardless of who petitions for judicial review. In addition, the court on review may modify the order for payment of costs in the final decision under sub. (5).

(7) An individual is not eligible to recover costs under this section if the person's properly reported federal adjusted gross income was \$150,000 or more in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the case. This subsection applied whether the person files the tax return individually or in combination with a spouse."

CONCLUSIONS OF LAW

1. The petition for redetermination of the respondent's refund claim and its pendency before respondent's appellate bureau was not a "contested case" within the meaning of §§ 227.01(2) and 227.115 (3), Stats.

2. Petitioner was not the "prevailing party" in any "contested case" before this "hearing examiner," within the

meaning of §§ 227.01(2) and 227.115 (2) and (3), Stats.

3. The respondent, a state agency, was not the "losing party" in any "contested case," within the meaning of §§ 227.01(2) and 227.115(3), Stats.

4. That petitioner's petition dated April 17, 1986 for review of respondent's denial of his claim for refund was withdrawn by his amended petition dated May 20, 1986.

5. In any event, petitioner's decision to file a petition for review with this Commission without having received a redetermination from respondent was the cause of his incurring "costs" for his own attorney fees, and premature filing of such appeal constitutes "special circumstances. . .that would make the award unjust", within the meaning of § 227.115(3), Stats.

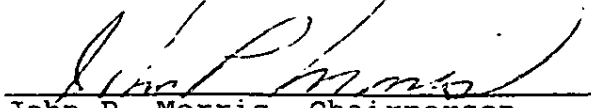
Therefore,

IT IS ORDERED

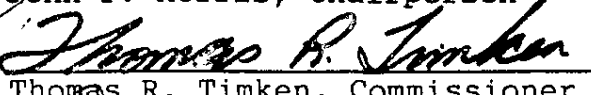
That petitioner's motion for attorney's fees is denied. The petition for review of respondent's refund denial was withdrawn.

Dated at Madison, Wisconsin, this 23rd day of September 1986.

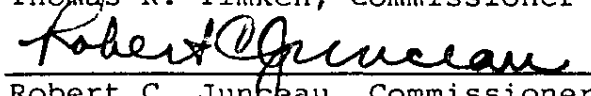
WISCONSIN TAX APPEALS COMMISSION



John P. Morris, Chairperson



Thomas R. Timken, Commissioner



Robert C. Junceau, Commissioner

ATTACHMENT:
"Notice of Appeal Information"

denial of his claim for refund was granted in full by notice of action issued dated May 13, 1986, which he received by mail on the same day as respondent filed a motion with this Commission to dismiss the petition for review as, in effect, premature.

Petitioner proceeded to amend his petition for review, acknowledging that respondent granted his claim for refund, but continuing to ask for attorneys fees.

§ 227.115 as created by 1985 Wisconsin Act 52, § 2, effective November 20, 1985, provides for the award of attorneys fees in administrative hearings under certain circumstances to individuals, small nonprofit corporations and small businesses. Under subs. (3), if an individual is "the prevailing party" in any "contested case" and submits a motion for costs, the "hearing examiner shall award the prevailing party the costs unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position." In addition, the hearing examiner may deny the motion awarding costs upon finding "that special circumstances exist that would make the award unjust."

Respondent opposes the motion to award costs on the grounds that there was no "contested case" involved in which petitioner was "the prevailing party."

The filing of a petition for redetermination and proceedings before respondent's appellate bureau is an informal review, not involving a "hearing required by law," and, as a consequence, is not a "contested case" as defined in § 227.01(2),

Stats. It was in that proceeding that petitioner prevailed in his claim for refund. This Commission has no jurisdiction over such proceedings.

The only proceedings before this Commission resulted from petitioner's premature petition for review, filed before respondent had acted, although after the 6 month review period provided in § 71.21(1)(a), Stats., had passed.

The 6 month provision of § 71.12(1)(a), Stats. is merely directory, not mandatory.¹ Thus, although respondent is directed to act within 6 months, it is not only not prohibited from acting thereafter, but must do so, which it did.² Moreover, its failure to act within the 6 month period does not result in an automatic granting of the petition for redetermination:³

Petitioner apparently recognized respondent's authority to act by accepting the respondent's action despite its "tardiness", and withdrawing the item from consideration by filing an amended petition for review with this Commission.

In the hearing before this Commission, only the attorney fee motion was considered. There was no "tax case" on its merits presented. Thus, the only "contested case", if any, involved the attorney fee question itself. Moreover, there was no "hearing required by law" on the merits of his claim for refund because respondent had not, prior to petitioner filing his original petition for review, issued its redetermination, and thus he was not "aggrieved by the redetermination" so as to require a hearing under § 73.01(5), Stats. We do not construe

"contested case" as used in § 227.115(3) to refer to a hearing limited to the award of fees itself, unless directly connected to or the consequence of a contested case. Moreover, petitioner was not the "prevailing party" in any contested case before this Commission, and conversely, neither was respondent the "losing party" under § 227.115(3).

We clearly do not see this as a case at all contemplated in the attorney fee provisions.

Were we lacking any other authority, however to deny the fees required we would still consider this a case where "special circumstances exist that would make the award unjust" under § 227.115(3). Petitioner has nowhere in the record suggested that he made any attempt to inquire of respondent as to the status of the action. We infer that he preferred to remain silent and file a petition with this Commission asking it to order the respondent to grant the refund because it had not acted within the time provided in § 71.12(1)(a), Stats. This would avoid a decision on the merits, and provide victory on a "technicality."

Although no evidence as to the delay in issuing the notice of action was presented, the petition was granted. Based on this Commission's accumulated experience with respondent as a litigant, we must infer that it would have granted the petition earlier had it been mindful of the impending "deadline."

In short, petitioner incurred his costs because he elected to file a petition with this Commission despite the

language of § 73.01(5) which requires one to be "aggrieved by the redetermination." Whatever costs he incurred related to the rather unusual course of proceedings thereafter were a result, we think, of his failure to direct his concerns to respondent about his failure to receive any redetermination notice.

In such special circumstances, we believe award of attorneys fees to petitioner would be unjust.

Submitted by:



Robert C. Junceau, Commissioner

FOOTNOTES

¹See Wisconsin Department of Revenue v. Vonasek & Schieffer, Inc. et al, Dane County Cir. Ct. Case No. 85-CV-5726 (July 3, 1986, citing State v. Industrial Comm., 233 Wis. 461 (1940).

²Id., citing State v. Industrial Comm., note 1, supra, 461-462.

³Id.