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MORRIS ANDREW K I9307 092683 TAC

STATE OF WISCONSIN
TAX APPEALS COMMISSION

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 ANDREW K. MORRIS
 P.O. Box 228
 Brookfield, Wisconsin 52005

 Petitioner,

 vs.

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

 Respondent.

DOCKET NO. I-9307
 DECISION AND ORDER
 (Drafted by
 Commissioner Doyle)

STATE OF WISCONSIN
 DEPARTMENT OF REVENUE
RECEIVED
 SEP 27 1983
 LEGAL DIVISION

*Can
be
sent*

The above-entitled matter having come on to be heard by the Commission; the petitioner, Andrew K. Morris, having appeared in person, representing himself; the respondent, Wisconsin Department of Revenue, having appeared by its attorney, Donald J. Goldsworthy; being fully advised in the premises, having considered the entire record herein, this Commission hereby finds and decides as:

FINDINGS OF FACT

1. This is a timely appeal from the respondent's notice dated July 26, 1982 denying petitioner's petition for redetermination of respondent's assessment of additional income taxes for the years 1975 and 1976.
2. On February 15, 1982 respondent issued a Notice of Amount Due for the years 1975 - 1978 in the total amount of \$751.64 including tax and interest. Said assessment for the years 1975 and 1976 was based upon a Federal Audit Report.
3. Under the Federal Audit Report certain expenses paid by the corporation, Andrew K. Morris & Associates, Inc., were

disallowed and construed to be preferential dividends. Said amounts were added into petitioner's taxable income for the years 1975 and 1976.

4. Respondent received the Federal Audit Report in January, 1980 but did not issue its assessment until February 15, 1982, nearly two years later.

5. Petitioner did not notify respondent of Federal changes within 90 days.

6. Petitioner does not dispute the basis of the assessment for the years at issue but objects to the imposition of interest at the rate of 12% for the 6 years arguing that the respondent sat for two years after receipt of the Federal Audit Report before making an assessment.

7. By enactment of Chapter 20, section 1090n Laws of 1981, the rate of interest in assessing additional taxes imposed under sec. 71.09(5)(a), Wis. Stats. was increased from 9% to 12%.

8. Chapter 20 section 2203(45)(g) Laws of 1981 provided that "the treatment of sections 71.09(5). . . of the statutes by this act first applies to all determinations, assessments or other actions made by the department of revenue on August 1, 1981, regardless of the taxable period to which they pertain."

RELEVANT WISCONSIN STATUTES

Section 71.09(5)(a)
Section 71.11(21m)
Section 71.11(21)(g)

CONCLUSIONS OF LAW

1. Petitioner did not report changes by the Internal Revenue Service for the years at issue within ninety days of its final determination, as required under sec.71.11(21m), Wis. Stats.

2. Pursuant to sec.71.11(21)(g), Wis. Stats., because petitioner failed to report federal changes to the years at issue, respondent has ten years from date when the tax return was filed within which to make an assessment.

3. Respondent's assessment was issued within the statute of limitations imposed under sec.71.11(21)(g), Wis. Stats. and was proper.

4. The imposition of interest under sec.71.09(5), Wis. Stats., is mandatory, and this Commission has no authority to abate interest imposed.

5. Pursuant to sec.71.09(5)(a), as amended by Chapter 20 section 1090n, the interest rate of 12% was properly applied for the period at issue in the assessment of respondent.

Therefore,

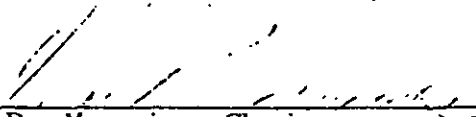
IT IS ORDERED

That respondent's action on the petitioner's petition for redetermination be and the same hereby is affirmed.


Dated at Madison, Wisconsin, this 26th day of September,

1983.


WISCONSIN TAX APPEALS COMMISSION



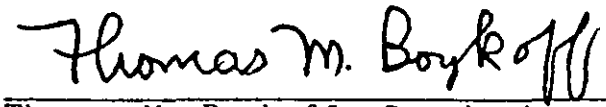
John P. Morris, Chairman




Thomas R. Timken, Commissioner



Catherine M. Doyle, Commissioner



Thomas M. Boykoff, Commissioner



William Bradford Smith, Commissioner

Attachment: "NOTICE OF APPEAL INFORMATION"

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STATE OF WISCONSIN
TAX APPEALS COMMISSION

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ANDREW K. MORRIS,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NO. I-9307
O P I N I O N

Respondent properly issued the assessment at issue within the statute of limitations pursuant to secs.71.11(21)(g) and 71.11(21m), Wis. Stats. Petitioner failed to notify respondent within 90 days of federal changes to the years at issue. Therefore, under sec.71.11(21)(g), Wis. Stats., respondent had ten years from the date when the return was filed within which to make an assessment. The assessment at issue was within the ten year period.

The petitioner has primarily objected to the imposition of 12% interest for the years 1975 and 1976. Petitioner argued that in January, 1980 respondent received the federal audit report upon which it based the assessment at issue but failed to issue its assessment for 2 years, until February 15, 1982, thus running up 2 more years interest.

During the period between January 1980 and February, 1982, the rate of interest imposed on assessments was raised from 9% to 12% by enactment of Chapter 20 section 1090n, Laws of 1981. The effective date of this statutory change as set forth in Chapter 20 section 2203(45)(g), Laws of 1981, reads as follows:

"The treatment of sections 71.09(5). . . of the statutes by this act first applies to all determinations, assessments or other actions made by the department of revenue on August 1, 1981, regardless of the taxable period to which they pertain."

The Commission herein holds that the new 12% rate of interest applies to the entire period of an assessment issued after August 1, 1981 regardless of whether the taxable period was prior to that date.

The Wisconsin Supreme Court in State ex rel. Globe Steel Tubes Co. v. Lyons 183 Wis. 107 (1924) stated at page 121, that "ordinarily a law will be construed as prospective instead of retroactive; but where the legislative purpose to have it retroactive is plain and justice requires that it be so construed, the court will not hesitate to give effect to the legislative intent."

The legislative intent to have the 12% rate of interest apply retroactively to periods prior to August 1, 1981 but subject to assessments issued after that date is plain and expressly stated.

The present case is distinguishable from Marcuvitz v. Wisconsin Department of Revenue, docket nos. I-5716 - I-5732, CCH Wis. Tax Reporter - New Matters - Paragraph 201-451 (December 15, 1977). In Marcuvitz the Commission interpreted a legislative amendment in 1975 to sec. 71.09(5)(a), increasing the rate of interest from 6% to 9%. The Commission held that the 9% rate of interest could not be retroactively applied to periods prior to the effective date of the amendment (November 1, 1975) because

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there was no expressly stated legislative intention to have the amendment be applicable retroactively.

The effective date language for the 1975 amendment read as follows: "The treatment of sections 71.09(5)(a) and (b). . . of the statutes shall take effect on the first day of the month following the 90th day after publication of this act." The effective date language of the 1981 amendment at issue herein is clearly distinguishable from that of the 1975 amendment. As to the 1981 amendment, the legislature expressly stated that the new 12% interest rate first applies to all assessments by respondent on August 1, 1981 regardless of the taxable period covered by the assessment.

Therefore, the Commission determines that as to the assessment at issue herein which was issued on February 15, 1982, the 12% rate of interest would be applicable for the entire period to which the assessment pertained.

Submitted by:

Catherine M. Doyle
Catherine M. Doyle, Commissioner