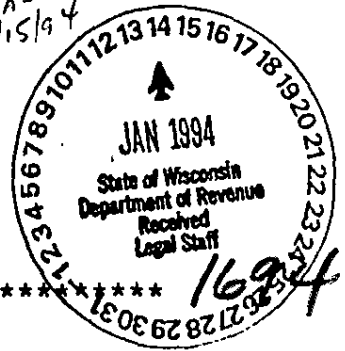


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STATE OF WISCONSIN  
TAX APPEALS COMMISSION

\*\*\*\*\*

JOHN J. AND LOIS R. HETTICH,  
5520 W. Idlewood Lane, N.W.  
Atlanta, GA 30327

\*  
\* DOCKET NO. 91-I-492

Petitioners,

\* RULING AND ORDER

vs.

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

\*  
\*

Respondent.

\*

\*\*\*\*\*

On July 14, 1993, the petitioners, John J. and Lois R. Hettich, by their counsel, Eugene O. Duffy, filed with this commission a NOTICE OF MOTION and MOTION FOR SUMMARY JUDGMENT, with supporting affidavits and other documentation, requesting this commission to enter summary judgment in their favor pursuant to Rule 802.08 of the Wisconsin Rules of Civil Procedure and Rules §§ TA 1.31(1) and 1.39 of the Wisconsin Administrative Code. The grounds alleged for this motion are that there is no genuine issue as to any material facts and, thus, petitioners are entitled to judgment as a matter of law. The petitioners also advance a collateral estoppel defense that is superfluous and will not be considered.

The petitioners rely, in part, on the respondent's failure to timely answer or object to their FIRST REQUEST FOR ADMISSIONS served on it on March 30, 1992, arguing that pursuant to § 804.11, Wis. Stats. (The Wisconsin Rules of Civil Procedure),

*Ch*

each matter for which an admission was requested is admitted by operation of law.

On September 8, 1993, the respondent, Wisconsin Department of Revenue, by its counsel, Kevin B. Cronin, filed with this commission a RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT, along with supporting affidavits and other documentation.

On September 8, 1993, the respondent also filed a MOTION TO WITHDRAW DEEMED ADMISSIONS in which it concedes it was late.

This commission finds for the petitioners, John J. and Lois R. Hettich, and against the respondent, Wisconsin Department of Revenue, for the following reasons:

After considering the entire record before us, including the briefs of counsel, this commission hereby finds, decides, and rules as follows:

1. On November 25, 1991, the petitioners, by their counsel, filed an appeal with this commission along with the companion appeals of:

<u>Bourassa</u>	-	Docket No. 91-I-495
<u>Beringer</u>	-	Docket No. 91-I-487
<u>Diekroeger</u>	-	Docket No. 91-I-493
<u>Estes</u>	-	Docket No. 91-I-494
<u>Rawles</u>	-	Docket No. 91-I-488
<u>Thorne</u>	-	Docket No. 91-I-490

2. The sole issue in all of these cases was the same, namely whether a timely refund claim was in fact filed by each of these taxpayers with the respondent in 1979 for the year 1978. The facts also appear to be virtually identical in all (7) cases.

3. On July 9, 1992, a telephone scheduling conference was held involving all (7) cases, with Wisconsin Tax Appeals

Commissioner Douglass Bartley presiding.

4. On July 9, 1992, a Scheduling Order was issued on behalf of this commission by Commissioner Bartley which contained the following order:

"Mr. Duffy will notify Mr. Cronin and the Commission of the case he selects for litigation by July 31, 1992. His motion to consolidate and the six cases not selected for immediate litigation will be held in abeyance pending the resolution of the case selected."

(His term having expired, Commissioner Bartley is no longer a member of the Wisconsin Tax Appeals Commission.)

5. On April 21, 1993, this commission ruled in favor of the petitioner in the case selected and tried -- George L. Bourassa v. Wisconsin Department of Revenue, Docket No. 91-I-495.

6. The respondent has neither appealed the Bourassa decision nor filed a notice of non-acquiescence to its holding pursuant to the provisions of § 73.01(4)(e)2, Wis. Stats. It is thus final.

7. The respondent has also refused to resolve the (6) companion cases, including the instant matter, in conformity with the Conclusions reached by this commission in the Bourassa matter.

8. On March 30, 1992, the petitioners, John J. and Lois R. Hettich, by their counsel, served the following FIRST REQUEST FOR ADMISSIONS on the respondent, Wisconsin Department of Revenue:

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

---

JOHN AND LOIS HETTICH,  
Petitioners,

DOCKET NO. 91-I-492

v.

WISCONSIN DEPARTMENT OF REVENUE,  
Respondent.

PETITIONERS' FIRST  
REQUEST FOR ADMISSIONS

---

Pursuant to §§ 804.11 and 73.01(4)(d), Wis. Stats. (1989-90), the petitioners, JOHN AND LOIS HETTICH, request that the respondent, Wisconsin Department of Revenue, admit to the truth of the following matters for the purposes of this action within 30 days after service hereof. Failure to respond will cause the requests to be deemed conclusively admitted for purposes of this action.

ADMISSIONS

1. The petitioners timely filed a claim for refund of their Wisconsin personal income tax for the calendar year 1978 with the Wisconsin Department of Revenue in 1979.

2. The petitioners' claim for refund of their Wisconsin personal income tax for the calendar year 1978 was filed as part of their original income tax return filed with the Wisconsin Department of Revenue in 1979.

3. Exhibit A attached hereto is a true and correct copy of the claim for refund filed by the petitioners for the calendar year 1978 with the Wisconsin Department of Revenue during 1979.

4. The Wisconsin Department of Revenue failed to act on the claim for refund filed in 1979 by the petitioners for the calendar year 1978 within the time required by § 71.10(10)(g), Wis. Stats. (1979-80).

5. Since the Wisconsin Department of Revenue failed to act on the claim for refund filed by the petitioners for the calendar year 1978 within one year after its receipt, the petitioners are entitled to the refund claimed for 1978 with statutory interest thereon.

6. During 1979, the Wisconsin Department of Revenue received other claims for refund for calendar year 1978, which other claims related to the same item of income and were filed in a manner and form similar to the petitioners' claim for refund (herein "other claims").

7. Except for the claims at issue in case Nos. 91-I-487, 91-I-488, 91-I-490, 91-I-492, 91-I-493, 91-I-494 and 91-I-495, some of these "other claims" were acted upon by the Wisconsin Department of Revenue within the time required by § 71.10(10)(g), Wis. Stats. (1979-80).

8. In the event it is determined that respondent failed to act within the time permitted by law with respect to the petitioners' refund claim here in issue, the respondent owes to the petitioners as a refund of taxes the sum of \$7,106.41 plus

statutory interest thereon for the period from April 15, 1979 to the date of payment.

9. Case Nos. 91-I-487, 91-I-488, 91-I-490, 91-I-492, 91-I-493, 91-I-494 and 91-I-495 involve common issues of law and/or fact.

10. Exhibit B attached hereto is a true and correct copy of the memorandum provided to the petitioners in 1979 by their employer, Siemens-Allis, regarding the filing of a claim refund with respect to the matters at issue in this action.

11. The Wisconsin Department of Revenue first acted on the petitioners' claim for refund for the calendar year 1978, which was filed in 1979, on March 13, 1991.

12. Exhibit C attached hereto is a true and correct copy of the Wisconsin Department of Revenue's notice of action on the claim for refund for 1978, filed by the petitioners in 1979.

13. Filing a claim for refund as part of the original personal income tax return filed for the year to which the claim for refund relates is an accepted practice in Wisconsin.

14. Wisconsin has adopted as its law the federal income tax law standard governing the requirements of what is necessary to set forth a claim for refund.

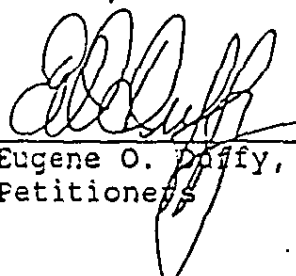
15. Under federal law, an informal written communication or series of such communications to the Internal Revenue Service by a taxpayer claiming a right to refund contingent upon future events constitutes a claim for refund.

16. Under Wisconsin law, an informal written communication or series of such communications to the Wisconsin Department of Revenue by a taxpayer claiming a right to refund contingent upon future events constitutes a claim for refund.

Dated this 27<sup>th</sup> day of March, 1992.

O'NEIL, CANNON & HOLLMAN, S.C.

By:

  
Eugene O. Daffy, Counsel for  
Petitioners

P. O. Address:

Suite 1400  
111 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202-4803

(414) 276-5000



April 13, 1979

Wisconsin Department of Revenue  
819 North 6th Street  
Milwaukee, Wisconsin 53202

Re: Capital Gains Tax on Sale  
of Personal Residence

Gentlemen:

John J. and Lois R. Hettich respectfully request that the tax on the capital gain amounting to \$ 64,603.74 due to the sale of our Wisconsin residence on July 14, 1978 be abated and that such tax plus interest due thereon should be refunded. However, this claim should be held in abeyance pending the court's decision as to the taxability of the gain on the sale of a Wisconsin residence.

Truly Yours,  
John J. Hettich  
John J. Hettich  
5520 West Idlewood Lane, Atlanta, Georgia 30337

Lois R. Hettich

Address of Wisconsin residence sold:  
1590 Rowlett St., Brookfield, Wisconsin 53005

EXHIBIT A

WLD ✓

(hand written)

SIEMENS-ALLIS EMPLOYEES

- R. E. Bailey
- W. E. Beringer
- G. W. Blazejovsky
- G. L. Bourassa
- N. A. Brasa
- M. C. Buerger
- H. P. Conn
- K. H. Diakroeger
- C. W. Diercks, Jr.
- R. A. Estes
- A. H. Grandy
- K. W. Hebebrand
- J. J. Hettich
- J. Liban
- R. Makowski
- J. S. Morgan
- C. A. Miller
- K. Nacker
- B. L. Peters
- D. A. Pau
- C. M. Rawles
- W. A. Rode
- M. H. Russell
- E. A. Satterfield
- H. A. Schuller
- T. T. Thorne
- G. A. White
- M. S. Williamson

Utility Power Corporation Employees

- J. C. Mallory
- L. J. Schwalter
- B. Torrison

3/6/79

EXHIBIT B

INTER-OFFICE CORRESPONDENCE

To: (Please see attached distribution list)

Date: March 6, 1979

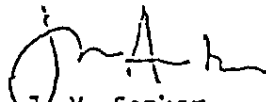
Copies To:

From: Director,  
Industrial Relations ..

Subject: RELOCATION - WISCONSIN PERSONAL INCOME TAX - CAPITAL GAINS

Those of you who have sold homes in Wisconsin can expect to pay a capital gains tax to the State of Wisconsin on the gain on the sale of your personal residence.

Attached herewith is a "Residence Questionnaire" (Form 1-B27) which notifies the State of Wisconsin of the change of your residence - a copy of which should be filed with the Wisconsin income tax return. Also attached is a suggested protective claim letter. This letter will protect your claim for a refund should the State of Wisconsin lose a case pending in the courts which challenges the validity of tax on the sale of residences.

  
J. H. SenkerJMS:rn  
Enclosures



INTER-OFFICE CORRESPONDENCE

To: Division/Plant Employee Relations Managers

Date: September 28, 1977

From: Corporate Employee Relations

Copies To:  
J. L. Platner  
G. L. Bourassa  
H. C. Equitz  
D. W. Rau  
C. J. Roginski  
Corp. ER Staff

Subject: WISCONSIN PERSONAL INCOME TAX - EMPLOYEES MOVING OUT OF WISCONSIN

The Allis-Chalmers Tax Department advises that employees moving out of the State of Wisconsin can expect to pay a capital gains tax to the State of Wisconsin re: the gain on the sale of their personal residence. Based on various levels of gain, the tax would be as follows:

<u>Gain</u>	<u>Tax</u> <u>(If income in 11.4% bracket)</u>
\$10,000.	\$1,140.
20,000.	2,280.
30,000.	3,420.
40,000.	4,560.
50,000.	5,700.

The Employee Relocation Council (an association of companies) is in the process of challenging the validity of this tax. Therefore, there is a chance that the tax on the sale of residences could be declared invalid by the courts. The filing of a protective claim (within four years of selling) for refund by employees leaving the State, may be in order since the State may be obliged to refund the tax if the State lost the case (see attachment 1).

Additionally, employees leaving the State should file a "Residence Questionnaire" (Form 1-827) which notifies the State of the change in residence. A copy of same should also be filed with the employee's final Wisconsin income tax return (see attachment 2).

Since the above is for informational purposes only, it is recommended that all affected employees contact their personal tax advisor for handling individual problems.

Robert M. Jarrett, Manager  
Personnel Administration Services

ms

SUGGESTED PROTECTIVE CLAIM LETTER

TO THE WISCONSIN DEPARTMENT OF REVENUE  
RE: CAPITAL GAINS TAX ON SALE OF PERSONAL RESIDENCE  
819 NORTH 6th STREET  
MILWAUKEE, WISCONSIN 53202

Gentlemen:

(Name of Taxpayer) respectively requests that the tax on the capital gain amounting to \_\_\_\_\_ due to the sale of my Wisconsin residence (date) be abated and that such tax plus interest due thereon should be refunded. However, this claim should be held in abeyance pending the court's decision as to the taxability of the gain on the sale of a Wisconsin Residence.

Signed:

Present Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Address of Wisconsin Property Sold:  
\_\_\_\_\_  
\_\_\_\_\_

Wisconsin Department of Revenue  
Revenue Audit Bureau  
Post Office Box 80  
Madison, Wisconsin 53701

RESIDENCE QUESTIONNAIRE

Persons claiming a change of legal residence from Wisconsin to another state must file this form with the Wisconsin Department of Revenue.

1. Your full name \_\_\_\_\_ Social Security Number \_\_\_\_\_

2. Spouse's full name \_\_\_\_\_ Social Security Number \_\_\_\_\_

3. Your present address \_\_\_\_\_

4. On what date did you move from Wisconsin? \_\_\_\_\_

5. What specific steps did you take to terminate your legal residence in Wisconsin and on what date did you take such steps? \_\_\_\_\_  
\_\_\_\_\_

6. In what state did you establish your new legal residence? \_\_\_\_\_

When did you begin working in that state? \_\_\_\_\_

7. Did your family move out of Wisconsin to your new legal residence? \_\_\_\_\_ If so, on what date? \_\_\_\_\_

8. In the state you are now claiming legal residence, have you:

a. Registered to vote? \_\_\_\_\_

b. Purchased a home? \_\_\_\_\_

If so, on what date was it purchased? \_\_\_\_\_

c. Filed resident income tax returns? \_\_\_\_\_ (State years filed)

9. What other specific steps did you take to establish your new legal residence? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Since moving from Wisconsin, have you:

a. Sent your children to Wisconsin schools? \_\_\_\_\_

b. Engaged in any income-producing activity in Wisconsin? \_\_\_\_\_

c. Purchased Wisconsin auto license plates? \_\_\_\_\_



State of Wisconsin • DEPARTMENT OF REVENUE

INCOME, SALES, INHERITANCE AND EXCISE TAX DIVISION • 400 UNIVERSITY AVENUE • MADISON, WISCONSIN

ADDRESS MAIL TO:

March 13, 1991

Revenue Audit Bureau  
Post Office Box 8906  
Madison, Wisconsin 53708

Attn: Eugene O. Duffy  
O'Neil, Cannon and Hollman, S.C.  
111 E. Wisconsin Avenue  
Suite 1400, Bank One Plaza  
Milwaukee, WI 53202-4803

Dear Eugene O. Duffy:

Consideration has been given to your letter dated September 10, 1990, regarding the processing of refund claims for John J. and Lois R. Hettich, Social Security Numbers 415-52-4270 and 256-36-3998, respectively.

We have no record of the claims for refund of the Wisconsin income tax paid on the gain on the sale of their personal residence in 1978 being timely received. Furthermore, the claims filed with your September 10, 1990, letter are denied since they were filed beyond the statute of limitations.

There are no statutory appeal rights for claims for refund filed beyond the statute of limitations.

Sincerely,

*Lynn Williamson*

L. L. Williamson, Chief  
Office Audit Section

LLW:GTF:slg  
Enc.

cc: John J. and Lois R. Hettich

EXHIBIT C.

9. The respondent did not serve upon the petitioners or the petitioners' counsel any written answer or objection addressed to the matter for which admissions were requested within the 30-day time limit for making such responses under § 804.11, Wis. Stats. (Rules of Civil Procedure).

10. During the time period required by law for said responses, neither the respondent nor its counsel sought an extension of time to make such response or objection. In addition, no such extension was ever granted by the petitioners or their counsel or this commission.

11. The respondent's stated reasons for submitting untimely denials to the petitioners' request for admissions do not constitute good and sufficient grounds for granting the respondent's MOTION TO WITHDRAW DEEMED ADMISSIONS under § 804.11 (2), Wis. Stats.

12. Section 802.08, Wis. Stats., provides as follows:

**802.08 Summary judgment.**

\* \* \*

(2) MOTION. ... The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ...

13. Under Wisconsin law, the granting of summary judgment may be based upon the foreclosure of pertinent issues of fact deemed conclusively proved through admissions, even if those admissions embrace issues of ultimate fact which may be dispositive of the entire case. See Bank of Two Rivers v. Zimmer, 112 Wis. 2d



624, at 630 (1983).

14. The petitioners' admissions are deemed conclusively proved through the operation of § 804.11(1)(b), Wis. Stats. Accordingly, there is no genuine issue as to any material fact in the matter now before us.

15. The petitioners, John J. and Lois R. Hettich, have shown good and sufficient grounds for the granting of their motion and are entitled to judgment in their favor as a matter of law according to this commission's decision in George L. Bourassa v. Wisconsin Department of Revenue, WTAC Dkt. No. 91-I-495 (April 21, 1993, as corrected April 26, 1993), CCH Wis. Tax Reporter ¶203-408.

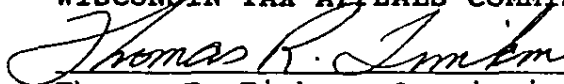
Therefore,

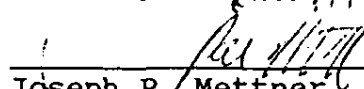
**IT IS HEREBY ORDERED**

1. That the respondent's motion to withdraw its deemed admissions is denied;
2. That the petitioners' motion for summary judgment is granted on the grounds that there is no genuine issue as to any material fact and petitioners are entitled to judgment as a matter of law.

Dated at Madison, Wisconsin, this 13th day of January, 1994.

**WISCONSIN TAX APPEALS COMMISSION**

  
Thomas R. Timken, Commissioner

  
Joseph P. Mettner, Commissioner

(not participating)  
Mark E. Musolf, Chairperson

ATTACHMENT: "Notice of Appeal Information"