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MARYARSKI STEPHEN THERESA 92I333 022393 TAC

FEB 24 1993

STATE OF WISCONSIN
TAX APPEALS COMMISSION

RECEIVED
LEGAL DIVISION

STEPHEN & THERESA MARYARSKI
P.O. Box 10
Wales, WI 53183

* DOCKET NO. 92-I-333
*

Petitioners,

* RULING AND ORDER

vs.

* GRANTING SUMMARY

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

* JUDGMENT
*
*

Respondent.

*

MARK E. MUSOLF, COMMISSION CHAIRPERSON:

This matter is before us on motion and cross-motion for summary judgment by respondent and petitioners, respectively. On the briefs are attorneys Mark P. Murphy for the petitioners and Veronica Folstad for the respondent. The facts set forth in petitioners' affidavit attached to their motion are not in dispute, and summary judgment is therefore appropriate on the legal issue involved, pursuant to Sec. 802.08, Stats.

By way of brief background, the petitioners were assessed additional income taxes in 1986, objected thereto, and, after their objections were denied by respondent in 1989, filed an untimely Petition for Review with this commission, which was dismissed for our lack of jurisdiction. They then paid the assessments in 1990 and 1991 and filed a claim for refund with respondent in 1992, which the respondent summarily rejected, citing sec. 71.75(5), Stats. (1989-90). The petition now before us appeals that rejection.

The statute involved is sec. 71.75(5):

A Claim for refund may be made within 2 years after the assessment of a tax...assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination (emphasis added).

Petitioners advance two reasons why their refund claim should be allowed. First, they argue that their initial letter dated March 10, 1986, objecting to the assessments, "was not a timely filed petition for redetermination" and therefore they are not barred by the statute, supra, from seeking a refund. Second, they argue that the payment date rather than the assessment date tolls the two year refund claim period, which would then bring their refund claim within the permissible filing time.

As to the first argument, the respondent correctly points out that petitioners offer no evidence in support of it. The respondent's Exhibits 7 and 8 clearly show that the petitioners were notified of the denial of their "petition for redetermination" and advised of their rights of appeal to this commission, which they failed to exercise in timely fashion. Petitioners have made no showing as to how the differing terminology used by them and the respondent in any way prejudiced them. Indeed, their affirmative action thereafter in filing an appeal with this commission, even though untimely, fatally undermines petitioners' implication that they were somehow disadvantaged by the "petition for redetermination" terminology used by the respondent. So petitioners' first argument fails.

Their second argument also fails. Although expressed

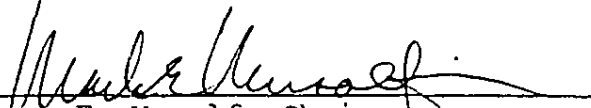
somewhat awkwardly, the statutory language, supra, is nevertheless clear that the refund claim must be made "within two years after the assessment" (emphasis added) or within two years of payment "if the assessment was not protested by the filing of a petition for redetermination (emphasis added)." Here the petitioners clearly missed the two-year deadline after assessment and, because they "protested" the assessment by petitioning for redetermination ("objected," by their terminology), did not qualify for the two-year deadline following payment. The statute thus prevents petitioners from both having their cake and eating it.

ORDER


Respondent's motion for summary judgment is granted, and the respondent's action of March 26, 1992, rejecting the income tax refund claims of petitioners, is affirmed.

Dated at Madison, Wisconsin, this 23rd day of February, 1993.

WISCONSIN TAX APPEALS COMMISSION


Mark E. Musolf, Chairperson


Thomas R. Timken, Commissioner


Douglass H. Bartley, Commissioner

ATTACHMENT:
"Notice of Appeal Information"