

GILBERT DAVID L 98D248 082799 TAC

R. DeBano

STATE OF WISCONSIN
TAX APPEALS COMMISSISON

AUG 27 1999
Darlene Skolaski
Deputy Clerk

1989

DAVID L. GILBERT
S78 W18425 Lions Park Dr. #8
Muskego, WI 53150,

DOCKET NO. 98-D-248

Petitioner,

vs.

RULING AND ORDER

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

Respondent.



DON M. MILLIS, COMMISSIONER:

This matter comes before the Commission on respondent's motion to dismiss the petition for review and petitioner's motion for summary judgment. Both parties have submitted supporting papers and briefs with regard to each motion. Petitioner is represented by Shellow, Shellow & Glynn, S.C., by Attorney Robert R. Henak. Respondent is represented by Attorney Veronica Folstad.

Based upon the submissions of the parties and the record in this matter, the Commission hereby finds, concludes, and orders as follows:

UNDISPUTED MATERIAL FACTS

1. On June 25, 1993, respondent issued a notice of a controlled substance tax assessment in the amount of \$9,800, plus interest (\$392) and

penalty (\$9,800). The assessment was made pursuant to section 139.93(1) of the Statutes.

2. Petitioner did not contest or appeal the assessment.

3. Respondent collected \$11,928.21 from petitioner pursuant to the assessment.

4. On January 24, 1997, the Wisconsin Supreme Court held that the controlled substances tax (Wis. Stat. §§ 139.87-.96) violates the constitutionally guaranteed privilege against self-incrimination. *State v. Hall*, 207 Wis. 2d 54, 90 (1997).

5. On or about November 10, 1997, petitioner filed a claim for refund with respondent, asserting that respondent illegally collected amounts pursuant to the assessment since the controlled substances tax was declared unconstitutional.

6. On November 26, 1997, respondent sent a letter to petitioner denying his claim for refund. Respondent did not attach to the letter any notice of petitioner's right to appeal or to object to respondent's denial of petitioner's claim for refund.

7. On or about February 25, 1998, petitioner filed what respondent treated as a petition for redetermination objecting to the denial of petitioner's claim for refund.

8. On August 13, 1998, respondent issued its notice of action letter denying the petition for redetermination. The notice of action letter included appeal information.

9. Petitioner filed a timely petition for review with the Commission.

APPLICABLE LAW

71.75 Claims for refund.

* * *

(5) A claim for refund may be made within 2 years after the assessment of a tax ... including penalties and interest, under this chapter, assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination.

...

71.88 Time for filing an appeal.

* * *

(2) APPEAL TO THE WISCONSIN TAX APPEALS COMMISSION.

(a) *Appeal of the department's redetermination of assessments and claims for refund.* A person feeling aggrieved by the department's redetermination may appeal to the tax appeals commission by filing a petition with the clerk of the commission as provided by law and the rules or practice promulgated by the commission. ... [E]xcept as provided in s. 71.75(5), if no petition for redetermination is made within the time provided the assessment, refund, or denial of refund shall be final and conclusive.

139.93 Appeals, presumption, administration.

(1) The taxes, penalties and interest under this subchapter shall be assessed, collected and reviewed as are income taxes under ch. 71.

227.48 Service of decision.

* * *

(2) Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decision, the time allowed for filing each petition and identification of the party to be named as respondent. No time period specified under s. 227.49(1) for filing a petition for rehearing, under s. 227.53(1)(a) for filing a petition for judicial review or under any other section permitting administrative review of an agency decision begins to

run until the agency has complied with this subsection.

CONCLUSIONS OF LAW

1. Petitioner's filing of the petition for redetermination with respondent more than 60 days after receipt of respondent's denial of petitioner's claim for refund does not deprive the Commission of subject matter jurisdiction, because the denial did not contain a notice of appeal rights specified in section 227.48(2) of the Statutes.

2. The Commission lacks subject matter jurisdiction over the petition for review with the Commission because petitioner filed his claim for refund more than two years following the assessment.

RULING

This matter presents two issues concerning the Commission's subject matter jurisdiction over the petition for review. First, does the Commission have subject matter jurisdiction notwithstanding the fact that the petition for redetermination was filed more than 60 days following respondent's denial of the claim for refund? Second, does the Commission lack subject matter jurisdiction over the petition for review because petitioner filed his claim for refund more than two years following the assessment?¹

¹ Petitioner also asserts in his motion for summary judgment that he is entitled to prevail on the merits of his claim for refund. Because we conclude that the Commission lacks subject matter jurisdiction over the petition for review, we may not consider the merits of petitioner's claim.

Timeliness of the Petition for Redetermination

Respondent argues that since the petition for redetermination was filed more than 60 days following the denial of the claim for refund, the denial has become final and conclusive. Respondent relies on section 71.88(2)(a), which provides that if "no petition for redetermination is made within the time provided the ... denial of refund shall be final and conclusive."

The problem with respondent's argument is that the time for petitioner to file the petition for redetermination never began to run. Section 227.48(2) requires each decision of an agency to be accompanied by a notice of appeal rights. Respondent's denial of petitioner's claim for refund failed to provide such a notice. Section 227.48(2) also provides that the time for filing a petition for any administrative review does not begin to run until the agency has served the notice of appeal rights. Since respondent's consideration of a petition for redetermination is a form of administrative review, the time for filing petitioner's petition for redetermination never ran. Therefore, section 71.88(2)(a) does not preclude our consideration of the petition for review.

Timeliness of the Claim for Refund

Petitioner cites a number of cases for the proposition that when an assessment is void *ab initio*, any statute of limitations that would preclude review of the assessment is inapplicable because there was nothing for the statute of limitation to act upon. See, e.g., *Family Hosp. Nursing Home, Inc. v. Milwaukee*, 78 Wis. 2d 312, 325 (1977); *Wisconsin Real Estate Co. v. Milwaukee*, 151 Wis. 198, 206 (1912); *Chicago & N.W. Ry. Co. v. Arnold*, 114

Wis. 434, 436 (1902); *Smith vs. Sherry*, 54 Wis. 114, 123 (1882). Petitioner argues that the assessment was void *ab initio* because, like the taxing authorities in the cases cited above, the legislature's imposition of the controlled substances tax was invalid.²

In each case cited by petitioner, the statute of limitations at issue purported to operate as a bar to a lawsuit filed in a court. The instant matter involves a proceeding before a state agency, the Commission. As a state agency, the Commission's powers are strictly construed:

Few principles of law are as well established as the proposition that administrative agencies, as entities created by the legislature as part of the executive branch of government, have only such powers as are expressly granted to them by the legislature, or as may be necessarily implied from the applicable statutes. ... In determining the nature and scope of an agency's powers, its enabling statutes are to be "strictly construed to preclude the exercise of a power not expressly granted," and "[a]ny reasonable doubt as to the existence of an implied power should be resolved against [the agency]."

Department of Revenue v. Hogan, 198 Wis. 2d 792, 816 (Ct. App. 1995)
(citations omitted).

The *Hogan* case involved claims for refund filed with respondent as a result of the U.S. Supreme Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989). The *Davis* decision held that discriminatory

² Petitioner correctly points out that respondent failed to respond to this argument offered by petitioner. Petitioner argues, therefore, that respondent should be deemed to concede the point and the Commission should determine that the statute of limitations does not apply. This we cannot do. Subject matter jurisdiction cannot be obtained by waiver or acquiescence. *Weisensel v. Department of Health & Social Services*, 179 Wis. 2d 637, 646 (Ct. App. 1993).

taxation of federal retirement income violated federal law and the principles of intergovernmental tax immunity. *Id.* at 817. In *Hogan*, the Court of Appeals held that the Commission could not certify a class for purposes of pursuing claims for refund under the *Davis* decision. 198 Wis. 2d at 817-18. In an unusual concurring opinion, the three judges on the panel expressed concern that their decision would mean that many members of the class certified by the Commission would not be able to pursue claims because, among other things, they would be time-barred. *Id.* at 819. The judges urged the legislature to extend the time for filing claims. *Id.*

The passage excerpted above and the concurring opinion in *Hogan* make it clear that the Commission's powers are limited to those set forth in the statutes. Were it otherwise, the Commission could have entertained 30 years worth of claims for refunds since the statute at issue in *Hogan* was enacted in the mid-1960s. Thus, the Commission may consider a petition for review only if it has explicit statutory authority to do so.

Petitioner argues that since the *Hall* decision held that the controlled substances tax was void on its face, this makes the tax void "from its beginning to its end." Citing *State ex rel. Comm'rs of Pub. Lands v. Anderson*, 56 Wis. 2d 666, 672 (1973). Thus, petitioner argues, the statute of limitations set forth in section 71.75(5) is inapplicable.

Since section 71.75(5) is not part of subchapter IV of chapter 139, it is not clear how the invalidity of the controlled substances tax renders section 71.75(5) inapplicable. Petitioner may be arguing that the *Hall* decision

voided section 139.93—the provision that incorporates the review provisions of chapter 71 to the controlled substances tax. If so, that would also eliminate the Commission's authority to review respondent's action. Petitioner cannot have it both ways.

Petitioner also argues that without relief from the statute of limitations, petitioner would not have a remedy to correct the illegal assessment. This is patently false. Petitioner had two opportunities to challenge the assessment. Petitioner could have objected to the assessment when it was first issued pursuant to section 71.88. Petitioner also had two years to file a claim for refund under section 71.75. Petitioner waited more than four years following the assessment to file his claim for refund.³

Because the claim for refund was not made within two years following the assessment, the Commission lacks subject matter jurisdiction over the petition for review. Thus, we cannot reach the merits of petitioner's motion for summary judgment.

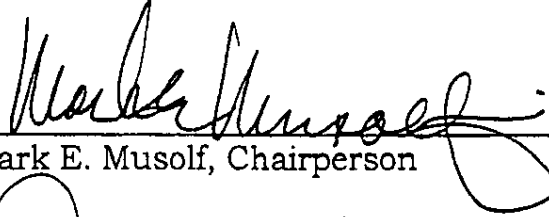
ORDER

1. Respondent's motion to dismiss is granted;
2. Petitioner's motion for summary judgment is denied;
3. The petition for review is dismissed.

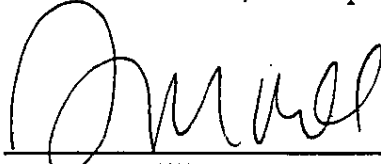
³ Petitioner was not required to wait until after the Supreme Court's decision in *Hall* to challenge the assessment on constitutional grounds. As early as February 11, 1992—more than 16 months *prior* to the assessment at issue here—the Commission received a petition for review in another matter that challenged the constitutionality of the controlled substances tax.

Dated at Madison, Wisconsin, this 27th day of August, 1999.


WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"