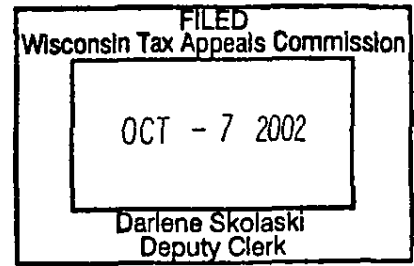




STATE OF WISCONSIN
TAX APPEALS COMMISSION



DALE W. AND CINDY L. KIMMONS
W6075 Hillcrest Drive
Merrill, WI 54452,

DOCKET NO. 01-I-174

Petitioners,

RULING AND ORDER

vs.

AWARDING RESPONDENT

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708,

SUMMARY JUDGMENT

Respondent.

THOMAS M. BOYKOFF, COMMISSIONER:

This case comes before the Commission on motions for summary judgment filed by both parties under Wis. Stat. § 802.08. The statutory ground for a summary judgment motion is that there are no genuine issues as to any material fact and a party is entitled to a judgment as a matter of law. Wis. Stat. § 802.08(2).

Leighton Walstrom, Farm Accounting & Tax Service, of Wausau, Wisconsin, represents petitioners. Attorney Robert J. Hackman, Deputy Chief Counsel, represents respondent Wisconsin Department of Revenue ("Department").

With their motions, both parties filed affidavits with exhibits and legal arguments.

Having considered the entire record, the Commission hereby finds, concludes, rules, and orders as follows:

UNDISPUTED MATERIAL FACTS

1. Petitioners filed a timely 1996 Wisconsin income tax return by its April 15, 1997 due date.
2. Under date of May 7, 2001, the Department issued and mailed to petitioners an assessment for \$6,139.66 for income tax years 1996 to 1998. The assessment for 1996 was for \$2,699.90, which is comprised of \$1,790 income tax and \$909.90 interest, primarily based on the Department adjusting petitioners' reported 1996 income from \$40,132 to \$65,182. The 1996 income reported by petitioners is 62% of the amount adjusted by the Department.
3. Under date of June 27, 2001, petitioners filed a petition for redetermination with the Department.
4. Under date of September 24, 2001, the Department granted in part and denied in part the petition for redetermination. The Department made no change to its adjustment of petitioners' income for tax year 1996.
5. Under date of October 29, 2001, and received on November 1, 2001, petitioners filed a timely petition for review with the Commission, contesting only the Department's adjustments to their 1996 income tax return.

WISCONSIN STATUTES INVOLVED

71.77 Statutes of limitations, assessments and refunds; when permitted.

(2) With respect to assessments of a tax . . . under this chapter in any calendar year . . . , notice shall be given within 4 years of the date the income tax . . . return was filed.

(7) Notwithstanding any other limitations expressed in this chapter, an assessment . . . may be made:

(a) If notice of assessment is given within 6 years after a return was filed and if on that return . . . the taxpayers jointly reported for taxation, less than 75% of the net income properly assessable, except that no assessment of additional income may be made under this subsection for any year beyond the period specified in sub. (2) unless the aggregate of the taxes on the additional income of such year is in excess of . . . \$200 in the case of a joint return.

CONCLUSIONS OF LAW

1. There are no genuine issues of material facts, and this case is appropriate for summary judgment as a matter of law.

2. The Department was not required to issue its assessment within 4 years of the filing date of petitioners' 1996 income tax return because petitioners reported less than 75% (62%) of their net income properly assessable for tax year 1996.

3. The Department properly issued its assessment within 6 years of the date petitioners filed their 1996 Wisconsin income tax return.

RULING

There is no dispute over the material facts in this case.¹ When petitioners filed their 1996 Wisconsin income tax return by its April 15, 1997 due date, they reported \$40,132 of income. The May 7, 2001 assessment of the Department adjusted the income amount to \$65,182.

Petitioners' income tax preparer stated that this unintentional error is attributed to a glitch in his computer program which miscalculated petitioners' farm loss limitation. Nonetheless, the original income reported was 62% of the correct

¹ Petitioners did not appeal any matters regarding their 1997 or 1998 Wisconsin income tax returns.

income as calculated by the Department and not disputed by petitioners.

The general statute of limitations for Department income tax assessments is 4 years. That is, by law, an assessment must be made within 4 years of the filing date of an income tax return. Wis. Stat. § 71.77(2). There is no dispute that petitioners filed their 1996 income tax return by its due date of April 15, 1997 and that the Department issued its notice of assessment on May 7, 2001, beyond the 4-year statutory period set forth in § 71.77(2).

There is, however, an exception to the 4-year statute in Wis. Stat. § 71.77(7)(a). The exception provides that the period within which the Department may issue an assessment is 6 years from the filing date *if* the taxpayers reported less than 75% of the net income they should have reported. These petitioners reported only 62% of their income on their original 1996 tax return. Therefore, this exception applies, and the Department had 6 years from the tax return's filing date to issue an assessment. The Department acted within this 6-year period, and the assessment was timely issued.

Petitioners argue that Department employees told their tax practitioner that although the statute of limitations was 4 years, the Department could ignore this and issue an assessment up to 6 years after the filing date. If the practitioner was indeed told this, the speaker may have — and certainly should have — said that the 6-year period was an exception provided by law to the 4-year period. And petitioners here fall within the exception.

Petitioners argue that the Department waited an excessive time period before issuing the assessment and should have corrected the error sooner. It certainly

would have been to petitioners' advantage if the Department had acted sooner, but the Department had 6 years in which to issue an assessment, and it properly acted within that time frame. The record does not substantiate petitioners' assertion that the Department in any way acted improperly.

This Commission has previously addressed the assertion that the Department should have acted more promptly in discovering a mathematical error. In *Maciejczak v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-434 (1999), the Commission held:

It would certainly have been better for petitioners if they had been audited sooner. However, the error was petitioners' and respondent acted within the parameters set forth in the law. The assessment . . . fell within the [proper] statute of limitations [period] Therefore, the Commission lacks the authority to modify respondent's action based on the time it took for respondent to uncover petitioners' errors.

The above language applies equally to the current case before the Commission.

Petitioners' representative has persistently requested a hearing on their appeal. He refers to his prior appeal to the Commission for different taxpayers in 1997, when a hearing was held and he prevailed. The statutes, however, do not mandate a hearing in every case appealed to the Commission.

When the Department or a petitioner files a motion for summary judgment (or other motion), the Commission acts on the motion based on documents filed by the parties. If one party prevails on such a dispositive motion, no hearing is necessary, as the case has been decided. If neither party prevails, a hearing may be scheduled at the discretion of the Commission. For example, a hearing might not be

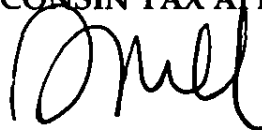
scheduled (or necessary) if another dispositive motion were to be filed and prevail, or if the case is submitted to the Commission on stipulated facts and briefs.

ORDERS

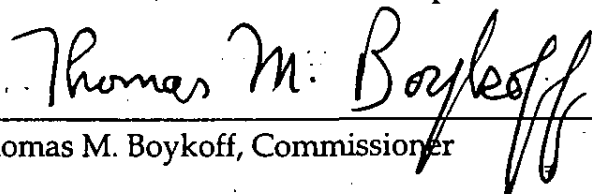
1. Petitioners' motion for summary judgment is denied.
2. The Department's motion for summary judgment is granted, and its action on petitioners' petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 7th day of October, 2002.

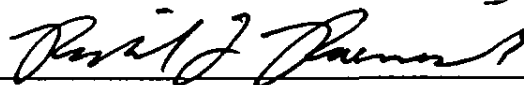
WISCONSIN TAX APPEALS COMMISSION



Don M. Millis, Commission Chairperson



Thomas M. Boykoff, Commissioner



Richard F. Raemisch, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"