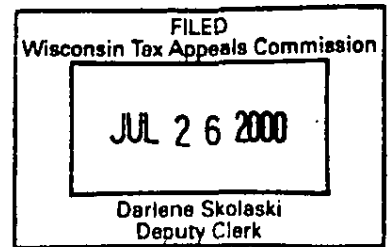


KUSS PHILLIP RUTH 99I213 072600 TAC

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STATE OF WISCONSIN
TAX APPEALS COMMISSION

PHILLIP A. AND RUTH E. KUSS
115 North Winter Street
River Falls, WI 54022,

DOCKET NO. 99-I-213

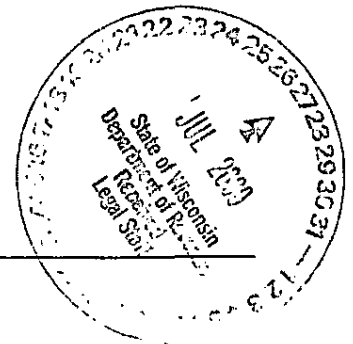
Petitioners,

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 for summary judgment. Both parties have filed submissions with respect to respondent's motion. Petitioners represent themselves. Respondent is represented by Attorney Robert C. Stellick, Jr.

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

SUMMARY OF UNDISPUTED FACTS

1. Petitioner Ruth E. Kuss was a member of the State of Minnesota Teachers Retirement System ("MTRS"), or a predecessor system, on December 31, 1963. After 31 years of service, Mrs. Kuss retired from the MTRS and began drawing a pension based on her service.

2. When petitioners' filed their Wisconsin income tax returns for 1994 and 1995, petitioners reported the pension income paid to Mrs. Kuss by the MTRS.

3. In September of 1996, petitioners filed amended Wisconsin income tax returns for 1994 and 1995 seeking a refund of the income taxes paid on the pension income received by Mrs. Kuss during 1994 and 1995.

4. In October of 1996, respondent issued the requested refund for 1994. On January 27, 1997, respondent issued an assessment seeking recovery of the 1994 refund. Petitioners filed a petition for redetermination with respondent appealing the assessment.¹ Respondent denied the petition for redetermination.

5. On January 16, 1997, respondent denied petitioners' claim for refund for 1995. Petitioners filed a petition for redetermination with respondent appealing the denial of the claim for refund. Respondent denied the petition for redetermination.

6. Petitioners filed a timely petition for review with the Commission.

APPLICABLE STATUTE

71.05 Income computation.

(1) EXEMPT AND EXCLUDABLE INCOME. There shall be exempt from taxation under this subchapter the following:

(a) *Retirement systems.* All payments received from the U.S. civil service retirement system, the U.S. military employe retirement system, the employe's retirement system of the

¹ Petitioners returned their 1994 refund check "under protest" when they filed the petition for redetermination. Respondent deemed the assessment relating to the 1994 refund claim paid in full by virtue of the returned check.

city of Milwaukee, Milwaukee county employes' retirement system, sheriff's annuity and benefit fund of Milwaukee county, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employe trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers' retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963, but such exemption shall not exclude from gross income tax sheltered annuity benefits.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact, and this matter is appropriate for summary judgment as a matter of law.
2. Petitioners are not entitled to a refund of Wisconsin income taxes paid on Mrs. Kuss' pension income from the MTRS because petitioners have not shown that the disparate treatment under section 71.05(1)(a) is impermissibly irrational or arbitrary.

RULING

The primary issue presented in this case is whether petitioners are entitled to a refund equal to the income taxes they paid on Mrs. Kuss' pension income in 1994 and 1995 based on the exemption provided by section 71.05(1)(a) of the Statutes. This section exempts from the income tax payments from certain retirement systems based on membership in any of these systems as of December 31, 1963. Respondent's basis for its actions is that Mrs. Kuss' pension income did not come from any of the systems identified in section 71.05(1)(a).

Petitioners' sole argument is that section 71.05(1)(a) unfairly discriminates against them because it grants an income tax exemption to persons who were members of certain retirement systems on December 31, 1963, but not to other similarly situated pensioners. There is no doubt that section 71.05(1)(a) discriminates against petitioners. By their very nature, tax statutes discriminate against certain taxpayers and favor others. In fact, were petitioners to prevail in this matter, they would be treated more favorably than would members of the MTRS who joined after December 31, 1963. Indeed, discrimination runs rampant through the tax code. However, discrimination can be permissible or impermissible. The issue is whether such discrimination or disparate treatment is impermissible.

The case that has spawned thousands of refund claims by retirees in Wisconsin and elsewhere is *Davis v. Michigan*, 489 U.S. 803 (1989). In *Davis*, the U.S. Supreme Court held that a state tax scheme that exempted annuities paid to state and local employees but did not exempt annuities paid to similarly situated federal employees violated federal law. *Id.* at 813-14, 817. However, nothing in *Davis* requires a state to treat pension income received from another state's pension system in the same way that it treats income from a local pension system. See, *Van Aman v. Dep't of Revenue*, Wis. Tax Rep. (CCH) ¶400-201, at 20,662 (WTAC 1996). Therefore, *Davis* does not assist petitioners.

Petitioners may be arguing that the disparate treatment caused by section 71.05(1)(a) is so inequitable that it violates the constitutional guarantee of equal protection. To invalidate a tax statute, a taxpayer bears a particularly heavy burden to prove that the statute is unconstitutional beyond a reasonable doubt. *GTE Sprint v. Wisconsin Bell*, 155 Wis. 2d 184, 192 (1990). Every presumption in favor of the state's power to tax is indulged, and only a clear and demonstrated usurpation of power will invalidate the statute. *Id.*

More specifically, in order to invalidate this statute on equal protection grounds, petitioners must show that the disparate treatment is irrational or arbitrary. *Omernik v. State*, 64 Wis. 2d 6, 18-19 (1974). The fact that inequity results from the disparate treatment is not sufficient to invalidate a tax statute. *GTE Sprint*, 155 Wis. 2d at 194.

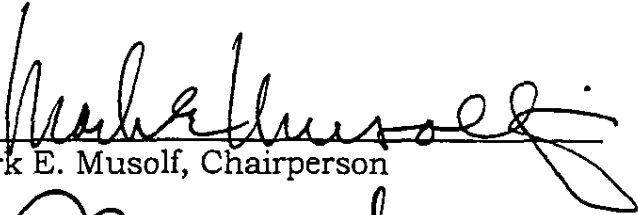
In this case, petitioners have provided nothing more than their opinion that section 71.05(1)(a) is unfair. Without evidence that the disparate treatment caused by section 71.05(1)(a) is irrational or arbitrary, the Commission must reject their claim for refund.

ORDER

Respondent's motion for summary judgment is granted, and its actions on the petitions for redetermination are affirmed.

Dated at Madison, Wisconsin, this 26th day of July, 2000.

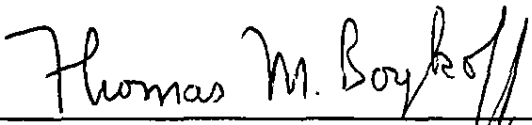
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"