SCHMITZ ELAINE 97D447 101600 TAC

Library

STATE OF WISCONSIN

TAX APPEALS COMMISSION

ELAINE K. SCHMITZ
12007 Elmhurst Parkway
Wauwatosa, WI 53226,

Petitioner,

vs.

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

Respondent.

DOCKET NO. 97-D-447

RULING AND ORDER

DON M. MILLIS, COMMISSIONER:

This matter comes before the Commission on both parties' motions for summary judgment. Both parties have submitted briefs and supporting papers relative to the summary judgment motions. Petitioner is represented by Henak Law Office, 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 finds, concludes, and orders as follows:

UNDISPUTED MATERIAL FACTS

1. On November 2, 1995, respondent issued petitioner a controlled substances tax assessment in the amount of $11,600, plus interest

($580) and penalty ($11,600). The assessment was issued pursuant to the controlled substances tax statute. Wis. Stat. § 139.87 *et seq.*

2. Petitioner filed with respondent a timely petition for redetermination on December 29, 1995.

3. On January 24, 1997, the Wisconsin Supreme Court declared the controlled substances tax unconstitutional. *State v. Hall*, 207 Wis. 2d 54 (1997).

4. On October 13, 1997, the 1997-99 biennial budget act was published. In this act, the Wisconsin Legislature "retroactively reimposed" the controlled substances tax after amending the tax in accord with the Supreme Court's decision in *Hall*. 1997 Wis. Act 27, §§ 2979m & 9143(2v).

5. Respondent denied petitioner's petition for redetermination on October 24, 1997.

APPLICABLE LAW

1997 Wisconsin Act 27

9143. Nonstatutory provisions; revenue.

* * *

(2v) DRUG TAX. The legislature intends that, irrespective of the constitutionality of the affix and display requirements under section 139.89 of the statutes and the rules that interpret that section, all other civil and administrative procedures that are related to the civil obligation to pay the tax, interest and penalties required under subchapter IV of chapter 139 of the statutes are severable from those affix and display requirements and are to remain in full force and effect. To the extent necessary to effectuate the legislature's intent, the civil obligation to pay the tax, interest and penalties required under subchapter IV of chapter 139 of the statutes is

retroactively reimposed beginning with the effective date under 1989 Wisconsin Act 122, section 3203(48)(a).

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. Respondent's assessment was void *ab initio* and could not be rehabilitated by the Legislature's re-enactment of the controlled substances tax.

OPINION

The Supreme Court ruled that the controlled substances tax was unconstitutional on its face because it concluded that section 139.91 of the Statutes violated the privilege against self-incrimination. *Hall*, 207 Wis. 2d at 90. Because the controlled substances tax was unconstitutional, it had no legal effect:

> An unconstitutional act of the legislature is not a law. It confers no rights, imposes no penalty, affords no protection, is not operative, and in legal contemplation has no existence.

John F. Jefke Co. v. Beck, 208 Wis. 650, 661 (1932). Moreover, because the controlled substances tax had no existence, any assessments made pursuant to the tax are likewise void *ab initio*. *Burlington Northern, Inc. v. Superior*, 149 Wis. 2d 190, 205 (Ct. App. 1989). *See, also, Family Hosp. Nursing Home, Inc. v. Milwaukee*, 78 Wis. 2d 312, 325-26 (1977); *Wisconsin Real Estate Co. v. Milwaukee*, 151 Wis. 198, 205 (1912) (an assessment outside the taxing authority's jurisdiction is "void *ab initio* and can never be rendered valid"). The

Waukesha County Circuit Court recently held that an assessment similar to the assessment at issue here had no legal effect and was void *ab initio*. *Gilbert v. Dep't of Revenue*, Case No. 99-CV-2198, Slip Op. at 4 (Waukesha Co. Cir. Ct. June 21, 2000).[1]

Respondent initially seeks to distinguish the present case from *Hall* because *Hall* involved the *criminal* prosecution for failure to comply with the controlled substances tax law, while this case involves the *civil* collection of the controlled substances tax. We see nothing in *Hall* to support this distinction. We read *Hall* as striking down the entire controlled substances tax law. The Waukesha County Circuit Court in *Gilbert* concurs. *Gilbert, supra*, at 4.

Thus, the assessment at issue here was clearly void *ab initio*. Respondent argues, however, that the 1997 budget act retroactively rehabilitated the controlled substances tax. Respondent argues that because the Legislature corrected the constitutional defects in the controlled substances law and then "retroactively reimposed" the tax, the assessment that was once without legal existence now has reacquired life. We don't see it that way. In *Wisconsin Real Estate Company, supra*, the Supreme Court held that an assessment issued outside a taxing authority's jurisdiction "can never be rendered valid." 151 Wis.

---

[1] The Circuit Court's decision in *Gilbert* reversed an earlier Ruling and Order of the Tax Appeals Commission. *Gilbert v. Dep't of Revenue*, 1999 WISC Lexis 43 (WTAC 2000). The Commission held that, notwithstanding the validity of the assessment, the Commission lacked the statutory authority to entertain the taxpayer's appeal because the taxpayer did not file a timely claim for refund. *Id.* at 9-10. The Circuit Court disagreed, concluding that the Commission had such authority. Respondent has appealed the Circuit Court's decision.

at 205.[2] We conclude that an assessment with no legal existence cannot be rehabilitated by an act of the Legislature.[3]

ORDER

Petitioner's motion for summary judgment is granted, and the respondent's action on the petition for redetermination is reversed.

Dated at Madison, Wisconsin, this 16th day of October, 2000.

WISCONSIN TAX APPEALS COMMISSION

Mark E. Musolf, Chairperson

Don M. Millis, Commissioner

Thomas M. Boykoff, Commissioner

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**

---

[2] Ironically, respondent arguably could have issued a new assessment against petitioner within the statute of limitations applicable to the controlled substances tax. Wis. Stat. §§ 71.77, 139.93.

[3] Petitioner has offered other arguments to support her position. Because we conclude that the assessment cannot be rehabilitated, we do not reach the merits of these other arguments.