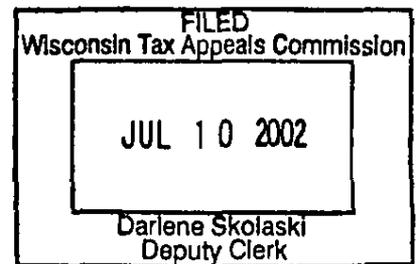


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STATE OF WISCONSIN  
TAX APPEALS COMMISSION



AUSTIN J. SCHMITZ  
8125 40th Avenue, Apt. 3A  
Kenosha, WI 53142,

DOCKET NO. 01-D-167

Petitioner,

vs.

RULING AND ORDER

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

Respondent.

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The above-entitled matter has come before the Commission on both parties' motions for summary judgment under Wis. Stat. § 802.08. Both parties have submitted briefs and documents in support of their motion and in opposition to the other party's motion. Petitioner is represented by Attorney Robert R. Henak of Henak Law Office, S.C. Respondent ("Department") is represented by Attorney Veronica Folstad.

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

**UNDISPUTED MATERIAL FACTS**

1. On September 24, 1993, the Department issued a controlled substance tax assessment to petitioner in the amount of \$34,239.10, pursuant to Wis. Stat. §§ 139.87-.96 (1995-96).

2. Petitioner did not contest or appeal the assessment.

3. The Department has seized \$397.91 from petitioner, and claims that the remaining assessment is still owed.

4. In *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997), Wis. Stat. §§ 139.87-.96 were declared unconstitutional.

5. By letter to the Department dated September 19, 2000, petitioner requested a refund of the taxes seized by the Department.

6. By letter dated September 12, 2001, the Department denied the request, stating as its reason that the claim was not filed within the statutory 2-year time limit pursuant to Wis. Stat. § 71.75(5)<sup>1</sup>.

7. Petitioner then filed a petition for review with the Commission.

#### APPLICABLE WISCONSIN STATUTES

##### 71.75 Claims for refund.

(1) . . . the provisions for refunds and credits provided in this section shall be the only method for the filing and review of claims for refund of income and surtaxes, and no person may bring any action or proceeding for the recovery of such taxes other than as provided in this section.

\* \* \*

(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. . . .<sup>2</sup>

##### 71.88 Time for filing an appeal.

(1) APPEAL TO THE DEPARTMENT OF REVENUE.

(a) *Contested assessments and claims for refund.* . . . any person feeling aggrieved by a notice of additional assessment, refund, or notice of

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<sup>1</sup> This statute was amended to "within 4 years" by 1997 Wisconsin Act 227.

<sup>2</sup> See Footnote 1.

denial of refund may, within 60 days after receipt of the notice, petition the department of revenue for redetermination. . . .

\*\*\*

(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 of practice promulgated by the commission. If a petition is not filed with the commission within the time provided in s. 73.01 or, except 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.

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### ISSUE INVOLVED

Whether the Commission has subject matter jurisdiction over petitioner's petition for review appealing the Department's denial of his claim for refund.

### 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. The Commission lacks subject matter jurisdiction over petitioner's petition for review, because petitioner filed his claim for refund more than two years after the date of assessment. Furthermore, petitioner failed to file a timely petition for redetermination with the Department after its denial of his claim for a refund.

### RULING

Section 802.08(2) of the Wisconsin Statutes provides that summary judgment "shall be rendered if the pleadings . . . on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." (Emphasis supplied.)

Each party has moved for summary judgment, attaching affidavits with exhibits and filing briefs supporting their motion and opposing the other party's motion.

This issue has been decided in *Gilbert v. Wisconsin Dep't of Revenue*, 2001 WI App. 153, 633 N.W.2d 218, *rehearing denied*, 247 Wis.2d 1035, 635 N.W.2d 783 (2001). This Commission has neither the authority nor the temerity to decide this case in an inconsistent manner. In fact, at least one similar case has recently been decided by the Commission, and the Commission's ruling in this case is consistent with the ruling in that case. *See Forest J. Morkin v. Wisconsin Dep't of Revenue*, Docket No. 01-D-166 (WTAC 2002).

In the instant case, petitioner was issued a controlled substance tax assessment in 1993, pursuant to Wis. Stat. §§ 139.87-.96 (1995-96). After the assessment, petitioner could have challenged it within the 60-day time period provided by Wis. Stat § 71.88. Petitioner also could have filed a claim for refund within two years after the assessment, pursuant to Wis. Stat. § 71.75. Petitioner did neither. Instead, he waited for more than 6 years to file a claim for a refund. In addition, when this refund was denied by the Department by a letter dated September 12, 2001, petitioner filed an appeal with the Commission instead of filing a petition for redetermination with the Department within the 60-day time period provided by § 71.88. However, petitioner did file a request for redetermination on the *original* 1993 assessment by a letter to the Department dated September 19, 2000.

In *Gilbert*, as in this case, Mr. Gilbert was issued an assessment under the

then-existing controlled substance law, §§ 139.87-.96. Citing the unconstitutionality of this statute under *State v. Hall, supra*, Mr. Gilbert requested a refund after the two-year filing deadline had passed. See § 71.75(5). The Department denied this claim, and the denial was appealed to the Commission. *David L. Gilbert v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-442 (WTAC 1999). The Commission ruled that since Mr. Gilbert failed to file a timely claim for refund, it lacked subject matter jurisdiction.

In upholding the Commission's ruling in *Gilbert*, the Court of Appeals stated:

The legislature provided Gilbert an administrative remedy for recovery of allegedly illegal or excessive state taxes. Gilbert did not timely avail himself of the remedy that was provided for him. Gilbert did not a (sic) seek refund until well after the two-year statute of limitations had run. If Gilbert wanted his refund claim to be considered, it was incumbent upon him to file it within the two-year statute of limitations. Gilbert cannot now circumvent the process by leapfrogging over the required first step for seeking a tax refund. We have long held that where the legislature allows a remedy for recovery of allegedly illegal or excessive state taxes, that remedy is exclusive, and no action seeking a different remedy against the State may be maintained. *Schlesinger v. State*, 198 Wis. 381, 385-86, 223 N.W. 856 (1929).

*Id.*, at paragraph 11.

In the instant case, petitioner (as did the taxpayer in *Gilbert*) also argues that because the assessing statutes §§ 139.87-.96 were ruled unconstitutional, the assessment was void *ab initio*. This argument was also addressed in *Gilbert*. Citing *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), the Court of Appeals stated that even though the assessing statute was ruled unconstitutional, "administrative remedies must be timely pursued in connection with *all* claims, including claims that a state taxing

*statute is unconstitutional". Id., at paragraphs 14-17 (emphasis added).* Here, petitioner did not file his claim within the required two-year period. Following the ruling in *Gilbert*, the Commission concludes that it lacks subject matter jurisdiction over petitioner's petition for review.

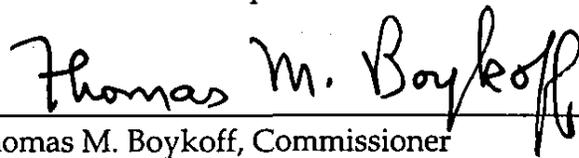
### ORDERS

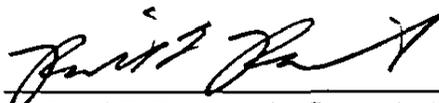
1. Petitioner's motion for summary judgment is denied.
2. The Department's motion for summary judgment is granted, and the petition for review is dismissed.

Dated at Madison, Wisconsin, this 10<sup>th</sup> day of July, 2002.

#### WISCONSIN TAX APPEALS COMMISSION

  
\_\_\_\_\_  
Don M. Millis, Chairperson

  
\_\_\_\_\_  
Thomas M. Boykoff, Commissioner

  
\_\_\_\_\_  
Richard F. Raemisch, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"