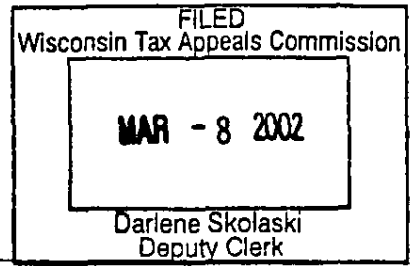






STATE OF WISCONSIN  
TAX APPEALS COMMISSION



**NED F. AND HELEN E. (DEC'D) SMITH**  
2632 Cherokee Road  
Janesville, WI 53545,

**DOCKET NO. 97-I-41**

Petitioners,

vs.

**RULING AND ORDER**

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

Respondent.

**THOMAS M. BOYKOFF, COMMISSIONER:**

This case comes before the Commission on two motions of the respondent Wisconsin Department of Revenue ("Department"). The first motion, filed on November 13, 2001, was to dismiss petitioners' petition for review on the basis of petitioners' failure to file timely claims for refund for their 1982 and 1983 income taxes, and thus, the Commission has no jurisdiction over the petition for review. The second motion, filed on February 1, 2002, was to dismiss petitioners' petition for review on the bases of petitioners' failure to prosecute their appeal and of filing a frivolous petition for review, and requesting the Commission to award the Department \$250 in costs and attorneys fees.

Petitioners represented themselves in filing their petition for

review. After the death of petitioner Helen E. Smith (date not in the record), petitioners are represented by petitioner Ned F. Smith. The Department is represented by Attorney Robert C. Stellick, Jr.

With its motions, the Department has filed affidavits, attachments, and briefs. Petitioners have not responded to the motions and have filed no documents since filing their petition for review.

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

#### **FACTS**

1. Under date of April 11, 1990, petitioners filed with the Department a claim for refund of the income taxes they had paid on federal retirement income for 1982, 1983, and 1984. Under date of August 24, 1990, petitioners filed with the Department another claim for refund of their 1982 and 1983 income taxes paid on their retirement income for those years.

2. Under date of October 15, 1990, the Department denied petitioners' claims for refund.

3. At the bottom of the Department's letter denying petitioners' refund claims, the Department provided a box on which to indicate that petitioners appealed its decision. Petitioners placed an "X" in the box, signed and dated (October 16, 1990) the area beside the box, and returned the letter to the Department.

4. Under date of December 30, 1996; the Department denied

petitioners' appeals. In another letter of the same date, the Department explained the basis for its denial. The second letter also proposed settling petitioners' refund claims for the 1984 through 1988 period by payment of tax and interest, in exchange for petitioners agreeing not to pursue any additional claims for years prior to 1989. Petitioners initially declined that offer, and later accepted it. The Department so notified the Commission, and, by an Order dated January 23, 2001, the Commission dismissed Docket No. 97-I-42 which covered years 1985 through 1987 and the portion of the current docket which covered tax year 1984.

5. Under date of January 16, 1997, petitioners filed with the Commission a petition for review of the Department's denial of their refund claims for 1982 and 1983. The Department filed a timely answer.

6. After the Commission's January 23, 2001 Order, the Department contacted Mr. Smith by telephone and mail, explaining why refunds for 1982 and 1983 were not possible and encouraging him to withdraw the appeal of these years. Mr. Smith has not followed the Department's recommendation.

7. Under date of December 13, 2001, the Commission issued a Scheduling Order directing petitioners to file a brief by January 25, 2002 and directing the Department to file a reply brief by February 22, 2002. No brief was filed by petitioners, making a reply brief by the Department unnecessary.

8. The December 13, 2001 Scheduling Order also directed

petitioners or a representative to provide the Commission with the name, address, and telephone number of any representative. Mr. Smith has not complied with this Order.

## RULING

### **Motion to Dismiss: Refund Claim Not Timely Filed**

Under Wis. Stat. § 71.75(5), an individual's claim for refund *must* be filed within 4 years of the date on which the income tax return is filed.

Petitioners' income tax returns for 1982 and 1983 were required to be filed by April 15, 1983 and April 15, 1984, respectively. Petitioners filed their refund claims for these years under date of April 11, 1990. The refund claim for 1982 was filed almost 7 years late, and the refund claim for 1983 was filed almost 6 years late.

Because of these late filed claims for refund, the Commission has no jurisdiction over the matters. This commission and the courts have long upheld this principle.

In *Gilbert v. Dep't of Revenue*, 246 Wis. 2d 734 (2001), petition for review denied by the Wisconsin Supreme Court (September 19, 2001), Mr. Gilbert filed a claim for refund 4½ years after the expiration of a 2-year claim for refund time period provided by statute to his circumstances. Even though the law under which the tax was imposed was held unconstitutional,<sup>1</sup> the Wisconsin Court of Appeals held (246 Wis. 2d at 739):

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<sup>1</sup> See, *State v. Hall*, 207 Wis. 2d 54 (1997).

TAC [Tax Appeals Commission] has held that if a taxpayer fails to file a refund claim within the time prescribed by statute, it lacks subject matter jurisdiction to determine whether the refund claim is valid. *See Bower v. Wis. Dep't of Revenue*, Docket No. 99-I-19 (1999). We agree with TAC's interpretation.

The Court amplified this statement as follows (246 Wis. 2d at 742)

(emphasis added):

*Hogan [v. Musolf*, 163 Wis. 2d 1] controls and supports our holding that *administrative remedies must be timely pursued in connection with all claims*, including claims that a state taxing statute is unconstitutional. *Id.* WISCONSIN STAT. § 71.75(5) specifically provides that any refund claim must be filed "within 2 years after the assessment of a tax." Gilbert's refund claim was not made within the required two-year period. Gilbert's refund claim was untimely. The legislature made compliance with this provision mandatory, since it is "the only method for the filing and review of claims for refund." Sec. 71.75(1). TAC properly dismissed Gilbert's claim and the circuit court improperly reversed TAC's ruling.

**Motion to Dismiss: Failure to Prosecute  
and Filing a Frivolous Petition for Review**

Because the Commission is granting the Department's motion to dismiss on the basis of late filing of petitioners' claims for refund, we do not need to address the motion to dismiss on alternative grounds. It is moot.

**Request for Costs and Attorneys Fees**

The Department requests \$250 costs and attorneys fees under sections 227.485 (titled "Costs to certain prevailing parties") and 814.025 (titled "Costs upon frivolous claims and counterclaims") of the Wisconsin Statutes. Under § 227.485(3), costs may be awarded "[i]n any contested case in which an individual, a small nonprofit corporation or a small business is the

prevailing party . . . .” The Department, however, is not “an individual, a small nonprofit corporation or a small business” for purposes of this statute and, therefore, may not be awarded costs under it.

The Department also requests attorneys fees and costs under § 814.025.<sup>2</sup> The basis of the request is the Department’s assertion that petitioners’ pursuing this appeal is frivolous; that the appeal was continued in bad faith to harass the Department; and that Mr. Smith knew or should have known that the appeal had no reasonable basis in law and could not be supported by a good faith argument for reversal of an existing law. We agree that Mr. Smith’s pursuing the appeal was frivolous, and that he should have known that it had no reasonable chance of prevailing. For these reasons, we award the Department attorneys fees.

The Department’s attorney submitted a sworn affidavit stating that he expended in excess of 5 hours researching points raised by Mr. Smith in correspondence and over the telephone, as well as drafting the motions, affidavits, and briefs before the Commission. The affidavit states that the Department paid its attorney \$47.88 per hour. Five hours at \$47.88 per hour equals an expenditure by the Department of \$244 for attorneys fees. The 5 hours was a minimum of time spent; more time was likely expended. The Department’s request for \$250 for attorneys fees is reasonable and is

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<sup>2</sup> This statute is adopted and followed by the Commission under Wis. Admin. Code § TA 1.39, which reads in part: “. . . the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state.”

supported by the affidavit. See *Nelson v. Machut*, 138 Wis. 2d 301 (Ct. App. 1987).

The Department also, under § 814.025, requested an unspecified amount for overhead and secretarial costs in responding to Mr. Smith's frivolous and unreasonable arguments. Under § 814.04(2), this commission may require petitioners to pay the Department "[a]ll the necessary disbursements and fees allowed by law. . . ." Examples of disbursements and fees, together with limitations on some of them, are specified in the statute. Section 814.04(2) does not authorize awards for the types of costs the Department requests. Even if it did, no precise amount for disbursement is specified with the Department's affidavit. Therefore, we award no costs.

#### **ORDERS**

1. The Department's motion to dismiss the petition for review on the basis that petitioners failed to file timely claims for refund is granted.
2. The Department's motion to dismiss the petition for review on alternate grounds is moot and, therefore, not granted.
3. The Department is awarded \$250 for attorneys fees but no amount for costs.

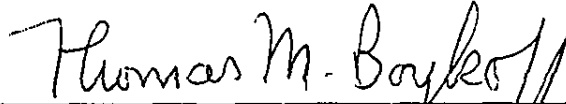


Dated at Madison, Wisconsin, this 8<sup>th</sup> day of March, 2002.

**WISCONSIN TAX APPEALS COMMISSION**



Don M. Millis, Acting Chairperson



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"