

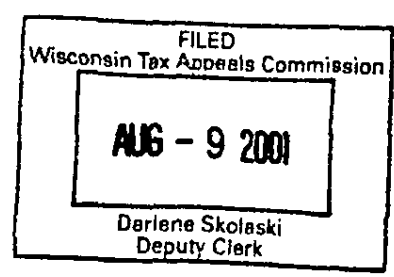
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STATE OF WISCONSIN
TAX APPEALS COMMISSION



WILLIAM K. AND VIRGINIA K. THOMAS
5917 Cornflower Lane
Greendale, WI 53129-2423,

DOCKET NO. 00-I-196

Petitioners,

vs.

RULING AND ORDER

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



Respondent.

DON M. MILLIS, COMMISSIONER:

This matter comes before the Commission on respondent's motion for judgment on the pleadings which the Commission has construed as a motion to dismiss the petition for review for failure to state a claim upon which relief can be granted pursuant to section 802.06(2)(a)6 of the Statutes. Both parties have submitted briefs concerning respondent's motion. Petitioners are represented by Attorney Don G. DiDio. Respondent is represented by Attorney Robert C. Stellick, Jr.

Respondent denominated its motion as one for judgment on the pleadings. Judgment on the pleadings is used to test the sufficiency of the defenses asserted in the answer. *All Electric Service, Inc. v. Matousek*, 46 Wis. 2d 194, 199 (1969). Here, respondent is arguing that even if we assume the facts alleged in the petition for review are true, they do not constitute a valid

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reason to reverse respondent's action on the petition for redetermination. In effect, this is a motion to dismiss the petition for review for failure to state a claim upon which relief can be granted.

There is no dispute about the facts. Petitioners filed amended Wisconsin income tax returns claiming refunds of Wisconsin income tax paid on retirement annuity payments received by petitioner William Thomas in 1995 through 1998 from the Wisconsin Retirement System ("WRS"). From 1955 to 1965, Mr. Thomas was a member of the Milwaukee Teacher Retirement Fund ("MTRF"). In October of 1965, Mr. Thomas withdrew his employee contributions and forfeited all employer contributions. The waiver signed by Mr. Thomas released the MTRF from "all right, interest or claim on [Mr. Thomas's] part to state deposit accumulations which accrued while a member" of MTRF. Years later, prior to his retirement, Mr. Thomas bought back his years at issue.¹

The facts as stated above come largely from the submissions of the parties. The facts set forth in the petition for review are less specific, but not materially inconsistent with the prior paragraph. The issue is whether, after Mr. Thomas withdrew his employee contributions, there remained anything in his MTRF account upon which his subsequent retirement benefit was based. Petitioners argue that his years of service remained in his account, and therefore, his WRS retirement benefits were paid on his account that existed as of December 31, 1963, thus making such benefits exempt from the income tax

¹ A WRS participant may under certain circumstances restore withdrawn contributions by "buying back" the amount withdrawn.

under section 71.05(1)(a) of the Statutes. Section 71.05(1)(a) provides, in relevant part:

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 . . . public employee trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund . . . , 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,

....

The Commission has rejected petitioners' reasoning in prior cases where we held that the withdrawal of contributions from an eligible retirement fund or its predecessor fund after December 31, 1963 removes any asset upon which subsequent retirement benefits could be based. *Groschel v. Dep't of Revenue*, 1996 Wisc. Tax LEXIS 34 at 7 (WTAC 1996); *Hansis v. Dep't of Revenue*, 2001 Wisc. Tax LEXIS 16 at 5 (WTAC 2001). The facts pled are materially the same as the facts of *Groschel* and *Hansis*. Petitioners urge us to disregard our decision in *Groschel*. Because we are convinced our decision in *Groschel* is correct, we decline petitioners' invitation.

Petitioners argue that the Supreme Court's decision in *Schmidt v. Employe Trust Funds Board*, 153 Wis. 2d 35 (1990), and the Court of Appeals decision in *Benson v. Gates*, 188 Wis. 2d 389 (Ct. App. 1994), have the effect of exempting Mr. Thomas' retirement benefits from the income tax. As we held in *Hansis* and in *Connor v. Dep't of Revenue*, 1995 Wisc. Tax LEXIS 41 (WTAC 1995), the *Schmidt* decision and the statute upon which it was based did not reinstate credit in the accounts of those who withdrew all of their retirement

contributions. *Hansis*, at 5-8; *Connor*, at 11. The benefit in *Schmidt* was granted by a subsequent act of the legislature based on service prior to July 1, 1966, and was not based on the prior service in the absence of the legislative act. Thus, the retirement benefits paid under *Schmidt* were not paid on the account of a member of a qualifying retirement system as of December 31, 1963—as required by section 71.05(1)(a)—but rather because of a subsequent act of the legislature that used in its calculation of the benefit years of service prior to July 1, 1966.²

The *Benson* case merely pertained to the statute of limitations for people who sought to claim the right to certain forfeited service and did not affect the taxability of retirement benefits. *Benson*, at 405; *Hansis*, at 7.

Petitioners also rely on respondent's statements in certain tax bulletins to support their position. In Wisconsin Tax Bulletin 98, respondent took the position that retirement benefits would be exempt if paid to persons who withdrew their retirement accumulations from the State Teachers Retirement System ("STRS") and, after December 31, 1963, became members of the STRS. In Wisconsin Tax Bulletin 118, respondent revoked Wisconsin Tax Bulletin 98 but provided that the revocation would be effective for taxable years beginning on or after January 1, 2000.

Petitioners argue that Wisconsin Tax Bulletin 118 precludes respondent from denying their claim for refund for the years prior to 2000.

² It should be noted that, unlike the beneficiary in *Schmidt*, Mr. Thomas did not allege that his benefits for pre-July 1, 1966, service was the result of a legislative act, but rather because he purchased forfeited years of service.

These bulletins apply only to persons who withdrew contributions from the STRS, not the MTRF to which Mr. Thomas belonged. Moreover, misstatements of the law or acts of generosity occasioned by respondent in its tax releases are not binding on the Commission.³

Petitioners also argue that respondent's differing treatment of annuitants under the exemption is unfair and in violation of article VIII, section 1 of the Wisconsin Constitution. While article VIII, section 1 of the Wisconsin Constitution requires that the rule of taxation be uniform, this section also provides in the last sentence that a tax "may also be imposed on incomes . . . and reasonable exemptions may be provided." Section 71.05(1)(a) is clearly an income tax exemption, and petitioners have not pled facts that, if proven, would show this statute or respondent's enforcement of it to be unreasonable.

Therefore, assuming all of the facts alleged in the petition for review are correct, petitioners cannot prevail on their appeal because they have failed to state a claim upon which relief can be granted.

ORDER

Respondent's motion is granted, and the petition for review is dismissed.

³ One possible exception to this rule is where a petitioner claims that respondent must be bound by advice under the doctrine of equitable estoppel. In this case, the petition for review does not include such a claim.

