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VAN AMAN ARTHUR A & BETTY L 98I258 050599 TAC

7/2/1999

FILED
Wisconsin Tax Appeals Commission
MAY - 5 1999
Darlene Skolaski
Deputy Clerk

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

ARTHUR A. AND BETTY L. VAN AMAN
P.O. Box 145
Ontario, WI 54651,

DOCKET NO. 98-I-258

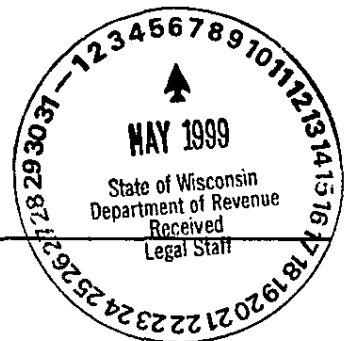
Petitioners,

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 to dismiss the petition for review.¹ Both parties have submitted supporting papers and briefs with respect to their positions on 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 finds, concludes, and orders as follows:

SUMMARY OF UNDISPUTED FACTS

1. Petitioners are Wisconsin residents who moved to this state in February of 1990.

¹ The parties agreed to treat respondent's motion to dismiss as a motion for summary judgment and to include in the record on summary judgment exhibits attached to respondent's initial brief and facts stated in petitioners' response.

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Betty L.

2. Prior to their retirement and prior to their move to Wisconsin, both petitioners were employed as public school teachers in Illinois.

3. Both petitioners were members of the Illinois Teachers' Retirement System ("ITRS") on December 31, 1963.

4. During the years 1990 through 1993, petitioners received annuity payments from the ITRS.

5. Petitioners reported their annuity payments from the ITRS on their Wisconsin income tax returns for the years 1990 through 1993.

6. In November 1994, petitioners filed a claim for refund for the years 1990 through 1993, asserting that the annuity payments from the ITRS were exempt under section 71.05(1)(a) of the Statutes.

7. Respondent denied the claim for refund, petitioners filed a petition for redetermination, and respondent denied their petition for redetermination. Petitioners then filed a petition for review with the Commission, which was assigned Docket No. 95-I-1219.

8. The Commission held a trial on November 6, 1995, on petitioners' refund claim. At trial, petitioners failed to present any evidence that they were in fact members of any retirement system on December 31, 1963, as described in Fact number 3, *supra*.

9. On March 13, 1996, the Commission issued a Decision and Order in Docket No. 95-I-1219, affirming respondent's denial of petitioners' claim for refund for the years 1990 through 1993. *Van Aman v. Dep't of*

Revenue, Wis. Tax Rep. (CCH) ¶ 400-201 (WTAC 1996). The Decision and Order was based on two separate holdings:

- A. Petitioners failed to present evidence at the trial that they were in fact members of any retirement system on December 31, 1963; and
- B. The failure of section 71.05(1)(a) to exclude payments from an Illinois public employee retirement system (1) is not unconstitutional under *Davis v. Michigan*, 489 U.S. 803 (1989), (2) does not violate constitutional guarantees of equal protection, and (3) is not invalid because other states have enacted similar exclusions.

10. Petitioners did not appeal the March 13, 1996, Decision and Order.

11. Petitioners continued to receive annuity payments from the ITRS in years 1994 through 1996 and reported these payments on their Wisconsin income tax returns filed for these years.

12. On December 22, 1997, petitioners filed a claim for refund for the years 1994 through 1996 equal to the Wisconsin income tax on their annuity payments from ITRS for those years.

13. Respondent denied petitioners' claim for refund for 1994 through 1996. Petitioners filed a petition for redetermination objecting to the denial of their claim. Respondent denied the petition for redetermination. Petitioners filed a timely petition for review with the Commission.

APPLICABLE WISCONSIN STATUTES

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 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. The doctrine of issue preclusion prevents petitioners from relitigating the validity of section 71.05(1)(a) of the Statutes, and there are no equitable considerations mitigating against use of this doctrine.

RULING

Ordinarily, petitioners would bear the burden of showing that respondent's action on the petition for redetermination is incorrect. *Woller v. Dep't of Taxation*, 35 Wis. 2d 227, 232 (1967). However, because this matter

comes before us on respondent's motion for summary judgment, respondent will not prevail unless it shows that it is entitled to summary judgment as a matter of law. *Grams v. Boss*, 97 Wis. 2d 332, 338 (1980).

The basis for respondent's motion for summary judgment is that the petition for review must be dismissed under the doctrine of issue preclusion. Specifically, respondent argues that one of the holdings in the March 13, 1996 Decision and Order (see Fact number 9.B.) precludes relitigating the issues raised in the petition for review in this case.

Issue preclusion forecloses relitigation of an issue of law or fact that has actually been decided in an earlier action. *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550 (1995); *Michelle T. v. Crozier*, 173 Wis. 2d 681, 687 (1993). In applying the doctrine of issue preclusion, we must weigh the goals of judicial efficiency and finality, protection against repetitious litigation, versus the right to a hearing on claims raised. *Crozier*, 173 Wis. 2d at 688. The Commission may consider five factors in determining whether to apply issue preclusion in this matter. *Id.* at 689. We will consider these in order.

Could petitioners have obtained review of the March 13, 1996 Decision and Order? Petitioners had the statutory right to petition for a rehearing and/or to appeal the Decision and Order to circuit court. Wis. Stat. §§ 73.015(2), 227.49, and 227.52.

If the issue is a question of law, is it a question that involves two distinct claims or intervening contextual shifts in the law? Petitioners' claim for the years 1990 through 1993 is identical to their claim in this case: The

limitation in section 71.05(1)(a) to persons who were members of certain Wisconsin retirement systems is invalid because (1) it violates the doctrine of intergovernmental immunity as set forth in *Davis v. Michigan*, (2) it violates constitutional guarantees of equal protection, and (3) other states have adopted tax laws treating retirement annuities from systems in other states the same as treatment of annuities from local systems. In both cases, petitioners argue that these principles mean that Wisconsin must exclude the income from a person who was a member of any public employee retirement system on December 31, 1963. In its March 13, 1996 Decision and Order, the Commission rejected these arguments.

There has been no change in the law since March of 1996 that would dictate a change in the earlier Decision and Order. Petitioners have suggested no intervening *legal* development that would alter the holding in the earlier Decision and Order.

Petitioners argue that there is a *factual* difference: the record clearly ~~indicates that both petitioners were members of the IFRS on December 31, 1963.~~ Petitioners failed to get this fact into evidence at trial in November of 1995. However, correcting the record in this case does not help petitioners' cause. In the earlier decision, the Commission stated:

Even if petitioners were members of an Illinois public employee retirement system as of December 31, 1963, their claim for refund must be denied because the failure of § 71.05(1)(a), Stats., to exclude payments from an Illinois public employee retirement system does not make the statute invalid.

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¶ 400-201 at 30,662. The validity of section 71.05(1)(a) was a separate and distinct ground for affirming respondent's denial of the claim for refund.

Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue? No; both the earlier case and this case are before the Commission. The quality and extensiveness of the proceedings are the same.

Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden in the first trial than in the second? No; the burdens are the same.

Are matters of public policy and individual circumstances involved that would render the application of issue preclusion to be fundamentally unfair, including the inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? No; petitioners have alleged no public policy concerns or individual circumstances that would mitigate against applying the doctrine of issue preclusion.

The only possible difference between the two proceedings is the factual issue of petitioners' membership in the ITRS on December 31, 1963. This fact is present in the record in this case. However, petitioners failed to get this fact in the record in the earlier proceeding. This difference is immaterial. Petitioners' membership in the ITRS on December 31, 1963, would not have changed the outcome of the earlier proceeding.

There is no doubt that petitioners are attempting to relitigate the same issue that was litigated before. Applying the equitable factors set forth by

the Supreme Court in *Crozier* does not mitigate against granting respondent's motion for summary judgment on the basis of issue preclusion.

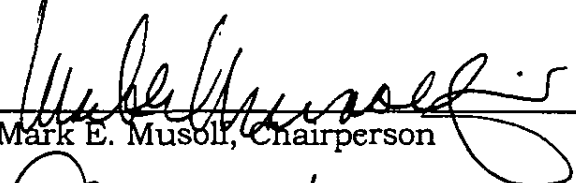
Therefore,

IT IS ORDERED

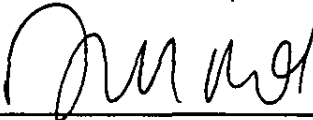
Respondent's motion for summary judgment is granted, and the petition for review is dismissed.

Dated at Madison, Wisconsin, this 5th day of May, 1999.

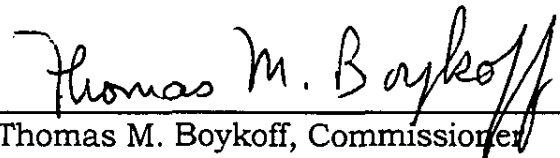
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musoll, Chairperson



Don M. Millis, Commissioner



Thomas M. Boykoff, Commissioner

~~ATTACHMENT: "NOTICE OF APPEAL INFORMATION"~~