

STATE OF WISCONSIN
TAX APPEALS COMMISSION

CLIFFORD AND BRENDA BVOCIK,

DOCKET NO. 13-I-270

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID D. WILMOTH, COMMISSIONER:

This case comes before the Commission for decision on Respondent's Motion for Summary Judgment. The Petitioners, Clifford and Brenda Bvocik, of Ripon, Wisconsin, appear *pro se* in this matter. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Sheree Robertson.

On August 19, 2014, Attorney Robertson filed a Notice of Motion and Motion for Summary Judgment, along with a Stipulation of Facts with Exhibits and a Memorandum of Law in Support of the Motion. The Petitioners were twice given the opportunity to submit a brief in response to the Department's Motion but did not do so. For the reasons stated below, we grant the Department's Motion for Summary Judgment.

FACTS

Jurisdictional Facts

1. By Notice of Amount Due, dated July 22, 2013, the Department assessed additional Wisconsin income tax and interest against the Petitioners for tax year ending December 31, 2009, in the amount of \$6,132.43. (Stipulation of Facts ("Stip.") ¶ 11; Ex. 1.)

2. Petitioner Clifford Bvocik timely filed a Petition for Redetermination with the Department, objecting to the Notice of Amount Due. (Stip. ¶ 12; Ex. 2.)

3. By Notice of Action, dated of December 18, 2013, the Department denied the Petitioners' Petition for Redetermination. (Stip. ¶ 13; Ex. 3.)

4. Mr. Bvocik timely filed a Petition for Review with the Commission objecting to the Department's action on the Petition for Redetermination. (Stip. ¶ 14; Ex. 4.)

5. On August 19, 2014, the Department filed a Notice of Motion and Motion for Summary Judgment, along with a Stipulation of Facts with Exhibits, and a Memorandum of Law in Support of its Motion.

6. The Commission issued a Briefing Order, dated August 21, 2014, ordering the Petitioners to file a brief in response to the Department's Motion no later than September 24, 2014. The Petitioners did not file a responsive brief on or before that date.

7. By Order dated September 30, 2014, the Commission ordered the Petitioners, no later than October 14, 2014, to either file a brief in response to the Department's Motion or notify the Commission that no brief would be filed. The Order

further stated that if no brief were filed, the case would be decided upon the record as presently constituted. The Petitioners did not file a responsive brief or a notice that no brief would be filed.

Material Facts

8. Petitioners are currently residents of the State of Wisconsin and were residents during the entire year of 2009. (Stip. ¶ 1.)

9. Petitioners were husband and wife but divorced in August 2002. (Stip. ¶ 2.)

10. During 2009, Mr. Bvocik was on probation to the Wisconsin Department of Corrections and was placed on a probation hold. (Stip. ¶ 3.)

11. Mr. Bvocik gave Petitioner Brenda Bvocik Power of Attorney over his financial affairs while he was incarcerated. Per the Power of Attorney, Mr. Bvocik authorized Ms. Bvocik to withdraw funds from his 401(k) retirement account with Fidelity Investments. (Stip. ¶ 4.)

12. As authorized under the Power of Attorney, in 2009, Ms. Bvocik withdrew \$43,851 from Mr. Bvocik's 401(k) account. (Stip. ¶ 5.)

13. Petitioners jointly filed a 2009 Wisconsin individual income tax return with the Department reporting their filing status as married, even though they were not married. (Stip. ¶ 7.)

14. On their jointly filed 2009 Wisconsin individual income tax return, Petitioners did not report as taxable income the \$43,851 of pension income from Mr. Bvocik's 401(k) account with Fidelity Investments. Petitioners also did not report on their

jointly filed 2009 Wisconsin individual income tax return \$10 of interest income that CitizensFirst Credit Union paid to Mr. Bvocik. (Stip. ¶ 8.)

15. The Department received federal audit information from the Internal Revenue Service notifying it that Petitioners' 2009 federal income tax return had been adjusted. Prior to the Department's receipt of the federal audit information, Petitioners did not notify the Department that their 2009 federal income tax return had been adjusted. (Stip. ¶ 9.)

16. After receiving the federal audit information, the Department audited Petitioners' 2009 Wisconsin individual income tax return and adjusted it to include the unreported pension income of \$43,851 and the \$10 of unreported interest income. Because the Wisconsin taxable income that Petitioners reported on their 2009 Wisconsin individual income tax return was adjusted, the Department determined that they did not qualify for the homestead credit that was previously allowed and also were not entitled to the previously allowed earned income credit. (Stip. ¶ 10.)

17. The Department of Revenue did not inform Ms. Bvocik that state income tax was withheld prior to distribution of the pension income from Mr. Bvocik's 401(k) account with Fidelity Investments. (Stip. ¶ 12.)

APPLICABLE LAW

A. Summary Judgment

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

B. Applicable Statutes and Rules

Wis. Stat. § 71.01 Definitions. In this chapter in regard to natural persons and fiduciaries, except fiduciaries of nuclear decommissioning trust or reserve funds:

...
(13) "Wisconsin adjusted gross income" means federal adjusted gross income, with the modifications prescribed in s. 71.05 (6) to (12), (19), (20), (24), (25), and (26).

...
(16) "Wisconsin taxable income" of natural persons means Wisconsin adjusted gross income less the Wisconsin standard deduction, less the personal exemption described under s. 71.05 (23), with losses, depreciation, recapture of benefits, offsets, depletion, deductions, penalties, expenses and other negative income items determined according to the manner that income is or would be allocated

Wis. Stat. § 71.02 Imposition of tax.

(1) For the purpose of raising revenue for the state and the counties, cities, villages and towns, there shall be assessed, levied, collected and paid a tax on all net incomes of individuals ... residing within the state

Wis. Stat. § 71.03 Filing returns; certain claims.

(1) DEFINITION. In this section, "gross income" means all income, from whatever source derived and in whatever form realized, whether in money, property or services, which is not exempt from Wisconsin income taxes. ... "Gross income" from an annuity, retirement plan or profit sharing plan consists of the gross amount received without reduction for the employee's contribution to the annuity or plan.

Wis. Admin. Code § Tax 3.085 Retirement plan distributions.

...
(2) RESIDENTS. Employee annuity, pension, profit-sharing or stock bonus plan distributions, including self-employed

retirement plan distributions, and distributions from qualified deferred compensation plans under ss. 401 (k), 403 (b) and 457 of the internal revenue code received by a person while a resident of Wisconsin shall be subject to the Wisconsin income tax, regardless of whether any of these distributions may be attributable to personal services performed outside of Wisconsin.

Presumption of Correctness and Burden of Proof

As a general matter, assessments made by the Department are presumed to be correct, and the burden is on the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determinations. *Calaway v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

ANALYSIS

Wis. Stat. § 71.02(1) serves to impose a tax on the net income of individuals residing in Wisconsin. Net income taxable in Wisconsin is derived from "Wisconsin adjusted gross income", after subtracting allowable statutory deductions and exemptions. See Wis. Stat. § 71.01(16) (defining "Wisconsin taxable income"). "Wisconsin gross income" is federal gross income, subject to certain adjustments not relevant to this case. "Gross income" is defined as "all income, from whatever source derived and in whatever form realized, whether in money, property or services, which is not exempt from Wisconsin income taxes," and includes, but is not limited to, wages, salaries, commissions, and other compensation for services. Wis. Stat. § 71.03(1). "Gross income" includes distributions received by a taxpayer from a 401(k) retirement plan. Wis. Admin. Code § Tax 3.085.

Clifford Bvocik gave Brenda Bvocik Power of Attorney over his financial affairs while he was incarcerated during 2009. Pursuant to that Power of Attorney, Mr. Bvocik specifically authorized Ms. Bvocik to withdraw funds from his 401(k) retirement account with Fidelity Investments, which she did in 2009. When filing a joint 2009 Wisconsin individual income tax return (even though not married at the time), the Petitioners did not report as taxable income the \$43,851 withdrawn from the 401(k) account, nor did they report interest income of \$10.

After receiving notice from the Internal Revenue Service of adjustments made to the Petitioners' 2009 federal income tax return, the Department audited Petitioners' 2009 Wisconsin income tax return and adjusted it to include the \$43,851 of unreported income from the 401(k) withdrawal and the \$10 of unreported interest income. Because the Petitioners' Wisconsin taxable income was adjusted upward, the Department determined that they no longer qualified for either the homestead credit or earned income credit previously claimed.

Mr. Bvocik's primary argument on appeal is that he should not be taxed on the proceeds distributed from the 401(k) account because, after Ms. Bvocik withdrew the funds, she was duped or coerced into transferring those funds, and all of Mr. Bvocik's other possessions, to another person.¹ Consequently, he claims that he never received the 401(k) distribution.

¹ In his Petition for Review, Mr. Bvocik also alleged that Ms. Bvocik was told, at the time she made the withdrawal from the 401(k) account, that all taxes and penalties had been paid. But he did not identify who made that statement to her, and he stipulated that the Department of Revenue did not inform Ms. Bvocik that state income tax was withheld prior to distribution.

But even if Mr. Bvocik's claim is true, the theft of his 401(k) funds occurred after they had been distributed to him, via his attorney-in-fact. Mr. Bvocik granted Ms. Bvocik a power of attorney over his financial affairs. He specifically directed her to withdraw funds from his 401(k) account. She withdrew the funds in accordance with his direction.

The Wisconsin Supreme Court has said, in addressing the principal/agent relationship established by a financial power of attorney:

The fundamentals of agency law include the concept that the agent is a substitute for the principal. *See* 3 Am.Jur.2d *Agency* § 1 (1986). Stated another way, the agent "acts for," "in the place of," and "instead of" the principal. *Id.* "It is, accordingly, a consequence of the [agency] relationship that whatever an agent does in the lawful prosecution of the transaction entrusted to him is the act of the principal." *Id.* at § 2.

In re Guardianship of Muriel K., 2002 WI 27, ¶ 25, 251 Wis.2d 10, 640 N.W.2d 773.

Under the law of agency, Mr. Bvocik, as principal, was in receipt of the 401(k) distribution when Ms. Bvocik, his agent, received the 401(k) proceeds.² Whatever may have happened to the funds thereafter cannot negate the tax that was imposed at the time the distribution was made.

The Petitioners did not contest the Department's other audit adjustments adding interest income and denying the Wisconsin Homestead and Earned Income Credits.

² In its Memorandum of Law in Support of its Motion, the Department argues that Mr. Bvocik was in constructive receipt of the 401(k) funds upon their distribution to his agent, Ms. Bvocik, citing I.R.C. § 451 and Treas. Reg. § 1.451-2(a). While we hold that Mr. Bvocik was in receipt of the funds under the law of agency, we note that the facts of this case also fit the elements of constructive receipt set forth in Treas. Reg. § 1.451-2(a).

DECISION AND ORDER

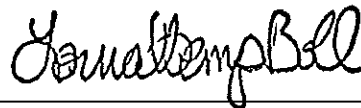
The Department's Motion was accompanied by stipulated facts sufficient to address the legal issues presented. Consequently, there is no genuine issue of material fact, and this case is ripe for summary judgment.

The distribution the Petitioners received from Mr. Bvocik's 401(k) retirement account in 2009 was Wisconsin taxable income which should have been reported on their 2009 Wisconsin individual income tax return. The Petitioners also failed to include \$10 of interest income on their 2009 Wisconsin return. Finally, because the Petitioners' taxable income for 2009 was greater than they initially reported, they did not qualify for the Wisconsin Homestead or Earned Income Credits. As a result, the audit adjustments made by the Department were correct.

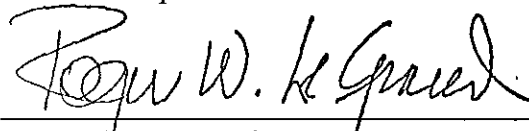
The Department's Motion for Summary Judgment is granted.

Dated at Madison, Wisconsin, this 12th day of November, 2014.

WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner



David D. Wilmoth, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS
RESPONDENT**

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.