

STATE OF WISCONSIN
TAX APPEALS COMMISSION

BETTY COSEY,

DOCKET NO. 11-I-105 (P-I)

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

The case comes to the Commission on the Respondent's motion to dismiss for failure to state a claim in the petition. The Petitioner in this matter, Ms. Betty Cosey, is representing herself, and has responded to the Department's motion by sending a letter to the Commission. The Respondent, the Wisconsin Department of Revenue ("the Department"), has filed briefs in support of its motion and is represented by Attorney Axel Candelaria. For the reasons stated below, we deny the motion to dismiss for failure to state a claim in part and we provisionally grant the motion in part.

Having considered the pleadings and briefs and letters of the parties, the Commission hereby finds, rules, and orders as follows:

FACTS¹

1. On March 4, 2010, the Department initially made income adjustments to Ms. Cosey's 2005, 2006, and 2007 Wisconsin income tax returns based on

¹ The facts are taken from the Respondent's brief. We have made edits for form and punctuation.

information received from the Internal Revenue Service (“IRS”). Among the information received was the fact that the IRS had disallowed Ms. Cosey’s federal earned income credit (“EIC”).

2. Ms. Cosey appealed that notice and submitted documentation to substantiate an additional amount of \$202 in Wisconsin withholding, \$132 for Dairyland Greyhound Park and \$70 from Laidlaw Transit Management Company, Inc. The Department gave Ms. Cosey credit for the substantiated \$202 in Wisconsin withholding.

3. Department did not receive any further documentation. Consequently, under Notice of Amount Due dated May 14, 2010, the Department issued an assessment against Ms. Cosey for calendar taxable years 2005, 2006, and 2007 (which incorporated or credited to Ms. Cosey the substantiated \$202 in withholding).

4. With respect to the May 14, 2010, assessment, Ms. Cosey failed to report \$4,277 in unemployment compensation for calendar taxable year 2005. For 2006, Ms. Cosey failed to report \$11,989 in unemployment compensation and \$770 in gambling income. For 2007, Ms. Cosey failed to report \$2,548 in gambling income and \$10,354 in wages.

5. Ms. Cosey timely filed her Petition for Redetermination with the Department. Ms. Cosey argued she was entitled to \$290 in school property tax credit. The Department explained that the school property tax credit is capped at \$150 for

married taxpayers filing as head of household, which was how Ms. Cosey filed.

6. Subsequently, under Notice of Action dated January 10, 2011, the Department denied Ms. Cosey's Petition for Redetermination since Ms. Cosey did not provide any additional information showing that the May 14, 2010, additional assessment should be less than what the Department assessed.

OPINION

The Department in this case has filed a motion to dismiss, arguing that the taxpayer's petition before the Commission lacks a basis for the Commission to grant relief to the Petitioner. The Petitioner has filed a response to the Department's motion in the form of a letter she wrote to the Commission, which was forwarded by the Department to the Commission on September 22, 2011. We will first set forth the background relevant to our decision. The second part of this opinion will set forth the law that applies to these motions. The last part of this opinion will state why we grant the motion in part and why we deny the motion in part.

BACKGROUND AND ARGUMENTS

This case initially came about in 2010 after the IRS disallowed some portion of the Petitioner's federal earned income credit (the "EIC"), apparently for 2005, 2006, and 2007. Subsequently, the Department issued an assessment based on this and other adjustments in 2010 and Ms. Cosey has filed a timely challenge to those adjustments here. By way of this motion, the Department seeks to have the entire case

before the Commission dismissed.

The adjustments the Department made to the Petitioner's returns for 2005, 2006, and 2007 appear to fall into several categories. First, there is the unreported unemployment compensation for several of the years involved. Second, the Petitioner's Wisconsin EIC was adjusted by the Department based on information received from the IRS. Third, there is also apparently unreported gambling income for one of the years. Finally, there also appears to be issues related to various other credits.

The Respondent's legal argument is that the petition fails to state facts or law upon which relief can be granted by the Commission to the taxpayer, as required by Wis. Stats. §§ 71.88(2) and 73.01(5)(b), as well as Wis. Admin. Code § TA 1.15(2)(c) and (d). In brief, the Department points out that it correctly added the unemployment income to the Petitioner's return, that the EIC adjustment cannot be changed without the federal EIC being changed first, and that the Petitioner is not eligible for various other credits in the amounts the Petitioner claimed. Ms. Cosey responds to the motion by sending us a copy of the page and a half hand-written petition, as well as an additional hand-written page, which contains the following edited language:

I, Betty Cosey, disagree with [the Department's Attorney] motion to dismiss. ..I have all my W-2's and other papers and would like to have the chance to explain them and to show why I feel this amount can't be right. I never denied owing. It's the amount I disagree with...I have all my papers and I just want to be treated fair.

RELEVANT LAW

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Torres v. Dean Health Plan, Inc.*, 2005 WI App 89, ¶ 6, 282 Wis. 2d 725, 698 N.W.2d 107 (citation omitted). The Wisconsin Supreme Court stated the following in *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, 284 Wis. 2d 307, 700 N.W.2d 180:

After liberally construing the complaint, a court should dismiss a plaintiff's claims if it is "quite clear" that there are no conditions under which that plaintiff could recover. *Id.*; see also *Prah v. Maretti*, 108 Wis. 2d 223, 229, 321 N.W.2d 182 (1982)... In other words, "A claim should not be dismissed ... unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations."

DECISION

We make several decisions and observations concerning this motion. First, even assuming the standard for the sufficiency of a petition in an administrative proceeding is the same as that for a complaint in a civil case in circuit court, the petition and the response here is, in our opinion, detailed enough to allow the Commission to understand the Petitioner's challenges and for the Department to prepare its case. The petition breaks down the Petitioner's issues by each of the three years involved, and raises certain questions about the computations and requests the opportunity to produce documentation. In a notice pleading state like Wisconsin, the standard for a Petitioner to meet in an administrative proceeding is not high, and, in our view, what

the Petitioner has put forward here is at least minimally adequate to commence a case.² Second, the information before the Commission is incomplete at this early stage of the case. For example, there does not appear to be a copy of the assessment against the Petitioner in the file, so we are unclear as to the dollar amount the Petitioner is said to owe, let alone any adjustments that may be proven to be appropriate. Also, there are no returns or affidavits in the file for us to examine. While the Respondent may very well prevail on some or all of the claims set forth in its briefs, the information before us at this time is preliminary and we cannot weigh competing information from the briefs. Simply put, as it is not readily apparent based on what we have before us that the Petitioner “cannot recover under any circumstances,” the petition is sufficient.³ See *Beloit Liquidating Trust v. Grade*, 2004 WI 39, Wis. 2d 356, 677 N.W.2d 298.

Nevertheless, our review of the materials submitted by the parties reveals that the Petitioner concedes that she did not report certain income on her returns for 2005, 2006, and 2007, namely the unemployment income.⁴ As to that portion of the assessment, the Department is correct that there is no legal basis for the Commission to

² There is authority that suggests that the remedy may be leave to amend the petition, and not dismissal. See, e.g., *Mobile Transport Systems, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-293 (WTAC 1997)(dismissal not required where the petition is inadequate); *Ecker v. Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶200-761 (WTAC 1971)(The Commission permitted a party to amend its petition for review, stating that nothing in § 73.01(5)(b), *Stats.* dictates that dismissal must be the remedy.)

³ We should point out that the Petitioner previously succeeded in getting the amount of this assessment reduced when she produced additional documentation for the Department to examine. See Fact 2 above.

⁴ There are also gambling winnings for 2010, but we cannot tell if there were withholdings on that income.

grant relief to the Petitioner. We are, however, for the reasons stated above, unable to determine on the record before us what portion of the assessment that might be and, if the Department wishes to pursue partial relief at this point in the case, further documentation will need to be provided to the Commission.

CONCLUSION

For the reasons stated above, the Department's motion to dismiss is provisionally granted in part and denied in part.

ORDERS

1. The Department's motion to dismiss is provisionally granted in part as to the portion of the assessment that relates to unreported unemployment income and the Department has 30 days from receipt of this decision to file supporting paperwork.

2. The Department's motion to dismiss as it relates to the other adjustments in question is denied and further proceedings will be necessary. The Commission will contact the parties.

Dated at Madison, Wisconsin, this 10th day of January, 2012.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner