

STATE OF WISCONSIN
TAX APPEALS COMMISSION

TODD J. AND ANGELA M. KELLER,

DOCKET NO. 17-I-198

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING & ORDER

DAVID D. WILMOTH, COMMISSIONER:

This case comes before the Commission for decision on the Respondent's Motion to Dismiss the Petitioners' Petition for Review. The Respondent asserts that the Petition for Review should be dismissed because the Petitioners' refund claim, which is the basis of their appeal, was filed late. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Kelly A. Altschul. The Petitioners, Todd and Angela Keller, of Pleasant Prairie, Wisconsin, are *pro se*. For the reasons stated below, the Commission finds that the Petitioners' refund claim was filed late and concludes that dismissal is appropriate.

FACTS

1. The Department issued to the Petitioners a Notice of Amount Due dated March 9, 2009, assessing Wisconsin income tax, interest, penalties, and fees totaling

\$7,830.01 for tax year 2006. (Affidavit of Department Resolution Officer Carrie Kloss (“Kloss Aff.”) ¶ 2, Ex. 1.)

2. The Department issued to the Petitioners a Notice of Amount Due dated March 12, 2009, assessing Wisconsin income tax, interest, penalties, and fees totaling \$6,782.00 for tax year 2005. (Kloss Aff. ¶ 3, Ex. 2.)

3. The Petitioners paid the assessments made in the Notices of Amount Due and did not file petitions for redetermination with the Department objecting to the assessments. (Kloss Aff. ¶ 4.)

4. On August 23, 2016, the Petitioners filed a refund claim with the Department requesting a refund and abatement of \$11,923.00 for interest, penalties, and fees assessed and paid for tax years 2005 and 2006. The Petitioners did not claim a refund for the taxes assessed and paid for tax years 2005 and 2006. (Kloss Aff. ¶ 5, Ex. 3.)

5. The Department issued to the Petitioners a Notice of Denial dated December 5, 2016, denying the Petitioners' refund claim based on the Department's determination that the claim had not been timely filed. (Kloss Aff. ¶ 8, Ex. 4.)

6. At a telephone status conference held on April 4, 2018, the Department's representative stated that the Department intended to file a Motion to Dismiss because the refund claim at issue was not timely filed by the Petitioners. One of the Petitioners stated that if the Commission granted the Department's Motion to Dismiss, the Petitioners would appeal. As a result, the Commission established a schedule which allowed the Petitioners an opportunity to submit a response in opposition to the Department's Motion. Along with the Status Conference Memorandum and Order sent to

the parties, the Commission stated: "Because the Petitioners expressed the intention of appealing from an adverse decision on the Department's motion, the Commissioner has provided an opportunity for the Petitioners to respond to the motion and provide a sworn affidavit of any facts they would like to have in the record for appeal." (Commission file.)

7. On April 26, 2018, the Department filed a Motion to Dismiss, along with an affidavit with exhibits and a Memorandum of Law in support of the Motion. Petitioners were twice given an opportunity to respond to the Department's Motion but did not do so. (Commission file.)

APPLICABLE LAW

Wis. Stat. § 71.75(5): A claim for refund may be made within 4 years after the assessment of a tax or an assessment to recover all or part of any tax credit, including penalties and interest, under this chapter, assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination. No claim may be allowed under this subsection for any tax, interest or penalty paid with respect to any item of income, credit or deduction self-assessed or determined by the taxpayer or assessed as the result of any assessment made by the department with respect to which all the conditions specified in this subsection are not met.

ANALYSIS

Wisconsin law requires a claim for refund to be filed within 4 years after the assessment of a tax, including penalties and interest, if the assessment was paid by the taxpayer and not protested by the filing of a petition for redetermination with the Department. Wis. Stat. § 71.75(5). The Department issued two Notices of Amount Due to the Petitioners, each assessing additional income tax, interest, penalties and fees. The first, dated March 9, 2009, was for tax year 2006, and the second, dated March 12, 2009, was for

tax year 2005. The Petitioners paid the assessments made in both Notices of Amount Due and did not file a petition for redetermination with the Department objecting to either of the assessments.

Under Wis. Stat. § 71.75(5), the four-year period for filing a claim for refund of all or any part of the assessment made in the Department's March 9, 2009 Notice of Amount Due expired on March 9, 2013. The four-year period for filing a claim for refund of amounts assessed in the Department's March 12, 2009 Notice of Amount Due expired on March 12, 2013.

On August 23, 2016, more than three years after the expiration of the four-year period for filing refund claims for the assessments for tax years 2005 and 2006, the Petitioners filed a claim for refund with the Department requesting a refund and abatement of the interest, penalties, and fees they paid on the Department's assessments. The Petitioners' refund claim was not timely, and the Department properly denied the claim.

The principal argument made by the Petitioners appeared in their petition for redetermination, a copy of which was attached to the Petition for Review filed with the Commission.¹ The Petitioners stated that they spoke with a Miss Hughes, a representative of the federal Internal Revenue Service, concerning federal income tax assessments for the years 2005 and 2006, and were advised that, if they wanted an abatement of the interest, fees, and penalties assessed by the IRS, they should first pay the assessment in full and thereafter file a request for a one-time abatement of those items. The Petitioners further

¹ The Petitioners also made this argument verbally at the telephone status conferences held in this case.

stated that, immediately after that call, they spoke by phone with a Susan Oerson, a representative of the Department, who confirmed the advice with respect to the interest, fees, and penalties imposed by the Department for tax years 2005 and 2006 – to pay the assessment in full and then request an abatement from Wisconsin after the IRS had acted on their request for abatement at the federal level. That is exactly what the Petitioners did.

In support of their argument, the Petitioners attached a “to whom it may concern” letter summarizing the instructions they say they were given by the IRS and the Department regarding their assessed federal and Wisconsin liabilities for 2005 and 2006, and also attached a copy of handwritten notes they say were contemporaneously taken. There is a reference to Miss. Hughes “IRS Agent” and, just below it, “Request abatement of the penalties file federal first then State.” To the right of this are a series of numerical calculations, the overall import of which is unclear, and then a reference to “Susan Oerson – State of WI.”² Directly underneath is writing which has been scratched out and is therefore illegible. There is no phone number or other identifying information, nor is there any narrative regarding the substance of the conversation, other than the brief statement just below the reference to the IRS Agent to request an abatement of the penalties first from the IRS and then from the state. The Petitioners acknowledge that they did not receive any written advice from the Department regarding a process for filing for an abatement of interest, penalties, and fees after payment of the Department’s assessment for 2005 and 2006.

² The handwriting is difficult to read. The Petitioners, in their typewritten submission, refer to the Department employee they say they spoke with as “Susan Oerson.”

The Petitioners' argument is one of equitable estoppel. Their claim is that the Department should be estopped from denying the refund claim because the Petitioners relied on erroneous advice from a Department representative and paid the interest, fees, and taxes instead of timely appealing the Department's assessments.

The elements of equitable estoppel are (1) action or non-action by the person against whom estoppel is asserted, (2) that induces reliance by another, (3) to his or her detriment. *Dep't. of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 634, 279 N.W.2d 213 (1979). The Commission must then balance the public interests at stake if the governmental action is estopped against the injustice that would be caused if the governmental action is not estopped. *Id.* at 639. A party's reliance on another's action or inaction must be reasonable. *Coconate v. Schwanz*, 165 Wis. 2d 226, 231, 477 N.W.2d 74 (Ct. App. 1991). A party asserting estoppel must prove all the elements by clear, convincing, and satisfactory evidence. *Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Supply Co., Inc. v. Dept. of Revenue*, 128 Wis. 2d 431, 439, 383 N.W.2d 502 (Ct. App. 1986). The Petitioners' assertion of equitable estoppel in this case fails for several reasons.

First, the cryptic handwritten notes presented by the Petitioners do not identify precisely who the Petitioners talked to or what exactly was asked of the person; they also fail to provide any reasonably detailed account of what advice was given. It is difficult to establish reasonable reliance on advice given by an agency representative without having something in writing from the representative or agency that would support that reasonable reliance. This is something the Petitioners acknowledge they do not have.

On the contrary, the Department provided the Petitioners with specific written directions regarding their rights to appeal the Department's assessments which were materially different from the advice they claim to have received via a phone conversation. Each assessment issued by the Department in this case contained an attachment entitled "Appeal Rights and Procedures" which informed the Petitioners of their options in dealing with the assessments. The options offered were to (1) appeal the assessments by filing petitions for redetermination with the Department within 60 days of receipt of the notices, or (2) pay the full amount due and, if the Petitioners later wished to contest any of the adjustments made, file a claim for refund with the Department within the time period set forth in Wisconsin Tax Publication 505 - Taxpayers' Appeal Rights and Office Audit Adjustments. Publication 505, which is readily available on the Department's website, states that a claim for refund must be filed within four years from the notice date on the assessment. Thus, the Department provided the Petitioners with specific written advice on their options for challenging all or any portion of the assessments. Their claimed reliance on verbal advice wholly inconsistent with that written advice is not reasonable.

Second, even assuming that the Petitioners reasonably relied on erroneous advice, they cannot, for the most part, show that their reliance was detrimental to their interests. In essence, the Petitioners would need to prove that, if they had received the correct advice from the Department (i.e., the advice in the appeal rights explanation attached to the assessments) rather than the claimed erroneous advice, they could have protected their right to a refund and abatement of the interest, fees, and penalties assessed

for 2005 and 2006.³ Even if the Petitioners had timely filed their refund claim, they would have no right to the claimed abatement. Wisconsin caselaw has consistently held that neither the Department nor the Commission has the authority to waive statutorily imposed interest or late filing fees. *Worley v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-571 (WTAC 1985) (“Interest and late charges imposed by respondent are mandatory under Chapter 71 of the Wisconsin Statutes and are not reviewable by this Commission.”) Thus, the Petitioners, in no event, could have achieved an abatement of interest or fees. They could have had the Department and the Commission review the imposition of a negligence penalty, but they certainly would not have had a right to abatement of the penalty.

Finally, we treat the Department’s Motion as one for summary judgment.⁴ 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. *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980), citing Wis. Stat. § 802.08(2). A party moving for summary judgment has the burden to

³ Here, the Petitioners do not allege that they did not owe the underlying tax, but only seek a refund based upon their requested abatement of interest, penalties, and fees.

⁴ The Department has filed a motion to dismiss the Petitioners’ Petition for Review. Because the Department also filed an affidavit and a brief in support of the motion, the Commission treats the Department’s motion as a motion for summary judgment. See Wis. Stats. §§ 802.06(3) and 802.06(2)(b); see also *Mrotek, Inc. v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-315 (WTAC 1997) (where the Department submitted matters outside of the pleadings, motion for judgment on the pleadings treated as motion for summary judgment); *City of Milwaukee v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-405 (WTAC 1999) (where parties submitted affidavits and briefs, motion to dismiss for failure to state a claim treated as motion for summary judgment); *Pierce Milwaukee, LLC v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-271 (WTAC 2009) (where parties submitted affidavits and briefs, motion to dismiss for lack of jurisdiction over late-filed refund claim treated as motion for summary judgment).

establish the absence of a genuine issue as to any material fact. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). The court must view the evidence, or the inferences therefrom, in the light most favorable to the party opposing the motion. *Id.* at 567.

If the moving party establishes a *prima facie* case for summary judgment, the court then examines the affidavits in opposition to the motion to see if the other party's affidavits show facts sufficient to entitle them to a trial. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis. 2d 181, 188, 148 N.W.2d 641 (1967). Once a *prima facie* case is established, "the party in opposition to the motion may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." *Board of Regents v. Mussallem*, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980), citing Wis. Stat. § 802.08(3). Any evidentiary facts in an affidavit are to be taken as true, unless contradicted by other opposing affidavits or proof. *Artmar*, 34 Wis.2d at 188. Where the party opposing summary judgment fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment pursuant to Wis. Stat. § 802.08(3). *Board of Regents*, 94 Wis.2d at 673.

In this case, the Petitioners, although twice given an opportunity to respond to the Department's Motion, have not provided any evidence contradicting the facts contained in the affidavit filed by the Department. Moreover, apart from the allegations made in their pleadings, the Petitioners have not submitted an affidavit or any other evidence regarding the factual basis for their assertion that they detrimentally relied on

erroneous advice from a representative of the Department. Consequently, there are no material issues of disputed fact and the Department is entitled to summary judgment.

CONCLUSION OF LAW

The Petitioners failed to file their refund claim within four years of the Department's assessments of additional tax, interest, penalties, and fees, as required by Wis. Stat. § 71.75(5). Consequently, the refund claim was untimely.

ORDER

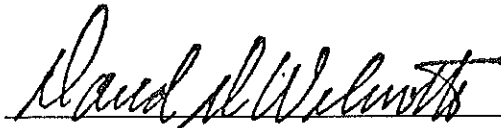
The Department's Motion for Summary Judgment is granted, and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 3rd day of December, 2018.

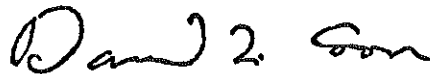
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



David D. Wilmoth, Commissioner



David L. Coon, 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 and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier 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.