

STATE OF WISCONSIN
TAX APPEALS COMMISSION

LARRY P. MENDEN,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NOS. 06-I-232
AND 06-I-233

RULING AND ORDER

DAVID C. SWANSON, COMMISSIONER:

This case comes before the Commission on the motion of the Wisconsin Department of Revenue (“Department”) for summary judgment on the basis that there is no genuine issue as to any material fact and the Department is entitled to judgment as a matter of law under Wis. Stat. § 802.08 and Wis. Admin. Code § TA 1.31.

Petitioner appears *pro se* and has filed a brief in support of his petition, various responses in opposition to the motion as well as copies of a number of documents and media productions. Attorney Lisa Ann Gilmore represents the Department and has filed an affidavit with exhibits and a memorandum of law in support of the motion, as well as responses to petitioner’s filings.

Having considered the entire record, including the motion, affidavit, exhibits, and memorandum of law of the Department and petitioner’s petition and filings, the Commission hereby finds, rules, and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS

1. By Notice to petitioner dated January 2, 2006, the Department notified petitioner that a total amount of \$6,328.81 (comprising tax, interest, penalties and fees) remained due on his Wisconsin income tax return for tax year 2000, and by additional Notice to petitioner dated January 2, 2006, the Department notified petitioner that a total amount of \$19,409.61 (comprising tax, interest, penalties and fees) remained due on his Wisconsin income tax returns for tax years 2001, 2002, 2003 and 2004 (collectively with 2000, the "years at issue") (together, the "Assessments"). (Affidavit of Lisa A. Gilmore filed October 4, 2006, Ex. 1 and 4.)

2. Under date of March 1, 2006, petitioner filed with the Department a timely petition for redetermination of the Assessments. (Gilmore Affidavit, Ex. 2.)

3. By letter to petitioner dated April 14, 2006, the Department requested that petitioner file Wisconsin income tax returns for the years at issue. (Gilmore Affidavit, Ex. 6.)

4. By Notices of Action dated July 24, 2006 issued to petitioner with respect to each Assessment, the Department denied the petition for redetermination on the basis that petitioner had failed to file Wisconsin income tax returns for the years at issue, as requested by the Department. (Gilmore Affidavit, Ex. 3 and 5.)

5. On September 22, 2006, petitioner filed a petition for review of the Assessments.

6. On October 4, 2006, the Department filed its answer to the petition, accompanied by a Notice of Motion, Motion for Summary Judgment and supporting

affidavit and exhibits.

7. On October 5, 2006, petitioner filed a “Motion to Claim and Exercise Constitutional Rights and Require the Presiding Judge to Rule Upon this Motion, and All Public Officers of this Court to Uphold Said Rights,” and on October 10, 2006, petitioner filed a “Motion for Citizen’s Demand for Trial by Jury” (collectively, “petitioner’s Motions”).

8. On October 18, 2006, the Department filed a Statement in Opposition to Petitioner’s Motions.

9. On November 20, 2006, petitioner filed a request for additional time to reply to the Department’s response to his Motions, as well as copies of a number of additional documents, including, but not limited to, the following: (1) certain sections of the Wisconsin Supreme Court Rules; (2) a letter addressed to petitioner from Attorney Guy G. Curtis of Imperial Nebraska opining that “our tax system is based on voluntary compliance”; (3) two letters addressed to petitioner from Albert J. Wagner, CPA, of AweSum Enterprises, Hatfield, Pennsylvania, concluding that there is no “‘so-called’ income tax” on “personal, private incomes”; (4) three letters from Michael L. Kailing, “Tax Accountant,” Honolulu, Hawaii, opining generally that there is no legal requirement for an individual either to file a federal income tax return or pay social security taxes; (5) Benedict D. LaRosa, *Democracy or Republic, Which Is It?* (pamphlet); and (6) *The Joe Banister Story* (VHS tape).

10. On December 8, 2006, the Department filed a response to petitioner’s filings noting that they were not responsive to the issues in this case.

11. On February 1, 2007, petitioner filed a response with the Commission asserting that “IRS Form 1040 violates the federal Paperwork Reduction Act (PRA) and is therefore a legally invalid form” and concluding that no individual can be required to file an IRS Form 1040. As support for his conclusions, petitioner submitted copies of various documents, including, but not limited to, the following: (1) Phil Hart, *Constitutional Income: Do You Have Any?* (3d Ed. 2005); (2) various sections of the United States Code; (3) various sections of the U. S. Code of Federal Regulations; and (4) blank IRS Forms 1040 for the years 1990-2005.

12. On February 6, 2006, the Commission held a telephone status conference in this case. Following that conference, by order dated February 8, 2007, the Commission directed petitioner to complete his filing of his response to the Department’s motion by February 22, 2007, and directed the Department to file its response, if any, to petitioner’s filings by March 8, 2007.

13. On February 22, 2007, petitioner filed copies of additional materials with the Commission, including, but not limited to, the following: (1) “Why the Income Tax is Bad,” *U.S. News and World Report*, May 25, 1956; (2) *The Ten Planks of the Communist Manifesto* (www.wealth4freedom.com/tenplanks.html); (3) various affidavits and letters sent by petitioner to various federal and state agencies; and (4) *Aaron Russo’s America: Freedom to Fascism* (DVD).

14. On March 2, 2007, the Department filed a response to petitioner’s latest filings noting that they were not responsive to the issues in this case.

15. Petitioner was a full-year Wisconsin resident for each of the years

at issue. (Gilmore Affidavit, ¶ 12.)

16. Petitioner has not filed a Wisconsin income tax return for any of the years at issue. (Gilmore Affidavit, ¶ 9.)

17. Petitioner received wages in excess of the Wisconsin income tax return filing requirement in each of the years at issue. (Gilmore Affidavit, Ex. 6.)

18. The Department estimated petitioner's income and applicable Wisconsin income tax due from petitioner for each of the years at issue pursuant to Wis. Stat. § 71.74(3), because petitioner never filed a Wisconsin income tax return for any of the years at issue. (Gilmore Affidavit, ¶ 10.)

RULING

A summary judgment motion will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Wis. Stat. § 802.08(2). A party moving for summary judgment has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

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 him to trial. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis.2d 181, 188, 148 N.W.2d 641, 644 (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, 809 (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.

Wisconsin Statutes § 71.02(1) provides that “there shall be assessed, levied, collected and paid a tax on all net incomes of individuals . . . residing within the state” Net income is derived from gross income, after subtracting allowable statutory deductions and exemptions. See Wis. Stat. § 71.01(16) (defining “Wisconsin taxable income”). “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, “compensation for services, including wages [and] salaries” Wis. Stat. § 71.03(1).

Any resident of Wisconsin whose gross income exceeds the threshold amount set annually by the Department is required to file a Wisconsin income tax return with the Department. Wis. Stat. § 71.03(2). For each of the years at issue, this threshold amount was \$9,000. “Any person required to file an income . . . tax return, who fails, neglects or refuses to do so . . . shall be assessed by the department according to its best judgment.” Wis. Stat. § 71.74(3). In the performance of its duty to assess

incomes, the Department is empowered to estimate incomes. Wis. Stat. § 71.80(1)(a). Assessments made by the Department are presumed to be correct, and the burden is on petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1).

The Department estimated petitioner's Wisconsin gross income for the years at issue because petitioner failed to file Wisconsin income tax returns for those years, and the Department issued the Assessments based on those estimates. Petitioner has failed to meet his burden to prove that either Assessment is incorrect.

Petitioner filed a petition for review and responded to the Department's motion, but he has never submitted any evidence to support his own claims or rebut the Department's evidence or arguments. Petitioner instead has filed copies of various documents that recite arguments typically offered by tax protestors. Petitioner also objects to the evidence in the record and the procedures used by the Department in making the Assessments.

Petitioner does not deny that he was a Wisconsin resident, nor that he was paid wages in Wisconsin in excess of \$9,000 during each of the years at issue, nor that he has failed to file a Wisconsin income tax return for each of the years at issue. Thus, there are no material facts in dispute in this case. However, petitioner asserts that wages, salaries and compensation for services do not constitute taxable income in Wisconsin. The only issue in dispute, therefore, is whether the Assessments are invalid as a matter of law under the definitions of "wages," "salaries" and "compensation for

services” applicable for Wisconsin income tax purposes.

In *Callahan v. Dep't of Revenue*, WTAC Docket No. 05-I-107 (January 9, 2006) and *Jerry E. and Lorilee L. King v. Dep't of Revenue*, WTAC Docket No. 06-I-32 (September 18, 2006), the Commission considered cases with facts and legal arguments that were very similar to the facts and law at issue in this case. In those cases, the petitioners argued, on a variety of grounds, that various types of wages are effectively immune from Wisconsin income tax. We rejected those arguments in *Callahan* and *King*, and we reject them again here.

In his petition and subsequent filings, petitioner relies on a litany of tired tax protestor legal arguments, apparently to delay or avoid paying state income taxes for the years at issue. These arguments and ones like them have been consistently rejected in prior cases before the Commission and the courts. They are groundless and frivolous, and have never prevailed in Wisconsin, nor, as far as the Commission is aware, in any court in the country. See *Tracy v. Dep't of Revenue*, 133 Wis. 2d 151 (Ct. App. 1986); *Steele v. Dep't of Revenue*, WTAC Docket No. 05-I-79 (December 12, 2005); *Kroeger v. Dep't of Revenue*, WTAC Docket No. 04-I-228 (March 21, 2005); *Boon v. Dep't of Revenue*, 1999 Wisc. Tax LEXIS 7 (WTAC 1999), *aff'd on other grounds* (Milwaukee Co. Cir. Ct. 1999).

There is no genuine issue of material fact in this case, and the Department is entitled to summary judgment as a matter of law. In addition, in light of the well-established authority cited above, petitioner's claims are groundless, frivolous, and a waste of state resources. Petitioner is therefore subject to an additional assessment in

the amount of \$300.00, pursuant to Wis. Stat. § 73.01(4)(am).

IT IS ORDERED

1. Petitioner's Motions are denied.
2. The Department's motion for summary judgment is granted, and its action on petitioner's petition for redetermination is affirmed.
3. An additional assessment of \$300.00 is imposed on petitioner pursuant to Wis. Stat. § 73.01(4)(am).

Dated at Madison, Wisconsin, this 31st day of May, 2007.

WISCONSIN TAX APPEALS COMMISSION

Diane E. Norman, Acting Chairperson

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"