

STATE OF WISCONSIN
TAX APPEALS COMMISSION

GARY J. SIMON,

DOCKET NO. 09-I-027

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This matter comes before the Commission on a motion for summary judgment filed by the Respondent, the Wisconsin Department of Revenue (the "Department"). The Department appears by Attorney Sheree Robertson and has filed supporting affidavits with exhibits in support of its motion. The Petitioner, Mr. Gary J. Simon, appears *pro se* and has filed a response with affidavits. Having considered the record before it in its entirety, the Commission finds, rules and orders as follows:

FINDINGS OF FACT

1. On or about April 15, 2008, the Petitioner filed a 2007 Wisconsin Form 1A individual income tax return (the "return") reporting \$0 in wages, tips, salaries, etc. on Line 1 of the return. No IRS Form W-2 federal wage statement was attached to the return. However, IRS Form 4852 was attached to the return reporting that the Petitioner's employer, MegTec Systems, Inc. ("MegTec"), had withheld \$12,319

in Wisconsin income tax from his wages for that year, and the Petitioner claimed that entire amount as a refund on Line 35 of the return. (Robertson Aff. 1, ¶ 2, Ex. 1.)

2. The Department obtained a W-2 Report based on the 2007 IRS Form W-2 Wage and Tax Statement issued by MegTec for Petitioner (the “W-2”). The W-2 states that MegTec paid the Petitioner \$39,183.10 in wages and withheld \$2,296.47 in State income tax for 2007. (Robertson Aff. 1, ¶ 3, Ex. 2.)

3. On June 6, 2008, the Department issued a Notice of Refund Offset to the Petitioner notifying him that it had made certain adjustments to his 2007 Wisconsin income tax return, resulting in a recalculated refund amount of \$302.47. The Department adjusted the Petitioner’s return by including \$39,183 as Wisconsin wage income and reducing the related Wisconsin income tax withheld to \$2,296.47, consistent with the W-2. The Notice further informed the Petitioner that the Department had applied the entire refund amount (\$302.47) to the Petitioner’s outstanding tax liability for 1995. (Robertson Aff. 1, ¶ 4, Ex. 3.)

4. On or about August 15, 2008, the Petitioner filed a petition for redetermination with the Department. (Robertson Aff. 1, ¶ 6, Ex. 4.) In his petition for redetermination, the Petitioner stated that the W-2 “was in error,” requested an informal conference with Department personnel and requested that the Department provide to him the information on the following list (statutory citations included):

1. Accounting of all monies sent to the Wis. DOR for the years 1993, 1994, 1995, 1996, 1997, 1998, 1999 and 2000. Wis. Stat. 71.80(8)

2. A copy of all rules concerning signatures on tax forms. Wis. Stat. 19.31 through 19.39

3. A copy of all signed assessments. Wis. Stat. 71.80(14)

4. A copy of all notices of withholding (garnishment of my earnings) sent to Megtec Systems that have been certified under the penalties of perjury to be true and correct. Wis. Stat. 71.91(7)(g)

5. A copy of all tax warrants signed under the penalty of perjury certifying that all assessments and penalties assessed by the Wis. DOR are true and correct. Wis. Const. Article 1, Section 11

6. I have never had any meaningful due process hearing with the Wis. DOR concerning the years 1993 through 2000. If you disagree, please provide finding of facts and conclusion of law to support all claims made by the Auditors at the Wis. DOR for those years. Wis. Const. Article 1, Sec 1

7. A copy of the notice that I am required to keep books and records and proof that it was served upon me. Wis. Stat. 71.80(9)

(Robertson Aff. 1, ¶ 6, Ex. 4 (citations in original).)

5. On December 11, 2008, the Department denied the Petitioner's petition for redetermination. (Robertson Aff. 1, ¶ 7, Ex. 5.) The Department did not hold an informal conference with the Petitioner in this matter, and did not provide the information that the Petitioner requested.

6. On February 13, 2009, the Commission received the Petitioner's petition for review with attached affidavits and exhibits 1-2, which had been sent via certified mail on February 12, 2009.

7. On March 12, 2009, the Department filed its answer, a notice of motion and motion to strike the Petitioner's affidavit and exhibits with attached affidavit of Attorney Robertson ("Robertson Aff. 2") and exhibits, a notice of motion and motion for summary judgment with attached affidavit of Attorney Robertson ("Robertson Aff. 1") and exhibits, and the affidavit of Department Resolution Officer John C. Teasdale in support of the motion for summary judgment.

8. On March 18, 2009, the Commission issued a Briefing Order requiring the Petitioner to file a response to the motions by April 13, 2009.

9. On Friday, April 10, 2009, the Petitioner filed a "Petition for More Time" requesting additional time to file a response to the motions.

10. On Monday, April 13, 2009, the Department filed an objection to the Petition for More Time. That same day, the Commission issued an Order denying the Petitioner's Petition for More Time.

11. On April 14, 2009, the Petitioner filed his response to the motions, one day after the deadline specified in the Commission's Briefing Order.

12. On April 15, 2009, the Petitioner filed a notice of motion and motion to vacate the Commission's Order dated April 13, 2009.

13. On April 16, 2009, the Commission issued an Order requiring the parties to file no additional motions until the Commission had ruled on the pending motions.

CONCLUSION OF LAW

There is no genuine issue of material fact in this matter and the Department is entitled to judgment as a matter of law.

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 or her 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 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.

The Petitioner in this matter has become a regular visitor to the Commission. *See, Gary J. Simon v. Dep't of Revenue*, Docket Nos. 08-I-110 and 08-I-112 (WTAC Dec. 23, 2008), *aff'd*, Case No. 09-CV-207 (Brown Co. Cir. Ct. Apr. 6, 2009); *Gary J. Simon v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 20011113044 (WTAC Oct. 17, 2001), *aff'd*, Wis. Tax Rptr. (CCH) ¶ 400-640 (Dane Co. Cir. Ct. June 13, 2002). The Commission's most recent ruling and order cited above involved petitions for review filed by the Petitioner contesting the Department's application of Wisconsin income tax to his wages for 2004 and 2006. *Id.*, WTAC Docket Nos. 08-I-110 and 08-I-112. In this matter, the Petitioner makes the same arguments that the Commission rejected in those cases. In particular, the Petitioner reasserts his demand that the Department provide him with a conference or hearing regarding his claims. As further discussed in these prior cases, the Petitioner's arguments are entirely without merit.

The Department has filed a motion for summary judgment on the basis that there is no genuine issue of material fact in this matter. As set forth in the Commission's Findings of Fact, above, the Department has established a *prima facie* case for summary judgment.

In response, the Petitioner offers a series of specious legal arguments and conclusions, and only one relevant factual argument. At various points in his filings, the Petitioner states that the W-2 issued to him by MegTec, his employer, was "incorrect" or "in error." However, he never describes the alleged error, nor does he

provide a statement of specific facts rebutting the facts established by the Department's affidavits and exhibits. The Petitioner's statements regarding his 2007 return and the W-2 are essentially "mere allegations or denials" of the Department's pleadings. *See, Board of Regents*, 94 Wis.2d at 673. To withstand the Department's motion, the Petitioner was required to "set forth specific facts showing that there exists a genuine issue requiring a trial," but has failed to do so. *Id.*

Instead, he offers a number of statements that purport to show that his Wisconsin wages are not subject to Wisconsin income tax. These tired tax-protestor 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); *Van Dyke v. Dep't of Revenue*, WTAC Docket No. 08-I-032 (August 21, 2008); *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).

There is no dispute that the Petitioner requested an informal conference or hearing before the Department, which he asserts is required by Wisconsin Administrative Code Tax § 1.14(5), and that the Department denied his request. The Petitioner raised exactly the same argument in his most recent cases before the Commission, and we ruled in favor of the Department. *See, Gary J. Simon v. Dep't of Revenue*, Docket Nos. 08-I-110 and 08-I-112 (WTAC Dec. 23, 2008), *aff'd*, Case No. 09-CV-207 (Brown Co. Cir. Ct. Apr. 6, 2009). In this matter, we again rule in the Department's

favor for the same reasons discussed in that previous ruling and order.

The Commission again concludes that the Petitioner's due process rights have not been violated. There is no genuine issue of material fact in this matter, and the Department has shown that it is entitled to judgment as a matter of law.

PENALTY

The Commission may impose an additional assessment of up to \$1,000 if it determines that the arguments made by the taxpayer are frivolous or groundless. Wis. Stat. § 73.01(4)(am); Wis. Admin. Code § TA 1.63. In *Gary J. Simon v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 20011113044 (WTAC Oct. 17, 2001), *aff'd*, Wis. Tax Rptr. (CCH) ¶ 400-640 (Dane Co. Cir. Ct. June 13, 2002), the Commission imposed an additional \$500 assessment under Wis. Stat. § 73.01(4)(am) on the Petitioner for making similar arguments in cases involving other tax years. In *Gary J. Simon v. Dep't of Revenue*, Docket Nos. 08-I-110 and 08-I-112 (WTAC Dec. 23, 2008), *aff'd*, Case No. 09-CV-207 (Brown Co. Cir. Ct. Apr. 6, 2009), we assessed \$750 on similar grounds. Because we recently rejected the same arguments the Petitioner repeats in this matter, we find that the Petitioner knew, or should have known, that this appeal was without reasonable basis in law or equity or could not be supported by a good faith argument for an extension, modification or reversal of existing law. Therefore, the Commission assesses additional damages against the Petitioner in the amount of \$1,000.

IT IS ORDERED

1. The Department's motion to strike is denied.
2. The Petitioner's affidavits and exhibits attached to his petition for

review are made a part of the record in this matter, but only to the extent that the statements included therein are based upon his personal knowledge and are relevant to this matter, and further provided that service of these documents did not constitute proper discovery upon the Department under applicable statutes and rules.

3. The Petitioner's Motion to Vacate the Commission's Order dated April 13, 2009 is denied.

4. The Petitioner's response to the Department's motions is accepted and made a part of the record in this matter, despite its untimely filing.

5. The Department's Motion for Summary Judgment is granted and its action on the Petitioner's petition for redetermination is affirmed.

6. An additional assessment of \$1,000 is imposed on the Petitioner pursuant to Wis. Stat. § 73.01(4)(am).

Dated at Madison, Wisconsin, this 13th day of July, 2009.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"