STATE OF WISCONSIN

TAX APPEALS COMMISSION

GARY J. SIMON, DOCKET NO. 16-I-040

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID L COON, COMMISSIONER:

This matter comes before the Commission on the Department's Motion for Summary Judgment filed on December 21, 2017. On June 4, 2018, the Petitioner filed a Motion for Leave to do Discovery.

The Petitioner is *pro se*. The Department is represented by Attorney Sheree Robertson.

For the reasons stated below, the Commission denies the Department's Motion for Summary Judgment, grants summary judgment to the Petitioner, and denies Petitioner's discovery Motion as moot.

FACTS

1. On April 24, 2009, the Department issued to Petitioner and his employer a Wage Attachment to collect Petitioner's past due taxes. (Supplemental

Affidavit of Robert A. Frauchiger, Revenue Agent Supervisor, Wisconsin Department of Revenue, ¶ 4, Ex. 15.)

2. In January 2013, the Department sent a letter to the Petitioner, requesting that he file a tax return for the 2011 tax year. (Affidavit of Department of Revenue Auditor Alberto Ciarletta ("Ciarletta Aff."), Ex. 1.)

3. Petitioner filed a 2011 tax return, dated February 18, 2013, which the Department received on or about February 26, 2013. (Ciarletta Aff., Ex. 2.)

4. Included with the 2011 tax return was a W-2 form with a handwritten alteration to the amount of Wisconsin income tax withholding and a Substitute Wage Statement - Employee Complaint stating that the Petitioner had asked his employer to change the W-2, but the employer had refused. (Ciarletta Aff., Ex. 2.)

5. Petitioner admits that he made the alteration to the W-2, claiming that he had a right to do so. (Gary Simon Brief in Support of Motion to Void Feb. 25, 2016 Deficiency Notice ("Motion to Void"), p. 5; Affidavit of Gary Simon dated September 14, 2016,[1] ¶ 15.)

6. Petitioner changed the amount of withholding on the 2011 W-2 form from $3,170.49 to $16,386 to include amounts that Petitioner's employer had withheld from his income for unpaid tax and interest due for prior tax years pursuant to a withholding certification from the Department. Using the altered withholding amount, Petitioner claimed a refund of $13,780. (Ciarletta Aff., Ex. 2.)

[1] This Affidavit was previously submitted by Petitioner in support of his Motion to Void.

7. The Department "processed" the 2011 tax return on March 21, 2013, rejecting the handwritten change to the W-2, and adjusted the refund from $13,780 to $517. The Department did not issue a notice on the refund after processing the return due to what the Department has claimed was a computer error. (Dep't Response Brief to Motion to Void, p. 10, and Dep't Brief in Support of Motion for Summary Judgment, p. 7.)

8. On April 8, 2015, the Department issued a Notice of Refund ("First Notice") reducing Petitioner's refund to $517. The First Notice did not state the tax year for which it was issued. (Ciarletta Aff., Ex. 3.)

9. Petitioner sent a letter dated June 5, 2015, to the Department requesting additional explanation and demanding that the information be provided within 30 days. (Affidavit of Department Resolution Office Audit Supervisor Mary E. Nelson ("Nelson Aff."), Ex. 7.)

10. The Department treated Petitioner's June 5, 2015 letter as a timely Petition for Redetermination. (Nelson Aff. ¶ 3.)

11. The Department issued a Notice of Action on the Petition for Redetermination on December 8, 2015, which denied the redetermination. The Department advised Petitioner that he could not claim the amounts attached for prior year liabilities as current (2011) tax year withholdings. (Nelson Aff. ¶ 5, Ex. 8 and Ex. 9.)

12. Petitioner received the Notice of Action on December 10, 2015. Petitioner timely filed a Petition for Review with the Commission that was received on February 10, 2016. (Commission File.)

13. After a subsequent audit of Petitioner's 2011 tax return, the Department issued a Notice of Amount Due ("Second Notice") dated February 25, 2016, which included an appeal right notice. The Second Notice again addressed the Petitioner's claimed refund of $13,780 (the amount already at issue before the Commission in the First Notice) as an underpayment, as well as interest, and added a fraud penalty on the additional amount that Petitioner had handwritten onto his W-2 and claimed as withholding. Further, the Second Notice contained an assessment of $585 in additional tax due on $7,977 of previously unreported income. (Nelson Aff. ¶ 6, Ex. 10.)

14. Although an appeal was pending before the Commission regarding Petitioner's 2011 tax return, the Department did not contemporaneously provide a copy of the February 25, 2016 Second Notice to the Commission nor alert the Commission to its existence. (Commission File.)

15. Petitioner did not separately respond to the Department regarding the February 25, 2016 Second Notice. (Nelson Aff. ¶ 9.) Petitioner has acknowledged receiving it and purposefully did not respond to it. (Petitioner's Reply to Respondent's Response Brief filed January 27, 2017, p. 1; Affidavit of Gary Simon dated October 14, 2016,[2] ¶¶ 9-11.)

16. By letter dated July 14, 2016, the Department first notified the Commission of the existence of the Second Notice. The Department also moved to withdraw the First Notice, which was already on appeal before the Commission, asking

[2] This Affidavit was previously submitted by Petitioner in support of his Motion to Void.

for a dismissal without prejudice because, according to the Department, its own action on the refund claim had been untimely. The Department then alleged that the Second Notice had become final because the Petitioner had not responded with a timely Petition for Redetermination. (Commission File.)

17. On August 10, 2016, the Commission issued a letter to the parties indicating that, based upon information currently in the Commission's file, the actions by the Department (i.e., the issuance of the Second Notice) seemed to be an amendment of the current matter before the Commission. (Commission File.)

18. Petitioner filed a motion on August 15, 2016, opposing the Department's request that the First Notice be withdrawn and dismissed. (Commission File.)

19. After a motion and briefing schedule was set by the Commission, Petitioner filed a Motion to Void the Second Notice. The parties subsequently filed briefs, affidavits, and exhibits. At that time, the Commission determined, under the specific facts of this matter, that the Second Notice was an amendment of the First Notice already pending before the Commission. (Commission File.)

20. On December 21, 2017, the Department filed a Motion for Summary Judgment incorporating the affidavits filed with its response to the Petitioner's previous Motion to Void, along with a supporting brief. (Commission file.)

21. On March 1, 2018, the Petitioner filed a Notice of Motion and Motion in Opposition to Summary Judgment along with a Brief in support of his opposition to Summary Judgment and some supporting documents. (Commission file.)

22. Following briefing and supplemental motions which were considered additional argument, on June 4, 2018, the Petitioner filed a Motion for Leave to do Discovery along with an affidavit and supporting documents. (Commission file.)

APPLICABLE LAW

Statutes

Wis. Stat. § 71.74(1): The department shall, as soon as practicable, office audit such returns as it deems advisable and if it is found from such office audit that a person has been over or under assessed, or found that no assessment has been made when one should have been made, the department shall correct or assess the income of such person....

Wis. Stat. § 71.75(7): The department shall act on any claim for refund or credit within one year after receipt and failure to act shall have the effect of allowing the claim and the department shall certify the refund or credit unless the taxpayer has consented in writing to an extension of the one-year time period prior to its expiration.

Wis. Stat. § 71.77(2): With respect to assessments of a tax or an assessment to recover all or part of any tax credit under this chapter in any calendar year or corresponding fiscal year, notice shall be given within 4 years of the date the income tax or franchise tax return was filed.

Wis. Stat. § 71.77(3): Irrespective of sub. (2), if any person has filed an incorrect income tax or franchise tax return for any year with intent to defeat or evade the income tax or franchise tax assessment provided by law, or has failed to file any income tax or franchise tax return for any of such years, income of any such year may be assessed when discovered....

Wis. Stat. § 71.83(1)(b)1: '*Income and franchise; all persons.*' [A]ny person making an incorrect, or failing to make a, report, ... with intent, in either case, to defeat or evade the income or franchise tax assessment required by law, shall have added to the tax an amount equal to 100% of the tax on the entire underpayment.

> Wis. Stat. § 71.88(1)(a): *Contested assessments and claims for refund.* Except for refunds set off under s. 71.93 in respect to which appeal is to the agency to which the debt is owed, except for refunds set off under s. 71.935 in respect to which an appeal is held under procedures that the department of revenue establishes . . . any person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of refund may, within 60 days after receipt of the notice, petition the department of revenue for redetermination....
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> Wis. Stat. § 71.88(2)(a): *Appeal of the department's redetermination of assessments and claims for refund.* A person feeling aggrieved by the department's redetermination may appeal to the tax appeals commission by filing a petition with the clerk of the commission as provided by law and the rules of practice promulgated by the commission.

DECISION

Procedural History

This matter has a tortured history to say the least, with both parties adding to the procedural muddle. Petitioner belatedly filed his 2011 tax return with the Department on February 26, 2013. Petitioner admits that he altered the W-2 form provided to him by his employer. Petitioner changed the current year withholdings shown on the W-2 form from $3,170.49 to $16,386. He added to the current year withholdings the amount sent to the Department by his employer pursuant to the Department's Wage Attachment dated April 24, 2009, to pay Petitioner's past due taxes for other tax years. Based upon the altered withholding figure, Petitioner attempted to obtain a larger refund than he was entitled to receive.

The Department adjusted Petitioner's refund from the $13,780 that he claimed to $517 via the First Notice dated April 8, 2015. The Department had been aware of

Petitioner's wrongful attempt to receive an inflated refund since at least March 21, 2013, when it processed the return, but the Department failed to issue the First Notice until April 8, 2015. By that time, the Department was beyond the one-year period prescribed by statute for the Department to act on a refund claim, so that refund was effectively granted.[3] Wis. Stat. § 71.75(7). The Department claims that the issuance of the First Notice was delayed due to a "computer glitch."

After receiving the First Notice, Petitioner sent a letter dated June 5, 2015, to the Department complaining that the First Notice did not list the tax year for which the First Notice applied. The Department decided to treat that letter as a Petition for Redetermination. If the Department had not done so, Petitioner would likely have been late in filing a Petition for Redetermination as a petition needs to be filed with the Department within 60 days after a taxpayer receives a notice.[4] Wis. Stat. § 71.88(1)(a).

The Department's failure to include the tax year on the First Notice was also claimed to be a computer error. While we find that this error was typographical in nature and was not in itself a fatal error, we are concerned with the number of computer errors that the Department has used as excuses. While almost no system can be 100% accurate all the

[3] The text of the statute notes that the Department's failure should have the effect of granting the refund; to begin that process, the Department shall "certify the refund." Wis. Stat. § 71.75(7). The Department in its briefs used the term "deemed granted" to describe the effect of this language. In fact, the refund claim is effectively granted by law.

[4] Not helping his own cause, at one point, Petitioner did try to argue that the Department should not have treated his June 5, 2015 letter as a Petition for Redetermination as he "did not request the DOR for a redetermination on his request for more information." Affidavit of Gary Simon dated September 14, 2016, ¶ 10.

time, the Department should act to review and make corrections necessary to prevent these issues in the future.

The Department ultimately denied the Petition for Redetermination. Petitioner then filed a Petition for Review with the Commission.

While the matter was pending before the Commission, the Department, in a subsequent office audit of the 2011 return, issued a Second Notice on February 25, 2016, but did not inform the Commission that it had done so. In that Notice, the Department acted from the perspective that the refund had been "deemed granted" under the statute. In order to recover the refund, the Department assessed Petitioner for an underpayment of tax in an amount equal to the refund effectively granted by statute. The Second Notice also sought a 100% "fraud penalty" on the Petitioner's underpayment due to his attempt to obtain a refund which he had no legal basis to receive. Petitioner acknowledged that he did receive the notice but did not respond to the Second Notice. The Department stated in its July 14, 2016 letter to the Commission that the Petitioner had failed to respond to the Second Notice. By that letter, the Department also finally advised the Commission of the existence of the February 25, 2016 Second Notice.

It is worth noting that, while the Department sought to recover the refund as an underpayment in the Second Notice, it appears that the Department never certified the refund as required by law, so that the refund was never actually paid or credited to Petitioner. In responses to requests for production of documents from the Petitioner, the Department admits "Respondent has not issued a notice to Petitioner showing that a refund

or credit of $13,801 is due him" and "Respondent has not issued a refund check for $13,801.00 to Petitioner for tax year 2011."[5]

On the specific facts of this matter as they stood at that time, the Commission issued a non-dispositive Ruling and Order, dated June 7, 2017, that the Department's Second Notice was an amendment of the First Notice pending before the Commission.

Analysis

These parties have created a procedural quagmire that the Commission has seldom seen and hopes not to see again. Petitioner initially creates the problem here by hand-altering numbers on tax documents and filing an incorrect return based upon those altered numbers. He was obviously attempting to avoid paying his tax obligations. The Department has provided proof of both his past debts and the Wage Attachment. Petitioner improperly tried to characterize the amounts taken under the Wage Attachment to his current year withholding, thereby attempting to receive a greater refund than he was entitled to receive.

Petitioner should not have done this. If Petitioner had issues with the collection of past due amounts, he should have addressed those concerns with the Department's collection division. As we have said many times before, the Commission does

[5] Despite the Department's response to the Petitioner's discovery denying that it had "not issued a notice to Petitioner showing that a refund or credit" was due to him, Petitioner submitted an exhibit along with a brief regarding the previous Motion to Void Second Notice, which appeared to show that the Department did perhaps at some point after it issued the Second Notice, credit an account of Petitioner's in an amount similar to the claimed refund. The record as to whether the refund was credited to Petitioner is not clear. But our ruling in this matter should be clear – the refund claim is granted by reason of the Department's failure to act on it within one year, and the Petitioner is entitled to the economic benefit of his refund from and after the date it was filed.

not have jurisdiction over collection matters. *Lemmens v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-238 (WTAC 2018).

This should have been a very easy case for the Department, but the Department's own errors and procedural wanderings created additional problems. The Department, for its part, claims "computer errors" to explain its way out of at least two issues with their handling of this matter. If a taxpayer missed a strict appeal deadline due to an accountant's computer error (or any error) with his or her calendaring program for example, it may be an explanation, but would not be an excuse. The missed appeal deadline would still result in dismissal due to lack of jurisdiction. *See Halbman v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-149 (WTAC 2017). The Department should likewise not be excused from missing deadlines due to a computer error.

In this matter, the Department should not have missed the statutory deadline for responding to a refund claim, computer error or not. The Department should have sent the First Notice within the one-year timeframe. It is clear that they could have, as the 2011 tax return had been processed within about a month of its filing and the issue created by the Petitioner had been identified prior to the one-year deadline. Properly done, if the Department believed that the Petitioner had committed fraud in the refund claim, a First Notice should have been timely issued and should also have assessed the 100% fraud penalty pursuant to Wis. Stat. § 71.83(1)(b).

Where the Department does grant a refund, whether by action within the one-year time period or by failing to act in that time frame and the refund being granted by law, the Department may, for at least four years after the filing of a return, audit a return and

issue an assessment. Wis. Stats. §§ 71.74(1) and 71.77(2). Through this audit and assessment process, the Department may recoup any refund paid if the audit finds the refund was not legally due to the taxpayer. This then creates an underpayment for which a Notice of Amount Due may be issued.

The Department has been confronted with this type of situation in the past and clearly understands how to deal with it properly. In *McCarthy, et al v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-397 (WTAC 1998), the Department faced a very similar situation. The Department issued the refund stating to the taxpayers as follows:

> Upon reviewing your file, the department has discovered that you filed a claim for refund that was not acted on within a one-year period as prescribed in sec. 71.75(7), Wis. Stats. Therefore, your federal pension is being subtracted from taxable income and a refund is being issued to you at this time.
>
> However, the department's position is that pre-1964 military service does not establish membership in the federal civil service retirement system. Since you were not a member of the federal civil service retirement system as of December 31, 1963, your retirement benefits are taxable for Wisconsin income tax purposes.
>
> Therefore, we will be sending you a bill in the next several weeks for the amount of this refund. You are encouraged to file an appeal of that Notice of Amount Due within 60 days from the date you receive it to keep this matter open until a final determination is made by the courts on this issue.

In this matter, once the Department failed to act on Petitioner's refund claim within one year, the Department should have clearly notified Petitioner that the refund claim was granted and would be certified to be paid to him. The Department should have also advised him that the Department would soon be issuing to Petitioner a subsequent Notice of

Amount Due. This could have been accomplished anytime along with the issuance of the First Notice, after the issuance of the First Notice, or during the review of the Petition for Redetermination.

Once the appeal of the First Notice was before the Commission, the Department should have notified the Commission of its error, advised that the refund claim was being granted as required by statute, and advised the Commission and Petitioner that a separate Notice of Amount Due would *subsequently* be issued. The Department should have then either requested a dismissal of the matter without prejudice or requested that the matter be held open pending the issuance and resolution of a new notice of amount due. Instead, the Department issued the Second Notice without notifying the Commission, which had a great chance of confusing or misleading Petitioner or any petitioner in a similar situation.

The Department then waited until after the appeal period had run on the Second Notice before contacting the Commission about its errors and actions. In the future, the Department should not resort to such legal shenanigans but should be more forthcoming with the Commission and petitioners and follow a procedure like that in *McCarthy* and/or as outlined above.

The Department moved for summary judgment on two alternative grounds. The first is based on a legal theory that, if the action of Petitioner was never a valid attempt to obtain a refund for the applicable tax year, the Department was under no obligation to timely respond to that refund claim within the one-year time period set forth in Wis. Stat.

§ 71.75(7). Therefore, the refund was never actually "deemed granted." We reject that theory.

First, that theory is based upon federal law. There is no federal corollary to Wis. Stat. § 71.75(7). In the federal cases, the IRS simply did not act on the refund claim it determined was invalid and the taxpayer had to sue to try to obtain a refund. Second, in the cases cited by the Department, the entire tax return was found to be invalid. For example, in *Scott E. Gillespie and Debra J. Gillespie v. United States of America*, 2016-2 U.S.T.C. ¶ 50,455 (7th Cir. 2016), an unpublished 7th Circuit Court of Appeals case, the IRS rejected the taxpayer's entire amended return and did not even process it. In this case, Petitioner's entire tax return was not invalid. He merely altered certain numbers related to his withholding to achieve an illegitimate result regarding the amount of his refund. Further, we are reluctant to make such an extension of Wisconsin law based upon the particular and peculiar facts of this matter.

Ultimately, as to the First Notice, the Department's claimed computer error allowed action on the refund claim to be delayed beyond the one-year time period in the statute. Therefore, the refund claim was effectively granted. By statute, the refund claim should have been certified and paid once the one-year period expired.[6] Consequently, we decline to grant summary judgment to the Department upholding the First Notice.

Alternatively, the Department asks that if we determine that their failure to act on the refund claim results in the claim being effectively granted, then we grant them summary judgment upholding the Second Notice. As noted above, under the overall circumstances of the matter, the Commission had determined that the February 25, 2016 Second Notice was an amendment of the matter before the Commission, especially as it consisted of some of the same issues already before the Commission. After much discussion and review of this matter, reading the additional filings and arguments of the parties, and additional review of statutes and cases, the Commission has determined that, from a procedural and jurisdictional standpoint, the February 25, 2016 Second Notice is not an amendment to the existing matter before the Commission and is a separate matter, even though it involves one of the same issues as that in the existing matter. The June 7, 2017 Ruling and Order is voided.

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[6] The Department has also argued that, due to Petitioner's "fraud" in making his refund claim, the one-year time period in Wis. Stat. § 71.75(7), should not apply or should be extended. While the "fraud" discovery rule of Wis. Stat. § 71.77(3), may extend the four-year time period for issuing an assessment under Wis. Stat. § 71.77(2), that discovery rule does not apply to Wis. Stat. § 71.75(7). Moreover, as noted, the Department discovered what Petitioner had done with his W-2 very early on and could easily have issued the resulting Notice of Refund in a timely fashion but did not do so for over two years. It was not Petitioner's claimed fraud that caused the Department's failure to timely act on the Petitioner's refund claim, it was the Department's claimed computer glitch.

The Department sent the Second Notice to the Petitioner pursuant to Wis. Stats. §§ 71.74(1) and 71.77(2). He acknowledged receiving it and not responding to it. The Department states that, as of July 14, 2016, it had not received any response from the Petitioner regarding that Second Notice. The Petitioner did not file a Petition for Redetermination within 60 days of the receipt of the Second Notice from the Department, as required by Wis. Stat. § 71.88(1)(a).

We deplore the conduct of the Department in this matter. The Department's actions, including not notifying the Commission of the Second Notice, using legal maneuvering that appears to have confused or misled Petitioner as to his obligation to respond to the Second Notice (especially since some of the substance of that Notice was already before the Commission regarding the April 5, 2015 First Notice), and the other errors by the Department are incredible, objectionable, and abhorrent. No one at the Department should feel proud of their conduct in this matter.

Nevertheless, we find that, in the end, there is no Petition for Review before the Commission for the Second Notice. Wis. Stat. § 71.88(2)(a). Because, the matter is not properly before the Commission, we do not have jurisdiction. "[W]here the Commission lacks jurisdiction, the Commission cannot hear the matter." *Ennis v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-147 (WTAC 2017).

As much as we, as a Commission, would like to be able to right every wrong that we believe the Department has imposed on a taxpayer, we are an agency with limited statutory jurisdiction. It is within our power to act on a petition for review filed with our agency claiming that a taxpayer is aggrieved by the action of the Department on the

taxpayer's petition for redetermination filed with the Department. Here, Petitioner filed what the Department treated as a Petition for Redetermination from the First Notice, and timely filed an appeal with the Commission when his Petition for Redetermination was denied. No petition for redetermination was filed with respect to the Second Notice and, because there was no action taken on a petition for redetermination, no appeal was taken to the Commission. While we do not approve of the actions taken by the Department with respect to the Second Notice, we do not believe the statutes which create the Commission and its limited jurisdiction justify our reaching out and grasping a matter not otherwise properly before us.

CONCLUSIONS OF LAW

1. Because the Department did not act on the Petitioner's 2011 refund claim within one year, the claim was effectively granted under Wis. Stat § 71.75(7). Having been granted by law as of February 26, 2014, the refund shall be certified by the Department as required by the statute.

2. The Commission has no jurisdiction to review the actions of the Department taken in the February 25, 2016 Second Notice, because that matter has not been appealed to the Commission by a Petition for Review.

ORDER

Based on the foregoing,

1. Respondent shall certify the full claimed refund of $13,780 as required by Wis. Stat § 71.75(7).

2. Summary Judgment is granted to the Petitioner.[7]

3. Respondent's Motion for Summary Judgment is denied.

4. Petitioner's Discovery Motion is denied as moot.

Dated at Madison, Wisconsin, this 12th day of November, 2018.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair
Dissenting in Part

David D. Wilmoth, Commissioner

David L. Coon, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

LORNA HEMP BOLL, CHAIR, *DISSENTING IN PART*:

I wholehearted agree with the majority's outrage. I also agree with the Commission's order requiring the Department to certify the refund if it has not done so. I agree that the First Notice (the April 2015 Notice of Refund) was late and ineffective. I do not agree that Petitioner was required to file a separate petition for review for the Second Notice (February 2016 Notice of Amount Due) to continue his battle regarding

[7] "If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor." Wis. Stat. § 802.08(6).

his 2011 refund, so I disagree with the Commission's conclusion that there is no valid appeal of the Second Notice for us to consider.

As to the merits of the Second Notice, assuming the majority's order regarding the appeal of the First Notice effectively creates an underpayment of Petitioner's 2011 taxes in hindsight, I agree that the Department may recover that underpayment; however, I object strongly to the fraud penalty, both legally and because it is simply unjust, given the Department's actions throughout this case.

Let me begin by saying that, once the Department failed to act on Petitioner's refund within one year, there was absolutely no justification for issuing the First Notice. The majority has fashioned a remedy requiring the Department to certify the refund Petitioner claimed for 2011, although the law already required it to do so, and has considered that certification and the presumed ensuing interception of the refund with corresponding credit to Petitioner's tax account all retroactive to the date of the Department's failure to act, February 26, 2014.[8]

Assuming the Department complies with the majority's order, the refund is effectively granted and the issue of the First Notice is resolved. With the dismissal of the appeal of the First Notice, the majority then views the procedural aspects surrounding

[8] Technically, under Wis. Stat. § 71.75(7), the Department of Revenue must certify the refund to the Department of Administration to begin the collection process outlined in Wis. Stat. § 71.74(13). After that, the Department of Revenue may intercept a refund and apply it to back due tax amounts. This is majority's order accomplished in hindsight. For brevity, this process is condensed into "crediting Petitioner's tax account."

the Second Notice in a vacuum. Seeing no timely second appeal,[9] the majority rules that it has no jurisdiction to consider the merits of the Second Notice.

VALIDITY OF PENDING APPEAL

Technical compliance with almost every legal requirement has gone out the window in this case. In the same spirit, it would be best to deem Petitioner's first (and only) appeal as an early appeal to the Second Notice, not only because it seems fair but because the issue of Petitioner's 2011 refund was already under appeal at the Commission.

A quick review of the facts: On February 10, 2016, Petitioner appealed the First Notice denying his 2011 refund. From there, the timeline is disturbing. Fifteen days later, on February 25, 2016, the Department issued its Second Notice regarding the same refund amount for the same tax year. The Second Notice added a fraud penalty, calculated as 100% of the same refund amount referenced in the First Notice, which was pending before the Commission. On March 9, 2016, while, unbeknownst to the Commission, the Department was stealthily waiting for the 60-day appeal period to expire on the Second Notice, the Department filed its Answer asking the Commission to affirm its redetermination of the First Notice denying the refund. Simultaneously, the Second Notice took the position that the refund had been granted and was being assessed back. Shortly after the 60 days ran on the Second Notice, the Department attempted to withdraw the First Notice, so it could default the Petitioner on the Second Notice.

[9] More precisely, a Petition for Redetermination, but eventually an appeal to the Commission.

Although this is hardly a sympathetic taxpayer, I cannot ratify the Department's tactics; they are the type that give lawyers a bad name. I cannot in good conscience participate in awarding the Department a 100% bonus recovery when its own tactics were, if not fraudulent themselves, at least unscrupulous.

Procedurally, the Department should never have issued the tardy First Notice, but I cannot ignore that it was issued nonetheless and that a timely appeal did reach this Commission. Until the date of this decision, the First Notice has been on appeal before the Commission. While that appeal was pending, the Department issued the Second Notice denying (in the form of assessing back) the same 2011 refund claim already being considered at the Commission. It is difficult to imagine a reasonable taxpayer would believe he would have to begin a second appeal over the very same refund just 15 days after appealing the First Notice to the Commission.[10] Allowing what is essentially a duplicate assessment, with slight modifications, will create the opportunities for abuse we feared in our now-defunct Order of June 7, 2017. Because both appeals address the identical issue of Petitioner's 2011 refund claim, I find Petitioner's appeal of the First Notice sufficient to extend to the Second Notice, at least insofar as it concerns the 2011 refund and the related fraud penalty assessment.[11] Thus, I believe we must consider the merits of the Second Notice.

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[10] The Petition appealing the First Notice was filed February 10, 2016. The Second Notice was issued on February 25, 2016.

[11] I could agree that the Petitioner might be foreclosed from contesting the new assessment for tax owed on the additional $7,977 unreported income; however, he does not appear to have contested it thus far and therefore the issue is moot.

MERITS OF SECOND NOTICE

At the time the Second Notice was issued, there was no actual underpayment. Assuming the Department will certify the refund and will credit Petitioner's account for the refund in satisfaction of back taxes in accordance with the majority opinion, that legal fiction creates an underpayment for the 2011 tax year. At the end of the day, I agree with the majority's result that the Department is entitled to reclaim the refund if and when the underpayment exists.

My primary disagreement concerns the fraud penalty assessment contained in the Second Notice. Because the majority finds there has been no valid appeal from the Second Notice, it rules it has no jurisdiction because the Second Notice has gone final. The result is that Second Notice stands in full, including the fraud penalty.[12]

Wisconsin Statute § 71.83(1)(b)1 allows a fraud penalty equal to 100% of the underpayment resulting from the taxpayer's "intent to defeat or evade the income or franchise tax required by law."[13] The verbiage of the fraud statute is mandatory. If we find the requisite intent, we must award the penalty in the amount of 100% of the underpayment. I do not believe Petitioner's actions amount to fraud. Moreover, given the Department's conduct in this case, the assessment of a fraud penalty is a bold bit of hypocrisy.

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[12] The assessed penalty is referred to as the "fraud penalty" for convenience and because the parties have so referred to the additional 100% penalty for "intent to defeat or evade."

[13] Actual "fraud" language was not included in this statute until the 2013 biennium in the newly created Wis. Stat. § 71.83(1)(b)(7).

No Basis for a Finding of Fraud

The Department assesses its fraud penalty under Wis. Stat. § 71.83(1)(b)(1) ("intent to defeat or evade" tax), but the Department consistently argues using the term "fraud" which carries the connotation of deception. The idea that the Department was "deceived" in any way is patently ridiculous. This taxpayer tried, in a very straightforward manner, to explain his intentions on his tax return. Petitioner was not disputing his taxes due for 2011; rather, he was very clearly objecting to the Department's collection methods and was seeking to recover an amount equal to the monies he believed had been wrongfully withheld from his paycheck during the 2011 tax year.

Of course, the state-designed tax forms do not have blanks for withholdings of garnishments or attached wages, so this taxpayer applied logic and characterized the attached funds as withholdings per the title of the statutory section by which the funds were attached, Wis. Stat. § 71.91(7) "Withholding by Employer of Delinquent Tax of Employee." (emphasis added). First, he asked his employer to add the amount of attached wages to his W-2, but his employer refused. Failing that, Petitioner added the amounts to the W-2 himself by hand. He provided additional clarity of intent when he attached a Substitute Wage Statement on which he wrote, "Requested that the Company change W-2 they said no. Wis Dept of Revenue was involved in illegal collection practices." He also attached his year-end paystub to show the dollar amount of the attachment, circled. The taxpayer's intent and actions could have been more clear.

A. Nature of Petitioner's Intent and Jurisdiction Over Collections

The statutory language requires an "intent to defeat or evade" the income tax assessment. While it is likely that Petitioner continues to dispute the merit of taxes long concluded, the record before shows only Petitioner's assertion that the Department was "involved in illegal collection practices." At most, we have a factual question regarding intent.

Petitioner's strategy is a *pro se* taxpayer's creative objection to a collection action. The Tax Appeals Commission's jurisdiction does not extend collections (*See, e.g., Lemmens v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-238 (WTAC 2018). Thus, we have no jurisdiction over Petitioner's objection. One could also conclude the Department's response to it (this particular fraud allegation) is similarly outside our jurisdiction.

B. Ulterior Motives for Fraud Penalty Assessment

If the Department had truly believed that the Petitioner had committed fraud, the First Notice should have contained that allegation. I suspect the addition of the fraud assessment was two-fold, first as retribution for continued tax disputes with the taxpayer and second as a backdoor argument to attempt to legitimize the First Assessment, neither of which is appropriate.

As to the first point, it is evident that this particular taxpayer has been a thorn in the Department's side for years; however, Petitioner's past conduct should not be relevant except to the extent that it directly affects the case at hand and, as noted below, as it may relate to sanctions. As to the second, the Department is mistaken in its argument that a fraud penalty brought under Wis. Stat. § 71.77(3) allows for a suspension of the

Department's one-year time limit for initially responding to the refund claim. The particular language of Wis. Stat. § 71.77(3) allows a fraud penalty to be assessed beyond the 4-year assessment time frame of Wis. Stat. § 71.77(2); it does not apply to the one-year timeframe allowed for initial consideration of refund claims under Wis. Stat. § 71.75(7). By so conflating these time limits, the Department argues that the First Notice was timely because there was fraud.[14] It is an interesting mental exercise to determine whether an untimely notice can become timely if amended to add a new allegation which excepts the initial notice from its time limit, but the argument is misplaced.

C. Objection to Fraud Penalty Assessment on Principle

Other actions on the part of the Department show an enormous amount of audacity. For example, after issuing the Second Notice to reclaim the refund, the Department categorically denied refunding or crediting the $13,000.[15] Worse is the manner in which the Department set the Petitioner up for default. The Department played along with the appeal of the First Notice while waiting for the 60 days to run on the Second Notice; it is simply wrong to allow the Department a victory for duping the Petitioner right in front of the Commission.

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[14] As noted in the majority's FN 6, this issue is moot because the fraud exception would allow the notice to be sent when discovered. Two years later is most definitely not "when discovered."

[15] In its responses to a Request for Production of Documents dated August 10, 2017, the Department stated, "Respondent has not issued a notice to Petitioner showing that a refund or credit of $13,801 is due him" and in its response to a Request for Production of Documents dated July 6, 2016, the Department stated, "Respondent has not issued a refund check for $13,801.00 to Petitioner for tax year 2011."

SANCTIONS

Neither party has behaved appropriately. There are mistakes and misdealings at every turn. This case should not serve as a model for anything other than what not to do. The Petitioner should not have disputed the attachment of his wages for back taxes. The Petitioner should not have attempted to modify his W-2 to characterize the attached wages as tax withholdings rather than tax payments and thus claim an unwarranted refund. The legislature should not have used the term "withholding" to describe wage attachment in Wis. Stat. 71.91(7) "Withholding by Employer of Delinquent Tax of Employee."

The Department should not have waited two years to issue its First Notice denying Petitioner's refund claim. The Department should not have issued the First Notice at all. The Department should not have failed to certify Petitioner's refund. The Department should not have missed its 6-month time limit for acting on Petitioner's Petition for Redetermination.[16] The Petitioner should not have needed to appeal the redetermination of the First Notice because the refund should already have had the effect of being granted. The Department should not have engaged in linguistic gamesmanship to obstruct discovery by feigning that wage attachment is something so different from garnishment so as to negate its obligation to answer interrogatories reasonably.[17]

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[16] Although there seem to be no repercussions in the statute, the Department is instructed to respond to a petition for redetermination with a notice which must be received by the petitioner within 6 months. Wis. Stat. § 71.88(1)(b). Six months from the Petition date was December 8, 2015. Petitioner received the Notice on December 10, 2015.

[17] Department responses to Request for Production of Documents dated July 6, 2016. Petitioner's Brief in Opposition to Summary Judgment, Ex. A.

The Department should not have issued a Second Notice for the same tax issue for the same year while an appeal of the First Notice was pending without alerting the Commission. The Department should not have attempted to double its recovery by alleging fraud.

And now, it appears the Commission should never have ruled that the Second Notice was an amendment to the First Notice.

None of this is to say that there is any justice in allowing the Petitioner to continue to fight a battle which has been fully litigated. Although the amounts were literally "withheld" from his 2011 wages, the attached wages are not current year tax withholdings. That money is gone, having been applied to old tax debts as a result of a collection action. This concept has been explained to the Petitioner repeatedly in the context of this case, as well as several prior litigated cases. He knows this avenue of self-help will not work. While I do not believe Petitioner's actions constitute fraud, I do believe they are frivolous and would impose maximum sanctions accordingly.

CONCLUSION

I believe the majority joins me in holding the Department itself is responsible for its blunders in this case. Our opinions do not castigate Department's counsel personally. That said, I believe justice is served if the Department certifies the refund as ordered by the majority's order and if the Department is then allowed to reclaim that refund amount, as well as the additional tax assessed on the unreported income. I will, however, not be party to doubling of the Department's recovery in the form of an award of the 100% fraud penalty assessment. Finally, I fully join the majority

in praying we never see such facts before us again and in hoping this decision will be accorded little to no precedential value.

Dated at Madison, Wisconsin, this 12th day of November, 2018.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair
Dissenting in Part

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
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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.