

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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GARY J. SIMON,

DOCKET NOS. 08-I-110  
AND 08-I-112

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**THOMAS J. McADAMS, COMMISSIONER:**

This matter comes before the Commission on a Motion for Summary Judgment filed by the Respondent, the Wisconsin Department of Revenue (hereinafter referred to as "the Department"). The Department appears by Attorney Sheree Robertson and has filed a brief with supporting affidavits in support of its motion. The Petitioner, Mr. Gary Simon, appears *pro se*, and has filed a written response, including a brief and an affidavit.

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 19, 2007, the Petitioner filed a 2004 Wisconsin individual income tax return reporting that \$14,138 of Wisconsin tax had been withheld from his income and that he was entitled to a refund of \$11,358. No federal Form W-2

wage statement was attached to this return, but there was attached a federal Form 4852 substitute Form W-2 reporting that his employer, Megtec Systems, had paid him wages in the amount of \$45,981 in 2004, and withheld \$14,138 of Wisconsin tax from his wages. (Affidavit of Attorney Sheree Robertson dated August 7, 2008, ¶ 1.)

2. On November 15, 2007, the Department issued a Notice of Amount Due to the Petitioner notifying him that it had made two adjustments to his 2004 Wisconsin income tax return. First, the Department included in Petitioner's income \$4,355 of net rental income that he had not reported on his return. Second, the Department audited his 2004 return and determined that, instead of his claimed refund of \$11,358, the Petitioner owed \$492.25, including interest. (Affidavit of Attorney Sheree Robertson, ¶ 3.)

3. The adjustments to the Petitioner's 2004 Wisconsin return were also based on the Department's determination that \$2,662.96 of Wisconsin income tax had been withheld from his wages in 2004, as reported by the 2004 Form W-2 for Petitioner filed with the Department. (Affidavit of Earl N. Munson dated September 23, 2008, ¶3.)

4. On or about October 17, 2007, the Petitioner filed a 2006 Wisconsin income tax return reporting \$15,345 of tax withheld and claiming a refund in the amount of \$12,745. The Petitioner attached a federal Form W-2 to his 2006 return showing that his employer had withheld \$2,957.40 of Wisconsin income tax from his wages. (Affidavit of Earl N. Munson, ¶4.)

5. The Department subsequently adjusted Petitioner's 2006 return to reflect the correct amount of state income tax withheld from his wages, as reported by his 2006 Form W-2. (Affidavit of Earl N. Munson, ¶ 4.)

6. Based on the adjustments to the 2006 return, the Department determined that the Petitioner was entitled to a refund of \$307.40, and not the claimed amount of \$12,745. (Affidavit of Attorney Sheree Robertson, Exh. 2; Munson Aff., ¶ 4.)

7. On November 5, 2007, the Department issued to the Petitioner the Notice of Refund Offset showing that the amount of his income tax refund for 2006 was \$0 after the offset with the 2004 return. (Affidavit of Attorney Sheree Robertson, Exh. 2; Munson Aff., ¶¶ 4-5.)

8. The Petitioner filed a letter on January 4, 2008 objecting to the November 5, 2007 Notice of Refund Offset and the November 15, 2007 Notice of Amount Due, which the Department treated as Petitioner's Petitions for Redetermination for both years at issue. (Affidavit of Attorney Sheree Robertson, Exh. 3; Affidavit of John C. Teasdale dated September 22, 2008, ¶ 2.)

9. On or about January 14, 2008, the Petitioner requested a hearing with the Department to discuss its determination as to the year 2006. In his Petition for Redetermination, the Petitioner stated that he wanted to call witnesses and to record the conference. (Affidavit of Gary J. Simon dated September 12, 2008, ¶ 7; Petition for Redetermination).

10. On or about May 9, 2008, the Petitioner received a letter from the Department denying the Petitioner a hearing. (Affidavit of Gary J. Simon, ¶ 8.)

11. The Department Resolution Officer assigned to these matters, Mr. John C. Teasdale, decided not to meet with the Petitioner at an informal conference because the Petitioner has raised tax protestor arguments in the past and the Petitioner has repeatedly violated Wisconsin income tax laws. (Affidavit of John C. Teasdale, ¶ 4.)

12. On May 15, 2008, the Department denied the Petitions for Redetermination. (Affidavit of Attorney Sheree Robertson, Exh. 3.)

13. On July 9, 2008, the Commission received a timely Petition for Review in the 2004 matter (Docket No. 08-I-110).

14. On July 21, 2008, the Commission received a timely Petition for Review in the 2006 matter (Docket No. 08-I-112).

#### **CONCLUSION OF LAW**

There is no genuine issue of material fact in these matters, and the Department has demonstrated that, under Wis. Stat. § 802.08(2), it 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.

These cases arise out of the Wisconsin income tax returns the Petitioner filed for 2004 and 2006. As to the 2004 return, the Petitioner incorrectly claimed that \$14,158 had been withheld from his wages and that he was entitled to a refund of \$11,348. The Department later determined that only \$2,662.96 of Wisconsin income tax had been withheld from his wages in 2004, and that the Petitioner, in fact, owed \$492.25, including tax and interest, for that year.

As to the 2006 return, the Petitioner incorrectly claimed that \$15,345 had been withheld and that he was entitled to a refund of \$12,745. The Department later determined that only \$2,957.40 of Wisconsin income tax had been withheld from his

2006 wages, and that the Petitioner was entitled to a refund of only \$307.40. The Department then offset that amount against the \$492.25 owed for 2004.

The Petitioner appeals those determinations here, claiming that his due process rights were violated when the Department declined to hold a hearing concerning his 2004 and 2006 returns. Based on our review of the affidavits and exhibits filed in these matters, there is no dispute between the parties that the Department declined to hold an informal conference with the Petitioner. For the reasons stated below, the Department is entitled to judgment as a matter of law.

#### **A. LEGAL ARGUMENTS**

The Department has filed a Motion for Summary Judgment in these matters. In support of its motion, the Department first argues that the Petitioner raises “tax protestor” arguments that have been denied by the Commission and courts in similar past cases. Second, the Department argues that the Petitioner’s rights to Due Process were not violated by the lack of an informal conference in these cases, noting that the appropriate notices were provided by the Department. In his response, the Petitioner denies raising or withdraws the claims that make up the substance of these matters, apparently conceding that the income in question was subject to Wisconsin income tax. (Petitioner’s Response, p. 2.) The Petitioner offers no arguments or evidence to show that the Department’s determinations of the taxes at issue in these matters are incorrect. According to Petitioner, the only remaining issue in this appeal is whether he was denied Due Process when the Department denied his request for a hearing on his petitions for redetermination.

## B. DUE PROCESS

There is no dispute that the Petitioner requested a “hearing” at which he could call witnesses and record their testimony. In arguing that he should have been granted a “hearing,” the Petitioner relies on Wisconsin Administrative Code Tax § 1.14(5), which states as follows:

Informal Conference. A taxpayer may request in a petition for redetermination or any time before the department of revenue has acted on the petition, an informal conference at which the facts and issues involved in the assessment or determination may be discussed. The conference shall be held at a time and place determined by the department.

The Petitioner interprets this provision to mean that a hearing is mandatory, but we reject this contention for two reasons. First, a plain reading of the provision reveals that the only mandatory language in the regulation relates to setting the time and place of the conference if the Department grants the taxpayer’s request. In Wisconsin, where the legislature has used the words “shall” and “may” in the same statutory section, only the use of the word “shall” is presumed to be mandatory.<sup>1</sup> *State v. Sprosty*, 227 Wis.2d 316, 324-5, 595 N.W.2d 692 (1999). Second, the plain language of Wisconsin Administrative Code Tax § 1.14(5) allows for an informal conference, not a “hearing.” There is absolutely no mention of calling witnesses and recording their testimony. The Petitioner simply misstates the regulation. Thus, there is no mandatory hearing under the regulation.

The Commission concludes that the Petitioner’s due process rights have

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<sup>1</sup> In Wisconsin, administrative regulations have the same effect as a statute. *Orion Flight Servs., Inc. v. Basler Flight Serv.*, 2006 WI 51, 290 Wis.2d 421, 714 N.W.2d 130.

not been violated. There is no genuine issue of material fact in these matters, and the Department has shown that it is entitled to judgment as a matter of law.

### C. 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. The Department requests that the Commission impose the maximum additional assessment here because of the Petitioner's history and because some of the Petitioner's initial arguments were tax protestor-type claims.<sup>2</sup> In *Gary J. Simon v. Wis. 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. Based on our review of these matters, we find that an additional assessment of \$750 is appropriate here. The Petitioner's assertion in this litigation that the regulations required a hearing is groundless, as the word "hearing" never appears in the regulation. Based on the plain language of the regulation, 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 \$750.

### IT IS ORDERED

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<sup>2</sup> The Petitioner has not responded to the Department's request for the additional assessment.

1. The Department's Motion for Summary Judgment is granted and its actions on Petitioner's Petitions for Redetermination are affirmed.

2. An additional assessment of \$750 is imposed on the Petitioner pursuant to Wis. Stat. §73.01(4)(am).

Dated at Madison, Wisconsin, this 23rd day of December, 2008.

**WISCONSIN TAX APPEALS COMMISSION**

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David C. Swanson, Chairperson

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Roger W. Le Grand, Commissioner

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Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"