STATE OF WISCONSIN

TAX APPEALS COMMISSION

DENNIS R. SPEAR, **DOCKET NO. 11-I-140**

Petitioner,

vs. **RULING & ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. McADAMS, COMMISSIONER:

This case comes before the Commission on the Respondent's motion to dismiss. In brief, the Petitioner has sought to be treated as a professional gambler for income tax purposes. After the Department conducted an audit of his personal returns for the years 2004 through 2007 and then issued an assessment for $149,901.17, the Petitioner filed this appeal to the Commission. The Department subsequently withdrew the portion of the assessment relating to the years 2005 thru 2007, but filed the motion to dismiss as to the 2004 year, arguing that the Petitioner's request for a refund as to that year is untimely. The Department of Revenue is represented in this matter by Attorney Julie A. Zimmer of Madison, Wisconsin. The Petitioner is *pro se*. Both sides have filed briefs. As the Petitioner's 2004 request for a refund is beyond the 4-year period set forth in Wis. Stat. § 71.75(2), the motion to dismiss must be granted.

FACTS[1]

1. By Notice of Amount Due dated March 15, 2010, the Department issued individual income tax assessments against Mr. Spear for $149,901 for taxable years 2005-2007 based on the addition of gambling income to the returns. Taxable year 2004 was also included on the notice, but no adjustment was made and no additional income was assessed because 2004 was closed to additional assessment pursuant to Wis. Stat. § 71.77(2). (Affidavit of Resolution Unit Supervisor Mary Nelson ("Nelson Affidavit"), Exhibit 1.)

2. By letter dated and received by the Department on May 17, 2010, Mr. Spear petitioned for a redetermination of the Notice of Amount Due. On page three of the petition for redetermination, Mr. Spear stated: "Because I did not file as a professional gambler in 2004 I have earlier requested that my 2004 tax return be treated as an amended return so I can claim the reduction in income for that year based on these court case[s]." (Nelson Affidavit, Exhibit 2.)

3. By letter dated November 3, 2010, the Department explained that Petitioner's 2004 claim for refund was untimely and not properly filed. (*Id.*, Exhibit 3, p. 2, ¶1.)

4. The period in which to file a claim for refund for taxable year 2004 expired on April 15, 2009, pursuant to Wis. Stat. § 71.75(2). The Department did not receive an amended 2004 Wisconsin tax return, or any other type of claim for refund,

[1] The Respondent submitted an affidavit in support of its motion to dismiss. The facts necessary to decide this motion are taken from that affidavit. Mr. Spear submitted substantial documentation with his petition to the Commission and we have quoted from his submissions below.

from Petitioner indicating corrections to his original 2004 Wisconsin tax return prior to April 15, 2009. (*Id.*, ¶5.)

5. By Notice of Action dated February 17, 2011, the Department denied Mr. Spear's petition for redetermination. The notice contained a typo in the second sentence, which was corrected in a revised notice sent to Petitioner on May 12, 2011, with the Department's answer. (*Id.*, Exhibits 4-5.)

6. The Petitioner timely appealed the Department's Notice of Action by filing his petition for review with the Clerk of the Wisconsin Tax Appeals Commission on April 18, 2011. (Commission File.)

7. In the petition for review, Mr. Spear twice states that he did not make a claim for refund with the Department until May 17, 2010. On page 2, he states "I made my request for refund in my response to the audit on May 17, 2010." On page 3, he states "Since the Audit started before the 4 years were up (10/17/08) then my request for refund on May 17, 2010 should be honored." (*Id.*)

8. By letter to the Tax Appeals Commission dated September 28, 2011, the Department withdrew its Notice of Amount Due, dated March 15, 2010, thus cancelling the 2005-2007 assessments. (*Id.*)

BACKGROUND

This case came about as a result of Mr. Spear's attempt to be considered a professional gambler for income tax purposes.[2] As a result of a successful 2004,[3] the

[2] The petition, which we quote from below, suggests that the ability to offset gains with losses motivated the change.

Petitioner made the decision "to turn pro." Thus, in the years 2005 thru 2007, he reported on his federal and state income tax returns that he was a professional gambler. The Department's Notice of Amount Due states that Mr. Spear had an adjusted taxable income of $823,351 in 2005, and $847,940 in 2007. The petition he filed in this case states as follows:

> I even made WDOR management aware of my intent to file as a Pro early in the first year that I filed as a professional, and asked them to audit my return that first year if they felt it would be of any concern. They did not, and instead waited 4 years before doing the audit which added over $100,000 to my tax assessment for this audit. Because I had not heard from WDOR I continued Gambling assuming they had determined my professional gambling was accepted.
>
> Being a WDOR employee I was aware of what happened to be the department's policy of normally reviewing all gambling returns every year as well as reviewing every WDOR employees[']returns every year. With all these reasons to audit my return sooner rather [than] later, plus actually asking to have it done, I was surprised to be contacted by Auditor [R.D.] in 2008 then requesting more information on my gambling activity for 2004-07.
>
> . . . It has been my experience that Wisconsin treats non-professional gamblers unfairly by taxing all gross winnings and not allowing a deduction for losses. Therefore, winning a large number of jackpots would almost assuredly [generate] a huge Wisconsin tax assessment on money that really wasn't income and that the gambler very likely no longer has in his possession. It would be more like taxing a

[3] The petition states that Mr. Spear made a profit 4 of the 5 years between 2004 and 2008, earning $39,116 in 2004, $9,298 in 2005, $46,796 in 2007, and $27,721 in 2008. Mr. Spear indicates that he played ". . . on many evenings and weekends from 2004 to 2007 . . . at whatever casino [he] felt was to his advantage to play, based on special offers and promotions that [he] had received." The Petitioner also states that he "spent hundreds of hours each year studying, practicing, and researching Video Poker strategy, in addition to the time spent playing the machine. I received Hundreds of W2G forms each year and have documented the large number of big jackpots I have won over these years."

> business on all money going thru the business with no deduction for cost of inventory, employees, or expenses, . . .
>
> It should be noted also that the IRS has accepted my federal tax return as filing, as a professional from 2005 to current without question. In addition after filling 2005, 2006 & 2007 as a professional gambler in Wisconsin in Oct 2008, with the 4-year audit requirement approaching, WDOR then decided without prior notice, to question my gambling activities. They wait this long even though I was working at WDOR and had [kept] them informed of my intent to file as a Professional Gambler since 2005.

After the Department performed an office audit, the Department issued a Notice of Amount due to Mr. Spear on March 15, 2010, assessing $149,901 additional income tax for the years 2005-2007 based on additional gambling income.[4] The 2004 year was also included on the notice, but no adjustment was made and no additional income was assessed for 2004 because more than four years had elapsed.

On May 17, 2010, Mr. Spear petitioned the Department for a redetermination of the notice of amount due. In his petition, he stated as follows:

> Because I did not file as a professional gambler in 2004 I have earlier requested that my 2004 tax return be treated as an amended return so I can claim the reduction in income for that year based on these court cases.

Mr. Spear referred to two then recent federal cases in which the U.S. Tax Court discussed the "session method" of determining a gambler's income.[5] The Department

[4] The tax comprised $108,839 of the total amount and the interest was $40,120.77.

[5] *John and Esther Chow v. Commissioner*, T.C. Memo. 2010-48 (Mar. 18, 2010); and, *George and Lillian Shollenberger*, T.C. Memo. 2009-306 (Dec. 28, 2009). In brief, the "session method" involves netting gains and losses on a daily or per session basis rather than bet-by-bet.

responded that if the statement in his petition was intended to be a claim for refund,[6] it was untimely and not properly filed. On February 17, 2011, the Department denied the petition for redetermination, finding that Mr. Spear's activities did not constitute a trade or a business.

Mr. Spear filed a timely petition to this Commission on April 18, 2011. In the petition, Mr. Spear wrote as follows:

> I made my request for refund with the Department in my response to the audit on May 17, 2010 . . . and since the audit started before the 4 years were up then my request for refund on May 17, 2010 should be honored.

On September 28, 2011, the Department sent the Commission a letter notifying the Commission that the Department was cancelling the 2005-2007 assessments against the Petitioner based "on additional factors considered." The Department, therefore, amended its original action and granted the petition for redetermination for the taxable years 2005-2007. The Department simultaneously filed this motion to dismiss as to the 2004 year.

RELEVANT STATUTE

> **71.75 Claims for refund. (1)** Except as provided in ss. 49.855, 71.77 (5) and (7) (b) and 71.935, the provisions for refunds and credits provided in this section shall be the only method for the filing and review of claims for refund of income and surtaxes, and no person may bring any action or proceeding for the recovery of such taxes other than as provided in this section.

[6] According to the Wisconsin Administrative Code, § Tax 2.12(2)(a), a "claim for refund" is defined as an amended Wisconsin return or credit claim on which a refund is requested.

> **(2)** With respect to income taxes and franchise taxes, except as otherwise provided in subs. (5) and (9) and ss. 71.30(4) and 71.77(5) and (7)(b), **refunds may be made if the claim therefore is filed within 4 years of the unextended date** under this section on which the tax return was due.

[emphasis added].

DECISION

When Mr. Spear filed his petition to the Commission, his challenge to the Department's $149,901 income tax assessment primarily involved its determination that he was not a professional gambler, and that therefore he was not able to deduct losses against winnings.[7] Mr. Spear's petition to the Commission was submitted with approximately 225 pages of documentation intended to establish his status as a professional gambler. On September 28, 2011, the Department sent a letter to the Commission stating that it had reevaluated its position, agreeing to withdraw the assessment for 2005 through 2007. The Department, however, simultaneously filed a motion to dismiss the remaining portion of the case that related to the 2004 year. Thus, as the assessment for 2004 was zero, the main legal issue remaining in the case became whether the Petitioner's request for a refund as to 2004 was timely. Further, the Department pointed out that equitable recoupment could not apply here. We will address both of the legal claims. The Department is correct that the request is untimely and that equitable recoupment does not apply.

[7] The Commission has noted on several occasions that Wisconsin treats gambling income somewhat differently than the federal government. *See, e.g., Grundahl v. Dep't of Revenue*, Wis. Tax Rptr. ¶401-345 (WTAC 2010)(*partial nonacq.* Oct. 22, 2010). In brief, in Wisconsin only professional gamblers are able to net losses against winnings.

A. Wis. Stat. § 71.75

The Department's motion to dismiss argues that the request for refund as to 2004 is untimely, as it was made more than 4 years after the due date of the tax return. The Department relies on the plain language of Wis. Stat. § 71.75. In response, Mr. Spear essentially argues that the 4-year limitation should not apply to him as the Department was conducting an audit during the relevant time frame. Mr. Spear's December 6, 2011, letter brief states as follows:

> Admittedly I did not file an actual amended return for 2004, but I did provide the information needed to determine the difference in tax just as I did for the 2005-07 tax years to [M.N.] . . .
>
> WDOR's handling of this audit should be a justification to extend the statute of limitations in this case. I should be allowed to file my amended return within a reasonable amount of time after being notified of this original audit. I did file the request for a refund . . . within a reasonable timeframe and my session based method of calculating non-professional gambling income (which is how I filed for 2004) was accepted . . . as a valid method.[8]

For the reasons stated below, we reject Mr. Spear's argument that the statute does not apply here; instead, we agree with the Department.

The relevant portion of the statute that is at issue in this appeal reads as follows:

> **(2)** With respect to income taxes and franchise taxes, except as otherwise provided in subs. (5) and (9) and ss. 71.30(4) and 71.77(5) and (7)(b), refunds may be made if the claim

[8] The Department's exhibit 3 reflects that on November 3, 2010 the Department sent Mr. Spear a draft amended notice of amount due using the session method which recalculated the amount due to $50,876.11. The amount of the claimed refund for 2004 is unclear, though.

> therefore is filed within 4 years of the unextended date under this section on which the tax return was due.

The unextended due date for Mr. Spear's 2004 return was April 15, 2005. Thus, 4 years from that date would have been April 15, 2009. In this case, the parties agree that the request for refund was made for the first time on May 17, 2010. The Petitioner's request for a refund is thus about 13 months too late.

Mr. Spear's legal argument is that, despite the plain language of the statute, he should be allowed to have the time limit extended, and that he should be given an undefined "reasonable time" to file for a refund after the audit began. The gravamen of this complaint is apparently that the audit took "almost 6 years" to get to the Resolution Unit stage, all the while that his 4-year period to file for a refund was running. There are several problems with this argument. First, it flies in the face of the plain language of the statute, which clearly says that the refund claim must be made within 4 years of the unextended due date of the return. Further, the statute declares in subsection (1) that the provisions described therein are the exclusive way to obtain a tax refund.

Second, the Petitioner's argument, as brief as it is, is undeveloped and there is no reference to authority or case law. Both are required. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct.App.1992). In essence, Mr. Spear's statutory argument in response to the Department's motion consists of a sentence or two, with no reference to legal authority whatsoever, and no analysis to support his contention that

his refund claim for 2004 "should" be allowed.[9] While it is often said that courts and Commissions do grant some leniency to *pro se* litigants, we cannot go so far as to draft a *pro se* appellant's arguments for him.[10] *See Waushara County v. Graf,* 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Particularly lacking in the Petitioner's case is an identifiable legal nexus between the length of the audit and the Petitioner's 4-year limit to file a claim for refund.

Third, there is Tax Appeals Commission case law holding that we are without jurisdiction when the refund claim is late. In *Smith v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-595 (WTAC 2002), the Commission set forth the principle that, if claims for refund are filed past the statute of limitations, the Commission has no jurisdiction to hear the case. In *Smith*, the Commission stated:

> Under Wis. Stat. § 71.75(5), an individual's claim for refund ***must*** be filed within 4 years of the date on which the income tax return is filed.
>
> Petitioners' income tax returns for 1982 and 1983 were required to be filed by April 15, 1983 and April 15, 1984, respectively. Petitioners filed their refund claims for these years under date of April 11, 1990. The refund claim for 1982 was filed almost 7 years late, and the refund claim for 1983 was filed almost 6 years late.
>
> Because of these late filed claims for refund, the Commission has no jurisdiction over the matters. This Commission and the courts have long upheld this principle.

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[9] We should also note that this discussion assumes that Mr. Spear is, in fact, entitled to a refund for 2004, a fact which has not been proven yet.

[10] We note that, while *pro se*, the Petitioner emphasizes on a number of occasions in the petition and the brief that he has worked for the Department for 21 years in collections and as a Field Revenue Agent. The Petitioner's response to the Department's motion stands in stark contrast to his claim that he qualifies as a professional gambler, a claim that Mr. Spear supported by substantial documentation, references to case law, and extensive analysis.

[emphasis added.]

The Commission in *Smith* relied on *Gilbert v. Dep't of Revenue*, 246 Wis. 2d 734, 633 N. W.2d 218 (Ct. App. 2001), a controlled substance tax assessment case where Mr. Gilbert filed a claim for refund after the expiration of the refund time period set by statute. Even though the law under which the tax was imposed had been held unconstitutional, the Wisconsin Court of Appeals stated as follows:

> [The Tax Appeals Commission] has held that if a taxpayer fails to file a refund claim within the time prescribed by statute, it lacks subject matter jurisdiction to determine whether the refund claim is valid. *See Bower v. Wis. Dep't of Revenue,* Docket No. 99-I-19 (1999). We agree with [the Commission's] interpretation.
>
> . . .
>
> The legislature provided Gilbert an administrative remedy for recovery of allegedly illegal or excessive state taxes. Gilbert did not timely avail himself of the remedy that was provided for him. Gilbert did not a seek refund until well after the . . . statute of limitations had run. If Gilbert wanted his refund claim to be considered, it was incumbent upon him to file it within the . . . statute of limitations. Gilbert cannot now circumvent the process by leapfrogging over the required first step for seeking a tax refund. We have long held that where the legislature allows a remedy for recovery of allegedly illegal or excessive state taxes, that remedy is exclusive, and no action seeking a different remedy against the State may be maintained. *Schlesinger v. State,* 198 Wis. 381, 385-86, 223 N.W. 856 (1929).

Thus, the Wisconsin Court of Appeals dismissed Mr. Gilbert's late claim for refund even though the underlying tax was unconstitutional.

The principle that we lack jurisdiction to hear late refund claims has been upheld on numerous occasions. *Kohlbeck v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-445 (WTAC 1999); *Lueneburg v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-748 (WTAC 2004); and *De Rango v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-655 (WTAC 2003). Further, there is a long line of cases holding that in administrative actions time limits are enforced to the letter. *See, e.g., LCM Funds Five North, LLC v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-513 (WTAC 2011)(the Commission has no jurisdiction where a report form was filed 10 months after the annual filing date); *Kohnke v. ILHR Department*, 52 Wis. 2d 687, 191 N.W.2d 1 (1971) (reciting the rule that when an administrative appeal is not taken within the statutory period allowed the court has no jurisdiction of the matter); *Brachtl v. Dep't of Revenue*, 48 Wis. 2d 184, 179 N.W.2d 921 (1970) (holding that timely service by the taxpayer is indispensable to trigger judicial review of the Commission's decision); *Ryan v. Dep't of Revenue*, 68 Wis. 2d 467, 228 N.W.2d 357 (1975) (strict compliance with the statutes is required); *Whistle B. Currier v. Dep't of Revenue*, 288 Wis. 2d 693, 709 N.W.2d 520 (Ct. App. 2005)("To dismiss an appeal because it comes one-day late may seem harsh. However, if statutory time limits to obtain appellate jurisdiction are to be meaningful they must be unbending," quoting *Kohnke*).

In sum, because Mr. Spear failed to file his 2004 claim for refund prior to April 15, 2009, the Commission lacks subject matter jurisdiction to determine whether his refund claim is valid.

B. Equitable Recoupment

Mr. Spear also argues that, because 2004 was initially included in the years under audit and a column for 2004 appeared on the March 15, 2010 Notice of Amount Due, his admittedly time-barred May 17, 2010, refund claim should be honored. His letter to the Commission states as follows:

> Actually WDOR ended up waiting almost 4 years to audit my 04-07 Wis income tax returns, and had been dragging out the Audit and Appeals stages for quite some time after the original request for information on these combined years returns. Since they opened the 2004 year in this audit, I believe I have the right to file an amended return, even if it was after the normal 4 year statute of limitations allowed to filing an amended income tax return.
>
> . . .
>
> Their mistake was including the 2004 year in their original audit of my Wisconsin income taxes. By including that 2004 year in the audit they are opening it up for me to provide more information on that tax year as well. Because the 2004 year was not changed by WDOR no difference in tax totals were made for that year, WDOR had no need to include it in the audit, ... Since they did include it, I decided to file an amended return with the Appeals section . . . . I agree that the amended return was filed over 4 years after the original due date in 2005, but it was actually only a short time after I had been contacted by WDOR concerning the audit. In addition both the audit and the Appeals process were draw[n] out longer than normally is the case because DOR asked me for and I agreed to give them more time to review the data I had provided at their request.

The second to last sentence in his December 6, 2011, letter states as follows:

> It is also my understanding that Claims for refunds or adjustments by amending returns that are past the 4 year statute of limitations can be used to offset other year's tax amounts that may be due. Although I don't have other

> amounts due, WDOR claims they have no procedure to issue refunds in these situations.

Based on these written statements, we believe that Mr. Spear is making an argument for invoking equitable recoupment.[11] We will explain below, however, the reasons that equitable recoupment does not apply here.

Equitable recoupment "permit[s] a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole." *Rothensies v. Electric Storage Battery Co.,* 329 U.S. 296, 299 (1946). In Wisconsin, equitable recoupment is applicable in two situations where there has been a tax assessment or refund claim. First, the State may invoke the doctrine to reduce a timely tax refund claim by the amount of a deficiency assessment barred by the statute of limitations. *American Motors Corp. v. Dep't of Revenue*, 64 Wis. 2d 337, 351, 219 N.W.2d 300 (1974). Similarly, if the State makes a timely additional assessment against a taxpayer, the taxpayer may credit a refund claim that would ordinarily be barred by the statute of limitations against the deficiency. *Dairyland Harvestore v. Dep't of Revenue*, 151 Wis. 2d 799, 806-07, 447 N.W. 2d 56 (Ct. App. 1989).

There are several problems with the invocation of equitable recoupment here. First, the main problem is that the argument here is woefully underdeveloped, consisting essentially of one sentence. As a general matter, courts and commissions will not address amorphous and poorly developed arguments. *See Block v. Gomez*, 201 Wis.

[11] It is commonly said that equitable relief is dependent on two maxims, one of which may be relevant here: equity aids the vigilant, not those who sleep on their rights; and one who seeks equity must have clean hands. *Kenosha County v. Town of Paris,* 148 Wis. 2d 175, 188, 434 N.W.2d 801, 807 (Ct.App.1988).

2d 795, 811, 549 N.W.2d 783, 790 (Ct. App. 1996). The main problem for us is that, as discussed below, the brevity of the claim forces us to guess at key parts of the tax controversy. The basic requirement that a brief state the issues, the facts necessary to understand them, and an argument on the issues cannot be waived. *Waushara County v. Graf*, at 451. While Commission practice is less formal than the circuit or appellate courts, we decline to make the arguments for Mr. Spear. The Petitioner convinced the Department to withdraw the assessment, but he has done nothing in his brief to help himself put forth his claim as to equitable recoupment.

Second, there is clearly an issue in this case that the Petitioner does not address whether the claim for refund is part of the "same transaction." In applying the doctrine of equitable recoupment, the Wisconsin Supreme Court adopted the "same transaction" test used in *National Cash Register Co. v. Joseph*, 299 N.Y. 200, 86 N.E. 2d 561 (1949):

> The result of this broader test or definition is that either the state or the taxpayer can counter with a "stale" claim, meaning one barred by the statute of limitations, so long as the same year or income tax period is involved.

American Motors Corp., 64 Wis. 2d at 353. Therefore, the "same transaction" test must be applied to determine if equitable recoupment can be applied to allow Petitioner's stale refund claim for 2004. More precisely, it must be determined whether Petitioner's time-barred refund claim applies to "the same year or income tax period" as the Department's timely additional assessments.

A recoupment defense arising out of the same transaction is never barred by the statute of limitations as long as the main action itself is timely. *United States v. Bull*, 295 U.S. 247, 262 (1935); *Dairyland Harvestore, Inc. v. Dep't of Revenue*, 151 Wis. 2d 799, 807, 447 N.W.2d 56 (Ct. App. 1989). The "same transaction" has been defined in Wisconsin as the same taxable year or period. *American Motors Corp.*, 64 Wis. 2d at 353. In this case, Mr. Spear attempts to use an alleged refund for 2004 against an assessment for 2005 through 2007. Mr. Spear, however, has not presented us with a rationale which supports this proposed application. Particularly lacking is an explanation of how the 2004 claim relates to the subsequent years, and whether there is any reason they might be considered part of the "same transaction."

The third problem is that there is nothing to recoup against now that the Department has dismissed the $149,901 assessment for 2005 through 2007. Here, no timely assessment for 2004 was made by the Department. The Department initiated its audit prior to April 15, 2009, but that audit did not result in an assessment against Mr. Spear for taxable year 2004. The column on the Notice of Amount Due for 2004, mistakenly left there by the auditor, totaled zero. No adjustment was made by the auditor for that year because by the time the assessment was issued on March 15, 2010, the Department was time-barred from issuing any assessment pursuant to Wis. Stat. § 71.77(2). Citing the *American Motors* case, the Commission has said this about the *amount* equitably allowed to be recouped:

> The doctrine of equitable recoupment does not ignore the statute of limitations and allow Petitioner to claim a refund . . . as if [it] had been timely claimed. It only allows Petitioner

> to claim the credit as a defense or equitable offset against the additional franchise tax assessment if the credits arise out of the same year or income tax period. Petitioner would not be allowed any refund over the amount of the additional assessment.

Oshkosh Truck Corp. v. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶ 400-811 (WTAC 2005). Equitable recoupment is a defensive doctrine which affords relief only by way of offset and only against a tax claim which itself is not time-barred. It may not be used affirmatively to initiate an independent suit for the refund of a barred tax. Robert E. Meldman and Richard J. Sideman, *Federal Taxation Practice and Procedure* 185 (5th ed. 1998). Thus, even if the defense of equitable recoupment were available here, Mr. Spear would not be able to recoup a refund over the amount of the now dismissed assessment.

The facts of this case are similar in certain key aspects to the facts in *Dep't of Revenue v. Van Engel,* 230 Wis. 2d 607, 601 N.W.2d 830 (Ct. App. 1999), a case that the Department cites in its motion to dismiss. In that case, Van Engel's attorney advised him to stop filing tax returns while federal charges were pending. Consequently, Van Engel did not file returns for 1988 through 1992. He did, however, pay estimated taxes. In 1995, after Van Engel pled guilty, he filed tax returns for the missing years. He calculated that, by applying the refunds due him for 1988 and 1989 to the other years, he was due a refund. He did this by applying what he claimed was his overpayment in 1988 to his 1989 liability, and then taking what he believed he was due in 1989 and applying it to 1990 and so on. As a result, he calculated he was owed over $62,000.

The Department, however, refused to apply the 1988 and 1989 refunds to the other years' tax, citing the 4-year statute of limitations. Consequently, the Department refused to offset Van Engel's claimed refunds for 1988 and 1989 against the assessments for years 1990, 1991, and 1992. Further, the Department, recognizing the 4-year bar created by Wis. Stat. § 71.77, made no additional assessments for the years 1988 and 1989, assessing Van Engel only for 1990, 1991, and 1992. According to the Department, Van Engel owed $21,020 for the years 1990, 1991, and 1992.

The Wisconsin Court of Appeals agreed with the Department that the factual underpinnings permitting equitable recoupment to offset otherwise time-barred refunds against tax assessments were not present. Specifically, the application of the refunds toward Van Engel's tax liability was improper for two reasons. First, the Department sought nothing from Van Engel for 1988 and 1989. The Department only assessed Van Engel for 1990, 1991, and 1992. Second, Van Engel's request in his 1990 tax return that a refund due in 1989 be applied to his tax liability did not convert those separate tax periods into the "same transaction." The appellate court wrote that the folly in this reasoning was that every time-barred refund could be revived simply by requesting that it be applied to a future tax liability. Thus, *Van Engel* supports the Department's argument here that a time-barred claim is not part of the "same transaction" as to subsequent years.

In sum, the Petitioner has not shown us that equitable recoupment applies to his claim now that the assessment for 2005 through 2007 has been dismissed.

CONCLUSION

The Petitioner's claim for refund is untimely under Wis. Stat. § 71.75(2). Further, the doctrine of equitable recoupment does not apply. The Department's motion to dismiss the remaining portion of the case relating to 2004 is granted.

Dated at Madison, Wisconsin, this 16th day of March, 2012.

WISCONSIN TAX APPEALS COMMISSION

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Lorna Hemp Boll, Chair

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Roger W. LeGrand, Commissioner

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Thomas J. McAdams, Commissioner

ATTACHMENT: "**NOTICE OF APPEAL INFORMATION"**