

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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GAYLEEN THOMAS,

DOCKET NO. 13-I-143

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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DECISION AND ORDER

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DAVID D. WILMOTH, COMMISSIONER:

This matter is before the Commission for decision following a trial held in Milwaukee, Wisconsin on April 9, 2014, before Commissioner David D. Wilmoth. The Petitioner appeared *pro se*. The Respondent, Wisconsin Department of Revenue (“the Department”), appeared by Attorney John R. Evans. The issue in this case is whether the Petitioner was entitled to an earned income credit (“EIC”) when filing her Wisconsin income tax returns for the years 2007, 2008, 2009 and 2010 (the “Period at Issue”).

Testimony at the trial was taken from Francis Thomas, the Petitioner’s husband; Digna Williams, the lessor of the property leased and occupied by the Petitioner and her family during the Period at Issue; Carrie Kloss, an employee of the Wisconsin Department of Revenue; and the Petitioner. The exhibits offered by the

Department and the Petitioner were admitted without objection. The parties made closing arguments in lieu of submitting post-trial briefs.

## **FINDINGS OF FACT**

### **A. Jurisdictional Facts**

1. The Department issued a Notice of Amount Due, dated April 9, 2012, assessing additional Wisconsin income tax against the Petitioner for the Period at Issue in the amount of \$5,883.00 in tax along with \$1,753.63 in interest, for a total of \$7,636.63. The additional assessment was based primarily on the denial by the Department of the EIC claimed by the Petitioner on each of her Wisconsin income tax returns filed for the Period at Issue. (Ex. 1.)

2. By letter dated April 18, 2012, the Petitioner filed a timely petition for redetermination protesting the Department's Notice of Amount Due. (Ex. 2.)

3. By Notice of Amount Due, dated April 13, 2013, the Department denied the Petitioner's Petition for Redetermination. (Ex. 3.)

4. On May 20, 2013, the Petitioner timely filed a Petition for Review with the Commission, objecting to the Department's Notice of Action denying the Petitioner's Petition for Redetermination. (Ex. 4.)

### **B. Material Facts**

5. During the Period at Issue, the Petitioner and her children lived at 3924 North 5<sup>th</sup> Street, Milwaukee, Wisconsin (the "Residence").

6. During the Period at Issue, the Petitioner was married to Francis Thomas.

7. The Petitioner and Mr. Thomas filed separate tax returns for each of the tax years during the Period at Issue.

8. During the Period at Issue, the federal forms W-2 issued by Mr. Thomas' employer were addressed to the Residence, the address of the Residence was used on his Wisconsin state tax returns, his driver's license and for the title and registration of his motor vehicle, and he received his mail at the Residence.

9. Mr. Thomas testified that, during the Period at Issue, he sometimes ate and slept at the Residence and sometimes ate and slept at the residence of a friend.

10. Mr. Thomas' vague testimony about his contributions to the family finances during the Period at Issue was not credible.

11. During the Period at Issue, the Petitioner leased the Residence from the property's owner, Digna Williams.

12. Ms. Williams credibly testified that, during the Period at Issue, she periodically ("every other month") went to the Residence to collect rent and that she "sometimes" saw Mr. Thomas at the Residence.

13. The Petitioner did not provide any testimony, nor did she offer any documentary evidence, to show that Mr. Thomas resided somewhere other than the Residence during the last six months of each year at issue.

14. The Petitioner provided credible documentary evidence showing that she bore the primary, if not entire, financial responsibility for the household in which she and her children lived. (Exs. A, B, C-1 (2010), C-2 (2009), C-3 (2008), and D (2008-2010).)

## DECISION

### A. Applicable Statutes

#### Wis. Stat. § 71.07(9e) Earned Income Tax Credit:

(af) For taxable years beginning after December 31, 1995, and before January 1, 2011, any natural person may credit against the tax imposed under s. 71.02 an amount equal to one of the following percentages of the federal basic earned income credit for which the person is eligible for the taxable year under section 32(b)(1)(A) to (C) of the Internal Revenue Code:

1. If the person has one qualifying child who has the same principal place of abode as the person, 4%.
2. If the person has 2 qualifying children who have the same principal place of abode as the person, 14%.
3. If the person has 3 or more qualifying children who have the same principal place of abode as the person, 43%.

...

(b) No credit may be allowed under this subsection to married persons, except married persons living apart who are treated as single under section 7703(b) of the internal revenue code, if the husband and wife report their income on separate income tax returns for the taxable year.

#### Internal Revenue Code § 7703(a) General Rule:

For purposes of part v of subchapter B of chapter 1 and those provisions of this title which refer to this subsection –

- (1) the determination of whether an individual is married shall be made as of the close of his taxable year; except that if his spouse dies during his taxable year such determination shall be made as of the time of such death; and
- (2) an individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

Internal Revenue Code § 7703(b) Certain Married  
Individuals Living Apart:

For purposes of those provisions of this title which refer to this subsection, if –

- (1) an individual who is married (within the meaning of subsection (a)) and who files a separate return maintains as his home a household which constitutes for more than one-half of the taxable year the principal place of abode of a child (within the meaning of section 152(f)(1)) with respect to whom such individual is entitled to a deduction for the taxable year under section 151 (or would be so entitled but for section 152(e)),
- (2) such individual furnishes over one-half of the cost of maintaining such household during the taxable year, and
- (3) during the last 6 months of the taxable year, such individual's spouse is not a member of such household, such individual shall not be considered as married.

**B. Presumptions and Burdens**

As a general matter, assessments made by the Department are presumed to be correct; the burden is upon the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determinations. *Woller v. Dep't of Taxation*, 35 Wis.2d 227, 232, 151 N.W.2d 170 (1967); *Calaway v. Dep't of Revenue*, Wis.

Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

Further, tax exemptions, deductions, and privileges are matters of legislative grace and will be strictly construed against the taxpayer. *Fall River Canning Co. v. Dep't of Taxation*, 3 Wis. 2d 632, 637, 89 N.W.2d 203 (1958). Tax credits are subject to the same strict construction. *L&W Construction Co., Inc. v. Dep't of Revenue*, 149 Wis. 2d 684, 690 (Ct. App. 1989).

### C. Analysis

Wisconsin Statute § 71.07(9e)(af) allows qualifying individuals to take an EIC against their Wisconsin taxable income in an amount equal to a specified fraction of the federal EIC for which the individual is otherwise eligible. Wis. Stat. § 71.07(9e)(b) provides that an individual who is married and who files a separate return is not entitled to an EIC unless the individual is treated as single under § 7703(b) of the Internal Revenue Code.

Internal Revenue Code § 7703(b) provides that an individual who is married and who files a separate return will nevertheless be considered single for any tax year in which: (1) the person maintains a household in which one or more “qualifying children” live for more than one-half of the tax year; (2) the person furnishes more than one-half of cost of maintaining the household during the tax year; and (3) the person’s spouse was not a member of the household during the last 6

months of the tax year.

For each tax year during the Period at Issue in this case, the Petitioner was married and filed a separate return. Consequently, in order to be eligible for an EIC, she must meet the requirements under I.R.C. § 7703(b) to be considered “single.”

The Department has not argued that the Petitioner failed to meet, and the evidence at the trial indicates that the Petitioner did in fact meet, the first two requirements of I.R.C. § 7703(b). Thus the only issue in dispute is whether the Petitioner’s husband, Francis Thomas, was a member of Petitioner’s household maintained at the Residence during the last 6 months of each tax year included in the Period at Issue.

In *Chiosie v. Commissioner*, T.C. Memo. 2000-117, the U.S. Tax Court considered whether a truck driver, who stayed at the same residence occupied by his estranged wife when he was not on the road, was a member of the same household as his estranged wife under the meaning of I.R.C. § 7703(b). The court stated:

The pivotal issue is therefore whether petitioner and Mrs. Chiosie were living apart in separate households. If they were not living apart in separate households, then section 7703(b) would not apply and petitioner's filing status is married filing separately and not head of household.

The concept of “living apart” has been considered by this and other courts. Generally, “living apart” connotes living in separate residences.

The court determined that the taxpayer was not “living apart” from his estranged wife

and that he was not “single” under the meaning of I.R.C. § 7703(b).

Evidence entered into the record at the trial demonstrated that the federal forms W-2 issued by Mr. Thomas’ employer were addressed to the Residence, that the address of the Residence was used on Mr. Thomas’ Wisconsin state tax returns, for his driver’s license and the title and registration of his motor vehicle, and that he received his mail at the address of the Residence. Mr. Thomas testified that, while he sometimes stayed with a friend during the Period at Issue, he also frequently stayed at the Residence. The Petitioner’s landlord, Ms. Williams, testified that she was at the Residence approximately twice a month and sometimes saw Mr. Williams there. At trial, the Petitioner presented neither testimony nor documentary evidence to refute that Department’s contention that Mr. Thomas was frequently at the residence and was, therefore, a member of the household maintained there under the meaning of I.R.C. § 7703(b).

#### CONCLUSIONS OF LAW

1. The Petitioner failed to establish by clear and convincing evidence that her husband was not a member of the household maintained at the Residence, under the meaning of Wis. Stat. § 71.07(9e) and I.R.C. §7703(b), for any of the tax years included in the Period at Issue.

2. The Petitioner does not qualify for an EIC for Wisconsin income tax purposes in any tax year included in the Period at Issue.



Therefore,

**IT IS ORDERED**

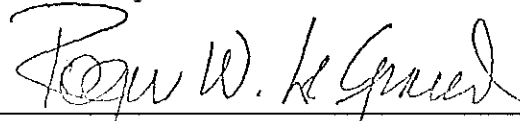
The Department's action on the Petitioner's Petition for Redetermination is affirmed.

Dated at Madison, Wisconsin, this 8<sup>th</sup> day of July, 2014.

**WISCONSIN TAX APPEALS COMMISSION**



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Lorna Hemp Boll, Chair



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Roger W. LeGrand, Commissioner



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David D. Wilmoth, Commissioner

**ATTACHMENT: NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION  
5005 University Avenue - Suite 110  
Madison, Wisconsin - 53705

**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 either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) 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.