

STATE OF WISCONSIN
TAX APPEALS COMMISSION

KURT W. AND BARBARA J. ZIPP,

DOCKET NO. 16-I-069

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID D. WILMOTH, COMMISSIONER:

This case comes before the Commission for decision on Respondent's Motion for Summary Judgment. The Petitioners, Kurt and Barbara Zipp, appear *pro se*. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Kelly A. Altschul.

On September 1, 2016, the Department filed a Motion for Summary Judgment. For the reasons stated below, we grant the Department's Motion for Summary Judgment.

FACTS

1. Pursuant to Section 6103(d) of the Internal Revenue Code, the Department received notice from the Internal Revenue Service on July 20, 2011, of a federal income tax adjustment made against the Petitioners for the year 2008. (Affidavit of Department Resolution Officer Terri Stover-Cramer ("Stover-Cramer Aff."), ¶ 2, Ex. 1.)

2. Pursuant to I.R.C. § 6103(d), the Department received notice from the IRS on July 20, 2011, of a federal income tax adjustment made against the Petitioners for the year 2009. (Stover-Cramer Aff. ¶ 3, Ex. 2.)

3. By Notice of Amount Due, dated July 9, 2015, the Department issued an income tax assessment against the Petitioners for the tax years 2008 and 2009 in the amount of \$9,765.84, including interest calculated to September 7, 2015, based on the federal tax adjustment made by the IRS for those years. (Stover-Cramer Aff. ¶ 4, Ex. 3.)

4. On or about September 1, 2015, the Department received a Petition for Redetermination from the Petitioners contesting the actions of the Department in its Notice of Amount Due. Petitioner, Kurt W. Zipp, admitted that it was "my error on my 2008 and 2009 return" which resulted in the adjustment for 2008 and 2009 and that the "fine and accrued interest is an exceptional burden." (Stover-Cramer Aff. ¶ 5, Ex. 4.)

5. The Department, by an Appeal Response Letter dated September 1, 2015, explained to the Petitioners that there are no fines or penalties included in the assessment made against them, that interest is assessed at 12% per year on any amount owed as required by Wis. Stats. § 71.82(1)(a). (Stover-Cramer Aff. ¶ 6, Ex. 5.)

6. The Department, by a Notice of Action dated January 26, 2016, denied the Petitioners' Petition for Redetermination. (Stover-Cramer Aff. ¶ 7, Ex. 6.)

7. On March 24, 2016, the Petitioners filed with the Tax Appeals Commission a Petition for Review dated March 22, 2016, contesting the Department's action on the Petition for Redetermination. In their Petition for Review, the Petitioners admitted that the IRS made an adjustment for the underpayment of their 2008 and 2009 federal

income taxes and stated (1) that "they are not contending that the tax due is wrong," and (2) that they "are objecting to the 4 years of compound interest at 12% APR." (Commission file.)

8. On September 1, 2016, the Department filed a Notice of Motion and Motion for Summary Judgment, along with an affidavit and exhibits in support of the Motion. (Commission file.)

9. At a telephone scheduling conference held on November 21, 2016, the Commission agreed to hold this matter, including any action on the Department's Motion for Summary Judgment, pending the provision of additional information related to the issues in the case. (Commission file.)

10. By letter dated November 28, 2016, the Department sent the Petitioners a copy of a Wisconsin Legislative Fiscal Bureau report concerning a budget request made by the Department for fiscal year 2011-2012 for additional resources to address a backlog of more than 107,000 federal audit reports with respect to which the Department had yet to make corresponding Wisconsin audit adjustments. (Commission file.)

11. At a telephone status conference held on February 1, 2017, the parties informed the Commission that they were unable to resolve the issues in this case and that the Commission should proceed to rule on the Department's Motion for Summary Judgment.

APPLICABLE LAW

A. Summary Judgment

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

B. Applicable Statutes

Wis. Stat. § 71.82 (1)(a) Interest:

(1) Normal.

(a) In assessing taxes interest shall be added to such taxes at 12 percent per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid.

Wis. Stat. § 71.76 Internal revenue service and other state adjustments:

If for any year the amount of federal net income tax payable, of a credit claimed or carried forward, of a net operating loss carried forward or of a capital loss carried forward of any taxpayer as reported to the internal revenue service is changed or corrected by the internal revenue service or other officer of the United States, such taxpayer shall report such changes or corrections to the department within 90 days after its final determination and shall concede the accuracy of such determination or state how the determination is erroneous. Such changes or corrections need not be reported unless they affect the amount of net tax payable under this chapter, of a credit calculated under this chapter, of a Wisconsin net operating loss carried forward, of a Wisconsin net business loss carried forward or of a capital loss carried forward under this chapter. ...

Wis. Stat. § 71.77(7)(b) Statutes of limitations, assessments and refunds; when permitted:

(7) Notwithstanding any other limitations expressed in this chapter, an assessment or refund may be made:

...

(b) If notice of assessment or refund is given to the taxpayer within 90 days of the date on which the department receives a report from the taxpayer under s. 71.76 or within such other period specified in a written agreement entered into prior to the expiration of such 90 days by the taxpayer and the department. If the taxpayer does not report to the department as required under s. 71.76, the department may make an assessment against the taxpayer or refund to the taxpayer within 4 years after discovery by the department.

C. Presumption of Correctness and Burden of Proof

As a general matter, assessments made by the Department are presumed to be correct, and the burden is on the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determinations. *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).

DECISION

Wisconsin's income tax is "federalized" in the sense that "Wisconsin adjusted gross income," the starting point for determining Wisconsin taxable income, is defined in Wis. Stat. § 71.01(13) as federal adjusted gross income, with certain modifications. Consequently, if the IRS audits a taxpayer's federal income tax return and makes adjustments which affect the tax reported on the taxpayer's federal return, those

adjustments could very well have a corresponding effect on the tax reported on the taxpayer's Wisconsin income tax return.

Wisconsin Statute § 71.76 requires Wisconsin taxpayers whose federal tax returns are adjusted by the IRS to report those adjustments to the Department within 90 days of the date on which those adjustments become final, if the federal adjustments affect the tax otherwise payable on the taxpayer's Wisconsin income tax return.

Section 6103(d) of the Internal Revenue Code allows the IRS to provide otherwise confidential federal income tax return information to state agencies charged with the duty to administer the tax laws of the state. Pursuant to an information sharing arrangement between the IRS and the Wisconsin Department of Revenue, the IRS routinely notifies the Department of audit adjustments made to the federal income tax returns of taxpayers who also file Wisconsin income tax returns.

The IRS made adjustments to the Petitioners' 2008 and 2009 federal income tax returns. The Petitioners do not dispute the correctness of the IRS adjustments. The Petitioners did not report those changes to the Department as required by Wis. Stat. § 71.76. Instead, the Department received information about the adjustments from the IRS on July 20, 2011.

Under Wis. Stat. § 71.77(7)(b), the Department had four years from that date to issue an assessment resulting from the IRS adjustments, which would have been July 20, 2015. The Department issued its assessment on July 9, 2015, eleven days short of the expiration of the four-year statute of limitation on the assessment.

The Petitioners did not dispute the amount of additional Wisconsin income tax assessed for 2008 and 2009, but filed a Petition for Redetermination with the Department stating that “the fine and accrued interest is an exceptional burden” and asking for an abatement. The Department responded by pointing out that no penalties had been imposed. The assessment consisted only of tax and statutorily imposed interest which the Department did not have the power to reduce or abate. Consequently, the Department denied the Petitioners’ Petition for Redetermination, and the Petitioners appealed to the Commission.

We sympathize with the Petitioners’ plight. By the time the Department issued its assessment, the accrued interest was nearly 40% of the total amount assessed. That the interest was such a substantial portion of the amount assessed is, obviously, a function of the rate of interest imposed and the amount of time it was allowed to accrue.

The Merriam-Webster Dictionary defines interest as “a charge for borrowed money generally a percentage of the amount borrowed.” The Oxford dictionary defines it as “Money paid regularly at a particular rate for the use of money lent, or for delaying the repayment of a debt.”

In the United States, the market generally dictates the rates lenders charge for the use of money. The “prime rate” is an interest rate determined by individual banks and is often used as a reference rate (also called the base rate) for many types of loans, including loans to small businesses, individuals, and credit card loans. The Board of Governors of the Federal Reserve System reports the prime rate posted by the majority of the largest twenty-five banks. Although the Federal Reserve has no direct role in

setting the prime rate, many banks choose to set their prime rates based partly on the target level of the “federal funds rate” (the rate that banks charge each other for short-term loans) which is established by the Federal Open Market Committee of the Federal Reserve.

Under the federal I.R.C. § 6621, interest rates applicable to the underpayment of federal income tax are based on and change with market interest rates. By contrast, pursuant to Wis. Stat. § 71.82(1)(a), the “normal”¹ interest rate applicable to underpayments of Wisconsin income tax is, and has for decades been, 12% per annum. Thus, the Wisconsin underpayment rate was 12% on December 19, 1980, when the prime rate reached a record 21.5%, and it was also 12% during the years 2010 through 2015, when the prime rate was a steady 3.25% and the federal rate on underpayments bounced between 3% and 4%.

It is no wonder that the Petitioners initially thought the assessment they received contained penalties – the Wisconsin underpayment rate so far exceeds market

¹ “Normal” interest under Wis. Stat. § 71.82(1)(a) accrues at 12% per annum on an underpayment of tax from the date tax should have been paid (e.g., the date a return is filed) until the date the additional tax assessed by the Department is required to be paid (e.g., the date specified in the assessment). “Delinquent” interest under Wis. Stat. § 71.82(2)(a) accrues at 18% per annum on an underpayment of tax from the date the tax was required to be paid (e.g., the date specified in the Department’s assessment) until the tax is paid. The payment due date specified in the Department’s assessment is extended during any appeal. Wis. Stat. § 71.89(1). Thus, normal interest runs for a limited time (but in this case almost four years) from the date a return with an innocent mistake is filed until the Department issues an assessment of additional tax. If the additional tax assessed is not promptly paid when due, the interest rate increases to discourage taxpayers borrowing long-term from the state. If the mistake on the return was not an innocent one, the Department can impose substantial penalties. Wis. Stat. § 71.83. For decades, under § 71.82(2)(b), the interest rate paid by the state to taxpayers on any overpayment of tax was 9% per annum. Apparently recognizing the 9% bore no reasonable relationship to prevailing market interest rates, the legislature, in 2013, reduced the rate to 3%. 2013 Wis. Act 20 § 1440e. No corresponding reduction was made to the interest rate on underpayments of tax.

interest rates for the period the Petitioners' underpayment was outstanding that it could reasonably be viewed as having a punitive aspect to it. However, no statute permits the waiver or abatement of statutory interest charges, and the Commission has consistently held that it does not have the authority to reduce or abate statutorily imposed interest on underpayments of tax. *Byrne v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-292 (WTAC 2010); *EDI Marketing, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-224 (WTAC 2009); *French v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-213 (WTAC 1983). As much as we might like to help to lighten the Petitioners' burden by reducing the rate applied to their assessment, we simply do not have the power to do so. The power to establish a rational underpayment interest rate, at least prospectively, lies exclusively with the legislature.

The other factor contributing to the substantial interest assessed to the Petitioners was the period of time that elapsed between the date on which the Department received information from the IRS regarding the adjustment made to the Petitioners' federal income tax returns for the years 2008 and 2009, and the date on which the Department ultimately issued its assessment. Although the Department took almost all of the four-year statute of limitations for their issuance of the assessment, as a matter of law, the assessment was timely. But in their appeal to the Commission, the Petitioners understandably asked: "... how did this happen? Was it a misplaced file? Was it an intentional delay to get 12% interest for four years just because it can be done?" To the Department's credit, they took these questions very seriously.

By letter dated November 28, 2016, the Department sent to the Petitioners, with a copy to the Commission, a copy of a Wisconsin Legislative Fiscal Bureau report dated May 15, 2013. The report reflects the fact that the Department requested additional resources to add 15 limited term audit staff positions to work specifically to address a backlog of more than 107,000 federal audit reports for which Wisconsin assessments were required to be issued. The report reflected that the Department had been receiving anywhere from 35,000 to 55,000 federal audit reports each year and simply did not have the personnel to process them on a timely basis. The Governor and the legislature provided additional funds in the 2013-2014 and 2014-2015 biennial budgets for additional audit staff to address this problem. Although there was clearly no nefarious intent in the Department's delay in issuing an assessment to the Petitioners, the fact that the Department acted to address the backlog of federal audit reports does not help the Petitioners, who appear to have been caught in the apex of the backlog.

Once again, as much as we might like to provide some relief to the Petitioners, we simply do not have the power to do so. The assessment was timely under applicable law and is, therefore, valid.

The Department correctly points out that the Petitioners did not report the IRS adjustment to the Department as required by Wis. Stat. § 71.76. Nor did they file amended Wisconsin returns and pay additional Wisconsin income tax for 2008 and 2009, which would have prevented four years of additional interest at twelve percent.

But the fact of the matter is that ordinary taxpayers do not understand the effect the federal adjustments may have on their Wisconsin tax liability nor do they know

of their obligation to report federal adjustments to the state. The Legislative Fiscal Bureau report provided by the Department states:

“DOR conducted a pilot project in 2012, to determine the level of compliance with the requirement that taxpayers amend their returns to reflect federal adjustments. Of 203 taxpayer returns to which federal adjustments applied, only three had been voluntarily amended.”

The Petitioners’ failure to appreciate the need to report the federal adjustments to the state, or that they may owe additional Wisconsin income tax, was enhanced by two things. First, the Petitioners stated in their Petition for Review – and we have no reason to doubt them – that the IRS agent they were dealing with in connection with the federal adjustments told them that they did not have to provide any information to Wisconsin. The agent explained to them that the IRS would report the adjustments to the Department and the Department would issue an assessment if any additional Wisconsin income tax were due. As it turns out, very bad advice, albeit from someone not authorized to provide guidance on behalf of the Department. Second, the Department issued refunds to the Petitioners for the years 2011 through 2014. The Petitioners question why the Department would have issued these refunds if additional taxes were due for the years 2008 and 2009. Certainly, the application of those refunds to the 2008 and 2009 assessments would have greatly reduced the interest.

Were it in our power to provide some equitable relief to the Petitioners in this case, we would be inclined to do so. But the Commission does not have that power.

Powers not expressly granted to an administrative agency must be reasonably implied from express terms of the statute, and any reasonable doubt should be resolved against the

grant of an implied power. ... Such reasonable doubt exists in particular respecting our authority to grant equitable relief by a final order overturning an otherwise appropriate assessment. Accordingly, doubt must be resolved in this case against the grant of such authority. ...

The legislature has empowered this agency to determine and apply Wisconsin tax statutes, but not to preempt application of a statute under a doctrine of equity. Unlike Caesar, we lack the authority to confer judicial powers upon ourselves, enticing though they may be.

Peterson v. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶203-026, (WTAC 1989). (citations omitted)

Perhaps the Petitioners can receive equitable relief from an agency that has that power.

ORDER

1. The Department's Motion was accompanied by affidavits and exhibits providing undisputed facts sufficient to address the legal issues presented. Consequently, there is no genuine issue of material fact, and this case is ripe for summary judgment.

2. The Department's assessment was issued within the four years allowed by statute and was, therefore, timely.

3. The assessment of 12% interest is valid as required by statute.

4. The Commission does not have the power to abate or reduce the imposition of interest at a rate of 12% per annum on unpaid taxes pursuant to Wis. Stat. § 71.82(1)(a).

5. The Department's Motion for Summary Judgment is granted.

Dated at Madison, Wisconsin, this 14th day of June, 2017.

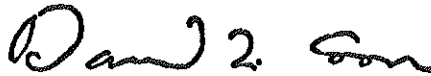
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



David D. Wilmoth, Commissioner



David L. Coon, 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 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.