

FILED

OCT 14 2024

Wisconsin Tax Appeals Commission  
Nicole Allee - Legal Assistant

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

---

WOLFGANG R. AND TERRY S. HEMSCHIK,

DOCKET NO. 23-I-028

Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

---

**RULING AND ORDER**

---

**JESSICA ROULETTE, COMMISSIONER:**

This matter comes before the Wisconsin Tax Appeals Commission (“the Commission”) on Cross-Motions for Summary Judgment. The Petitioners are represented by Thomas K. Riechert of Waukesha, Wisconsin. The Respondent, the Wisconsin Department of Revenue (“the Department”), is represented by Attorneys Jared M. Boucher and Dominic L. Weisse, of Madison, Wisconsin. For the reasons stated below, we deny Petitioners’ Motion for Summary Judgment and grant Respondent’s Motion for Summary Judgment.

The issue for determination is whether and how Wisconsin statutes require a taxpayer to calculate the other state tax credit available when the taxpayer pays income tax to a state other than Wisconsin on income considered income for Wisconsin tax purposes in the same year.

## FACTS

1. Petitioners Wolfgang and Terri Henschik are a married couple who resided in Wisconsin in 2021. (Pet. Ex. A<sup>1</sup>; Affidavit of Heidi Silvers (“Silvers Aff.”), ¶ 8.)

2. In 2021, Petitioners sold a condominium in Colorado that resulted in a capital gain of \$1,300,401. Petitioners paid \$56,504 in non-resident income tax to the State of Colorado on the capital gain income in 2022. (Silvers Aff. ¶¶ 8, 9.)

3. In 2021, Petitioners sold property in Arizona that resulted in a capital gain of \$58,527. Petitioners paid \$1,064 in non-resident income tax to the State of Arizona on the capital gain income in 2022. (Silvers Aff. ¶¶ 10, 11.)

4. On May 17, 2022, Petitioners filed a joint income tax return with the State of Wisconsin and claimed \$57,568 credit for tax paid to another state on line 16, as calculated on Schedule OS. (Pet. Ex. D, pp. 3, 14-15.)

5. On July 8, 2022, the Department issued a Notice of Amount Due – Individual Income Tax which notified Petitioners that they owed an additional \$17,689.59 to the State of Wisconsin for the 2021 tax year. The explanation of the change gave two bases for the increased amount owed. First, Wisconsin reduced the credit available to Petitioners for tax paid to another state because Wisconsin taxes 70% of capital gain income, which is less of the capital gain income than the other state’s tax. Second,

---

<sup>1</sup> The Commission’s October 25, 2023, Amended Briefing Order failed to direct the parties regarding the designation by letter or number of their respective Exhibits. This has led to a woefully confused record, which the Commission addresses in this ruling by referring to Exhibits by a citation which tells the reader which party filed the exhibit and what letter was placed on the Exhibit, e.g. “Dep’t Ex. A” and “Pet. Ex. A.”

Petitioners paid too little in estimated withholding and so owed additional underpayment interest. (Dept. Ex. D.)

6. On July 15, 2022, Petitioners sent a letter to the Department objecting to the additional assessment, which the Department treated as a Petition for Redetermination. (Silvers Aff. ¶ 15, Dept. Ex. E.)

7. On December 28, 2022, the Department issued a Notice of Action denying Petitioners' Petition for Redetermination. (Silvers Aff. ¶ 16, Dept. Ex. F.)

8. On February 13, 2023, Petitioners filed a petition with the Commission, appealing the December 28, 2022, Notice of Action. (Commission file.)

9. On January 16, 2024, both parties filed initial pleadings in support of their respective Motions for Summary Judgment. The Department filed a Notice of Motion and Motion for Summary Judgment, a Brief in Support of the Motion for Summary Judgment, an Affidavit with attached Exhibits A, B, C, D, E, F, G, and H, and Proposed Findings of Fact. The Petitioners filed a Motion for Summary Judgment, a Brief in Support of the Motion for Summary Judgment with attached Exhibits A, B, C, D, E, F, G, H, I, J, K, and L, and Proposed Findings of Fact. (Commission file.)

10. On March 12, 2024, both parties filed responsive pleadings to the initial pleadings filed on January 16, 2024. The Department filed a Response brief with attached Exhibits A, B, C, and D. The Petitioners filed a Response Brief with attached Exhibits B, C, D, E, F, H, I, J, L, MM, NN, OO, and PP. (Commission file.)

11. On March 12, 2024, the Department additionally filed a Motion to Strike Petitioners' Exhibit L. (Commission file.)

12. On July 15, 2024, the Commission issued a Ruling and Order denying the Department's Motion to Strike Petitioners' Exhibit L. (Commission file.)

## APPLICABLE LAW

### SUBCHAPTER I TAXATION OF INDIVIDUALS AND FIDUCIARIES

#### Wis. Stat. § 71.01 Definitions.

(13) "Wisconsin adjusted gross income" means federal adjusted gross income, with the modifications prescribed in s. 71.05(6). . . .

...

(16) "Wisconsin taxable income" of natural persons means Wisconsin adjusted gross income less the Wisconsin standard deduction, less the personal exemption described under s. 71.05(23), with losses, depreciation, recapture of benefits, offsets, depletion, deductions, penalties, expenses, and other negative income items determined according to the manner that income is or would be allocated, except that the negative items on individual or separate returns for net rents and other net returns which are marital property attributable to the investment, rental, licensing or other use of nonmarital property shall be allocated to the owner of the property.

#### Wis. Stat. § 71.05 Income Computation.

(6) MODIFICATIONS AND TRANSITIONAL ADJUSTMENTS. Some of the modifications referred to in s. 71.01 (13) and (14) are:

...

(b) *Subtractions.* From federal adjusted gross income subtract to the extent included in federal taxable or adjusted gross income . . . :

...

9. On assets held more than one year and on all assets acquired from a decedent, 30 percent of the capital gain as computed under the internal revenue code, not including capital gains for which the federal tax treatment is determined under section 406 of P.L. 99-514; not including amounts treated as ordinary income for federal income tax purposes because of the recapture of depreciation or any other reason; and not including amounts treated as capital gain for federal

income tax purposes from the sale or exchange of a lottery prize. For purposes of this subsection, the capital gains and capital losses for all assets shall be netted before application of the percentage.

**Wis. Stat. § 71.07 Credits.**

**(7) OTHER STATE TAX CREDIT.**

**(a)** In this subsection:

1. "Net Wisconsin income tax" means the gross Wisconsin income tax less all nonrefundable credits that may be claimed by that taxpayer, except for the credit paid to other states. . . .

**(b)**

1. Subject to conditions and limitations in pars. (c) and (d), if a resident individual . . . pays a net income tax to another state, that resident individual . . . may credit the net tax paid to that other state on that income against the net income tax otherwise payable to this state on income of the same year. The credit may not be allowed unless the income taxed by the other state is also considered income for Wisconsin tax purposes. The credit may not be allowed unless claimed within that time provided in s. 71.75 (2), but s. 71.75 (4) does not apply to those credits. For purposes of this subdivision, amounts declared and paid under the income tax law of another state are considered a net income tax paid to that other state only in the year in which the income tax return for that state was required to be filed. . . .

**(c)** The total credits under par. (b) 1. and 2. may not exceed an amount determined by multiplying the taxpayer's net Wisconsin income tax by a ratio derived by dividing the income subject to tax in the other state that is also subject to tax in Wisconsin while the taxpayer is a resident of Wisconsin, by the taxpayer's Wisconsin adjusted gross income. . . .

**ANALYSIS**

The issue presented in this appeal is a technical one: when a taxpayer reports income on income tax returns filed in Wisconsin and in another state, and pays income tax to the other state on income reported on both returns, how does the taxpayer

calculate the credit against Wisconsin income tax due available to the taxpayer for income tax paid to another state? Petitioners argue that, when a Wisconsin resident reports the same income on two income tax returns for the same year, and pays income tax to the other state, the resident is entitled to a credit on their Wisconsin income tax return for the tax paid to the other state. The Department agrees with the Petitioners' general proposition. The Department's position is that a taxpayer is entitled to a credit for tax paid to another state, for tax levied on the same income on which Wisconsin levied an income tax. In summary, the real dispute is about whether a taxpayer may claim a credit for all income tax paid to another state regardless of whether both states levy tax on the same income, or whether the taxpayer must first determine a proportion of the income tax paid to the other state when Wisconsin only levies income tax on a portion of the income reported on the other state's income tax return.

#### *Summary Judgment Standard*

The parties have filed simultaneous Motions for Summary Judgment. Summary judgment can only be granted when no material facts are in dispute. Wis. Stat. § 802.08(2). Although both parties have submitted "Proposed Findings of Fact," at this juncture, the Commission is not tasked with finding facts, as it would following a trial, but must apply the law to undisputed facts.

Summary judgment is warranted where "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). This appeal is ripe for

summary judgment. In addition, assessments made by the Department are presumed to be correct, and the burden is upon the Petitioners to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1).

#### *Analysis of Applicable Wisconsin Income Tax Credit Statutes*

Petitioners realized a capital gain of \$1,300,401 when they sold real estate in Colorado in the relevant tax year. Petitioners paid \$56,504 in non-resident income tax to the State of Colorado on that capital gain income. Petitioners realized a capital gain of \$58,527 when they sold real estate in Arizona in the relevant tax year. Petitioners paid \$1,064 in non-resident income tax to the State of Arizona on that capital gain income. When Petitioners filed their Wisconsin resident income tax return, they claimed a credit of \$57,568 for income tax paid to another state. The Department reduced the credit available to the taxpayers, because taxpayers are only entitled to claim a credit for income tax paid to another state when the other state has assessed an income tax on the same income being taxed by Wisconsin. Wis. Stat. § 71.07(7)(b)1. The applicable statute further specifically provides, at subsection (c), that

[t]he total credits under par. (b) 1. and 2. may not exceed an amount determined by multiplying the taxpayer's net Wisconsin income tax by a ratio derived by dividing the income subject to tax in the other state that is also subject to tax in Wisconsin while the taxpayer is a resident of Wisconsin, by the taxpayer's Wisconsin adjusted gross income. . . .

Petitioners argue that they must be allowed a credit against their Wisconsin income tax for every dollar they paid to other states as income tax. They further argue that the

Department has no basis for requiring taxpayers to use Schedule OS<sup>2</sup> to calculate how much of the income tax paid to another state may be claimed as a credit against income tax due to Wisconsin, because Petitioners assert that there is no basis in Wisconsin law to reduce the other state tax credit unless the tax paid to another state exceeds the tax due to Wisconsin for the out of state income, regardless of whether the states are applying a tax to the same dollars of income.

Schedule OS sets out steps for taxpayers to take to calculate the appropriate credit for income tax paid to another state. Wisconsin's statute provides that taxpayers are only entitled to claim a credit for income tax paid to another state when the other state has assessed an income tax on income which is considered income for Wisconsin tax purposes. Wis. Stat. § 71.07(7)(b)1. Schedule OS states "To be eligible for this credit, you must have been a full-year or part-year Wisconsin resident in 2021 and have paid 2021 state income tax **on the same income** to Wisconsin and another state." (Ex. C to Petition, Commission file, emphasis in original). Schedule OS then walks taxpayers through a calculation which ultimately results in a percentage of the income tax paid to another state determined to be allowed as a credit against income tax due to Wisconsin. Where one hundred percent of the income is taxed as income in both states, one hundred percent of the income tax paid to another state is available as a credit against income tax due to Wisconsin.<sup>3</sup> Where a smaller percentage of the income is taxed in both states (for example, seventy percent), taxpayers multiply the tax paid to the other state by the relevant

---

<sup>2</sup> Schedule OS is a Wisconsin tax form further titled "Credit for Net Tax Paid to Another State."

<sup>3</sup> Unless the tax paid to the other state exceeds the tax paid to Wisconsin, which is not the case in this appeal.



percentage, and the resulting amount is available as a credit against income tax due in Wisconsin (continuing the example, seventy percent of the income tax paid to the other state is available as a credit against income tax due to Wisconsin). The second page of Schedule OS offers further calculations which prevent taxpayers from claiming a credit greater than the tax paid to Wisconsin on the same income, but that calculation does not apply in this appeal.

The parties' central disagreement is whether the Department impermissibly changes the plain meaning of the other state tax credit statute when it reads "The credit may not be allowed unless the income taxed by the other state is also considered income for Wisconsin tax purposes" to mean "The credit is only allowed if the income taxed by the other state is also taxed by Wisconsin."

In order to decide which party is correct on this issue, the Commission must determine what "considered income for Wisconsin tax purposes" means.<sup>4</sup> The statutes do not define "considered income for Wisconsin tax purposes." The statutory section containing definitions relating to taxation of individuals offers two definitions that assist this inquiry. Wis. Stat. §§ 71.01(13) and (16). The definition of "Wisconsin adjusted gross income" specifically provides that the reduction provided in Wis. Stat. § 71.05(6) is excluded from Wisconsin adjusted gross income. Wis. Stat. § 71.01(13). The definition of "Wisconsin taxable income" incorporates "Wisconsin adjusted gross income" in its

---

<sup>4</sup> The Commission's analysis of the meaning of "considered income for Wisconsin tax purposes" has been affirmed by a Circuit Court in an earlier case where taxpayers contested the calculation of the other state tax credit in the context of capital gains income in another state, under an earlier version of Wis. Stat. § 71.07(7)(b)1. See *Arthur and Katherine Garst v. Wisconsin Department of Revenue*, CCH ¶ 203-027 (Dane Cnty. Cir. Ct. 1988, *affirming* WTAC). We follow the precedent set in the *Garst* appeal in the instant appeal.

definition of "Wisconsin taxable income" and so also excludes that income excluded under Wis. Stat. § 71.05(6).

Petitioners here claimed the full amount of the capital gains realized on the sale of the properties in Arizona and Colorado on their 2021 Schedule OS as income taxed by Wisconsin and each other state, and this is the source of the parties' dispute. In Wisconsin, income tax is assessed on seventy percent of capital gains realized from the sale of an appreciated asset, with certain exceptions not relevant in this appeal. Wis. Stat. § 71.05(6)(b)9. The reduction is made in accordance with the statute regarding "Income Computation." Wis. Stat. § 71.05(6)(b)9. The thirty percent of capital gains income is subtracted from the taxpayers' capital gains income before the Wisconsin tax on the capital gains income is calculated. The subtraction is achieved through the completion of Schedule SB,<sup>5</sup> which provides a number which is then subtracted from the taxpayers' Wisconsin adjusted gross income on line 4 of the taxpayers' Wisconsin income tax return. The statutory authority for this subtraction is found at Wis. Stat. § 71.01(13). In plain English, thirty percent of capital gains income, as limited by the statute, is not considered income for Wisconsin tax purposes. Wis. Stat. § 71.05(6)(b)9. In this case, Wisconsin did not consider \$1,300,401 of the capital gain from the sale of the Colorado property as income for Wisconsin tax purposes. Wisconsin considered \$910,281, or seventy percent, of that capital gain as income for Wisconsin tax purposes. Similarly, Wisconsin did not consider \$58,527 of the capital gain from the sale of the Arizona property as income for

---

<sup>5</sup> Schedule SB is a Wisconsin income tax form further titled "Form 1 - Subtractions from Income."

Wisconsin tax purposes. Wisconsin considered \$40,969, or seventy percent, of that capital gain as income for Wisconsin tax purposes.

Petitioners argue that the full amount of their capital gains is reported as income on their Wisconsin tax return, and so it is considered income for Wisconsin tax purposes. The Commission disagrees. When Wisconsin disregards thirty percent of capital gains income before applying its tax, that thirty percent of capital gains income is not considered income for Wisconsin tax purposes. The plain language of the other state tax credit statute only allows a taxpayer to claim a credit for tax levied by both states on the same income. To find what the Petitioners ask us to find would essentially leave Wisconsin taxpayers as a whole to subsidize the payments made by individual taxpayers to other states, which is not required by the plain language of the statute.

Petitioners argue that the Department has no legal basis for its instructions to taxpayers who owe income tax to more than one state for the same year to multiply the tax paid to that other state by the percentage representing the portion of the income taxed in both states, because the one and only statutory limit specified in the other state tax credit statute is contained in Wis. Stat. § 71.07(7)(c). That argument fails, as the statute is clear that there is another "limit" placed on the other state tax credit when Wisconsin considers a smaller portion of the income as income for tax purposes than does the other state. Wis. Stat. § 71.07(7)(b)1.

Petitioners argue passionately that when the Department applied a thirty percent reduction in the credit available to Petitioners, the Department did something that was not authorized by law. It is true that the statute regarding other state tax credits

does not provide for a set percentage reduction in credit available. However, the statutory authority for the Department's calculation does come directly from the other state tax credit statute. The other state tax credit statute directs that a Wisconsin taxpayer can claim a credit for income that is considered income for Wisconsin tax purposes and is also taxed by another state. The thirty percent reduction applied by the Department was statutorily authorized as it was applied, because thirty percent less income was taxed in Wisconsin than was taxed in Colorado and Arizona, for the respective capital gains income realized at the sale of the property in those states.

Petitioners also argue that the other state tax credit is only limited in one way. They argue that the only limit authorized by statute is set forth in Wis. Stat. § 71.07(7)(c). While that statutory subsection is the only portion of the other state tax credit statute which specifically mentions a calculation involving a ratio, even that subsection requires the taxpayer to use, as the numerator, that income which is taxed by both the other state and by Wisconsin. In other words, the ratio whose use is specifically urged by Petitioners must have \$910,281 as the numerator, and \$1,045,970 as the denominator. This ratio represents the portion of the income taxed by Wisconsin as the numerator, and the portion of the income taxed by the other state as the denominator. For these Petitioners, the calculation provides a factor of 0.87, which the statute then directs the taxpayer to multiply times the tax due to Wisconsin, which was \$71,118. That calculation gives a result of \$61,873. Pursuant to Wis. Stat. § 71.07(7)(c), the Petitioners would not have been allowed to claim a tax credit greater than \$61,783. However, that is not the only way that Wisconsin law limits the credit.

As noted above, Wis. Stat. § 71.07(7)(b)1. can also limit the other state tax credit claimed by a Wisconsin taxpayer. When, as here, the income taxed by the other state is greater than the income taxed by Wisconsin, no credit is available for that portion of tax paid to the other state on income that is not taxed by Wisconsin.

### CONCLUSIONS OF LAW

1. The amount of credit available to Wisconsin taxpayers for tax paid to another state or states requires taxpayers to calculate the amount of income being taxed by both Wisconsin and the other state to ensure that credit is claimed only on tax paid on income which is taxed by both states pursuant to Wis. Stat. § 71.07(7)(b)1.

2. The amount of credit available to Wisconsin taxpayers for tax paid to another state or states is also limited pursuant to the calculation specifically set forth in Wis. Stat. § 71.07(7)(c).

ORDER

Based on the foregoing reasoning and caselaw, IT IS ORDERED that

1. Summary judgment is granted in favor of Respondent.
2. Summary judgment is denied as to Petitioners.

Dated at Madison, Wisconsin, this 14<sup>th</sup> day of October, 2024.

WISCONSIN TAX APPEALS COMMISSION

  
\_\_\_\_\_  
Elizabeth Kessler, Chair

  
\_\_\_\_\_  
Jessica Roulette, Commissioner

  
\_\_\_\_\_  
Kenneth P. Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION