STATE OF WISCONSIN

TAX APPEALS COMMISSION

PAUL KOMARCK, **DOCKET NO. 22-I-191**

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

KENNETH P. ADLER, COMMISSIONER:

This matter comes before the Wisconsin Tax Appeals Commission on Cross-Motions for Summary Judgment. The Petitioner appears by his representative Joseph House. The Department of Revenue ("Department") is represented by Attorney Jeremy R. Lange.

The primary issue for determination concerns the Department's assessment of unpaid income tax for the years 2017 through 2020. The two secondary issues are whether Petitioner correctly (1) claimed an exclusion for health insurance premium payments and (2) deducted Schedule C losses from his income. For the reasons stated below, we deny Petitioner's Motion for Summary Judgment and grant the Department's Motion for Summary Judgment, thereby upholding its assessment as modified.

FACTS

Procedural

1. Petitioner, Paul Komarck, filed individual income tax returns with the State of Wisconsin for the years of 2017 through 2020. (Affidavit of Jeremy ("Lange Aff.") ¶¶ 2, 10, Exs. A, I.)

2. On December 14, 2021, the Department issued a Notice of Office Audit Amount Due - Individual Income Tax ("Assessment") to Petitioner regarding his income taxes for the years of 2017 through 2020 ("Audit Period"). For each of these years, he filed a Schedule C to deduct claimed business losses from his income and for each year also excluded an additional $3,000.00 from his income as alleged payments for health insurance premiums ("premium exclusion"). The Assessment disallowed the business losses and reversed the premium exclusion for the Audit Period. These changes resulted in Petitioner owing additional income tax for each year of the Audit Period. (Lange Aff. ¶ 2, Exs. A, I.)

3. On January 22, 2022, Petitioner filed an "Appeal of Determination"[1] with the Department. Petitioner contested the disallowance of both the business losses and the premium exclusion. (Lange Aff., ¶ 3, Ex. B.)

4. On April 27, 2022,[2] the Department issued a Notice of Action, which denied the Petitioner's Petition for Redetermination because Petitioner did not respond to requests for additional information to substantiate his claims. The denial noted

[1] Appeals to the Department are formally designated as Petitions for Redetermination.
[2] Attorney Lange's Affidavit attests that the Notice of Action was dated February 1, 2021, but the Notice of Action attached to his Affidavit as Exhibit C is dated April 27, 2022. The Commission accepts the date reflected on the attached Exhibit C as the true and correct date of issuance of the Notice of Action.

Petitioner could appeal to the Tax Appeals Commission ("Commission"). (Lange Aff., ¶ 4, Ex. C.)

5. On June 30, 2022, the Commission received a letter from Petitioner's representative which appealed the Department's Notice of Action.[3] The Commission accepted and filed the letter, which was dated June 26, 2022, and sent by regular mail. (Lange Aff., ¶ 5, Ex. D, Commission file).

Health Insurance Premiums

6. For the 2017 tax year, Petitioner did not pay health insurance premiums as he was enrolled in health care coverage as a dependent of his domestic partner. For later years, Petitioner paid his own health insurance premiums from his personal bank account. On December 1, 2020, a single monthly health insurance premium payment in the amount of $666.10 was made directly from Petitioner's retirement plan to his health insurance provider.[4] (Lange Aff. ¶¶ 8, 9, Exs. G, H.)

Schedule C Business Losses

7. For each year of the Audit Period, Petitioner claimed Schedule C business losses. The business losses were claimed in connection with Petitioner's business – a sole proprietorship named Komarck Constr Consulting ("Komarck Consulting"). The

[3] Appeals to the Commission from Department Notices of Action are formally designated as Petitions for Review.

[4] During discovery the Department requested Petitioner identify all direct premium payments from his retirement plan to his health care provider. (Lange Aff. ¶ 7, Ex. F, ROG. 9.) Petitioner failed to identify any such payments. However, the Department identified a single direct payment and states that the assessment should be adjusted to reflect this single payment. The Department does not provide any information as to the dollar amount of the requested adjustment. However, Exhibit G identifies that December 1, 2020, Health Insurance deduction as $666.10 (Respondent's Brief in Support of Motion for Summary Judgment, page 4, footnote 2.)

annual losses were attributed to a multitude of expense types, including advertising, insurance, repairs and maintenance, travel, uniforms, janitorial, accounting, and mobile phone. Petitioner also claimed the following amounts for depreciation: $353 in tax year 2017; $0 in tax year 2018; $1,287 in tax year 2019, and $2,059 in tax year 2020. (Lange Aff. ¶¶ 2, 10, Exs. A, I.)

PRESUMPTION OF CORRECTNESS

Wisconsin law makes clear that the Assessments made by the Department are presumed to be correct, and the burden is on Petitioner to prove, by clear and satisfactory evidence, in what respects the Department erred in its assessment.[5] Testimony by interested parties that is not corroborated by other evidence will not overcome the presumption of correctness.[6]

STANDARD OF REVIEW

Summary judgment should be granted if "there is no credible evidence" in support of the elements on which the plaintiff bears the burden of proof.[7] Wisconsin courts have explained this in detail:

> The party moving for summary judgment need only explain the basis for its motion and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact; the moving party need not support its motion with affidavits that specifically negate the opponent's claim.[8]

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[5] *Itsines v. Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-341 (WTAC 2010), *citing Edwin J. Puissant, Jr. v. Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(2).

[6] *Dvorak v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-600 (WTAC 2002).

[7] *Christianson v. Downs*, 90 Wis. 2d 332, 337, 279 N.W.2d 918, 921 (1979); Wis. Stat. § 802.08.

[8] *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291–92, 507 N.W.2d 136 (Ct. App. 1993).

ANALYSIS

I. Whether Petitioner is entitled to the health insurance premium exclusion from income.

Federal Regulations

The Code of Federal Regulations ("Code") explains that certain payments made by a retired public safety officer for health insurance premiums can be excluded from income:

> In the case of an employee who is an eligible retired public safety officer who makes the election described in paragraph (6) with respect to any taxable year of such employee, gross income of such employee for such taxable year does not include any distribution from an eligible retirement plan maintained by the employer described in paragraph (4)(B) to the extent that the aggregate amount of such distributions does not exceed the amount paid by such employee for qualified health insurance premiums for such taxable year.
> 26 I.R.C. § 402(l)(1)

The above exclusion is subject to a limitation of $3,000.00 for a taxable year.[9] The Code defines the key terms in the exclusion, such as "eligible retired public safety officer" and "eligible retirement plan."[10] In this case, the relevant issue concerns the requirement that payments for health insurance premiums be made directly from the pension to the provider of the health plan:

> **(5) Special rules.** For purposes of this subsection—
>
> **(A) Direct payment to insurer required.** Paragraph (1) shall only apply to a distribution if payment of the premiums is made directly to the provider of the accident or health plan or

[9] 26 I.R.C. § 402(l)(2).
[10] 26 I.R.C. § 402(l)(4)(B)-(C).

> qualified long-term care insurance contract by deduction from a distribution from the eligible retirement plan.
> 26 I.R.C.§ 402(l)(5)(A)(prior to 2022).

The Code, as it existed during the entire Audit Period, strictly limited the income exclusion to health insurance premium payments made *directly* by the retirement plan to the provider of the health plan. However, two years after the final year of the audit period being appealed by Petitioner, in 2022, the "[d]irect payment to insurer required" provision was replaced with language permitting direct payments from the taxpayer to the provider of the health plan:

> **(5) Special rules.**--For purposes of this subsection--
>
> **(A) Direct payment to insurer permitted.--**
>
> **(i) In general.**--Paragraph (1) shall apply to a distribution without regard to whether payment of the premiums is made directly to the provider of the accident or health plan or qualified long-term care insurance contract by deduction from a distribution from the eligible retirement plan, or is made to the employee.
> 26 I.R.C.§ 402(l)(5)(A) (2022 and after).

The Department asserts the statutory language in effect during the Audit Period[11] disqualified all of Petitioner's premium payments to the provider of the health plan during that period with the exception of a single payment made on December 1, 2020. The Department further asserts the language of the Code provision is clear and the facts regarding Petitioner's premium payments are not in dispute.

[11] Tax years 2017 through 2020.

Petitioner asserts he is entitled to a $3,000.00 annual exclusion from his income because of the payments he made for health insurance premiums during the Audit Period.[12] He continues by stating that "[p]etitioner is deprived of his health insurance deduction because he personally paid the premiums" and "[p]etitioner is entitled to fair procedures whether or not provided by law."[13] He does not, however, provide any relevant law to rebut the clear language of 26 I.R.C. § 402(l)(5)(A) as it existed during the Audit Period. And he does not rebut the Department's information regarding when and how the health insurance premiums were paid. Nor does he argue or provide evidence that he paid any of the health insurance premiums directly during any point in the Audit Period. Instead, Petitioner claims there is something unconstitutional about the application of 26 I.R.C. § 402(l)(5)(A) as it existed at the time of the Audit Period, by asserting he has been denied due process of law under the 5th and 14th Amendments to the United States Constitution. He claims he lost his exclusion from income "over a minor detail of payment method."[14] However, Petitioner does not clearly identify what is unconstitutional or how it is unconstitutional.

The Commission does not find Petitioner's position persuasive for the following reasons. First, the Commission cannot ignore statutory mandates on equitable grounds.[15] Therefore, even though Petitioner may believe it is unfair to apply the law as it existed during the Audit Period because it was subsequently changed after the Audit

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[12] Lange Aff., ¶ 2, Ex. A.
[13] Petitioner's Reply to Respondent's Brief in Support for [sic] Motion for Summary Judgment, page 6.
[14] Petitioner's Reply to Respondent's Brief in Support for [sic] Motion for Summary Judgment, page 7.
[15] *Peterson vs. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-026 (WTAC 1999).

Period, the Commission does not have equitable powers and must apply the law as written at the time Petitioner filed the tax returns under review.

Second, Petitioner has provided no legal foundation for his position which would, if found to be correct, override the provisions in 26 I.R.C. § 402(l)(5)(A) as they existed during the Audit Period.

Third, the Constitutional argument presented by Petitioner is not fully developed to explain how or why due process is violated by the federal code as it existed during the Audit Period. And, even if the argument were fully developed, the general Constitutionality of a statute cannot be addressed by the Commission.[16]

Based upon the above, Petitioner has not provided clear and satisfactory evidence that the Department's assessment was incorrect. Thus, the Commission must grant summary judgment in the Department's favor on this issue and uphold the assessment as modified to account for the single monthly health insurance premium payment acknowledged by the Department.

II. Whether the Department was correct to disallow Petitioner's Schedule C business losses during the Audit Period.

The claiming of Schedule C business losses is governed by section 1.183-2(a) of the Treasury Regulations which states in relevant part:

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[16] In general, constitutional issues cannot be addressed by the Commission. *Warshafsky v. Journal Co.*, 63 Wis. 2d 130, 147, 216 N.W.2d 197 (1974). However, raising a Constitutional issue at the Commission is necessary to preserve that issue for review by a higher court upon appeal. *State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶ 55, 244 Wis. 2d 613, 628 N.W.2d 376. Additionally, Petitioner has failed to argue that the statute is unconstitutional as applied to his particular circumstances, and the Commission cannot develop an argument which a party has failed to develop.

> Except as provided in section 183 and § 1.183-1, no deductions are allowable for expenses incurred in connection with activities which are not engaged in for profit . . . . The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case . . . . [T]he facts and circumstances must indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit.
> Treas. Reg. § 1.183-2, interpreting 26 C.F.R. § 1.183-2

Caselaw has interpreted the above to mean a taxpayer may only claim Schedule C losses if the taxpayer can prove that he was engaged in a trade or business during the relevant period.[17] To establish that he was engaged in a trade or business, the taxpayer must be continuously and regularly involved in the activity for the primary purpose of making a profit.[18] For this test, objective facts are prioritized over the taxpayer's statement of his intent.[19]

Section 1.183–2(b) of the Treasury Regulations, provides a nonexclusive list of the relevant factors to be considered in determining if the taxpayer was continuously and regularly engaged in the activity for profit. These factors include:

> (1) the manner in which the taxpayer carries on the activity;
> (2) the expertise of the taxpayer or his advisors;
> (3) the time and effort expended by the taxpayer in carrying out the activity;
> (4) the taxpayer's past financial success in carrying out similar or dissimilar activities;
> (5) the expectation that assets used in the activity may appreciate in value;
> (6) the taxpayer's history of income and losses in the activity;

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[17] *Commissioner v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987); *see also* Treas. Reg. § 1.183–2(a).
[18] *Id.*
[19] *Wesley v. Comm'r*, 93 T.C.M. (CCH) 1062 (T.C. 2007); Treas. Reg. § 1.183–2(a).

(7) the amount of occasional profits, if any, earned by the taxpayer in the activity;
(8) the taxpayer's financial status; and
(9) whether or not the activity includes elements of personal pleasure or recreation.[20]

Although no one factor is determinative of the taxpayer's intention to make a profit (Treas. Reg. § 1.183-2(b), a record of substantial losses over many years and the unlikelihood of achieving a profitable operation are important factors bearing on the taxpayer's true intention.

The Department asserts Komarck Consulting has never operated as a real business and supports this assertion by explaining Petitioner has not presented sufficient, credible evidence as required by the nine elements listed above. Therefore, the Department argues none of the deductions on the Schedule C during the Audit Period are valid.

Petitioner acknowledges that he cannot rebut the Department's assertions, agrees to their disallowance, and explains "[p]etitioner has conceded all schedule C expenses for all years except for depreciation."[21] He then reviews the nine factors detailed above and asserts he should be allowed deductions for depreciation as it "is a mandatory expense to be claimed by th [sic] entity owning the property."[22]

Petitioner's request to allow the depreciation expenses claimed on the Schedule Cs for each year of the Audit Period cannot be granted.[23] First, Petitioner has

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[20] Treas. Reg. § 1.183 - 2(b)(1)-(9).
[21] Petitioner's Reply to Respondent's Brief in Support for [sic] Motion for Summary Judgment, page 2.
[22] Petitioner's Reply to Respondent's Brief in Support for [sic] Motion for Summary Judgment, page 5.
[23] The depreciation amounts which cannot be allowed are $353 in tax year 2017; $0 in tax year 2018; $1,287 in tax year 2019; and $2,059 in tax year 2020. (Lange Aff. ¶¶ 2, 10, Exs. A, I.)

acknowledged he lacks substantiation as required by the Internal Revenue Code for the expenses claimed. Without that substantiation, the Commission cannot determine there is a legitimate business which allows the claiming of *any* Schedule C expenses. Second, even if Petitioner did establish he operated a legitimate business and was therefore allowed to submit a Schedule C listing depreciation expenses, he has not presented *any* information to verify how the depreciation expenses presented in tax years 2017, 2019, and 2020 were calculated. Therefore, Petitioner has not overcome the presumption of correctness that the expenses were correctly disallowed by the Department.

Thus, the Commission must grant summary judgment in the Department's favor on this issue and uphold the assessment as it pertains to the disallowance of Schedule C business losses.

CONCLUSIONS OF LAW

1. Petitioner was not eligible for the income exclusion for health insurance premium payments referenced in 26 I.R.C. § 402(l)(1) during the Audit Period for premium payments not made directly by the retirement plan to the health insurance provider as required by 26 I.R.C. § 402(l)(5)(A) as that section existed during the Audit Period.

2. Petitioner did not meet the requirements to claim Schedule C business losses pursuant to 26 C.F.R. § 1.183-2 during the Audit Period because he could not verify the existence of the business pursuant to the criteria found at Treas. Reg. § 1.183-2(b).

ORDER

1. Summary judgment is granted in favor of Respondent, with the Department directed to adjust the assessment for tax year 2020 to account for the payment of one month's health insurance premium payment of $666.10 directly from Petitioner's retirement plan to the provider of the health plan.

2. Summary judgment is denied as to Petitioner.

Dated at Madison, Wisconsin, this 13th day of January, 2025.

WISCONSIN TAX APPEALS COMMISSION

Elizabeth Kessler, Chair

Jessica Roulette, Commissioner

Kenneth P. Adler, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
101 E Wilson Street, 5th Floor
Madison WI 53703

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR JUDICIAL REVIEW FOLLOWING THE DISPOSITION OF A TIMELY PETITION FOR REHEARING, THE TIME ALLOWED, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's decision rendered:

PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of this 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 *https://wicourts.gov*.

This notice is part of the decision and incorporated therein.