

GILBERT DAVID 99CV2198 062100 WAUKESHA CTY CIR CT

Legal Library

JUN 22 2000

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

DAVID L. GILBERT,
Petitioner,

v

**FILED DECISION AND ORDER
IN CIRCUIT COURT**

WISCONSIN DEPARTMENT
OF REVENUE,

CASE NO 99-CV-2198

JUN 21 2000.

Respondent

WAUKESHA COUNTY, WISCONSIN

David Gilbert ("Gilbert") filed a petition for judicial review of the Ruling and Order of the Wisconsin Tax Appeals Commission ("TAC") dated August 27, 1999, as well as the Order of the TAC dated October 8, 1999. The TAC dismissed Gilbert's petition for review of actions of the Wisconsin Department of Revenue ("DOR"), and denied Gilbert's petition for rehearing. After consideration, the court determines that TAC's dismissal of Gilbert's petition for review and TAC's denial of Gilbert's rehearing request were improper. Accordingly, the court remands this matter to the TAC for further consideration.

STATEMENT OF FACTS

On June 25, 1993, the DOR issued a notice of a controlled substance tax assessment in the amount of \$9,800, plus interest and penalties. The assessment was made pursuant to Wis Stat §139.93(1). Pursuant to the assessment, the DOR collected \$11,928.21 from Gilbert.

In 1997, the Wisconsin Supreme Court decided *State v. Hall*, 207 Wis. 2d 54 (1997). The *Hall* court held that Wis Stat § 139.87-96, the controlled substances tax, violated the constitutionally guaranteed privilege against self-incrimination. Accordingly, the *Hall* court held



that the statutes were unconstitutional.

In November of 1997, Gilbert filed a claim for a refund with the DOR, asserting that the DOR illegally collected amounts pursuant to the assessment citing the fact that the controlled substances tax was declared unconstitutional in *Hall*. On November 26, 1997, the DOR sent a letter to Gilbert denying his claim for refund. The DOR stated that the refund claim was denied because it was not filed within two years of the assessment as required by Wis. Stat. §139.93(1) and § 71.75(5).

By letter dated March 27, 1998, Gilbert filed a petition for redetermination under Wis. Stat. § 71.88, objecting to the denial of his claim for a refund. The DOR issued a letter denying the petition for redetermination on August 13, 1998, again stating that Gilbert's request was untimely.

Gilbert timely filed a petition for review with the TAC on October 9, 1998, alleging that the purported assessment was invalid and the DOR erred on a number of grounds, including timeliness, void assessment, and retroactivity. On November 5, 1998, the DOR sought an order dismissing Gilbert's petition for review.

In a ruling and order dated August 27, 1999, TAC determined that Gilbert's refund claim was untimely. Accordingly, the TAC granted DOR's motion to dismiss without addressing whether the assessment itself was constitutionally valid under *Hall*.

On September 9, 1999, Gilbert timely filed with the TAC a petition for rehearing. The petition was denied by TAC on October 8, 1999.

Gilbert now seeks judicial review of TAC's decisions pursuant to Wis. Stat. §227.52.

STANDARD OF REVIEW

Wis Stat § 227.52 states that "administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review . . ." However, Wis Stat § 73.01(4)(a) vests in TAC "exclusive initial jurisdiction for all questions of law and fact arising under ch 71." *Hogan v. Musolf*, 163 Wis 2d 1, 24 (1991). Accordingly, the scope of review to be accorded TAC's legal conclusions, with respect to an issue that is within the initial jurisdiction of TAC, cannot be determined by a reviewing court in the absence of TAC's initial analysis of that issue.

In the present case, TAC denied Gilbert's petition based on untimeliness. Accordingly, TAC did not address several questions of fact and law present in this case. As such, this court may not review said issues of fact and law. This court may only review TAC's decisions to deny Gilbert's petition for lack of timeliness.

ANALYSIS

GILBERT'S PETITION FOR REVIEW WAS IMPROPERLY DENIED.

As stated, the scope of this court's review is limited to the issue of the timeliness of Gilbert's petition for rehearing and petition for redetermination. After careful review, the court determines that Gilbert's petitions were in fact timely, and TAC improperly denied said petitions.

Under Wis. Stat. § 71.88(1), a taxpayer may seek a redetermination within 60 days after an assessment. Under Wis. Stat. § 71.75(5), a taxpayer may seek a refund within two years after

the assessment. Gilbert first requested his refund, and later his redetermination, approximately six years after the initial assessment. Accordingly, the DOR and TAC assert that Gilbert's petitions were untimely and must therefore be denied for lack of subject matter jurisdiction. However, the DOR and TAC fail to recognize that in the present case, no valid assessment ever occurred and, as such, Gilbert's petitions cannot be untimely.

There is no question that the *Hall* decision declared Wis. Stat. § 139.87-96 unconstitutional. Accordingly, Gilbert's assertion that the *Hall* holding served to effectively invalidate the DOR's 1993 assessment against him is correct. The taxing authority had no jurisdiction to impose the tax in the first place because the authorizing statute was facially unconstitutional and therefore void. While the DOR and TAC are correct that a legally effective assessment would provide the necessary trigger under the statutes at issue here, no such assessment was made or served in this case. Imposition of the drug tax was unconstitutional at the time it was imposed against Gilbert. Neither the statutory imposition of the tax nor the purported assessment had any legal effect, they were void *ab initio*.

Under established Wisconsin case law,¹ an authorizing statute held unconstitutional is void *ab initio*, or from the beginning. Because the authorizing statute at issue in this case was void, so too is the assessment resulting from it. A void assessment has no legal existence, and therefore cannot trigger a statute of limitations. Accordingly, the limitations provided under Wis. Stat. § 71.75(5) and 71.88(1) have not been triggered. As such, the limitations periods have not run and Gilbert's claim is timely.

¹ See *Chicago & Northwestern Railway Co. v. Arnold*, 114 Wis. 434, 436 (1902), *Burlington Northern v. City of Superior*, 149 Wis. 2d 190 (Ct. App. 1989), *Family Hospital Nursing Home, Inc. v. City of Milwaukee*, 151 Wis. 198 (1912).

As stated, TAC denied Gilbert's claim solely on the issue of timeliness. As discussed, the court concludes that TAC's determination was improper. Accordingly, the court concludes that TAC does have jurisdiction over this matter, and remands this case back to TAC for a full analysis of the remaining issues brought by Gilbert.

ORDER

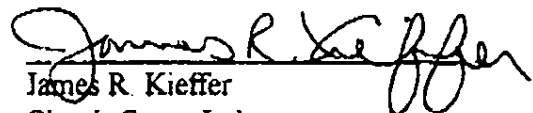
IT IS ORDERED that the Wisconsin Tax Appeals Commission's Ruling and Order of August 27, 1999, dismissing David Gilbert's petition for review is reversed.

IT IS FURTHER ORDERED that the Wisconsin Tax Appeals Commission's Order of October 8, 1999, denying rehearing is reversed.

IT IS FURTHER ORDERED that this matter is remanded to the Wisconsin Tax Appeals Commission for consideration of David Gilbert's refund and reassessment claims on the merits.

Dated this 21st day of June, 2000.

BY THE COURT.


James R. Kieffer
Circuit Court Judge
Branch 8