

**GREGORY O. PALO,
JUANITA M. STRADER,**

Petitioners,

Vs.

Case No. 11CV671

**BRENDA MANTSCH,
WISCONSIN DEPARTMENT
OF REVENUE and WISCONSIN
TAX APPEALS COMMISSION,**

Respondents.

DECISION AND ORDER

This is an action for judicial review pursuant to Wis. Stats. §§ 73.015 and 227.53. Petitioners Gregory Palo and Juanita Strader seek judicial review of the January 14, 2011 Ruling and Order of the Wisconsin Tax Appeals Commission, hereinafter "Commission" (R. 30)¹. The Commission determined that the family support payments ordered in the 2001 Judgment of Divorce between Gregory Palo and Brenda Mantsch are properly treated as child support for purposes of Wisconsin income tax.

Following issuance of the Commission's Order, petitioners filed a "Petition for Trial and Review" on February 11, 2011. The Department of Revenue (DOR), respondent Brenda Mantsch, and petitioners Palo/Strader each filed briefs. Brenda Mantsch also filed an affidavit stating that as of May 9, 2011, she had not

¹The Commission filed its record of proceedings on March 11, 2011. Record references in this Decision appear as "R. -."

been served with the petition for review. No reply brief or proof of service has been filed by petitioners Palo/Strader.

FACTS

The Commission's Ruling and Order provides a comprehensive Statement of Facts for these joint appeals, and therefore need not be repeated here (R. 30:2-7). Additional facts relevant to this Decision will be stated as necessary.

DECISION

I. Court's competency to proceed

By Amended Notice of Appearance and Statement of Position filed May 18, 2011, DOR asserts that this court lacks competency to proceed because petitioners did not serve Brenda Mantsch personally or by certified mail. "Competency" refers to the power of the court to adjudicate the particular case before the court. As the Wisconsin Supreme court explained in *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 9, 273 Wis. 2d 76, "failure to comply with a statutory mandate pertaining to the exercise of subject matter jurisdiction may result in a loss of the circuit court's competency to adjudicate the particular case before the court."

Section 73.015, Stats., provides the exclusive method of judicial review of Tax Appeals Commission decisions. Subsection (2) states: "Any adverse determination of the tax appeals commission is subject to review in the manner provided in ch. 227." Thus, the legislature has made the judicial review

procedures set forth in ch. 227 applicable to review of Tax Appeals Commission decisions.

Section 227.53(1)(a)1. provides:

Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board, the credit union review board, or the savings institutions review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1. to 4.

Pursuant to subsec. (1)(c), "a copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record."

It is the petitioners' burden to show compliance with the statutory requirements for the court's exercise of jurisdiction or competency. *Danielson v. Brody Seating Co.*, 71 Wis. 2d 424, 427-429, 238 N.W. 2d 531 (1976). As has been noted, petitioners have not responded to Mantsch's affidavit of non-service. They have not met their burden to show compliance with the statutory mandate.

Failure to strictly comply with the filing and service requirements of ch. 227 deprives the court of competency to proceed and, in most cases, requires dismissal. *Currier v. Wisconsin Department of Revenue*, 2006 WI App 12, ¶¶ 19-23, 288 Wis. 2d 693; *Ryan v. Department of Revenue*, 68 Wis. 2d 467, 471-472,

228 N.W. 2d 357 (1975). This court notes, however, that § 227.53(1)(c) further provides:

A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

The record in this case is unclear as to the Commission's designation of parties pursuant to § 227.47(1). This may be because the January 14, 2011 Order contemplated further action: "The Commission will contact the parties in Docket Nos. 09-I-152-SC and 09-I-153-SC for further proceedings in those matters" (R. 30:46).²

In any event, although the petitioners have not shown strict compliance with the statutory requirements necessary to trigger judicial review, § 227.53(1)(c) appears to preclude dismissal solely for the failure to properly serve Brenda Mantsch. The court therefore reviews the Commission's decision.

II. Standard of Review

The Commission determined that the family support ordered in the 2001 Palo/Mantsch divorce "must be considered in substance and reality for tax purposes to be entirely 'child support'" (R. 30:42). In so doing, the Commission made factual findings and interpreted applicable federal and Wisconsin law pertaining to the tax consequences of family support orders. Petitioners seek

² Docket No. 09-I-153-SC was resolved by Stipulation and Order entered March 3, 2011 (R. 33).

reversal and a trial³ on numerous grounds: misconduct by parties and attorneys, alleged forgeries in court filings related to the Palo/Mantsch divorce, and errors of law by the Commission.

The Commission's factual findings are reviewed using the "substantial evidence" test. Under this analysis, an agency's findings of fact "may be set aside only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence." *Milwaukee Symphony Orch. v. Wis. DOR*, 10 WI 33, ¶ 31, 324 Wis. 2d 68.

An agency's interpretation and application of a statute, however, raises a question of law to be determined by the court. Courts may grant varying levels of deference to the agency's interpretation depending on the relative institutional qualifications and capabilities of the court and the agency. The highest level of deference is "great weight," followed by "due weight," with "no deference" a distant last. No deference is given to an agency interpretation when the question is one of first impression, the agency lacks expertise with respect to the legal issue and its prior positions have been unhelpfully inconsistent. *Id.*, ¶¶ 33-34, 37.

"Great weight" deference is given when:

- (1) the agency is charged by the legislature with administering the statute in question; (2) the agency interpretation is of long standing; (3) the agency employed its specialized knowledge or expertise in interpreting the statute; and (4) the agency's

³ Although § 227.56 refers to "trial," § 227.57(1) provides that judicial review is conducted by the court without a jury and is confined to the record. None of those statutes' provisions allowing the court to hear additional evidence applies here.

interpretation will provide uniformity and consistency in the application of the statute.

Id., ¶ 35. By contrast, courts give lesser "due weight" deference when the agency has some experience interpreting the law at issue, but does not possess the expertise that would place the agency in a better position than the court to interpret the statute. "Due weight" allows the court to replace an agency's interpretation, even if reasonable, with a more reasonable interpretation. Under "great weight" courts must sustain an agency's reasonable interpretation even if a more reasonable interpretation exists. *Id.*, ¶¶ 35-36.

The Tax Appeals Commission's interpretation is entitled to great weight in this case. The Legislature has delegated authority to the Commission to administer and interpret Wisconsin income tax laws. The Commission has a track record of considering the tax implications of § 71 payments, as discussed at R. 30:14-21. Its interpretation will provide uniformity and consistency on the taxability of family support payments. Accordingly, the Commission's legal interpretation must be affirmed if it is reasonable, even if there is a more reasonable interpretation.

III. Commission's Findings of Fact

As noted, a court reviewing an agency's findings of fact determines whether reasonable minds could arrive at the same conclusion reached by the trier of fact. The Commission made detailed findings of fact at pages 3-7 of the Ruling and Order.

Petitioners' April 18, 2011 brief does not address specific findings of fact with which they take issue. Instead, petitioners cite numerous grievances concerning the parties' 2001 divorce proceeding. In essence, petitioners ask the court to reopen the 2001 divorce judgment based on their assertions of fraud, forgery and transcript errors. This court lacks authority to revisit the 2001 divorce proceeding, and declines to do so. The Commission's factual findings are supported by substantial evidence.

IV. The Commission reasonably concluded that the family support payments must be considered child support for tax purposes.

The Commission's Conclusion of Law states: "The 'family support' payments for the years at issue constituted 'child support' under Section 71 of the Internal Revenue Code and, as such, were not deductible by Mr. Palo and were not includible in Ms. Mantsch's gross income" (R. 30:7). The Commission next discusses the applicable law as it applies to the 2001 divorce judgment.

As the Commission explains, the practice of "Lesterizing" is a technique to enable divorcing spouses to better allocate cash flow due to different tax brackets.⁴ The problem in this case arises because the 2001 divorce judgment "is silent regarding the tax consequences to the parties and does not allocate the 'family support' payments to 'maintenance' and 'child support' components" (R. 30:14).

⁴ "Lesterizing" is derived from the United States Supreme Court decision in *Commissioner v. Lester*, 366 U.S. 299 (1961).

This is not the first time the Commission has addressed the tax implications of § 71 payments. In its decision, the Commission discusses five prior cases and summarizes the principles emerging from them as follows:

First, in *Smith*, the Commission used the principles of statutory construction to construe the written agreement, noting the agreement was tantamount to a contract. Second, in *Oehler*, IRC § 71 controlled the tax result, not the language used by the parties in the agreement. In fact, the tax result under IRC § 71 may be the opposite of what the parties placed in the agreement. As *Seamans* states, the analysis under IRC § 71 is objective, not subjective. Third, the analysis begins by determining if the payments are alimony under IRC § 71. Then, the payments must be analyzed in light of the test for child support in IRC § 71(c). Fourth, what was said at the hearing by the parties is not determinative, and may not in a given case even be relevant. Fifth, as in *Carran*, the IRS's determination of the tax treatment of the payments for federal income tax purposes does not determine the result for Wisconsin purposes. Finally, the *Carran* case confirms that the six-month and one-year presumptions in the Treasury Regulations may be rebutted by the taxpayer.

(R. 30:21).

The Commission next addresses each of the parties' arguments, concluding that the disputed payments were child support for two reasons: Palo failed to rebut the one-year presumption⁵ that covers these payments, and Wisconsin law requires child support in most circumstances. (R. 30:26).

With respect to the first reason, the Commission determined that Palo's affidavit was insufficient, as were the transcripts of the 2001 divorce proceeding, to overcome the presumption. The Commission weighed the evidence, and it is

⁵ The "one-year presumption" basically refers to the federal regulation that presumes payments to be child support if scheduled payment modifications occur within a year of a child or children turning 18.

not the court's function to second-guess the Commission's determinations as to the strength of the evidence.

Finally, the Commission applied Wisconsin law to reach its conclusion that the family support payments were child support. The Commission cited Wis. Stats. § 767.511(1a), which requires that a judgment of divorce "shall. . . order either or both parents to pay an amount reasonable or necessary to fulfill a duty to support a child." Furthermore, courts "shall determine child support payments by using the percentage standard" established by the Department of Children and Families. § 767.511(1j). The Commission reasoned:

Applying this standard here, the income tax returns filed by Mr. Palo reflect that in 2001 his gross monthly income was approximately \$4,600 per month. Thirty-four percent of that number would be approximately \$1,500 per month. The payments of \$1,250 per month here, as pointed out by Ms. Mantsch, fall below that amount and, therefore, must be considered in substance and reality for tax purposes to be entirely "child support."

R. 30:41-42.

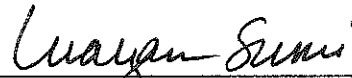
As earlier noted, the petitioners did not file a reply brief or otherwise respond to the arguments presented in support of the Commission's decision by the Wisconsin Department of Revenue. The Commission's legal interpretation is entitled to great weight, and because it is reasonable, must be affirmed.

ORDER

The January 14, 2011 Ruling and Order of the Tax Appeals Commission is hereby AFFIRMED.

Dated this 19th day of August, 2011.

BY THE COURT



Maryann Sumi, Judge
Circuit Court Branch 2

Cc: Mr. Gregory Palo
Ms. Juanita Strader
AAG F. Thomas Creeron III
Ms. Brenda Mantsch