MCCARTHY THOMAS W ET AL 98CV3144 ET AL 113099 DANE CTY CIR CT

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

O R D E R

By judicial assignment order dated March 17, 1999, and consolidation order dated March 4, 1999, the petitions to review in the following cases pending in seven different branches of the circuit court were consolidated and reassigned and then briefed and argued. In accord with this court's decisions:

IT IS ORDERED:

Case No. 98-CV-3144 is REVERSED AND REMANDED;

Case No. 98-CV-3145,
Case No. 98-CV-3289 are AFFIRMED;

Case No. 98-CV-3147,
Case No. 98-CV-3148,
Case No. 98-CV-3288,
Case No. 98-CV-3290 are AFFIRMED IN PART & REVERSED & REMANDED IN PART;

Case No. 98-CV-3273 is REVERSED AND REMANDED;

Case No. 98-CV-3274 is AFFIRMED;

Dated at Madison, Wisconsin this 30th day of November, 1999.

Daniel L. LaRocque
Reserve Judge
Dane County Circuit Court Branch #16

cc: F. Thomas Creeron III
Assistant Attorney General
PO Box 7857
Madison WI 53707-7857

Atty. Eugene O. Duffy
111 East Wisconsin Ave., Ste. 1400
Milwaukee WI 53202-4803

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

THOMAS W. AND DELORES M. MCCARTHY, DOLORES H. REUTER, JAMES AND EUNICE CLAUSING AND GERALD AND PATRICIA GIESE,

Petitioners,

v. Case # 98-CV-3144

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

The issue in the McCarthy appeal is whether the petitioners received a notice of assessment from the Department of Revenue (DOR) from which an appeal is allowed pursuant to sec. 71.88, Stats.[1] This court concludes that the communication to petitioners from the DOR was an assessment within the meaning of the statute for purposes of allowing an appeal. The Commission's judgment is reversed and remanded.

Petitioners are retired federal pensioners who had attached a refund claim to their respective 1995 state income tax returns for that portion of the tax imposed upon their pensions. After several years, DOR wrote to petitioners to notify them that "that a refund was being issued to you at this time" because the department had failed to act on their claims within the one year statutory time limit. The same notification, however, advises the petitioners that the pensions were taxable and that the petitioners would be receive "a bill in the next several weeks for the amount of this refund." The taxpayers then petitioned the DOR for a redetermination of assessment. DOR rejected the petition as premature on grounds that the letter was not a notice of redetermination of assessment

[1] Section 71.88(1) APPEAL TO THE DEPARTMENT OF REVENUE (a) *Contested assessments and claims for refund*... [A]ny person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of refund may, within 60 days after receipt of the notice, petition the department of revenue for redetermination .

(2) APPEAL TO THE WISCONSIN TAX APPEALS COMMISSION (a) *Appeal of the department's redetermination of assessments and claims for refund.* A person feeling aggrieved by the department's redetermination may appeal to the tax appeals commission by filing a petition with the clerk of the commission as provided by law and the rules of practice promulgated by the commission. If a petition is not filed with the commission within the time provided in s. 73.01 or, except as provided in s. 71.75 (5), if no petition for redetermination is made within the time provided the assessment, refund, or denial shall be final and conclusive

and therefore not reviewable. The Wisconsin Tax Appeals Commission agreed and held that it lacked subject matter jurisdiction.

This court's review of the Commission's decision is novo because the appeal is a review of the Commission's statutory jurisdiction. The statute permits persons "feeling aggrieved" to contest assessments.[2] As the Commission declared, a complaining party is aggrieved only when an injury is real and immediate, not conjectural or hypothetical. *Fox Dept. of Health & Soc. Services, 112 Wis.2d 514 (1983).* In other words, the complaining party must show that he or she has sustained or is immediately in danger of systaining some direct injury. *Id.*

When a government agency notifies a taxpayer that he or she will be required to pay a specific amount ("the amount of this refund") on a specific income ("your retirement benefits") for a specific reason ("Since you were not a member of the federal civil service retirement system as of December 31, 1963...") within a specified period ("we will be sending you a bill in the next several weeks"), the injury is not conjectural or hypothetical but is real and immediate.

Apart from what a professional tax advisor might conclude, a reasonable taxpayer could interpret the letter as a notice of assessment. The letter does not suggest a future formal or official notice. Instead it refers to a forthcoming "bill," a colloquial term which could reasonably infer something else. An average taxpayer, not unlike a consumer who purchases merchandise, would reasonably view a "bill" as nothing more than a courtesy reminder. Taxpayers should not be made to guess whether they have been assessed or not. This court concludes that the Commission therefore had subject matter jurisdiction to hear the matter and the order is therefore reversed and remanded to the Commission.

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[2] There is no distinction between "feeling aggrieved" and "aggrieved " Apparantly the petitioners would interpret the former phrase, used in sec. Sec. 71.88, Stats , as a subjective standard allowing an appeal based upon the actual reasonable belief of a taxpayer.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v. Case # 98-CV-3273

EUGENE AND LORRAINE HAFNER, et al,

Respondents.

The Wisconsin Department of Revenue (DOR) appeals a decision of the Wisconsin Tax Appeals Commission which ruled that the Commission lacked subject matter jurisdiction over Lorraine Hafner's refund claim for tax year 1989. The Commission concluded that when DOR petitioned for review to the circuit court on June 23, 1993, it failed to include the Hafner docket for the 1989 refund claim. Thus, the Commission ruled, when the Court of Appeals ultimately reversed and remanded those cases in favor of DOR, Hafner's case was not among them. This court concludes that DOR's original petition to review this matter in 1993 did include the Hafner docket and therefore reverses and remands for further proceedings.

Because this appeal concerns only the scope of the Commission's jurisdiction, the The petition for matter is reviewed *de novo. See Amsoil, Inc. v. LIRC, 173 Wis.2d 154 (Ct. App. 1992.* The Commission placed great weight on the prayer for relief in the DOR's petition to review which sought to reinstate DOR's determination with respect to tax years 1982 through 1988 even though the Hafner docket in question involves the tax year 1989.

First, the prayer for relief in a complaint is not part of the complaint. *Schmitt v. Osborne, 80 Wis.2d 19 (1977).* Thus, even where a prayer for relief seeks relief not obtainable under the facts alleged, a complaint is not insufficient. *Id.* Similarly, where the prayer for relief is indefinite or uncertain, it does not defeat the underlying claim. *Department of Agriculture v. Laux, 233 Wis. 287 (1936).* A prayer for relief in a petition to review is not different from a prayer for relief in any other civil complaint. Pleadings are to be construed as to do substantial justice. Section 802.02(6), Stats.

The petition for review specifically identifies the Hafner docket (91-I-SC-343-SC) in two separate paragraphs. Read in context, the petition (paragraphs 4 though 6) states that the Commission determined, without benefit of any evidentiary record, that Hafners were members of the class certified, were entitled to refunds in docket 91-I-342-SC, and that DOR was aggrieved. When the court of appeals reversed in *DOR v. Hogan, 198 Wis.2d 792, (Ct. App. 1995),* it effectively reversed and remanded the Hafner's 1989 refund matter.[1]

Nor does this court agree with the contention that DOR failed to brief or argue the matter in the circuit court or the court of appeals. The record establishes that the basis of the Commission's wholesale grant of summary judgment to numerous individual dockets was based solely on its decision to grant summary judgment to the class The mandate of the court of appeals reversed and remanded the summary judgment issued by the Commission and there was no further issue before the circuit court for further litigation. The decision of the Commission is reversed and remanded for further proceedings.

[1] While this court's construction of the June 23, 1993 petition to review is dispositive, it also appears that the stipulation of the parties also contemplated the DOR's right to contest individual refund claims without having to appeal in the first place.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

Case # 98-CV-3274

MELVIN M. AND DIANE D. MAVES, et al,

Respondents.

The Department of Revenue (DOR) seeks review of a Tax Appeals Commission interpretation of a requiring DOR to continue to pay the Melvin and Diane D. Maves' refund claims for tax years prior to 1989. This court affirms the Commission.

DOR concedes the Commission's decision interpreting the stipulation is entitled to due deference. For purposes of appeal, DOR also accepts the Commission's findings of fact which includes relevant excerpts of the lengthy stipulation. The stipulation is dated March 25, 1994, and was intended to permit members of the class certified in a pending class action to begin receiving payments with regard to tax years 1984 through 1988 on their individual refund claims without having to await the resolution of the pending disputed issues in the lawsuit. The class action lawsuit was ultimately dismissed by the Wisconsin Court of Appeals, *Hogan v. DOR, 198 Wis.2d 792 (Ct. App. 1995),(Hogan II.)*

Purusant to the procedure put in place by the stipulation, the Maves received a questionairre from DOR to verify Mr. Maves federal employment. DOR accepted Mr. Maves answers and proceeded to make refund payments in installments pursuant to the stipulated schedule. After two installments, however, DOR reevaluated the answers to the questions and advised the Maves that it had determined that he was not eligible for refunds because his position as a civilian National Guard technician did not qualify under the exclusion for federal pensions.

The Commission ruled that DOR was required to continue to pay the Maves refund claim to the extent that it was timely for tax years prior to 1989. It did so on grounds that the stipulation did not authorize DOR to rescind or revoke a finding of eligibility based upon the verification process it had installed. It held that the stipulation contemplated a one-

time verification process meant to be a final determination. It also concluded that the question whether Mr. Maves was a member of thefederal retirement system on December 31, 1963 was a question upon which reasonable persons could differ and that Mr. Maves believed he was a member when he detailed his federal employment history.

DOR does not contend that the answers to their questionairre constituted fraud or deceit. Rather, it argues that the intent of the parties was to pay refunds only to eligible persons, and the belated discovery that Mr. Maves did not qualify means the agreement to pay is not applicable. The dispositive question is not whether the parties intended only eligible persons receive refunds; that was their intent. Rather, the question is whether the parties intended DOR's acceptance and verification as a final determination of eligibility. DOR concedes that the parties failed to foresee the precise situation which gives rise to the present dispute, a good faith misunderstanding of the meaning of "membership" in the CSRS.

When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties under the contract, a term which is reasonable in the circumstances may be supplied by the court. *Spencer v. Spencer, 140 Wis.2d 447 (Ct. App. 1987).* This principle is described in *Restatement (Second) of Contracts, sec. 204: official comment: ...The supplying of an omitted term is not technically interpretation, but the two are closely related; courts often speak of an 'implied term.' ...the court should supply a term which comports with community standards of fairness and policy.Irather than analyze a hypothetical model of the bargaining process...Spencer at 451.*

The Commission found that the parties had an implied agreement that acceptance and payment based upon the information DOR sought from the taxpayer was a final resolution of eligibility.

This court affirms the findings and conclusions of Commission and remands for an order granting the Maves their right to the remaining refund payments.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

EUGENE AND LORRAINE HAFNER and
GABRIEL DERANGO,

Petitioners,

Case # 98-CV- #3145
Case # 98-CV- #3289

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

These retired federal employees, the "interrupted service petitioners," appeal a summary judgment in favor of the Department of Revenue (DOR).[1] The Tax Appeals Commission upheld a denial of refund claims for state income taxes under sec. 71.05(1)(a), Stats., enacted as 1989 Wisconsin Act 31, which exempts payments received from the federal civil service retirement system (CSRS) "paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963...". These petitioners separated from federal service for a time and later returned, and because they voluntarily withdrew and later redeposited their contributions to a federal civil service retirement system (CSRS), the Commission denied eligibility by concluding that petitioners were not members of a CSRS on December 31, 1963. The Commission is affirmed.[2]

This court gives due deference to the Commission's interpretation of sec. 71.05, Stats., in light of it's prior experience in construing it. See *Video Wisconsin Ltd. V. Dept. of Revenue, 175 Wis.2d 195 (Ct. app. 1993).* The statute provides for a tax exemption and thus is narrowly construed. *See Comet Co. v. Department of Taxation, 243 Wis.2d 117 (1943).*

Much of the parties wrangling focuses upon federal statutes relating to participation in the CSRS, set forth in part principally as found in 5 U.S.C. sections 8334

[1] Case #98-CV-3289 relate to technical corrections made by the Commission to the underlying decision and is not discussed further These two cases are among nine cases consolidated with the consent of the parties by Judge O'Brien of the Dane County Circuit Court, Branch 16.

[2] The procedural background of these consolidated cases, including the relevant employment history of Mrs. Hafner and Mr. DeRango, is described in the Commission's "national guard technicians" decision as well as in the parties appeal briefs.

and 8342.[3] This court is satisfied that the petitioners did not receive a federal pension based on membership in CSRS as of December 31, 1963. That was the essence of the Commission's ruling, notwithstanding the petitioners purchase of credit for CSRS service previously forfeited. The petitioners argue that a federal employee with membership in CSRS acquires vested rights and does not forfeit or lose membership as the result of an interruption in federal service and withdrawal of contributions, thus withdrawal and repurchase is irrelevant and unnecessary. This court agrees with the Commission's distinction between federal grants of creditable service, including credit for military service, and membership in a CSRS. Specifically, the Commission concluded that the Hafners were not entitled to a refund for the years at issue because, notwithstanding Mrs. Hafner's purchase of credit for previously forfeited CSRS service, she was not a member of the CSRS as of December 31, 1963. She withdrew her CSRS funds in 1958. It also concluded that Mr. DeRango was not entitled to a refund for the years at issue because notwithstanding his purchase of credit for previously forfeited CSRS service, his benefits were not paid on the CSRS account he had as of December 31, 1963. He withdrew his CSRS funds in 1976. This court concludes that the Commission neither misinterpreted nor misapplied the federal law.

Nor did the Wisconsin Supreme Court in *Hogan v. Musolf, 163 Wis.2d 1 ((1991)(Hogan I)*, decide the scope of 1989 Wis. Act 31 contrary to the Commission's interpretation. The petitioners point to a comment in *Hogan I*: "On August 9, 1989, 1989 Wisconsin Act 31, section 1817m, went into effect exempting for 1989 and subsequent tax years the pension income *of the federal retirees in the certified class...* " (Emphasis supplied.) The certified class to which this comment can be attributed was the class created by the circuit court in its grant of a temporary injunction in a related case later reversed by the court of appeals in *DOR v. Hogan, 198 Wis.2d 792 (Ct. App. 1995). (Hogan II)*. The circuit court had certified as a class of plaintiffs retired federal civilian employees who were members of a U.S. retirement system as of December 31, 1963 and included all such persons "*who by operation of federal law have a constructive date of employment on or before such date for purposes of eligibility for employment.*"

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[3] A description of the technical details of the federal scheme and the parties respective interpretations were developed in their briefs, at oral argument and in a series of letters to the court following argument.

(Emphasis supplied.) The supreme court's gratuitous reference to the scope of Act 31 in *Hogan I* was not pertinent to its holding and the Commission concluded it was dictum.[4] The Commission therefore applied the plain language of Act 31 to require actual rather than constructive membership in the CSRS on the critical date.

Nor does the Commission's decision violate the narrow scope of the doctrine of intergovernmental tax immunity. *See Jefferson County v. Acker, 119 S.Ct. 2069 (1999).* A tax is not unconstitutional so long as it is imposed equally on the other similarly situated constituents of the state. The Commission constructed sec. 71.05, Stats., applying it to a state pensioner under the state retirement system in *Connor v. Wisconsin DOR, Wis. Tax Rptr. [CCH] p 400-176 (WTAC 1995),* consistently with it's application to the federal pensioners here. The Commission had evidence in the form of a letter to DOR from the federal Retirement Policy Division of the Office of Personnel Management interpreting the CSRS. This evidence supports its finding that the withdrawal of contributions constitutes a forfeiture of a CSRS pension by receipt of a lump sum separation benefit prior to retirement.

There is no evidence to support nor an assertion that the petitioners in this case relied upon the DOR's publication concerning Wisconsin's taxation of federal retirement benefits. In light of this court's conclusion that the Commission properly interpreted federal law, the court summarily rejects the petitioners arguments concerning violation of due process and also rejects the claim of a violation of the Tax Injunction Act.[5] The order of the Commission dated November 23, 1998, insofar as it relates to these two cases is affirmed.

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[4] The holding of *Hogan I* is that in matters of state taxes, a failure to exhaust administrative remedies before DOR and the Commission bars a sec. 1983 action in state courts.

[5] The court adopts by reference the arguments advanced by DOR in regard to these issues as set forth on pages 23 to 32 of its response brief brief dated August 2, 1999.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

JAMES L. AND CARROLL DAWSON,
MELVIN M. AND DIANE D. MAVES,
ROGER W. AND NANCY KURTH AND
LYLE E. AND DARLENE A. REYNOLDS,

Petitioners,

v.

Case # 98-CV-3147
Case # 98-CV-3148
Case # 98-CV-3288
Case # 98-CV-3290

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

The petitioners, retired civilian national guard technicians, seek review of a summary judgment by the Wisconsin Tax Appeals Commission in favor of the Department of Revenue (DOR) that denied refund claims, with one exception, for state income taxes on their federal pension income.[1] This court concludes that DOR is estopped from seeking assessments for tax years subsequent to 1988 against Dawson and Reynolds but rejects the petitioners remaining arguments. The Commission's judgment is therefore affirmed in part and reversed and remanded in part.

Petitioners assert numerous grounds for relief. They allege that the Commission violated the holding of *Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989)*, the doctrines of estoppel and intergovernmental tax immunity and the provisions of 4 U.S.C. sec. 111, the holding of *Hogan v. Musolf, 163 Wis. 2d 1 (1991)*, constitutional equal protection and due process, the statute of limitations, as well as the terms of a stipulation between the parties. Because DOR should have been estopped from making assessments for the years 1989 and after against petitioners Dawson and Reynolds, that part of the

[1] Cases #98-CV-3288 and #98-CV-3290 relate to technical corrections made by the Commission to its underlying decisions and are not discussed further.
Case #98-CV-3147 relates to adverse determinations for the tax years prior to 1989.
Case #98-CV-3148 relates to the tax years 1989 and after.
Case #98-CV-3274, discussed in a separate opinion, relates to DOR's appeal of Maves' claims for tax years prior to 1989

decision of the Commission is reversed and remanded for entry of a judgment in their favor.

The United States Supreme Court in *Davis* declared that Michigan's state income tax scheme (similar to Wisconsin law prior to 1989) violated the intergovernmental immunity doctrine as reflected in 4 U.S.C. sec. 111 because the tax discriminated in favor of retired state employees and against retired federal employees.

In the wake of *Davis*, several Wisconsin residents who were federal retirees brought a civil rights action under 42 U.S.C. 1983. *Hogan v. Musolf, 163 Wis.2d 1 (1991). (Hogan I)* ultimately reversed a court of appeals decision. The court of appeals had upheld the circuit court's certification of a class and temporary injunction barring DOR from collecting or imposing state income tax on the pensions of any plaintiffs in the class. The supreme court granted the DOR's motion to dismiss the lawsuit on grounds that taxpayers must first exhaust available state administrative remedies.

In the meantime, while *Hogan I* was still pending in the circuit court, the plaintiffs changed their individual refund claims to one seeking refunds on behalf of the class certified by the circuit court in the pending class action. The Commission granted certification and ordered refunds. The Wisconsin court of appeals reversed, deciding that the Commission lacked authority to certify a class in a taxpayer suit. *Wisconsin Dept. of Revenue v. Hogan, 198 Wis.2d 792 (Ct. App. 1995) (Hogan II).*

Also while the original lawsuit was pending, the Wisconsin legislature acted to cure Wisconsin's discriminatory tax scheme when it enacted 1989 Wis. Act 31, sec. 1817m, effective for the years 1989 forward. That law, sec. 71.05(1)(a) Stats., exempts "All payments received from the U.S. civil service retirement system, the U.S. military employe retirement system...which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963..."

Following enactment of Wis. Act 31, DOR secretary, Mark D. Bugher, issued a widely disseminated announcement in August, 1989. The DOR advisory was sent to Wisconsin tax practitioners, associations for retired federal employees, and other organizations, and the petitioners received a copy of the release.

The tax advisory, in the form of answers to frequently asked questions, purported to declare who was affected by the circuit court's temporary injunction and by the tax

exemption legislation introduced in part in response to the court's injunction, 1989 Wis. Act 31. First, DOR declared that the injunction was effective as to retired federal civilian employees,and their survivors, who paid state income taxes for the year 1982 and forward on U.S. retirement benefits and who "were members of a United States Government retirement system or fund as of December 31, 1963, *including all such persons who by operation of federal law have a constructive date of employment or service on or befor such date for purposes of elgibility for retirement...."*

In the next question: "Who will be affected by the exemption provision in ...[1989 Wisconsin Act 31] ?", DOR answered in part: " *These are the same persons identified in Answer 1 as being affected by the preliminary injunction."* [Emphasis supplied.] Thus, DOR advised that if the taxpayer fell within the class of persons covered by the circuit court's order, those same persons were covered by the tax exemption created by the legislature in 1989. Beginning in 1989 and for various years thereafter, petitioners exempted their federal pension income. It was not until 1995 that DOR issued assessments, including penalties and interest, effectively disavowing its earlier answer to the taxpayers question.

The petitioners contend that the Commission should have estopped DOR from making the assessments. This court gives due weight to the Commission decision in these cases.[2] To prevail on an estoppel claim each individual taxpayer must establish the existence of (1) action by DOR (2)upon which that taxpayer reasonably relied (3) to that taxpayer's detriment. *San Felippo v. Department of Revenue, 170 Wis.2d 381 (Ct. App. 1992)* Whether the facts presented are sufficient to establish a claim of estoppel is a question of law. *Mowers v. City of St. Francis. 108 Wis.2d 633 (Ct. App. 1982).* The burden is upon the taxpayer to establish each element of estoppel by clear and convincing evidence. *Id.* Estoppel against governmental agencies is to be excercised with caution and restraint for reasons of public policy. *Advance Pipe & Supply v. Revenue Dept., 128 Wis.2d 431 (Ct. App. 1986)* Estoppel may be applied against the state when the elements are clearly present and it would be unconscionable to allow the state to revise an earlier position. *San Felippo at 390.* Whether justice requires the application of estoppel is

determined on a case-by-case basis. *Id.* Estoppel is not applied as freely against governmental agencies as it is against private persons. *Id.*

When taxpayers have relied upon departmental pronouncements that the taxpayers were not subject to the tax, estoppel has been applied. See *DOR v. Family Hosp., Inc., 105 Wis.2d 250, (1982), DOR v. Moebius Printing Co., 89 Wis.2d 610 (1979)* and *Libby v. DOR, 260 Wis. 551 (1952).* The Commission rejected the estoppel argument, holding that it may be used against the government only when the conduct in question is of such a character as to amount to fraud. *Libby,* on the other hand, suggests that fraud in context of estoppel is virtually synonymous with "inequitable" or "unconscientious". In *Ryan* v. *DOR, 63 Wis.2d 467, (1975),* relied upon by the commission, the court suggested a test of "manifest abuse of discretion." In *State v. Green Bay, 96 Wis. 2d 195 (1980),* the court suggested a balancing test to determine whether the imposition of estoppel would work a serious injustice and not unduly harm the public interest.

This court concludes that the Commission applied too stringent a test. It should have estopped the DOR from seeking assessements based upon the terms of 1989 Act 31 as to those who relied upon the DOR advice to their detriment, petitioners Dawson and Reynolds.[3] DOR maintains that even if there is evidence to support estoppel , the matter should be remanded for fact finding to determine detrimental reliance. This court disagrees. This is review of a summary judgment proceeding. There are no disputed facts or inferences from facts in the respective proofs upon which to base a trial on the merits. Dawson and Reynolds were therefore entitled to summary judgment relating to to tax years 1989 and after. The Commission judgment in that respect is therefore reversed and remanded for entry of judgment in their favor.

This court rejects the petitioners other arguments. These arguments include an alleged violation of the doctrine of intergovernmental immunity and sec. 4 U.S.C. 411, the holding of *Hogan v. Musolf, 163 Wis.2d 1 (1991),* the legislative scope of 1989 Wis. Act 31, misinterpretation of federal law establishing membership in the federal Civil

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[3] The petitioners suggest that because the Commission decided the case without the benefit of a collegial decision after two of the three members were disqualified, the court should not give weight to the Commission's decision. They provide no authority for their suggestion.

Service Retirement System (CSRS), reliance upon tax bulletins, and the statute of limitations.

The petitioners constitutional claim of an equal protection violation is without merit. The discrimination alleged is based upon the payment of refunds to some other civilian national guard technicians. The doctrine of equal protection requires the claimant to show intentional, systematic and arbitrary discrimination. See *Sunday Lake Iron Co. v. Wakefield Township, 247 U.S. 350 (1918)* The evidence supports the Commission's determination that errors were inadvertant and therefore did not amount to a violation of constitutional law.

The Commission's interpretation of the stipulations does not afford relief. The Commission read it to provide that the parties agreed to require actual membership in the CSRS as of December 31, 1963. The Commission's reading of the stipulation is the only reasonable interpretation and withstands judicial review.

This court also confirms the Commission's determination that DOR's assessments did not exceed the six-year statute of limitations provided in sec. 71.77(7)(a), Stats. The Commission applied its interpretation established in *Port Affiliates Inc. v. DOR, Wis. Tax Rptr. [CCH] 203-302 (WTAC 1992)*. Thus, notice is "given" when it is "issued," and therefore complete upon mailing. The Commission was also entitled to conclude that the notice was mailed within the six year period, despite some inconsistencies in the evidence upon which the Commission relied. Further, the Commission could reasonably find that the "net income properly assessable" under the statute includes the disputed pension income under the analysis described in *A.O. Smith Corp. v. DOR, 43 Wis.2d 420 (1969)*. Due process is not violated by construing the provisions sec. 71.74(11), Stats., as directory rather than mandatory. The Commission has adopted the reasoning of *State v. Industrial Comm., 233 Wis. 461 (1940)*, to construe a statute as directory even though it uses the word "shall" in regard to an administrative agency's duty. See *American Cyanamid Co v. DOR, Wis. Tax Rptr. [CCH] 203-317, Feb. 11, 1992*. The Commission did not err in rejecting *McKesson Corp. v. Florida Div. Of Alcoholic Bev., 496 U.S. 18 (1990)*. as a basis to find a due process violation. This is not a retroactive income tax but

[3] Petitioners do not refute DOR's contention that the affidavits of Maves and Kurth do not claim to have relied upon the notice interpreting 1989 Wis. Act 31

a tax exemption created by Wis. Act 31, and personal income taxes were federalized in Wisconsin in 1965. See *Liincoln Savings Bank v. DOR, 215 Wis.2d 430 (1998)*.. Finally, the Commission did not err in denying abatement of interest and penalties beacause it is not empowered to review the matter under Sec. 73.01(4)(a), Stats.

The judgment of the Commission is therefore affirmed in part and reversed and remanded in part.