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MORKIN FOREST J 02CVD0680 011003 WALWORTH CTY CIR CT

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY
BRANCH III

FOREST J. MORKIN,

Petitioner,

v.

Case No. 02CV00680

FILED
CIRCUIT COURT

JAN 10 2003

WISCONSIN DEPARTMENT
OF REVENUE,

Respondent.

COPY

Clerk of Courts Walworth Co.
By: Claudia J. Last

**MEMORANDUM DECISION ON PETITIONER'S PETITION FOR
REVIEW OF THE RULING AND ORDER OF THE WISCONSIN
TAX APPEALS COMMISSION OF JULY 10, 2002.**

1.

APPEARANCES

- 1) The Petitioner by Attorney Robert R. Henak of Henak Law Offices, S.C., of Milwaukee, Wisconsin.
- 2) The Wisconsin Department of Revenue by James E. Doyle, Attorney General and by Mary E. Burke, Assistant Attorney General, Wisconsin Department of Justice.

II.

PROCEEDINGS TO DATE

The Petitioner commenced this action for judicial review under Chapter 227.52 and 227.53 of a decision of the Wisconsin Tax Appeals Commission.

From the Petitioner's petition for review;

5. The facts showing that Morkin is aggrieved by the Ruling and Order and that his substantial

interests, including his legal rights, duties and privileges have been affected, include the following:

(a) On February 9, 1995, the Wisconsin Department of Revenue issued a Notice of Amount Due to petitioner, claiming taxes, interest and penalties totaling \$33,000. The claim was alleged to have been based on the Wisconsin Tax on Controlled Substances, Wis. Stat., Section 139.87 et seq.

(b) From that date through July, 2001, the Department seized \$1,066.64 from Morkin based on that notice. The Department views the account as delinquent and apparently intends to continue seizing money from Morkin to pay the claimed assessment.

(c) On January 24, 1997, the Wisconsin Supreme Court held that the controlled substances tax violates the constitutionally guaranteed privilege against self-incrimination. See State v. Hall, (cits omit).

(d) By letter to the Department dated September 13, 2000, Mr. Morkin, by undersigned counsel, requested redetermination of the tax liability pursuant to Wis. Stat., Section 71.88(1) and a refund pursuant to Wis. Stat. Section 71.75 of the \$1,066.64 seized from him up to that time plus statutory interest, citing the fact that the drug tax law had been declared unconstitutional.

(e) By letter dated September 12, 2001, James G. Jenkins, Chief, Alcohol & Tobacco Enforcement, responded that he was denying Morkin's refund claim because it was not filed within two years of the "assessment," citing "section 71.75(5), Wis. Stats." The letter did not expressly address Mr. Morkin's request for redetermination, but implicitly denied that request on the same grounds.

(f) The Department has not filed a new assessment based upon the 1997 amendments to the Wisconsin Tax on Controlled Substances.

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(g) *Morkin timely filed a petition for review with the Commission on October 23, 2001. In his Petition for Review, Morkin alleged that the Department erred in the following manner:*

(i) *That the Department erred in concluding that Morkin's requests for redetermination and for a refund were untimely;*

(ii) *That the purported assessment dated February 9, 1995, was and is void, Wisconsin's Tax on Controlled Substances having been held unconstitutional in Hall, (op cit).*

6. *The grounds specified in Wisconsin Statutes Section 227.57, upon which Morkin contends that the Ruling and Order and the Order denying rehearing should be reversed are that:*

(a) *The Commission erred in its interpretation of the law and a correct interpretation of the law compels a finding in favor of Morkin.*

(b) *To the extent that the Commission's action is based on a factual finding that "Petitioner did not contest or appeal the assessment," that finding is not supported by substantial evidence in the record.*

II

DISCUSSION AND DECISION

The Wisconsin Tax Code provides;

73.015 Review of determination of tax appeals commission. (1) This section shall provide the sole and exclusive remedy for review of any decision or order of the tax appeals commission and no person

may contest, in any action or proceeding, any matter reviewable by the commission unless such person has first availed himself or herself of a hearing before the commission under s. 73.01 or has cross-appealed under s. 70.995(8)(a).

(2) Any adverse determination of the tax appeals commission is subject to review in the manner provided in ch. 227.

The Administrative Procedure Code provides (in part);

227.57 Scope of Review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.

(2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

(4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously

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interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(7) If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the

constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

The Department has moved for summary judgment in this case. In the oft quoted case of Transportation Ins. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, (1993) (Ct. App.) at pp 289 and 290;

*(1.) Summary judgment is used to determine whether there are any disputed issues for trial. U.S. Oil Co., Inc. v. Midwest Auto Care Services, Inc. (cits omit). Appellate courts and trial courts follow the same methodology. Green Springs Farms v. Kersten. (cits omit). First, the pleadings are examined to determine whether they state a claim for relief. See *ibid.* If they do, and if the responsive pleadings join issue, the court must then examine the evidentiary record to determine whether there is a "genuine issue as to any material fact," and, if not, whether a party is thereby entitled to "judgment as a matter of law." Rule 802.08(2), Stats.*

The well-known purpose of summary judgment is "to avoid trials where there is nothing to try." Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton. (cits omit). Summary judgment is thus consistent with the underlying purpose of the rules of civil procedure "to secure the just, speedy and inexpensive determination of every action and proceeding." Rule 801.01(2), Stats. In a real sense, it is akin to the motion for dismissal at the end of a plaintiff's case-in-chief, which the trial court should grant if "there is no credible evidence" in support of the elements on which the plaintiff bears the burden of proof, Rules 805.14(1) & (3), Stats.; see Christianson v. Downs. (cits omit), but comes at an earlier state in the proceedings.

The statute of limitations for claims for refund, Section 71.75(5) is now four years.

However, as the Department points out in its brief at p 6, footnote 1, the new four year statute deals with claims for refunds for tax years beginning with January 1, 2000.

It is undisputed that (from the July 10, 2002 decision of the Wisconsin Tax Appeals Commission);

UNDISPUTED MATERIAL FACTS

1. On February 9, 1995, the Department issued a controlled substance tax assessment to petitioner in the amount of \$33,000 pursuant to Wis. Stat. Section 139.87 et seq.

2. Petitioner did not contest or appeal the assessment.

3. The Department has seized \$1,066.64 from petitioner, and claims that the remaining assessment is still owed.

5. By letter to the Department dated September 13, 2000 (although received by the Department on September 11, 2000), petitioner requested a refund of the taxes seized by the Department.

6. By letter dated September 12, 2001 the Department denied the request, stating as its reason that the claim was not filed within the statutory 2-year time limit pursuant to Wis. Stat. Section 71.75(5).

In *Gilbert v. DOR*, 246 Wis. 2d 734, (2001)(Ct. App.), the following occurred;

On June 25, 1993, the DOR issued a Notice of Amount Due to Gilbert claiming taxes, interest and penalties totaling \$19,992 under the then-existing Wisconsin tax on controlled substances. See Wis.

Stat. Sections 139.87-.96. The DOR collected \$11,928.21 from Gilbert pursuant to the assessment. On January 24, 1997, the Wisconsin Supreme Court held that the controlled substances tax violated the constitutionally guaranteed privilege against self-incrimination. State v. Hall (cits omit). On November 10, 1997, Gilbert requested a refund of \$11,693.83, citing the unconstitutionality of the controlled substances tax law under Hall. The DOR denied Gilbert's request because it was not filed within two years of the assessment as was required under Wis. Stat. Section 71.75(5).

On November 23, 1998, Gilbert filed a cross-motion for summary judgment on the grounds that the controlled substances tax assessment dated June 25, 1993, was and is void under Hall. On August 27, 1999, TAC granted the DOR's motion to dismiss on the grounds that Gilbert's request for a refund was untimely under Wis. Stat. Section 71.75(5) because he did not file it within two years after notice of the assessment under the controlled substances tax law.

On September 9, 1999, Gilbert filed a petition with TAC asking it to grant a rehearing on its August 27, 1999 decision. On October 8, 1999, TAC denied Gilbert's rehearing petition. On November 2, 1999, Gilbert filed a Petition for Judicial Review of TAC's Ruling and Order. On June 21, 2000, by decision and order, the circuit court reversed TAC's ruling and order. Relying upon municipal property tax cases, the circuit court held that the DOR's assessment was void ab initio (void from the beginning) and that the time limitations contained in Wis. Stat. Section 71.75 were therefore inapplicable to Gilbert's refund claim.

Further at p 738;

Wisconsin's tax on controlled substances provided: " The taxes, penalties and interest under this subchapter shall be assessed, collected and reviewed as are income taxes under ch. 71." Wis. Stat. Section 139.93(1). In short, Section 139.93(1) tells us that controlled substances taxes are assessed and collected in the same manner as income taxes. Therefore, an understanding of the administrative procedures relating to income tax refund claims and assessments is necessary. There are four steps in that process. Our analysis begins and ends with step one. Under Wis. Stat. Section 71.75, the first step a taxpayer must take is to file an individual refund claim with the DOR. Section 71.75 provides in relevant part:

Claims for refund. (1) [T]he provisions for refunds and credits provided in this section shall be the only method for the filing and review of claims for refund of income and surtaxes, and no person may bring any action or proceeding for the recovery of such taxes other than as provided in this section.

(5) A claim for refund may be made within 2 years after the assessment of a tax . . . including penalties and interest, under this chapter, assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination. (Emphasis added.)

TAC has held that if a taxpayer fails to file a refund claim within the time prescribed by statute, it lacks subject matter jurisdiction to determine whether the refund claim is valid. See Bower v. Wis. Dep't of Revenue. (cits omit). We agree with TAC's interpretation.

And at p 740;

The legislature provided Gilbert an administrative remedy for recovery of allegedly illegal or excessive state taxes. Gilbert did not timely avail himself of the remedy that was provided for him. Gilbert did not seek (sic) refund until well after the two-year statute of limitations had run. If Gilbert wanted his refund claim to be considered, it was incumbent upon him to file it within the two-year statute of limitations. Gilbert cannot now circumvent the process by leapfrogging over the required first step for seeking a tax refund. We have long held that where the legislature allows a remedy for recovery of allegedly illegal or excessive state taxes, that remedy is exclusive, and no action seeking a different remedy against the State may be maintained. Schlesinger v. State. (cits omit).

Our supreme court solidified this edict in Hogan v. Musolf. (cits omit).

p 741;

The Hogan court described the necessary steps for pursuing refund claims:

Aggrieved taxpayers seeking refunds must make a claim with the department of revenue pursuant to the procedure of sec. 71.75, Stats. and subch. XIV of ch. 71. If not satisfied with the Department's ultimate determination, the taxpayer may then obtain a hearing from the Tax Appeals Commission under sec. 73.01(4). . . .

p. 741;

Finally, we note that Gilbert makes much of the fact that the taxing statute he was assessed under has now been rendered unconstitutional. We do not agree with the circuit court's holding that the DOR's tax assessment was void ab initio (void from

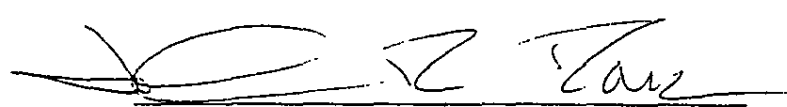
the beginning) and that therefore the time limitations contained in Wis. Stat. Section 71.75 were inapplicable to Gilbert's refund claim. Hogan clarified that the DOR and TAC "would become ineffectual if they lost their authority to review a case every time a constitutional claim was asserted." *Hogan*, (cits omit).

Hogan controls and supports our holding that administrative remedies must be timely pursued in connection with all claims, including claims that a state taxing statute is unconstitutional. *Id.* Wisconsin Stat. Section 71.75(5) specifically provides that any refund claim must be filed "within two years after the assessment of a tax." Gilbert's refund claim was not made within the required two-year period. Gilbert's refund claim was untimely. The legislature made compliance with this provision mandatory, since it is "the only method for the filing and review of claims for refund."

This court must follow *Gilbert* (op cit) and *Hogan* (op cit). The petition to review is hereby dismissed.

Dated at Elkhorn, Wisconsin this 10th day of January, 2003.

BY THE COURT:



Hon. John R. Race
Circuit Court Judge Branch III
Walworth County, Elkhorn, WI

cc: Attorney Robert R. Henak
Asst. Attorney General Mary E. Burke