TRACY DONALD G & SHIRLEY 84CV294 113084 ROCK CTY CIR CT

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STATE OF WISCONSIN CIRCUIT COURT, BRANCH 1 ROCK COUNTY

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DONALD G. TRACY and
SHIRLEY TRACY,

Petitioners,

v.

WISCONSIN DEPARTMENT
OF REVENUE,

Respondent.

- -

MEMORANDUM OF DECISION
AND ORDER FOR JUDGMENT

Case No. 84-CV-294

NATURE OF ACTION

This is a proceeding commenced May 15, 1984, to review a Ruling and Order of the Wisconsin Tax Appeals Commission, dated March 26, 1984.

The Ruling and Order dismissed the Petitioners' Petition for Review of an assessment of income taxes by the Wisconsin Department of Revenue for the taxable years 1980-1982.

Following a March 9, 1984, Hearing, the Commission granted the Wisconsin Department of Revenue's Motion for Summary Judgment. The Commission determined that the Department was entitled to an Order affirming its assessments as a matter of law because no genuine issue of material fact existed.

SCOPE OF JUDICIAL REVIEW

The scope of review by a Circuit Court of the Decisions and Orders of the Tax Appeals Commission is limited by secs. 73.015(2)

and 227.20, Stats.

ISSUE RAISED BY APPEAL

The issue raised by this appeal is:

> Did the Wisconsin Tax Appeals Commission properly affirm the Department's assessments of income against the Petitioners for the taxable years 1980-1982?

STATEMENT OF FACTS

Petitioners Donald G. Tracy and Shirley Tracy are Wisconsin residents who failed to file complete Wisconsin income tax returns for the taxable years 1980, 1981 and 1982. Although the Petitioners mailed income tax returns to the Department for these years, the Department determined that the returns were incomplete. A Fifth Amendment objection on grounds of self-incrimination was typed on the forms, and the words "none" or "object" were typed in each space on the form.

When the Petitioners failed to send amended and complete returns, as requested by the Department, the Department issued assessments based upon estimated income figures. Petitioners were notified of the tax due, and were sent a worksheet showing the figures which were used in arriving at that total. Donald G. Tracy was assessed $3,643.39 in income tax, and Shirley Tracy was assessed $1,494.57.

The Department denied Petitioners' Petition For Redetermination, and Petitioners filed an Appeal with the Wisconsin Tax Appeals Commission. Prior to the Hearing, Petitioners sent interrogatories to the Department which were objected to by the Department's attorney. Petitioners also sent the Department's attorney a Motion For A Change of Hearing Date And Time, requesting the Hearing be moved to Waukesha, Wisconsin. The Department's attorney filed a general Reply stating that Petitioners failed to show good and sufficient cause for the requested change. Also, the Department's attorney served a Notice Of Motion and Motion For Summary Judgment.

A Hearing was held before the Commission on March 9, 1984. Exhibits were received and the parties offered oral argument on the Motions. A unanimous Ruling And Order by the Commission, dated March 26, 1984, accompanied by a written opinion, granted the Department's Motion For Summary Judgment, and denied Petitioners' Motion For Additional Time.

THE COURT'S DECISION

The Commission is correct. The six contentions which are advanced by the Petitioners are frivolous and without merit.

Petitioners claim first, that the Department had no authority to assess the Petitioners' income tax liability.

This contention is frivolous and without merit.

Wisconsin's income tax laws, contained in ch. 71, Stats., give the authority and power to assess personal income tax liability

to the Department of Revenue. Section 71.01(1), Stats., provides that: "Every natural person domiciled in the state shall be deemed to be residing within the state for purposes of determining liability for income taxes and surtaxes."

Section 71.10(2)(a)5., Stats., further provides:

> "For the 1977 calendar year or corresponding fiscal year and thereafter:
>
> a. Every natural person domiciled in this state during the entire taxable year having gross income of $3,200 or more if under 65 years of age [is required to file returns] . . . ."

Petitioners were residents of Janesville, Wisconsin, during the tax years 1980, 1981 and 1982. When the Department of Revenue received Petitioners' incomplete tax forms for t ese years, it notified Petitioners that the forms, as submitted, did not constitute filing of Wisconsin income tax returns as required by statute.

Petitioners were requested to file proper returns for 1980, 1981 and 1982, which were to meet the following two criteria: (1) the forms were to contain sufficient information to determine whether tax liability existed; and (2) the forms were to be signed. The Department advised Petitioners that sec. 71.10(2)(c), Stats., allows the Department to require "any person other than a corporation to file an income tax return when in the judgment of the Department a return should be filed."

Petitioners' refusal to respond to the Department's requests for a complete and accurate filing of returns allowed the Department to assess their individual tax liability under sec. 71.11(4), Stats.,

for each of the three years. This statutory section states:

> "DEFAULT ASSESSMENT. Any person required to make an income or franchise tax return, who fails, neglects or refuses to do so in the manner and form and within the time prescribed by this chapter, or makes a return that does not disclose the person's entire net income, shall be assessed by the department according to its best judgment."

Petitioners' argument that income has not been defined is frivolous since "income" has been defined already by the statutes. Section 71.10(2)(d), Stats., specifies that the word "gross income," as used in personal income tax statutes, includes compensation for services, including salaries, wages and fees.

Petitioners' contention that they did not grant jurisdiction to the Commission is meritless since they submitted to the Commission's jurisdiction by filing an appeal under secs. 71.12(1)(c) and 73.01(5), Stats.

Since the term "income" is defined by statute and since the Department acted according to the procedures specified in those statutes, the Department had the authority to issue the challenged assessments.

Petitioners' next contention is that the Commission did not have sufficient evidence to affirm the Department's assessment.

This contention is frivolous and without merit.

The Commission is given final authority to hear and determine all questions of law and fact arising in appeals from tax assessments made by the Department. Sec. 73.01(4), Stats. Further, sec. 71.12(3), Stats., provides that persons questioning such assessments must make ". . . full disclosure under oath at the

hearing before the tax appeals commission of any and all income received. . . ." The Petitioners failed to make any disclosure under oath at the Hearing held March 7, 1984, as to income received by them during 1980, 1981 and 1982. Therefore, Petitioners failed to meet the full disclosure requirement of sec. 71.12(3), Stats.

Failure to make full disclosure under oath of all income received during the tax years in question constitutes a failure of petitio ers to meet their burden of proof. In Woller v. Department of Taxation, 35 Wis.2d 227, 232-33, 151 N.W.2d 170 (1967), the Wisconsin Supreme Court stated that when an income tax assessment is disputed, the burden of proof is on the taxpayer to show error in the assessment because the assessment is presumed to be correct. Id. at 232. The Court determined that the taxpayer's failure to present any evidence showing error means the case must be decided against the taxpayer. Id. at 233. See also Skaar v. Department of Revenue, 61 Wis.2d 93, 101, 211 N.W.2d 642 (1973), cert. denied, 416 U.S. 906 (1974).

Petitioners failed to present any evidence indicating the Department's assessment was in error. Therefore, the assessment made by the Department against Petitioners is presumed to be correct.

Petitioners' third contention is that the Commission had no authority to grant the Department's Motion For Summary Judgment, and instead should have granted Petitioners' Motion For Additional Time for interrogatories.

This contention is frivolous and without merit.

Section 73.01(4)(b), Stats., provides that Hearings held before the Tax Appeals Commission are open to the public and are conducted in accordance with rules of practice and procedure prescribed by the Commission. Section T.A. 1.39 Wis. Adm. Code states:

> "Practice and procedures. (s. 73.01(4)(d), Stats.) Except as provided in s. TA 1.53, the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state."

Circuit courts have the authority under sec. 802.08(2), Stats., to grant Summary Judgment where

> ". . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Motion must be served at least twenty days before the time fixed for the Hearing, and the adverse party may serve opposing affidavits prior to the day of Hearing. The Department's attorney properly served the Motion For Summary Judgment, along with the supporting affidavit, on January 20, 1984. The Hearing was held March 7, 1984; therefore, the twenty-day notice requirement was met.

If Petitioners felt that the objections made by the Department's attorney were inadequate, then Petitioners could have requested the Commission to issue an Order compelling discovery under sec. 804.12(1), Stats. However, Petitioners failed to provide any notice whatsoever to the Commission that they had served

interrogatories on the Department. Further, they failed to request the Commission to compel answers until the March Hearing date.

After hearing oral argument from both sides on March 7, 1984, the Commission rendered a unanimous decision granting Respondent's Motion For Summary Judgment. The Commission determined that good and sufficient cause existed for granting the Department's Motion because Petitioners failed to meet the burden of proof necessary to overcome the presumption that the tax assessment was correct. Further, Petitioners failed to set forth sepcific facts showing that there was a genuine issue to be tried, as required by sec. 802.08(3), Stats. The Commission determined that there was no legitimate legal purpose to be served in compelling a response to Petitioners' list of interrogatories, and denied Petitioners' Motion. Because it granted the Department's Motion For Summary Judgment, the Commission saw no good or sufficient cause to grant the Petitioners' Motion, and properly denied additional time for interrogatories.

The Commission is an independent tribunal exercising a quasi-judicial function. Sawejka v. Morgan, 56 Wis.2d 70, 76, 201 N.W.2d 528 (1972). Section 73.01(4), Stats., specifically gives the Commission a broad grant of authority to hear and determine all questions of law and fact arising under the tax laws of the state, except as may be otherwise expressly delegated. Id. at 75. The Commission is, in effect, a state tax court. 49 Wis. Bar. Bull. 48, 49-51 (1976).

The Commission properly reviewed all questions of law and

fact presented by both Petitioners and Respondent, and rendered a Decision after hearing oral arguments on both Motions. Because the undisputed evidence established the legal basis for the Department's Motion For Summary Judgment, that Motion was properly granted by the Commission and no purpose would have been served by granting Petitioners additional time.

Petitioners' fourth claim is that wages do not constitute income under Wisconsin's income tax law.

This contention is frivolous and without merit.

Wisconsin has adopted, for purposes of income taxation, the definitions of income found in the Federal Internal Revenue Code. See sec. 71.02(2), Stats. Section 61(a) of the 1954 Internal Revenue Code defined "gross income" for tax purposes as "all income from whatever source derived." This definition includes wages. See Treas. Reg. § 1.61-2(a)(1). Thus, in affirming the conviction of a taxpayer on the charge of willful failure to file a tax return, the United States Ninth Circuit Court of Appeals summarily rejected the taxpayer's contention that wages were not income citing the above regulation and stating:

> "As for Buras' argument that he may not be taxed because he is a wage earner, the Sixteenth Amendment is broad enough to grant Congress the power to collect an income tax regardless of the source of the taxpayer's income. United States v. Russell, 585 F.2d 368, 370 (8th Cir. 1978); United States v. Silkman, 543 F.2d 1218, 1220 (8th Cir. 1976), cert. denied 431 U.S. 919, 97 S. Ct. 2185, 53 L.Ed.2d 230 (1977)." United States v. Buras, 633 F.2d 1356, 1361 (1980).

The very same argument was rejected in Daniel T. Betow v. Wisconsin Department of Revenue, Wisconsin Tax Appeals Commission,

Docket No. I-8737, CCH Wisconsin Tax Reporter, New Matters (Part 2), 1979-1982, paras. 202-032 (June 10, 1982), aff'd, Rock County Circuit Court, Branch 5, Case No. 82-CV-311 (January 14, 1983), aff'd, Court of Appeals District IV, Case No. 83-264 (November 22, 1983).

The Petitioners' fifth contention is that federal reserve notes are not legal tender for purposes of the income tax.

This contention is frivolous and without merit.

> "Federal statutes prescribe the money which shall constitute legal tender, [31 USC §§ 451 et seq., Annotation: 31 ALR 246.] and by the so-called 'gold standard' legislation of 1933 and 1934, Congress has undertaken to establish a uniform currency, to make that currency legal tender for the payment of debts, and to reject a dual, that is, a bimetal, system. All coins and currencies of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations, are legal tender for the payment of public debts, public charges, taxes, duties, and dues." 54 Am. Jur. 2d, Money, § 22.

The argument that the only income which can be taxed is that paid in gold or silver coin has been found frivolous by the United States Court of Appeals for the Eighth Circuit. As stated by that Court in the per curiam opinion in United States v. Daly, 481 F.2d 28, 30 (8th Cir. 1973), upholding a conviction for the willful failure to file an income tax return:

> "Defendant's fourth contention involves his seemingly incessant attack against the federal reserve and monetary system of the United States. His apparent thesis is that the only 'Legal Tender Dollars' are those which contain a mixture of gold and silver and that only those dollars may be constitutionally taxed. This contention is clearly frivolous. See Koll v. Wayzata State Bank, 397 F.2d 124 (8th Cir. 1968)."

Wisconsin has also recently rejected the contention that only gold and silver coin are legal tender. Kauffman v. Citizens State Bank of Loyal, 102 Wis.2d 528, 531-33, 307 N.W.2d 325 (Ct. App. 1981), stated in part:

> "Congressional Joint Resolution 192, dated June 5, 1933, now 31 U:S.C. sec. 463, suspended the gold standard in the United States and the right of the obligee of a debt to require payment in gold. Congress made federal reserve notes legal tender for all debts, public and private, 31 U.S.C. sec. 392. Conceding that Congress may make federal reserve notes legal tender in transactions involving the federal government, appellant contends that only gold and silver coin, or currency redeemable in such, is lawful as between private persons under this state's laws and the United States Constitution.
>
> Article I, sec. 10 of the United States Constitution, provides in relevant part, 'No state shall . . . make any thing but gold and silver coin a tender in payment of debts.' Article I, sec. 10 prohibits the states from declaring legal tender anything other than gold or silver, but does not limit Congress' power to declare what shall be legal tender for all debts. Julliard v. Greenman, 110 U.S. 421, 446-50 (1884). See also United States v. Rifen, 577 F.2d 1111, 1113 (8th Cir. 1978); Chermack v. Bjornson, 302 Minn. 213, 223 N.W.2d 659 (1974), cert. denied 421 U.S. 915 (1975).
>
> As stated in Norman v. Baltimore & O. R. Co., 294 U.S. 240, 303 (1935), because the constitution was designed to provide the same currency having a uniform value in all of the states:
>
> [T]he power to regulate the value of money was conferred upon the Federal government, while the same power . . . was withdrawn from the States. The States cannot declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in the Congress. (Emphasis added.)
>
> Congress has declared that federal reserve notes are legal tender for all debts, public and private. 31 U.S.C. sec. 392. That section is well within

the constitutional authority of Congress. United States v. Wangrud, 533 F.2d 495, 495-96 (9th Cir.) cert. denied 429 U.S. 818 (1976).

Federal reserve notes are legal tender in Wisconsin, not by any law of this state, but because Congress has made them legal tender throughout these United States."

It is not necessary that wages be paid either in gold or silver to be taxable in the State of Wisconsin. Wages received in any form of legal tender are subject to taxation.

Petitioners' sixth contention is that they have a valid Fifth Amendment claim against the Department.

This final contention is frivolous and without merit.

The income tax laws of the state and federal governments are premised upon a self-assessment reporting system whereby the taxpayer voluntarily reports income, determines the tax to be assessed thereon and pays the same. The Petitioners' argument proceeds from the incorrect premise that their total refusal to provide any financial information in order to preclude the assessment in income taxes against them can effectively thwart the state and federal tax systems. The Petitioners claim they are attempting to shield themselves from prosecution for failure to file by making a blanket constitutional challenge to State tax laws. The Commission's Decision rejecting Petitioners' Fifth Amendment challenge, in a like fact situation to the case here, was upheld in Paul W. and Yvonne D. Christian v. Wisconsin Department of Revenue, Marathon County Circuit Court, Branch IV, Case No. 82-CV-1208 (May 4, 1984).

The federal courts have effectively addressed the Fifth Amendment challenge in cases involving failure to file United States returns. A blanket challenge to the tax laws based upon a Fifth Amendment privilege was asserted in a recent case, Gimelli v. United States, 84-1 U.S.T.C. par. 9289 (CCH) (E.D. La., February 17, 1984). In Gimelli, as here, the purported return contained no information regarding income, deductions or tax owed, if any, but rather asserted a "Fifth Amendment" challenge on the form. The Gimelli court held:

> "The Fifth Circuit recently reaffirmed its position that a taxpayer may not make a blanket claim of the constitutional objections as a basis for refusing to provide any financial data on his federal income tax return. See Beatty v. Commissioner, [82-1 USTC §9204], 667 F.2d 501 (5th Cir. 1982). In Beatty, the Court held that the Fifth Amendment does not justify a refusal to provide any financial information on a tax return, and where the information provided on a purported return is so incomplete that tax liability cannot be computed, the filed document does not even constitute a tax return. Id. at 502. See also, [citations] (1040 forms which lack financial data and invoke Fifth Amendment privilege are not returns within the meaning of the Internal Revenue Code) [citations]."

Recent Seventh Circuit decisions have also held that the mere unsupported assertion of a Fifth Amendment privilege against self-incrimination on an income tax return is not adequate justification for failure to file a tax return. United States v. Verkuilen, 690 F.2d 648, 654 (7th Cir. 1982); United States v. Stout, 601 F.2d 325, 328 (7th Cir.), cert. denied, 444 U.S. 979 (1979); United States v. Jordan, 508 F.2d 750, 752 (7th Cir.), cert. denied, 423 U.S. 842 (1975). The Court in Verkuilen, 690 F.2d at 654, held

that taxpayers must show a "colorable claim" or involvement in activities for which they would be criminally prosecuted as a direct result of disclosing income information on a tax return. Since Petitioners failed to demonstrate the existence of such a claim, the Fifth Amendment privilege does not provide them an effective shield.

An individual must show more than a "mere possibility of incrimination" in order to assert a valid Fifth Amendment claim. California v. Byers, 402 U.S. 424, 427 (1971). See also In Matter of Grant, 83 Wis.2d 77, 81, 264 N.W.2d 587 (1978). The Fifth Amendment privilege protects only against real or appreciable danger, not against vague assertions of speculative consequences faced by furnishing income information. Stuart v. Department of Finance and Administration, 598 F.2d 1115, 1116 (8th Cir. 1979). In United States v. Neff, 615 F.2d 1235, 1239 (9th Cir. 1980), the Court specifically held that the requirement of filing tax returns does not violate the Fifth Amendment. The Third Circuit Court of Appeals reached the same conclusion and added: "A vague possibility of prosecution for tax fraud may not properly be used as an excuse for engaging in a course of conduct that itself amounts to tax fraud." United States v. Edelson, 604 F.2d 232, 235 (3rd Cir. 1979). See also United States v. Sullivan, 274 U.S. 259, 263 (1927).

The Petitioners here have not established a valid legal basis for claiming the Fifth Amendment privilege for the tax years in question. Instead, they claim to be "Free and Natural Persons" who

have no tax liability to the State. "Political or social protest does not constitute a valid legal justification for failure to file a tax return containing sufficient information as required by law from which the tax can be computed." Verkuilen, 690 F.2d at 654. The Fifth Amendment claim is wholly invalid.

COSTS UPON FRIVOLOUS CLAIMS

The Court has found all of the Petitioners' contentions to be frivolous because they are wholly without merit or any reasonable basis in law. Petitioners should have known that these contentions could not be supported by a good faith argument for an extension, modification or reversal of existing law. The Court will, therefore, award costs and reasonable attorneys fees to the Respondent, under the provisions of sec. 814.025, Stats.

Respondent may submit an affidavit documenting its costs and reasonable attorneys' fees solely attributable to this action for inclusion in the Judgment. The Court will, upon Notice to the parties, review that affidavit and after Hearing determine the amount to be awarded. See Christian v. Wisconsin Department of Revenue, Marathon County Circuit Court, Branch IV, Case No. 82-CR-1208 (May 4, 1984).

THE COURT'S ORDER

IT IS ORDERED:

That a Judgment be entered, pursuant to the provisions of

sec. 227.20(2), Stats., affirming the Ruling And Order of the Wisconsin Tax Appeals Commission, dated March 26, 1984, which granted the Department's Motion For Summary Judgment and dismissed the Petitioners' Petition For Review of assessments of income tax liability for taxable years 1980-1982.

IT IS FURTHER ORDERED:

That the Department, pursuant to the provisions of sec. 814.025, Stats., be awarded its costs and reasonable attorneys' fees in this action in an amount to be determined by the Court.

Dated this 30th day of November, 1984.

BY THE COURT:

J. Richard Long

J. Richard Long, Circuit Judge