NATIONAL PRESTO INDUSTRIES INC 9511269 081596 TAC

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STATE OF WISCONSIN

TAX APPEALS COMMISSION

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NATIONAL PRESTO INDUSTRIES, INC. *
3925 N. Hastings Way
Eau Claire, WI 54703 * DOCKET NO. 95-I-1269

Petitioner, *

vs. * **RULING AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE *
P.O. Box 8933
Madison, WI 53708 *

Respondent. *

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MARK E. MUSOLF, COMMISSION CHAIRPERSON, JOINED BY DON M. MILLIS, COMMISSIONER:

This matter is before us on respondent's motion to dismiss for lack of jurisdiction. Representing the parties on briefs are Attorney Robert A. Schnur for petitioner and Attorney Michael J. Buchanan for respondent.

Having considered the submissions of the parties, including affidavits with exhibits, we rule and order as follows, granting the respondent's motion:

FACTS

1. By notice of field audit action dated November 4, 1992, the petitioner was notified that, as a result of a franchise tax field audit conducted by the respondent for the years 1985, 1986, and 1987, the petitioner was entitled to a franchise tax refund in the amount of $235,961.81 including interest computed to November 20, 1992. This refund was the result of additional franchise tax and interest of $61,150.88 for 1985 and $24,926.85

for 1986, together with a tax overpayment of $322,039.54 for 1987. The field audit action letter further advised petitioner of its right to appeal the field audit action to the respondent within 60 days, pursuant to § 71.88(1), Stats.

2. The petitioner accepted receipt of the payment of the refund as a result of the field audit and did not file a petition for redetermination within 60 days, or at any other time, with the respondent pursuant to § 71.88(1), Stats.

3. By letter dated September 13, 1994 and an amended 1985 Wisconsin tax return Form 4-X, the petitioner filed with the respondent a claim for refund in the amount of $12,448.00.

4. By letter dated November 10, 1994, the respondent notified the petitioner that its claim for refund of $12,448.00 for the year 1985 was "rejected" because of the prohibition contained in § 71.75(4), Stats., and its failure to fall within the exception provided in § 71.75(5). This letter was sent by ordinary mail and contained no explanation of petitioner's appeal rights.

5. The next response the respondent received from the petitioner was a letter dated June 13, 1995, disputing respondent's reasons for rejecting the refund claim.

6. Under date of June 29, 1995, respondent sent petitioner a letter wherein it further informed the petitioner of the reasons why it could not act on petitioner's claim for refund or petition for redetermination (to the extent the June 13, 1995 letter from petitioner could be considered such a petition).

7. On August 30, 1995, petitioner filed a petition for

review with this commission.

WISCONSIN STATUTES INVOLVED

71.75 Claims for refund.

(1) Except as provided in ss. 46.255, 71.77(5) and (7)(b) and 71.93, the 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.

* * *

(4) Except as provided in subs. (5) and (5m), no refund shall be made and no credit shall be allowed for any year that has been the subject of a field audit if the audit resulted in a refund or no change to the tax owed or in an assessment that is final under s. 71.88(1)(a) or (2)(a), 71.89(2), 73.01 or 73.015 and if the department of revenue notifies the taxpayer that unless the taxpayer appeals the result of the field audit under subch. XIV, the field audit is final. ...

(5) A claim for refund may be made within 2 years after the assessment of a tax ... assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination. ...

71.88 Time for filing an appeal.

(1) APPEAL TO THE DEPARTMENT OF REVENUE.

(a) Contested assessments and claims for refund. ... any 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. ...

RULING

Respondent rejected petitioner's claim for refund because § 71.75(4), supra, prohibits it. Petitioner, however, claims it falls under the exception to 71.75(4) which is set forth in § 71.75 (5), supra, which allows a claim for refund "within 2 years after

the assessment of a tax ..." The bone of contention is whether the additional franchise tax determined to be due for 1985, which was one year of the three-year field audit that resulted in a refund of $235,961.81, qualifies as an "assessment" for purposes of the exception to § 71.75(4).

Section 71.75(4) specifically denies a claim for refund for any year that has been the subject of a field audit if the audit resulted in a refund. This is unambiguous statutory language which clearly applies here because 1985 was "a year which was the subject of a field audit," and the audit "resulted in a refund" of $235,961.81.

On the other hand, the exception in § 71.75(5) allows filing a claim for refund, but only after the assessment of a tax by field audit. This subsection is also unambiguous. The field audit here assessed no tax; it granted a refund for the audit period. True, the audit found additional tax and interest due for 1985, a part of the audit period, but that was not an "assessment" within the meaning of § 71.75(5) because the audit granted a refund.

The logic and harmony of §§ 71.75(4) and (5) are evident: (4) prohibits a refund claim after an audit which granted a refund, whereas (5) allows a refund claim after an audit which assessed tax, but only where the taxpayer pays the tax and does not petition for redetermination. Both subsections allow the taxpayer only one opportunity for redress in the wake of an audit: a petition for redetermination or a claim for refund, but not both.

Were we to interpret § 71.75(5) to allow the exception petitioner urges, the obvious purpose of audit finality evident in § 71.75(4) would be emasculated. That is why § 71.75(4) applies only where, as is undisputed here, the petitioner was notified of its appeal rights when it received the Notice of Field Audit Action granting a refund. Those appeal rights included the right to appeal any audit item, including the amount of tax determined for 1985, which petitioner chose not to contest. Having had its statutory opportunity to petition for redetermination of the audit findings, petitioner now wants a second kick at the cat, which is not authorized by either § 71.75(4) or (5) and would not result in a harmonious construction of those two subsections. See, Midcontinent Broadcasting Co. v. Dept. of Revenue, 91 Wis.2d 579, 592 (Ct. App. 1979).

Our conclusion here that the terms "assessment" and "refund" apply only to the ultimate audit result and not to individual years or periods which were part of the audit transaction is also consistent with past decisions interpreting other statutes dealing with assessments and refunds.[1]

Having determined that petitioner was prohibited by statute from making a refund claim for 1985, we address the petitioner's assertion that respondent improperly "rejected" its refund claim without advising petitioner of its appeal rights.

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[1] Lotzer v. WDOR, CCH Wis. Tax Rptr. ¶ 203-260 (WTAC 1991, nonacq.), which embraced the Supreme Court's approach in American Motors Corp. v. Dept. of Revenue, 64 Wis.2d 337, 351-3 (1974).

Under these circumstances, where the petitioner was previously advised of its appeal rights within the Department when it received the audit result, which petitioner declined to exercise, the respondent was by statute prohibited from granting petitioner additional appeal rights other than to this commission, which respondent did.

Accordingly, petitioner's attempt to invoke either § 227.48(2), Stats., or the doctrine of equitable estoppel is obviated by respondent's having notified petitioner of its appeal rights pursuant to § 71.88(1), Stats., in the Notice of Field Audit Action following the audit under review, which included the year 1985.

Because the petitioner's claim for refund is barred by § 71.75, Stats., the respondent is entitled to dismissal of the petitioner's petition for review because it fails to state a claim upon which relief can be granted by this commission.

ORDER

The respondent's motion is granted; the petition for review is dismissed.

Dated at Madison, Wisconsin, this 15th day of August, 1996.

WISCONSIN TAX APPEALS COMMISSION

Mark E. Musolf, Chairperson

(Dissents)
Joseph P. Mettner, Commissioner

Don M. Millis, Commissioner

ATTACHMENT: "Notice of Appeal Information"

METTNER, COMMISSIONER, DISSENTING:

For the reasons set forth below, I respectfully dissent from the Ruling and Order of the Commission majority granting the respondent's motion to dismiss in this case.

It is perhaps cruel understatement to say that the position of the respondent adopted by the Commission in this matter results in the department "having its cake and eating it too," for it also appears that the respondent wishes in this case to revisit the main course and take one last turn through the kitchen to pick over the hors d'oeuvre tray.

Unless the exception provided under § 71.75(5), Stats., applies, refund claims are precluded under § 71.75(4) "for any year that has been the subject of a field audit if the audit resulted in a refund or no change to the tax owed or in an assessment that is final under s. 71.88(1)(a) or (2)(a), 71.89(2), 73.01 or 73.015 ..." (emphasis added)

The relevant authority concerning finality of the respondent's actions is found in § 71.88(2)(a), Stats., which provides "If a petition [for review] is not filed with the [Tax Appeals] 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 of refund shall be final and conclusive." (emphasis added)

As noted above, in § 71.75(5), Stats., an exception is provided to the general rule of § 71.88(1)(a) and (2)(a), Stats., that the respondent's actions are considered final and conclusive

upon the expiration of the deadline for filing a petition for redetermination. Under this statute, "A claim for refund may be made within 2 years after the assessment of a tax ... assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination."

Clearly, the respondent's action in this case with respect to the 1985 tax year constituted "the assessment of a tax," which, after all, is nothing more that a properly noticed adjustment increasing the taxpayer's liability for a given tax year. This amount was assessed upon field audit and was paid when the respondent offset the additional tax liability with the amount of refunds due for the 1986 and 1987 tax years, lowering the net refund due the petitioner in the final audit action. The petitioner has not filed a petition for redetermination challenging the respondent's actions on audit. Thus, one might assume, a 2-year window should be available after the respondent's adjustment within which the petitioner might, as it has, file a refund claim with respect to the additional tax determined to be due for 1985.

Unfortunately for the petitioner, the respondent and the Commission majority tell us this is not the case.

The difficulty of statutory interpretation in this case rests in the respondent's narrow and excessively formalistic view of § 71.75(4) and (5), namely that an adjustment made to any tax year in an audit ultimately resulting in a refund check being issued to a taxpayer is subject to appeal only through the filing of a timely petition for redetermination, with no subsequent 2-year

window of opportunity available to the taxpayer for the filing of a refund claim.

Reasonable people may differ as to whether the scheme of § 71.75(4), Stats., should be read to apply to discrete tax years or to a global audit action by the respondent. It is the Commission's position that the preclusive scheme of subsection (4) applies to the audit in toto as opposed to individual tax years. Even if this is true, however, the distinctly worded language of the exception found in subsection (5) (the so-called 2-year window provision) must be considered. As the petitioner has observed, it is not necessary -- or perhaps even permissible -- to read §§ 71.75(4) and 71.75(5), Stats., as mutually exclusive where both provisions touch upon the facts at hand. It simply doesn't matter whether the liability associated with this assessment, when offset by refunds due for other years under audit, created a net refund for the taxpayer. This is because the audit also resulted in an assessment (the increase of the 1985 tax liability) which is not "final," rendering the preclusive language of § 71.75(4), Stats., inapplicable.[2]

Even though the petitioner qualifies under the conditions set forth in § 71.75(5), Stats., the respondent and this commission have somehow read the exception out of the petitioner's reach in

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[2] The key here is the incorporation of § 71.75(5) by reference in the language of § 71.88(2)(a) describing the conditions necessary for an action of the respondent to become "final and conclusive." In other words, if a taxpayer qualifies under the conditions of § 71.75(5) to file a refund claim, the action of the respondent is not final, allowing a revisitation of the action for purposes of filing the refund claim within the 2-year window.

the name of audit finality, which, we are told, would be "emasculated" by allowing the petitioner to file a refund claim for 1985. If this is emasculation -- and I sincerely doubt that it is -- it is an emasculation in which the legislature has clearly conspired, for the offending dagger may be found in the first sentence of § 71.75(4), Stats.

As the petitioner has observed, if the actions of the respondent in this case had resulted in three actions (one assessment and two refunds), there would be no argument that the 2-year window for the filing of a refund claim would be available to the petitioner for the 1985 tax year. Such would be the case without any offense to, or evisceration of, policies of audit finality.

For the reasons set forth above, I would deny the respondent's motion to dismiss in this matter.

Respectfully submitted,

Joseph P. Mettner, Commissioner

WISCONSIN TAX APPEALS COMMISSION

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes. **The petition must be filed in circuit court and served upon the Wisconsin Tax Appeals Commission and the Department of Revenue** within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) **The petition for judicial review should name the Department of Revenue as respondent.**

This notice is part of the decision and incorporated therein.