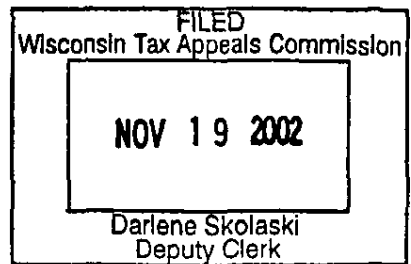


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STATE OF WISCONSIN  
TAX APPEALS COMMISSION

ANDRE O. HASTINGS  
17157 Oriole Road  
Fort Meyers, FL 33912-5111,

DOCKET NO. 02-I-216

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE  
P.O. Box 8907  
Madison, WI 53708-8907,

Respondent.



THOMAS M. BOYKOFF, COMMISSIONER:

This case comes before the Commission on the motion of respondent Wisconsin Department of Revenue ("Department") to dismiss petitioner's petition for review on the following grounds:

1. The Commission lacks authority under Wis. Stat. § 73.01(4) to review questions of law and fact in regard to the imposition of delinquent interest under Wis. Stat. § 71.82(2) and the imposition of the delinquent account fee under Wis. Stat. § 73.03(33m), because the imposition of delinquent interest and the delinquent account fee to a delinquent tax account both occur by operation of statute and are areas of administrative activity of the Department that do not fall within the jurisdiction of the Commission designated in Wis. Stat. § 73.01(4);
2. The petition for review fails to state a claim upon which relief can be granted;
3. The petition for review does not allege any justiciable error by the Department in denying petitioner's claim for refund;

4. The collecting of delinquent accounts is an administrative activity of the Department that is not within the jurisdiction of the Commission; and

5. There exists no legal basis on which to grant relief to petitioner.

Christopher H. Graham, CPA, of Keller & Owens, LLC, Overland Park, Kansas, represents petitioner. Attorney Michael J. Buchanan represents the Department.

With its motion, the Department filed an affidavit, with exhibits, and a brief. Petitioner has not filed a reply.

Having considered the entire record, the Commission finds, rules, and orders as follows:

#### FACTS

1. Under date of December 26, 2000, the Department issued an income tax assessment to petitioner covering tax years 1997 and 1998 ("period under review") for \$50,720.92, consisting of income tax, interest, and penalties. The assessment was not appealed or paid, and became delinquent on February 26, 2001.

2. Under date of May 2, 2001, petitioner paid the Department \$56,021 in full payment of the delinquent assessment. The payment included income tax (\$40,278), underpayment interest (\$404), delinquent account fee (\$3,299), late payment interest (\$10,039), and delinquent interest (\$2,001). The last four items were "Paid Under Protest."

3. The May 2, 2001 letter accompanying the above payment requested

a refund of the underpayment interest, delinquent account fee, regular interest, and delinquent interest, totaling \$15,743. The Department deemed the request a claim for refund.

4. Under date of August 8, 2001, the Department denied the refund claim.

5. Under date of August 17, 2001, petitioner filed a petition for redetermination.

6. Under date of May 17, 2002, the Department denied petitioner's petition for redetermination.

7. Petitioner filed a timely appeal to the Commission, appealing only the denial of his claim for refund of the delinquent account fee and the delinquent interest.

#### RULING

In his petition for review, petitioner appealed only two portions of the Department's assessment: the delinquent account fee (\$3,299) imposed under Wis. Stat. § 73.03(33m) and the delinquent interest (\$2,001) imposed under Wis. Stat. § 71.82(2). He did not appeal the income tax, underpayment interest, or late payment interest. Further, petitioner does not dispute that the tax which is covered by the assessment before us is delinquent.

#### Delinquent Account Fee

The statute imposing the delinquent account fee (referred to as the "collection fee" by petitioner), § 73.03 (33m) reads, in part, as follows:

73.03 Powers and duties defined. It shall be the duty of the department of revenue, and it shall have power and authority:

\* \* \*

(33m) To collect, as taxes under ch. 71 are collected, from each person who owes to the department of revenue delinquent taxes, fees, interest or penalties, a fee for each delinquent account equal to \$35 or 6.5% of the taxes, fees, interest and penalties owed as of the due date specified in the assessment, notice of amount due or notice of redetermination on that account, whichever is greater. . . .

The above-quoted statute directs the Department to impose and collect the delinquent account fee from each person who owes the Department delinquent fees, interest or penalties. Petitioner does not dispute that he owes the Department delinquent fees, interest, and penalties. Therefore, the Department is clearly required, by law, to impose the fee at issue.

Petitioner asserts that he was a professional football player for the New Orleans Saints during the period under review; that his employer incorrectly provided him with a W-2 form for each year reporting less Wisconsin income than was actually taxable; that upon receiving the Department's assessment, he contacted tax professionals to clarify the correct amount of tax; that once he learned of the error, he filed amended income tax returns; and that he "did not willfully delay paying his taxes."<sup>1</sup>

The Commission has no reason to doubt petitioner's genuine efforts to pay the correct tax, nor to question that he made no willful delay. However, § 73.03(33m) provides no exceptions. Each person who owes delinquent taxes, interest or penalties is

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<sup>1</sup> Petitioner's petition for review, p. 3.

required to pay the delinquent account fee. Petitioner falls under the statute's coverage. Therefore, the Department acted within its authority.

Statutory interpretation begins with the language of the statute. *Alberte v. Anew Health Care Services, Inc.*, 232 Wis. 2d 587, 592 (2000). A statute which is not ambiguous must be applied as written, without examining its legislative history, context or application. *State v. Waalen*, 130 Wis. 2d 18, 24 (1986).

The statute under review is not ambiguous. We hold that the Department applied the statute correctly. Therefore, the Department's application of § 73.03(33m) cannot be overturned.

The Commission cannot rewrite the subject statute. Even if we believed the statute to be unfair, we cannot go beyond legitimate construction when, as here, the meaning is plain and not ambiguous. See *In Interest of G. & L.P.*, 119 Wis. 2d 349, 354 (Ct. App. 1984), and *State v. Hall*, 207 Wis. 2d 54, 82 (1997). The Department correctly imposed the delinquent account fee here.

#### Delinquent Interest

Each natural person's income tax is due on the April 15th following the close of a calendar year. See § 71.03(8)(b). Therefore, petitioner's 1997 and 1998 income taxes were due on April 15, 1998 and April 15, 1999, respectively.

Income tax becomes delinquent if not paid when due. See §§ 71.82(2)(a) and 71.91(1)(a). Further, "when delinquent [tax] shall be subject to interest at the rate of 1.5% per month until paid." Wis. Stat. § 71.82(2)(a). Since petitioner did not pay the full amount of income tax, the Department was directed, by statute, to impose delinquent

interest at the rate of 18% per year.<sup>2</sup>

The statute under review clearly requires the Department to impose delinquent interest when income taxes are delinquent. Under the same rationale as the analysis above, the Commission cannot order the Department to refund delinquent interest to petitioner.

The Commission reached the same conclusion, that the Department's imposition of delinquent interest was mandated by statute, and refused to reduce or overturn it in *Eugene C. Trimble v. Dep't of Taxation*, Wis. Tax Rptr. (CCH) ¶ 200-357 (1967); *Marie L. Menacher v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-421 (1984); and *John R. Worley and Mary Worley v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-571 (1985), *rehearing denied* (WTAC Aug. 7, 1985).

The Commission rules that petitioner has failed to state a claim upon which relief can be granted pursuant to Wis. Stat. § 802.06(2)(a)6. Because the case is resolved on this basis, we need not address the other four bases included in the Department's motion.

**IT IS ORDERED**

The Department's motion to dismiss the petition for review is granted on the ground that the petition fails to state a claim upon which relief can be granted

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<sup>2</sup> It is not clear if petitioner knows of or has availed himself of § 71.82(2)(b), which requires the Department to provide, by administrative rule, for reduction of 18% interest to 12% interest per year in stated instances when the secretary of the Department determines that reduction to be fair and equitable.

