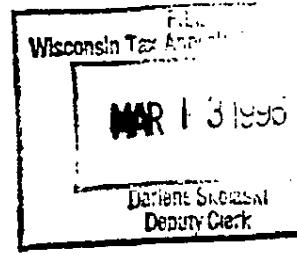


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STATE OF WISCONSIN
TAX APPEALS COMMISSION

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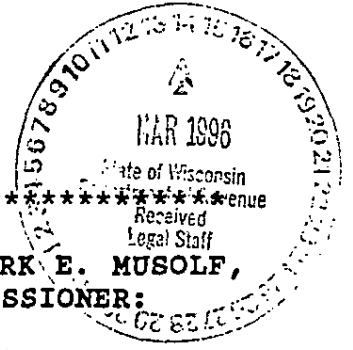
ARTHUR A. and BETTY L. VAN AMAN *
10546 Granada Dr. *
Sun City, AZ 85373 * DOCKET NO. 95-I-1219

Petitioners, *

vs. * DECISION AND ORDER

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

Respondent. *



DON M. MILLIS, COMMISSIONER, JOINED BY MARK E. MUSOLF,
COMMISSION CHAIRPERSON, AND JOSEPH P. METTNER, COMMISSIONER:

The above-entitled matter was heard in LaCrosse, Wisconsin on November 6, 1995. Written briefs were submitted by the parties following the conclusion of the hearing. Petitioners represented themselves, and respondent was represented by Attorney Kevin B. Cronin.

FINDINGS OF FACT

1. Petitioners are Wisconsin residents who moved to this state in February of 1990.
2. Prior to their retirement and prior to their move to Wisconsin, both petitioners were employed as public school teachers in the state of Illinois.
3. During the years 1990 through 1993, petitioners received annuity payments from a public employee retirement system in Illinois ("Illinois annuity payments").
4. When filing their Wisconsin income tax returns for

the years 1990 through 1993, petitioners included their Illinois annuity payments and paid tax thereon.

5. In November of 1994, petitioners filed a claim for refund for tax years 1990 through 1993, asserting that the Illinois annuity payments are exempt pursuant to § 71.05(1)(a), Stats. The aggregate amount of their claim for refund is \$13,580.82.

6. Under the date of January 6, 1995, respondent denied petitioners' claim for refund.

7. Under the date of January 16, 1995, petitioners filed a timely petition for redetermination.

8. Under the date of July 14, 1995, respondent denied the petition for redetermination.

9. On August 1, 1995, petitioners filed a petition for review with the Commission.

APPLICABLE WISCONSIN STATUTES

71.05 Income computation.

(1) EXEMPT AND EXCLUDABLE INCOME. There shall be exempt from taxation under this subchapter the following:

(a) Retirement systems. All payments received from the U.S. civil service retirement system, the U.S. military employe retirement system, the employe's retirement system of the city of Milwaukee, Milwaukee county employe's retirement system, sheriff's annuity and benefit fund of Milwaukee county, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employe trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers 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, or was retired from any of the systems or funds as of December 31, 1963, but such exemption shall not exclude from gross income tax sheltered annuity benefits.

CONCLUSIONS OF LAW

1. Petitioners do not qualify for the exclusion under § 71.05(1)(a), Stats., because there is no evidence that they were members of any retirement system on December 31, 1963.

2. The failure of § 71.05(1)(a), Stats., to exclude payments from an Illinois public employee retirement system is neither unconstitutional under Davis v. Michigan, 489 U.S. 803 (1989), nor a violation of equal protection.

OPINION

Petitioners raise a single issue for consideration: Does § 71.05(1)(a), Stats., impermissibly discriminate against persons receiving payments from public employee retirement systems sponsored by other states?

Petitioners bear the burden to demonstrate that respondent's denial of their claim for refund is in error. Woller v. Department of Taxation, 35 Wis. 2d 227, 232, 151 N.W. 2d 170 (1967). It is well established that tax exemptions are matters of legislative grace to be strictly construed against the granting of the same and that petitioners bear the burden to show that they fall clearly within the terms of the exemption. Ramrod, Inc. v. Department of Revenue, 64 Wis. 2d 499, 504, 219 N.W. 2d 604 (1974).

Section 71.05(1)(a), Stats., exempts from the income tax payments from certain public employee retirement systems to persons who were members of these systems as of December 31, 1963. This exclusion does not apply to any public employee retirement system sponsored by the state of Illinois or any political subdivision

thereof. Petitioners argue that failure of this exclusion to apply to payments from Illinois public employee retirement systems is invalid.

Petitioners do not argue, however, that the requirement of membership as of December 31, 1963 is invalid. In fact, there is no evidence in the record that either of the petitioners were members of any retirement system as of December 31, 1963.¹ Even if petitioners were members of an Illinois public employee retirement system as of December 31, 1963, their claim for refund must be denied because the failure of § 71.05(1)(a), Stats., to exclude payments from an Illinois public employee retirement system does not make the statute invalid. Therefore, petitioners' appeal must fail.

Petitioners rely heavily on the U.S. Supreme Court's decision in Davis v. Michigan, 489 U.S. 803 (1989). In Davis, the Supreme Court held that the discriminatory treatment of Michigan's income tax law in favor of annuities paid to state and local employees and against annuities paid to federal employees violated 4 U.S.C. § 111 and the doctrine of intergovernmental immunity.

¹ Petitioners submitted, along with their reply brief, a document that purports to be a notarized statement from an official of the Teachers' Retirement System of the State of Illinois that states that Mr. and Mrs. Van Aman began contributing to this system in 1952 and 1955, respectively. Were this document admitted into evidence, it may lead to the inference that the petitioners were each members of the Teachers' Retirement System of the State of Illinois as of December 31, 1963. Because neither this document nor any other evidence concerning petitioners' membership as of December 31, 1963 was introduced at the hearing, we cannot find that the petitioners were members of any public retirement system as of December 31, 1963.

Davis, 489 U.S. at 813-14, 817. The intergovernmental immunity that is the subject of the Davis decision is between the federal government and the state governments. There is nothing in Davis that requires one state to tax its own public employee annuitants in the same manner it taxes public employee annuitants deriving payments from other jurisdictions.

Conceivably, petitioners are arguing that the treatment afforded them by § 71.05(1)(a), Stats., is a violation of equal protection under the federal and Wisconsin constitutions. The same equal protection analysis applies under both the federal and Wisconsin constitutions. Treiber v. Knoll, 135 Wis. 2d 58, 68, 398 N.W. 2d 756 (1987). To invalidate a tax statute, petitioners bear a particularly strong burden to prove the statute is unconstitutional beyond a reasonable doubt. GTE Sprint v. Wisconsin Bell, 155 Wis. 2d 184, 192, 454 N.W. 2d 797 (1990); State v. Iglesias, 185 Wis. 2d 117, 133, 517 N.W. 2d 175 (1994). Every presumption in favor of the state's power to tax is indulged, and only a clear and demonstrated usurpation of power will authorize judicial interference with a legislative action. GTE Sprint, 155 Wis. 2d at 192 (citing Walters v. City of St. Louis, 347 U.S. 231, 237-38, 98 L. 2d. 660, 666 (1954)).

At most, petitioners have shown that they will pay tax on their annuities when other annuitants will not. The issue, however, is whether there was a reasonable basis for the classification. Omernik v. State, 64 Wis. 2d 6, 18-19, 218 N.W. 2d 734 (1974). Petitioners have submitted no evidence at all to show

that the classification lacks a reasonable basis. Therefore, any argument that § 71.05(1)(a), Stats., is invalid fails for lack of evidence that the classification contained therein is not reasonable.

Petitioners claim that other states have amended their income tax laws to provide exempt treatment to annuities received not only by federal employees but also by employees of other states. Any grant of exemption by other states is a legislative matter and has no bearing on whether § 71.05(1)(a), Stats., is invalid.

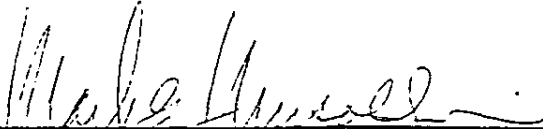
Therefore,

IT IS ORDERED

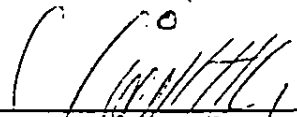
That respondent's action on petitioners' petition for redetermination is hereby affirmed.

Dated at Madison, Wisconsin, this 13th day of March, 1996.

WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Joseph P. Mettner, Commissioner



Don M. Millis, Commissioner

ATTACHMENT:
"Notice of Appeal Information"

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.