STATE OF WISCONSIN

TAX APPEALS COMMISSION

NAZIR I. AND AMINAH AL-MUJAAHID,

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NOS. 16-I-235
AND 16-I-236

RULING AND ORDER

In an order dated December 13, 2016, the Commission dismissed these cases based upon the Wisconsin Department of Revenue's withdrawal of its assessments. Petitioners[1], by their attorney, have moved for costs pursuant to Wis. Stat. § 227.485. Because we find the Department was substantially justified in bringing its assessments and also because special circumstances exist which would make an award of costs unjust, we deny Petitioners' Motion.

FACTS

1. On May 1, 2015, a Milwaukee County trial court found the Petitioner guilty on multiple counts of "Fraudulent Claim / Income Tax Credit" under Wis. Stat. § 71.83(2)(b)4 for offenses committed in 2007-2012, which related to the tax years 2006-2011. (Criminal Complaint, Ex. A attached to Affidavit of Department

[1] As the caption indicates, there are two Petitioners, Nazir I. and Aminah Al-Mujaahid. Any reference to "Petitioner" in the singular refers to Nazir Al-Mujaahid.

Attorney Mark S. Zimmer ("Zimmer Aff.").)

2. The statute under which Petitioner was convicted reads as follows:

> "Fraudulent claim for credit." A claimant who files a claim for credit under s. 71.07, 71.28 or 71.41 or subch. VIII or IX that is false or excessive and filed with fraudulent intent and any person who, with fraudulent intent, assist in the preparation or filing of the false or excessive claim or supplied information upon which the false or excessive claim was prepared is guilty of a Class H felony and may be assessed the cost of prosecution.

Wis. Stat. § 71.83(2)(b)4.

3. Each count for which Petitioner was convicted was based upon Petitioner's filing of false claims in the names of other individuals for tax credits which the Department paid out in refunds for the tax years in question. (Complaint, Ex. A.)

4. The court's decision following the court trial indicates that there was credible testimony from the investigating agents to the effect that the Petitioner admitted filing the tax returns for the years in question in the names of other individuals and that he kept at least a portion of the resulting tax refunds for himself. (Ex. B, Trial Court Decision, pp. 13, 16-17, 21, 22.)

5. Petitioner submitted an Affidavit of one of the persons with whose identity Petitioner claimed the fraudulent refunds. The Affiant states that Petitioner had no knowledge of the content of the tax returns in question. These assertions are simply not credible in light of the evidence presented at the criminal court trial. The Affiant also indicates that Petitioner received the refunds in question and passed them on to him. (Affidavit of Damien James Sherrer.)

6. The judgment of conviction, filed May 14, 2015, indicates that

Petitioner must repay the amounts of the refunds paid out for tax years 2007-2010[2]. (Judgment of Conviction, Ex. A.)

7. Petitioner appealed his convictions, first by filing Motions after Verdict which were denied on May 11, 2016. As of September 2016, Petitioner's appeals remained pending at the court of appeals. (Ex. A.)

DECISION

Petitioners bring this motion pursuant to Wis. Stat. § 227.485. That subsection states:

> In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

We will address each of Petitioners' arguments in turn.

1. ***Petitioners claim they are entitled to costs as the prevailing party because the Department voluntarily cancelled or withdrew its assessments.***

Most cases involving motions for costs arise in the context of motions brought after a verdict, so the prevailing party is clearly determined. With a voluntary dismissal, the identity of a "winning" and "losing" party is not so clear. Less clear is the

[2] The trial court dismissed the Count relating to the tax year 2006 as untimely rather than on its merits. The restitution amount is $10,315. The assessments themselves are not in the Commission file but they are substantially higher with the addition of interest and penalties for all five years. By its withdrawal of the assessments, the Department indicates it is satisfied with the restitution amount despite potentially being entitled to a larger recovery.

appropriateness of awarding costs. Even if Petitioners can be considered a prevailing party, an award of costs in this case is not appropriate.

Recovery of costs by a prevailing party is not automatic. Or, as the court of appeals has explained in the reverse, losing alone does not automatically mean that a party must pay costs. *See Behnke v. DHSS*, 146 Wis. 2d 178, 183, 430 N.W.2d 600, 602 (Ct. App. 1988). Caselaw emphasizes that the statute provides for an award of costs unless we find that the Department was "substantially justified in taking its position or that special circumstances exist that would make the award unjust." *Behnke*; Wis. Stat. § 227.485. We find both factors as noted below and, therefore, deny an award of costs.

2. ***Petitioners claim the assessments were "not related" to their joint tax returns because the criminal activity related to tax returns filed in the names of others.***

In an affidavit, Petitioners' attorney puts forth an argument that the assessments did not relate to Petitioners' joint income tax return. We find this argument disingenuous. While the Department has not pointed to specific errors in Petitioners' joint return as filed, its assessments are based upon Petitioners' failure to report ill-gotten income.

Petitioner was engaged in, and convicted of, fraudulently claiming income tax credits. Those refundable tax credits resulted in Petitioner's receipt of income tax refunds. There was credible testimony that Petitioner received the refunded credits. Although he made statements to the effect that he passed most of the money on to the people in whose name the taxes were filed, what Petitioner did with the money after fraudulently receiving it is irrelevant.

The Department had a reasonable basis to believe that Petitioner received illegal income; illegal income is reportable income which should have been included on Petitioners' joint tax return. Even if we believe he was facilitating someone else to receive the fraudulent credit, his "commission" or "cut" was reportable income, which likewise should have been included on Petitioners' joint tax return. So, yes, these assessments do address Petitioners' joint tax return because Petitioners failed to report income "from whatever source." Wis. Stat. § 71.03(1).

3. *Petitioner denies filing credit claims on behalf of third parties and claims there is no evidence that Petitioner was involved in returns of third parties.*

Petitioner's continued denials conflict with the legal fact of his convictions for filing credit claims in the names of third parties. His convictions speak for themselves; thus, this argument has no merit.

We note that the Commission need not be convinced of the fraudulent activity. The question before the Commission regarding a claim for costs is whether the Department had a reasonable basis for bringing its assessments. The Commission has reviewed the record of the criminal proceedings and the recording of the criminal trial and finds sufficient evidence of fraudulent activity and Petitioner's profit therefrom to find that the Department was substantially justified in bringing the assessments.

4. *Petitioners claim the Department's Assessments were invalid because they were brought more than four years after the date of the income tax returns at issue.*

Generally, the Department has four years in which to bring an assessment for incorrect tax returns. An exception arises in cases of fraudulent tax reporting. Wis.

Stat. § 71.77(3) provides that, if a taxpayer files an incorrect income tax return for any year "with intent to defeat or evade the income tax . . ., income of any such year may be assessed when discovered." (emphasis added) *See George v. Dep't of Revenue*, Wis. Tax Rptr. ¶ 401-480 (WTAC 2011) ("[O]ur review of the history and circumstances of the provision indicates that the legislature intends that there be no time limitation on the Department to assess when fraud is discovered.").

Petitioner filed fraudulent tax returns in the names of others; he also filed incorrect returns of his own when he failed to report the illegal income he received or any amounts he retained from the initial fraudulent tax credit claims. Petitioners' fraudulent returns, which excluded known income (that income itself from fraudulent tax activity), evince an additional layer of intent to evade paying taxes.

Because the assessments in these cases arise out of fraudulent tax reporting, the four-year statute of limitations does not apply. Thus, we find that the assessments were not invalid as untimely.

5. Petitioner's spouse claims she is entitled to costs because she was not involved in the criminal activity.

While there is no evidence in the record to implicate Aminah Al-Mujaahid in her husband's criminal activity, as Petitioner's wife, Aminah Al-Mujaahid files tax returns jointly with Nazir Al-Mujaahid. His ill-gotten gains should have been included in their reportable income for the years at issue. The record contains no basis for a finding of "innocent spouse." Moreover, the innocent spouse rules may in certain cases provide relief from an assessment, but we find no caselaw to justify those rules to

award costs related to a joint return.

6. *Petitioners claim the December 2015 Assessments were unjustified because the Department already knew about the May 2015 restitution order.*

The Department has explained that it withdrew the Assessments because a restitution order meant the Department would recover the credits that had been paid out as a result of Petitioner's criminal conduct. The Petitioner was convicted in May 2015; the restitution order was part of the conviction order.

Bringing the assessments in December 2015 was not unreasonable. Although the restitution order had been issued, Petitioner's Motions for Post-Conviction Relief had not yet been heard. Those motions were not denied until May 2016 and, at least as of September 2016, his convictions remained on appeal at the court of appeals.

Petitioner had every right to appeal his convictions. Likewise, the Department had every right to bring its assessments while the post-conviction motions were pending. It also had every right to decide, in December 2016, to withdraw the Assessments. At that point, the Department was sufficiently convinced of the validity of the restitution order; however, the Department could just as easily have waited until all appeals were exhausted. We do not find the Department's actions in bringing its assessments unreasonable, nor do we find the Department unjustified in not withdrawing the Assessments sooner.

7. *The Petitioners claim the December 2015 Assessments were unjustified because they resulted in double jeopardy in light of the May 2015 restitution order.*

Even if we were to find that the assessments might have duplicated the restitution, we cannot say that the Department acted unreasonably in maintaining an alternate avenue for recovery should the post-conviction motions or appeals have turned in Petitioner's favor. When the Department chose to recover through the restitution order sometime after post-conviction relief was denied, it withdrew the assessments. That decision removed any potential for duplicate recovery.

8. *Petitioners disagree that an award of costs would be unjust.*

Petitioner has played fast and loose with the tax code. He has assisted others in making fraudulent tax claims. He kept some of those ill-gotten gains for himself. Even if he does pay restitution to make the Department whole, the Department certainly should not have to reimburse him for doing so. In light of this entire set of circumstances, it is outrageous for Petitioner to suggest that he has been wronged in this situation. We find these facts to be the type of circumstances which would make an award of costs unjust.

CONCLUSIONS OF LAW

1. The Department's assessments were not barred by a four-year statute of limitations because Petitioner had engaged in fraudulent activity with intent to evade taxes.

2. The Department was substantially justified in bringing its assessments against the Petitioners.

3. In addition or alternatively, the Department has also shown that special circumstances exist such that an award of costs would be unjust.

4. Petitioners are not entitled to costs.

IT IS ORDERED that Petitioners' Motion for Costs is denied.

Dated at Madison, Wisconsin, this 28th day of February, 2017.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

David D. Wilmoth, Commissioner

David L. Coon, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

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

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. **Several points about starting a case:**

1. **The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier** within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.

2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.

3. The 30-day period starts the day after personal service or the day we mail the decision.

4. **The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is *http://wicourts.gov*.

This notice is part of the decision and incorporated therein.