

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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TODD AND FILOI AIONO DIMOFF,

DOCKET NO. 09-I-240

Petitioners,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**ROGER W. LEGRAND, ACTING CHAIRPERSON:**

This matter comes before the Commission on a Motion for Summary Judgment and Stipulation of Facts with exhibits filed by the parties on August 5, 2010. Mr. Carl M. Busateri represents the Petitioners in this matter. The Respondent, the Wisconsin Department of Revenue (the "Department"), is represented by Attorney John R. Evans. Both parties have submitted briefs.

The Commission's findings of fact consist of facts stipulated by the parties which are relevant to the case. Having considered the entire record before it, the Commission finds, decides and orders as follows:

**FINDINGS OF FACT**

1. Petitioner, Todd P. Dimoff ("Todd"), is an adult resident of the State of Wisconsin and for all periods of time relevant to the above-captioned matter was subject to the Wisconsin Statutes for all such periods of time, except as to such

periods of time that Todd was a part-year resident of California, and the Department granted refunds in error. (Stip. ¶ 1.)

2. Petitioner, Filoi M. Aiono Dimoff (“Filoi”) is an adult and was a resident of the State of California for all of the year 2003 and was subject to the California Statutes. She and Todd were married November 8, 2003 and they moved to Wisconsin in early 2004; making her a part-year resident of Wisconsin and the Department has granted refunds in error. (Stip. ¶ 2.)

3. Petitioners late filed their 2003 Wisconsin tax return on April 15, 2005, that a bookkeeping and tax service prepared the 2003 Wisconsin tax return, and that there was tax due in 2003 of \$6,454. (Stip. ¶ 3., Exh. 1.)

4. Petitioners timely filed their 2004 Wisconsin tax return on March 3, 2005, and that there was tax due in 2004 of \$764. (Stip. ¶ 4., Exh. 2.)

5. Petitioners did not include payment with the 2003 or 2004 tax returns in any amount. (Stip. ¶ 5.)

6. The Department of Revenue billed Todd and Filoi \$10,120 (\$6,464 for the tax, \$291 for the interest on underpayment, \$30 for the late filing fee, \$1,614 for the negligence penalty, and \$1,732 for the interest) on August 9, 2005 for 2003. (Stip. ¶ 6., Exh. 3).

7. The tax bill was paid through garnishment of wages and an offset of Petitioners’ Wisconsin income tax refunds; that Petitioners paid a total of \$13,936; that the amounts as collected from time-to-time by garnishment and by offset of tax refunds were applied to the delinquent accounts based upon the Department’s

statutory application of monies, first to collection fees under Wis. Stat. Ch. 73, then to penalties and interest on all delinquencies, and then to the raw tax of the oldest delinquency first. (Stip. ¶ 7.)

8. On July 7, 2008, Todd and Filoi filed an amended return for the year 2003 claiming Petitioners were part-year residents of Wisconsin and part-year residents of California and claiming a refund of taxes in the amount of \$5,571, the difference between the \$6,454 owed on the original tax return and the \$883 owed on the amended tax return. (Stip. ¶ 8, Exh. 4.)

9. On August 25, 2008, the Department issued a Notice of Refund statement announcing a refund to be issued to Todd and Filoi for \$7,357 (\$5,098 for the tax, \$2,003 for the interest, and \$256 for underpayment interest) for the year 2003. (Stip. ¶ 9, Exh. 5.)

10. On July 21, 2008, Todd and Filoi filed an amended return for the year 2004 claiming Petitioners were part-year residents of Wisconsin and part-year residents of California. (Stip. ¶ 10, Exh. 6.)

11. The Department issued a Notice of Refund statement on August 18, 2008, announcing a refund to be issued to Todd and Filoi for \$1,033 (\$794 for the tax and \$239 for the interest) for the year 2004. (Stip. ¶ 11, Exh. 7.)

12. The Department refunded Todd and Filoi a total of \$8,390 for the years 2003 and 2004. (Stip. ¶ 12, Exhibits 5 and 7.)

13. The Statute of Limitations to amend the 2003 tax return expired on April 15, 2008, four years after the filing deadline of April 15, 2004. (Stip. ¶ 13.)

14. Petitioners, Todd and Filoi, filed an appeal for reconsideration, also known as a Petition for Redetermination, with the Resolution Unit of the Department on October 23, 2008. (Stip. ¶ 14, Exh. 8.)

15. Petitioners' October 23, 2008 Petition for Redetermination was filed 66 days after the Department's August 18, 2008 Notice of Refund for the 2004 refund, but 59 days after the Department's August 25, 2008 Notice of Refund for the 2003 year. (Stip. ¶ 15.)

16. At the time the October 23, 2008 appeal was written and mailed, although the aforementioned Notices of Refund had been received, actual checks had not yet arrived; this is evidenced by reference in the October 23, 2008 letter of appeal. (Stip. ¶ 16.)

17. A check was issued on October 29, 2008, but not received until November 3, 2008, along with a Notice of Refund for \$7,351.76 for 2003, and that the difference between the amount on the Notice of Refund on August 25, 2008 (Exh. 5) and the amount of the check received was a \$5.00 processing fee for back child support. (Stip. ¶ 17; Exh. 9, the Respondent's record; and Exh. 9A, the Petitioner's record.)

18. A check was issued on December 3, 2008, along with a Notice of Refund, for \$231.42 for 2004, and that the difference between the amount on the Notice of Refund on August 18, 2008 (Exh. 7) and the amount of the check received was \$801.47, which was for tax still owed for 2004. (Stip. ¶ 18, Exh. 10.)

19. By letter dated March 5, 2009 to Petitioners from the Respondent, the Department informed Petitioners that Petitioners' appeal dated October 23, 2008 for the 2004 refund was late filed. (Stip. ¶ 19, Exh. 11.)

20. The Notice of Action denying the Petition for Reconsideration, also known as a Petition for Redetermination, was sent on October 8, 2009. (Stip. ¶ 20, Exh. 12.)

21. Petitioners, Todd and Filoi, filed a Request for Appeal, also known as a Petition for Review, to the Wisconsin Tax Appeals Commission on December 7, 2009. (Stip. ¶ 21, Exh. 13.)

22. The amount collected in paragraph 7 was applied to Petitioners' delinquencies for 2003 and 2004 in the order prescribed in Wis. Stat. § 71.91(5)(k), that is costs (including Wis. Stat. § 73.03(33m)), penalties, interest, and tax; at the time of the Notice of Refund, the paragraph 7 amount of \$13,936 had been applied to the delinquencies except as to \$801.47 of tax still owing on the delinquency for 2004. (Stip. ¶ 22.)

## **DECISION AND ORDER**

This case concerns claims for income tax refunds for the years 2003 and 2004. Petitioners filed their 2003 Wisconsin income tax a year late and their 2004 income tax in a timely manner. Both returns were filed "no remit," which means that the tax was not sent in with the filing. In 2008, the Petitioners filed amended returns for the years 2003 and 2004. These returns amended the Petitioner's Wisconsin income tax on the ground that some of Petitioner's Wisconsin income was earned in California. This

resulted in refunds being granted to Petitioners. A Notice of Refund dated August 25, 2008 was sent to Petitioners for the year 2003 in the amount of \$7,357 (Exhibit 5). A Notice of Refund dated August 18, 2008, was sent to Petitioners for the year 2004 in the amount of \$1,032.89. (Exhibit 7). Both of these notices informed Petitioners that they had 60 days from receipt of the notice to appeal. (Exhibits 5 and 7.) Petitioners did appeal the refunds for both years on October 23, 2008. Their complaint was that the Department of Revenue should have caught the mistakes regarding California income when the original returns were filed. Petitioners admit that a bookkeeping and tax service prepared the original returns and was responsible for the mistake. However, Petitioners assert that the Department has responsibility to check over returns and make necessary adjustments. If the Department had done this, according to Petitioners, a full refund of \$13,986 would have been given to Petitioners rather than the \$8,390 which they received.

The Commission finds that the Department acted correctly in this matter. Section 71.80(11) Wis. Stats. provides that the Department has audit authority. The Department presumes the monies initially reported on returns are correct. In *Kryshak v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶203-084 (WTAC 1989), this Commission concluded that it is the taxpayer who has liability for the information on his return, not the preparer. But Petitioners have cited no statute or cases to support their position that the state has responsibility to initially audit every return to provide that no mistakes were made.

In this case, the bookkeeping and tax service made the initial mistake. The original 2003 return was filed over a year after the due date and no tax was remitted with the form. The Department collected the tax by garnishment and added interest, late fees, and a negligence penalty. An amended 2003 return was filed more than four years after the due date of the 2003 return. Under section 71.75(2) Wis. Stats., Petitioners must claim a refund within 4 years of the unextended due date of the return. The date of the self-assessed unextended due date of the original 2003 tax return was April 15, 2004. The 4-year statute of limitations ran on April 15, 2008. The amended 2003 tax return was filed on July 7, 2008, and was too late. The State paid out the refund for the 2003 return in error. The State cannot reassess Petitioner for the Department's mistake as that would be a stale claim. But Petitioners have no claim for the portion of the refund they did not receive because the 4-year statute of limitations had run out.

With respect to the 2004 original tax return, it was filed in a timely manner on April 15, 2005. It also was a no remit return, although Petitioners owed \$764 on it. (Exh. 2.) The Notice of Refund was sent on August 18, 2008. (Exh. 7.) The 60-day appeal notice was part of Exhibit 7. However, the Petitioners filed their Notice of Redetermination with the Department on October 23, 2008. (Exh. 8.) This was 66 days after the notice of August 18, 2008. The appeal was too late and Petitioners must live with the refund they received from the Notice of Refund dated August 18, 2008.

In conclusion, the 2003 amended tax refund was made in error since the 4-year statute of limitations had run before the amended return was filed. The 2004

amended tax refund was received by Petitioners, but any redetermination of that figure was barred because Petitioner did not appeal to the Department within 60 days.

In its notice of refunds for both 2003 and 2004, the Department added 9% interest to the overpaid amount of tax which is what is called for in the statute. It declined to refund delinquent interest and negligence penalties as they are non-appealable under the statutes. It declined to refund the collection costs on the original 2003 and 2004 filings because they were no remit returns and collection costs are non-refundable. The Department acted properly except for its mistake in providing taxpayer with a refund on the 2003 amended return. This actually benefitted the taxpayers. The Petitioners raised no cognizable claims for further refunds under the statutes.

The Department's motion for summary judgment is granted based upon the Stipulation of Facts filed with the Commission which shows that there is no genuine issue of material fact and the Respondent is entitled to judgment as a matter of law. The Petition for Review filed with this Commission is hereby dismissed.

Dated at Madison, Wisconsin, this 3<sup>rd</sup> day of June, 2011.

**WISCONSIN TAX APPEALS COMMISSION**

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Roger W. Le Grand, Acting Chairperson

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Thomas J. McAdams, Commissioner

**ATTACHMENT: "NOTICE OF APPEAL INFORMATION"**