STATE OF WISCONSIN

TAX APPEALS COMMISSION

GARY R. GEORGE, **DOCKET NO. 08-I-57 AND 08-I-60**

Petitioner,

vs. **RULING AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

These two cases[1] come before the Commission on the taxpayer's motion to dismiss the assessments. The Petitioner in this matter is represented by Attorney Timothy M. Homar of the law firm of La Rowe, Gerlach, & Roy LLP, which is located in Sauk City, Wisconsin. The Respondent in this matter, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney John R. Evans, of Madison, Wisconsin. The issue in this case is the construction and application of Wis. Stat. § 71.77(3), which allows the Department to issue an income tax assessment in cases of fraud or evasion "when discovered." Specifically, the taxpayer argues that the assessments the Department issued in 2005 for tax years 1989 through 1993 are untimely. For the reasons stated below, we find for the Respondent.

[1] One of the assessments is for 1989 and the other is for the period 1990-1993.

FINDINGS OF FACTS[2]

A. Jurisdictional Facts

1. The Department issued the income tax assessment for $15,020.59 for 1989 on February 21, 2005.[3] The second assessment covering 1990, 1991, 1992, and 1993 for $76, 306.85 was also issued that same day.[4] Commission file.

2. The Petitioner filed a Petition for Redetermination on March 4, 2005.[5] *Id.*

3. The Petitioner filed a timely petition before the Tax Appeals Commission on April 23, 2008. *Id*.

B. Material Facts

1. The Department's investigation of Petitioner Gary R. George began in the mid-1990s. The Petitioner was a prominent state senator at the time. The Department began its preliminary investigation of the Petitioner in May of 1993 as a result of information received from its investigation of another taxpayer. At around the same time, the Petitioner was also the target of other investigations, including an Internal Revenue Service field audit and a State Ethics Board investigation. The results of the Department's preliminary investigation led to a full-scale investigation of the Petitioner. (Petitioner's Brief at 2, citing Petitioner's appendix ("appendix"), pp. 5-6).

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[2] Neither party filed a statement of facts. We have compiled the necessary facts from the briefs, the exhibits, and the affidavits.
[3] Of the $15, 020, the tax itself was $3,191. The remainder was $3,191 in penalties and $8,638.59 in interest.
[4] Of that amount, the tax was $21,572 and $33,162.85 was interest.
[5] The file does not reflect when the Department denied the Petition for Redetermination.

2. This full-scale investigation culminated in an extensively detailed investigative report dated August 31, 1998, which fills four binders. The investigative report, which was written by a Department investigator, states that the statute of limitation for tax year 1991 was October 14, 1998 and for tax year 1992 was August 15, 1999. (*Id.,* citing appendix, p. 8).

3. In August of 1999, roughly a year after the Department's full-scale investigation concluded, Department records indicate that the Department was preparing to assess the Petitioner for the 1989-1993 tax years. Petitioner never received a notice of assessment at that time. (*Id.*, citing appendix at 33).

4. On December 16, 1999, a departmental supervisor forwarded the investigator's recommendation for assessments against the Petitioner onward to her supervisors. In December 1999, the Department still had not made any assessment of the Petitioner for the 1989-1993 tax years, and correspondence within the Department dated as late as March of 2000 indicates that an assessment against Petitioner was not forthcoming. (*Id.,* citing appendix, pp. 39 and 68-72).

5. Approximately four years later, Petitioner was indicted on federal charges. He pled guilty to one count and began serving his prison term in September of 2004. (*Id.).*

6. A few months later, on January 26, 2005, the investigating agent submitted to his supervisor essentially the same recommendation as he did in 1999,

which was for assessments against the Petitioner for the tax years 1989-1993. (*Id.*, appendix, pp. 73-81).

7. On February 21, 2005 – over six years after the Department concluded its special investigation – the Department finally assessed the Petitioner for the 1989-1993 tax years. (*Id*., appendix, pp. 82-83).

8. The Department collected documents related to the assessments herein, and those documents fill 12 file drawers, each being 22 inches deep. The full report referenced above is composed of four 4-inch binders. (Affidavit of John R. Evans, dated March 7, 2011, ¶¶ 6 and 7).

RELEVANT STATUTES

Wis. Stat. § 71.77:

> (2) With respect to assessments of a tax or an assessment to recover all or part of any tax credit under this chapter in any calendar year or corresponding fiscal year, notice shall be given within 4 years of the date the income tax or franchise tax return was filed.
>
> (3) Irrespective of sub. (2), if any person has filed an incorrect income tax or franchise tax return for any year with intent to defeat or evade the income tax or franchise tax assessment provided by law, or has failed to file any income tax or franchise tax return for any of such years, **income of any such year may be assessed when discovered ...**
>
> (4) Irrespective of sub. (3), if additional assessments are made for any period more than 6 years before the year in which the assessment is made, the burden of proof shall rest with the state to prove its case by a preponderance of the evidence.

[emphasis added].

DECISION

This case requires us to decide whether there is any time limitation on the Department's power to assess income tax where the Department has discovered income tax fraud. In brief, the Department issued an assessment in this case in 2005 for the income tax years 1989 through 2003. The Petitioner argues that the assessment is untimely under Wis. Stat. § 71.77(3). The Department replies that there is, in fact, no time limitation for it to act when it discovers income tax fraud. The first part of this decision will summarize the legal arguments the parties make to the Commission. The second part of the opinion will set forth the relevant law and principles that apply here. The last part of the opinion will state the reasons why we find for the Respondent.

1. Legal Arguments

A. The Petitioner

Petitioner contends that Wis. Stat. § 71.77(3) is a statute of limitation, and that in the cases of "intent to defeat or evade" the income tax, the Department may only assess the income when the income is discovered. The Petitioner argues that while there is no limitation on when the Department may discover fraud, the period to act does not remain open forever after the Department has discovered the fraud. If the Department fails to assess the income when discovered, then the statute bars the assessment. This time limitation helps ensure a fair hearing and efficient judicial administration. The words "when discovered" can be reasonably applied to each

circumstance with a reasonable time standard. Here, the Department sat idly by for over five years before making the assessment. It failed to meet the time limitation of Wis. Stat. § 71.77(3) in this case. For these reasons, the Petitioner requests that the Commission dismiss the assessments for the 1989 and the 1990-1993 tax years as untimely under Wis. Stat. § 71.77(3).

B. The Department

The Respondent replies that rather than a statute of limitation, the plain meaning of "when discovered" is an exception to the statute of limitation applicable to fraudulent actors. First, the Department argues that the plain meaning of the statute is just that, a plain and simple exception to the statute of limitation. Second, this is supported by the rules of construction. The structure of the statute indicates that there is no limitation on an assessment when fraud is discovered and, when the statute is read i*n pari materia*, the Department's plain meaning of the statute is supported. Finally, the Department argues that the Petitioner's argument, essentially creating an immediate statute of limitation beneficial to a perpetrator of fraud is absurd in a legal sense as well as in a practical sense.

2. Relevant Law and Principles

A. Procedure and Burden of Proof

Wis. Stat. § 802.06(2)(b) states that motions concerning a statute of limitation shall be treated as one for summary judgment and disposed of as provided in Wis. Stat. § 802.08. A motion for summary judgment will be granted if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). In this case, the parties do not dispute the facts, so only issues of law remain. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶4, 308 Wis. 2d 684, 748 N.W.2d 154.

B. Statutes of Limitation

In *Maryland Cas. Co. v. Beleznay,* 245 Wis. 390, 14 N.W.2d 177 (1944), the Wisconsin Supreme Court stated the following about statutes of limitation:

> This court, by a long line of cases, has followed the construction that our statutes of limitation extinguish the right as well as the remedy.... [i]n Wisconsin the running of the statute of limitations absolutely extinguishes the cause of action for in Wisconsin limitations are not treated as statutes of repose.[6] The limitation of actions is a right as well as a remedy, extinguishing the right on one side and creating a right on the other, which is as of high dignity as regards judicial remedies as any other right and it is a right which enjoys constitutional protection.

Further, in *Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 2001 WI 86, 245 Wis. 2d 1, 628 N.W.2d 893 the Wisconsin Supreme Court quoted the following:

> Statutes of limitation, which "are found and approved in all systems of enlightened jurisprudence," articulate the principle that it is more just to put the adversary on notice to defend a claim within a specified period of time than to

[6]The distinction between a statute of limitation and a statute of repose is that a statute of limitation begins to run when a cause of action accrues, as opposed to a statute of repose, which begins to run when the defendant acts in some way. *Aicher v. Wis. Patients Comp. Fund,* 2000 WI 98, ¶ 26, 237 Wis. 2d 99, 613 N.W.2d 849.

> permit unlimited prosecution of stale claims. Statutes of limitation promote fair and prompt litigation and protect defendants from stale or fraudulent claims "brought after memories have faded or evidence has been lost." ... Statutes of repose operate similarly to protect both plaintiffs and defendants from litigating claims in which the truth may be obfuscated by death or disappearance of key witnesses, loss of evidence, and faded memories.

In this case, there is no dispute as to the import of the statute of limitation, rather the dispute here is in the construction and application of Wis. Stat. § 71.77(3).[7]

C. Principles of Statutory Interpretation

The Petitioner's brief sets out well the applicable principles of statutory interpretation. In *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, the Wisconsin Supreme Court stated that one begins by looking to the language of the statute for a plain meaning. Statutory language must be read to give each word meaning and to avoid surplusage of words and absurd results. The context of the statute may provide further insight into the statute's meaning. If this process yields a clear meaning, then the statute is unambiguous and is applied according to that clear meaning. If the statutory language is still ambiguous after this process, only then is there a need to consult extrinsic sources of interpretation.

[7] For more information on these statutes, *see* Daniel J. La Fave, *Remedying the Confusion Between Statutes of Limitation and Statutes of Repose In Wisconsin--A Conceptual Guide*, 88 Marq. L. Rev. 927 (Summer 2005).

We must assume that the legislature's intent is expressed in the statutory language. *Id.* at ¶44. Statutory language is given its common, ordinary, and accepted meaning. *Id.* at ¶45. The only exception is for technical or specifically defined words or phrases. *Id.* "If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.*

In addition, we look to the context and structure of the statute for further insight into its plain meaning. Using context to discern the meaning of statutory language does not require that we first determine the statute is ambiguous. "[S]cope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Kalal,* at ¶48. This means that context and structure are part of the initial analysis, and not something held in reserve only if a statute is ambiguous. By examining the context, the statutory language is interpreted not in isolation, but as part of a whole and in relation to the language of surrounding or closely related statutes. Thus, the textual context and structure of a statute is used to interpret the plain meaning of the statute.

D. Analysis

This case requires us to choose between two readings of the meaning of Wis. Stat. § 71.77(3). The Petitioner's reading of that section would require the Department to issue an assessment in a case involving fraud at the time "when discovered." On the other hand, the Department's reading essentially is that when

fraud is discovered, the Department may issue an assessment at *any* time thereafter. For the reasons stated below, we believe the Department's reading is correct. First, the Department has the better statutory construction argument. Second, while the Petitioner argues that the "when discovered" language in the statute is a limitation, the Petitioner cannot say exactly what that limit is, although the Petitioner argues that the alleged limit was violated here. Third, the Petitioner's construction would lead to results that would be anomalous, if not absurd. Finally, our review of the context and history of this provision leads us to the conclusion that the legislature meant what it said.

First, after reviewing the briefs, we believe that the Department's construction is the more natural reading of the statute. As the Petitioner concedes, one of the rules of statutory construction that guide us is that we must look at the statute as a whole, and the context and structure of a statute are important to its meaning. *State v. Quintana*, 2008 WI 33, 308 Wis. 2d 615, 748 N.W.2d 447. Statutory language is not to be viewed in isolation, but rather as part of a whole and in relation to the language of surrounding or closely-related statutes. A statute's purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes---that is, from its context or the structure of the statute as a coherent whole. *Id.* When we look to Wis. Stat. § 71.77 in its entirety, we see that the context of (3) is clearly as an exception to the general 4-year statute of limitation from Wis. Stat. § 71.77(2). Indeed, the first clause of (3) reads "Irrespective of sub. (2), ..." The construction urged

upon us by the Petitioner simply focuses too much on the two isolated words "when discovered," and not their meaning in the context of the statute as a whole. Instead, when the two provisions are read *in pari materia*, it is clear that the general rule is the 4-year limitation in sub. (2), and sub. (3) allows the Department to issue an assessment outside the 4-year limitation when the Department discovers fraud. The legislature, however, placed no further time limit on the Department in sub. (3) when the Department discovers fraud, although sub. (4) dictates that after 6 years the burden of proof shifts to the Department to prove the case by a preponderance of the evidence. The Department's construction of the statute is better because it harmonizes subs. (2), (3), and (4).

Second, a problem with the Petitioner's construction is demonstrated by the fact that it would, in our view, mean no set and discernible time limit at all. Does "when discovered" mean just that which those two words seem by themselves to command, that the Department must issue a fraud assessment at the moment of discovery? Perhaps realizing that this position is untenable, the Petitioner's reply brief states that income tax fraud assessments can be issued by the Department when discovered, but thereafter the Department must act in a "reasonable" time period. In our view, there are several problems with this fallback position as well. The initial problem is, of course, that this Commission cannot re-write the statute of limitation to insert a limit that the legislature did not state. While the Wisconsin Supreme Court has stated that the Commission plays an important role in interpreting the tax code, the

Commission clearly does not have the power to change what its written words command. *See, generally, Menasha v. Dep't of Revenue*, 2007 WI 114, 302 Wis. 2d 104, 737 N.W.2d 431. Further, the Petitioner's "reasonable" time limitation goes against the principle that "limitations statutes barring the collection of taxes otherwise due and unpaid are strictly construed in favor of the Government." *Lucia v. United States,* 474 F.2d 565, 570 (1973). In sum, the Petitioner's construction would change Wis. Stat. § 71.77(3) from a provision in a statute which the legislature entitled "Statutes of limitations," into something more akin to a statute of repose, with no hard and fast boundaries. In our view, this flaw in the Petitioner's construction of the statute is fatal.

Third, the Petitioner's construction of "when discovered" would lead to anomalous, and arguably absurd, results. A canon of construction, however, is that the language of a statute is read in the context in which it appears in relation to the entire statute so as to avoid absurd results. *Wisconsin Citizens Concerned for Cranes & Doves v. DNR,* 2004 WI 40, ¶6, 270 Wis. 2d 318, 677 N.W.2d 612. Two examples of the consequences of the Petitioner's construction suffice. If we were to read the two words "when discovered" literally and in isolation, the taxpayer who commits fraud would have an advantage in that the Department would have virtually no time to consider the assessment after discovery before being cut off by this statute of limitation. In a situation involving multiple investigations and prosecutions like that here, the Department clearly would be disadvantaged by having to act without full investigation and review. The second anomalous result the Petitioner's construction produces relates

to a comparison between compliant and noncompliant taxpayers. If the Department were to discover an adjustment for a compliant taxpayer in the second of the four years, the Department still has two years to issue the assessment. Under the Petitioner's interpretation, after fraud is discovered, the Department would only have moments or a "reasonable" time to assess. Thus, a taxpayer who commits fraud would potentially be better off *vis-a-vis* the compliant taxpayer, as the Department would have two years after "discovery" to assess the compliant taxpayer.

Finally, while at first glance it seems exceptional that the Department's power to assess is not time limited where the Department discovers fraud, our review of the statutes and the case law shows that is probably the result the legislature intends. Certainly, the legislature knows how to create and amend tolling provisions when it wants to do so. For example, there are numerous qualifications to the statutes of limitation concerning criminal conduct. *See, e.g.,* Wis. Stat. § 939.74(2)(b) [setting a 1-year limitation after the discovery of a theft and a maximum of 5 years from the crime] and Wis. Stat. § 939.74(3) [tolling running of time provision while actor is not publicly a resident of the state.] Further, the legislature also makes adjustments to limitation periods when it wants to do so. For example, the legislature expanded the time limits on sexual assault prosecutions involving a minor victim in 1987, 1993, 1997, 2003, and 2005. *See, generally, State v. MacArthur,* 2008 WI 72, 310 Wis. 2d, 750 N.W.2d 910. We note that the provision in question in this case appears to have been around a long time. *See, e.g., Verdev v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶200-426

(WTAC 1968) [The Department reconstructed a taxpayer's income for the years 1946 through 1951 where the taxpayer made an incorrect income tax report with intent to defeat or evade.]; *Sommerfeldt v. Wisconsin Department of Taxation,* Wis. Tax Rptr. (CCH) ¶200-183 (WBTA 1965). [Assessments of persons filing returns with intent to defeat or evade may be made when discovered and assessments for 1948, 1949 and 1950 were not barred by the statute of limitation.]; *Lewis v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶200-886 (WTAC 1973) (penalty assessment not subject to the statute of limitation.); *Smukowski v. Wisconsin Department of Taxation,* Wis. Tax Rptr. (CCH) ¶200-260 (WBTA 1965) [Income subject to assessment at twice the normal rate if incorrect returns with intent to defeat or evade are filed. Income during 1950 through 1960 subject to double rate penalties.]

Further, the courts have discussed the reasons for these provisions. For example, in *Badaracco v. C.I.R.*, 464 U.S. 386 (1984) a taxpayer filed a false return, but later filed a nonfraudulent amended return. The applicable federal statute of limitation said a tax may be assessed "at any time," regardless of whether or not more than three years had expired since the filing of the amended return. In finding for the IRS, the United States Supreme Court said there was no need in that case to twist the federal provision beyond the contours of its plain and unambiguous language in order to comport with good policy, for its literal language was supported by substantial policy considerations---the increased difficulty in investigating fraud cases as opposed to cases marked for routine audits. Wisconsin courts have made similar observations. In *State*

v. Lyons, 183 Wis. 107, 197 N.W. 578 (1924), the Wisconsin Supreme Court stated the following:

> Taxes "are obligations of the highest character, for only as they are discharged is the continued existence of government possible. Payment alone discharges the obligation, and until payment the state may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the state, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of this obligation." citing *Florida Central & P. R. Co. v. Reynolds,* 183 U. S. 471, 475, 22 Sup. Ct. 176, 178 (46 L. Ed. 283).

Based on our review of the history and circumstances of this provision, it appears likely the legislature intends the result that the language of Wis. Stat. § 71.77 compels---that the Department may issue an assessment when it discovers income tax fraud at any time.[8]

CONCLUSION

We find for the Department for four reasons. First, the Department has the better reading of the statute, a reading that harmonizes subs. (2), (3), and (4) of Wis. Stat. § 71.77. Second, the construction the Petitioner proposes is unworkable, in that either the Department would have to assess at the moment fraud is discovered or in an amorphous "reasonable" time period. Third, the Petitioner's construction would lead to results that were at least anomalous, and perhaps absurd. Finally, our review of the

[8] The reasons for the delay in this case are not at issue here in this motion, and neither is the actual length of the delay, whether it is 6 years or 12 years. In its brief, the Department notes that the taxpayer was facing a number of separate investigations and that the Department's investigation compiled a substantial volume of materials.

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. Thus, the Commission denies the Petitioner's motion to dismiss.

ORDER

The Petitioner's motion to dismiss is denied.

Dated at Madison, Wisconsin, this 23rd day of September, 2011.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner

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