

STATE OF WISCONSIN
TAX APPEALS COMMISSION

RAY C. AND NANCY C. HUBBARTT,

DOCKET NO. 11-I-144

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

This matter comes before the Commission on the Petitioners' Motion to for Summary Judgment. This case concerns an assessment the Department issued against the Petitioners on August 23, 2010, for income taxes for the periods ending December 31, 2005, and December 31, 2007. The Petitioners are represented by Attorney Thomas Kubasta of Kubasta, Rathjen, Bickford & Lorensen, of Wautoma, Wisconsin. The Department is represented by Attorney Mark S. Zimmer. The parties have submitted a Stipulation of Facts and agree that this matter is ripe for summary judgment.¹

The central issue in this matter is whether the amounts paid to Nancy Hubbartt related to the in-home care she provided to her developmentally disabled adult brother were exempt from taxation under section 131 of the Internal Revenue Code, as adopted by Wisconsin.

¹ Stipulation, ¶ 22.

FACTS

A. Jurisdictional Facts

1. On August 23, 2010, the Department issued a Notice of Amount Due - Individual Income Tax to the Petitioners for amounts due relative to the periods ending December 31, 2006 and December 31, 2007. (Stipulation Exhibit B.)
2. On October 5, 2010, Petitioners filed a Petition for Redetermination which was denied by the Department on April 19, 2011. (Stipulation, Exhibits C and D.)
3. On April 28, 2012, Petitioners filed a timely Petition for Review of the Department's decision. (Commission file.)
4. The parties have stipulated to the relevant facts. Petitioners filed a Motion for Summary Judgment on April 30, 2012.² (Commission file.)

B. Material Facts³

1. At all times material to this case, Petitioner Mary Hubbartt⁴ provided care in her home for her developmentally disabled brother. (Stipulation, ¶4.)
2. During the calendar year of 2006, the Human Services Department of Manitowoc County provided payments to Petitioner Nancy Hubbartt for the care and supportive services she provided to her brother; payment was made through an

² The parties discussed and agreed to the need for the Commission to decide the legal issue of whether the care payments in question are excludable from income. Thus, we proceed as though both parties have moved for summary judgment as had been originally discussed at the January 17, 2012, teleconference in this case.

³ The parties have submitted Stipulation of Facts, edited here for form, as a basis for this motion.

⁴ Both Ray and Nancy Hubbartt are listed as Petitioners in this matter because, as a married couple, they filed taxes jointly for the years in question. In this decision, we may refer to the singular Petitioner, Nancy Hubbartt, but our findings obviously apply to both Petitioners.

intermediary agent based on service logs completed by Nancy Hubbartt. Said payments were made under the Community Integration Program pursuant Wis. Stat. § 46.278 and 42 U.S.C. 1396n(c). (Stipulation, ¶¶ 4, 5, 6.)

3. The payments to the Petitioner were reported on Form W-2⁵ by the fiscal intermediary agent as wages, and Wisconsin income tax was withheld by the agent and remitted to the Wisconsin Department of Revenue. (Stipulation, ¶ 8.)

4. Petitioners did not include the amounts paid to Nancy Hubbartt pursuant to the Community Integration Program as income on their federal or Wisconsin income tax returns. (Stipulation, ¶ 9.)

5. During 2006, Petitioner Nancy Hubbartt was not a licensed foster care provider, and her home was not a licensed Adult Family Home, a community-based residential facility, or foster home under Chapter 48 of the Wisconsin Statutes. (Stipulation, ¶¶ 12, 13.)

6. Petitioners cared for no persons other than Petitioner's brother in their home during 2006. (Stipulation, ¶14.)

7. The Internal Revenue Service assessed Petitioners for taxes due on the amounts paid to Nancy C. Hubbartt pursuant to the Community Integration Program for 2006. Petitioners did not appeal the IRS determination. That determination is now final. (Stipulation, ¶¶ 19, 20.)

8. The relevant facts are essentially the same for the year 2007.

⁵ The amounts reported by the fiscal intermediary agent on the Form W-2 are not in dispute. (Stipulation ¶ 23.)

OPINION

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).

Here the parties have stipulated to the facts essential to the legal question in this case; that is, whether the in-home care provided by the Petitioners is exempt from taxation as “amounts received by a foster care provider during the taxable year as qualified foster care payments” as set forth in I.R.C. § 131(a).⁶

A. Applicable Law

The Wisconsin Statutes define “Wisconsin taxable income” as “Wisconsin adjusted gross income” less the standard deduction, personal exemption, and several additional items not relevant to this case. Wis. Stat. § 71.01(16).

“Wisconsin adjusted gross income” is defined as “federal adjusted gross income” with “modifications” which are not relevant to this discussion. Wis. Stat. § 71.01(13).

Thus, we must look to the federal definition of adjusted gross income for our answers in this case. That definition can be found in the Internal Revenue Code sections of the United States Code, specifically in 26 U.S.C. § 61. Section 61 of the Internal Revenue Code states that “except as otherwise provided in this subtitle gross

⁶ The Wisconsin statutes echo the federal code and in many parts refer to the federal code by adoption. The parties’ arguments are based on the language of the federal code and we too will address the federal provisions.

income means all income from whatever source derived." The Code goes on to list many items which are not included in gross income.⁷ This case turns on one of those items: foster care payments. I.R.C. § 131 provides that gross income does not include "qualified foster care payments":

Sec. 131. Certain Foster Care Payments

(a) General rule

Gross income shall not include amounts received by a foster care provider during the taxable year as qualified foster care payments.

B. Burden of Proof

This case turns on the meanings and interrelationships of the IRS Code and the corresponding Wisconsin Statutes. Wisconsin courts and this Commission have long held that tax exclusions or exemptions are matters of legislative grace and therefore tax statutes granting them are to be strictly construed. Taxpayers bear the burden of proof to bring themselves clearly within the terms of the exemption. *Ramrod, Inc. v. Dep't of Revenue*, 64 Wis. 2d 499, 504, 219 N.W.2d 604 (1974). Doubts are to be resolved in favor of taxability. *Dep't of Revenue v. Greiling*, 112 Wis. 2d 602, 605, 334 N.W.2d 118 (1983).

These Wisconsin holdings are consistent with the long-held federal interpretations of 26 U.S.C. 61, the Internal Revenue Code. Under 26 U.S.C. § 61(a), except as otherwise provided, "gross income means all income from whatever source derived." It is well established that "income" under section 61(a) is to be given its

⁷ Section 61 concludes with cross references as follows: For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

broadest meaning and that exclusions from income are disfavored. *See Commissioner v. Schleier*, 515 U.S. 323, 327-28 (1995); *United States v. Burke*, 504 U.S. 229, 233, 248 (1992); *Commissioner v. Jacobson*, 336 U.S. 28, 49 (1949). "A taxpayer claiming an exclusion from income bears the burden of proving that his claim falls within an exclusionary provision of the Code." *Taggi v. United States*, 35 F.3d 93, 95-96 (2d Cir. 1994).

Petitioners rely on Section 131 of the Internal Revenue Code, as adopted by Wisconsin, as the foundation for their claim of income tax exemption for the home care payments Petitioner Nancy Hubbarth received for the care of her brother. Section 131 provides an income tax exclusion for certain foster care payments. Petitioners bear the burden of proving entitlement to the exemption.

C. Analysis

Foster care itself is not defined in the state statutes or federal regulations. Although foster homes are referenced as they relate to children in the Children's Code in Chapter 48 of the Wisconsin Statutes, foster care and related terms are not defined there or in any other section of the Wisconsin Statutes. Further confusion arises because I.R.C. § 131 uses the undefined term "foster care" to define the parameters of foster care payments. We are therefore left with a study of the somewhat circular federal code language and a search for a reasonable interpretation.

Section 131 of the federal code states that income does not include "amounts received by a foster care provider during the taxable year as qualified foster care payments." Given this definition, we need to determine (1) whether Petitioner is a

“foster care provider” and (2) whether the payments she received were “qualified foster care payments.” We turn first to the latter question:

1. Qualified Foster Care Payments

Again, the tax code provides that income does not include “amounts received by a foster care provider during the taxable year as qualified foster care payments.” I.R.C. § 131(a). The Code offers only limited guidance:

131(b) Qualified Foster Care Payment Defined.—
For purposes of this section—

131(b)(1) In general.—

The term “qualified foster care payment” means any payment made pursuant to a foster care program of a State or political subdivision thereof—

131(b)(1)(A) which is paid by—

131(b)(1)(A)(i) a State or political subdivision thereof, or

131(b)(1)(A)(ii) a qualified foster care placement agency, and

131(b)(1)(B) which is—

131(b)(1)(B)(i) paid to the foster care provider for caring for a qualified foster individual in the foster care provider's home, or

131(b)(1)(B)(ii) a difficulty of care payment.

131(b)(2) Qualified foster individual.— The term “qualified foster individual” means any individual who is living in a foster family home in which such individual was placed by—

131(b)(2)(A) an agency of a State or a political subdivision thereof, or

131(b)(2)(B) a qualified foster care placement agency.

131(b)(3) Qualified foster care placement agency defined. -
The term "qualified foster care placement agency" means any placement agency which is licensed or certified by—
 131(b)(3)(A) a State or political subdivision thereof, or
 131(b)(3)(B) an entity designated by a State or political subdivision thereof,
for the foster care program of such State or political subdivision to make foster care payments to providers of foster care.

The Code languages defines "qualified foster care payment" as any payment made pursuant to a foster care program of a state or political subdivision thereof which is paid by a state or political subdivision thereof, or by a "qualified foster care placement agency," *and* which is either paid to the "foster care provider" for caring for a "qualified foster individual" in the foster care provider's home or is a "difficulty of care payment."

Applying this language to the facts of this case, payments were made pursuant to the Community Integration Program (CIP-1B) of Manitowoc County and its Department of Human Services, which were paid by Manitowoc County (a political subdivision of the State of Wisconsin), which were paid to the Petitioner for caring for her brother in her home.

Many terms are undefined. Is the Community Care Program a "foster care program"? Is the Petitioner a "foster care provider"? Is she caring for a "qualified foster care individual" in her home, or, in the alternative, are the payments "difficulty of care payments"?

We begin by recognizing that Wisconsin has a foster care program outlined under the Children's Code. Wis. Stat. Ch. 48. The statutory language defining income and its exclusions requires the payments be made pursuant to "a" foster care program, not

“the” foster care program. We question the Department’s reference to foster care for children as “the” foster care program in Wisconsin. We do not decide here however whether the Children’s Code is the only foster care program in Wisconsin as we find a clearer ruling based on a different point in the Code. Yet, we do note that I.R.C. § 131 was amended in 1986 to accommodate adults into the federal definition of foster care.

We further note that I.R.C. 131 describes “certain” foster care payments which are excluded from income. This verbiage would seem to imply that, where payments are received for some form of foster care, it does not necessarily follow that all such payments are excluded from income.

Looking to the terms of the statutory exclusion, we choose the term “qualified foster individual” as the term of art upon which this decision will focus. The IRS Code defines “qualified foster individual” as any individual who is living in a foster family home in which such individual was placed by an agency of a State or a political subdivision thereof, or a “qualified foster care placement agency.” I.R.C. § 131(b)(2).

Petitioner’s brother is an individual who is living in his sister’s home. Without deciding whether her home is a foster family home, we look to see whether he was “placed” there by Manitowoc County or a “qualified foster care placement agency.” I.R.C §§ 131(b)(2)(A) and 131(b)(2)(B). We find that he was not.

The Department argues that Petitioner’s brother placed himself by choosing his sister’s home. Petitioners argue that, although it was at his own election, Petitioner’s brother was placed in his sister’s care pursuant to and therefore “by” the Community Integration Program.

The Department has submitted the Affidavit of the Business Division Manager of the Manitowoc County Human Service Department. Her testimony explains that Petitioner's brother was a "client" of the Community Integration Program which is administered by Manitowoc County. Through his participation in the program, Petitioner's brother employed his sister as a caregiver. In keeping with the program's intent of increasing independence of developmentally disabled persons, Petitioner's brother had the right to choose his sister or anyone else as his caregiver. The Petitioner was paid through a fiscal intermediary based on services logs she would complete. Petitioner received a W-2 reporting her income and withholding.

We therefore find that Petitioner's brother was not "placed" in his sister's home by Manitowoc County. Thus he is not a "qualified foster care individual." This holding is consistent with a similar case which came before the US Tax Court Small Claims Division from the State of Washington, *Alexander v. Commissioner*, T.C. Summary Opinion 2011-48 (2011). As here, the tax court was faced the issues of how or by whom the individuals were "placed" in their adult child's home through a program designed to encourage independence. The tax court drew attention to the express employer/employee relationship between the individual and the caregiver, the individuals' freedom to choose the current or a different caregiver, the timesheets kept by the caregiver, and W-2s reflecting withholding as evidence that the individuals were not placed by the state agency within the meaning of I.R.C. § 131. Here too we have an employment contract between the individual and caregiver, the individual elected to be cared for by his sister through a very similar program, and the caregiver received W-2s

reflecting income calculated from her logs. Through similar reasoning with similar facts, we reach a similar conclusion.

2. Difficulty of Care Payments

We then look to the alternate provision in I.R.C. §131.

131(c) Difficulty of Care Payments. –

For purposes of this section –

131(c)(1) Difficulty of care payments. –

The term "difficulty of care payments" means payments to individuals which are not described in subsection (b)(1)(B)(i), and which –

131(c)(1)(A) are compensation for providing the additional care of a qualified foster individual which is –

131(c)(1)(A)(i) required by reason of a physical, mental, or emotional handicap of such individual with respect to which the State has determined that there is a need for additional compensation, and

131(c)(1)(A)(ii) provided in the home of the foster care provider, and

131(c)(1)(B) are designated by the payor as compensation described in subparagraph (A).

Petitioner argues in the alternative that the payments are exempt as "difficulty of care payments." "Difficulty of care payments" are payments which are not described in subsection (b)(1)(B)(i) (the preceding subsection), and which are compensation for providing the additional care of a "qualified foster individual" which is "required by reason of a physical, mental, or emotional handicap" of such individual with respect to which the state has determined that there is a need for additional compensation. The care must be provided in the home of the foster care provider, and the payments must be "designated by the payor" as compensation for such additional care as described in this

section.

Because the first subsection refers to care of an individual in the provider's home and this subsection also refers to care in the provider's home, these payments must refer directly to the need for an additional level of care by reason of the individual's physical, mental, or emotional handicap. It is not disputed that Petitioner's brother requires this type of care as he is living with his sister because he is developmentally disabled. However, the regulations further require that Petitioner's brother be a "qualified foster care individual" and that the payments be "designated by the payor" as compensation for such additional care. As explained above, Petitioner's brother is not a "qualified foster care individual." In addition, nothing in the record indicates that the payments to Petitioner were so designated. Thus, the payments do not qualify as "difficulty of care payments" so as to qualify for the exemption.

Thus, because Petitioner's brother is not a "qualified foster care individual" and the payments are not "difficulty of care payments," the payments for his care are not "qualified foster care payments" eligible for exclusion from income under I.R.C. § 131.

CONCLUSIONS OF LAW

1. Petitioner's brother is not a "qualified foster care individual" because he was not "placed" in her home by the Community Integration Program or by Manitowoc County.
2. Payments received by the Petitioner for the care of her brother do not constitute "difficulty of care" payments.

3. Payments received by the Petitioner were not “qualified foster care payments.”

4. The Petitioners have not met their burden to show entitlement to the income tax exemption for foster care payments and therefore the assessments at issue are upheld.

RULING AND ORDER

We appreciate the willingness of Petitioner to care for her brother and do not seek to discourage her or others from providing this type of support. Nevertheless, the tax code’s exclusions are to be narrowly construed. The care in this case may indeed be considered foster care under a generic understanding that foster care can mean caring for someone who requires some level of care in one’s home. However, the exclusion refers to “certain” foster care payments, and, while its requirements could be better written, the convoluted language of the section’s provisions makes it clear that not all foster care payments fall within the exclusion. Because the care in this case does not fall squarely within the provisions, the income must be taxable.

It is therefore ordered that the Petitioners’ Motion for Summary Judgment is denied. There being no genuine issue of material fact with respect to tax liability and based upon the reasoning set forth above, Summary Judgment is granted to the Department with respect to tax liability.

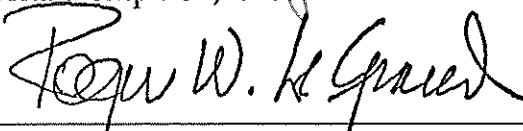
Because the income figures from the fiscal intermediary are not in dispute, there are no issues remaining for resolution at trial. Accordingly, the assessments are upheld and the Petitioners' action is dismissed.

Dated at Madison, Wisconsin, this 13th day of December, 2012.

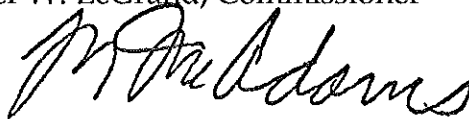
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner



Thomas J. McAdams, 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 either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) 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.