

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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TINA M. JACOBSEN n/k/a TINA M. LEMMENS,  
Petitioner,

DOCKET NO. 16-I-293

vs.

WISCONSIN DEPARTMENT OF REVENUE,  
Respondent.

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RULING AND ORDER ON  
MOTION FOR SUMMARY JUDGMENT

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**DAVID L. COON, COMMISSIONER:**

This case comes before the Commission for decision on the Respondent's Motion for Summary Judgment. The Petitioner, Tina M. Jacobsen n/k/a Tina M. Lemmens, of Neenah, Wisconsin, is *pro se*. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Sheree Robertson. For the reasons set forth below, we hold in favor of the Department.

**FACTS**

*Jurisdictional Facts*

1. In tax years 2010 and 2011, Petitioner and Rick E. Jacobsen ("Jacobsen") were married, but they divorced in May 2015. (Affidavit of Alexandria D.

Meyer, Revenue Auditor, Wisconsin Department of Revenue ("Meyer Aff.") ¶¶ 2 and 6, Exs. 1 and 10.)

2. In May 2011, a Criminal Complaint was filed with the State of Wisconsin Circuit Court in Outagamie County ("Circuit Court") charging Petitioner with five counts of theft from a business setting, one count of fraudulent writings, and two counts of misdemeanor theft. (Affidavit of Sheree Robertson, Attorney, Wisconsin Department of Revenue ("Robertson Aff.") ¶ 6, Exs. 12 and 15.)

3. In Petitioner's criminal case, the Circuit Court issued a Judgment of Conviction, sentencing her to serve five years in prison with extended supervision. (Robertson Aff. ¶¶ 5 and 8, Ex. 13.)

4. On April 1, 2012, Petitioner and Jacobsen jointly filed a 2011 Wisconsin income tax return claiming a refund of \$1,940. (Meyer Aff. ¶ 2, Ex. 1; Affidavit of Carrie Kloss, Office Audit Resolution Officer, Wisconsin Department of Revenue ("Kloss Aff.") ¶ 6.)

5. On April 5, 2012, the Department sent a Notice of Refund Offset to Petitioner, advising that the \$1,940 refund was being applied to an outstanding liability for the 2010 tax year. (Kloss Aff. ¶5, Ex. 8.)

6. On August 1, 2012, Petitioner and Jacobsen jointly amended their 2011 Wisconsin income tax return by removing \$43,007 of car and truck expenses previously claimed on their original 2011 Wisconsin income tax return. That amended return showed gross tax due of \$6,122. After subtracting the remaining available withholding of \$3,062 (the original \$5,002 withheld less the previous refund of \$1,940 that

applied toward the 2010 liability), the return showed a net amount due of \$3,060. They did not remit payment of the tax due. (Meyer Aff. ¶ 2, Exs. 1-2; Kloss Aff. ¶ 6.)

7. The Department issued a Notice of Amount Due – Individual Income Tax dated August 17, 2012, to Petitioner and Jacobsen. The Notice of Amount Due shows the Department likewise applied \$3,062 of withheld income tax against tax due of \$6,122. The Notice assessed a tax due of \$3,060, plus regular interest of \$105.64, and underpayment interest of \$38, for a total amount of \$3,203.64. (Kloss Aff. ¶¶ 6 and 7, Ex. 9.)

8. Because the Petitioner did not remit payment for the amount due in the Notice of August 17, 2012, it went delinquent and the Department began actions to collect the debt, including the issuance of a Notice of Warrant (Lien) Filing (“Notice of Warrant”) dated January 20, 2017. (Affidavit of Robert A. Frauchiger, Revenue Agent Supervisor, Wisconsin Department of Revenue (“Frauchiger Aff.”) ¶ 3, Ex. 20.)

9. On May 1, 2013, the Department received electronically a federal audit report from the Internal Revenue Service (IRS) notifying it of adjustments made to Petitioner and Jacobsen's 2010 and 2011 federal income tax returns. For tax year 2010, the IRS had corrected Petitioner's income to include \$261,959 of unreported "other income," \$1,388 of unreported gambling income, and \$301 of unreported federal Schedule C income. The IRS had also disallowed \$40,213 of the car and truck expenses claimed as deductions. For tax year 2011, the IRS had corrected Petitioner's and Jacobsen's income to include \$62,450 of unreported "other income" and \$415 of unreported federal Schedule

C income and disallowed \$46,281 of the car and truck expenses claimed as deductions.  
(Meyer Aff. ¶ 3.)

10. After receiving the federal audit report, the Department reviewed Petitioner and Jacobsen's 2010 and 2011 amended Wisconsin income tax returns and adjusted them to reflect the corrections the IRS made. Petitioner and Jacobsen's 2011 amended Wisconsin income tax return was adjusted to include the unreported "other income" of \$62,450. The amended return was also adjusted to include unreported federal Schedule C income of \$415, and another \$3,274 was added to income because the 2011 amended Wisconsin income tax return excluded only \$43,007 of the car and truck expenses despite the fact that the IRS disallowed \$46,281 of the car and truck expenses.  
(Meyer Aff. ¶ 5.)

11. On December 16, 2014, Petitioner filed a bankruptcy petition with the United States Bankruptcy Court for the Eastern District of Wisconsin, Milwaukee Division (Bankruptcy Court), attaching a Schedule E to her petition showing Wisconsin income tax liabilities for tax years 2010 through 2013. (Affidavit of Bernard Mollet, Revenue Agent, Wisconsin Department of Revenue ("Mollet Aff.") ¶ 2, Ex. 17.)

12. On April 17, 2015, the Bankruptcy Court issued the Discharge of Debtor in Petitioner's bankruptcy case. (Mollet Aff. ¶ 3, Ex. 18.)

13. By a Notice of Amount Due dated October 13, 2015, the Department issued an income tax assessment, including interest, to Petitioner for tax years ending December 31, 2010, and December 31, 2011, in the total amount of \$42,534.18, which

included \$36,361.68 assessed for tax year 2010 and \$6,172.50 assessed for tax year 2011. (Meyer Aff. ¶ 6, Ex. 4.)

14. The Department has not issued a Notice of Warrant for the amount at issue in the Notice of Amount Due of October 13, 2015. (Frauchiger Aff. ¶ 2.)

15. Since the Petitioner and Jacobsen were divorced in May 2015, the October 13, 2015 Notice was addressed to the Petitioner and mailed to her. (Meyer Aff. ¶ 6.)

16. On or about October 22, 2015, Petitioner timely filed an objection—which was considered a Petition for Redetermination—to the Notice of Amount Due dated October 13, 2015. (Kloss Aff. ¶ 2, Ex. 5.)

17. By its Notice of Action dated October 13, 2016, the Department denied Petitioner's Petition for Redetermination. (Kloss Aff. ¶ 3, Ex. 6.)

18. Petitioner filed a Petition for Review with the Commission received on December 5, 2016, via certified mail date stamped December 1, 2016. (Commission file.)

19. The Department subsequently conceded that the portion of the Notice of Amount Due dated October 13, 2015, assessing additional tax for tax year ending December 31, 2010, should be cancelled because the tax liability for that year was discharged in bankruptcy. (Robertson Aff. ¶ 9.) Thus, only the tax year 2011 remains at issue.

20. On June 7, 2017, a briefing order was issued on the Department's request. On July 31, 2017, the Department filed a motion for summary judgment, brief,

affidavits, and exhibits. On October 4, 2017, Petitioner filed a response brief, without affidavits or exhibits. On November 2, 2017, the Department filed a reply brief with an affidavit and exhibit. (Commission file.)

## **APPLICABLE LAW**

### *Summary Judgment*

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). A party opposing a motion for summary judgment “may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.” Wis. Stat. § 802.08(3).

### *Burden of Proof*

Assessments made by the Department are presumed to be correct, and the burden is on the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

## *Applicable Statutes*

### Wis. Stat. § 71.01(13)

**71.01 Definitions.** In this chapter in regard to natural persons and fiduciaries, except fiduciaries of nuclear decommissioning trust or reserve funds:

...

(13) "Wisconsin adjusted gross income" means federal adjusted gross income, with the modifications prescribed in s. 71.05 (6) to (12), (19), (20), (24), (25), and (26).

### Wis. Stats. §71.10(6)(a)

**71.10 General provisions.**

...

(6) MARRIED PERSONS. (a) *Joint returns.* Persons filing a joint return are jointly and severally liable for the tax, interest, penalties, fees, additions to tax and additional assessments under this chapter applicable to the return....

### Wis. Stat. § 71.11(2)

**71.77 Statutes of limitations, assessments and refunds; when permitted.**

...

(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.

### 11 U.S. Code § 507(a)(8)

**11 USC § 507 - Priorities**

(a) The following expenses and claims have priority in the following order:

...

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for —

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition —

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition...

11 U.S. Code § 523(a)

**11 USC § 523 – Exceptions to Discharge**

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed.

26 U.S. Code § 61

**26 USC § 61. Gross income defined**

(a) **General definition** Except as otherwise provided in this subtitle, gross income means all income from whatever source derived...

**DECISION**

In the current matter, the Petitioner has not filed any affidavits setting forth “specific facts showing that there is a genuine issue for trial” and, therefore, has not shown that there is any genuine issue for trial. Wis. Stat. 802.08(3). That being the case, we will decide this matter by applying the applicable law to the uncontroverted facts set forth by the Respondent in its affidavits and exhibits to determine if the Respondent is entitled to judgment on its motion.

There are three primary issues related to the Petitioner’s liability for the additional assessment. First, are monies embezzled by the Petitioner taxable income? Second, was the Department’s audit and issuance of the October 13, 2015, Notice of Amount Due timely? Third, was the tax liability for the 2011 tax year discharged in bankruptcy?



Over the course of several years, Petitioner embezzled nearly one-half million dollars from her employer, Community Blood Center, Inc. She was convicted of crimes and imprisoned for her actions. For the 2011 tax year, the IRS determined that her embezzlement, in the amount of \$62,450, was "other income" that should have been reported on her return as taxable income. Petitioner, in her Petition for Review, concedes that the Department included the "correct calculations from the Internal Revenue audit."

It is somewhat difficult from the Petitioner's filings to tell if, before the Commission, she continues her objection to the embezzled funds being included as taxable income or merely objects to the calculations made based on that additional income and other unrelated issues. Because, at least in her Petition for Redetermination, the Petitioner claimed that embezzled income does not meet "the guidelines for 'gross income'," For completeness, we will address this issue.

Petitioner did embezzle money from her employer and was convicted of doing so. She did not report that money as income on her 2011 tax returns.

"Adjusted gross income" in Wisconsin is "federal adjusted gross income" with some modification. Wis. Stat. § 71.01(13). Pursuant to the Sixteenth Amendment to the United States Constitution, "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived...." Congress codified this in § 61(a) of the Internal Revenue Code ("IRC"), stating "gross income means all income from whatever source derived."

In *James v. United States*, 366 U.S. 213, 81 S. Ct. 1052, 6 L.Ed.2d 246 (1961), the Supreme Court determined that embezzled funds were included as gross income (overruling *Commissioner of Internal Revenue v. Wilcox*, 327 U.S. 404, 66 S. Ct. 546, 90 L. Ed. 752) stating, "We should not continue to confound confusion, particularly when the result would be to perpetuate the injustice of relieving embezzlers of the duty of paying income taxes on the money they enrich themselves with through theft while honest people pay their taxes on every conceivable type of income." *James* at 221.

Wisconsin has followed this practice of taxing embezzled funds. In *Lemons v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 201-390 (WTAC 1977), the Commission concluded, "The value of the illegal benefit and/or gains the petitioner received . . . constitute taxable income to him in said year, under the provisions of Section 61 and Reg. 1.61-14 of the Internal Revenue Code." Further, in *Opitz v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-891 (WTAC 1987), the Commission decided that "monies illegally obtained by the petitioner constituted taxable income" during the applicable tax years. Based upon the broad definition of gross income, Petitioner's embezzled funds are taxable income.

In her Petition, the Petitioner alleges that the Department's Notice was beyond the statutory four-year period with respect to her 2011 tax year since the Notice was issued on October 13, 2015. "With respect to assessments of a tax . . . notice shall be given within 4 years of the date the income tax or franchise tax return was filed." Wis. Stat. § 71.77(2). Here, Petitioner filed her joint income tax return for 2011 on April 1, 2012.

Four years from that filing date would be April 1, 2016. Therefore, the Department's Notice of October 13, 2015, was timely.<sup>1</sup>

The Petitioner filed a bankruptcy petition on December 16, 2014, and received an order for Discharge of Debtor on April 15, 2015. Although the Petitioner received her discharge, there are some debts that, under the bankruptcy code, are not dischargeable by law.

Exceptions to discharge relevant to this matter are found in 11 USC § 523(a) and 11 USC § 507(a)(8). A tax debt is non-dischargeable, if it is 1) A tax on or measured by income; 2) for a tax year ending on or before the date of the filing of the petition; and 3) has a return that is last due to be filed after three years before the bankruptcy petition is filed. The debt at issue is an income tax and is for a tax year, 2011, which ended before the filing of the bankruptcy petition on December 16, 2014. Three years before the filing date of the bankruptcy petition would be December 16, 2011. The last due date for the filing of the 2011 tax year was April 17, 2012.<sup>2</sup> That filing due date is after December 16, 2011, so the amount due for the 2011 tax year falls clearly within the statutory exception to discharge.

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<sup>1</sup> The Department also asserts other arguments that the Department's notice was timely. For example, the Department notes that the Petitioner had 90 days pursuant to Wis. Stat. § 71.76 to notify the Department of the changes made to the 2011 return by the IRS audit. With Petitioner failing to make that notification, the Department, per Wis. Stat. § 71.77(7)(b), may make an assessment "within 4 years after discovery by the department" of the IRS change. In this matter, the Department received an electronic notice from the IRS on May 1, 2013, which would extend the time to send a Notice to the Petitioner to May 1, 2017, well beyond October 13, 2015, the date that the Notice was sent.

<sup>2</sup> April 15, 2012, was a Sunday, and April 16, 2012, was Emancipation Day in the District of Columbia, a federal holiday.

On mere assertion, without affidavit, other facts, or law, Petitioner claims that the Department did not object to discharge, so, apparently, the tax debt must be discharged. As noted, this debt is an exception to discharge. Additionally, the statute specifically states that such a debt is excluded from discharge "whether or not a claim for such tax was filed or allowed." 11 USC § 523(a). Based upon the statutory exception, the debt for the 2011 tax assessment was not discharged.

Petitioner makes a number of other arguments related to the calculation of the debt, responsibility for payment, and equal protection. None of these are persuasive, and most are merely assertions in pleadings rather than facts set forth in an affidavit as required in Wis. Stat. § 802.08(3).

Petitioner claims that she is unable to find documents or tax tables to verify the Department's calculations of her gross tax due. The Commission is not tasked with doing a petitioner's work, even if the petitioner is acting *pro se*. Petitioner has not provided any affidavit or other information to show that the Department's calculations of gross tax are incorrect. She merely alleges that she has not verified those calculations. Further, the Department has submitted affidavits which show that the Department did provide Petitioner with a letter dated May 18, 2017, which included the 2011 tax computation worksheets showing how the Department calculated the gross tax. (Kloss Aff. ¶ 4, Ex. 7; Robertson Aff. ¶ 3, Ex. 11.)

Petitioner also asserts that \$5,002 of income withholdings for the 2011 tax year were not credited toward the calculation of taxes due. Petitioner additionally

disputes that she received a \$1,940 refund from her original tax return. Petitioner is incorrect.

On Petitioner's original joint return, Petitioner and Jacobsen claimed a refund of \$1,940 from their withholdings, after tax. By a Notice dated April 5, 2012, Petitioner was advised that the \$1,940 refund was being applied to tax due on an outstanding liability for the 2010 tax year. Petitioner did "receive" the \$1,940 refund, but it was applied to another liability instead of being received as a cash refund to her.

When Petitioner and Jacobsen filed their joint amended return in August 2012, they reported tax due of \$6,086 (\$6,122 including a \$36 IRA penalty). On their amended return, they correctly included the whole \$5,002 that had been withheld for the 2011 tax year, and then also correctly subtracted the \$1,940 refund received and applied to their 2010 obligation, leaving them with \$3,062 of available withholdings to apply toward the tax due. This resulted in \$3,060 of tax still due for 2011 based on the amended return, which, along with regular interest and underpayment interest, was assessed on the Notice of Amount Due issued on August 17, 2012.

After the Department received the audit report from the IRS in 2013, the Department issued another Notice of Amount Due dated October 13, 2015. In that Notice, the Department calculated net tax due, after adding to "other income" Petitioner's income due to embezzlement, of \$10,172. The Department then subtracted the original tax obligation reported on the amended return of \$6,086 from the \$10,172 total, to find additional tax due of \$4,086 (before interest) for 2011. The \$5,002 withholding for 2011 and the original refund claim of \$1,940 in the Notice of Amount Due of April 17, 2012,

were properly accounted for with that subtraction. The Notice of October 13, 2015, only represents the new tax due after a recalculation that included the embezzlement income and other minor adjustments.

Petitioner also raises a number of issues related to her ex-husband. She claims that he has paid some of the obligations, that he should bear responsibility for 50% of the obligations, and that he has not been and should not be granted innocent spouse relief. In this matter, Petitioner filed a joint return with her then husband and is jointly and severally liable for the tax due. Wis. Stat. § 71.10(6)(a).

As to her claim that Jacobsen has already paid some portion of the total amount due from either Notices of April 17, 2012, and October 13, 2015, respectively, we note that Jacobsen is not before the Commission and Petitioner has provided no affidavit or other proof of his payment. Further, that issue is a collections matter and the Commission does not have jurisdiction as to the Department's collection of past due, delinquent taxes. See *Kaminske v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-638 (WTAC 2012), citing *Beck v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-275 (WTAC 1997).

Whether Jacobsen has been or should be granted innocent spouse relief is immaterial to a determination of Petitioner's joint and several liability for the taxes due on their joint tax returns. As noted above, we do not have jurisdiction over collections. Further, the issue of innocent spouse relief is not before us, and Petitioner has not developed the issue via any affidavit to show that this is a material issue of fact.

Petitioner also asserts that her divorce decree splits the tax liability 50/50, so she should only be liable for half of the assessment. The divorce decree is in family

court and is not controlling here. Again, it is at best a potential collections issue. Here, Petitioner is jointly and severally liable for the full amounts due for her jointly filed tax return. Any issues between her ex-spouse and her would be addressed in a different forum.

Petitioner also raised an issue regarding a tax warrant filed against her. The Department has not issued a tax warrant for the amount in the Notice of Amount Due of October 13, 2015. The tax warrant filed on January 30, 2017, is for the delinquent tax from the Notice of August 17, 2012, which has gone to collections with the Department and is not before the Commission. The only amount before the Commission is the additional tax due from the Notice of October 13, 2015, which at that time was \$6,172.50, including tax and interest, and is above and beyond the amount due in the Notice of August 17, 2012.

Finally, Petitioner appears to raise an equal protection argument of some sort, primarily in a single line in a concluding paragraph, stating, in part, "Petitioner would like to see ... all people who have business theft crimes be treated equally according to the legal system and the Wisconsin Department of Revenue." This claim is completely undeveloped. Further, there is no factual basis to show that Petitioner has been treated any differently from any other embezzler who comes to the attention of the Department.

**CONCLUSIONS OF LAW**

1. Petitioner's income due to embezzlement is taxable to her.
2. The Department's audit and issuance of the Notice of Amount Due of October 13, 2015, was timely.
3. Petitioner's tax liability for the 2011 tax year was not discharged in bankruptcy.
4. Petitioner is jointly and severally liable for the amount due for her jointly filed tax return.


**ORDER**


Based on the foregoing, the Commission orders as follows:

1. The Department's Motion for Summary Judgment is granted.
2. The Department's action on Petitioner's Petition for Redetermination is affirmed.

Dated at Madison, Wisconsin, this 27th day of March, 2018.

**WISCONSIN TAX APPEALS COMMISSION**

  
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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 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.