

STATE OF WISCONSIN
TAX APPEALS COMMISSION

CLAUDE AND PATRICIA MERCKES,

Petitioners,

DOCKET NOS. 12-I-026
AND 12-I-038

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission on Respondent's Motion for Summary Judgment. The Petitioners, Claude and Patricia Merckes, appear on their own behalf. The Respondent in these matters, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer. Respondent has filed a brief and several affidavits in support of its motion. Petitioners have filed opposing materials, and Respondent has filed a reply to the Commission. Subsequent to the initial briefing, the parties provided supplemental filings as was requested in the commission's preliminary order. For the reasons stated below, we find there are no genuine issues of material fact and that summary judgment is appropriate.

FACTS

1. For the tax years 2003-2008, Petitioners filed Wisconsin Form 1

income tax returns with the Department; in each of those years (“Audit Period”), Petitioners took a Line 11 subtraction for the income earned on the reservation of the Stockbridge-Munsee Community of Wisconsin (“Tribe”). (Abrams Aff., Ex. A-1.)

2. Petitioner Patricia Merckes¹ is an enrolled member of the Tribe. (Exhibit A-2.)

3. During the Audit Period, Petitioner Patricia Merckes received income in the form of W-2 wages from Konkapot Enterprises, Inc., located on the Tribe’s reservation, and W-2 wages from the Tribe itself (Abrams Aff., Ex. A-1, Forms W-2.). She also received Schedule K-1 income as part-owner of Konkapot Enterprises, Inc. (Abrams Aff., Ex. A-1, Schedule E.), and per-capital income from the Tribe (Abrams Aff. Ex. A-1, Form 1040).

4. During the Audit Period, Petitioners resided at W12776 School House Road, Bowler, Wisconsin, which corresponds to the 2.5 acre parcel of land described as “SE¹/₄ of SW¹/₄ of SE¹/₄ of SW¹/₄ Section 35 T28N R13E.” (Abrams Aff., Ex. A-3.)

5. By Notice of Amount Due dated April 12, 2010, the Department issued an income tax assessment in the amount of \$16,663.43, including tax and regular interest, for the tax years 2003-2006, based on the Department’s disallowance of the Line 11 Subtraction for Native American Income. (Abrams Aff. Ex. A-4, p. 4.)

6. By Notice of Amount Due dated April 12, 2010, the Department issued an income tax assessment in the amount of \$6,301.68, including tax and regular

¹ Claude Merckes is a party by virtue of his marriage to Patricia. This case involves the income and residence of Petitioner Patricia Merckes. As such, we may at times in this decision refer only to “Petitioner” in the singular.

interest, for the tax years 2007-2008, based on the Department's disallowance of the Line 11 subtraction for Native American Income. (Abrams Aff. Ex. A-4, p. 4.)

7. The Line 11 subtraction is allowed for tribal members who work and live on tribal land; the Department's disallowance is based on its contention that Petitioners did not reside on tribal land during the audit period.

8. Petitioners filed timely Petitions for Redetermination which the Department denied in Notices of Action dated December 12, 2011. (Abrams Aff. Ex. A-7.)

9. Petitioners filed timely Petitions for Review with the Wisconsin Tax Appeals Commission on February 10, 2012. (Abrams Aff. Ex. A-8.)

OPINION

The appeals in these cases are two-fold. First, Petitioner argues that she does not owe the additional income tax by virtue of where she lives. Second, she argues that, if she does owe the tax, she is not liable for the resulting penalties but should be treated the same as those who participated in the Escrow Plan.²

With respect to liability for the income tax, we previously found that the "boundary case" describes the history and current status of the lands inside and outside of the Stockbridge-Munsee reservation and therefore it is applicable to the facts of this case. In *State of Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009) ("boundary case"), the Seventh Circuit clarified the boundaries of reservation land and the

² The Escrow Plan allowed members of the Tribe, who may or may not have resided on the reservation, who earned income on the reservation to pay disputed taxes into an escrow account until the resolution of litigation regarding reservation boundaries in *State of Wisconsin v. Stock-bridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009) ("boundary case").

timing of the changes to those boundaries over the years.

The Commission previously found that the parcel of land belonging to the Petitioners does not fall within the current description of the reservation as described in *Stockbridge-Munsee Community* and Exhibit A-11. However, in its earlier decision, the Commission sought clarification as to the specific terms of ownership of the land on which Petitioners reside. Having received that clarification, the Commission finds, rules, and orders as follows:

CONCLUSIONS OF LAW

1. Petitioners did not reside on reservation land during the tax years at issue.
2. Petitioners did not reside on trust land during the tax years at issue and in fact their property did not become trust land until 2011.
3. Petitioners were not entitled to a line 11 deduction for the income earned on the reservation because they did not reside on tax-exempt land during the tax years at issue.
4. Petitioners are not entitled to a waiver of interest because they were not participants in the Escrow Plan.
5. Petitioners are not entitled to treatment as though they were participants in the Plan based on equal protection or due process because the Department did not act in an intentional or purposeful way to exclude the Petitioners from the Plan.

ANALYSIS

A. Petitioners' Residence is Not on Tax-Exempt Land

Under federal procedures, there are two different ways in which land may be deemed exempt from state taxation. First, when the land is specifically reserved for the Tribe, those lands are exempt from state jurisdiction including taxation. *LaRock v. Dep't of Revenue*, 232 Wis. 2d 474, 606 N.W.2d 580 (Ct. App. 1999), *aff'd* 241 Wis. 2d 87, 621 N.W.2d 907 (2001).

Reservation boundaries can change over time for various reasons. The Stockbridge Reservation boundaries and the history of changes to those boundaries were set out in detail in *State of Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009). As noted in our earlier decision, the location of Petitioners' residence did not fall within the boundaries of the reservation as it was defined in the years at issue.

The second way in which property may be exempt from taxation is classification as "trust land." Trust land comes about when Tribes or members of the Tribe purchase privately owned property themselves and then request that the property be placed in trust with the federal government on behalf of the Tribe or individual under 25 U.S.C. § 465. Such "trust lands" are exempt from state taxation, but not until the approval process is complete. Before the approval process is complete, however, such land remains fee land which is subject to state taxation. *Ho-Chunk Nation v. Dep't of Revenue*, 317 Wis. 2d 553, 766 N.W.2d 738 (2009).

In this case, it appears that the trust process may have begun during the time period at issue as evidenced by the Tribe's grant which states that the Tribe "has

requested that the United States acquire and hold in trust” the property which was granted to the Petitioners. (Dept. Ex. A-3.) However, the Stockbridge Community Legal Office confirmed that the property on which the Petitioners resided did not become trust land until November 10, 2011. (Pet. Ex. 2.) Thus, Petitioners’ property was not trust land during the tax years at issue.

The Petitioners did not reside on reservation land. The process to place it in trust may have been pending but was not complete. The Tribe still held title to the property in fee simple. Therefore, the property was subject to taxation by the State of Wisconsin.

B. Petitioners are Not Entitled to a Waiver of Interest

The Petitioners further argue that, if they are found liable for the tax, they should not be subject to the interest and penalties assessed in conjunction with the tax. By statute, the Tax Appeals Commission does not have authority to review the imposition of statutory interest. *Worley v Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-571 (WTAC 1985) (“Interest and late charges imposed by respondent are mandatory under Chapter 71 of the Wisconsin Statutes and are not reviewable by this Commission.”)

The Wisconsin Tax Appeals Commission also lacks authority to review the constitutionality of laws duly enacted by the Legislature of the State of Wisconsin. In this case, however, we are asked to address the application and/or interpretation of a court approved stipulation rather than statute, so we will set forth our conclusions as to Petitioners arguments.

The Escrow Plan allowed Tribe members who were potentially liable for

state income taxes, depending on the outcome of the boundary case, to have withholding for the potential tax deposited into an interest-bearing escrow account to be held there until the case was finally decided. When the decision indicated liability for state income tax for those residing on properties outside the narrowly defined boundaries, the escrowed funds, with interest, were paid over to the Department. Participants in the Escrow Plan, by the Plan's terms, were not required to pay interest on the tax liability until after the December 31, 2012 tax year.

Petitioners raise constitutional arguments with their request that the Commission declare the Plan's provisions extend to them so as to relieve them of these additional charges. Their equal protection and due process arguments are based upon the fact that they never received notice of the Plan and therefore were not given the same opportunity as others to formally opt into the Plan.

Under the terms of Stipulation between the Department and the Tribe, the Tribe was to "provide a list of consenting tribal members" to the Department. It is unclear from the record what steps the Tribe took to notify its members to obtain their consent. However, the Tribe did compile and provide a list of the Escrow members to the Department. The Department was not a player in the compilation of the list.

The parties agree that Petitioners were not on that list. Petitioners contend that they did not even know about their opportunity to opt into the Plan. However, as the Department argues, the Escrow Plan was an agreement between the Department and the Tribe; the Department had no direct relationship with or obligation to the Petitioners with regard to the Plan. Any dispute Petitioners have regarding the handling of the Plan lies

instead with the Tribe.

The Department simply agreed that it would not charge additional interest to those who placed withheld funds into the interest-bearing escrow account. Petitioners had no funds in the account during the pendency of the boundary case; no interest was earned in the escrow account on their behalf. Although it is unfortunate that the Petitioners were unaware of the Plan, any dispute the Petitioners have regarding their omission from the Plan is with the Tribe, not the Department.

We find no purposeful or intentional act on the part of the Department that affected Petitioners participation in the process of the Escrow Plan. We also find no purposeful or intentional act on the part of the Department which resulted in disparate treatment of the Petitioners in this case. Therefore, even if it were within our power to waive statutory interest, the Commission concludes that Petitioners are not constitutionally entitled to a waiver of interest because any disparate treatment between petitioners and certain members of the Tribe has not been purposeful or intentional. *See Maves, Dawson, Kurth, and Reynolds v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-396 (WTAC 1998).

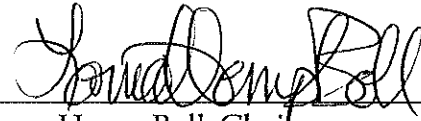
ORDER

Based on the foregoing reasoning and caselaw, and there being no remaining issues of material fact,

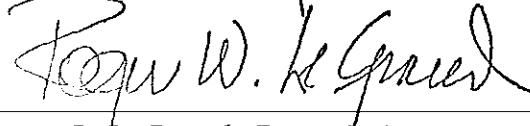
IT IS HEREBY ORDERED that the Department's Motion for Summary Judgment is granted and Assessments at issue are upheld.

Dated at Madison, Wisconsin, this 12th day of December, 2013.

WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger L. LeGrand, 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.