

STATE OF WISCONSIN  
TAX APPEALS COMMISSION



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JOHN J. AND DIXIE R. POEHLING,

DOCKET NOS. 15-I-153-SC,  
15-I-179 AND 15-I-180

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING AND ORDER**

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**DAVID L COON, COMMISSIONER:**

This matter comes before the Commission on the Petitioners' Motion for Partial Summary Judgment. While the Department did not separately file a motion for summary judgment, it requests that it be granted summary judgment pursuant to Wis. Stat. § 802.08(6). This matter concerns assessments the Department issued against the Petitioners for the tax years 2009 to 2012 ("audit period").

The Petitioners, John J. Poehling, Sr., and Dixie R. Poehling, are *pro se*. The Department is represented by Attorney Mark S. Zimmer.

**FACTS**

1. During the entire audit period, Petitioner John J. Poehling Sr. ("John Sr.") was one of six current income beneficiaries of the Gerhard G. Poehling Family Trust ("Trust") u/a 1975. (Joint Stipulation of Undisputed Facts, ("Stip.") ¶ 1.)

2. During the entire audit period, Petitioners John Sr. and Dixie R. Poehling were married to each other and were both residents of the State of Wisconsin. (Stip. ¶ 2.)

3. In each year of the audit period, Petitioners filed Form 1 Wisconsin income tax returns. (Stip. ¶ 2, Exs. 2-4, 9.)

4. In addition, Petitioners filed Form 1X Wisconsin amended income tax returns for the years 2009, 2010 and 2011. (Stip. ¶ 2, Exs. 6-8.)<sup>1</sup>

5. Trust Point Inc. ("Trustee") (f/k/a La Crosse Trust Company and North Central Trust) is the sole Trustee of the Trust and is the legal owner of the trust property. The Trustee is headquartered in the State of Wisconsin and is subject to the jurisdiction of the Wisconsin Department of Revenue for income and franchise tax purposes. (Stip. ¶ 4.)

6. The Trustee reported on the Trust's Form 1041 Schedule B the following amounts of Distributable Net Income:

A. For tax year 2009: \$1,322,917 (Stip. Ex. 15, p. JointSOF0148 line 7).

B. For tax year 2010: \$1,123,143 (Stip. Ex. 16, p. JointSOF0156 line 7).

C. For tax year 2011: \$1,713,649 (Stip. Ex. 17, p. JointSOF0164 line 7).

D. For tax year 2012: \$1,803,421 (Stip. Ex. 18, p. JointSOF0175 line 7).

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<sup>1</sup> The second sentence of the Joint Stipulation at ¶ 2 erroneously references federal Form 1040 rather than Wisconsin Form 1; however, the attached Exhibits 6-8 are correctly the Petitioners' amended Wisconsin Form 1X, which incorporates the amended federal Form 1040X. Exhibit 9 is the Petitioners' Wisconsin Form 1 and federal Form 1040 for 2012.

7. The Trustee made distributions of cash to the income beneficiaries of the Trust, in the following total amounts:

A. For tax year 2009: \$761,400.

B. For tax year 2010: \$362,400.

C. For tax year 2011: \$756,600.

D. For tax year 2012: \$788,400.

(Stip. ¶ 18.)

8. The Trustee made distributions of cash to John Poehling Sr., as his one-sixth share of the above distributions and which John Poehling Sr. acknowledges receiving, in the following amounts:

A. For tax year 2009: \$126,900.

B. For tax year 2010: \$60,400.

C. For tax year 2011: \$126,100.

D. For tax year 2012: \$131,400.

(Stip. ¶ 21.)

9. The Trustee did not make any other distributions of cash, property, or otherwise, related to the tax years 2009, 2010, 2011 or 2012. (Stip. ¶ 19.)

10. For each of tax years 2009 through 2012, the Trustee issued Schedule 2K-1 Forms to John Poehling Sr. (Stip. ¶ 20, Amended Exs. 19-22, pp. JointSOF0236-0266.)

11. In both their originally-filed and their amended federal and Wisconsin tax returns filed for the years of the audit period, the Petitioners included in their taxable income either none or less than all the income reported by the Trust on the

federal K-1 and Wisconsin 2K-1 forms. The Petitioners did, however, disclose the amount of and information regarding the income reported by the Trust on a Form 8275 Disclosure Statement attached to each of the returns. (Stip. Exs. 2, 3, 4, 6, 7, 8, 9.)

12. For each year of the audit period, Petitioners disputed having to pay income tax on anything more than the actual cash received from the Trust. The Department disagreed with the Petitioners and assessed Petitioners additional tax due (plus statutory interest) for failure to include in taxable income John Poehling Sr.'s share of the Trust income less his share of the depreciation reported on his 2K-1. (Stip. Exs. 24 and 25.)

13. Petitioners timely filed Petitions for Redetermination in response to the above assessments. (Stip. ¶ 23, Ex. 26.)

14. The Department issued Notices of Action on April 27, 2015, denying the Petitions for Redetermination. (Stip. ¶ 24, Exs. 27, 28, and 29.)

15. Petitioners timely appealed the Notices of Action to the Tax Appeals Commission. (Commission File.)

16. On March 16, 2016, the Department issued alternate assessments to the Trust due to the dispute between the Petitioners and the Trust over the taxability and deductibility of the reported income and distributions. (Reply Affidavit of John S. Poehling, Sr., ("Pet. Reply Aff."), Ex. 69.)

17. The Trust timely filed Petitions for Redetermination, which the Department subsequently denied. The Trust then timely filed Petitions for Review with the Commission. (Commission File.)

18. The Department and the Trustee reached a confidential settlement of the Trust's appeal of the alternative assessments. On February 13, 2017, the Commission signed and entered a Stipulation and Order for Dismissal of the alternate assessments. As part of that settlement, the Trust agreed to pay tax on the difference between the amount of Trust income included on the Wisconsin 2K-1 forms issued to John Poehling Sr. during the audit period and the amount of the cash distributions made by the Trust to John Poehling Sr. during the audit period. The amounts added to the Trust's income in the settlement were credited by the Department against the amounts of additional income assessed to the Petitioners, and the assessments against the Petitioners were modified accordingly. (Commission File, Affidavit of Carrie A. Kloss, Tax Resolution Officer for the Wisconsin Department of Revenue, ¶ 3.)

19. The assessments at issue in these cases, as modified by the Department, tax only the amount of the cash distributions made by the Trust to John Poehling Sr. during the audit period, net of John Poehling Sr.'s corresponding share of depreciation reported by the Trust. (Pet. Reply Aff., Ex. 72.)

20. On March 17, 2017, Petitioners filed a Motion for Partial Summary Judgment along with a Brief, affidavit, and exhibits. On April 17, 2017, the Department filed a Response Brief with an affidavit. On May 1, 2017, Petitioners filed a Reply Brief along with a reply affidavit and exhibits.<sup>2</sup>

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<sup>2</sup> On June 9, 2017, a representative of the Trust filed a letter brief. As the Trust is not a party to the pending matter, that letter has been disregarded and not considered in the determination of this motion.

## 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). If it appears that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, summary judgment may be awarded to that party even though the party has not moved for summary judgment. Wis. Stat. § 802.08(6).

## DECISION

During the audit period, the Trust issued federal K-1 and Wisconsin 2K-1 forms to the Petitioners reporting Petitioners' share of income (and depreciation) as Trust beneficiaries. Petitioners' concern or complaint has been that they received less in actual cash distributions than the Trust reported as their total share of Trust income. The Petitioners and the Department have stipulated to the figures for the income reported by the Trust, the distribution deduction taken by the Trust, the actual cash received by the Petitioners, and the depreciation allocated to the Petitioners for each year of the audit period.

The Petitioners, in an ongoing battle with the Trust over income and distribution issues, have filed their Motion for Partial Summary Judgment seeking the Commission to grant an order or judgment stating that, if a trust has a legal duty to distribute income and takes a corresponding distribution deduction, the trust must

distribute that full amount in actual cash to comply with the tax code. The Petitioners have phrased their issue in a variety of ways, but this is the essence of what they ask. Petitioners' stated goal is to use such an order "to compel the Trustee to distribute the more than \$10,000,000 they are improperly withholding." (Reply Brief p. 6.)

On the other hand, the Department has requested summary judgment as it believes that, based upon the facts as stipulated to by the parties and as contained in the filed affidavits, the Department is entitled to judgment as a matter of law pursuant to Wis. Stat. § 802.08(6).

A taxpayer, aggrieved by an action of the Department (and after a decision by the Department on a Petition for Redetermination), may seek review of the Department's actions. The Commission finds that the parties have stipulated to facts and presented affidavits sufficient for the Commission to decide the matter as a matter of law.

Where a trust has income, a trust may or must per the terms of the trust documents pass income to the beneficiaries so that the beneficiaries receive the income and report the income as their personal income for purposes of taxation. Here, the Trust issued 2K-1 forms to the Petitioners for the audit period, reporting to Petitioners their one-sixth proportional share of the income (as well as the Petitioners' share of the depreciation deduction). The Petitioners did not receive the entire amount of income reported on the 2K-1 form in a cash payment or any other form of payment. The Trust did take the distribution deduction for the total amount of income reported on the 2K-1 forms for each year of the audit period.

The Petitioners' dispute with the Trust has been over the difference between the total income amounts reported on the 2K-1 forms and the actual cash that Petitioners received from the Trust. Because of this, the Petitioners disputed the amount of income that they were required to claim on their personal tax returns. They included form 8275 Disclosure Statements with their federal returns noting their dispute. The Department disagreed and issued assessments for the full amount of income reported by the Trust on the 2K-1 forms, regardless of whether the Petitioners received that full amount in actual cash.

While this matter has been pending, though, the Department issued an alternative assessment against the Trust, assessing Wisconsin income tax on the difference between the amount of income reported by the Trust on the 2K-1 forms issued to the Trust beneficiaries and the amount of cash distributed by the Trust to the beneficiaries. The Department and the Trustee ultimately settled the alternative assessment by allocating to the Trust as additional taxable income the difference between the amount of income reported on the Petitioners' 2K-1 and the amount of the cash distribution made to them during the audit period.<sup>3</sup> After settling with the Trust regarding the alternative assessment, the Department modified its assessment against the Petitioners, removing the amounts of income the Petitioners did not receive in cash.

Due to the settlement of the alternative assessment with the Trust, the Department has included only the actual cash received by the Petitioners from the Trust in

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<sup>3</sup> The Commission makes no decision or comment regarding the Department's use of its discretion in the settlement of this issue. The Commission makes no endorsement of any legal principal for purposes of precedent in future matters based upon this settlement by the Department.



the modified assessment. The disputed income is, therefore, no longer before the Commission. The current figures in the modified assessment for income less depreciation are as follows:

	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>
Cash Received	\$126,900.00	\$60,400.00	\$126,100.00	\$131,400.00
Depreciation	(\$147,244.00)	(\$94,111.00)	(\$90,421.00)	(\$90,421.00)
Adjustment	(\$20,344.00)	(\$33,711.00)	\$35,679.00	\$40,979.00

(Pet. Reply Aff. Ex. 72.)

The Petitioners make arguments related to the income not received as cash. They want an order, or judgment, that they believe they can use to force action by the Trust to send them additional cash. The modified assessment includes only the income (net of depreciation allowance) actually received by the Petitioners; thus, any issues related to the additional income are no longer before the Commission. A decision on the modified assessment will dispose of the matter. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (“As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.”); *see also State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“[C]ases should be decided on the narrowest possible ground.”).

The Petitioners acknowledge and stipulate to the receipt of actual cash distributions from the Trust. There is no dispute as to the amount of the cash received.

Further, the Petitioners acknowledge that the actual cash distributions received from the Trust are income taxable to them. Regarding the modified assessment, they state, “The respondents [sic] final assessments against the petitioners reflects the way

the Petitioners initially reported their tax returns, as such, there was no basis for issuing the [original] assessment.” (Pet. Reply Brief, p. 6). Indeed, the Petitioners in a “Petitioners’ Prehearing Memorandum” state, “In accordance with the U.S. Tax Court filing by the IRS in the 2008 US Tax Court case, the income beneficiaries should have only paid taxes on the actual distributions less the depreciation deduction or \$(20,344) in 2009, \$(35,711) in 2010, \$35,678 in 2011 and \$40,978 in 2012 for total taxable income for the four years of \$20,601.” (Poehling Aff. Ex. 55, p. 4.)<sup>4</sup> These are the nearly exact amounts of the additional income (less depreciation deduction) contained in the modified assessment.<sup>5</sup> This is consistent with the Petitioners’ argument “that the Trust beneficiaries are only taxable on income which they actually receive in cash.” (Petitioners’ Cover Letter dated March 17, 2017.)<sup>6</sup>

Petitioners raised issues with the original assessment related to the Department’s presumption of correctness. Before the Commission, the Petitioners carry the burden to prove that the Department’s determination is incorrect. (See *Puissant v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984)). In this matter, the original assessment has been modified so those arguments as to the original assessment are moot. Petitioners have stipulated to the amount of cash received from the Trust, which is the same amount contained in the modified assessment. Consequently, there is no longer a dispute

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<sup>4</sup> The Commission’s noting of the Petitioners’ statement should not be construed as the Commission’s agreement with any IRS determination related to the Petitioners’ past matters before the IRS.

<sup>5</sup> The amounts for 2011 and 2012 are different by one dollar likely due to rounding. There is a \$2,000 difference for 2010. This is due to the Petitioners using an amount of \$58,400 for actual cash received for 2010 in their Prehearing Memorandum but subsequently stipulating that the actual cash received in 2010 was \$60,400.

<sup>6</sup> While this statement is contained in what is called a “cover letter,” it is clear to the Commission that the information contained in the five-page letter is additional argument and explanation that these *pro se* Petitioners intend to be considered by the Commission.

between the parties regarding the amount of income properly taxable to the Petitioners for the audit period.

Petitioners also make other arguments including, but not limited to, issues related to prior IRS proceedings and the settlement of the alternative assessment. None of these arguments is persuasive or applicable as to the modified assessment now before the Commission.

Based upon the stipulation of the parties and the acknowledgments of the Petitioners as to the actual cash received, we find that there is no genuine issue of material fact as to the amount of income taxable to the Petitioners for the audit period. The Department is therefore entitled to judgment as a matter of law.

#### CONCLUSIONS OF LAW

1. Cash distributed by the Trust to the Petitioners during the audit period, in amounts stipulated to by the parties and included in the assessment as modified, is taxable income to the Petitioners for Wisconsin income tax purposes.
2. As there are no other genuine issues of material fact, the Department is entitled to summary judgment as a matter of law.

#### ORDER

Based on the foregoing and there being no questions of material fact, it is the order of this Commission that the Department's request for summary judgment is granted and the Petitioners' Motion for Partial Summary Judgment is denied.

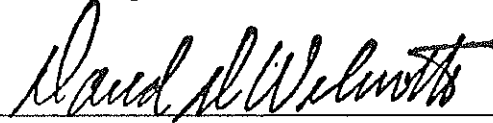
Dated at Madison, Wisconsin, this 25<sup>th</sup> day of October, 2017.

WISCONSIN TAX APPEALS COMMISSION



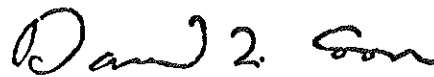
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Lorna Hemp Boll, Chair



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David D. Wilmoth, Commissioner



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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.