

**STATE OF WISCONSIN**  
**TAX APPEALS COMMISSION**

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**PETER A. VAN DYKE,**

**DOCKET NO. 08-I-032**

Petitioner,

vs.

**RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE,**

Respondent.

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**DAVID C. SWANSON, COMMISSIONER:**

This case comes before the Commission on the motion of the Wisconsin Department of Revenue (“Department”) for summary judgment on the basis that there is no genuine issue as to any material fact, petitioner has failed to state a claim upon which relief can be granted and the Department is entitled to judgment as a matter of law under Wis. Stat. § 802.08 and Wis. Admin. Code § TA 1.31.

Petitioner appears *pro se* and has filed an affidavit in response to the motion. Attorney Mark S. Zimmer represents the Department. The Department’s previous representative, Attorney Donald J. Goldsworthy, filed an affidavit with exhibits and a brief in support of the motion.

Having considered the entire record, including the motion, affidavits, exhibits and brief, the Commission hereby finds, rules, and orders as follows:

## **JURISDICTIONAL AND MATERIAL FACTS**

1. Petitioner filed a 2001 Wisconsin income tax return dated October 12, 2002 reporting Wisconsin income in the amount of \$11,144. (Affidavit of Donald J. Goldsworthy dated April 9, 2008, ¶ 2.)

2. By Notice to petitioner dated June 26, 2007, the Department notified petitioner that it did not have a Wisconsin income tax return on file for petitioner for the year 2003 (the “year at issue”) and requested that he file such a return. (Goldsworthy Aff., Ex. 1.)

3. By Notice dated September 7, 2007, the Department issued an income tax assessment against petitioner in the total amount of \$2,705.90, comprised of tax, interest, penalties and fees, for 2003 (the “Assessment”). (Goldsworthy Aff., Ex. 2.)

4. On September 17, 2007, petitioner filed with the Department a document labeled “Conditional Acceptance—Request for Proof of Claim” with a copy of the Assessment with the phrase “Conditionally Accept for Value” handwritten across the printed text, which the Department treated as a timely petition for redetermination of the Assessment. (Goldsworthy Aff., Ex. 3.) In that correspondence, petitioner requested that the Department provide him with 5 separate “Proofs of Claim” in connection with the Assessment.

5. By Notice of Action dated January 8, 2008, the Department denied the petition for redetermination on the basis that petitioner had failed to file a Wisconsin income tax return for the year at issue, as requested by the Department. (Goldsworthy Aff., Ex. 4.)

6. By letter dated January 10, 2008, petitioner again requested various “Proofs of Claim” from the Department. (Goldsworthy Aff., Ex. 5.) By letter dated January 16, 2008, the Department notified petitioner that its position had not changed. (Goldsworthy Aff., Ex.6.)

7. By certified mail date-stamped March 8, 2008, petitioner filed a petition for review of the Assessment. In its entirety, the petition for review states as follows: “I have been sick w/ cancer + have had 3 strokes may I please get an extention [sic] on my appeals?”

8. On April 9, 2008, the Department filed an alternative answer to the petition, accompanied by a notice of motion, motion for summary judgment and supporting affidavit and exhibits, including a motion for the Commission to assess an additional \$1,000 against petitioner under § 73.01(4)(am), Stats.

9. On April 14, 2008, the Commission issued a briefing order in response to the Department’s motion.

10. On May 16, 2008, petitioner filed an affidavit with attachments in response to the motion admitting receipt of various communications from the Department and apparently denying any liability for Wisconsin income tax on the grounds that petitioner has no contract relationship with the Department. Petitioner further attests that the Wisconsin Constitution guarantees the freedom to contract. Petitioner cites no statutory basis for his position regarding Wisconsin income tax.

11. On May 23, 2008, the Department filed a reply to petitioner’s response.

12. The Department estimated petitioner's income and applicable Wisconsin income tax due from petitioner for each of the years at issue pursuant to Wis. Stat. § 71.74(3), because petitioner never filed a Wisconsin income tax return for any of the years at issue. (Goldsworthy Aff., ¶ 10.)

### RULING

A summary judgment motion will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Wis. Stat. § 802.08(2). A party moving for summary judgment has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

If the moving party establishes a *prima facie* case for summary judgment, the court then examines the affidavits in opposition to the motion to see if the other party's affidavits show facts sufficient to entitle him to trial. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis.2d 181, 188, 148 N.W.2d 641, 644 (1967). Once a *prima facie* case is established, "the party in opposition to the motion may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." *Board of Regents v. Mussallem*, 94 Wis. 2d 657, 673, 289 N.W.2d 801, 809 (1980), citing Wis. Stat. § 802.08(3). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar*, 34 Wis.2d at 188. Where the

party opposing summary judgment fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment pursuant to Wis. Stat. § 802.08(3). *Board of Regents*, 94 Wis.2d at 673.

Wisconsin Statutes § 71.02(1) provides that “there shall be assessed, levied, collected and paid a tax on all net incomes of individuals . . . residing within the state . . . .” Net income is derived from gross income, after subtracting allowable statutory deductions and exemptions. *See* Wis. Stat. § 71.01(16) (defining “Wisconsin taxable income”). “Gross income” is defined as “all income, from whatever source derived and in whatever form realized, whether in money, property or services, which is not exempt from Wisconsin income taxes”, and includes, but is not limited to, “compensation for services, including wages [and] salaries . . . .” Wis. Stat. § 71.03(1).

Any resident of Wisconsin whose gross income exceeds the threshold amount set annually by the Department is required to file a Wisconsin income tax return with the Department. Wis. Stat. § 71.03(2). For the year at issue, this threshold amount was \$9,000. “Any person required to file an income . . . tax return, who fails, neglects or refuses to do so . . . shall be assessed by the department according to its best judgment.” Wis. Stat. § 71.74(3). In the performance of its duty to assess incomes, the Department is empowered to estimate incomes. Wis. Stat. § 71.80(1)(a). Assessments made by the Department are presumed to be correct, and the burden is on petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1).

The Department estimated petitioner's Wisconsin gross income for 2003 because petitioner failed to file a Wisconsin income tax return for that year, and the Department issued the Assessment based on that estimate. Petitioner filed a petition for review and responded to the Department's motion, but he has never asserted that the Department's claims are incorrect. Petitioner instead has recited various statements typically offered by tax protestors and attempted to shift the burden of proof to the Department.

Petitioner does not deny that he was a Wisconsin resident, that his gross income exceeded \$9,000 during the year at issue, and that he has failed to file a Wisconsin income tax return for that year. Thus, there are no material facts in dispute in this case.

In his petition for redetermination and subsequent filings, petitioner relies on tired tax protestor legal arguments, apparently to delay or avoid paying state income tax for the year at issue. These arguments and ones like them have been consistently rejected in prior cases before the Commission and the courts. They are groundless and frivolous, and have never prevailed in Wisconsin, nor, as far as the Commission is aware, in any court in the country. *See Tracy v. Dep't of Revenue*, 133 Wis. 2d 151 (Ct. App. 1986); *King v. Dep't of Revenue*, WTAC Docket No. 06-I-32 (September 18, 2006); *Callahan v. Dep't of Revenue*, WTAC Docket No. 05-I-107 (January 9, 2006); *Steele v. Dep't of Revenue*, WTAC Docket No. 05-I-79 (December 12, 2005); *Kroeger v. Dep't of Revenue*, WTAC Docket No. 04-I-228 (March 21, 2005); *Boon v. Dep't of Revenue*, 1999 Wisc. Tax LEXIS 7 (WTAC 1999), *aff'd on other grounds* (Milwaukee Co. Cir. Ct. 1999).

There is no genuine issue of material fact in this case, and the Department is entitled to summary judgment as a matter of law. In addition, in light of the well-established authority cited above, petitioner's claims are groundless, frivolous, and a waste of state resources. Petitioner is therefore subject to an additional assessment in the amount of \$300.00, pursuant to Wis. Stat. § 73.01(4)(am).

**IT IS ORDERED**

1. The Department's motion for summary judgment is granted, and its action on petitioner's petition for redetermination is affirmed.

2. An additional assessment of \$300.00 is imposed on petitioner pursuant to Wis. Stat. § 73.01(4)(am).

Dated at Madison, Wisconsin, this 21<sup>st</sup> day of August, 2008.

**WISCONSIN TAX APPEALS COMMISSION**

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David C. Swanson, Chairperson

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Roger W. LeGrand, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"