

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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TERRANCE AND DAWN WALSH,

DOCKET NO. 16-I-263

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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CORRECTED<sup>1</sup> RULING AND ORDER

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**DAVID L. COON, COMMISSIONER:**

This case comes before the Commission for decision on Respondent's Motion for Summary Judgment. The Petitioners, Terrance and Dawn Walsh, appear *pro se*. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer.

On January 18, 2017, the Department filed a Motion for Summary Judgment. For the reasons stated below, we grant the Department's Motion for Summary Judgment.

**FACTS**

1. The Department electronically received notification from the IRS of Petitioners' 1099-R information returns indicating the Petitioners had received early

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<sup>1</sup> The original ruling contained a formatting error which caused some confusion; it has been corrected in this version.

distributions from their Robert W. Baird & Co., Inc. retirement plans in the amounts of \$101,126 and \$30,000 in 2011 and \$7,781 in 2013. (Kloss Aff. ¶ 2, Ex. 1.)

2. Petitioners did not report these distributions as income on their jointly-filed Wisconsin income tax returns in either 2011 or 2013. (Kloss Aff. ¶ 2.)

3. By Notice of Amount Due dated December 29, 2015, the Department issued an assessment of individual income tax to Petitioners in the total amount of \$19,048.32, including \$9,965.00 in additional income tax, \$4,499.32 in regular 12% interest, and \$4,584.00 in early withdrawal penalty. (Kloss Aff. ¶ 3, Ex. 2.)

4. On February 25, 2016, Petitioners sent an email to the Department admitting they owed the additional income tax on their retirement plan distributions (stating in part "Since we do owe the tax..."), but asked to have the penalty and interest discharged due to "extreme hardship" in their business. The Department treated this email as a Petition for Redetermination of the December 29, 2015 assessment. (Kloss Aff. ¶ 4, Ex. 3.)

5. On September 29, 2016, the Department's Resolution Officer met with the Petitioners to discuss their appeal. The Petitioners provided no additional information and agreed they did not qualify for any of the statutory exemptions for the early withdrawal penalty. (Kloss Aff. ¶ 5.)

6. By Notice of Action dated October 21, 2016, the Department denied Petitioners' Petition for Redetermination, stating that the interest and penalty are assessed per statute and are not abatable. (Kloss Aff. ¶ 6, Ex. 4.)

7. On November 3, 2016, Petitioners timely filed a Petition for Review

with the Tax Appeals Commission. Petitioners admitted in the Petition that they made early withdrawals from their IRA due to “suffering severe economic conditions.” They alleged that they used the funds to pay “trust fund taxes” due from their business, which they were trying to keep operating. The Petitioners requested that the Commission waive the interest and penalty assessments. (Kloss Aff. ¶ 7, Ex. 5; Commission File.)

8. On January 20, 2017, the Commission issued a Briefing Order which required the Petitioners to file a response to the Department’s Motion for Summary Judgment, along with any affidavits and other documents, by March 3, 2017. The Petitioners failed to file a response by that date. On March 8, 2017, the Commission provided a second chance for the Petitioners to respond by issuing an Order requiring the Petitioners to file a response by March 22, 2017. The Petitioners again filed nothing. In the March 8, 2017 Order, the Petitioners were advised that, should they not file a brief, “the case will be decided based upon the record as presently constituted.” (Commission file.)

## APPLICABLE LAW

### A. 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).

### B. Applicable Statutes

Wis. Stats. § 71.82(1)(a) Interest:

(1) Normal.

(a) In assessing taxes interest shall be added to such taxes

at 12 percent per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid.

**Wis. Stats. § 71.83 Penalties.**

(1) Civil.

(a) *Negligence.*

....

6. 'Retirement plans.' Any natural person who is liable for a penalty for federal income tax purposes under section 72 (m) (5), (q), (t), and (v), 4973, 4974, 4975, or 4980A of the Internal Revenue Code is liable for 33% of the federal penalty unless the income received is exempt from taxation under s. 71.05 (1) (a) or (ae). The penalties provided under this subdivision shall be assessed, levied, and collected in the same manner as income or franchise taxes.

**C. Presumption of Correctness and Burden of Proof**

As a general matter, 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 determinations. *Calaway v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

**DECISION**

As an initial matter, we note that the Petitioners did not file any response to the Department's Motion for Summary Judgment. They have not provided any affidavits (with any attached documents) to dispute the factual claims made by the Department. Therefore, as we advised in our March 8, 2017 Order, we decide the matter based upon the record as presently constituted.

The Department received copies of the 1099-R documents from the IRS showing that the Petitioners had made early withdrawals from retirement accounts in 2011 and 2013. Based upon the information received, the Department issued an assessment of additional income tax, interest, and early withdrawal penalties. Petitioners do not dispute in their Petition for Redetermination or Petition for Review the correctness of the assessment of additional tax issued by the Department.

While the Petitioners do not dispute the amount of additional Wisconsin income tax assessed for 2011 and 2013, they filed a Petition for Redetermination with the Department asking for an abatement of both the penalty and interest, stating that "It has been an extremely difficult time to recover from the economy and we have worked very hard to keep current." The Department responded by noting that, in addition to the additional income tax assessed, the assessment imposed the statutorily required interest and early withdrawal penalty, which the Department did not have the power to reduce or abate. Consequently, the Department denied the Petitioners' Petition for Redetermination.

The Petitioners appealed to the Commission making the same request for abatement of the interest and penalty, again not contesting the validity of the additional income tax assessed. They alleged that they only used the retirement funds to essentially save their business during difficult economic times and preserve as many as 30 jobs. Further, the Petitioners have not responded with any additional information or arguments to the Department's Motion for Summary Judgment.

The Department correctly notes that the statutory imposition of interest is mandatory. Wisconsin Statute § 71.82 (1)(a) states, "In assessing taxes interest shall be added to such taxes at 12 percent per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid." (emphasis added).

The Legislature's use of the word "shall" in a statute has long and consistently been interpreted as meaning that an act or action is mandatory, unless there is some other clear intent. "The general rule is that the word 'shall' is presumed mandatory when it appears in a statute." *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 570, 263 N.W.2d 214, 217 (1978). On the other hand, the word "may" is usually interpreted as granting discretion. *See State v. McKenzie*, 139 Wis. 2d 171, 177, 407 N.W.2d 274, 277 (Ct. App. 1987). Further, "[w]hen the words 'shall' and 'may' are used in the same section of a statute, one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings." *Karow*, 82 Wis. 2d at 571. "It is reasonable to presume that the legislature chose its terms carefully and precisely to express its meaning." *McKenzie*, 139 Wis. 2d at 177. *See also Rotfeld v. Wisconsin Dep't of Natural Resources*, 147 Wis. 2d 720, 434 N.W.2d 617 (Ct. App. 1988).

The Commission has also consistently followed the appellate courts' interpretation of the word "shall" being mandatory. Specifically, with respect to interest, Wisconsin caselaw holds that neither the Department nor the Commission has the authority to waive or cancel statutorily imposed 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.”). See also *United Wisconsin Grain Producers, LLC v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-468 (WTAC 2011).

We do sympathize with the Petitioners' plight. When the Department issued its assessment, the accrued interest of \$4,499.32 was over 45% of the total amount of additional income assessed. The combined interest and penalty at the time of the assessment was \$9,083.32, nearly as much as the actual assessment of additional tax. As we noted recently in another matter, the high interest assessment is a function of the rate of interest imposed and the amount of time that had passed. *Zipp v. Dep't of Revenue*, Docket No. 16-I-069 (WTAC 2017).

We further stated in *Zipp*:

Under the federal I.R.C. § 6621, interest rates applicable to the underpayment of federal income tax are based on and change with market interest rates. By contrast, pursuant to Wis. Stat. § 71.82(1)(a), the “normal” interest rate applicable to underpayments of Wisconsin income tax is, and has for decades been, 12% per annum. Thus, the Wisconsin underpayment rate was 12% on December 19, 1980, when the prime rate reached a record 21.5%, and it was also 12% during the years 2010 through 2015, when the prime rate was a steady 3.25% and the federal rate on underpayments bounced between 3% and 4%.

...

However, no statute permits the waiver or abatement of statutory interest charges and the Commission has consistently held that it does not have the authority to reduce or abate statutorily imposed interest on underpayments of tax.

*Id.* (citations omitted)

Regardless of the Petitioners' situation, their noble use of the funds to save employee jobs (which we have no reason to doubt and will assume is correct for purposes of discussion), and how much we might like to help the Petitioners' by reducing the rate applied to their assessment, we do not have the power or the jurisdiction to do so. Again, as we noted in *Zipp*, "The power to establish a rational underpayment interest rate, at least prospectively, lies exclusively with the legislature." *Id.* Unless the legislature acts to adjust the statutory interest rate applied or to grant the Commission the power to issue an abatement under specified circumstances, we cannot issue such an abatement.

As to the early withdrawal penalty, Wis. Stat. § 71.83(1)(a)6 applies a penalty equal to 33% of the federal penalty unless an exception applies to the taxpayer. The Petitioners acknowledged to the Department that they do not fit into an exception and have not alleged any applicable exception to the Commission either in their Petition for Review or in response to the Department Motion for Summary Judgment.

Where there is no applicable exception, the imposition of the early withdrawal penalty is also made mandatory with the same usage of the word "shall." "The penalties provided under this subdivision shall be assessed, levied, and collected in the same manner as income or franchise taxes." Wis. Stat. § 71.83(1)(a)6 (emphasis added). Interpreting "shall" as mandatory here is consistent with the Commission's previous determinations of the legislature's use of the word "shall" as mandatory in other penalty imposition statutes. *United Wisconsin Grain Producers, LLC v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-468 (WTAC 2011) ("In this case, the failure to withhold resulted in a civil negligence penalty assessed under Wis. Stat. § 71.83(1) (2005-2006). The



penalty was appropriate in keeping with the terms of the statute which mandates that a 25% penalty 'shall be added to the tax' if the taxpayer fails to properly withhold. The Petitioner does not deny a failure to withhold and has in fact paid the tax, disputing only interest and penalties."); see also, *Singer v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-434 (WTAC 1984) ("[I]mposition of the penalty is mandatory unless the individual comes within exceptions set forth in secs. 71.21(14) and (16)...").

While we again might like to provide some relief to the Petitioners based upon their situation as they presented it in their Petition for Redetermination and their Petition for Review, we simply do not have the power to do so. The penalty was assessed, like the interest was assessed, under the mandatory language of the statute. The Petitioners have not filed a brief making arguments for any specific theory of equitable relief, but they raised issues that sound in equity in their Petition for Review. The Commission does not have such equitable powers, even if we were inclined to grant relief. "The legislature has empowered this agency to determine and apply Wisconsin tax statutes, but not to preempt application of a statute under a doctrine of equity." *Peterson v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-026 (WTAC 1989) (citations omitted).

#### ORDER

1. The Department's Motion was accompanied by affidavits and exhibits providing undisputed facts sufficient to address the legal issues presented. Consequently, there is no genuine issue of material fact, and this case is ripe for summary judgment.

2. The assessment of interest and penalty is valid as required by statute.

3. The Commission does not have the power to abate or reduce the imposition of interest at a rate of 12% per annum on unpaid taxes pursuant to Wis. Stat. § 71.82(1)(a) nor the penalty under Wis. Stat. § 71.83(1)(a)6.

4. The Department's Motion for Summary Judgment is granted.

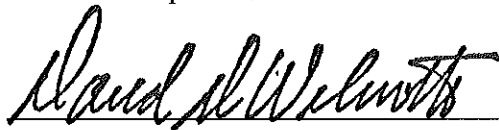
Dated at Madison, Wisconsin, this 27th day of June, 2017.

WISCONSIN TAX APPEALS COMMISSION



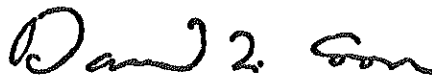
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Lorna Hemp Boll, Chair



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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.