

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

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**LEO E. WANTA**  
13093 77<sup>th</sup> Avenue  
Chippewa Falls, WI 54729,

DOCKET NO. 96-I-888

Petitioner,

vs.

**RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE**  
P.O. Box 8907  
Madison, WI 53708-8907,

Respondent.

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**DON M. MILLIS, COMMISSION CHAIRPERSON:**

This matter comes before the Commission on each party's motion for summary judgment. Each party has submitted briefs and supporting papers with respect to the motions. Petitioner is currently represented by Attorney Thomas E. Henry of Omaha, Nebraska, and Attorney Jan Morton Heger of Laguna Niguel, California.<sup>1</sup> Respondent is represented by its Deputy Chief Counsel, Robert J. Hackman.<sup>2</sup>

Based on the submissions of the parties and the entire record in this matter, the Commission hereby finds, concludes, rules, and orders as follows:

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<sup>1</sup> Petitioner was initially represented by Attorney Patricia Cameron of Laguna Hills, California, who drafted petitioner's motion for summary judgment.

<sup>2</sup> Respondent was initially represented by Attorney Neal E. Schmidt, who drafted respondent's motion for summary judgment.

## UNDISPUTED MATERIAL FACTS

### *Criminal Prosecution*

1. Under the date of December 24, 1990, respondent issued an income tax assessment against petitioner in the principal amount of \$10,027. The assessment was an estimate of amounts due from petitioner for the years 1986 through 1989, years for which petitioner did not file Wisconsin income tax returns.<sup>3</sup>

2. Respondent subsequently investigated petitioner and his income. Respondent failed to find any Wisconsin income for 1986 and 1987. However, respondent determined that petitioner was a Wisconsin resident for all of 1988 and 1989, and that he had Wisconsin income for 1988 and 1989.

3. On June 11, 1991, petitioner and his wife filed Wisconsin income tax returns for 1986 through 1989. On each return, petitioner and his wife reported no Wisconsin income.

4. On May 8, 1992, the Wisconsin Department of Justice filed a criminal complaint ("Complaint") against petitioner in Dane County Circuit Court in the name of the State of Wisconsin. The Complaint alleged two felony counts of falsely or fraudulently filing an income tax return, contrary to section 71.83(2)(b)1 of the Statutes, and four felony counts of tax evasion, contrary to section 71.83(2)(b)3 of the Statutes.

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<sup>3</sup> This assessment is not at issue in this proceeding. While it is not clear from the record, it appears that petitioner did not file a petition for redetermination with respondent, and the assessment became final and conclusive. However, because this assessment was an estimated or doomsday assessment, and because petitioner subsequently filed income tax returns for the years at issue, it is likely that respondent withdrew this assessment in favor of the assessment it issued on January 29, 1996—the assessment at issue in this case—which was based, in part, on amended income tax returns petitioner subsequently filed for 1988 and 1989 in June of 1995.

5. Count One of the Complaint alleged that petitioner filed a Wisconsin income tax return for calendar year 1988 that reported no taxable income for that year, but that during that year petitioner had net taxable income of approximately \$166,372.

6. Count Two of the Complaint alleged that petitioner filed a Wisconsin income tax return for calendar year 1989 that reported no taxable income for that year, but that during that year petitioner had net taxable income of approximately \$66,309.

7. Counts Three through Six of the Complaint alleged that petitioner intentionally concealed certain properties to evade the collection or assessment of tax by respondent.

8. According to the Complaint, New Republic-USA Financial Group Ltd. ("New Republic") is a corporation incorporated in Mississippi in 1988, with petitioner as its president and his daughter its vice-president and treasurer.

9. According to the Complaint, petitioner held himself out as a dealer in foreign currency and, according to one of petitioner's associates, had access to \$500,000 that had been deposited in a California bank. Petitioner's associate claimed that this amount was the proceeds of a transaction involving Japanese yen.

10. According to the Complaint, as the result of a complex series of transactions, most of the \$500,000 found its way into New Republic's checking account with the Banca Nazionale Del Lavoro ("Banca Nazionale") in New York, an American

branch of an Italian bank headquartered in Rome. Petitioner and his daughter were signatories on this checking account.<sup>4</sup>

11. The Complaint alleged that amounts of net income petitioner received as cited in Counts One and Two were the result of payments from the Banca Nazionale checking account to or on behalf of petitioner in 1988 and 1989.

12. In June of 1992, petitioner remitted payment to respondent in the amount of \$14,129 as payment for income tax liabilities in 1988 and 1989.

13. Prior to trial on the charges contained in the Complaint, the issue of petitioner's competency to stand trial was raised. Ultimately, the Dane County Circuit Court held four separate hearings on petitioner's competency:

- A. Following a hearing on March 10, 1994, the circuit court found petitioner competent to stand trial.
- B. Following a hearing on July 13, 1994, the circuit court found petitioner not competent to stand trial and ordered him committed to the Department of Health and Social Services<sup>5</sup> ("H&SS").
- C. Following a hearing on November 4, 1994, the circuit court once again found petitioner incompetent and continued his commitment.
- D. Finally, following a hearing on February 3, 1995, the circuit court found petitioner competent to stand trial.<sup>6</sup>

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<sup>4</sup> According to the Complaint, the signature card on this checking account also contained the name "Frank B. Ingram", which is apparently an alias used by petitioner.

<sup>5</sup> H&SS is now known as the Department of Health and Family Services.

<sup>6</sup> At all times, petitioner asserted that he was competent to stand trial.

14. Petitioner stood trial on all six counts of the Complaint in Dane County Circuit Court on May 8-11, 1995. After four days of trial, a jury found petitioner guilty on all counts.

15. In June of 1995, petitioner and his wife filed amended Wisconsin income tax returns for 1988 and 1989. The 1988 amended return reported Wisconsin income of \$166,372, the same amount alleged in Count One of the Complaint. The 1989 amended return reported Wisconsin income of \$63,310, the same amount alleged in Count Two of the Complaint.

16. The amended returns asserted that the total amount of tax due for 1988 and 1989 was \$10,249 and \$3,880, respectively. The sum of these amounts is \$14,129, the same amount petitioner paid to respondent in June of 1992.

17. On November 20, 1995, the court sentenced petitioner to two years in prison for each of Counts Three through Six, to run consecutively, and imposed six years of probation following petitioner's imprisonment for Counts One and Two.

18. Ultimately, the Dane County Circuit Court ordered petitioner to pay restitution in the amount of \$14,128.10, representing the tax owing to respondent.<sup>7</sup>

#### *Petitioner's Appeal*

19. Petitioner appealed his conviction to the Court of Appeals on several grounds: (1) The burden of proof for showing incompetency—clear and convincing evidence—is unconstitutional, (2) The evidence did not support his conviction, (3) Venue

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<sup>7</sup> Since the \$14,129 paid in June of 1992 was applied by the Circuit Court to petitioner's penalty, the principal tax owing remained unpaid. The record does not indicate why the restitution order is \$0.90 less than the principal tax amount.

was not proper in Dane County, (4) The circuit court judge failed to properly instruct the jury, (5) Ineffective assistance of counsel, (6) Petitioner was denied counsel of choice, and (7) Petitioner had paid the amount owed.

20. In a published decision dated February 4, 1999, the Court of Appeals rejected each of the grounds asserted by petitioner. *State v. Wanta*, 224 Wis. 2d 679 (Ct. App. 1999).

21. On April 27, 1999, the Wisconsin Supreme Court denied petitioner's petition for review of the Court of Appeals' decision.

*Federal Court Proceedings*

22. On October 22, 2001, petitioner filed a "Petition for Declaratory and/or Injunctive Relief and an Action in the Nature of a Petition for Writ of Mandamus" with the United States District Court for the Western District of Wisconsin.

23. In an Order dated January 31, 2002, the District Court construed petitioner's filing largely as a writ of habeas corpus and dismissed it as untimely.<sup>8</sup>

24. Petitioner subsequently sought review of the District Court's order by the Seventh Circuit Court of Appeals.

25. On November 1, 2002, the Court of Appeals rejected petitioner's appeal.

26. On November 14, 2002, petitioner filed a motion for reconsideration that was denied by the Court of Appeals on November 25, 2002.

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<sup>8</sup> To the extent that petitioner's filing sought relief not permitted in a writ of habeas corpus, the District Court determined that the filing failed to state a claim upon which relief can be granted.

27. Petitioner subsequently filed a petition for a writ of certiorari with the United States Supreme Court. This petition was denied on May 12, 2003.

28. On April 10, 2002, petitioner filed an Application for a Writ of Mandamus with the Seventh Circuit Court of Appeals. The record does not indicate whether this application constituted an appeal from any action of the District Court. The Court of Appeals denied the application on April 24, 2002.

*Proceedings before the Commission*

29. Under the date of January 29, 1996, respondent issued an income tax assessment against petitioner and his wife in the total amount of \$25,082.84. The assessment included tax, interest, and a 100% penalty under section 71.83(1)(b)1 of the Statutes for filing a late or fraudulent return with intent to defeat or evade the income tax. Respondent applied the \$14,129 petitioner remitted in June of 1992 to the 100% penalty.<sup>9</sup>

30. Petitioner filed a timely petition for redetermination objecting to the assessment.<sup>10</sup> Respondent denied the petition for redetermination on August 12, 1996. Petitioner then filed a timely petition for review with the Commission.

31. On September 2, 1997, petitioner filed his initial motion for summary judgment. The bases for the motion was (1) that petitioner had already paid \$28,258 to respondent, and (2) that petitioner was not a resident of Wisconsin during the years at issue.

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<sup>9</sup> The years at issue in this assessment were 1988 through 1990. On June 22, 2001, respondent withdrew the assessment with respect to 1990.

<sup>10</sup> The record does not indicate whether petitioner's wife objected to the assessment. In any case, she is not a party in this matter before the Commission.

32. On January 15, 1998, petitioner's initial counsel—Attorney Cameron—filed notice that she was withdrawing her representation of petitioner. Shortly thereafter, the Commission learned that petitioner's appeal was pending before the Wisconsin Court of Appeals. Therefore, the Commission held this matter in abeyance until petitioner's appeal ran its course.

33. Following the denial of petitioner's appeal by the Wisconsin Court of Appeals and denial of the petition for review by the Wisconsin Supreme Court, petitioner resumed prosecution of his case before the Commission. Petitioner once again retained Attorney Cameron as his counsel.

34. Eventually this matter was set for trial in July of 2001.

35. In June of 2001, respondent filed a motion for summary judgment, arguing that the preclusive effect of petitioner's criminal conviction entitled respondent to an order affirming its actions on the assessment issued in January of 1996.

36. The Commission indefinitely postponed the trial to deal with respondent's motion for summary judgment, and a briefing schedule was set. In the course of the briefing schedule, petitioner filed a cross-motion for summary judgment.

37. On February 4, 2002, Attorney Cameron once again withdrew as petitioner's representative, and by Order dated February 7, 2004, the Commission suspended the briefing schedule on the motions for summary judgment.

38. Shortly after the appearances of petitioner's current representatives, the Commission was advised of the appeal pending before the Seventh Circuit Court of

Appeals. The Commission once again held this matter in abeyance pending proceedings before the federal judiciary.

39. Following the denial by the United Supreme Court of petitioner's petition for a writ of certiorari, the Commission afforded petitioner, through his newly retained counsel, an opportunity to supplement and brief the motions for summary judgment that were pending before the Commission.

### **CONCLUSIONS OF LAW**

1. There is no genuine dispute of material fact, and respondent has shown good and sufficient cause that summary judgment should be granted.

2. Petitioner is precluded from raising defenses to respondent's assessments, because these defenses were raised or could have been raised in his criminal prosecution.

### **RULING**

This matter has taken a long and tortured journey for more than seven years before the Commission. In the end, resolution of this matter depends on a single, straightforward question: Does the preclusive effect of petitioner's criminal conviction mandate that the Commission affirm the action of respondent with respect to 1988 and 1989?

Under the doctrine of claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings." *Northern States*

*Power Co. v. Bugher*, 189 Wis. 2d 541, 550 (1995) (quoting *Lindas v. Cady*, 183 Wis. 2d 547, 558 (1994)).

The elements of claim preclusion are:

“(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of actions in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction.”

*National Operating, L.P. v. Mutual Life Ins. Co.*, 244 Wis. 2d 839, 869 (2001). All of these elements are met in this matter.

#### *Identity of Parties or Their Privies*

The only issue with respect to the identity of the parties is whether respondent is in privity with the State of Wisconsin, plaintiff in the criminal prosecution of petitioner. The criminal prosecution was prompted by an assessment and subsequent investigation by respondent. But for the fact that criminal prosecutions are brought in the name of the state, perhaps respondent might have been the plaintiff. In the same way that state officials are in privity with the State of Wisconsin, respondent as an agency of the State of Wisconsin is “sufficiently closely related to the state for purposes of [this action] that [it is] bound by judgment against the state . . . concerning the validity of state statutes at issue and conversely can assert such judgments as [claim preclusion].” *Northern States Power*, 189 Wis. 2d at 553. We conclude, therefore, that respondent is in privity with the State of Wisconsin.

### *Identity Between the Causes of Actions*

It is important to note that the second element of claim preclusion is not that the causes of actions be identical. Rather, the test is whether the claims arise from the same transaction, incident or factual situation. *Id.* at 554. The basis of the assessment at issue, except as to 1990 which has been withdrawn, has the exact same basis as the criminal prosecution: petitioner's realization of net taxable income in 1988 (of \$166,372) and 1989 (of \$66,309). Each of the defenses raised by petitioner could have been raised during the criminal proceeding.

For example, it appears that petitioner's counsel in the criminal proceeding was aware of petitioner's assertion that he was not a resident in 1988 and 1989, but did not assert the defense because counsel believed there was no evidence to support the defense. *Wanta*, 224 Wis. 2d at 701.<sup>11</sup> With respect to petitioner's claim that he has already paid the amount respondent asserts he still owes, petitioner raised this matter on appeal, and the Wisconsin Court of Appeals rejected the argument and explicitly approved of the restitution order entered by the Circuit Court. *Wanta*, 224 Wis. 2d at 705. Finally, we also find it noteworthy that every fact necessary to show that petitioner owed the amounts alleged for 1988 and 1989 had to be proved beyond a reasonable doubt, a much higher standard than is applicable in this proceeding. We conclude, therefore, that there is an identity between the causes of actions in the criminal case and the present matter.

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<sup>11</sup> Even if we were able to consider the evidence offered by petitioner of his residency for 1988 and 1989, what he has offered (*see* Affidavit of Olga Sarantopoulos) fails to come close to the type of evidence necessary to establish residency or domicile elsewhere. *See, George v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-301 (WTAC 1997); *Soto v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-092 (WTAC 1989).

*Final Judgment on the Merits in a Court of Competent Jurisdiction*

There is no doubt that the judgment of the circuit court was a final judgment by a court of competent jurisdiction. That judgment was affirmed. In this case, petitioner has had not one but several days in court to raise his defenses to the facts underlying the assessment at issue here. He is not entitled to another.

We also note that petitioner's current counsel have raised a number of fact-based arguments in support of petitioner's cause. As indicated above, many of these were or could have been raised in the criminal proceeding. Even without the preclusive effect of the criminal conviction, the Commission could not accept these factual allegations because they were not presented to the Commission in the form of an affidavit or in documents authenticated by an affidavit.

**ORDER**

1. Respondent's motion for summary judgment is granted.
2. Petitioner's motion for summary judgment is denied.
3. Respondent's action on the petition for redetermination is modified by cancellation of the assessment with respect to 1990 and, as modified, is affirmed.

Dated at Madison, Wisconsin, this 16th day of June, 2004.

**WISCONSIN TAX APPEALS COMMISSION**

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Don M. Millis, Commission Chairperson

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Jennifer E. Nashold, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"