

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

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**PAUL AND BARBARA WEPRINSKY**  
4965 S. Heritage Road, Apt. 104  
Greenfield, WI 53220,

**DOCKET NOS. 94-I-257,**  
**95-I-04, 02-I-231-SC,**  
**and 02-I-232-SC**

Petitioners,

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:**

These matters come before the Commission on respondent's motion for summary judgment. Both parties have submitted briefs and supporting papers with respect to respondent's motion. Petitioners are represented by Charles Ksobiech. Respondent is represented by Attorney Robert C. Stellick, Jr.

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

**UNDISPUTED MATERIAL FACTS**

**General Facts**

1. Petitioner Paul Weprinsky commenced his military service with the federal government in 1955. Mr. Weprinsky's military service included active service.

2. Mr. Weprinsky receives a military pension based on his military service. Respondent's assessments do not involve Mr. Weprinsky's income from his military pension, and it is not the subject of any of the dockets at issue here.

3. Mr. Weprinsky became a National Guard technician no earlier than September 14, 1965. Mr. Weprinsky's service as a National Guard technician ended on October 31, 1987.

4. Upon his retirement, Mr. Weprinsky began to collect a federal Civil Service Retirement System ("CSRS") pension based on his service as a National Guard technician.

5. Petitioners reported Mr. Weprinsky's income from his CSRS pension on their 1987 and 1988 Wisconsin income tax returns.

6. Petitioners did not include Mr. Weprinsky's income from his CSRS pension on their Wisconsin income tax returns for 1989 through 1992, 1994, 1995, 1997, and 1998.

### **Jurisdictional Facts**

#### *Docket No. 94-I-257*

7. At some point prior to August 8, 1994, petitioners filed a claim for refund of income tax petitioners' paid in 1987 and 1988 on Mr. Weprinsky's CSRS pension income. Respondent denied the claim for refund.

8. Under the date of March 13, 1990, petitioners filed a petition for redetermination objecting to respondent's denial of the claim for refund. Under the date of August 8, 1994, respondent denied the petition for redetermination. Petitioners

filed a petition for review with the Commission on August 15, 1994. This petition for review was assigned Docket No. 94-I-257.

*Docket No. 95-I-04*

9. Under date of August 15, 1994, respondent issued an income tax assessment against petitioners in the principal amount of \$6,663 and interest of \$2,223.78 for tax years 1989 through 1992. The basis of the respondent's assessment was petitioners' failure to report Mr. Weprinsky's CSRS pension income on petitioners' income tax returns for the years at issue.

10. Petitioners never filed a petition for redetermination with the respondent, and the assessment became final and conclusive on October 17, 1994.

11. On January 3, 1995, petitioners filed a petition for review with the Commission ostensibly appealing respondent's assessment for 1989 through 1992. This petition for review was assigned Docket No. 95-I-04.

*Docket No. 02-I-231-SC*

12. Under the date of September 6, 1999, respondent issued an income tax assessment against petitioners for 1994 in the total amount of \$380.92. The basis of the respondent's assessment was petitioners' failure to report Mr. Weprinsky's CSRS pension income on petitioners' 1994 income tax return.

13. Under the date of September 21, 1999, petitioners filed a petition for redetermination objecting to the income tax assessment. Under the date of June 24, 2002, respondent issued a notice of action denying the petition for redetermination.

14. On July 24, 2002, petitioners filed a petition for review with the Commission. This petition for review was assigned Docket No. 02-I-231-SC.

*Docket No. 02-I-232-SC*

15. Under the date of January 17, 2000, respondent issued an income tax assessment against petitioners for 1995, 1997, and 1998 in the total amount of \$1,834.92. The basis of the respondent's assessment was petitioners' failure to report Mr. Weprinsky's CSRS pension income on petitioners' income tax returns for 1995, 1997, and 1998.

16. Under the date of March 1, 2000, petitioners filed a petition for redetermination objecting to the income tax assessment. Under the date of June 24, 2002, respondent issued a notice of action denying the petition for redetermination.

17. On July 24, 2002, petitioners filed a petition for review with the Commission. This petition for review was assigned Docket No. 02-I-232-SC.

**APPLICABLE WISCONSIN STATUTE**

**71.05 Income computation. (1) EXEMPT AND EXCLUDABLE INCOME..** There shall be exempt from taxation under this subchapter the following:  
(a) *Retirement systems.* All payments received from the U.S. civil service retirement system, the U.S. military employee retirement system, the employee's retirement system of the city of Milwaukee, Milwaukee county employees' retirement system, sheriff's annuity and benefit fund of Milwaukee county, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employee trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963, but such exemption shall not exclude from gross income tax sheltered annuity benefits.

**CONCLUSIONS OF LAW**

1. There are no genuine issues of material fact and these matters are appropriate for summary judgment as a matter of law.

2. The Commission lacks subject matter jurisdiction over the petition for review in Docket No. 95-I-04 because petitioners failed to file a timely petition for redetermination objecting to respondent's assessment.

3. Mr. Weprinsky's CSRS payments are not exempt from Wisconsin's income tax under section 71.05(1)(a) of the Statutes, because Mr. Weprinsky was not a member of the CSRS as a matter of historical fact on December 31, 1963.

## **RULING**

### *Subject Matter Jurisdiction*

When a petitioner before the Commission has failed to file a petition for redetermination with respondent, the Commission lacks subject matter jurisdiction over the petition for review. *Haughen v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-155 at 30,500 (WTAC 1995). Petitioners failed to file a petition for redetermination objecting to respondent's assessment for 1989 through 1992. Therefore, the Commission lacks subject matter jurisdiction over the petition for review in Docket No. 95-I-04 and must dismiss the petition for review.

### *Constructive Membership in the Civil Service Retirement System*

Section 71.05(1)(a) of the Statutes provides that payments "which are paid on the account of any person who was a member of [an eligible retirement] system or fund as of December 31, 1963" are exempt from Wisconsin's income tax. Pension payments to Mr. Weprinsky based on his military service are exempt from Wisconsin's

income tax. However, because Mr. Weprinsky did not become a member of the CSRS until 1965 at the earliest, his pension income from this system is not exempt under section 71.05(1)(a).

Petitioners appear to assert that the CSRS gives Mr. Weprinsky credit in its benefits calculation for service in the military or under the military retirement program, and, therefore, this makes Mr. Weprinsky a constructive member of the CSRS on December 31, 1963. In support of this argument, Mr. Weprinsky provides one page from the Commission's decision in *Hafner v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-395 (WTAC 1998), *aff'd* Wis. Tax Rptr. (CCH) ¶400-455 (Dane Co. Cir. Ct. 1999), *aff'd* 239 Wis. 2d 218 (Ct. App. 2000). That portion of *Hafner* recounted the procedural history of *Department of Revenue v. Hogan*, 198 Wis. 2d 792 (Ct. App. 1995) (*Hogan II*). As the Commission noted in *Hafner*, the Commission in *Hogan II* adopted the notion that section 71.05(1)(a) applied to members who had a "constructive" date of employment or service on December 31, 1963. *Hogan v. Dep't of Revenue*, Docket No. 91-I-386, Oral Dec. (WTAC May 27, 1993). Petitioners appear to argue that because Mr. Weprinsky may be able to enhance his CSRS pension based on his military service, and because he was in the military on December 31, 1963, that this somehow gives Mr. Weprinsky a constructive membership in the CSRS on December 31, 1963.

Petitioners failed to note that the Commission's decision in *Hogan II* was reversed by the Court of Appeals. *Hogan II*, 198 Wis. 2d 817-18. The Court of Appeals did not address the issue of constructive membership. However in *Hafner*, the Commission rejected the notion of constructive membership and held that in order to

qualify for the exemption under section 71.05(1)(a) a retiree must be a member “as a historical fact.” *Hafner*, Wis. Tax Rptr. (CCH) ¶400-395, at 10. This conclusion was explicitly affirmed by the Court of Appeals:

The commission concluded that the statutory language was unambiguous—that when it talks about “membership” in the CSRS on the stated date, it means “membership as a historical fact, not membership that is constructive or purchased at a later date.”

... We consider this interpretation of the statute to be reasonable—both on its face and in light of prior decisions of the commission. ... Indeed, ... we consider the commission’s interpretation to be not only the most reasonable, but quite possibly the *only* reasonable interpretation of WIS. STAT. § 71.05(1)(a).

*Hogan II*, 239 Wis. 2d at 224-26 (emphasis in original).

Therefore, we must reject petitioners' notion that Mr. Weprinsky’s prior military service made him a member of the federal Civil Service Retirement System on December 31, 1963.<sup>1</sup>

### ORDER

1. Respondent’s motion for summary judgment is granted.
2. The petition for review in Docket No. 95-I-04 is dismissed.
3. Respondent’s actions on the petitions for redetermination in Docket

Nos. 94-I-257, 02-I-231-SC, and 02-I-232-SC are affirmed.

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<sup>1</sup> We note that in its Answer/Motion for Summary Judgment, respondent gave “notice that it may seek its costs and attorney fees in these matters and such other relief and/or sanctions the Commission may deem appropriate.” [Emphasis supplied.] In its affidavit filed on August 26, 2003, respondent listed its attorney’s cost with respect to these matters. However, in neither its submission filed on August 26, 2003, nor its brief filed on December 4, 2003, did respondent actually request costs for its attorney fees, cite a statute under which it might seek attorney fees or argue why it is entitled to attorney fees. Based on the totality of respondent’s submissions to date, we conclude that respondent has elected not to pursue its costs and attorney fees at the present time.

Dated at Madison, Wisconsin, this 6th day of April, 2004.

**WISCONSIN TAX APPEALS COMMISSION**

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Don M. Millis, Commission Chairperson

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Thomas M. Boykoff, Commissioner

**ATTACHMENT: "NOTICE OF APPEAL INFORMATION"**