

STATE OF WISCONSIN
TAX APPEALS COMMISSION



EDWARD LEWIS,

DOCKET NO. 21-I-264

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER ON MOTION FOR SUMMARY JUDGMENT

JESSICA ROULETTE, COMMISSIONER:

This case comes before the Commission for decision on Respondent's Motion for Summary Judgment. The Petitioner, Edward Lewis, appears *pro se*. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Nicole M. Kuehl. The Respondent has filed a brief and affidavit in support of its Motion. Petitioner has filed no pleadings since the initial Petition. Petitioner has filed no sworn statements in support of any facts. For the reasons stated below, we grant summary judgment to the Respondent.

ISSUE

The issue on appeal is whether the Respondent properly adjusted Petitioner's gross income and calculated applicable tax, penalties and interest for years in which the Petitioner failed to report certain distributions as taxable income.

FACTS

1. On or about September 29, 2020, the Department issued Mr. Lewis a Notice of Office Audit Amount Due (“Notice”) for \$8,400.40 for tax years 2016, 2017, 2018, and 2019. (Affidavit of Kimberly Fabian, Resolution Officer, Wisconsin Department of Revenue (“Fabian Aff.”), ¶ 2, Ex. 1.)

2. On October 15, 2020, Mr. Lewis contested the September 29, 2020 notice, which the Department treated as a Petition for Redetermination. (Fabian Aff., ¶ 17, Ex. 8.)

3. On March 31, 2021, the Department issued a Notice of Action denying Petitioner’s appeal. (Fabian Aff., ¶ 18, Ex. 9.)

4. On May 10, 2021, Petitioner filed his petition with the Commission. (Commission file.)

5. The Department adjusted Mr. Lewis’ income based on information it received from the Internal Revenue Service (“IRS”) as authorized by law under I.R.C. § 6103(d). (Fabian Aff., ¶ 3.)

6. The IRS adjusted Mr. Lewis’ 2016 return to include \$30,000 more in taxable retirement income from State Street Retiree Services than previously reported. Mr. Lewis reported retirement income for 2016 of \$2,850. (Fabian Aff., ¶ 4, Ex. 2.)

7. In 2016, Mr. Lewis had \$48,000 from State Street Retiree Services transferred to Scottrade, Inc. – Retirement, a qualified plan. The qualified rollover was not assessed tax. (Fabian Aff., ¶ 5.)

8. For 2016, Mr. Lewis had distributions of \$80,500 in total. \$48,000 was rolled over to a qualified plan, \$2,850 was reported as income, and \$30,000 was unreported. No Wisconsin taxes were withheld from the distributions. The Department adjusted Mr. Lewis' 2016 income by \$30,000. (Fabian Aff., ¶ 6, Ex. 1.)

9. In 2017, Mr. Lewis had \$14,000 in unreported taxable income from a pension/annuity/IRA/401K from Scottrade, Inc. - Retirement. Mr. Lewis had \$900 in Wisconsin taxes withheld from this distribution. (Fabian Aff., ¶ 7, Ex. 3.)

10. For 2017, the Department adjusted Mr. Lewis' income by \$14,000 and allowed credit for \$900 of withholding. (Fabian Aff., ¶ 8, Ex. 1.)

11. In 2018, Mr. Lewis had \$11,000 in unreported taxable income from a pension/annuity/IRA/401K from Scottrade, Inc. - Retirement. Mr. Lewis had \$1,100 in Wisconsin taxes withheld from this distribution. (Fabian Aff., ¶ 9, Ex. 4.)

12. In 2018, Mr. Lewis had an additional \$27,000 in unreported, taxable income from a pension/annuity/IRA/401K from TD Ameritrade Clearing, inc. Mr. Lewis had \$610 in Wisconsin taxes withheld from this distribution. (Fabian Aff., ¶ 10, Ex. 5.)

13. In 2018, Mr. Lewis had further \$40 in unreported, taxable income from a pension/annuity/IRA/401K from Ramirez v. JC Penney QSF. No Wisconsin taxes were withheld from this distribution. (Fabian Aff., ¶ 11, Ex. 6.)

14. In 2018, Mr. Lewis had \$102,545.70 transferred from State Street Retiree Services to TD Ameritrade Clearing, Inc., a qualified plan. This direct rollover

amount was not assessed tax. (Fabian Aff., ¶ 12.)

15. For 2018, the Department adjusted Mr. Lewis' income by \$38,040 and allowed credit for the \$1,710 of withholding. (Fabian Aff., ¶ 13, Ex. 1.)

16. In 2019, Mr. Lewis had \$43,400 in unreported taxable income from a pension/annuity/IRA/401K from TD Ameritrade Clearing, Inc. Mr. Lewis had \$2,040 in Wisconsin taxes withheld from this distribution. (Fabian Aff., ¶ 14, Ex. 7.)

17. For 2019, the Department adjusted Mr. Lewis' income by \$43,400 and allowed credit for \$2,040 of withholding. (Fabian Aff., ¶ 15, Ex. 1.)

18. The Department assessed early withdrawal penalties totaling \$3,149 against Mr. Lewis for the 2017 and 2018 distributions of \$14,000 and \$11,000 from Scottrade, Inc., the 2018 and 2019 distributions from TD Ameritrade Clearing, Inc. of \$27,000 and \$43,000 respectively, and the 2018 distribution of \$40 from Ramirez v. JC Penney QSF. (Fabian Aff., ¶ 16, Exs. 1, 3, 4, 5, 6, 7.)

APPLICABLE LAW

One Federal statute and five Wisconsin statutes dictate the outcome of this case:

26 U.S. Code § 408(d)(1): Except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distribute, as the case may be, in the manner provided under section 72.

Wis. Stat. § 71.01(4): "Federal taxable income" and "federal adjusted gross income" of natural persons and fiduciaries mean taxable income or adjusted gross income as determined

under the internal revenue code or, if redetermined by the department, as determined by the department under the internal revenue code or as may be determined on final appeal therefrom.

Wis. Stat. § 71.01(13): “Wisconsin adjusted gross income” means federal adjusted gross income, with the modifications prescribed in s. 71.05(6) to (12), (19), (20), (24), (25), (25m), and (26).

Wis. Stat. § 71.01(16): “Wisconsin taxable income” of natural persons means Wisconsin adjusted gross income less the Wisconsin standard deduction, less the personal exemption described under s. 71.05(23), with losses, depreciation, recapture of benefits, offsets, depletion, deductions, penalties, expenses and other negative income items determined according to the manner that income is or would be allocated, except that the negative income items on individual or separate returns for net rents and other net returns which are marital property attributable to the investment, rental, licensing or other use of nonmarital property shall be allocated to the owner of the property.

Wis. Stat. § 71.02(1): For the purpose of raising revenue for the state and the counties, cities, villages and towns, there shall be assessed, levied, collected and paid a tax on all net incomes of individual and fiduciaries. . . .

Wis. Stat. § 71.83(1)(a)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 percent of the federal penalty unless the income received is exempt from taxation under s. 71.05(1)(a) or (6)(b)54. The penalties provided under this subdivision shall be assessed, levied, and collected in the same manner as income or franchise taxes.

ANALYSIS

This is a Motion for Summary Judgment by Respondent. Summary

judgment must 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. *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980), citing 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. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis. 2d 181, 188, 148 N.W.2d 641, 644 (1967).

As a general rule, 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). Wisconsin law makes it clear that the Department's assessments are to be upheld unless the Petitioner provides clear and satisfactory evidence that they are incorrect. (*Edwin J. Puissant, Jr. v. Dept of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); *Itsines v. Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-341 (WTAC 2010); *NEJA Group, LLC v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-815 (WTAC 2014)). The Wisconsin Supreme Court has expressly said that, "When the assessment [of the Department] is disputed, as here, the burden of proof is on

the taxpayer to show error in the additional assessment because the additional assessment is presumed to be correct." (*Woller v. Wisconsin Dep't of Taxation*, 35 Wis. 2d 227, 232, 151 N.W.2d 170 (1967)).

The Petitioner has failed to file any pleadings responsive to Respondent's Motion for Summary Judgment. Specifically, the Petitioner has not contested any of the Respondent's proffered affidavits or exhibits. Thus, the issue is whether the Petitioner received distributions from retirement plans which he did not report as income on his Wisconsin tax returns for 2016, 2017, 2018, and 2019, and, if so, whether the Petitioner paid the proper amount of state income tax on such distributions. The Commission believes that the case can be resolved under the summary judgment standard.

Wis. Stat. § 71.02(1) imposes a tax on the net income of individuals residing in Wisconsin. *Bvocik v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-890 (WTAC 2014). Net income taxable in Wisconsin is derived from "Wisconsin adjusted gross income," after subtracting allowable statutory deductions and exemptions. *Id.* "Wisconsin gross income" is federal gross income and Wisconsin follows the federal tax code for many income items including the taxation of retirement benefits. Distributions from retirement plans are included in the distributee's gross income per 26 U.S. Code § 408(d)(1). Wis. Stat. § 71.01(4) provides that "federal taxable income" and "federal adjusted gross income" mean taxable income or adjusted gross income as determined under the Internal Revenue Code. Wisconsin taxable income is based on federal taxable income. Wis. Stat. §§ 71.01(13) and (16). Therefore, distributions from retirement accounts

that are not rolled over into another qualified retirement account are included in taxable income and subject to Wisconsin tax. *Bvocik v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-890 (WTAC 2014).

Taxable distributions received from retirement plans before the age of 59 ½ are further subject to an additional federal tax of 10%. Wis. Stat. § 71.83(1)(a)6. provides that the Wisconsin penalty is equal to 33% of the additional federal tax. Where there is no applicable exception, the imposition of the early withdrawal penalty is mandatory. *Walsh v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-156 (WTAC 2017); *United Wisconsin Grain Producers, LLC v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-468 (WTAC 2011). The Respondent assessed this penalty under the mandatory language of the statute.

The Petitioner received \$32,850 in distributions in 2016, and he rolled over \$48,000 from one qualified plan to another that year as well. No Wisconsin taxes were withheld from any of the distributions. The Petitioner received \$14,000 in distributions in 2017. \$900 was withheld for Wisconsin taxes from these distributions. These distributions were subject to an early withdrawal penalty. The Petitioner received \$38,040 in distributions in 2018, and he rolled \$102,545.70 from one qualified plan to another that year as well. \$1,710 was withheld for Wisconsin taxes from the 2018 distributions. These distributions were subject to an early withdrawal penalty. The Petitioner received \$43,400 in distributions in 2019. \$2,040 was withheld for Wisconsin taxes from the 2019 distributions. These distributions were subject to an early withdrawal penalty.

For 2016, the Department calculated gross income tax of \$5,415, and subtracted the previously assessed tax of \$3,308 to determine \$2,107 of tax due from Petitioner for that year. Interest as of September 29, 2020 was calculated at \$915.77. For 2017, the Department calculated gross income tax of \$1,869, and subtracted both the school property tax/rent credit of \$92 and previously assessed tax of \$808 to determine \$969 of tax due from Petitioner for that year. An early withdrawal penalty of \$462 was added, and the \$900 of tax withheld was subtracted, before interest of \$21.73 as of September 29, 2020 was calculated. For 2018, the Department calculated gross income tax of \$3,588, and subtracted the previously assessed tax of \$931 to determine \$2,657 of tax due from Petitioner for that year. An early withdrawal penalty of \$1,255 was added, and the \$1,710 of tax withheld was subtracted, before interest of \$185.25 as of September 29, 2020 was calculated. For 2019, the Department calculated gross income tax of \$3,864, and subtracted the previously assessed tax of \$862 to determine \$3,002 of tax due from Petitioner for that year. An early withdrawal penalty of \$1,432 was added, and \$2,040 of tax withheld was subtracted, before interest of \$43.65 as of September 29, 2020 was calculated.

The Department's calculations are supported by the Affidavit of Kimberly Fabian and its attached exhibits. The Petitioner has filed no documents specifically contesting any of the Department's exhibits or any of the calculations made by the Department. There is no basis in the record to deny Respondent's Motion for Summary Judgment.

CONCLUSIONS OF LAW

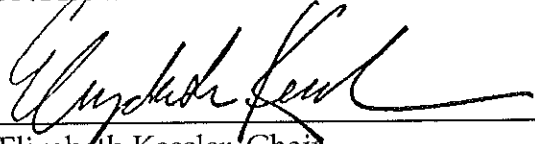
1. Because Petitioner failed to report certain distributions as taxable income for 2016, 2017, 2018, and 2019, the Respondent properly adjusted Petitioner's gross income and calculated applicable tax, penalties, and interest for those years.
2. The Respondent is entitled to summary judgment as a matter of law.

ORDER

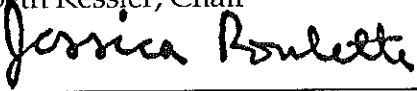
Based on the foregoing, it is the order of this Commission that the Respondent's Motion for Summary Judgment is granted and its assessments are upheld.

Dated at Madison, Wisconsin, this 6th day of December, 2022.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Jessica Roulette, Commissioner



Kenneth P. Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
101 E Wilson St, 5th Floor
Madison, Wisconsin 53703

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. Alternately, 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 Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, 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 <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.