

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

CLEVELAND LEE SR. AND CAROLYN LEE,

DOCKET NO. 08-I-186

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This case comes before the Commission on the motion of the Respondent, the Wisconsin Department of Revenue (the “Department”), for summary judgment on the basis that there is no genuine issue of material fact in this case and the Department is entitled to judgment as a matter of law under Wis. Stat. § 802.08(1) and Wis. Admin. Code § TA 1.31. Petitioner Cleveland Lee Sr. represents the Petitioners¹ in this case and has filed a brief, affidavits with exhibits, and various additional documents in response to the motion. Attorney Sheree Robertson represents the Department and has filed a brief and affidavits with exhibits in support of the motion.

Having considered the entire record, the Commission hereby finds, rules and orders as follows:

FINDINGS OF FACT

1. During the years 1999, 2000 and 2001 (the “years at issue”), the

¹ Petitioner Carolyn Lee has not personally communicated with the Commission in this matter.

Petitioners were residents of Wisconsin and filed joint Wisconsin income tax returns for the years at issue. (Affidavit of Attorney Sheree Robertson dated April 9, 2009 (“Robertson Aff.”), ¶¶ 9 & 13; Affidavit of Department Special Agent Vern Barnes dated May 22, 2009 (“Barnes Aff.”), ¶ 4, Ex.’s 12-14.)

2. By a Notice of Amount Due dated February 5, 2007, the Department issued an income tax assessment to the Petitioners for the years at issue in the total amount of \$93,438.66, including tax, interest, underpayment interest and penalty. The assessment is based on the Department’s inclusion of previously unreported embezzlement/theft income in the Petitioners’ Wisconsin income for the years at issue. (Robertson Aff. ¶ 2, Ex. 1.)

3. On or about April 4, 2007, the Petitioners filed a petition for redetermination with the Department. (Robertson Aff. ¶ 3, Ex. 2.)

4. By a Notice of Action dated October 2, 2008, the Department denied the Petitioners’ petition for redetermination. (Robertson Aff. ¶ 4, Ex. 3.)

5. On November 21, 2008, the Commission received the Petitioners’ petition for review via certified mail date-stamped November 18, 2008.

6. On December 18, 2008, the Department filed an answer, which it amended on March 24, 2009.

7. On April 9, 2009, the Department filed a notice of motion and motion for summary judgment with attached affidavit in support of the motion.

8. The Commission subsequently issued a Briefing Order, as amended on May 7, 2009, scheduling the submission of briefs by the parties in this matter.

9. On May 13, 2009, the Petitioners filed their brief in opposition to the motion.

10. On May 27, 2009, the Department filed its brief in support of the motion and in reply to the Petitioners' brief.

11. On August 1, 2009, the Petitioners served a Request for Admissions on the Department. On August 7, 2009, the Department filed a motion for a protective order from answering any further discovery requests pending the Commission's ruling on the summary judgment motion. On September 18, 2009, the Petitioners filed a motion to deem admitted all facts included in their Request for Admissions.

12. On August 19, 2005, Petitioner Cleveland Lee Sr. was convicted of fifteen felonies, including two counts of theft (trustee/bailee) (business/employment) (value>\$2500), ten counts of forgery-uttering and three counts of filing false income tax returns. On September 25, 2007, the Court of Appeals, District I, unanimously affirmed Mr. Lee's conviction. On January 22, 2008, the Supreme Court denied Mr. Lee's petition for review. *State of Wisconsin v. Cleveland Lee Sr.*, Milwaukee Co. Cir. Ct. Case No. 2005CF63 (Aug. 19, 2005), *aff'd*, Appeal No. 2006AP1737-CR (Ct. App., Sep. 25, 2007) (unpublished opinion), *pet. den'd* (Wis., Jan. 22, 2008). (Robertson Aff. ¶¶ 7-12, Ex.'s 8-10.)

13. In decisions issued on January 4, 2008 and October 9, 2008, the Milwaukee County Circuit Court granted summary judgment to Harambee Community School, Inc. ("Harambee") in its suit against Petitioner Cleveland Lee Sr. for damages in the amount of \$642,000 and dismissed Mr. Lee's counterclaims, which

decisions were affirmed by the Court of Appeals following Mr. Lee's appeal. *Harambee Community School, Inc. v. Cleveland Lee*, Milwaukee Co. Cir. Ct. Case No. 2007CV6359 (Oct. 9, 2008), *aff'd*, Appeal No. 2008AP2717 (Ct. App., July 7, 2009) (unpublished opinion). This case involved claims for conversion and civil theft totaling \$642,000 brought against Mr. Lee by Harambee, the same organization from which he was convicted of embezzling funds in *State v. Lee, supra*, and to which he was ordered to pay restitution in the same amount (\$642,000).

14. In the tax matters involved in his criminal case, Mr. Lee was convicted of three counts of filing false and fraudulent tax returns, as a party to a crime, contrary to Wis. Stat. §§ 71.83(2)(b)1 and 939.05 (2005-06), for the same three years at issue in this case (1999, 2000 and 2001). (Robertson Aff., ¶¶ 9, 10 & 13; Barnes Aff., ¶ 4, Ex.'s 12-14.)

15. As part of his sentence in the criminal case, Mr. Lee was ordered to pay \$642,000 in restitution to Harambee and \$34,367.26 to the Department.² (Robertson Aff., ¶¶ 7-8, Ex. 8.)

16. The material facts at issue in *State v. Lee, supra*, are the same as the material facts at issue in this matter. (Robertson Aff. ¶¶ 7-12, Ex.'s 8-10.)

² The amount of income tax evaded per the criminal complaint was \$34,366, and the amount of income tax claimed in the assessment is \$34,478. (Robertson Aff., Ex. 1 & Ex. 7, pp. 17-18.) Although there is a small discrepancy between these two amounts (\$112), the Commission applies the standard rule and presumes that the Department's assessment is the correct amount, absent proof to the contrary. See, *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1).

CONCLUSIONS OF LAW

1. The Petitioners are precluded from raising defenses to the Department's assessment, because these defenses were raised or could have been raised in the criminal prosecution of Petitioner Cleveland Lee Sr.

2. There is no genuine issue of material fact in this matter and the Department is entitled to judgment as a matter of law pursuant to Wis. Stat. § 802.08.

RULING

Summary judgment is warranted where "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). If the moving party has established a *prima facie* case for summary judgment, then the opposing party must establish that there is a genuine issue of material fact that entitles that party to a trial. *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473 (1980). The Commission concludes that the Petitioners have failed to show that there is a genuine issue of material fact in dispute in this case, and the Department therefore is entitled to judgment as a matter of law.

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 determination. *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1). In this case, the Petitioners challenge an assessment that stems directly from Mr. Lee's convictions for

filing false or fraudulent returns for the years at issue. In response, the Department argues that the Petitioners' claims are barred under the doctrines of claim preclusion and issue preclusion.

Under the doctrine of claim preclusion, a final judgment is conclusive in all subsequent actions between the same parties as to all matters that were litigated or could have been litigated in the former proceeding. See, *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). 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).

In *Wanta v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-763 (WTAC June 16, 2004), *aff'd*, Wis. Tax Rptr. (CCH) ¶ 400-798 (Chippewa Co. Cir. Ct. Dec. 20, 2004), *aff'd*, 288 Wis. 2d 658, 707 N.W.2d 580 (Ct. App. Nov. 15, 2005) (unpublished opinion), the Commission applied the doctrine of claim preclusion and granted summary judgment to the Department in a case very similar to this case. There, the petitioner asked the Commission to review an assessment for the same tax years and virtually the same amount of income tax that had been at issue in a criminal case in which the petitioner had been convicted of two counts of filing false and fraudulent tax returns under Wis. Stat. § 71.83(2)(b)1. The Commission found that: (1) the parties, the petitioner and the State, were the same; (2) the criminal litigation and restitution order and the litigation before the Commission applied to the same underlying facts; and (3)

the circuit court that tried the case was a court of competent jurisdiction. On that basis, the Commission held that the petitioner's asserted defenses were barred because they could have been litigated in the prior criminal proceeding and restitution hearing.

The same situation is present in this case. The parties, Mr. Lee and the State, are the same.³ The Department is an agency of the State government and Department personnel participated in the investigation and trial in Mr. Lee's criminal case. As in *Wanta*, we find that the Department is in privity with the State in these circumstances. Furthermore, the criminal litigation and restitution order and the petition before the Commission apply to the same underlying facts.⁴ Finally, the Milwaukee County Circuit Court that tried the case was a court of competent jurisdiction, and its judgment is now final. Therefore, Mr. Lee's asserted defenses against the assessment at issue are barred because they either were or could have been litigated in the criminal proceeding.

Following the conclusion of briefing on the Department's motion for summary judgment, the Petitioners attempted to serve additional discovery requests on the Department. On September 18, 2009, the Petitioners filed a motion to deem admitted all facts included in a request for admissions served on the Department on August 1, 2009 due to the Department's failure to respond. As discussed above, based

³ Petitioner Carolyn Lee has not communicated with the Commission regarding this matter, and, based on the record before the Commission, has never filed a separate objection to the assessment. The tax returns at issue were filed jointly by the Petitioners, and thus the assessment was issued to both Petitioners.

⁴ Because we find that the Petitioners' arguments in this case are barred by the doctrine of claim preclusion, we do not recite the various arguments, both factual and legal, that the Petitioners offer in their filings with the Commission in opposition to the assessment.

on the findings and decisions of the courts in Mr. Lee's related criminal case, there are no genuine issues of material fact in this case. The Commission will not permit the Petitioners to engage in a new round of discovery to evade or delay enforcement of the court's decision regarding Mr. Lee's income tax liability for the years at issue.

We find that here is no genuine issue of material fact in this case and the Department is entitled to summary judgment as a matter of law.

ORDER

1. The Petitioners' motion dated September 18, 2009 to deem certain facts admitted and their requests to conduct additional discovery in this matter are denied.

2. The Department's motion for summary judgment is granted and its action on the Petitioners' petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 23rd day of November, 2009.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"