

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

DAVID & REBECCA LANGE,

DOCKET NO. 08-I-48 (P)

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This matter comes before the Commission on a Motion for Summary Judgment filed by the Respondent, the Wisconsin Department of Revenue (the “Department”), which is supported by affidavits, briefs, exhibits, and proposed findings of undisputed facts filed by the Department’s representative in this case, Attorney Mark S. Zimmer. The Department’s position is that there is no genuine issue as to any material fact and the Department is entitled to judgment as a matter of law pursuant to Wis. Stat. § 802.08 and Wis. Admin. Code § TA 1.31. The Petitioners, David and Rebecca Lange, are represented in this litigation by Attorney Tony J. Renning of Davis & Kuelthau, s.c., of Oshkosh, Wisconsin, and by Mr. Jeff Dorn, C.P.A., and have filed a brief in opposition to the Department’s motion.

Having considered the entire record before it, including the motion, the affidavits, the briefs, and the exhibits, the Commission hereby finds, rules and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS¹

1. This matter relates to the Petitioners' joint individual income tax returns for calendar years 2003 and 2004 and the assessment dated August 6, 2007 by the Department thereon. (Zimmer Aff. ¶ 2, Ex. 1.)

2. On or about August 31, 2007, the Petitioners filed a letter dated August 14, 2007, which Respondent accepted as a timely petition for redetermination of the assessment. (Zimmer Aff. ¶ 3, Ex. 2.)

3. Respondent issued a Notice of Action on February 11, 2008, denying the Petition for Redetermination in full. (Zimmer Aff. ¶ 4, Ex. 3.)

4. The Petitioners timely appealed the Notice of Action to the Commission by a document dated April 3, 2008 and filed with the Commission on April 7, 2008. (Zimmer Aff. ¶ 5, Ex.4.)

5. In the assessment, the Respondent adjusted the tax liability of Petitioners for calendar years 2003 and 2004 based upon earlier adjustments made by the Internal Revenue Service (the "IRS"). (Zimmer Aff. ¶ 2, Ex. 1.)

6. The Petitioners' position for why they believe the assessments made by the Department against them for tax year 2003 are incorrect is as follows:

Petitioner David Lange never signed any tax documents and never received tax returns. Lange is the victim of fraud.

(Respondent's Exhibit 5, Response to Interrogatory No. 12.)

¹ The Commission adopts the statement of facts submitted by the Department with the Motion for Summary Judgment, filed on November 20, 2008, making minor adjustments for form and consistency. The preparer of the returns at issue is referred to throughout as "A.W."

7. The Petitioners' position for why they believe the assessment made by the Department against them for tax year 2004 is incorrect is as follows:

Petitioner David Lange never signed any tax documents and never received tax returns. Lange is the victim of fraud.

(Respondent's Exhibit 5, Response to Interrogatory No. 23.)

8. The Petitioners retained A.W. to file their 2003 Wisconsin income tax return sometime prior to April 15, 2004. (Respondent's Exhibit 5, Response to Interrogatory No. 2.)

9. The Petitioners paid A.W. to prepare their 2003 Wisconsin income tax return sometime prior to April 15, 2004. (Respondent's Exhibit 5, Response to Interrogatory No. 3.)

10. A.W. informed the Petitioners that A.W. would have their refund deposited into A.W.'s account, and consequently A.W. provided the Petitioners with a check for the total amount of their refund, less A.W.'s fee. (Respondent's Exhibit 5, Response to Interrogatory No. 3.)

11. A.W. informed the Petitioners that A.W. would file their Wisconsin income tax returns electronically. (Respondent's Exhibit 5, Response to Interrogatory No. 4.)

12. Petitioners state that they did not execute a written authorization for their 2003 Wisconsin income tax return to be filed electronically. (Respondent's Exhibit 5, Response to Interrogatory No. 4.)

13. Petitioners admit that they received a refund of \$403 from A.W. in connection with their 2003 Wisconsin income tax return at the time they paid for the tax preparation. (Respondent's Exhibit 5, Response to Interrogatory No. 7.)

14. A.W. informed the Petitioners that A.W. had filed their 2003 Wisconsin income tax return electronically. (Respondent's Exhibit 5, Response to Interrogatory No. 8.)

15. Petitioners received the summary (Exhibit 6) from A.W., but did not receive a copy of the 2003 tax return. (Respondent's Exhibit 5, Response to Interrogatory No. 12; Exhibit 6; Exhibit 8, Pg. 2.)

16. Petitioners retained A.W. to file their 2004 Wisconsin income tax return sometime prior to April 15, 2005. (Respondent's Exhibit 5, Response to Interrogatory No. 13.)

17. Petitioners paid A.W. to prepare their 2004 Wisconsin income tax return sometime prior to April 15, 2005. (Respondent's Exhibit 5, Response to Interrogatory No. 14.)

18. A.W. informed the Petitioners that A.W. would have their refund deposited into A.W.'s account, and consequently A.W. provided the Petitioners with a check for the total amount of their refund, less A.W.'s fee. (Respondent's Exhibit 5, Response to Interrogatory No. 14.)

19. A.W. informed the Petitioners that A.W. would file their 2004 Wisconsin income tax return electronically. (Respondent's Exhibit 5, Response to Interrogatory No. 15.)

20. The Petitioners state that they did not execute a written authorization for their 2004 Wisconsin income tax return to be filed electronically. (Respondent's Exhibit 5, Response to Interrogatory No. 15.)

21. Petitioners admit that they received a refund of \$882 from A.W. in connection with their 2004 Wisconsin income tax return at the time they paid for the tax preparation. (Respondent's Exhibit 5, Response to Interrogatory No. 18.)

22. A.W. informed the Petitioners that A.W. had filed the 2004 Wisconsin income tax return electronically. (Respondent's Exhibit 5, Response to Interrogatory No. 19.)

23. The Petitioners received the summary (Exhibit 6) from A.W. but did not receive a copy of the 2004 tax return. (Respondent's Exhibit 5, Response to Interrogatory No. 12; Exhibit 6; Exhibit 8, Pg. 2.)

24. After receiving adjustments from the IRS to their 2003 and 2004 federal income taxes that resulted in significant additional amounts due, the Petitioners retained a new representative, Mr. Jeff Dorn, C.P.A., to look into their returns for the years at issue.

25. Based on Mr. Dorn's findings, the Petitioners contacted the local police to report an apparent fraud committed against them by A.W. in connection with the returns at issue. According to the police report:

According to David, for these two years, [A.W.] who prepared these taxes, took all sorts of outlandish credits to jack up the refund, and then apparently took 2/3 of the refund each year. Credits that were put onto David's tax

forms were school credits, stating he went back to school and also that he bought a car for business purposes.

(Respondent's Exhibit 8.)

26. On or about August 14, 2007, Petitioners, by their representative Mr. Dorn, attempted to file new original 2003 and 2004 Wisconsin income tax returns, stating in part that: "The previous accountant electronically filed their returns without their signature." (Respondent's Exhibit 2.)

27. The Department refused to accept these "new original" returns, on the grounds that such returns had already been filed, and that these were thus amended returns for the years at issue.

CONCLUSION OF LAW

The Respondent is not entitled to judgment as a matter of law and there are genuine issues of material fact remaining for determination in this matter.

RULING

The Respondent has filed this Motion for Summary Judgment, claiming that there is no genuine issue as to any material fact and that the Respondent is entitled to judgment as a matter of law. In brief, the Respondent argues that the returns in question were filed by the Petitioners' agent (A.W.) and that, therefore, the Petitioners are bound by the actions of their agent. In response, the Petitioners admit that their agent for preparing the returns filed the returns, but point out that they never saw the electronically filed returns and did not sign or otherwise authenticate them. The Petitioners state that once they discovered what had happened, they did all they could to rectify the situation promptly and they should be allowed to file correct Wisconsin

income tax returns. The Petitioners admit that they owe the taxes shown on the “new original” returns that they attempted to file, but do not admit owing the taxes shown on the returns filed by A.W. or the refunds that A.W. apparently claimed on their behalf and retained for his own purposes.

A. FACTS THAT ARE RELEVANT TO THE MOTION

In early 2004, the Petitioners retained A.W. to prepare their 2003 Wisconsin income tax return. Subsequently, A.W. told the Petitioners that A.W. would file their Wisconsin returns electronically and that their refund would be deposited into A.W.’s account. A.W. then gave the Petitioners a check from his personal account for \$403 for what A.W. told them was their refund. The Petitioners never executed a written authorization for their returns to be filed electronically and never received a paper copy of the return. The same fact pattern was repeated for 2004, except that the Petitioners received \$882 from A.W. for 2004.

The Department paid out refunds on the electronically filed returns to A.W. The returns each claimed a far smaller tax due to Wisconsin and a far larger refund than the Petitioners were actually entitled to receive. A.W. retained most of each refund and paid lesser amounts to the Petitioners as their refunds, as noted in the Petitioners’ subsequent police report. The Department then issued the assessment at issue, and rejected the Petitioners’ “new original” returns for 2003 and 2004.

B. SUMMARY JUDGMENT STANDARDS

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). The party moving for summary judgment has the burden to establish the absence of a genuine issue as to any material fact. *Grams v. Boss*, 97 Wis.2d 332, 294 N.W.2d 473 (1980). The court must view the evidence, or the inferences therefrom, in the light most favorable to the party opposing the motion. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis.2d 555, 567, 278 N.W.2d 857, 862 (1979).

Summary judgment is generally inappropriate when matters of complex factual proof need to be resolved before legal issues can be decided. *See, e.g., Peters v. Holiday Inns, Inc.*, 89 Wis.2d 115, 129, 278 N.W.2d 208 (1979). Summary judgment is not a matter of right, and the trial court may deny summary judgment if it determines that the opposite side is entitled to trial. *Wozniak v. Local No. 1111 of United Elec., Radio, and Mach. Workers of America (UE)*, 45 Wis.2d 588, 173 N.W.2d 596 (1970). A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy. *Kraemer*, 89 Wis.2d at 566. Summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183, 260 N.W.2d 241 (Wis. 1977). Summary judgment should not be granted if reasonable persons could reach reasonable, but differing inferences and results from the facts that are undisputed. *Maynard v. Port Publ'ns, Inc.*, 98 Wis.2d 555, 297 N.W.2d 500 (1980). Any reasonable doubt as to existence of a genuine issue of material fact must be

resolved against the moving party. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis.2d 349, 356, 286 N.W.2d 831 (1980).

C. THE RESPONDENT'S ARGUMENTS

In support of its motion, the Department makes a two-part argument. First, the Department alleges that A.W. was acting as the Petitioners' agent when he filed their 2003 and 2004 returns and that, under the black letter law of agency, the Petitioners are bound even under these facts by the actions of their agent. The second part of the argument is that an alleged fraud by their agent does not relieve the Petitioners from their tax liabilities.

In support of their claim of agency between the Petitioners and A.W., the Department points to the definition of agency, which is the fiduciary relationship resulting from the manifestation of consent by one person to another that the second shall act on his behalf and subject to the first party's control, and the second party so consents to act. *Gorski v. Gorski*, 82 Wis. 2d 248, 253, 262 N.W.2d 120, 122 (1978). The Department argues that all of the elements of agency are present here. The Department points out that the Petitioners retained A.W. to file their returns for each year in question and that both times A.W. told them that A.W. would file their returns electronically. A.W. also told the Petitioners that A.W. would have their refunds sent to A.W.'s account and that A.W. would pay the Petitioners out of A.W.'s account. The Department states that it is clear that the entire transaction had the Petitioners' consent and approval and that they benefited from the arrangement between them and A.W., receiving refunds from the electronically filed returns. The Petitioners concede that

A.W. was their agent, at least for purposes of *preparing* their 2003 and 2004 Wisconsin income tax returns. Petitioners' Brief, at p. 3.

The second part of the Respondent's argument is that the Petitioners are responsible for A.W.'s conduct in the filing of their 2003 and 2004 returns. The Department points out the black letter law that a taxpayer who has engaged an agent to file proper and correct tax returns is not relieved of the responsibility for the taxes in the event the agent fails to comply. The Respondent further points out that the Commission has never accepted "it's the accountant's fault" as a defense. According to the Department,

Since [A.W.] was acting as the Petitioners' agent for filing, the 2003 and 2004 Wisconsin income tax returns that he filed on their behalf constitute the Petitioners' income tax returns. It is on the basis of those returns that the Respondent's adjustments were made, pursuant to the earlier IRS adjustments. Whether, as Petitioners allege in their police report Exhibit 8, [A.W.] filed false returns, or absconded with some of the refunds he claimed on their behalf, is not relevant to the Petitioners' tax liability to the State of Wisconsin. If Petitioners have a claim for fraud, their remedy is against [A.W.]. Respondent paid out refunds on Petitioners' electronically-filed tax returns in good faith, and the State of Wisconsin in no way benefited from [A.W.'s] alleged fraud. Respondent did not defraud Petitioners. While their ire is certainly understandable, it is entirely misplaced.

The Department goes on to state that the Petitioners "bear a responsibility for any fraud that may have occurred" because they did not monitor A.W. closely enough. The Department states that the fact that the Petitioners only received a summary of their

return should have made them suspicious, as well as the fact that A.W. ran their refund through A.W.'s account.

In its rebuttal brief, the Department goes on to point out that A.W. appeared to be acting within the scope of his apparent authority from the Petitioners, so the Department had no reason to question the returns that A.W. filed. After discussing public policy concerns, the Department posits that the Petitioners are in a better position to track down A.W. for the excess refunds than is the State of Wisconsin. Respondent's Reply Brief, at p. 4.

D. THE PETITIONERS' RESPONSE

In response to the Department's motion, the Petitioners argue that A.W. exceeded his authorization in filing their 2003 and 2004 Wisconsin income tax returns. The Petitioners concede that A.W. was acting as their agent for purposes of *preparing* their 2003 and 2004 Wisconsin income tax returns. The Petitioners, however, contend that A.W. exceeded his authorization and committed fraud against them and the State of Wisconsin. The Petitioners state that they should be held responsible only for taxes that they actually owed, not for the amounts allegedly taken by A.W. In support of their position, the Petitioners mainly offer public policy arguments and little legal analysis.

E. DECISION

In order to prevail on its motion, the Department must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. The parties seem to agree that the Petitioners hired A.W. as their agent to

prepare their income tax returns for 2003 and 2004 and that he filed fraudulent returns on their behalf for those years. However, the parties dispute the legal effect and the extent of the agency.

A complete summary of the law of agency in Wisconsin is well beyond the scope of this motion. Wisconsin has, however, looked to the Restatement (Second) of Agency as an authority in this area.² See, e.g., *State v. Timblin*, 259 Wis.2d 299, 657 N.W.2d 89 (Ct.App. 2002); *Johnson v. Minnesota Mutual Life Insurance Co.*, 151 Wis.2d 741, 748, 445 N.W.2d 736 (Ct. App. 1989). The Restatement (Second) of Agency defines agency as the fiduciary relationship that arises from the manifestation of consent by one person to act in his behalf and subject to his control, and consent by the other so to act. Whether an agency exists is a legal concept based upon the particular facts. *Cochran v. Allyn*, 16 Wis.2d 20, 23, 113 N.W.2d 538, 540 (1962).

The Petitioners concede that A.W. was their agent for purposes of preparing the returns. They do not, however, concede that he acted as their agent in *filing* the returns in question. Petitioners' Brief, at p. 3. For purposes of this motion, we must view the evidence and the inferences wherefrom in the light most favorable to the party opposing the motion. *Kraemer*, 89 Wis.2d at p. 566. Whether or not the Petitioners' argument is based on a reasonable distinction or a mere *post hoc* excuse is a

² The *Restatement (Second) of Agency* was superseded by the *Restatement (Third) of Agency* in 2005. Historically, Wisconsin courts have looked to the *Restatement (Second) of Agency* for guidance. To date, however, it appears that no Wisconsin court has cited the *Restatement (Third) of Agency* in a published case. It appears likely, however, that Wisconsin courts would rely on the *Restatement (Third) of Agency* as one of its members and contributors is Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson. See Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WILR 1. We are not aware of any differences between the Restatements that would affect the outcome here.

question that would be better decided after a hearing before the Commission where credibility can be evaluated. In any event, we find that this question presents a genuine issue of material fact.

Other factual issues linger as well. The record before the Commission in this case does not reveal what amounts A.W. received from the Department. Similarly, the Petitioners have not accounted for the money they actually received from A.W. as refunds for 2003 and 2004. While the Department's assessments are presumed to be correct, the refunds A.W. received and how he received them are still at issue, as are the refunds the Petitioners actually received. Finally, the Petitioners did not sign or authenticate the returns that A.W. filed. Neither party addresses this question directly and the Department's reliance on agency in this context has not resolved this factual and legal issue.³

The law governing this matter remains unclear. Neither party has directed the Commission to a published case where an agent filed a false return on a taxpayer's behalf with the intent to defraud the taxpayer or the state. Summary judgment should not be granted if reasonable persons could reach reasonable, but differing inferences and results from the undisputed facts. *Maynard*, 98 Wis.2d at 555. In the Commission's opinion, the Petitioners are entitled to trial on the extent and effect of the agency at issue.

³ Unfortunately, there is little modern guidance here. Prior to the electronic filing era, the law was well settled that a Form 1040 that is not duly signed and verified under penalties of perjury does not constitute a valid Federal income tax return. *Elliot v. Comm'r*, 113 T.C. 125, 128 (1999). In a footnote, the Department appropriately points out that unlike the federal system, Wisconsin does not require a written power of attorney for tax preparers. However, the applicable requirements in Wisconsin remain unclear based on the record before us.

ORDER

1. The Department's motion for summary judgment is denied.
2. The Commission will contact the parties to schedule further proceedings in this matter.

Dated at Madison, Wisconsin, this 16th day of April, 2009.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner