

STATE OF WISCONSIN
TAX APPEALS COMMISSION

EUGENE J. FLENTJE,

DOCKET NO. 08-H-203

Petitioner,

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 and the Department is entitled to judgment as a matter of law under Wis. Stat. § 802.08 and Wis. Admin. Code § TA 1.31. The Petitioner represents himself in this case and has filed a petition for review and two responses to the motion, which the Commission has construed as a cross-motion for summary judgment.¹ Attorney Sheree Robertson represents the Department and has filed a brief, affidavits with exhibits, and a reply brief in support of its motion. Although the amount in controversy in this case is less than \$2,500, the Commission determined, pursuant to Wis. Stats. § 73.01(1)(b), that it merits decision by the full Commission.

Having considered the entire record, the Commission hereby finds, rules

¹ In its Order to Supplement the Record dated October 16, 2009, the Commission informed the parties of its construction of the Petitioner's responses, and neither party objected.

and orders as follows:

FINDINGS OF FACT

1. During all of 2007, the Petitioner resided at 416 Park Lane, Mishicot, Wisconsin, which is an affordable housing project for elderly and low-income individuals (the "Facility") in the Village of Mishicot, Wisconsin (the "Village"). (Affidavit of Department Resolution Officer Marie Romero dated March 31, 2009 ("Romero Aff."), ¶ 3.)

2. During all of 2007, the Facility was owned and operated by the Mishicot Housing Corporation ("MHC"), a nonstock corporation organized under Chapter 181 of the Wisconsin Statutes on April 9, 1976. (Affidavit of Attorney Sheree Robertson dated August 3, 2009 ("Robertson Aff."), ¶ 2, Ex. 6; Affidavit of Eugene J. Flentje dated October 29, 2009 with attached Articles of Incorporation (the "Articles") and Bylaws ("Bylaws") of MHC in effect during 2007.)

3. As of July 3, 2009, MHC was not listed by the U.S. Department of Housing and Urban Development on its website list of public and Indian housing in Wisconsin. (Robertson Aff., ¶ 3, Ex. 7.)

4. The record is unclear as to MHC's federal income tax status.²

5. Since at least 2006, the Village has treated the Facility as exempt from property tax under Wis. Stat. § 70.11(4). (Affidavit of Village Assessor Paul Mael

² The parties dispute whether MHC is recognized by the Internal Revenue Service as exempt under Section 501(c)(4) of the Internal Revenue Code of 1986, as amended. Neither party submitted any documentation from the IRS regarding this point. While such information might be relevant, it would be of limited assistance in determining MHC's status as a housing authority under Wis. Stat. § 66.1201(4), which is the relevant issue in this case.

dated February 20, 2009, ¶ 6.)

6. In addition to MHC's Articles and Bylaws, the relationship between MHC and the Village was governed initially by a Cooperation Agreement dated November 16, 1976 between MHC and the Village (the "1976 Agreement"). (Robertson Aff., ¶ 5, Ex. 9, pp. 2-23.)

7. MHC and the Village entered into a second Cooperation Agreement dated November 30, 1979 (the "1979 Agreement"). *Id.*

8. The Village Board approved the 1976 and 1979 Agreements on November 16, 1976 and November 6, 1979, respectively. *Id.*

9. According to its terms, the 1979 Agreement terminated on December 31, 1982. No subsequent agreement has been executed between MHC and the Village, which apparently have continued to follow the 1979 Agreement despite its expiration. *Id.*

10. Although the Village treats the Facility as exempt from property tax, MHC has been required to make an annual payment in lieu of tax to the Village with respect to its property pursuant to the 1976 and 1979 Agreements between MHC and the Village. *Id.*

11. MHC did not make a payment in lieu of tax to the Village in 2007. (Robertson Aff., ¶ 5, Ex. 9, pp. 24-38.)

12. The Petitioner filed with the Department a 2007 Wisconsin individual income tax return and a 2007 Wisconsin Schedule H Homestead Credit form claiming a Homestead Credit and related refund in the amount of \$484.00. (Romero

Aff. ¶ 4, Ex. 1.)

13. With a Notice of Refund dated February 26, 2008, the Department issued the claimed refund for 2007 to the Petitioner by a check in the amount of \$484.00. (Romero Aff. ¶ 5, Ex. 2.)

14. The Department subsequently audited the Petitioner's 2007 Wisconsin return and determined that he was not eligible for the \$484.00 Homestead Credit and related refund that had been issued to him, on the grounds that the Facility is exempt from property tax. More specifically, the Department determined that MHC is not a public housing authority as defined under Wis. Stats. §§ 66.1201(3)(b) and (4) and that any payments in lieu of tax made by MHC to the Village therefore were not made pursuant to § 66.1201(22), Stats., rendering residents of the Facility ineligible for the Wisconsin Homestead Credit under § 71.53(2)(e), Stats. (Romero Aff. ¶ 6.)

15. By a Notice of Amount Due dated July 3, 2008, the Department issued an assessment to the Petitioner in the amount of \$484.00 to recover the 2007 Homestead Credit refund previously paid to the Petitioner. (Romero Aff. ¶ 7, Ex. 3.)

16. On or about July 9, 2008, the Petitioner filed a petition for redetermination with the Department. (Romero Aff. ¶ 8, Ex. 4.)

17. By a Notice of Action dated November 11, 2008, the Department denied the Petitioner's petition for redetermination. (Romero Aff. ¶ 10, Ex. 5.)

18. On December 30, 2008, the Commission received the Petitioner's petition for review via certified mail date-stamped December 29, 2008.

19. On January 26, 2009, the Department filed an answer, which it

amended on July 7, 2009.

20. On August 5, 2009, the Department filed a notice of motion and motion for summary judgment, brief and two affidavits with exhibits in support of the motion.

21. On August 17, 2009, the Petitioner filed an objection in opposition to the motion.

22. On August 24, 2009, the Department filed a reply brief in support of the motion.

23. On September 1, 2009, the Petitioner filed a second objection to the motion.

24. On October 16, 2009, the Commission construed the Petitioner's responses as a cross-motion for summary judgment and issued its Order to Supplement the Record requiring the Petitioner to file certified copies of the Articles of Incorporation and Bylaws of MHC.

25. On October 30, 2009, the Petitioner filed certified copies of the Articles of Incorporation and Bylaws of MHC with attached affidavit of the Petitioner dated October 29, 2009.

26. On November 4, 2009, the Department filed its response to the Petitioner's October 30, 2009 filing.

CONCLUSIONS OF LAW

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

2. Pursuant to Wis. Stat. § 71.53(2)(e), residents of the MHC Facility were not eligible for the Wisconsin Homestead Credit for 2007 due to MHC's failure to qualify as a housing authority under Wis. Stat. § 66.1201(4) during that year.

3. Pursuant to Wis. Stat. § 71.53(2)(e), residents of the MHC Facility were not eligible for the Wisconsin Homestead Credit for 2007 due to MHC's failure to make a payment in lieu of property tax to the Village of Mishicot for that year.

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). In this case, both parties have moved for summary judgment, indicating that there is no genuine issue of material fact in dispute. However, the Commission has determined that the Department, not the Petitioner, 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). Tax exemptions, deductions and privileges are matters of legislative grace and are strictly construed

against the taxpayer. *Ramrod, Inc. v. Wis. Dep't of Revenue*, 64 Wis. 2d 499, 504 (1974). Tax credits are subject to the same strict construction. *L&W Construction Co., Inc. v. Wis. Dep't of Revenue*, 149 Wis. 2d 684, 690 (Ct. App. 1989). Consistent with precedent, the Petitioner has the burden of proof regarding his claim of the Homestead Credit for 2007.

In *Jean B. Martin v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-311 (WTAC July 15, 1997), another taxpayer presented virtually the same question to the Commission that the Petitioner presents in this case, and the Commission held that residents of the MHC Facility were not eligible for the Wisconsin Homestead Credit during the period 1986-1989. In this case, the Commission reaches the same conclusion regarding the Petitioner, but limits that decision to tax year 2007.

1. Applicability of the Doctrine of Issue Preclusion

In addition to its arguments interpreting the statutes at issue in this case, the Department argues that the Commission is bound to follow *Martin* under the doctrine of issue preclusion. In a court proceeding, determining whether issue preclusion bars a plaintiff's claim involves a two-step analysis. *In re Estate of Rille ex rel. Rille*, 300 Wis.2d 1, 19-20, 728 N.W.2d 693 (2007). The first step is to determine whether, as a matter of law, issue preclusion can be applied by examining whether the issue in the current proceeding "was actually litigated and determined in the prior proceeding . . . and whether the determination was essential to the judgment." *Id.*, 300 Wis. 2d at 20 (citations omitted). If the claim of issue preclusion survives the first step of this

analysis, the second step is to determine whether applying the doctrine would be fundamentally fair according to an analysis of several factors.³ *Id.*

We find that, as a matter of law, issue preclusion cannot be applied here, because the issue in this case was not actually litigated and determined in *Martin*. First, the Commission is an administrative agency, not a court, and its decisions generally are binding only upon the parties before it in the case being decided. While the Commission generally treats its own decisions as precedent and follows them as a matter of policy, it cannot accord preclusive effect to prior cases that involved different parties. *Martin* involved a different taxpayer's claim, and the record shows no relationship between that taxpayer and the Petitioner that might bring this doctrine into play in this case. Second, this case involves a different tax period (2007) than the period involved in *Martin* (1986-89), a difference of some twenty years. Third, *Rille* indicates that a party's claim is subject to issue preclusion only if that party had an opportunity to object in the case sought to be used to preclusive effect. *Id.* at 33 and 40 (discussing the due process aspects of the second step of the analysis requiring "fundamental fairness"). The record provides no indication that the Petitioner had any opportunity to

³ "The factors to be considered in determining whether to apply issue preclusion are as follows:

- 1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law;
- 2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
- 3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;
- 4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and
- 5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?" *Rille*, 300 Wis.2d at 29 (citations omitted).

object or otherwise intervene in *Martin*, or that he was even a resident of the Facility at that time.

Based on our conclusion that the doctrine of issue preclusion cannot be applied here as a matter of law, we do not reach the second step of the two-step analysis. However, we note that even a cursory review of the record before us would provide little support for the proposition that applying the doctrine of issue preclusion in this case would be fundamentally fair.

2. Qualification of MHC as a Public Housing Authority

Although *Martin* involved tax years approximately 20 years prior to 2007, the relevant statutes have not been amended since then in any way that would change the outcome in this case.⁴ The Petitioner's claim is grounded in Wis. Stat. § 71.51, which provides for the Homestead Credit for qualifying taxpayers. This credit is subject to the limitations enumerated in Wis. Stat. § 71.53(2)(e), which defines the following type of claim as ineligible for the credit:

(e) The claimant resided for the entire calendar year to which the claim relates in housing which was exempt from taxation under ch. 70 other than housing for which payments in lieu of taxes are made under s. 66.1201(22) except as provided under s. 71.54(2)(c)2.⁵

Wis. Stat. § 71.53(2)(e).

⁴ Because this case involves a claim for tax year 2007, the Wisconsin Statutes cited herein are the statutes that were in effect that year. *Martin* involved Wis. Stat. § 66.40, which was renumbered as § 66.1201 in 1999.

⁵ The exception provided under § 71.54(2)(c)2, Stats., applies only to certain claimants who were part-year residents of tax-exempt housing. The Petitioner was a full-year resident of the Facility in 2007, and this exception therefore does not apply in his case.

Wis. Stat. § 66.1201(22) exempts the property of a Chapter 66 housing authority from property tax,⁶ but permits the municipality where a project is located to collect a payment in lieu of tax from the authority. According to Wis. Stat. § 66.1201(3)(b), an “authority” or “housing authority” means a “public corporation” established pursuant to Wis. Stat. § 66.1201(4). Wis. Stat. § 66.1201(4) provides as follows:

(4) Creation of housing authorities.

(a) When a council declares by resolution that there is need for an authority to function in the city, a public body corporate and politic then exists in the city and shall be known as the ‘housing authority’ of the city. The authority may then transact business and exercise any powers granted to it under this section.

(b) The council shall adopt a resolution declaring that there is need for a housing authority in the city if the council finds that insanitary or unsafe inhabited dwelling accommodations exist in the city or that there is a shortage of safe or sanitary dwelling accommodations in the city available to persons of low income at rentals they can afford. In determining whether dwelling accommodations are unsafe or insanitary the council may take into consideration the degree of overcrowding, the percentage of land coverage, the light, air, space and access available to the inhabitants of the dwelling accommodations, the size and arrangement of the rooms, the sanitary facilities, and the extent to which conditions exist in the buildings which endanger life or property by fire or other causes.

(c) In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers under this section upon proof of the adoption of a

⁶ Such property is likewise exempt under Wis. Stat. § 70.11(18).

resolution by the council declaring the need for the authority. The resolution is sufficient if it declares that there is a need for an authority and finds that either or both of the conditions described in par. (b) exist in the city. A copy of the resolution duly certified by the city clerk is admissible evidence in any suit, action or proceeding.

Wis. Stat. § 66.1201(4).

There is no evidence in the record that the Village ever intended to organize MHC as a housing authority under Wis. Stat. § 66.1201. Indeed, the Village does not appear to have ever treated MHC as a governmental entity.⁷ For example, the Village treats the Facility property as exempt under § 70.11(4), the general exemption for housing provided by private benevolent organizations, not as exempt under Wis. Stats. §§ 66.1201(22) and 70.11(18), the exemptions for housing provided by public housing authorities.

The Village has never adopted the specific resolutions required by Wis. Stat. § 66.1201(4) with regard to MHC. The Petitioner argues that the Village effectively passed such resolutions by approving the 1976 and 1979 Agreements with MHC. However, neither the Board resolutions nor the Agreements include the specific language required by the statute. In particular, the Board resolutions and the Agreements include no statement confirming the need for the authority or any basis for finding that need existed in the Village. *See*, Wis. Stat. § 66.1201(b)-(c). Without such a

⁷ MHC may qualify as a “quasi-governmental corporation,” and therefore a “public corporation,” under a common law facts and circumstances analysis further explained in *State v. Beaver Dam Area Development Corp.*, 312 Wis.2d 84, 752 N.W.2d 295 (2008). However, even if that were true, the record in this case does not support classifying MHC as a “housing authority” under the more restrictive statutory definition of that term provided under Wis. Stat. § 66.1201(4).

statement of policy from the Village, there is no basis for us to conclude that MHC has ever been a “housing authority” under the statutory definition.

In the Petitioner’s favor, each Agreement defines MHC as the “local Authority” in its opening paragraph. However, the Agreements otherwise treat MHC and the Village as completely separate and independent entities. According to the minutes of the Board’s November 6, 1979 meeting, two members of the Village Board who were also members of MHC abstained from voting on the 1979 Agreement due to a perceived conflict of interest, even though MHC is organized solely for not-for-profit purposes. According to the minutes of the Village Board’s November 16, 1976 and November 6, 1979 meetings, the only issues discussed by the Village Trustees when they considered and approved the Agreements were the amounts of the annual payments to be made by MHC to the Village.

MHC’s Articles of Incorporation provide that MHC is organized not for profit under Chapter 181, Stats., and Section 501 of the Internal Revenue Code,

and the objects and purposes to be transacted and carried on are to promote the general social welfare of the community and for that purpose: to acquire, construct, provide and operate rental housing and related facilities suited to the special needs and living requirements of eligible occupants as determined by Farmers Home Administration [FHA] regulations, without regard to race, color, creed or national origin;

Art. 5, MHC Art. of Inc. Although the Articles refer to federal FHA regulations, they do not include any references to Wisconsin law or public housing authorities. Moreover, both the Articles and Bylaws of MHC establish the corporation as an entity controlled

entirely by its membership, which is composed of individuals and organizations residing in the Mishicot area. (§2.01, MHC Bylaws.) Membership is not open to the public, in that new members must be approved by a majority vote of either the MHC Board of Directors or the members. (§2.02, MHC Bylaws.) The members elect the MHC Board of Directors. (§3.01, MHC Bylaws.) The Village government and its officials have no stated role or authority in the governance of MHC. While these factors are not determinative in our analysis, none supports the qualification of MHC as a “housing authority” under § 66.1201(4), Stats.

In *Martin*, the Commission held that MHC did not qualify as an “authority” under this statute. On the record before us, we agree with that portion of the Commission’s holding in *Martin* for the year 2007. However, we do not agree that a Chapter 181 nonstock corporation can never be a housing authority under Wis. Stat. § 66.1201(4). If the Village were to adopt the resolutions required under the statute to designate MHC as a public housing authority and otherwise comply with the statutory requirements, such actions could establish the right of the residents of the MHC Facility to claim the Wisconsin Homestead Credit. However, the fact that the Village has not chosen to do so since the Commission issued its decision in *Martin* in 1997 indicates that the Village never intended to establish MHC as a public housing authority. Although the record in this case may be more complete than the record in *Martin*, the basic facts surrounding the organization and operations of MHC remain unchanged. Thus, we reach the same conclusion that the Commission reached in *Martin*, and hold that MHC did not qualify as a housing authority under Wis. Stat. § 66.1201(4) in 2007.

3. MHC's Payments in Lieu of Tax

The 1979 Agreement required MHC to make annual payments in lieu of tax to the Village as follows:

Each such annual Payment in Lieu of Taxes shall be made after the end of the fiscal year established for such Project, and shall be in the amount equal to either (i) three thousand six hundred (\$3,600.00) dollars, or (ii) the amount permitted to be paid by applicable state law in effect on the date such payment is made, whichever amount is the lower.

(§ 3(b), 1979 Agreement.) No document submitted by either party indicates that the parties ever agreed to suspend the payments in lieu of tax for any year, including 2007.

Receipts for payments received by the Village from MHC during the years 1998 through 2008 show that these payments varied in amount and by the dates of their receipt.⁸ For the years 1998 through 2004, MHC paid \$4,800 to the Village for each year at various times during that year or the following year.⁹ For 2005, MHC paid \$1,200 to the Village on December 20, 2006 as a "2005 tax equivalent partial payment." Finally, a receipt dated January 2, 2008 records a payment of \$1,200 made by MHC to the Village as a "2006 Tax Equivalent."

⁸ See, Robertson Aff., ¶ 5, Ex. 9, pp. 24-38.

⁹ On January 7, 1998, MHC made three payments to the Village totaling \$4,800 for "1998 tax." On April 18, 2000, MHC paid \$4,800 to the Village for "1999 Property Tax Equivalent." On April 23, 2001, MHC paid \$4,800 to the Village for "2000 Property Tax Equivalent." On December 20, 2002, MHC paid the Village \$4,800 for "2001 Property Tax Equivalent." On December 31, 2003, MHC paid the Village \$4,800 for "2002 Property Tax Equivalent." On December 31, 2004, MHC paid the Village \$4,800 for "2003 Property Tax Equivalent." On December 30, 2005, MHC paid the Village \$4,800 for "2004 Property Tax Equivalent." (Robertson Aff., ¶ 5, Ex. 9, pp. 31-38.)

The Village provided no receipt for any payment in lieu of tax made by MHC to the Village for 2007 in response to the Department's *subpoena duces tecum* requesting such documentation. However, the Village did provide copies of letters from Village representatives to MHC dated November 24, 2008 and February 13, 2009 requesting a discussion of "partial payments" and "the lack of payments to the Village in recent years of sums due to the Village pursuant to previous Cooperation Agreements between the Village" and MHC.¹⁰ Taken together, this evidence indicates that MHC never made a payment of lieu of tax to the Village for 2007.

For the Petitioner to qualify for a 2007 Homestead Credit, MHC had to have "made" a payment of lieu of tax to the Village for that year. Wis. Stat. § 71.53(2)(e). The evidence shows that MHC never made any such payment.

4. Conclusion

There are no genuine issues of material fact in dispute in this case, and the Department is entitled to summary judgment as a matter of law. However, as discussed above, the Commission's holding in this matter applies only to tax year 2007, and residents of the MHC Facility may be eligible for the Wisconsin Homestead Credit for tax years in which MHC and the Village fully comply with the statutory requirements for such eligibility.

¹⁰ Robertson Aff., ¶ 5, Ex. 9, pp. 24-27.

ORDER

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

Dated at Madison, Wisconsin, this 3rd day of May, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"