STATE OF WISCONSIN

TAX APPEALS COMMISSION

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**MICHAEL AND DIANA LENZ,** **DOCKET NO. 10-I-03**

Petitioners,

vs. **RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE,**

Respondent.

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**THOMAS J. MCADAMS, ACTING CHAIRPERSON**:

This case comes before the Commission on the Respondent's motion for summary judgment, which was filed with exhibits and briefs. The Petitioners in this matter, Mr. and Mrs. Michael A. W. Lenz of Mukwonago, Wisconsin, are *pro se* and have filed a response with exhibits. The Respondent in these matters, the Wisconsin Department of Revenue ("the Department"), is represented in these matters by Attorney Mark S. Zimmer. For the reasons stated below, we grant the Department's motion.

## FACTS

For the purpose of deciding this motion, we find the following facts:

1. Petitioners Michael and Diana Lenz ("Petitioners") filed a 2008 Wisconsin Form 1 tax return on or about April 15, 2009, and claimed on the attached Form 1040 federal income tax return that Petitioners had zero wages, salaries, tips, etc. On this Form 1, Petitioners claimed a federal adjusted gross income of -$15,867 for

Wisconsin purposes, and asserted that they were entitled to a refund of $5,994 Wisconsin tax withheld and a Homestead Credit of $1,160, less sales and use tax due on out-of-state purchases in the amount of $71, for a total refund claimed of $7,083. (Affidavit of John Teasdale, ¶2; Exhibit 1).

2. Petitioners did not attach any W-2 wage statements to their returns. Instead, Petitioners attached a Form 4852[1] claiming under penalties of perjury that they received zero wages or other compensation, and asserting that Petitioner Michael A.W. Lenz had $5,659.82 in Wisconsin income tax withheld and that Petitioner Diana Lenz had $334.46 in Wisconsin income tax withheld. (Affidavit of John Teasdale, ¶3).

3. According to the W-2 records of the Internal Revenue Service, Petitioner Michael A. Lenz (in fact) had wages, tips or other compensation for the year 2008 from Petitioner, Michael Lenz's employer of Milwaukee, Wisconsin, in the amount of $91,816.72, with Wisconsin income tax withheld in the amount of $5,659.82. (Affidavit of John Teasdale, ¶4; Exhibit 2).

4. According to the W-2 records of the Internal Revenue Service, Petitioner Diana Lenz (in fact) had wages, tips or other compensation for the year 2008 from an employer in Waukesha, Wisconsin, in the amount of $11,781.11, with Wisconsin income tax withheld in the amount of $334.46. (Affidavit of John Teasdale, ¶5; Exhibit 3).

5. Forms W-2 are required to be submitted by employers to the Internal Revenue Service with a Form W-3, which provides "Under penalties of perjury,

[1] Form 4852 is a substitute for Form W-2.

I declare that I have examined this return and accompanying documents, and, to the best of my knowledge and belief, they are true, correct, and complete." (Affidavit of John Teasdale, ¶6; Exhibit 4).

6. Petitioners received a Notice of Refund from the Department dated June 12, 2009, adjusting the Petitioners' claimed refund to $1,684. The adjustment was made to add in the $103,492.00 of unreported wage income of the Petitioners, as reported on the Petitioners' W-2 forms, Exhibits 2 and 3. (Affidavit of John Teasdale, ¶7; Exhibit 5).

7. A letter from Petitioner Michael A.W. Lenz dated June 15, 2009 was received by the Department on June 17, 2009 and by the Resolution Unit on July 6, 2009, which was treated as a timely Petition for Redetermination. (Affidavit of John Teasdale, ¶8; Exhibit 6).

8. By Notice of Action dated November 13, 2009, the Department denied the Petitioner's Petition for Redetermination in part, granting the Petitioners a married couple credit in the amount of $353.00, which was refunded to Petitioners with interest shortly thereafter. (Affidavit of John Teasdale, ¶9; Exhibit 7).

9. The Petitioners' timely Petition for Review was received in the office of the Wisconsin Tax Appeals Commission on January 5, 2010. (Affidavit of John Teasdale, ¶10; Exhibit 8).

10. The Department filed an Answer in this action on February 3, 2010, and also sent a cover letter to the Petitioners. In this letter, the Department advised the Petitioners that their Petition was groundless and frivolous, and offered the Petitioners

the opportunity to withdraw the Petition by March 1, 2010. The Department also warned Petitioners of the possibility of an award of sanctions for filing a frivolous petition, with copies of three cases involving similar matters, with awards of sanctions of up to $1,000. (Affidavit of Mark S. Zimmer, ¶2; Exhibit 9).

11. Petitioners did not withdraw their Petition by March 1, 2010, but instead served upon the Respondent two sets of Requests for Admission, most of which were requests for admission of legal or statutory interpretation, or which were statements of the type usually recited by tax protesters. (Affidavit of Mark S. Zimmer, ¶3; Exhibit 10). The Commission issued a protective order at the Department's request on August 27, 2010.

12. On April 23, 2010, the Department issued a letter correcting certain responses to the Request for Admissions. (Affidavit of Mark S. Zimmer, ¶5; Exhibit 12).

13. On April 23, 2010, The Department issued a letter to Petitioner Michael Lenz's employer requesting a notarized statement as to whether Petitioner Michael Lenz was an employee, the amounts of wages paid by the company to Petitioner Michael Lenz, and whether the W-2 issued by the company was erroneous in any way. (Affidavit of Mark S. Zimmer, ¶6; Exhibit 13).

14. That on June 9, 2010, the Department received a notarized response from the Payroll Manager stating that "Michael A. Lenz was employed there during the year 2008. Michael Lenz received wages in the amount of $101,530.00." The Payroll Manager also confirmed that the W-2 filed by his employer for Michael Lenz for 2008 is accurate. (Affidavit of Mark S. Zimmer, ¶7; Exhibit 14).

15. On April 23, 2010, the Department issued a letter to Petitioner Diana Lenz's employer requesting a notarized statement as to whether Petitioner Diana Lenz was an employee, the amounts of wages paid by the company to Petitioner Diana Lenz, and whether the W-2 issued by the company was erroneous in any way. (Affidavit of Mark S. Zimmer, ¶8; Exhibit 15).

16. On April 30, 2010, the Department received a notarized response dated April 27, 2010 from that employer stating that Diana Lenz was employed there during the year 2008 through August 13, 2008, that the amount of wages paid to her in 2008 was $11,781.11, and that the W-2 filed by the employer for her was correct. (Affidavit of Mark S. Zimmer, ¶9; Exhibit 16).

17. On August 18, 2010, The Department provided to the Petitioners a copy of the Commission's decision in *Louis M. Sytsma v. Dep't of Revenue,* Docket Nos. 10-I-078-SC and 10-I-079-SC (WTAC 2010), noting that the taxpayer in that case made arguments nearly identical with those of the Petitioners, and that the Commission sanctioned Mr. Sytsma for filing a frivolous petition by adding $500 to each of the amounts due. The Department further requested that the Lenzs withdraw their Petition in this case. (Exhibit 17).

**OPINION**

The Petitioners in this case filed a 2008 Wisconsin return which listed no wage income and requested a refund of $5,994 withheld by the Petitioners' respective employers. Mr. Lenz's employer, however, reported that it paid $91,816.72 as wages to Mr. Lenz during 2008. Additionally, Mrs. Lenz's employer paid her $11,781 as wages

during that same year. The Department calculated that the Lenz's were entitled to a refund, but only of $1,662, meaning that the Lenz's would pay a Wisconsin income tax of $4,330 for 2008 on their combined income of $103,492. Based on their self-reported federal adjusted gross income of -$15,867, the Petitioners claimed a refund of $7,083 on their Wisconsin income tax forms. In brief, the Lenz's legal argument is that they had no wages in 2008 subject to income tax. The Department disagrees. The first part of this opinion will state the applicable law. The second part will summarize the arguments the parties make concerning summary judgment. The final part will set forth the reasons why we grant the Department's motion and why an additional assessment is appropriate.

**A. Summary Judgment Law**

A summary judgment motion will 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. 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. *Grams v. Boss,* 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

If the moving party establishes a *prima facie* case for summary judgment, the court then examines the affidavits in opposition to the motion to see if the other party's affidavits show facts sufficient to entitle him or her to trial. *Artmar, Inc v. United Fire & Casualty Co.,* 34 Wis. 2d 181, 188, 148 N.W.2d 641, 644 (1967). Once a *prima facie*

case is established, "the party in opposition to the motion may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." *Board of Regents v. Mussallem,* 94 Wis. 2d 657, 673, 289 N.W.2d 801, 809 (1980), *citing* Wis. Stat. § 802.08(3). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar,* 34 Wis. 2d at 188. Where the party opposing summary judgment fails to raise an issue of material fact, the trial court is authorized to grant summary judgment pursuant to Wis. Stat. § 802.08(3). *Board of Regents,* 94 Wis. 2d at 673.

**B. The Legal Arguments**

**1. The Department's Arguments**

The Department argues that it is entitled to summary judgment because the Petitioners received Wisconsin income and they are subject to Wisconsin taxes on that income. The Department makes several points. First, the Department argues that the Petitioners' reliance on I.R.C. §§ 3401 and 3121 is misplaced. The Department states that the definition of "wages" in I.R.C. § 3401(a) relates to withholding requirements. Similarly, I.R.C. § 3121 relates to FICA withholding. Second, the Department asserts that it has proven by way of affidavits from the Lenz's employers that during the relevant period the Lenz's were residents of Wisconsin and that they performed services for an employer. Finally, the Department argues that the Commission rejected the Lenz's argument in another case in 2010.

### 2. Petitioners' Legal Claims

In response to the Department's motion, the Petitioners main claim is that the gross receipts for their labor are not taxable as federal income in the absence of a government granted privilege and that Petitioners' gross receipts for labor are not Wisconsin taxable income as meant by the Wisconsin Constitution. Petitioners' Brief at 26-7. In support of this claim, the Petitioners point to the definition of "employee" in Wis. Stat. § 71.63(2), which they believe determines what individuals the Department can tax:

> "Employee" means a resident individual who performs services for an employer anywhere or a nonresident individual who performs or performed such services within this state, **and includes an officer, employee or elected official of the United States, a state, territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of these entities.** The term includes an officer of a corporation, an entertainer and an entertainer corporation, but does not include a qualified real estate agent or a direct seller who is not treated as an employee under section 3508 of the Internal Revenue Code.

[emphasis added by the Petitioners].

The Petitioners argue that based on Wis. Stat. § 71.63(2), there are two requisites to being a "statutory employee" who can be taxed. First, one must be a "resident individual who performs service for an employee anywhere." Second, one must be an elected official, a corporate officer, or an entertainer.

## C. Analysis

### 1. The Summary Judgment Motion

Wis. Stat. § 71.02(1) provides that "there shall be assessed, levied, collected and paid a tax on all net incomes of individuals … residing within the state …." Net income is derived from gross income, after subtracting allowable statutory deductions and exemptions. *See* Wis. Stat. § 71.01(16) (defining "Wisconsin taxable income"). "Gross income" is defined as "all income, from whatever source derived and in whatever form realized, whether in money, property or services, which is not exempt from Wisconsin income taxes," and includes, but is not limited to, wages, salaries, commissions, and other compensation for services. Wis. Stat. § 71.03(1).

Petitioners assert that they had no taxable income for the year 2008 because the Lenz's "wages" for 2008, as reported by their employers, are not "wages" as defined under applicable federal and Wisconsin law. Petitioners do not deny that Mr. Lenz received $91,816.72 from his employer in 2008, an amount that his employer reported as "wages" paid to Mr. Lenz during that period. Petitioners do not deny that Mrs. Lenz received $11,781.11 from her employer. Petitioners do not claim that their employers made a mistake by reporting this amount as "wages" paid to the Lenz's. Thus, there are no material facts in dispute in this case.[2] The only issue in dispute is

[2] The Lenz's response to the motion goes through the Department's proposed facts, opposing almost all of them at least in part. Having reviewed the Petitioners' responses, we conclude that, in fact, there is no genuine dispute of material fact.

whether the assessment is invalid as a matter of law under the definition of "wages" applicable for income tax purposes.[3]

The Commission has rejected the argument the Petitioners make in this case on several occasions. For example, in *Callahan v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-874 (WTAC 2006), the Petitioner argued that federal and state law is that the government can tax only employees of the government; therefore, all other employees in the private sector are immune from income tax liability. The Petitioner in *Callahan* argued an interpretation of 26 U.S.C. § 3401, which imposes responsibilities to withhold tax from "wages." In its holding, the Commission stated the following:

> This language does not address how other employees' wages are subject to withholding or taxation. 26 U.S.C. § 7701(c) states that the use of the word "includes" "shall not be deemed to exclude other things otherwise within the meaning of the term defined." Thus, the word "includes" as used in the definition of "employee" is a term of enlargement, not of limitation. It clearly makes government employees and officials a part of the definition of "employee," which generally includes private citizens. *See United States v. Latham*, 754 F.2d 747, 750 (7th Cir. 1985), and *Peth v. Breitzmann*, 611 F.Supp. 50, 53 (E.D. Wis. 1985).
>
> The definition of employee as found in 26 U.S.C. § 3401(c) is almost identical to Wis. Stat. § 71.63(2): "Employee" means a resident individual who performs or performed services for an employer anywhere or a nonresident individual who performs or performed such services within this state, and includes an officer, employee or elected official of the United States, a state, territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of these entities…. As with the federal definition of "employee", the word "includes" is a term of

[3] On Page 27 of their brief, the Petitioners write "[t]he Petitioners do not argue that they did not receive money by the private sector entities in exchange for their labor. The Petitioners only rebut the characterization of those payments as statutory "wages" . . ."

> enlargement and not of limitation. Therefore, since petitioner was a resident of this state and performed services for an employer in 2000, he was an employee. Any income he received from his employer in 2000 was taxable income. Wis. Stats. §§ 71.02(1) and 71.03(1)-(2).

The Commission stated that dismissal of the petition was warranted as there was no genuine issue of material fact, and the Department was entitled to summary judgment as a matter of law. Additionally, the Commission determined that Mr. Callahan delayed or avoided paying his 2000 state income taxes by asking frivolous questions and arguing that the State of Wisconsin had no authority to impose taxes on him. Thus, the Commission issued an additional assessment of $300.00 on Mr. Callahan pursuant to Wis. Stat. § 73.01(4)(am).

Later that same year, the Commission also decided another case where the Petitioner made an argument similar to what the Petitioners make here. *King v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-925 (WTAC 2006). In the course of the litigation, the Kings made the following argument:

> I received no 'wages' includable in 'gross income' as the foregoing quoted terms are specially defined and used pursuant to Title 26, U.S.C., Internal Revenue Code, and Title 26 C.F.R., and as the term 'include' is legally defined as a word of limitation in the context of the said quoted terms in *Black's Law Dictionary, Sixth Edition,* p. 763,….

The Commission rejected the Petitioners' arguments, however, stating the following:

> In *Callahan v. Dep't of Revenue*, WTAC Docket No. 05-I-107 (January 9, 2006), the Commission considered a case with facts and legal arguments that were very similar to the facts and law at issue in this case. In that case, the petitioner argued that the federal and state governments can tax the wages of only government employees, and that the wages of

> employees of private sector employers are effectively immune from income tax. We rejected that argument in *Callahan*, and we reject it again here.
>
> In their filings with both the Department and the Commission, petitioners deny that they are "tax protestors," as that term is commonly understood, but their legal arguments indicate otherwise. These arguments and ones like them have been consistently rejected in prior cases before the Commission and the courts. *See Callahan*. They are groundless and frivolous, and have never prevailed in Wisconsin, nor, as far as the Commission is aware, in any court in the country. *See, Bierman v. C.I.R.*, 769 F. 2d 707, 708 (11th Cir. 1985) (finding similar arguments "patently frivolous" and noting that they "have been rejected by courts at all levels of the judiciary"); *Tracy v. Dep't of Revenue,* 133 Wis. 2d 151 (Ct. App. 1986); *Steele v. Dep't of Revenue,* WTAC Docket No. 05-I-79 (December 12, 2005); *Kroeger v. Dep't of Revenue,* WTAC Docket No. 04-I-228 (March 21, 2005); and *Boon v. Dep't of Revenue,* 1999 Wisc. Tax LEXIS 7 (WTAC 1999), *aff'd. on other grounds* (Milwaukee Co. Cir. Ct. 1999).

The Commission thus determined that there was no genuine issue of material fact, and the Department was entitled to summary judgment. The Commission further found that the Kings knew, or should have known, that their appeal was without reasonable basis. Consequently, the Commission imposed an additional assessment of $300 under Wis. Stat. § 73.01(4)(am) and Wis. Admin. Code § TA 1.63.[4]

In sum, dismissal of the petition is warranted as there is no genuine issue of material fact, and based on *Callahan* and *King*, the Department is entitled to summary judgment as a matter of law.

[4] In addition to *King* and *Callahan*, the Commission also rejected this argument in a small claims case in 2010. *Louis M. Sytsma v. Dep't. of Revenue*, Docket Nos. 10-I-078-SC and 10-I-079-SC (WTAC 2010). The Commission termed the Petitioner's arguments as a "confusing welter of definitions" and a "soup of frivolity." The Commission assessed a sanction of $500 in each of the two cases.

**2. Additional Assessment**

The Commission may impose an additional assessment of up to $1,000 if it determines that the arguments made are frivolous or groundless. Wis. Stat. § 73.01(4)(am); Wis. Admin. Code § TA 1.63. The Department requests that the Commission impose an additional assessment and we agree that such an assessment is appropriate here for at least two reasons. First, from our review of Commission case law, it appears that every previous time a Petitioner has raised this basic argument, the Commission has imposed the additional assessment. The Petitioners were made aware of this fact, but the Petitioners continued on, responding in their brief that their claim is different because it is based on Wisconsin law. In fact, the Petitioners do not cite any Wisconsin case or statute that supports their argument. The Petitioners' claim here is the same as that in *Callahan* and *King*.

The second reason that the additional assessment is appropriate is that numerous court decisions reject the "wages are not income" argument. *See, e.g., United States v. Romero*, 640 F.2d 1014, 1016 (9th Cir. 1981) (rejecting Romero's proclaimed belief that he was not a "person" and that the wages he earned were not "income."); *United States v. Richards*, 723 F.2d 646, 648 (8th Cir. 1983) (claim that wages and salary are not income within the meaning of the Sixteenth Amendment is "totally lacking in merit."); *Abrams v. Commissioner*, 82 T.C. 403, 413 (1984) (court rejects argument that wages are not income and awarded damages of $5,000 for pursuing a position that was "frivolous and groundless...and maintained primarily for delay.") Wisconsin courts have also rejected closely related variations of the "wages are not income" claim. *See, e.g., Tracy v.*

*Dep't. of Revenue*, 133 Wis. 2d 151, 394 N.W.2d 756 (Ct. App. 1986); *Mitchell v. Dep't. of Revenue*, 132 Wis. 2d 335, 392 N.W.2d 469 (Ct. App. 1986). In both cases, the Wisconsin Court of Appeals found that the arguments were frivolous and upheld the imposition of costs against the taxpayer. In addition to the case law, there is abundant information available that these positions are frivolous and groundless. *See, e.g.*, John W. Wright, *Taxation: Frivolous Tax Litigation: Pecuniary Sanctions Against Taxpayers And Their Attorneys,* 39 Okla. L. Rev. 156 (Spring 1986); Danshera Cords, *Tax Protestors And Penalties: Ensuring Perceived Fairness And Mitigating Systemic Costs,* BYU L. Rev. 1515 (2005). While we recognize that the Petitioners are representing themselves, even a minimal inquiry into the validity of the argument would have shown it to be frivolous and groundless.[5]

In sum, we grant the Department's request for the additional assessment as we have concluded that the Petitioners knew or should have known that this appeal lacked any reasonable basis in law or equity and could not be supported by a good faith argument for a reversal or modification of the law. Consistent with recent Commission precedent, we have determined that an additional assessment of $500 is appropriate.

**CONCLUSION**

The Department is entitled to summary judgment as a matter of law as there is no genuine issue of material fact and the Department is clearly entitled to

[5] As mentioned above, the Respondent informed the Petitioners in writing more than once that the Petitioners' argument had been found by the Commission to be frivolous, enclosing copies of at least one of the decisions in which the Commission so held. Instead of withdrawing the petition before this Commission, however, the Petitioners subsequently asked the Commission to impose a $1,000 sanction on the Department, a request which we summarily deny.

judgment. Further, the Department's request for an additional assessment is appropriate in the amount of $500 as the Petitioners' argument is frivolous and groundless.

**ORDERS**

1. The Department's action on the Petitioners' request for redetermination is affirmed.

2. The Department's request for an additional assessment is granted, in the amount of $500.

Dated at Madison, Wisconsin, this 29th day of April, 2011.

**WISCONSIN TAX APPEALS COMMISSION**

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Thomas J. McAdams, Acting Chairperson

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Roger W. Le Grand, Commissioner

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