STATE OF WISCONSIN

TAX APPEALS COMMISSION

GREAT-WEST LIFE & ANNUITY INSURANCE CO.,

DOCKET NO. 08-I-128

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

BOTTOLFSON 1997 TRUST, By FIRST FINANCIAL TRUST, N.A., TRUSTEE,

DOCKET NO. 08-I-129

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

THOMAS J. McADAMS, COMMISSIONER:

This case comes before the Commission as each of the parties has filed a motion requesting summary judgment. The Petitioners are represented by Attorney Maureen A. McGinnity of Foley and Lardner, Milwaukee, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney

Peter D. Kafkas. In brief, the dispute in this case concerns the Department's issuance of a jeopardy assessment against a lottery prize. For the reasons stated below, we grant the Department's Motion for Summary Judgment and deny the Petitioners' Motion for Summary Judgment.

FACTS[1]

A. Jurisdictional Facts: Great-West.[2]

1. On or about March 15, 2005, Great-West filed a Wisconsin Form 4, Corporation Franchise or Income Tax Return for the year 2001. (McGinnity Aff., Ex. Q ("Great-West's 2001 refund claims").) Great-West's 2001 refund claims stated there were estimated tax payments of $763,080 against taxes of $147,143, thereby claiming a refund of $615,987. Of the $763,080 in estimated tax payments, $428,943.01 was attributable to the Bottolfson jeopardy assessment offsets. (McGinnity Aff., Exs. I, J, L, O.)

2. By Notice of Amount Due dated December 19, 2005, the Department denied Great-West's 2001 refund claims and assessed additional amounts due. (McGinnity Aff., Ex. R.)

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[1] We have compiled the necessary facts from the parties' submissions. Sections A and B are taken from the Department's proposed facts, while the material facts in Section C are taken from the Petitioners' submission. We have made edits, mostly for form and consistency, and we have attempted not to use the names of the numerous attorneys and law firms involved except where necessary. We also point out that neither of the attorneys in this tax appeal was involved in the underlying case.

[2] Great-West Life & Annuity Insurance Company has its headquarters in Greenwood Village, Colorado, and its web site states that it has provided financial services in North America since 1891. Its companies, when combined, compose the fifth-largest life insurer by market value in North America. *See* https://www.gwrs.com/login.do (last visited December 5, 2012).

3. On or about February 16, 2006, Great-West timely filed a Petition for Redetermination with the Department which, among other things, protested the denial of its 2001 refund claims. Great-West argued that the trust document "expressly" authorized the assignment of beneficial interests.[3] (McGinnity Aff., Ex. S.)

4. On or about June 20, 2008, the Department issued a Notice of Action granting in part and denying in part Great-West's Petition for Redetermination. The Notice of Action denied this Petition with respect to the refund claim attributable to the Bottolfson jeopardy assessment offsets. (McGinnity Aff., Ex. T.)

5. Great-West timely filed a Petition for Review with the Commission on August 18, 2008.

B. Jurisdictional Facts: Bottolfson 1997 Trust.

1. On or about March 14, 2005, the Bottolfson 1997 Trust ("Trust") filed a Wisconsin Form 2, Fiduciary Income Tax Return for the year 2001. (McGinnity Aff., Ex. L (hereinafter "Trust's 2001 refund claims").) The Trust's 2001 refund claims sought refunds in the total amount of $763,080.00. Of that total, $428,943.01 was attributable to the Bottolfson jeopardy assessment offsets.

2. By notice dated November 23, 2005, the Department denied the Trust's 2001 refund claims. (McGinnity Aff., Ex. M.)

3. On or about January 20, 2006, the Trust filed a Petition for Redetermination with the Department, among other things, arguing that a trust

[3] *Black's Law Dictionary* (6th ed). defines a beneficial interest in trust law as the interest of a beneficiary in right to income or principal of trust funds, in contrast to a trustee who holds legal title.

document described later herein "expressly" stated that the beneficial interests were assignable. (McGinnity Aff., Ex. N.)

4. On or about June 20, 2008, the Department issued a Notice of Action to the Trustee, granting in part the Trust's 2001 unrelated refund claims and denying such refund claims to the extent attributable to the Bottolfson jeopardy assessment offsets. (McGinnity Aff., Exs. O, P (Notice and related Partial Closing Agreement).)

5. The Trust filed a Petition for Review with the Commission on August 18, 2008.

C. Material Facts

Identification of Taxpayers

1. The Trust is a trust created pursuant to a trust agreement dated February 26, 1998, by and between Mr. Bottolfson and First Financial Trust, N.A., Trustee ("Trustee"), as amended April 29, 1998. (Bottolfson Dep., pp. 68-69 & Ex. 6, 7.)

2. Great-West Life & Annuity Insurance Co. ("Great-West") is the assignee of the beneficial interests in the Trust, having succeeded to the rights of the original assignee, Stone Street Capital, Inc. ("Stone Street"). (Oh Aff., ¶ 5 & Ex. D.)

Bottolfson's Lottery Prize

3. In 1994, Mr. Donald Bottolfson won the Wisconsin "Megabucks" lottery with a prize of $9,768,197.74 (the "Lottery Prize"). The Lottery Prize was payable to Mr. Bottolfson in twenty-five annual installments, beginning in 1994 and

ending in 2018. (Bottolfson Aff., Ex. 17.)

4. Mr. Bottolfson received his first installment payment of the Lottery Prize in September of 1994. The transmittal letter for the payment explained that state and federal income taxes on the prize payment had been withheld, as well as $184 for a child support arrearage. From a gross payment of $252,602.03, Mr. Bottolfson was paid $164,184.14. (*Id.*) Respondent did not apply any offsets or reductions from Mr. Bottolfson's 1994 Lottery Prize payment for allegedly past due taxes from prior years and as of the date of this first payment was not asserting that Mr. Bottolfson owed back taxes. (*Id.*; Bottolfson Dep., pp. 61-63.)

5. Mr. Bottolfson received his second installment payment of the Lottery Prize in August of 1995. After deducting federal and state taxes from the gross payment of $253,000, the net payment was $164,627.10. (Bottolfson Aff. Ex. 18.) Respondent did not apply any offsets or reductions from Mr. Bottolfson's 1995 Lottery Prize payment for allegedly past due taxes from prior years and as of the date of this second payment was not asserting that Mr. Bottolfson owed back taxes. (*Id.*; Bottolfson Dep., pp. 63-64.)

6. Mr. Bottolfson received his third installment payment of the Lottery Prize in August of 1996. After deducting federal and state taxes and child support arrearages from the gross payment of $262,361, the net payment was $105,128.05. (Bottolfson Aff., Ex. 19.) Respondent did not apply any offsets or reductions from Mr. Bottolfson's 1996 Lottery Prize payment for allegedly past due taxes from prior years and as of the date of this payment was not asserting that Mr.

Bottolfson owed back taxes. (*Id.*; Bottolfson Dep., pp. 64-65.)

7. In August of 1997, Mr. Bottolfson received a letter from Respondent informing him that he would not be receiving his annual Lottery Prize payment that year due to a federal tax lien that exceeded the net payment to which he otherwise would have been entitled after deducting state and federal taxes and child support arrearages. The federal tax lien was in the amount of $136,294.76 and related to the years 1989-1992. Respondent's letter to Mr. Bottolfson did not mention any state tax liens, and as of the date of this letter Respondent was not asserting that Mr. Bottolfson owed the State of Wisconsin any back taxes. (Bottolfson Aff., Ex. 20; Bottolfson Dep., pp. 65-67.)

Creation of the Trust

8. On or about March 14, 1997, Mr. Bottolfson's ex-wife, Ms. Barbara Bottolfson, commenced an action against Mr. Bottolfson in circuit court claiming that she and Mr. Bottolfson lived together after their divorce in 1989, that they had a partnership agreement to share income and expenses, and that she was entitled to a share of the Lottery Prize. ("Action"). (Bottolfson Aff. Ex. 10, p. 10-29, Complaint.)

9. Ms. Barbara Bottolfson commenced the Action on her own accord and without any influence from Mr. Bottolfson, Great-West, or Stone Street. (Bottolfson Dep., pp. 51-53; Oh Aff., ¶ 9.)

10. Mr. Bottolfson denied Ms. Barbara Bottolfson's allegations in the Action and counterclaimed for a portion of the child support arrearage that had been

withheld from his Lottery Prize payments and paid to Ms. Barbara Bottolfson. (Bottolfson Aff., Ex. 10, p. 10-24, Answer.)

11. Ms. Barbara Bottolfson was represented by a law firm in the Action, and Mr. Bottolfson was represented by a different law firm. (Bottolfson Aff., Ex. 10, pp. 10-25, 10-35.)

12. To settle the Action, Mr. Bottolfson agreed to give Ms. Barbara Bottolfson a 5% interest in the installment payments of the Lottery Prize through the year 2009. (Bottolfson Dep., pp. 20, 53.)

13. As of the time Ms. Barbara Bottolfson commenced the Action, Wisconsin law did not permit the assignment of a lottery prize. It did, however, allow the payment of a lottery prize to another person pursuant to court order. Wis. Stats. §§ 565.30(1) and 565.30(6) (1997-98). (Evans Aff., Ex. 8.)

14. To effect the settlement in the Action in a manner believed consistent with Wis. Stat. § 565.30, Mr. Donald Bottolfson and Ms. Barbara Bottolfson, on the advice of their respective counsel, agreed to structure the settlement by having the court order Mr. Bottolfson to create a trust to which he would transfer his right to receive the Lottery Prize payments, with the Bottolfsons splitting the beneficial interests in the trust. (Bottolfson Dep., p. 53; Trust and estate attorney Dep., pp. 75-76.)

15. Following a hearing on August 15, 1997, the court in the Action entered a Judgment ("August 1997 Judgment"). The August 1997 Judgment specifically recited that "Wis. Stat. § 565.30 provides that the right to receive a prize may not be assigned, but that the court may order that the prize be paid to another person." The

August 1997 Judgment then ordered Mr. Bottolfson to create the Donald Bottolfson Revocable Trust in a form substantially similar to the trust agreement attached to the Judgment, in which both Mr. Bottolfson and Ms. Barbara Bottolfson would have beneficial interests ("Revocable Trust"). The August 1997 Judgment required Mr. Bottolfson to submit the order to the Lottery and to do whatever else was necessary to obtain Respondent's consent to assign the Lottery Prize payments for the years 1997 through 2009 to the Revocable Trust. The court retained jurisdiction to make such further orders or judgments as may be necessary to obtain Respondent's consent. (Bottolfson Aff., Ex. 10, p. 10-6, Judgment and Stipulation.)

Respondent's Consent to Mr. Bottolfson's Assignment of the Right to Lottery Prize Payments to the Trust

16. Mr. Bottolfson's attorney in the Action initially requested Respondent's consent to the assignment of the Lottery Prize payments to the Revocable Trust by letter dated August 20, 1997, directed to the administrator of Respondent's Lottery Division. This letter asked the administrator to execute and return an acknowledgement that Respondent had received the court order in the Action and would implement its terms by making lottery payments to the Trust. (Evans Aff., Ex. 3.)

17. The attorney in the Action was unable to secure Respondent's consent. In the fall of 1997, Mr. Bottolfson hired an additional attorney who had expertise in estate and trust matters ("the trust and estate attorney") to try to obtain the consent required by the court order and thereby avoid the necessity of a declaratory

judgment action to establish that Respondent was to make Lottery Prize payments to the Trust rather than to Mr. Bottolfson. (Trust and estate attorney Dep., pp. 17-18, 29, 117-18, 152, 168-69.)

18. Shortly after the trust and estate attorney got involved, Respondent referred the matter of the requested consent to the Wisconsin Department of Justice (the "DOJ"), which assigned an assistant attorney general to review the matter. These two attorneys exchanged correspondence and had discussions over a period of several months. (Trust and estate attorney Aff., ¶ 6.)

19. In his communications with the trust and estate attorney, the assistant attorney general took the position that a transfer of Mr. Bottolfson's Lottery Prize payments to a trust would circumvent the anti-assignment provision in Wis. Stat. § 565.30(6) because of the "pass through" nature of a trust, *i.e.* the beneficial interests in a trust are freely transferable. (*Id.* & Ex. B.)

20. The trust and estate attorney strongly disagreed with the assistant attorney general's position. He pointed out to the assistant attorney general that the parties to the Action were not seeking Respondent's consent to an assignment of the Lottery Prize in contravention of Wis. Stat. § 565.30(6), but rather were seeking consent to the direction of payment to another person pursuant to court order under Wis. Stat. § 565.30(1). (Trust and estate attorney Aff., Ex. C, p. 2.) He argued that the assignment of beneficial interests in a trust is not the same as an assignment of the lottery prize itself and that the rationale for restricting assignments of lottery prizes does not apply to the assignment of beneficial interests in a trust. He argued that Respondent had no

legitimate interest in trying to prevent a subsequent transfer of the beneficial interests in the trust by withholding its consent to Mr. Bottolfson's transfer of the Lottery Prize payments to the trust pursuant to court order. (*Id.*, ¶ 6 & Ex. A, C, D; Trust and estate attorney Dep., pp. 148-49.)

21. In his communications with the assistant attorney general, the trust and estate attorney also raised some concerns with the form of the Revocable Trust agreement appended to the August 1997 Judgment. He wanted to assure that the trust would address the Bottolfsons' estate planning needs irrespective of whether they later assigned their beneficial interests. (Trust and estate attorney Dep., pp. 31-32.) The trust and estate attorney advised the assistant attorney general that he and Ms. Barbara Bottolfson's counsel had agreed to replace the original Revocable Trust agreement with a standard estate planning form of trust agreement. (Trust and estate attorney Aff., Ex. A, at p. 6.) The trust and estate attorney forwarded a draft of the new trust agreement to the assistant attorney general in December of 1997. (Trust and estate attorney Aff., Ex. C; McGinnity Aff., ¶ 4 & Ex. C.)

22. The assistant attorney general and the trust and estate attorney ultimately did not resolve their differences as to whether the assignability of beneficial trust interests was a justification for Respondent to withhold its consent to Mr. Bottolfson's transfer of his right to the Lottery Prize payments to a trust pursuant to a court order. In January of 1998, the assistant attorney general advised the trust and estate attorney that the matter of the Respondent's consent should be addressed by Respondent rather than by the Department of Justice. The assistant attorney general

referred the trust and estate attorney to Respondent's Chief Legal Counsel, John Evans. From that point forward, all of the trust discussions were with Respondent rather than with the assistant attorney general. (Trust and estate attorney Aff., ¶ 7.)

23. The trust and estate attorney had a discussion with Mr. Evans in mid-January of 1998. (Trust and estate attorney Aff., ¶8.) The trust and estate attorney and Attorney Evans have different recollections of the import of their discussion. (*Compare* trust and estate attorney Aff. *with* Evans Affidavit.)

24. Mr. Evans referred the trust and estate attorney to another Department attorney ("staff attorney") to finalize the form of the trust agreement and Amended Judgment in the Action that would be acceptable to Respondent. (Trust and estate attorney Aff., ¶ 9.) Mr. Evans viewed the staff attorney as having expertise in trust law, and Mr. Evans relied upon the staff attorney as it related to the form of the trust agreement that would be acceptable to Respondent. (Evans Dep., pp. 51-52.)[4]

25. The trust and estate attorney's standard form of trust agreement that he forwarded to the assistant attorney general in December of 1997 and which was used as the basis for the final agreement did not restrict the assignability of trust interests. (McGinnity Aff., ¶ 4 & Ex. C.) The only change the Department's staff attorney requested after he took over the negotiations with the trust and estate attorney was to provide that the circuit court would retain jurisdiction to resolve any controversy regarding the interpretation of the trust. (Trust and estate attorney Aff., Ex.

[4] The staff attorney in this case retired in 2002 and reportedly lives out of state. There is no deposition or affidavit in the record of his testimony. (Attorney Evans Dep., p. 52.)

E.) The trust and estate attorney incorporated that change in Article II on "Amendment or Revocation," and in Article IV, Section H on "Governing Law." (*Id.* and compare McGinnity Aff., Ex. C with Bottolfson Aff., Ex. 6.) Once that change was made, the staff attorney advised "there are no further problems." (Trust and estate attorney Aff., Ex. F.) At no time after Mr. Evans became involved did Respondent ever specifically request that the Trust Agreement be modified to restrict assignability of the beneficial interests. (Trust and estate attorney Dep., pp. 52-53.)

26. The trust and estate attorney also negotiated the language of an Amended Judgment with the Department's staff attorney. There was give and take about what the order should say, and they exchanged drafts back and forth. (*Id.*, pp. 155-56.)

27. One of the drafts of the Amended Judgment discussed by the trust and estate attorney and the Department's staff attorney included a section called "Consent of the Department of Revenue" to be signed by Mr. Evans, whereby Respondent would agree that the Amended Judgment was entered pursuant to Wis. Stat. § 565.30(1), and that Respondent would make all further payments to the Trust, which would be the legal owner of the Lottery Prize. (Trust and estate attorney Aff., Ex. G.)

28. The Department's staff attorney indicated that Respondent preferred not to sign a consent appended to the Amended Judgment because Respondent was not a party to the Action. (Trust and estate attorney Dep., pp. 159-60.) The trust and estate attorney therefore suggested that Respondent instead sign a

separate "Acknowledgement" after the Amended Judgment was entered by the court in the Action, with the Acknowledgement indicating that Respondent would comply with the court order and cause all further lottery payments to be paid to the Trustee of the Trust. (Trust and estate attorney Aff., ¶ 10 & Ex. H, I.)

29. Mr. Evans initially responded to the suggestion for a separate Acknowledgment by stating that the form of the Amended Judgment was adequate to require Lottery Prize payments to be made to the Trust and indicated that he had confirmed with the administrator of the Lottery Division that prize payments in fact would be paid to the Trust pursuant to the court order. (*Id.*, Ex. J.) With that assurance, the parties' attorneys in the Action went forward and arranged for the court to enter the Amended Judgment on February 25, 1998. (Trust and estate attorney Aff., ¶ 10.)

30. The February 25, 1998 Amended Judgment entered by the court in the Action references the August 1997 Judgment, and recites that the parties to the Action agreed to a new trust agreement and that Respondent had agreed to recognize the Trust as the "winning ticket" pursuant to Wis. Stat. § 565.30 and cause all of the Lottery Prize payments to be paid to the Trust. The Amended Judgment further states in paragraph 3 of the order section:

> Pursuant to Section 565.30(1) of the Wisconsin Statutes, the Defendant's lottery prize shall be paid to the Bottolfson 1997 Trust, which shall become the legal owner of the prize.

(Trust and estate attorney Aff., Ex. K.)

31. On March 2, 1998, the trust and estate attorney forwarded to Mr. Evans a certified copy of the Amended Judgment as well as the final Trust agreement

signed by Mr. Bottolfson. (*Id.*) Mr. Evans was not concerned about the language in the Trust agreement, considering that to be a private matter between the Bottolfsons. He was only concerned with the language of the Amended Judgment. (Evans Dep., pp. 40-42.)

32. After the court in the Action entered the Amended Judgment, the trust and estate attorney was advised that the Trustee required a specific written acknowledgement from Respondent that the Lottery Prize payments would be paid to the Trust. Mr. Evans assisted the trust and estate attorney in obtaining such an acknowledgment from the administrator of the Lottery Division. (Trust and estate attorney Aff., ¶ 11 & Ex. K-M.) The lottery administrator's March 19, 1998 letter to the trust and estate attorney stated:

> **ACKNOWLEDGEMENT OF THE LOTTERY DIVISION**
>
> The Lottery Division of the Department of Revenue acknowledges receipt of the order of the . . . Circuit Court dated February 25, 1998, in the case of Bottolfson v. Bottolfson, Case No. 97-CV-86. The Lottery Division will comply with this order, will cause all further lottery payments in question to be paid to the Trustee of the Bottolfson 1997 Trust, and will issue all tax withholding and other information regarding such payments to the Trustee of said Trust.

(*Id.*, Ex. M.)

33. At the trust and estate attorney's request, the Lottery Division administrator later clarified that Respondent would make all payments of the Lottery Prize to the Trust through the year 2018, not just the payments through 2009 in which Ms. Barbara Bottolfson had a beneficial trust interest. (Trust and estate attorney Aff.,

¶ 11 & Ex. N-O.) The lottery administrator's November 5, 1998 letter to the trust and estate attorney stated:

> The Wisconsin Lottery reaffirms that all annual payments (beginning with the 1998 payment) related to the *Wisconsin's Very Own Megabucks* jackpot prize won by Donald Bottolfson in 1994 will be made to the Bottolfson 1997 Trust. These payments will be made annually to the Trust through the year 2018.

(Trust and estate attorney Aff., Ex. O.)

34. At no time after the assistant attorney general referred the consent issue back to Respondent in January of 1998 did Respondent specifically indicate it was concerned with the fact that, once the Lottery Prize payments were assigned to the Trust, the beneficial interests in the Trust would be freely assignable. (Trust and estate attorney Aff., ¶¶ 12-13.)

Mr. Bottolfson's Assignments of the Right to Lottery Prize Payments to the Trust

35. Following the court's entry of the Amended Judgment on February 25, 1998, Mr. Bottolfson and the Trustee executed the new Trust agreement approved by Respondent, effective February 26, 1998. (Bottolfson Ex. 6.)

36. Pursuant to the Amended Judgment, Mr. Bottolfson assigned to the Trust all of his right, title and interest in installments 5 through 25 of the Lottery Prize payments, payable in 1998-2018. (Oh Aff., Ex. A.)

Assignments of Beneficial Interests in the Trust

37. In 1997 and 1998, Stone Street was a financing company engaged in the business of purchasing interests in lottery prizes and reselling those interests to other financial companies. (Gawad Aff., ¶ 2.) In June of 1997, Mr. Bottolfson entered

into an agreement with Stone Street titled "Sale Agreement for Lottery Prize Payments of Donald H. Bottolfson" ("1997 Sale Agreement") to exchange his rights to the annual Lottery Prize payments for the years 1997 through 2009 for a lump sum payment.

38. The 1997 Sale Agreement was subject to certain conditions precedent, including the following:

> (b) The issuance of a final non-appealable order signed by a court with appropriate jurisdiction in a form acceptable to Purchaser and its assigns (the "Court Order"), directing the State Lottery to recognize this Agreement and the Terms Rider and to make the Assigned Payments, without reduction or set off (other than income tax withholding), directly to Purchaser or its named assigns, as directed by Purchaser . . . .
>
> (c) Receipt by Purchaser or its assigns of a written acknowledgment from the State Lottery in a form satisfactory to Purchaser and its assigns confirming that Lottery Winner is the winner of the Lottery Prize, including the Assigned Payments, in the amount described in the Terms Rider and acknowledging the State Lottery's unqualified agreement to make all of the Assigned Payments to Purchaser or its named assigns, in accordance with this Agreement and the Terms Rider and as directed precisely in accordance with the Court Order (the "Lottery Letter").

(Bottolfson Aff., Ex. 2, ¶ 6.)

39. The 1997 Sale Agreement also was subject to the attached Terms Rider (*Id.* ¶ 2), which provided in pertinent part:

> EXCEPTIONS AND ADDITIONAL CONDITIONS TO SALE AGREEMENT
>
> Notwithstanding anything in the Sale Agreement to the contrary, Purchaser and Lottery Winner agree that Lottery Winner will exercise his best efforts to have the Lottery Prize transferred to a trust, the form, substance, and trustee of which will be reasonably acceptable to Purchaser. Such

> transfer to a trust shall be accomplished by a court order to be obtained, or consented to by Lottery Winner. . . . Upon transfer to a trust, the transaction contemplated by the Sale Agreement shall continue on the same terms and conditions with references to "Lottery Prize" to be deemed to include a reference to the trust then owning the Lottery Prize. . . .

(Bottolfson Aff., Ex. 2, Terms Rider, pp. 2-3.)

40. Mr. Bottolfson made certain representations and warranties in the 1997 Sale Agreement, including the following:

> (d) Lottery Winner and the Lottery Prize, including the Assigned Payments, are not subject to any outstanding or unsatisfied judgment, levy or claim.
>
> * * *
>
> (f) There are no lawsuits or claims pending or threatened against Lottery Winner, and Lottery Winner knows of no basis for any such lawsuit or claim.
>
> (g) Lottery Winner has paid or will pay all federal, state and local taxes due through the date of this Agreement and the Assignment Date or has made or will make adequate provision for such payments.
>
> (h) There are no outstanding or unsatisfied judgments or federal, state or local tax or other liens against Lottery Winner or the Lottery Prize, including the Assigned Payments.

(Bottolfson Aff., Ex. 2, ¶ 5.)

41. Ms. Barbara Bottolfson entered into a similar agreement with Stone Street dated June 1997 that included the same provisions as those quoted in paragraphs 39-40 above. (Bottolfson Aff., Ex. 3.)

42. Mr. Bottolfson understood that, absent court approval of the transfer of his right to Lottery Prize payments to the Trust, there was no deal with Stone Street. (Bottolfson Dep., p. 61.)

43. The fact that the Bottolfsons planned to transfer their beneficial interests in the Trust to a financing company was disclosed to the court in the Action. (Bottolfson Dep., pp. 54, 75.)

44. Critical conditions of Stone Street proceeding with the purchase of the Bottolfsons' beneficial interests in the Trust were the assurances that Mr. Bottolfson's transfer of his right to the Lottery Prize payments to the Trust was valid under Wisconsin law and that Stone Street's subsequent purchase of the beneficial Trust interests also was valid under Wisconsin law. The trust and estate attorney provided Stone Street with copies of his March 24, 1998 memorandum regarding his negotiations with Respondent, his exchange of correspondence with the Department of Justice referenced in his March 24 memorandum, the Amended Judgment in the circuit court Action, and the March 19, 1998 letter from Respondent agreeing to make subsequent Lottery Prize payments to the Trust. Based on this information, Stone Street concluded that both Bottolfson's assignments to the Trust and Stone Street's purchases of assignments of beneficial interests in the Trust were valid under Wisconsin law. (Gawad Aff., ¶¶ 4-7 & Ex. A-C; Trust and estate attorney Aff., ¶¶ 15, 17.)

45. Prior to finalizing its purchase of the Bottolfsons' beneficial interests in the Trust following the entry of the Amended Judgment in the Action, Stone Street conducted lien and credit searches. As of that time (in 1998), Respondent had not asserted that Mr. Bottolfson owed the State of Wisconsin any back taxes. The lien search and credit report for Mr. Bottolfson showed various liens totaling $63,768, of which the only Wisconsin state tax lien was for $500.00. Stone Street insisted that Mr.

Bottolfson satisfy those outstanding liens as a condition of finalizing the sale. Mr. Bottolfson therefore agreed to allow Stone Street to withhold $75,000 from the proceeds from the sale of his beneficial interests in the Trust to satisfy all liens. (Gawad Aff., ¶¶ 8-9; Trust and estate attorney Aff., ¶ 18; Bottolfson Aff., Ex. 16.)

46. Before agreeing to purchase an assignment of the beneficial Trust interests from Stone Street, Great-West similarly required assurances that Mr. Bottolfson's transfer of his right to Lottery Prize payments to the Trust was valid, that Great-West legally could purchase beneficial interests in the Trust, and that an appropriate court order had been entered. Great-West obtained an opinion from outside counsel at a Milwaukee law firm that the overall transaction complied with Wisconsin law. (Oh Dep., pp. 18, 28, 31, 35.) Great-West's in-house counsel also personally reviewed Wis. Stat. § 565.30, the materials from the trust and estate attorney, the Amended Judgment, and Respondent's correspondence acknowledging its agreement to pay future prize payments to the Trust and concluded that Great-West validly could purchase the beneficial interests in the Trust. (*Id.*, pp. 40-41, 44, 52, 121; Trust and estate attorney Aff., ¶ 16 & Ex. R.) Absent the court order and Respondent's acknowledgment, Great-West would not have purchased the beneficial interests in the Trust from Stone Street. (Oh Aff., ¶ 6; Trust and estate attorney Aff., ¶¶ 16-17.)

47. Great-West also required as a condition of purchase that Stone Street complete an extensive lien search to assure there were no judgments or liens that could constitute a prior claim against the Lottery Prize. Great-West's outside counsel reviewed the lien search for Mr. Bottolfson, which did not reveal any judgments or liens

other than those Mr. Bottolfson satisfied by agreeing to the $75,000 hold back. (Oh Dep., pp. 12, 16, 28.)

48. On April 29, 1998, Mr. Bottolfson and Ms. Barbara Bottolfson irrevocably assigned their beneficial interests in the Trust to Stone Street with respect to the Lottery Prize payments for the years 1998 through 2009. (Oh Aff., Ex. B.)

49. Mr. Bottolfson entered into a second Sale Agreement with Stone Street dated September 2, 1998 relating to his Lottery Prize payments for the years 2010-2018 ("1998 Sale Agreement"). The 1998 Sale Agreement includes the same provisions as the 1997 Sale Agreement quoted in paragraphs 38 through 41 above. (Bottolfson Aff., Ex. 5.)

50. On October 11, 1998, Mr. Bottolfson assigned to Stone Street his beneficial interests in the Trust relating to the 2010-2018 lottery payments. (Oh Aff., Ex. C.)

51. On May 5, 1998, and October 20, 1998, Stone Street assigned to Great-West all of its interests in the 1997 and 1998 Sale Agreements and all of its beneficial interests in the Trust. (Oh Aff., Ex. D.)

Respondent's Lottery Prize Payments to the Trust

52. Respondent paid annual Lottery Prize installment payments to the Trust in August of 1998, 1999, and 2000. Respondent withheld federal and state taxes due from the Trust on its receipt of such payments. Respondent did not assert that any amounts were due from Mr. Bottolfson for delinquent taxes and did not deduct from

the 1998-2000 payments to the Trust any amounts attributable to Mr. Bottolfson's alleged back taxes. (McGinnity Aff., Ex. D.)

53. The Trust made annual distributions to Great-West in 1998, 1999, and 2000. (Oh Aff., ¶ 8.)

Respondent's Offsets of Mr. Bottolfson's Jeopardy Assessments Against Lottery Prize Payments to the Trust

54. By letter dated November 12, 1999, Respondent notified the Trustee that its "group" was eligible to convert the remaining annual Lottery Prize payments to a single lump sum cash payment. (McGinnity Aff., Ex. E.) The Trustee exercised this option by submitting a Grand Prize Conversion Request on December 14, 2000. (*Id.*, Ex. F.) Respondent advised by letter dated August 6, 2001, that it was in a position to fulfill the conversion request. (*Id.*, Ex. G.)

55. On August 17, 2001, Respondent sent the Trustee a check for the 2001 annual Lottery Prize installment payment. This time the payment check and transmittal letter were accompanied by a "Notice of Deductions from Prize Winnings." The Notice indicated that, in addition to deducting state and federal income taxes on the prize payment, Respondent was also deducting $145,352.02 for a "Jeopardy Assessment dated 7/30/01 per Sec. 71.74(14) WI Stats." (McGinnity Aff., Ex. H.)

56. Later, on August 22, 2001, Respondent sent to Mr. Bottolfson a Notice of Jeopardy Collection Determination with three Notices of Amount Due also dated August 22, 2001 for the tax years 1989-92, 1997, and 2000 totaling $283,590.99 in tax, interest, penalties and late fees. (McGinnity Aff., Ex. I.)

57. On or about September 4, 2001, Respondent sent the Trustee a check for the lump sum Lottery Prize cash-out in the amount of $2,763,865.84. The cash-out information provided with the check indicated that, in addition to withholding federal and state taxes due on the Lottery Prize payment, Respondent also withheld the sum of $283,590.99 for "State Debtor Recovery for DOR," *i.e.* a jeopardy assessment against Mr. Bottolfson. (McGinnity Aff., Ex. J.)

58. The $145,352.02 that Respondent withheld from the Trust's August 17, 2001 annual Lottery Prize payment, and the $283,590.99 Respondent withheld from the Trust's September 4, 2001 lump sum cash-out payment, for a total of $428,943.01, were for jeopardy assessments Respondent issued against Mr. Bottolfson based on Mr. Bottolfson's alleged personal tax liabilities (hereinafter "Bottolfson jeopardy assessment offsets"). (McGinnity Aff., Ex. Z, Resp. to RFA 106.)

59. By letter dated September 12, 2001, the Trustee put Respondent on notice that the Trustee reserved all rights with respect to the Bottolfson jeopardy assessment offsets. (McGinnity Aff., Ex. K.)

60. On May 1, 2009, Petitioners' counsel served a discovery request on Respondent requesting, among other things, Respondent's "entire file(s) regarding the alleged tax liability of Mr. Donald Bottolfson and jeopardy assessments in connection with which the Wisconsin Lottery offset $428,943.01 from the August 2001 and September 2001 lottery prize payments paid to the Bottolfson 1997 Trust." (McGinnity Aff., ¶ 2 & Ex. A.) Respondent refused to produce its entire files relating to Mr. Bottolfson, asserting that Mr. Bottolfson is a different taxpayer subject to taxpayer

confidentiality rules. Respondent provided a partial response, producing documents on which Respondent intended to rely in this litigation. (*Id.* ¶ 3.) The Bottolfson tax liability documents produced by Respondent reveal the following:

- Respondent first sent Mr. Bottolfson a request to file for tax years 1989-92, 1996 and 1997 on July 29, 1999 – well after Mr. Bottolfson had assigned his right to the Lottery Prize payments to the Trust and assigned his beneficial interests in the Trust to Stone Street. (McGinnity Aff., ¶ 3 & Ex. B, p. DOR000119.)

- In October of 1999, Respondent sent Mr. Bottolfson assessments for tax years 1989-1992 totaling $69,824.37, and for 1997 in the amount of $40,014.65. Mr. Bottolfson refused delivery of those assessments. (*Id.*)

- On March 19, 2001, Respondent sent Mr. Bottolfson a request to file tax returns for 1997 and 1998. (*Id.*)

- On July 30, 2001, Respondent mailed Mr. Bottolfson assessments for 1997 and 1998 totaling $88,892.77. (*Id.*)

- On August 16, 2001, representatives of Respondent, including legal counsel, reviewed a legal opinion and concluded Respondent could not offset Mr. Bottolfson's tax liabilities against the Lottery Prize payments except under Wis. Stat. § 71.74(14). (*Id.* p. DOR000297).

- On August 22, 2001, Respondent sent Mr. Bottolfson estimated assessments and a notice of jeopardy assessments for the years 1989-1992, 1997, and 2000. (*Id.* p. DOR000164.) The notice to Mr. Bottolfson states that payment of the jeopardy assessments was withheld from "your lottery payment." (McGinnity Aff., ¶ 10 & Ex. I.)

61. Respondent included a copy of its August 22, 2001 Notice of Jeopardy Assessment directed to Mr. Bottolfson with its September 4, 2001 lump sum Lottery Prize payment to the Trust. (McGinnity Aff., ¶ 11 & Ex. J.)

62. The reason Mr. Bottolfson did not file state or federal tax returns for the years 1989-1992 is that he was not working in those years and had no income to

report. It was his understanding he was not required to file tax returns for those years. (Bottolfson Dep., p. 58.)

63. The reason Mr. Bottolfson did not fight the federal tax assessment that resulted in a federal tax lien for the years 1989-1992 (which Respondent later deducted from his 1997 Lottery Prize payment) is that, at the time of the assessment, he could not afford to do so. (Bottolfson Dep., pp. 72-73.) By the time the IRS issued the Notice of Levy in July of 1997, it was too late to contest the underlying federal assessment. (Trust and estate attorney Dep., pp. 48-49.)

64. In connection with paying annual Lottery Prize payments to Mr. Bottolfson for the years 1994 through 1997, Respondent did not tell Mr. Bottolfson it contended he owed back taxes going all the way back to 1989 and did not deduct any alleged back taxes from those Lottery Prize payments. (Bottolfson Dep., pp. 61-67.)

65. At no time during the negotiations between the trust and estate attorney and Respondent did Respondent assert that Mr. Bottolfson owed back taxes dating back to 1989 for failing to file individual income tax returns. (Trust and estate attorney Aff., ¶ 19; Trust and estate attorney Dep., pp. 166-67.)

66. Respondent's assertion that Mr. Bottolfson owed back taxes for failing to file returns back to 1989 was not discovered in the 1998 lien searches Stone Street conducted prior to closing on its agreements to purchase the Bottolfsons' beneficial interests in the Trust because, as of 1998, Respondent had not even requested that Mr. Bottolfson file returns, much less perfected a tax lien. (Gawad Aff., ¶ 9; Trust and estate attorney Aff., ¶ 18; Oh Dep., pp. 12, 16, 19, 28.)

RELEVANT WISCONSIN STATUTE

During the period material to this case, Wis. Stat. § 565.30 stated as follows:

> (1) **Payment of Prizes.** The administrator shall direct the payment of a prize . . . to the holder of the winning lottery ticket or lottery share or to a person designated under sub. (2), except that a prize may be paid to another person under a court order or to the estate of a deceased prize winner...
>
> * * *
>
> (6) **Nonassignability.** The right of any person to a prize may not be assigned.

Wis. Stat. § 565.30 (1997-98).

In 1999, the legislature repealed subsection (6), so that lottery prizes are now assignable assuming certain conditions are met. *See* 1999 Wis. Act 9, §§ 3025pL and 3025pp (repealing § 565.30(6) and creating § 565.30(6r)).[5]

DECISION

The facts necessary to this case are summarized below.[6] Mr. Donald Bottolfson of Amery, Wisconsin, won the Wisconsin lottery[7] in 1994. He had divorced in 1989, but his ex-wife, Ms. Barbara Bottolfson, moved back in with him after he won the $9.8 million lottery prize. After Mr. Donald Bottolfson became engaged to another

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[5] While the legislature repealed the anti-assignment provision in 1999, it imposed approximately 15 conditions to be met before a court can approve such an assignment. The newer version of the statute is too long to reproduce here.

[6] The additional facts stated in this section come from Mr. Bottolfson's deposition testimony.

[7] The Wisconsin Lottery has been managed since August 1995 by the Department of Revenue; before that time, it had been managed first by the Lottery Board (until October 1992) and then by the Gaming Commission. *See* http://legis.wisconsin.gov/lab/reports/97-2summary.htm (last visited on October 18, 2012).

woman, Ms. Barbara Bottolfson sued in circuit court to get her perceived share of the prize, claiming that she and Mr. Donald Bottolfson had a post-marital partnership and had agreed to share the income.[8] Mr. Donald Bottolfson hired an attorney to respond to the suit.

Mr. Donald Bottolfson eventually received investment advice from an accountant that he should sell about half of the 25 annual payments of the prize to an annuity company for $1.8 million. The expectation was that Mr. Bottolfson would earn a greater return on the $1.8 million dollars than he would otherwise get from the annual payments. In addition, he would also generate the cash to pay Barbara to settle the suit. It was not possible until around 2001 for a lottery winner to receive a lump sum from the State rather than annual payments. Further, the Wisconsin Statutes explicitly prohibited assignment of lottery prizes.[9] Nevertheless, the attorneys representing Mr. Donald Bottolfson set about looking for a way to sell the right to the prize in connection with the resolution of the civil suit. They eventually decided to set up a revocable trust with assignable interests.

In 1997, an attorney specializing in trusts and estates contacted the DOJ and then the Department on Mr. Bottolfson's behalf. Generally, the Department's attorneys and DOJ pointed to the anti-assignment statute, but eventually the head of the

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[8] At his deposition, Mr. Donald Bottolfson testified that his ex-wife was "just being greedy."

[9] *Restatement (Second) of Contracts* § 317(2) states the following about assignments:
Assignment of a right . . .
(2) A contractual right can be assigned unless . . .
(b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
(c) assignment is validly precluded by contract.

Wisconsin Lottery sent a letter to Mr. Bottolfson acknowledging receipt of the court order and indicating that the state would send the annual payments to the revocable trust. The trustee (Mr. Donald Bottolfson) would divide the annual payments, with 95% going to Mr. Donald Bottolfson, and 5% going to Ms. Barbara Bottolfson.[10] As stated in fact ¶37, Mr. Donald Bottolfson entered into the initial transaction with Stone Street in June of 1997, and Stone Street subsequently transferred its interest to Great-West, a Petitioner in this case. The initial agreement between Mr. Donald Bottolfson and Stone Street appears to have taken place prior to the resolution of the circuit court case and before the statute was modified.

The Department made three annual payments to the trust beginning in 1998. In 2001, however, the Department finished an audit of Mr. Bottolfson and realized that he had not filed a return for most of the previous 12 years. Wis. Stat. § 565.30(5) required the Department to withhold delinquent state taxes owed by the payee. The Department then issued a jeopardy assessment of $145,352.02 under Wis. Stat. § 71.74(14) on the 2001 annual payment. The audit showed Mr. Bottolfson also owed an additional estimated $283,590.99. In September of 2001, the Lottery paid Mr. Bottolfson $2,763,865.84 to "cash him out." This payoff amount reflects a deduction for a second jeopardy assessment for the additional $283,590.99 Respondent claimed was owed in back taxes. It is the approximately $428,000 total that the Department kept by way of the jeopardy assessments that is at issue.

[10] Ms. Barbara Bottolfson testified before the circuit court that she expected to receive about $100,000 in total from the $9.8 million prize.

In 2005, the 1997 Donald Bottolfson Trust filed a trust return for 2001 and claimed a refund of the $428,943.01 in taxes attributable to the Department's jeopardy assessments. The Department denied the claim, and then the Trust filed a petition here before the Commission in 2008. In 2005, Great-West filed a corporate return for 2001 and ultimately its request for a refund was denied by the Department in 2008. Great-West likewise appealed to this Commission after the Department denied its Petition for Redetermination.

The first issue in this case is whether summary judgment is appropriate. The second issue is which party has the burden of proof in a case that involves a jeopardy assessment.[11] The third issue is the validity of the use of a revocable grantor trust as a device to avoid the now repealed anti-assignment law. The fourth issue is whether equitable estoppel applies so as to prevent the Department from collecting the tax from the lottery payments because the Department allegedly participated in the arrangement. The final issue is whether the Petitioners are entitled to attorneys' fees.

A. Summary Judgment

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). The purpose of

[11] In this case, the income taxes are assessed against Mr. Bottolfson, but the Petitioners before the Commission are the 1997 Trust and Great-West. We have jurisdiction in this case because the trust and Great-West filed their respective returns requesting refunds and the Department denied those refunds. As the Petitioners presciently note in the first line of their brief, "This is not a typical tax case." (Petitioners' Brief at 1.)

summary judgment is "to avoid trials where there is nothing to try." *Transportation Ins. Co. v. Hunzinger Construction Co.*, 179 Wis. 2d 281, 507 N.W.2d 136, 139 (Ct. App. 1993). When "both parties file counter-motions for summary judgment, and neither argues that factual disputes bar the other's motion, the facts are deemed stipulated" and summary judgment is appropriate. *Hussey v. Outagamie County*, 201 Wis. 2d 14, 18, 548 N.W.2d 848, 850 (Ct. App. 1996).

The parties here argue that summary judgment is appropriate.[12] We agree.

B. Burden of Proof

The parties dispute who has the burden of proof here as to the jeopardy assessments. Ordinarily, the Department's assessments are presumed valid, and the taxpayer bears the burden of demonstrating clearly and convincingly that the Department erred. Here, however, the issue is the denial of a refund claim the Petitioners are making against the Department arising out of the jeopardy assessments[13] the Department issued against the Wisconsin lottery payments to the 1997 Bottolfson trust. As the Department runs the Wisconsin lottery, the Department essentially issued the jeopardy assessments against monies it already had in its possession, and then paid the balance left over to Mr. Bottolfson's Trust. The amount of the tax is not in dispute.

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[12] Each side has filed proposed facts for the Commission to consider. Each side, however, analyzes the other side's proposed facts, while insisting that summary judgment is appropriate. After reviewing the submissions and the responses, we have determined that most of the points made in the responses do not concern what we see as the material legal issues. We find that there is enough agreement to proceed to summary judgment.

[13] "Jeopardy assessment" has been defined as "a special assessment under the U.S. income-tax laws levied to collect an alleged deficiency when the taxing officer believes that delay may jeopardize the collection of the claim." *Webster's Third New International Dictionary*, p. 1213.

In addition to the 1997 version of Wis. Stat. § 565.30(1) and (6) reprinted above, two other statutes are important here. First, Wis. Stat. § 71.74(14) states as follows:

> **(14) Additional remedy to collect tax.** The department may also proceed under s. 71.91(5) for the collection of any additional assessment of income or franchise taxes or surtaxes, after notice thereof has been given under sub. (11) and before the same shall have become delinquent, **when it has reasonable grounds to believe that the collection of such additional assessment will be jeopardized by delay...**

(emphasis added). Additionally, Wis. Stat. § 565.30(5) (1997-98) provided as follows:

> **(5) Withholding of delinquent state taxes, child support or debts owed the state.** The administrator shall report the name, address and social security number of each winner of a lottery prize equal to or greater than $1,000 to the department of revenue to determine whether the payee of the prize is delinquent in the payment of state taxes ... Upon receipt of a report under this subsection, the department of revenue shall first ascertain ...whether any person named in the report is delinquent in ...payment of state taxes under ch. 71, 72, 76, 77, 78 or 139. Upon this certification by the department of revenue or upon court order **the administrator shall withhold the certified amount** and send it to the department of revenue for remittance to the appropriate agency or person.

(emphasis added).

There is little case law to guide us here as to the allocation of the burden of proof. Neither party cites a case directly on point, and our independent research has not produced any case law directly on this issue. However, there is one recent case which helps to guide our analysis. In *Brown v. State*, 230 Wis. 2d 355, 602 N.W.2d 79 (Ct. App. 1999), the purchaser of a winning lottery ticket brought an action against the State

and the Department of Revenue for misrepresentation, breach of contract, and a declaratory judgment that the Lottery violated the gaming statute by failing to disclose that the prize was payable in 25 annual installments. The Wisconsin Court of Appeals held that, although Brown did have a contract with the State, it did not automatically follow that all principles of contract law and contract construction were applicable. The significant facts of this contract were that one party is the State, and the subject of the contract is the state lottery, which is established and governed by state law. The court explained that these facts bring into play two important principles. First, a state agency such as the Department has only those powers expressly granted to it or necessarily implied. *Brown County v. DHSS*, 103 Wis. 2d 37, 43, 307 N.W.2d 247, 250 (1981). Second, all persons are presumed to know state law. *See Krause v. Mass. Bay Ins. Co.*, 161 Wis. 2d 711, 718, 468 N.W.2d 755, 758 (Ct. App. 1991). Thus, following the *Brown* analysis, we conclude that the starting point for analyzing the governing statutes is the statutes themselves.

1. The Department's Position

The Department argues that there is no statutory provision articulating that the Department has the burden of proof with a jeopardy assessment. Additionally, the Petitioners are relying on a sixty-two year old case involving the common law right to set off – not a statutory tax jeopardy assessment. *See Haueter v. Budlow*, 256 Wis. 561, 571, 42 N.W.2d 261 (1950). The Department also argues it had authority to withhold delinquent taxes from the winner of a lottery prize. *See* Wis. Stat. § 565.27(5), (5t).

The common law rule that the moving party has the burden of proof, including not only the burden of going forward but also the burden of persuasion, is generally observed in administrative hearings. Beyond the generalities, the burden of proof is best decided by use of the five factor analysis outlined in McCormick, *Evidence* § 337, pp. 788-89 (2nd Ed. 1972), and adopted by the Wisconsin Supreme Court in *State v. McFarren*, 62 Wis. 2d 492, 499-503, 215 N.W.2d 459, 463-65 (1974). "The five factors are: (1) special policy considerations; (2) the judicial estimate of probabilities; (3) convenience; (4) the fairness factors, and (5) the natural tendency to place the burdens on the party desiring change." *Id.* at 85-86. Under the *McFarren* analysis, the Department argues, the burden should be on the Petitioners.

2. The Petitioners' Arguments

The Petitioners argue that this case does not ask the Commission to determine the propriety of the Bottolfson jeopardy assessments. Rather, the issue in this case is whether the Department was entitled to offset those assessments against payments due to a different taxpayer, the Trust. The Petitioners state that, as this is not a typical "tax case," the presumption of correctness plainly does not apply here. Petitioners argue that the *Hauter* case cited in their opening brief makes clear Respondent has the burden of proof.

3. Analysis

We appreciate the parties' discussing contract law principles such as set-off, but we do not think that discussion provides the entire answer here because there are clearly tax and lottery statutes involved that this approach does not incorporate.

Further, even if we were to apply the state's proposed test, we would not apply the McCormick factors the same way the State does. In fact, we would give much greater weight than the Department does to the fact that an extraordinary remedy such as a jeopardy assessment is at issue here. Thus, instead of contract or trust law principles, our decision is grounded in the words of the statutes themselves.

The language of Wis. Stat. § 71.74(14) allows an assessment if the collection of the tax will be "jeopardized by delay." We also note that for income tax purposes, Wisconsin generally follows federal law, and that the federal law and Wis. Stat. § 71. 74(14) have substantial similarities.[14] In short, both jeopardy statutes are concerned with the ability of the taxpayer to interfere with or defeat the collection process.

Recognizing that a jeopardy assessment is a powerful tool in the Department's hands and further recognizing that the issuance of a jeopardy assessment must be based upon the Department's belief, it is reasonable to assume that that belief must be based on the existence of facts supporting a conclusion that the taxpayer's action would delay or hamper the collection process. In this sense, a reasonable belief is not one made arbitrarily. As noted in *State v. Carter*, 733 N.W.2d 333, 336 (Ia. 2007), "[A] jeopardy assessment, which is in the nature of an emergency-collection procedure, is defined as [a]n assessment by the [taxing authority] -- without the usual review procedures -- of additional tax owed by a taxpayer who underpaid, based on the [tax

[14] There are two differences between the two jeopardy statutes, however. First, while the federal jeopardy statute does explicitly set forth the respective burdens of proof, the Wisconsin statute does not. Second, the federal statute provides for an expedited pre-trial hearing.

authority's] belief that collection of a deficiency would be jeopardized by delay." (Internal quotation marks omitted.) "Reasonable under the circumstances" for the purposes of determining the reasonableness of a jeopardy assessment means something more than "not arbitrary or capricious," and something less than "supported by substantial evidence." *Harvey v. U.S.*, 730 F. Supp. 1097, 1104 (S.D. Fla. 1990). The government needs to prove only that the circumstances *appear* to jeopardize collection. *Cantillo v. Coleman*, 559 F. Supp. 205, 207 (D.C. N.J. 1983); *See Guillaume v. Commissioner of Internal Revenue*, 290 F. Supp.2d 1349, 1354 (S.D. Fla. 2003) (emphasizing that the ultimate question is not whether the taxing authority was correct, but rather whether the assessment was reasonable under the circumstances).

Thus, we see the resolution of the question of who has the burden of proof as a matter of statutory interpretation that must be looked at as a two-part question. First, we look to the language of Wis. Stat. § 71.74 itself to determine whether the Department had "reasonable grounds to believe that the collection ... would be jeopardized by delay." That burden to show reasonableness falls upon the Department. Second, consistent with 26 U.S.C.A. § 7429 and Wisconsin law,[15] we hold that the burden of proof with regard to the amount assessed is upon the Petitioners. *See Miller v. U.S.*, 615 F. Supp. 781 (D. Ohio 1985); *Harvey*, 730 F. Supp. at 1097; *Wellek v. U.S.*, 324 F. Supp.2d 905 (N.D. Ill. 2004).

[15] In Wisconsin, a tax assessment is presumed to be correct and the taxpayer has the burden to demonstrate error. *See Woller v. Dep't of Taxation*, 35 Wis. 2d 227, 232, 151 N.W.2d 170 (1967).

The Commission, having thoroughly reviewed the record, has made its own independent determination of the facts and the legal conclusions to be drawn from them. The Commission determines both that the Department's jeopardy assessments made under Wis. Stat. § 71.74 against Mr. Bottolfson and the lottery prize are reasonable under the specific circumstances of this case[16] and that the amounts assessed are appropriate under the specific facts of this case. Several factors enter into our determination. First, the legislature's clear direction in Wis. Stat. § 565.30(5) that the Department "shall withhold" tax money owed from the prize *already* in the Department's possession. Second, there is the fact that Mr. Bottolfson had not filed returns for most of the previous 12 years.[17] Third, the size of the estimated debt was substantial. Fourth, there was the obvious possibility that Mr. Bottolfson created the trust to avoid the anti-assignment provision and to undermine the Department's ability to withhold the taxes he owed. Last, and least, we cannot help but point out that while the Department withheld $428,000, the Lottery still paid Mr. Bottolfson more than $2 million in 2001.

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[16] We note that the Petitioners do not dispute the amounts the Department assessed.

[17] In addition to the general factors for determining the reasonableness of a jeopardy assessment, federal courts may consider any other appropriate factors. *Lindsey v. U.S.*, 1992 WL 179067 at 3. Courts have even found that as little as erratic fiscal behavior can satisfy the general test for reasonableness when it suggests tax dollars are in jeopardy. *Guillaume v. C.I.R.*, 290 F. Supp.2d 1349 (S.D. Fla. 2003); *See Friedman v. United States*, 2002 WL 31495842 (N.D. Ga. 2002) (finding a taxpayer's failure to file tax returns for seventeen years and unwillingness to make more than nominal payments towards outstanding tax liability was reasonable grounds for the IRS to use jeopardy procedures).

Thus, as the standard is met as to the reasonableness of the jeopardy assessments, we can now turn to the issue of the tax consequences of the trust device. We repeat that what the Petitioners question here is whether the jeopardy assessments were appropriate against what they argue under trust and contract law is *their* prize.

C. The Trust Device and the Anti-Assignment Provision

The central issue in this case is whether the transfer to the revocable grantor trust worked to avoid the provision in the now repealed statute that prohibited the assignment of lottery prizes. The Petitioners' argument is that the trust device fits under subsection 1, which states that a court may order that a prize may be paid to another person under a court order. The Department argues, however that the assignment to Stone Street (and hence that to Great-West) violates subsection 6 of the repealed part of the former statute. The first section of this portion of the opinion will set forth the legal arguments. The second part will discuss statutory construction. The final part will analyze this case under the substance and realities test.

1. Legal Arguments

Because the gravamen of this case is the use of the trust device, we set forth the parties' legal arguments concerning the trust device in detail.

a. The Petitioners' Arguments

The Petitioners argue that, in 1998, Wis. Stat. § 565.30 had two competing provisions material to this action. Subsection (6) provided that "[t]he right of any person to a prize may not be assigned." Subsection (1), on the other hand, provided that "a prize may be paid to another person under a court order."

The Petitioners further argue that great care was taken to structure Mr. Bottolfson's transfer of his right to the Lottery Prize payments to the Trust as a direction of payment by court order under subsection (1) rather than as an assignment of the prize itself under subsection (6). The trust and estate attorney's correspondence leading up to the final language of the February 25, 1998 Amended Judgment and February 26, 1998 Trust Agreement made very clear that subsection (1) controlled rather than subsection (6). In his December 11, 1997 letter to the Wisconsin Department of Justice, the trust and estate attorney specifically stated: "Your letter also persists in calling this an assignment governed by section 565.30(6), but I have explained that we are seeking a direction of payment under section 565.30(1)." (Trust and estate attorney Aff., Ex. C, p. 2).

The Petitioners claim that the trust and estate attorney ultimately prevailed in his position, and the governing documents plainly reflect a direction of payment under Wis. Stat. § 565.30(1) rather than an outright assignment of the prize under Wis. Stat. § 565.30(6). As a matter of law, therefore, Mr. Bottolfson's assignments of his rights to the Lottery Prize payments to the Trust were clearly authorized, proper and enforceable, and Respondent's argument to the contrary is frivolous.

b. The Department's Arguments

The Department responds by making three basic points summarized below. First, the Department argues that the trust was used to conceal the illegal assignment of rights to a lottery prize. The Department specifically points to the fact that different trust versions were used to conceal the planned illegal assignment and

mislead the government. The first trust document was signed by Mr. Bottolfson on August 14, 1997, before any contact with the Department. That first trust document had provisions expressly allowing the assignment of beneficial interests and it applied Massachusetts governing law. The attorney for Mr. Bottolfson presented it to the Department, which then referred the matter to the DOJ. The assistant attorney general informed Mr. Bottolfson's attorney that the trust document would not be approved. Even though the assistant attorney general did not know that Mr. Bottolfson and his ex-wife had signed sale agreements, he warned Mr. Bottolfson's attorney that a trust could not be used to assign a lottery prize.

The trust and estate attorney then presented a second trust document, which deleted all provisions allowing for assignment of beneficial interests and replaced Massachusetts governing law with Wisconsin governing law. The assistant attorney general referred the matter back to the Department along with the second trust document.

In discussions with the DOJ and with the Department's staff attorney, the trust and estate attorney gave the impression that the trust would be used to divide the prize between Mr. Bottolfson and his ex-wife as the original winners of the Lottery Prize and for estate planning. Again, the trust and estate attorney did not inform the Department of the Stone Street assignments. He felt it was "none of the State's business." (Trust and estate attorney Dep., p. 175.)

The Department's staff attorney, although unaware of the Stone Street assignments and the Sale Agreements for Lottery Prize Payments, insisted on additional

provisions requiring retained jurisdiction of the circuit court. No circuit court order ever discussed or permitted any assignment to third parties, so neither the DOJ attorney nor the Department's staff attorney was tipped off to the sale and assignment.

Then, after the Department approved the third trust document, Mr. Bottolfson executed a fourth trust document, reversing course again, and adding language "expressly" allowing assignment of a beneficial interest and changing governing law back to Massachusetts. The fourth trust document was not disclosed to the court or the Department.

The second basic point the Department argues is that the communications between the trust and estate attorney and the Department confirm use of the trust to conceal the underlying assignments and mislead the government. The Department argues that the trust and estate attorney misled the Department into understanding that the lottery payout would be made to Mr. Bottolfson and his ex-wife and the lottery payments would be taxed to them in Wisconsin. Several letters from the Department confirm that the Department understood that the Bottolfsons would be taxed based on their ownership of the prize and that the Lottery Prize payments would be made by the trust to the Bottolfsons into the future. The trust and estate attorney never wrote to the Department to contradict any those letters or the understandings set forth within them, and he knew that the Lottery Prize payments had already been sold and assigned to third parties via the sale agreements.

Third, the Department argues that, because the assignment is void, Mr. Bottolfson's trust retains Mr. Bottolfson as the beneficiary. The trust is a revocable grantor trust which may be disregarded by taxing authorities. Further, Wisconsin law required the trust to pay the taxes on the lottery prize payments if Mr. Bottolfson failed to do so. The Department had a perfected lien to the extent Mr. Bottolfson did not file tax returns and pay his taxes. Also, the contracts between Mr. Bottolfson and Stone Street and Great-West were unenforceable as to the State of Wisconsin as the alleged obligor.

2. Statutory Construction

This case requires that we determine the meaning of the two provisions of the former Wis. Stat § 565.30 that are in issue here. The goal of statutory interpretation is to discern the intent of the legislature. *Teschendorf v. State Farm Ins. Companies,* 2006 WI 89, 293 Wis. 2d 123, 717 N.W.2d 258. Because a legislature expresses its purpose by words, our first resort in construing a statute is to look to what is written in the statute books, not to what is unwritten; our aim in doing so is to ascertain—neither to add nor to subtract, neither to delete nor to distort. *State v. Bruckner,* 151 Wis. 2d 833, 844, 447 N.W.2d 376, 381 (Ct. App. 1989) (quoting *62 Cases of Jam v. U.S.,* 340 U.S. 593, 596 (1951)). In statutory construction, context and structure are important factors, and construction should strive to avoid absurd or unreasonable results. *State ex rel. Kalal v. Circuit Court,* 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004).

The process we use is straightforward. We must first look to the plain language of the statute. *Hemburger v. Bitzer*, 216 Wis. 2d 509, 517, 574 N.W.2d 656 (1998). A statute, word or phrase is ambiguous, and use of the rules of construction proper, only when it is capable of being interpreted by reasonably well-informed persons in two or more senses. *See Guertin v. Harbour Assurance Co. of Bermuda, Ltd.*, 135 Wis. 2d 334, 338, 400 N.W.2d 56, 58 (Ct. App. 1986), *aff'd*, 141 Wis. 2d 622, 415 N.W.2d 831 (1987). If the language in the law is plain, the analysis stops there. If the language in the statute is ambiguous, we look at extrinsic aids such as legislative history, scope, purpose, subject matter and context to determine the legislature's intent. *Id.* However, neither party claims the statute here is ambiguous.

Instead, the parties dispute which subsection controls the result here. The Department points to subsection 6, which is the provision explicitly prohibiting assignment. The Petitioners, however, look to fit the trust agreement under subsection 1 as a circuit court judge allowed the formation of the trust as part of the resolution of the civil suit between the Bottolfsons. The issue thus becomes which statutory provision controls. The first question we examine is the meaning of both provisions.

3. Substance and Realities

Regardless of the labels attached by parties, Wisconsin courts have long looked to substance in taxation matters. *Cliff's Chemical Co. v. Wisconsin Tax Commission*, 193 Wis. 295, 214 N.W. 447 (1927); *Miller v. Wisconsin Tax Commission*, 195 Wis. 219, 221, 217 N.W. 568 (1928). The Wisconsin Supreme Court has stated that it will make determinations of taxability based on the facts of a given case viewed as a whole and

that it is the "substance and realities" of a taxpayer's activities that are determinative of the Department's power to tax. *Dep't of Revenue v. Sterling Custom Homes Corp.*, 91 Wis. 2d 675, 679, 283 N.W.2d 573, 575 (1979). In *Sterling Custom Homes*, the issue was the taxability of the taxpayer's real construction activities and the court examined the taxpayer's everyday work activities to determine that its actual activities were entitled to the real property exemption to the sales and use tax.

This Commission has used this test as well. For example, in *Manpower Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-223 (WTAC 2009) the Commission determined that in substance and reality temporary services were not the same thing as the services the Wisconsin Statutes specifically tax, and thus were not subject to the sales tax on services. Also, in *Sullivan Bros. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-600 (WTAC 2012) we used the substance and realities test to determine that a wholly-owned corporate subsidiary did not qualify as a customer in the context of a sales tax exemption.

The parties here dispute exactly what the trust agreement in question is. Is it an "assignment," which is prohibited by subsection 6? Or is it a "court order," which is allowed by subsection 1? We think that, to resolve this question, we must look at the substance and realities of the documents that are in the record.

When we analyze the trust device under the test, we note several things that lead us to conclude that this is, in fact, a prohibited assignment. First, the Petitioners' construction of how this statute worked eviscerates the anti-assignment provision, emphasizing one subsection while ignoring the existence of another. In

general, however, our task is to read a statute so as to harmonize *all* of the statute's provisions.[18] As it relates to this case, there would be no reason to have an anti-assignment provision in subsection 6 if parties could fit what is in reality an assignment under subsection 1. The Petitioners' argument would essentially render subsection 6 superfluous as applied to these facts. We note that the statute does not say that prizes cannot be assigned except where there is a court order approving an assignment. The two subsections are mutually exclusive. It would border on absurd if a party could squeeze what the statute explicitly prohibits—an assignment—into another subsection of the very same statute.

Second, we have a different view from the Petitioners of the context and structure of this statute. What the legislature mentioned in subsection 1 of the statute along with "court order" is payment to an estate. Further, the rest of the statute in the next several sections discusses how a lottery prize can be divided by a judge where there are liens and restitution orders and child support. We think that a plain and commonsense reading of this statute's context and structure is that subsection 1 refers to situations where title or ownership of property passes by operation of law,[19] such as

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[18] As a general matter, statutory provisions should be read *in pari materia* if possible. *State v. Clausen*, 105 Wis. 2d 231, 244, 313 N.W.2d 819 (1982).

[19] *Black's Law Dictionary* 1092 (6th ed. 1990) defines the term as follows:

> *Operation of law.* This term expresses the manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or co-operation of the party himself. http://thelawdictionary.org/operation of law/ (last visited August 27, 2012).

by probate, or by the methods mentioned in the adjacent sections.[20] Numerous courts have agreed with this interpretation. *See, e.g., Walker v. Rogers,* 272 Ill.App.3d 86, 208 Ill.Dec. 815, 650 N.E.2d 272 (1995). In *Walker,* the Illinois court had before it an arrangement similar to the one here. After reviewing the case law, the *Walker* court stated as follows:

> In *In re Louisiana Lottery Corp. Grand Prize Drawing of March 21, 1992* (La.App.1994), 643 So.2d 843, 846, the court held that allowing the voluntary assignment of lottery winnings pursuant to a judicial order would render the general prohibition of assignment "virtually meaningless." The court also cited *Marianov* and *Converse.* (*Louisiana Lottery,* 643 So.2d at 846.) In *R & P Capital Resources, Inc. v. California State Lottery* (1995), 31 Cal.App.4th 1033, 37 Cal.Rptr.2d 436, the court interpreted the phrase "appropriate judicial order" by looking at another exception to the assignment prohibition clause of the lottery statute which allowed payment to a deceased lottery winner's estate or trust. The court concluded these provisions were not really exceptions to the prohibition against assignment, but instead, applied to determine ownership when the winner was deceased. The court held that the "appropriate judicial order" exception referred only to an order entered following a contested proceeding to determine ownership. The court stated any other interpretation would allow the exception to swallow the "no assignment" rule. The court cited the statute's lack of

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[20] *Black's Law Dictionary* seems to support this construction. The entry there for "assignment" contains the following:

> In contracts. 1. The act by which one person transfers to another, or causes to vest in that other, the whole of the right, interest, or property which he has in any realty or personalty, in possession or in action, or any share, interest, or subsidiary estate therein. *Seventh Nat. Bank v. Iron Co.* (C. C.) 35 Fed. 440; *Haug v. Riley,* 101 Ga. 372, 29 S. E. 44, 40 L It A. 244. More particularly, a written transfer of property, as distinguished from a transfer by mere delivery. 2. In a narrower sense, the transfer or making over of the estate, right, or title which one has in lands and tenements; and, in an especially technical sense, the transfer of the unexpired residue of a term or estate for life or years. **Assignment does not include testamentary transfers.** The idea of an assignment is essentially that of a transfer by one existing party to another existing party of some species of property or valuable interest, except in the case of an executor. *Ilight v. Sackett,* 34 N. Y. 447. 3. A transfer or making over by a debtor of all his property and effects to one or more assignees in trust for the benefit of his creditors. http://thelawdictionary.org/assignment/ (last visited August 27, 2012).

> standards for courts to use in determining whether to approve assignments. Additionally, the court relied on the *parens patriae* rationale, citing *Marianov, Converse,* and *McCabe. R & P,* 31 Cal.App.4th at 1037-40, 37 Cal.Rptr.2d at 439-40 . . . .
>
> There is a difference between an order enforcing a judgment and an order declaring an assignment is valid. Because clause two is an exception to the general rule prohibiting assignments, it must be narrowly construed. (*People v. Lofton* (1977), 69 Ill.2d 67, 71, 12 Ill.Dec. 713, 715, 370 N.E.2d 517, 519; *Mid-South Chemical Corp. v. Carpentier* (1958), 14 Ill.2d 514, 519, 153 N.E.2d 72, 74; *Doubler v. Doubler* (1952), 412 Ill. 597, 600, 107 N.E.2d 789, 790.) We interpret clause two as applying to judicial orders entered in separate proceedings where disposition of a lottery prize is an appropriate remedy, such as an order directing payment of prize winnings to a former spouse as part of an equitable distribution or spousal support in a marital dissolution case, for a child support arrearage, or a garnishment order allowing a debtor to satisfy a judgment from a debtor-lottery winner.

Id. Like the *Walker* court, we believe assignments like the one in this case were meant by the legislature to fall under subsection 6, and not under subsection 1.[21] The agreement in this case is thus not similar in substance to what the statute lists in subsection 1. Instead, it is exactly what subsection 6 prohibits. Also, we have noted that the sale agreement between Mr. Bottolfson and Stone Street states the following:[22]

> Winner hereby sells and **assigns** to purchaser and its **assigns** all lottery winner's right, title, and interest in and to the **assigned** payments, including without limitation, the right to receive the **assigned** payments from the State Lottery...

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[21] We note parenthetically that when the legislature decided in 1999 Wisconsin Act 9 to allow assignments it repealed subsection 6, and left the former subsection 1 largely intact. *See* Petitioners' Exhibit 1.

[22] *See also* Facts ¶38 and ¶40 above, in which the 1997 Sale Agreement is referenced on numerous additional occasions as an "assignment."

(Trust and estate attorney Dep., p. 21 (quoting from deposition exhibit, emphasis added). In substance and reality, the agreement in question is an assignment.

A third problem is that the Judgment and Stipulation does not fit any of the types of court orders that Wis. Stat. § 565.30(1) (1997-98) in our opinion allowed. In brief, Wis. Stat. § 565.30 taken as a whole allowed assignments specifically for testamentary transfers, child support agreements, liens, maintenance, family support, and spousal support. The Petitioners seem to be arguing or assuming that the Judgment and Stipulation is related to the divorce and we agree with the Petitioners that this is the closest general category this agreement comes to. However, the claim that this assignment is related to the Bottolfson's divorce does not stand up to examination. First, the Bottolfsons divorced in 1989, and Mr. Bottolfson won the prize in 1994. Second, the court case (97CV86) associated with the settlement agreement is not a family court case, but instead is denominated an "unclassified civil" case. The civil complaint Ms. Bottolfson filed with the court makes claims based in contract and partnership law, and not in family law. Third, the circuit court order never references Wis. Stat. § 565.30(5m). Finally, the settlement agreement itself disclaims any connection to any of the situations described in Wis. Stat. 565.30(5m). For example, the following language appears in the circuit court Judgment and Stipulation: "Defendant denies that there was any formal or informal partnership...." And later in the same document, the following appears: "This stipulation in no way satisfies the judgment held by the Plaintiff against the Defendant, docketed in ... County on April 23, 1997 in case no. 88FA151." (Petitioners' Exhibit 10, ¶4.) Like the *Walker* court, we strictly

construe the exceptions to the legislative prohibition on assignment and when we do that we find that this agreement fits nothing listed in the statute.

In sum, there are at least three problems with the Petitioners' understanding of the statute. First, it largely ignores the existence of the anti-assignment law that was in effect. Second, the Petitioners overlook the structure of the statute as a whole. Third, the agreement in question does not fit with anything the statute allowed. The attempt to shoehorn the trust agreement into a subsection 1 court order is unconvincing, especially as the Petitioners' own documents repeatedly refer to this agreement as an assignment. Thus, Mr. Bottolfson continued to own the prize for tax purposes the trust notwithstanding, and the Department had the legal right to withhold the unpaid taxes from the Lottery Prize payments.

D. Equitable Estoppel

The Petitioners argue that the Department should be estopped from collecting the tax as the Department allegedly acquiesced in the trust arrangement, before changing its mind and issuing the jeopardy assessments that are at issue here. In brief, the Department responds that estoppel does not apply because the Department was never fully informed by the Petitioners. The first part of this portion of the opinion will set forth the law and the second part will state the reasons the Department should not be estopped.

1. Summary of Equitable Estoppel Law

A party asserting estoppel must prove all of the elements by clear, convincing, and satisfactory evidence.[23] *Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Supply Co., Inc. v. Dept. of Revenue,* 128 Wis. 2d 431, 439, 383 N.W.2d 502 (Ct. App. 1986). Equitable estoppel is a bar to the assertion of what would otherwise be a right; it does not of itself create a right. *Murray v. City of Milwaukee,* 2002 WI App 62, ¶ 15, 252 Wis. 2d 613, 642 N.W.2d 541. The elements of equitable estoppel are (1) action or non-action by the person against whom estoppel is asserted, (2) that induces reliance by another, (3) to his or her detriment. *Dep't. of Revenue v. Moebius Printing Co.,* 89 Wis. 2d 610, 634, 279 N.W.2d 213 (1979). The Commission must then balance the public interests at stake if the governmental action is estopped against the injustice that would be caused if the governmental action is not estopped.[24] *Id.* at 639.

A party's reliance on another's action or inaction must be reasonable. *Coconate v. Schwanz,* 165 Wis. 2d 226, 231, 477 N.W.2d 74 (Ct. App. 1991); *Gonzalez v. Teskey,* 160 Wis. 2d 1, 14, 465 N.W.2d 525 (Ct. App.1990). Equitable estoppel is not as freely granted against a governmental agency as it is against private parties. *Moebius* at 638. Equitable estoppel is designed to promote equity and justice. *Rascar, Inc. v. Bank of Oregon,* 87 Wis. 2d 446, 453, 275 N.W.2d 108 (Ct. App. 1978).

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[23] Unlike the issue in the first section of this decision, here the Petitioners clearly bear the burden of proof.

[24] The balancing test needs to be applied only when a party is successful in showing the basic elements of equitable estoppel. *See Independence Corrugated, LLC v. City of Oak Creek,* 2008 WI App 160, 314 Wis. 2d 508, 758 N.W.2d 225.

2. The Facts and the Arguments

a. The Petitioners' Argument

According to the Petitioners, the facts summarized above establish all of the elements of estoppel. First, the Respondent took action by affirmatively committing to honor the Amended Judgment requiring Mr. Bottolfson to assign his interests in the Lottery Prize payments to the Trust, and by making subsequent Lottery Prize payments to the Trust.

Second, the Respondent's assurances induced reliance by Mr. Bottolfson, Ms. Barbara Bottolfson, and the circuit court in resolving the Action, by the Trustee of the Trust in agreeing to accept the Lottery Prize payments into the Trust, and by Stone Street and Great-West in purchasing the Bottolfsons' beneficial interests in the Trust. Had Respondent not expressly acknowledged the validity of the Amended Judgment, Stone Street would not have purchased the beneficial interests from the Bottolfsons, and Great-West would not have purchased the beneficial interests from Stone Street, at least not without reducing the purchase price by the amount of Mr. Bottolfson's tax liabilities.

Third, Great-West has suffered detriment because it closed on its purchase from Stone Street and paid for assignments of beneficial interests in the Trust in anticipation of receiving a specific value in return, all with the assurance that Respondent would pay the stream of Lottery Prize payments to the Trust, which in turn would distribute the payments to Great-West as the assignee of the beneficial interests in the Trust. Through Respondent's unilateral offsets against the Trust's Lottery Prize

payments, Great-West has been deprived of almost $430,000 of the value for which it paid. Further, Great-West has been forced to incur substantial attorney's fees to recover the amounts withheld by Respondent.

b. The Department's Argument

The Department responds that equitable estoppel cannot lie against the Department here for five reasons. First, the trustee and Great-West were not reasonable and justified in relying on the representations of a seller's attorney as opposed to getting a writing from the Department. Second, equitable estoppel cannot lie against the Department since Mr. Bottolfson's attorney did not give adequate and accurate information to the Department and he did not obtain approval in writing from the Department for the assignment of the Lottery Prize. Third, the court order did not approve the ultimate assignment of the Lottery Prize (whether or not referred to as a beneficial interest in the trust or the Lottery Prize) to Stone Street or Great-West. If the court order included such an approval, it would have tipped off the Department. Fourth, equitable estoppel cannot lie against the Department, since the Department did not approve the trust document actually used to subvert the nonassignability statute; any approval of use of the third trust submitted to the Department was therefore negated and the new provisions "expressly" allowing for the assignment of beneficial interests must fail. Finally, the Department is not subject to equitable estoppel since there was not adequate and accurate disclosure to the Department and the Petitioners did not reasonably rely on any action or inaction by the Department, and, also, not on any writing of the Department.

c. Application of the Law to the Facts

After reviewing the record here, we conclude that equitable estoppel should not apply here for several reasons. First, unlike several cases where the taxpayer was successful with an equitable estoppel claim, here the advice the Department and DOJ responded with appears to have been an accurate summary of the law as it then existed. Unlike the Petitioners, we think that we must look at this episode as a whole. When we do that, we see that a DOJ attorney told them that their attempt to avoid the anti-assignment law would not work. The following excerpt comes from a letter an assistant attorney general wrote to Mr. Bottolfson's attorneys in December of 1997:

> Having reviewed with the Department of Revenue the [trust and estate attorney's] letter of November 10, 1997, it remains our conclusion that the direct payment of the lottery winnings to the revocable trust would contravene sec. 565.30(6), prohibiting the assignment of lottery prizes.
>
> There are three principal reasons for this conclusion. First, this is not a case where the trust claims to have purchased a lottery prize . . . we believe that the statutory provision against assignment was intended to mean exactly what it says.
>
> Second, the [trust and estate attorney's] letter refers to the policies underlying the statutory non-assignment provisions. We believe the principal one to be the protection of lottery winners, not simply against natural human weaknesses, but against businesses that seek to buy up guaranteed income streams at below market rates. The underlying policy appears to be the same as the one that prohibits the assignment of social security or retirement benefits. As I mentioned when I spoke with both of you, the only thing the trust appears to accomplish is to pass through the income from the ticket . . . . All of its other provisions are to the effect of making the interests of the beneficiaries assignable.

> This kind of pass-through highlights, as an extreme case, the more general problem with lottery prizes being paid to non-natural persons, whose ownership interests are freely alienable. If lottery prizes can be paid directly to pass-through trusts, the beneficial interests of which are fully assignable, then this would seem to provide a relatively easy way to circumvent sec. 565.30(6)'s prohibition against assignment. Although [the trust and estate attorney] has consistently attempted to distinguish this trust from other assignments as being the product of contested litigation, I am unable to see this as a principled basis for permitting this result.
>
> . . . .
>
> Overall, this matter appears to reflect an exaggerated and unwarranted sense of entitlement on the part of Mr. Bottolfson and his attorneys. The trust device as a settlement of the underlying litigation was selected without any advance consultation with the Lottery. The drafting was at points sloppy. [Mr. Bottolfson's counsel] himself neglected to "closely review[ ] the trust until recently." Finally, [Mr. Bottolfson's counsel] appears to resist the most fundamental concept of personal jurisdiction, that a party with an interest in litigation—including executive branch agencies or officials—cannot be bound by court order without prior notice and an opportunity to be heard.

(Petitioners' Exhibit 4, GW000031.) Despite receiving this clear statement of the law as it then existed, the Petitioners base most of their case on what the Department's staff attorney reportedly said and did[25] subsequent to the issuance of the letter quoted above, claiming that he agreed to or accepted the assignment via the trust. In particular, the Petitioners seem to focus on the statement from the staff attorney that "there are no further problems." (Fact ¶52 above). We, however, have a different view from the Petitioners of the context and import of that statement.

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[25] Once again, in fairness we note that the Department's staff attorney has not been deposed in connection with this case and, thus, has not had the chance to respond to the claims put forth in this case.

Having reviewed the submissions, we see the actions and communications from the Department's staff attorney as ambiguous at best. We do not know, however, that he was asked the right questions, that is, the same questions posed by this case. Hornbook law clearly states that beneficial interests in a trust are assignable. *See* Bogert's § 188, *The Law of Trusts and Trustees* § 188 (2011) (attached to Petitioners' motion). The issue here, however, is the *tax consequences* of the transaction, and there is no evidence before us that the Department's staff attorney provided incorrect advice there. Surely, the Petitioners' attorneys knew when they tried to work around the anti-assignment provision that in the taxation context commissions and courts look to substance, and not mere form. That has been the law in the federal system since the late 1920s. *See Clifford v. Helvering*, 293 U.S. 465 (1935). The same has been true in Wisconsin since *Cliff's* and *Miller*.

There are a number of additional problems with the Petitioners attempting to base their equitable estoppel claim on the Department's staff attorney. First, the staff attorney did not know all of the facts, such as that the assignment had essentially already taken place in June of 1997. Second, the staff attorney was only one of several attorneys from the State whose advice was sought in 1997 and in 1998, albeit one of the last. Third, the Department's staff attorney was not involved in the circuit court proceedings.

But, even if we were to agree with the Petitioners' contentions regarding one particular attorney, basing their equitable estoppel claim on that attorney's response is problematic under the law. In several cases, the Wisconsin Supreme Court

has stated that, in order to estop the government, the government's conduct must be of such a character as to amount to a fraud. *State v. City of Green Bay,* 96 Wis. 2d 195, 291 N.W.2d 508 (1980). The term "fraud" is to be construed as "unconscientious" or "inequitable." *Id.* at 203. In no way does the conduct in this case reach even this first level, even if it was less than fully consistent with what the assistant attorney general had written. Second, even if we believed the parties were equally at fault, in this area of the law, that is not good enough as the Petitioners have to prove their case. *In pari delicto potior est conditio defendentis* is a doctrine which states that in the case of equal fault, the position of the defendant is stronger. *Evans v. Cameron,* 121 Wis. 2d 421, 360 N.W.2d 25 (1985). The doctrine of *in pari delicto* is an application of the principle that "[n]o court will lend its aid to a [person] who founds his [or her] cause of action upon an ... illegal act." *Clemens v. Clemens,* 28 Wis. 637 (1881). The risks to the Petitioners in proceeding with this transaction were manifest.

Second, we are troubled by the fact the Petitioners never informed the Department fully as to Mr. Bottolfson's tax problems and their plans to assign the beneficial interest.[26] While it was not necessarily their obligation to do so, we are mindful that equitable relief can be given only in limited circumstances and here the Petitioners just were not open with the Department as to their true intentions. In our view, there might have been a different result with the Department's staff attorney if

[26] We should also indicate that we are troubled by the April 1998 amendment of the trust after the alleged understanding was reached to reinstate provisions the Department had requested to be removed.

those with whom he dealt had been more forthcoming.[27] It is hard to imagine the Department's staff attorney would have been cooperative had he known that Mr. Bottolfson owed hundreds of thousands of dollars in back taxes. It just goes against common sense that a Department attorney would knowingly give several million dollars of lottery money to a person the Department would undoubtedly perceive as a tax scofflaw. The following deposition excerpt[28] illustrates our point that the Department was not acting with full knowledge of the facts in 1997 and in 1998:

> Q. **[Department Counsel]** Okay. Did you disclose to the Department of Revenue that there were any issues with regard to -
>
> A. **[Donald Bottolfson's Attorney]** I was going to tell the State that Don had state tax problems? Come on, Peter.
>
> Q. Well, let me ask you this. You understand -
>
> A. And how would that be in the interest of my client?
>
> Q. Well, let me ask you this. Is it true that you must understand, I believe, that it takes a certain amount of time for federal or state tax audits to get completed; do you understand that?
>
> . . .
>
> A. I'm still not - I'm trying to figure out. I was supposed to tell the State, the Department of Revenue that they were conducting an audit or should - what, should conduct an audit or -
>
> . . .
>
> Q. The fact of the matter is I'm trying to inquire whether or not you or anybody else or Mr. Bottolfson or Great-West or Stone Street should realize or should have realized that there might have been tax issues in this matter?
>
> . . .

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[27] For our purposes here, we have assumed based on the timeline in the facts that the Department's attorneys did not know about Mr. Bottolfson's tax issues in 1997 or 1998. The facts placed before us indicate that the Department sent a letter to Mr. Bottolfson requesting that he file returns on July 29, 1999, well after the events of 1997 and 1998. *See* Material Fact ¶60.

[28] We have edited this portion of the transcript to exclude evidentiary objections and extraneous remarks.

A. I'm going to cut to the chase. I discussed Don's federal tax issues with him when I learned that there was a federal tax lien or whatever, and what he told me was that he hadn't filed because he wasn't working and didn't -

. . .

Q. Okay. Did you disclose that to Stone Street or to Great-West?

. . .

A. They knew it. I think they told me. They insisted on it being paid.

(Trust and estate attorney Dep., pp. 46-9.)

Clearly, the attorneys representing the Bottolfsons shared with the Department only what was necessary to make the transaction go forward. This is demonstrated in the deposition of the trust and estate attorney where he continually refers to the existence of the sale agreement as "the elephant in the room" during his discussions with the State. (Trust and estate attorney Dep., pp. 75-83.)[29] An estoppel is not created, however, unless the party against whom it is urged had full knowledge of the facts. *Caveney v. Caveney*, 234 Wis. 637, 650, 291 N.W. 818, 824 (1940). There is no clear proof in this record that the Department's attorneys in 1997 and early in 1998 knew about the sale and the debts to the State.[30] In our view, the Petitioners appear to have been aware from the start that the trust arrangement carried risk, as evidenced by the fact that Stone Street required that $75,000 be withheld from the proceeds from the sale of Mr. Bottolfson's beneficial interests in the Trust to satisfy all liens. (*See* Fact ¶45 above). Further, it appears that the federal lien on the lottery payments for Mr. Bottolfson's unpaid taxes was in existence *before* Stone Street entered into the

[29] The trust and estate attorney later defines "the elephant in the room" as something that ". . . isn't ever discussed."

[30] We view the deposition testimony of the trust and estate attorney on this point as self-serving and inadequate to demonstrate that the State knowingly acceded to the sale.

transaction with Mr. Bottolfson, and, frankly, at that point a forthcoming state lien was very foreseeable. Inherent in getting equitable relief is the notion something unfair was said or done, but we do not see that here. Estoppel is a shield, not a sword. *Utschig v. McClone*, 16 Wis. 2d 506, 114 N.W.2d 854 (1962).

Third, as the Department points out, Mr. Bottolfson's assignment was agreed to before the Department allegedly consented and began making the payments after the court order. In June of 1997, Mr. Bottolfson entered into an agreement with Stone Street titled "Sale Agreement for Lottery Prize Payments of Donald H. Bottolfson" to exchange his rights to the annual Lottery Prize payments for the years 1997 through 2009 for a lump sum payment. The August 1997 Judgment then ordered Mr. Bottolfson to create the Donald Bottolfson Revocable Trust in a form substantially similar to the trust agreement attached to the Judgment, in which both Mr. Bottolfson and Ms. Barbara Bottolfson would have beneficial interests. The trust and estate attorney first had a discussion with Mr. Evans of the Department of Revenue in mid-January of 1998. Thus, the alleged consent of the Department did not lead to reliance by the Petitioners. As mentioned above, reliance is one of the elements to equitable estoppel. Here, it was good lawyering for the various attorneys representing Mr. Bottolfson to try to get the Department to go along with the arrangement, but it cannot be said based on the timing that the Department induced the action by the Petitioners.

Fourth, the Petitioners seem to argue that it is inequitable for the Department to issue the jeopardy assessments on the payments because the Petitioners had a court order, but the fact is that the circuit court did not decide the tax implications

of the transaction. *See, e.g., Mantsch, Palo, and Strader v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶401-394 (WTAC 2011) (holding that circuit court order denominating payments as family support did not control for tax purposes). The legislature has in fact in Wis. Stat. § 73.01(4) made the Commission the "final authority for the hearing and determination of all questions of law and fact" under the tax code. *Menasha v. Dep't of Revenue,* 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95 (holding that the Commission's determinations on tax assessments and the tax code are entitled to great weight deference). Further, it does not appear to us from reading the court transcript that the circuit court judge had the legality of the arrangement under Wis. Stat. § 565.30 placed or fully litigated before the court by the parties to that suit.[31] The following portions of the transcript illustrate the point:

> **The Court:** So do I understand correctly that this is a comprehensive settlement of any and all claims of any type or nature whatsoever known or unknown which this lady may have against this man and vice versa?
>
> **[Attorney for Mr. Donald Bottolfson]:** Yes, your honor.
>
> **The Court:** So I misspoke when I said this is an interim order? This is a final order to resolve the case?
>
> **[Attorney for Ms. Barbara Bottolfson]:** It is, your honor. The mechanics of this work in this fashion. Around the country and we believe in Wisconsin that lottery proceeds have been bought out by particular financing companies. They can only be bought out, our understanding is, if those moneys are in a trust or are funneled towards a trust.
> . . .
>
> **The Court:** I see.

[31] We note that the order seems to combine sub 1 and sub 6 as if they are one and the same.

> **[Attorney for Ms. Barbara Bottolfson]:** And that's what we are trying to do here is to create this trust and off that trust an agreement resolving this case, but it is contingent upon the lottery approving this trust. So it is preliminary from that standpoint.
>
> When this trust goes to the lottery and the lottery says, yep, this is satisfactory, this case is over with; but if they don't, it is not.
>
> **The Court:** And if they don't, we step back to where we were five minutes ago?
>
> **[Attorney for Ms. Barbara Bottolfson]:** Right.

(August 15 Transcript, pp. 4-5.) As this excerpt shows, the court's approval was subject to the State's consent, and not *vice versa*. The circuit court's order is simply not a decision on the interplay between the two subsections of the statute or the tax consequences of the transaction. Under the circumstances, the Petitioners went forward at their own peril.

The strongest part of Petitioners' argument is that one of the Department's attorneys and the Lottery agreed that the money would be paid to the trust and that the Lottery made several annual payments to the trust. Further, years went by before the audit division of the Department determined that Mr. Bottolfson had not filed a return for most of the previous decade and owed hundreds of thousands of dollars in Wisconsin income tax. Perhaps one arm did not know what another arm was doing. Instead of proceeding directly against Mr. Bottolfson, however, the Department then issued jeopardy assessments on the money the Petitioners expected to receive from the lottery division via the Trust. We see several responses to this.

First, the Petitioners have not clearly proven that an assignment was ever agreed to by any representative of the Department. Several state employees were involved and arguably only one or two was aware of Mr. Bottolfson's transfer of his beneficial interest in the trust. Under the totality of the circumstances, it was not reasonable for Mr. Bottolfson or the Petitioners to rely on one attorney from the State more than another in the context of an uncertain legal question, and then to claim detrimental reliance. As a practical matter, this is a case with little or no defining Wisconsin legal precedent. The Petitioners were undoubtedly aware of the diversity of opinion that existed. The efforts Petitioners' attorneys went through to obtain consent from the State demonstrate to us the uncertain legal prospects the Petitioners knew they faced.[32] There is no single authoritative state action or misrepresentation that the Petitioners can point to, unlike the cases discussed below, where the Department gave a legal determination which caused the taxpayer not to collect the tax.[33] What comes through to us from the testimony in the transcripts is the confidence the Petitioners'

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[32] At the time these events occurred, approximately 36 States had lotteries and 28 of those had anti-assignment laws similar to Wisconsin's. In addition to the *Walker* case discussed above, there were numerous other court cases prohibiting the assignment of lottery payments. *See, e.g., Petition of Singer Asset Finance Company, L.L.C.*, 314 N.J.Super. 116, 714 A.2d 322 (1998) (Court order sanctioning an assignment of lottery winnings is limited to circumstances of necessity); *In re Meyers*, 139 B.R. 858 (Bankr.N.D.Ohio 1992) (Assignment of lottery prize void under Ohio law prohibiting assignment absent court order); *McCabe v. Director of New Jersey Lottery Commission*, 143 N.J.Super. 443, 363 A.2d 387 (1976) (Allowing lottery winner to obtain a lump sum of money by assignment would contravene intent of state anti-assignment law); *Converse v. Lottery Commission*, 56 Wash.App. 431, 783 P.2d 1116 (1989); *Lotto Jackpot Prize of December 3, 1982 Won by Marianov*, 533 Pa. 402, 625 A.2d 637 (1993); *In re Louisiana Lottery Corp. Grand Prize Drawing of March 21, 1992*, 643 So.2d 843 (1994).

[33] It also seems unlikely to us that the same Department that lobbied against amending the statute to allow assignments would knowingly around the same time approve an assignment. (Evans Aff.)

attorneys had that their trust/court order argument was correct and that it would prevail. Given the legal landscape, that confidence was unwarranted.

Second, the Department was not a party to the circuit court case that produced the order on which the Petitioners rely. It is not remarkable that the Department would obey a court order which purported to be related to a divorce.[34] In that circumstance, it seems unlikely a reasonable person would look behind the order to determine the underlying legal theory upon which the court's order rested. Arguably, division of a lottery prize pursuant to a divorce would not be prohibited by the statute. Further, at one point, it was represented to the Department that the trust was part of a standard estate plan, which would also not be a prohibited assignment.

Case law shows what is required to estop the government. Cases in which the Department has been equitably estopped have typically involved situations where the Department authoritatively told the taxpayer not to collect the tax and then later demanded the tax. *See Dep't of Revenue v. Family Hospital, Inc.*, 105 Wis. 2d 250, 254-55, 313 N.W.2d 828 (1982) (as a result of taxpayer's reliance on Department memoranda which expressly listed parking receipts as nontaxable, taxpayer suffered detriment because it did not collect the tax from persons using its parking facility, could not now do so, and would be required to make the payment from its own funds); *Dep't of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 632-33, 279 N.W.2d 213 (1979) (as a

[34] We note again that the Judgment and Stipulation here was not in substance and reality related to the divorce or to spousal support. We view the agreement as primarily a device for Mr. Bottolfson to earn better investment returns. In addition to the issues with the Judgment and Stipulation we describe above, we note that the $100,000 Ms. Bottolfson expected to receive from the alleged partnership was about 1% of the $9,800,000 prize.

result of taxpayer's reliance on Department's extensive examination of taxpayer's sales records and on its representations that exemption certificates taxpayer had on file from customers were valid, taxpayer suffered detriment because it failed to collect sales tax from customers who filed exemption certificates and would be required to pay the deficiency itself). These cases, however, are readily distinguishable from the evidence here.

We think it self-evident that the provision of allegedly inconsistent or ambiguous advice is materially different from the individualized determinations and legal authorities relied on by the taxpayers in cases such as *Moebius Printing* and *Family Hospital* where years went by without the tax being collected and then the Department changed its position and demanded the tax. Even in the light most favorable to the Petitioners, their facts do not rise to this level. If this were a contracts case, we would have to conclude that there had been no meeting of the minds in this case.[35]

On balance here, the equities do not favor the Petitioners. The Wisconsin Supreme Court in 1929 said the following about those seeking equitable relief:

> But the portals of equity are closed to those who come seeking relief from the consequences which naturally flow from deliberate wrongs committed by the applicant for relief...
>
> Equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, . . . will appeal in vain to a court of conscience, even

[35] For example, the deposition transcripts demonstrate that the trust and estate attorney and Attorney Evans have diametrically opposed recollections of the import of their 1998 conversation.

> though in his wrongdoing he may have kept himself strictly 'within the law.'
>
> In order to deny plaintiff relief in equity, the court must clearly see that it is the fruit of *his own* wrong, or relief from the consequences of *his own* unlawful act, which the plaintiff seeks . . . (citations omitted).

David Adler & Sons Co. v. Maglio, 200 Wis. 153, 228 N.W. 123 (1929) (emphasis in original). This quote illustrates to us the kind of scrutiny given to estoppel claims and the kind of searching inquiry we must perform. We should make clear that we certainly are not suggesting or finding anything untoward was intentionally done in this case. We do, however, assess and weigh the respective equities.

The result from which Petitioners seek relief here is clearly the "fruit of their own course of conduct." We have closely read the depositions the parties gave us and it comes through that the Petitioners' attorneys were overly confident that the trust device would work. Mr. Bottolfson's representatives certainly were not doing anything unethical, but they definitely also were not disclosing all of the facts to the Department. They intended all along to avoid the anti-assignment law. They were admittedly aware at some point early on of Mr. Bottolfson's tax issues with the federal government, and then those with the State of Wisconsin. And yet they proceeded. This case is admittedly not all black and white, and contains some slight shades of grey, the most noticeable of which is the staff attorney not contesting in some fashion the division of the lottery prize.

We understand that in a more perfect world the machinery might have acted faster or in possession of more of the facts. But even if we were to accept the

Petitioners' spin on the undisputed facts, we could at most only surmise that the Department sent mixed signals to the Petitioners on the subject of the creation of the trust and the division of the prize. Absolutely nothing in the summary judgment submissions, however, suggests that the Department defrauded the Petitioners or manifestly abused its discretion in any way. What it comes back to is that Petitioners have the burden of proof on the estoppel issue and that burden has not been met here to prove to us clearly and convincingly that on these facts the Department should be estopped from collecting (or retaining) the tax Mr. Bottolfson clearly owes. When it comes to estoppel, proof must be clear, satisfactory and convincing. *Variance, Inc. v. Losinske*, 71 Wis. 2d 31, 39, 237 N.W.2d 22, 26 (1976). Instead, what we have here for the Petitioners is their ultimately unsuccessful reliance on advice that predicted a result that ultimately did not come to pass. Thus, we deny the Petitioners equitable relief.[36]

CONCLUSIONS OF LAW[37]

1. The Department has shown that its jeopardy assessments were reasonable under the specific circumstances outlined above.

2. The agreement is unquestionably an assignment, and at that time was prohibited by Wis. Stat. § 565.30(6). The prize thus for tax purposes continued to be owned by Mr. Bottolfson and the Department was thus required by statute to withhold the taxes Mr. Bottolfson owed.

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[36] Our resolution of this issue means that we must also deny the Petitioners' request for costs on the basis that the Department's legal position was frivolous under Wis. Stat. § 227.483.

[37] We reiterate that this is a decision concerning the tax consequences of the specific facts before us. It is not a decision concerning trust law, family law, or contract law.

3. The Petitioners' refund claims thus were properly denied by the Department and the Departments actions on the Petitions for Redeterminations are affirmed.

CONCLUSION

The Department's Motion for Summary Judgment is granted for two reasons. First, the Wisconsin Statutes prohibited the assignment of the lottery prize during the period in question. Second, the Department should not be equitably estopped from collecting the tax.

ORDERS

1. The Petitioners' Motion for Summary Judgment is denied.

2. The Department's Motion for Summary Judgment is granted.

Dated at Madison, Wisconsin, this 9th day of January, 2013.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

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. Alternatively, 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 Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue)** 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 *http://wicourts.gov*.

This notice is part of the decision and incorporated therein.