STATE OF WISCONSIN
TAX APPEALS COMMISSION

DUMKE ENTERPRISES, INC., DOCKET NO. 18-I-193

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID L. COON, COMMISSIONER:

This case comes before the Commission for decision on Respondent's Motion for Summary Judgment. The Petitioner, Dumke Enterprises, Inc., appears by Dan Dumke, Markesan, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Sheree Robertson. Both parties have filed briefs, affidavits, and other exhibits in support of their positions. For the reasons stated below, we find for the Department.

FACTS

1. The Department conducted and completed an office audit of Petitioner's 2010 through 2013 Wisconsin Corporation Franchise Tax Returns ("Tax Period"). (Affidavit of Scott Zimmerman, Wisconsin Department of Revenue Auditor ("Zimmerman Aff.") ¶ 3.)

2. During the Tax Period, Petitioner filed Wisconsin Corporation Franchise or Income Tax Returns and reported its business activity as agriculture. (Zimmerman Aff. ¶ 3.)

3. The Department determined that Petitioner did not add back to Wisconsin income the correct amount of Section 179 expense/depreciation due to differences between state and federal law, and also determined that Petitioner incorrectly took additional subtractions during the Tax Period for the Section 179 expense/depreciation for years prior to 2010. (Zimmerman Aff. ¶ 3.)

4. The Department adjusted Petitioner's 2010 through 2013 Wisconsin Corporation Franchise Tax Returns to add back to Petitioner's Wisconsin income the Section 179 expense/depreciation Petitioner deducted each year in excess of the $25,000 limit in Wisconsin and also added back to Petitioner's Wisconsin income the additional Section 179 expenses/depreciation Petitioner subtracted for tax years prior to 2010. (Zimmerman Aff. ¶ 3.)

5. On March 13, 2017, the Department issued a Notice Amount Due – Corporation Franchise Tax, assessing Petitioner the total amount, at that time, of $135,465.45 for the Tax Period. (Zimmerman Aff. ¶ 6, Ex. 1.)[1]

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[1] The Department of Revenue issued to Dumke Enterprises the Notice of Amount Due – Corporation Franchise Tax under the 6-year rule set forth in § 71.77(7)(a), Wis. Stat., because it reported for taxation less than 75% of the net income properly assessable and the additional franchise tax assessed was more than $100. There has been no dispute as to this issue.

6. Petitioner timely filed an appeal dated March 17, 2017, objecting to the Notice of Amount Due - Corporation Franchise Tax, which the Department considered a Petition for Redetermination. (Zimmerman Aff. ¶ 10, Ex. 14.)

7. Petitioner and the Department entered into three separate Stipulation and Agreement documents to extend the time period for the Department to act on the Petition for Redetermination. (Affidavit of James Anfang, Field Audit Resolution Officer, Wisconsin Department of Revenue, ("Anfang Aff.") ¶ 6, Exs. 17-19.)

8. On August 16, 2018, the Department issued a timely Notice of Action denying Petitioner's Petition for Redetermination. (Anfang Aff. ¶ 7, Ex. 20.)

9. On September 10, 2018, Petitioner filed a timely Petition for Review with the Commission. (Commission file.)

10. On October 5, 2018, the Department filed its Answer with the Commission. (Commission file.)

11. On March 22, 2019, the Department filed a Motion for Summary Judgment along with affidavits and exhibits. (Commission file.)

12. On April 22, 2018, Petitioner filed a document titled "Respondent's Notice of Motion and Motion for Summary Judgment" along with an affidavit and exhibits. Petitioner also filed other letter briefs with additional arguments on July 9, 2019, on July 17, 2019, and on November 8, 2019. (Commission file.)

13. On May 22, 2019, the Department filed a Reply Brief with supplemental affidavits and documents.[2] (Commission file.)

APPLICABLE LAW

Summary Judgment Standard

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). "When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." Wis. Stat. § 802.08(3).

Statutes

> **Wis. Stat. § 71.22(5m)(b) (2007-2008):**
> Notwithstanding subs. (4) and (4m), section 101 of P.L. 109–222, related to extending the increased expense deduction under section 179 of the Internal Revenue Code, applies to property used in farming that is acquired and placed in service in taxable years beginning on or after January 1, 2008, and used by a person who is actively engaged in farming. For purposes of this paragraph, "actively engaged in farming" has the meaning given in 7 CFR 1400.201, and "farming" has the meaning given in section 464 (e) (1) of the Internal Revenue Code.

[2] The Department also filed an additional affidavit on May 24, 2019, and a supplemental letter brief on July 17, 2019.

Wis. Stat. § 71.26(2)(a) (2009-2010):
Corporations in general. The "net income" of a corporation means the gross income as computed under the Internal Revenue Code as modified under sub. (3) and modified as follows....

Wis. Stat. § 71.26(3)(y) (2013-2014):
For taxable years beginning before January 1, 2014, a corporation shall compute amortization and depreciation under the federal Internal Revenue Code as amended to December 31, 2000....

Wis. Stat. § 71.26(3)(y)1 (2009-2010):
Except as provided in subd. 2., a corporation shall compute amortization and depreciation under the federal Internal Revenue Code as amended to December 31, 2000....

Wis. Stat. § 71.26(3)(y)2 (2005-2006):
For property acquired and placed in service in taxable years beginning on or after January 1, 2006, a corporation that is actively engaged in farming may compute amortization and depreciation on property used in farming under any subsequent change to section 101 of P.L. 107–147 or section 201 of P.L. 108–27 enacted after December 31, 2005...This subdivision does not apply unless a federal law change enacted after December 31, 2005, revises section 101 of P.L. 107–147 or section 201 of P.L. 108–27.

DECISION

This matter is a cautionary tale in more than one way for taxpayers. First, there are dangers and pitfalls with representing oneself in legal matters (*pro se*).[3]

Here, Petitioner begins on a bad footing by filing a response that is titled "Respondent's Notice of Motion and Motion for Summary Judgment." Due to this title, the Department, in its Reply Brief, opines on whether this was intended as a cross-motion

[3] While this is not a typical *pro se* situation of an individual representing himself or herself in a legal matter, Mr. Dumke is representing a business entity of which he appears to be the primary, if not sole, owner; therefore, this is akin to such a *pro se* representation.

for summary judgment. Based upon context and content, we determine that Petitioner's filing is Petitioner's Response Brief to the Department's Motion for Summary Judgment.

When a motion for summary judgment is filed, the party opposing the motion must either show that there are genuine issues of material fact or that the moving party is not entitled to judgment as a matter of law to defeat the motion. Mere allegations or denials made by the party opposing the motion are not sufficient to show that there are genuine issues of material facts. Further, as to legal issues, the party opposing the motion must cite to caselaw, statutes, and/or regulations to support their arguments. The Commission need not address arguments that are not developed and are not supported by such citations. (*See State v. Pettit*, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct App., 1992). Unfortunately, Petitioner, here, fails to do either.

While the Petitioner did file an affidavit, executed by Mr. Dumke, with its brief, as well as some additional documents, Petitioner fails to include facts that are material to the issues at hand. For example, in the final paragraph of the affidavit, Petitioner asserts that Mr. Dumke holds two patents. While this may be true and Mr. Dumke may be congratulated for his ingenuity, this fact, if completely true, is not a material fact regarding this matter.

We will not address each and every fact that Petitioner supplies in the affidavit but, in reviewing the affidavit, we note that all of the points made are either not in dispute (the dates and times that parties had contact in person or on the phone), are not material (that Mr. Dumke once worked for a CPA firm), or are opinions or conclusions rather than factual representations (that the Department's assessment was

"fraud"). On the whole, it appears that the affidavit primarily gives a timeline of Mr. Dumke's contacts with the Department and his opinions related to what he sees as the Department staff's incompetence.

Other than cursory reference to federal Section 179, Petitioner does not cite to or argue from any actual law. Petitioner's arguments fall, generally, into one of three categories: 1) Petitioner's representative is smarter than everyone else involved in the matter; 2) Petitioner is right regardless of anything anyone else argues; and, 3) Petitioner makes inflammatory, if not defamatory, commentary about Department staff and the Commission. Beyond reference, without discussion, to federal Section 179, Petitioner has not supported its arguments with any meaningful citation to statutes, regulations, or caselaw.

Professional representation might have helped the Petitioner craft a proper response to the Motion for Summary Judgment. As it is, the responses provided do not put any material facts at issue and do not make any developed, supported arguments regarding the legal issues involved.

The material facts that are before the Commission are undisputed. Petitioner, as an agricultural business, claimed Section 179 expense deductions. The only question is a legal one: whether the amounts that Petitioner claimed are correct or incorrect under Wisconsin law for Wisconsin State tax purposes.

When businesses purchase certain assets, they are not generally allowed to deduct the cost of these assets as an expense in the year acquired and placed in service.

These assets are depreciated and deducted over time based upon depreciation schedules applicable to the type of asset.

For the most part, Wisconsin's tax is "federalized." Pursuant to Wis. Stat. § 71.26(2)(a) "The 'net income' of a corporation means the gross income as computed under the Internal Revenue Code as modified under sub. (3) and modified as follows...."

Even though "federalized," as noted in the statute, the state can and often does modify or exclude portions of the federal tax provisions, creating situations where Wisconsin's deductions, exemptions, and treatment of other tax issues differ from the federal. The treatment of depreciation is one such situation. Wisconsin did not fully adopt the federal depreciation law for a significant period of time, including during the Tax Period.

Throughout the Tax Period in this matter, Wis. Stat. § 71.26(3)(y)1 (2009-2010) stated, "Except as provided in subd. 2.,[4] a corporation shall compute amortization and depreciation under the federal Internal Revenue Code as amended to December 31, 2000...." Wisconsin adopted the federal depreciation law, including what is called Section 179, as it existed on December 31, 2000. Any amendments to the federal law after December 31, 2000, were not adopted by Wisconsin and would have no application for Wisconsin tax purposes. In 2013, the legislature passed 2013 Act 20, which did amend Wisconsin's treatment of depreciation, but not "for taxable years beginning before 2014,"

[4] This exception under subd. 2., will be discussed further.

(i.e. for the Tax Period in this case). For tax years beginning before 2014, the Wisconsin depreciation law for this Tax Period remained the federal law as of December 31, 2000.

At the federal level, an exception to the general rules for depreciation is found in what is referred to as federal Section 179,[5] which allows certain amounts of otherwise depreciable assets to be taken as an expense deduction in the year acquired and placed in service rather than being depreciated over time. The Small Business Job Protection Act of 1996, Pub. L. No. 104-188, amended the federal provision to increase the annual expense deduction limit each year between 1996 to 2003 from $18,000 in 1997 to $25,000 in 2003. There were no further relevant amendments until after December 31, 2000.[6] Therefore, the federal provision applicable on December 31, 2000, was Pub. L. No. 104-188.

For Wisconsin purposes, the Section 179 limit was, therefore, $25,000 from tax year 2003 until amended by 2013 Act 20 which applied to the 2014 tax year and years following. Any amount above $25,000, taken as an expense deduction on a federal return, would need to be added back to Wisconsin income. Unless a further Wisconsin exception applied, the maximum annual amount of Section 179 expense deduction allowed in Wisconsin during the Tax Period was $25,000.

For farm businesses, Wisconsin did create an exception regarding depreciation in Wis. Stat. § 71.26(3)(y)2 (2005-2006), which stated, "For property acquired and placed in service in taxable years beginning on or after January 1, 2006, a corporation

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[5] 26 U.S.C. 179.

[6] For a more complete history of Section 179, please see *Section 179 and Bonus Depreciation Expensing Allowances*, Gary Guenther, Analyst in Public Finance, Congressional Research Service, May 1, 2018, p. 5-8.

that is actively engaged in farming may compute amortization and depreciation on property used in farming under any subsequent change to section 101 of P.L. 107−147 or section 201 of P.L. 108−27 enacted after December 31, 2005.... This subdivision does not apply unless a federal law change enacted after December 31, 2005, revises section 101 of P.L. 107−147 or section 201 of P.L. 108−27." This exception allowed farm businesses to take advantage of changes to the federal depreciation law, including Section 179, if the federal law was changed after December 31, 2005. One such change was made through Pub. L. No. 108-27 which had increased the Section 179 expense deduction limit for the tax years after 2002 and before 2006 from $25,000 to $100,000 (with a phase out provision) and adjusted the amount annually for inflation.

Pub. L. 109-222 made a further change to Section 179. The Department admits that Pub. L. No. 109-222 did amend Pub. L. No. 108-27 and was enacted after December 31, 2005. The change was a simple extension ("tax extender"). Pub. L. No. 109-22 extended the time period for the increased $100,000 amount of Pub. L. No. 108-27 (greater than the previous $25,000) to include tax years before 2010.[7]

Due to the extension created by Pub. L. No. 109-222, the Wisconsin legislature enacted a new statute related to depreciation for farm businesses with the creation of Wis. Stat. § 71.22(5m)(b) (2007-2008), which stated, "Notwithstanding subs. (4) and (4m),[8] section 101 of P.L. 109−222, related to extending the increased expense

[7] The American Jobs Creation Act of 2004, Pub. L. No. 108-357, had previously extended Section 201 of Pub. L. No. 108−27 from applying to tax years before 2006 to tax years before 2008. Pub. L. No. 109-222 extended Section 201 of P.L. 108-27 from applying to tax years before 2008 to tax years for before 2010.

[8] Subs. 4 & 4m otherwise reject section 101 of Public Law 109-222.

deduction under section 179 of the Internal Revenue Code, applies to property used in farming that is acquired and placed in service in taxable years beginning on or after January 1, 2008, and used by a person who is actively engaged in farming." For Wisconsin tax purposes, the legislature specifically adopted Pub. L. No. 109-222, which granted the greater ($100,000) Section 179 expense deduction for farmers for the tax years 2008 and 2009 for property acquired and placed in service on or after January 1, 2008.

By the terms of Pub. L. No. 109-222, the extension of the higher $100,000 (adjusted for inflation) limit for Section 179 purposes under Pub. L. No. 109-222 would expire after the 2009 tax year unless further extended by Congress and unless Wisconsin adopted the further federal extension. During the Tax Period, the Wisconsin legislature did not adopt any further federal public law as an extender or amendment related to this statute.[9] Therefore, the period of higher Section 179 deductions for farm businesses expired after the 2009 tax year.[10] Without the adoption of an applicable amendment beyond the 2009 tax year, the Wisconsin allowable Section 179 expense deduction for farm businesses reverted back to the $25,000 limit allowed for all businesses and remained as such through the entire Tax Period. The Petitioner took deductions for amounts significantly greater than $25,000 for each year of the Tax Period. Therefore, the Department adjusted and corrected the Petitioner's error.

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[9] In 2013 Act 20, which was enacted June 30, 2013 and published July 1, 2013, the legislature did amend Wis. Stat. § 71.22(5m)(b) to apply the farm exception only to property "acquired and placed in service in taxable years beginning after December 31, 2007, and before January 1, 2010...." This further confirms, by legislative action taken during the Tax Period, that the farm exception ended after the 2009 tax year and did not apply during the Tax Period.

[10] The Department's guidance, Respondent's Ex. 15, issued in October 2010, took the position that the farm exception expired after the 2009 tax year, so it should not be a surprise to taxpayers such as the Petitioner.

As can be seen from this, a second caution to taxpayers is that, just because a deduction, an exemption, or other tax provision existed in some form in one year, it can be changed and may not exist or may not exist in the same form in subsequent years. Taxpayers need to monitor each year for changes in the tax laws, which can be a daunting task. Seeking out professional assistance may be a wise course of action.

Finally, there was also an issue related to what appears to be an attempt by Petitioner to carryover Section 179 deductions from years prior to the Tax Period. The Petitioner claimed expense deductions in excess of the Wisconsin $25,000 expense deduction limit for each year of the Tax Period. Having, in each year of the Tax Period, used the entire expense deduction available, even if a carryover were otherwise allowed, there was no remaining available deduction against which to apply a carryover. Again, Petitioner erred in this and the Department has corrected this error.

CONCLUSIONS OF LAW

1. The limit for Section 179 expense deductions in Wisconsin was $25,000 during the Tax Period.

2. The increased Section 179 expense deduction for farm businesses in Wisconsin expired after the 2009 tax year and did not apply during the Tax Period.

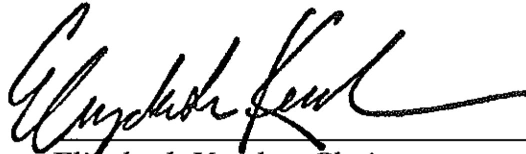
3. The Department correctly added back the Section 179 expense deductions taken by Petitioner in excess of the $25,000 limit for Wisconsin tax purposes.

ORDER

The Department's Motion for Summary Judgment is granted, and the Petition for Review is dismissed.

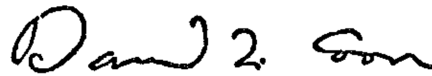
Dated at Madison, Wisconsin, this 15th day of January, 2020.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair

Lorna Hemp Boll, Commissioner



David L. Coon, 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. Alternately, 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 Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier,** 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 *https://wicourts.gov*.

This notice is part of the decision and incorporated therein.