STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 00-2154

DAVID L. GILBERT,
Petitioner-Respondent,

v.

WISCONSIN DEPARTMENT OF
REVENUE,
Respondent-Appellant.

Appeal From a Judgment Entered In The Circuit Court For Waukesha County, The Honorable James R. Kieffer, Circuit Judge, Presiding

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BRIEF OF PETITIONER-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Gilbert anticipate that the briefs will fully present and meet the issues on appeal. Absent something new or unexpected in the Department's reply, therefore, oral argument likely is not necessary in this case. Wis. Stat. (Rule) 809.22.

Because Mr. Gilbert's entitlement to relief is clear under well-established Wisconsin law, publication normally would be unnecessary. Given the Department's refusal to acknowledge the controlling effect of that law, however, publication may be necessary.

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BRIEF OF PETITIONER-RESPONDENT

INTRODUCTION

This case addresses David Gilbert's claim that the controlled substance tax assessment against him dated June 23, 1993, was and is void under *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997). The Tax Appeals Commission ("Commission" or "TAC")dismissed Gilbert's petition for review of actions of the Department of Revenue denying (1) Gilbert's request for redetermination of his claimed controlled substance tax liability and (2) his request for refund of nearly $12,000 unlawfully seized from him pursuant to that assessment (R15 (TAC Ruling and Order (8/27/99); *see id.* (Gilbert's Petition to

TAC)).[1] The Department denied the claims as untimely (R15 (Gilbert's Petition to TAC, Exh. 5)) and the Commission dismissed Gilbert's petition on the same grounds (R15 (TAC Ruling and Order (8/27/99)); App.106-115).

On Gilbert's Petition for Judicial Review of that decision, the Circuit Court for Waukesha County, Hon. James R. Kieffer, presiding, held that Gilbert's petition for reassessment and request for a refund were timely, and therefore reversed the Tax Appeals Commission and remanded the matter to the Commission for decision on the merits of Gilbert's claims (R12; App. 101-05).

STATEMENT OF FACTS

The Department's "Statement of Facts" omits a number of relevant facts. More importantly, it misstates the facts when it asserts that "Gilbert did not contest or appeal the assessment." DOR Brief at 3. If this is meant as a factual assertion, it is wrong. Mr. Gilbert in fact did contest and appeal the assessment when he requested redetermination under Wis. Stat. §71.88(1) through counsel by letter dated March 27, 1998 (R15 (Petition to TAC, Exh. 4)). Mr. Gilbert understands the Department's position that his redetermination request was untimely, but that is a legal issue, and not a factual one.

The Department also misstates the facts in asserting that "[o]n October 13, 1997, . . . the Legislature retroactively reimposed civil liability for the controlled substances tax to any extent necessary to comply with *Hall*." DOR Brief at 4. While it is a fact that the Legislature *sought* to impose civil liability retroactively at that time, the question of whether it in fact succeeded in doing so is a legal question

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[1] Throughout this brief, references to the appeal record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Because counsel for the parties were not served with the Tax Appeals Commision record (R15), counsel is unable to cite to a particular page of that record number. Accordingly, he will refer to the specific document within that record number. Where the referenced material is contained in the Appellant's Appendix, it will be further identified by Appendix page number as App. __.

which remains in dispute.

It is also legally inaccurate to state that the Legislature sought to *re*impose the tax. Because the tax as originally enacted was unconstitutional on its face and thus void, it had no legal existence. While it may be acceptable in layman's terms to state that the Legislature sought to "reimpose" the tax after it was stuck down in *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997), use of that term is inaccurate and misleading when applied in the legal sense. The Legislature simply cannot "reimpose" that which was never legally valid in the first place.

Given the serious omissions from the Department's brief, it is necessary to restate the relevant facts in full. These facts are set forth in the TAC Record (R15 (Petition to TAC at 1-3 and Exhibits 1-5; Response to Motion to Dismiss; Gilbert's Memorandum of Law in Support of Cross-Motion for Summary Judgment and in Response to Motion to Dismiss at 1-2; and Affidavit of Robert R. Henak)). The Department has never disputed these relevant facts, although it had disputed the legal significance of them.

On June 25, 1993, the Wisconsin Department of Revenue issued a Notice of Amount Due to petitioner, claiming taxes, interest and penalties totaling $19,992.00. The claim was alleged to have been based on the Wisconsin Tax on Controlled Substances, Wis. Stat. §§139.87 *et seq.* (R15 (Petition to TAC, Exh. 1; Affidavit of Attorney Robert R. Henak at 1-2)).

From that date through March 11, 1998, the Department seized $11,928.21 from Gilbert based on that notice. The Department views the account as delinquent and apparently intends to continue seizing money from Gilbert to pay the claimed assessment. (R15 (Petition to TAC at 1-2; Affidavit of Attorney Robert R. Henak at 2)).

On January 24, 1997, the Wisconsin Supreme Court held that the controlled substances tax violates the constitutionally guaranteed privilege against self-incrimination. *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997).

By letter to the Department dated November 10, 1997, Mr.

Gilbert requested a refund of the $11,693.83 seized from him up to that time, citing the fact that the drug tax law had been declared unconstitutional in *Hall.* (Petition to TAC, Exh. 2; Affidavit of Attorney Robert R. Henak at 2 & Exh. 2)).

By letter dated November 26, 1997, James G. Jenkins, Chief, Alcohol & Tobacco Enforcement, responded that he was denying Gilbert's refund claim because it was not filed within two years of the assessment, citing "section 13.93(1) [sic], and 71.75(5)." That letter did not contain any notice of appeal rights. (R15 (Petition to TAC at 2 & Exh. 3; Affidavit of Attorney Robert R. Henak at 2 & Exh. 3)).

By letter dated March 27, 1998, undersigned counsel (1) supplemented Gilbert's request for a refund and (2) requested redetermination under Wis. Stat. §71.88(1). (R15 (Petition to TAC at 2 & Exh. 4; Affidavit of Attorney Robert R. Henak at 2 & Exh. 4)).

By Notice of Action dated August 13, 1998, the Office of Appeals denied Gilbert's requests on the grounds that the request for a refund was untimely. (R15 (Petition to TAC at 2-3 & Exh. 5; Affidavit of Attorney Robert R. Henak at 2 & Exh. 5)).

The Department of Revenue has not filed a new assessment based upon the 1997 amendments to the Wisconsin Tax on Controlled Substances. (R15 (Affidavit of Attorney Robert R. Henak at 2)).

Gilbert timely filed a petition for review with the Commission on October 12, 1998, alleging that the purported assessment was invalid and that the Department erred on a number of grounds. (R15).

By motion dated November 5, 1998, the Department sought an order dismissing Gilbert's petition. That motion claimed that Gilbert's request for a refund (and presumably his request for reassessment) was untimely, and that Gilbert did not timely file a Petition for Redetermination from what the Department labeled a "refund denial issued on November 26, 1997." (R15).

On November 23, 1998, Gilbert filed a cross-motion for summary judgment on the grounds that the controlled substance tax assessment dated June 25, 1993, was and is void under *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997), and that the provisions of

1997 Act 27 Sections 2979m, 2979mt, and 9143(2v) cannot be applied retroactively to Gilbert consistent with the state and federal constitutions. Gilbert did not move for summary judgment on his remaining claims. (R15)

The briefs filed by Gilbert and the Department did not indicate that these parties disagreed on any material facts regarding the specific claims raised by Gilbert in his motion. (*See* R15).

A summary of the three precise legal arguments Gilbert made before the Commission follows:

(i) The Timeliness Argument. Gilbert argued that the limitations periods for filing a request for redetermination under Wis. Stat. §71.88(1) and for requesting a refund under Wis. Stat. §71.75(5) do not apply because the drug tax law was declared unconstitutional in *Hall*. The assessment thus was void and, under long-established Wisconsin law, could not trigger the running of a limitations period.

(ii) Void Assessment Argument.--Because the drug tax was declared unconstitutional in *Hall*, the purported assessment was void and Gilbert was entitled to vacation of the assessment and refund of the amounts paid, plus statutory interest.

(iii) Retroactivity Argument.--The 1997 amendments to the drug tax law cannot constitutionally apply to reinstate any alleged liability on the part of Gilbert. Such retroactive imposition of a new tax violates the Due Process and *Ex Post Facto* Clauses of the state and federal constitutions.

(R15).

By Ruling and Order dated August 27, 1999, the Commission granted the Department's motion to dismiss without addressing Gilbert's substantive claims for relief. The Commission granted the Department's motion on the grounds that Gilbert's request for a refund

was untimely under Wis. Stat. §71.75(5) because he did not file that request within 2 years after the Controlled Substance Tax Assessment. The Commission did not address Gilbert's separate request for a redetermination of the initial assessment. Given its analysis of the refund issue, however, it presumably reached the same decision in light of the 60-day limitations period under Wis. Stat. §71.88(1). Based on its conclusion that Gilbert's challenges were untimely, the Commission did not address whether the assessment itself was constitutionally valid. (R15; App. 106-15).

On September 9, 1999, Gilbert timely filed with the Commission a Petition for Rehearing of the Commission's Ruling and Order issued on August 27, 1999 (R15).

By Order dated October 8, 1999, the Commission denied Gilbert's petition for rehearing (R15; App. 116-18).

Gilbert then filed a Petition for Judicial Review of the Commission's Orders on November 2, 1999.(R1). The parties briefed the issues (R8; R9; R11) and, by Decision and Order entered June 21, 2000, the Circuit Court, Hon. James R. Kieffer, reversed:

> There is no question that the *Hall* decision declared Wis. Stat. §139.87-96 unconstitutional. Accordingly, Gilbert's assertion that the *Hall* holding served to effectively invalidate the DOR's 1993 assessment against him is correct. The taxing authority had no jurisdiction to impose the tax in the first place because the authorizing statute was facially unconstitutional and therefore void. While the DOR and TAC are correct that a legally effective assessment would provide the necessary trigger under the statutes at issue here, no such assessment was made or served in this case. Imposition of the drug tax was unconstitutional at the time it was imposed against Gilbert. Neither the statutory imposition of the tax nor the purported assessment had any legal effect; they were void *ab initio*.
>
> Under established Wisconsin case law, an authorizing statute held unconstitutional is void *ab initio*, or from the beginning. Because the authorizing statute at issue in this case was void, so to is the assessment

> resulting from it. A void assessment has no legal existence, and therefore cannot trigger a statute of limitations. Accordingly, the limitations provided under Wis. Stat. §71.75(5) and 71.88(1) have not been triggered. As such, the limitations periods have not run and Gilbert's claim is timely.

(R12:4; App. 104 (citing *Chicago & Northwestern Railway Co. v. Arnold*, 114 Wis. 434, 436, 90 N.W. 434 (1902); *Burlington Northern v. City of Superior*, 149 Wis.2d 190, 441 N.W.2d 234 (Ct. App. 1989); *Family Hospital Nursing Home, Inc. v. City of Milwaukee*, 78 Wis.2d 312, 254 N.W.2d 268, 275 (1977); *Wisconsin Real Estate Co. v. Milwaukee*, 151 Wis. 198, 138 N.W. 642 (1912)).

The Department appealed from that order (R13).

SUMMARY OF ARGUMENT

The Department's brief reflects a high level of confusion regarding the actual issues in this case. There is no issue regarding exhaustion of administrative remedies; the record demonstrates that Gilbert petitioned for redetermination of the original assessment pursuant to §71.88(1) and requested a refund pursuant to Wis. Stat. §71.75(5), and appealed denial of those requests through the proper channels, all the way to the Tax Appeals Commission, and the Department does not assert otherwise.

There likewise is no "sovereign immunity" issue, since the legislature established the very procedures for redetermination and refund used by Gilbert to challenge the invalid tax in this case. *See* Wis. Stat. §§71.88(1) & 71.75(5).

Rather, the sole issue is quite simple, although virtually ignored by the Department: Were Gilbert's petition for redetermination of the original assessment and his request for a refund of the taxes illegally seized under that assessment timely filed? As found by the circuit court, this question turns not on the type of simplistic counting of days preferred by the Department, but on the legal question of when the statutory time periods begin to run.

The limitations periods for filing a petition for redetermination of an assessment under Wis. Stat. §71.88(1) and for requesting a refund under Wis. Stat. §71.75(5) run from the date of the assessment or notice of the assessment. The sole issue on appeal, therefore, involves when a document is deemed an "assessment" such as would trigger running of the limitations periods under those statutes?

Under well-established Wisconsin law, an assessment pursuant to a facially unconstitutional tax law, such as the pre-1997 controlled substance tax law, is void. *E.g.*, *Chicago & Northwestern Railway Co. v. Arnold*, 114 Wis. 434, 436, 90 N.W. 434 (1902). As such, the purported assessment here can have no legal effect, including that of triggering a statute of limitations. *Id.* Because the statutory limitations periods for filing either a petition for redetermination or a request for a refund accordingly had not begun to run at the time Gilbert filed his requests, they likewise had not expired. The circuit court thus was correct that the requests were timely and the Commission must be reversed.

The Department is correct that review is *de novo*. DOR Brief at 2.

ARGUMENT

BECAUSE HIS REFUND AND REDETERMINATION REQUESTS WERE TIMELY FILED, MR. GILBERT IS ENTITLED TO AFFIRMANCE AND TAX APPEALS COMMISSION CONSIDERATION OF HIS CLAIMS ON THEIR MERITS

The Department's argument on appeal can be summarized as follows: Because the doctrine of sovereign immunity protects the state from liability for money damages absent its consent, those seeking money from the state must strictly comply with the statutory prerequisites for seeking such relief, including the requirement to exhaust all administrative remedies. Although the Department argues the point at length, the fact is that Mr. Gilbert does not dispute that basic principle.

The Legislature has waived the state's sovereign immunity to

the extent of authorizing both requests for refunds of taxes under Wis. Stat. §71.75(5) and challenges to assessments under Wis. Stat. §71.88(1). Gilbert does not claim that he is exempt from the statutory prerequisites for such claims. Nor has he sought relief through procedures outside these exclusive procedures established by the Legislature for challenging an assessment or seeking a refund. *Compare Metzger v. Department of Taxation*, 35 Wis.2d 119, 150 N.W.2d 431 (1967) (circuit court without jurisdiction to enjoin assessment of gift tax where taxpayer has not exhausted statutory administrative remedies).

Rather, the dispute in this case centers on a separate issue: Did Mr. Gilbert in fact comply with the statutory prerequisites for his request for redetermination of the assessment under Wis. Stat. §71.88(1) and for his refund request under Wis. Stat. §71.75(5)? The circuit court held that he had complied with those requirements, while the Department asserts in conclusory terms that he has not.

The only defect cited by the Department concerns the timeliness of Gilbert's requests.[2] Under Wis. Stat. §71.88(1), a taxpayer may seek redetermination within 60 days of an assessment. Under Wis. Stat. §71.75(5), the taxpayer may seek a refund within 2 years after the assessment.

If the mere issuance of something labeled an "assessment" triggered the limitations periods under these statutes, Mr. Gilbert's requests would have been untimely and he would lose. While the purported assessment in this case was issued June 25, 1993, Mr. Gilbert did not seek a refund under §71.75(5) until November 10, 1997, and did not seek redetermination under §71.88(1) until March 27, 1998.

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[2] Mr. Gilbert sought redetermination of the assessment under §71.88(1) and a refund of the illegally seized taxes under §71.75(5). When the Department denied those requests, he appealed to the Tax Appeals Commission under Wis. Stat. §§71.88(2) & 73.01. And, when the Tax Appeals Commission dismissed his appeal and denied his request for reconsideration, he sought relief from the circuit court as authorized by Wis. Stat. §73.015. The Department does not dispute that Gilbert followed the appropriate procedures if the initial requests were timely.

Long established Wisconsin law holds, however, that the mere issuance of something labeled a "tax assessment" does not trigger the running of statutory deadlines for challenging the purported assessment. Rather, there must be a constitutionally valid event to "trigger" the running of the limitations period.

When the taxing authority had no jurisdiction to impose the tax in the first place, either because the statutes did not authorize a particular tax or, as here, the authorizing statute was facially unconstitutional and therefore void, the purported assessment does not trigger the running of the statutory time period. Rather, that "assessment" is void *ab initio* and can be challenged at any time. *See, e.g., Chicago & Northwestern Railway Co. v. Arnold*, 114 Wis. 434, 436, 90 N.W. 434 (1902) (When "there was a want of authority *ab initio* to set the machinery of taxation in motion, or, in other words, there was no jurisdiction on the part of the taxing officers, . . . there is nothing for a statute of limitation to act upon") (citing *Smith v. Sherry*, 54 Wis. 114, 11 N.W. 465 (1882)). *See also Burlington Northern v. City of Superior*, 149 Wis.2d 190, 441 N.W.2d 234, 241 (Ct. App. 1989); *Family Hospital Nursing Home, Inc. v. City of Milwaukee*, 78 Wis.2d 312, 254 N.W.2d 268, 275 (1977); *Wisconsin Real Estate Co. v. Milwaukee*, 151 Wis. 198, 138 N.W. 642 (1912).

The Courts have distinguished between assessments which are void, as in this case, for want of authority to issue them, and those which are valid but for some failure to comply with a required procedure in imposing an otherwise valid tax. In the former class of cases, the assessment is "void *ab initio*" and no tax legally may be imposed. In the latter, the assessment is merely voidable, and a tax legally may be imposed so long as the taxing authority follows the proper procedures. *See Hermann v. Town of Delavan*, 215 Wis.2d 370, 572 N.W.2d 855, 862-63 (1998); *Family Hospital Nursing Home, Inc.*, 254 N.W.2d at 275-76; *Ash Realty Corp. v. Milwaukee*, 25 Wis.2d 169, 130 N.W.2d 260 (1964); *Wisconsin Real Estate Co.*, 151 Wis. at 204-05. Only in the "void *ab initio*" situation is the assessment deemed insufficient to trigger running of the limitations period.

This case, of course, falls within the first category of cases. The "trigger" under Sections 71.75(5) and 71.88(1) is an "assessment." Wis. Stat. §71.75(5) provides that "[a] claim for refund may be made within 2 years after the assessment of a tax or an assessment to recover all or part of any tax credit . . .." Wis. Stat. §71.88(1) similarly provides that, with certain exceptions not relevant here, "any person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of refund may, within 60 days after receipt of the notice petition the department of revenue for redetermination."

While a legally effective assessment thus would provide the necessary "trigger" under the statutes at issue here, no such assessment was made or served in this case. Because imposition of the controlled substance tax was unconstitutional on its face, as the Supreme Court held in *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997), the state had no authority to assess it against Mr. Gilbert, regardless how diligently it may have followed the required procedures.

Under established Wisconsin law, therefore, the 60-day deadline under §71.88(1) and the 2-year deadline under §71.75(5) never began to run. Because the assessment was void, "there is nothing for a statute of limitations to act upon." *Arnold*, 114 Wis. at 436. Gilbert's requests thus were timely under those statutes and he is entitled to affirmance of the circuit court's order reversing the Tax Appeals Commission.

While the legal principles mandating reversal here are well-established, the Department seeks to distinguish them away on the grounds that they were first established in cases involving state statutes limiting challenges to local property tax assessments. DOR Brief at 14-16, 26-27. Yet, the Department cites neither authority nor any rational basis for the exemption it seeks, and there certainly is none in the cases themselves. Each states the principle in broad terms, focusing on the taxing authorities' lack of jurisdiction to impose the tax rather than the nature of the tax or the particular subdivision of the state which seeks to impose it. *See, e.g.*, *Smith*, 54 Wis. at 123:

> "The power of taxation is an attribute of sovereignty, and can be exercised *only* under express authority of the sovereign. Every tax in this state must be expressly

> authorized by statute. The state acts through its municipalities, and the municipalities act through their officers; . . . and when municipalities or their taxing officers assume to levy a tax or to institute a tax proceeding not authorized by statute, they are outside their functions, and are not acting *virtute officii*. They are not in the exercise of the sovereign power of taxation, and are as powerless to tax as private persons. Their whole proceeding is a mere usurpation, and absolutely void throughout for all purposes. In such a case there is nothing for the statute of limitations to act upon."

(Emphasis in original; underlining added), quoting *Knox v. Cleveland,* 13 Wis. 245, 327-28 (1860).

> In the absence of the statute, the result would be the same. The land being exempt from taxation, there was a want of authority *ab initio* to set the machinery of taxation in motion, or, in other words, there was no jurisdiction on the part of the taxing officers. Where such is the case, this court has held that there is nothing for a statute of limitation to act upon.

Arnold, 114 Wis. at 436 (citing *Smith*, *supra*).

> The theory for not applying the limitation period is that the tax assessment was void ab initio so there was nothing for a statute of limitation to act upon.

Family Hospital Nursing Home, 254 N.W.2dat 275 (citations omitted).

In each of these cases, the Court allowed the plaintiff to bring what would otherwise have been an untimely lawsuit under the applicable statute of limitations but for the fact that the assessment necessary to trigger the running of that limitations period was void. None of the authorities establishing Gilbert's right to reversal here even suggests, let alone holds, that a different result would be required either where the statutory deadline or limitations period concerns taxation by the state rather than a municipality or where the void tax is on an occupation rather than property.

Issues of sovereign immunity and exhaustion are simply

irrelevant under these cases; if the limitations period has run, action is barred regardless whether the defendant is the state, a municipality, or a private party. If, on the other hand, the deadline or limitations period has not run, either because the time period has not lapsed or because the assessment is void so the period never began to run, then the action may proceed.

This line of authorities likewise did not, as the Department claims, authorize taxpayers to pursue remedies outside the exclusive remedies provided by statute. To the contrary, the available procedures under those decisions remained exactly those otherwise authorized and required to be followed by law. The statute at issue in many of the more recent cases, Wis. Stat. §74.31(1) (now codified at Wis. Stat. §74.35), for instance, specifically authorized the bringing of an action in circuit court after exhaustion of administrative remedies and imposed a 1-year deadline for filing such claims.[3]

All these cases did was recognize that a void assessment, which can have no legal effect, would not trigger the running of the limitations period or statutory deadline for bringing such an action. The required procedure or "manner" prescribed by the legislature remained unchanged; the courts merely held that the limitations period had not expired in the absence of a legally effective assessment necessary to trigger the running of that limitations period.[4]

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[3] In *IBM Credit Corp. v. Village of Allouez*, 188 Wis.2d 143, 524 N.W.2d 132, 136 (1994), the Supreme Court did hold on other grounds that the remedies provided in Wis. Stat. §74.35 (1989-90) were not exclusive.

[4] The vast majority of the state's authorities and argument thus are simply irrelevant. Gilbert is not seeking to excuse any failure to comply with the statutory requirements for challenging the assessment. *Compare Keith & Ellen Bower v. Wis. Dept. of Revenue*, Docket No. 99-I-19 (May 11, 1999) (App. 123-28) (taxpayers sought relief from limitations period based on "mitigating circumstances"); *Swanson v. State*, 441 S.E.2d 542 (N.C. 1994) (class refund claims still must comply with prescribed administrative procedures).

Nor does he seek to rely on procedures for redress not authorized by law. *Compare Hogan v. Musolf*, 163 Wis.2d 1, 471 N.W.2d216 (1991) (42 U.S.C. §1983 class action no substitute for compliance with administrative appeal procedure); *Lick v. Dahl*, 285 N.W.2d 594 (S.D. 1979) (class action for refunds not permitted); (continued...)

The Department's suggestion that the issue in this case is "whether the Legislature can and has placed a time limitation on the filing of all claims for refund of taxes from the state treasury,"DOR Brief at 17, thus is inaccurate. Mr. Gilbert does not dispute that the Legislature in fact did place such time limitations under §§71.88(1) and 71.75(5). The issue is not whether Gilbert should be excused from the procedural requirements, but whether he has in fact complied with them. In other words, the issue is whether a legally void assessment, as in this case, has the effect of triggering the time periods set forth in those statutes. Under established Wisconsin law, it clearly does not.

The absence of a valid "trigger" in this case also explains why the decision in *Department of Revenue v. Hogan*, 198 Wis.2d 792, 543 N.W.2d 825 (Ct. App. 1995), *cert. denied*, 519 U.S. 819 (1996), is neither controlling nor even very relevant to the issue before this Court. In *Hogan*, the Court held that the Commission had no authority to certify a class action of federal retirees seeking refunds of state income taxes unconstitutionally collected on their federal retirement benefits. The Court did not decide, and apparently was not asked to decide, whether any individual's request was time-barred.

Nor did the unusual, 3-member concurring opinion in *Hogan* decide this issue. Rather, in explaining why they believed their result to be unjust, the concurring judges noted the 4-year limitations period under Wis. Stat. §71.75(2), along with other factors, and stated that "[o]ur decision *may thus result* in persons otherwise entitled to refunds losing their rights because they have relied on this class action and it is too late, expensive or inconvenient for them to file individual claims for a refund." 543 N.W.2d at 836 (concurring opinion; emphasis added). The concurrence did not in fact hold that the claims would be

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[4](...continued)
Woosley v. State, 3 Cal. 4th 758, 13 Cal. Rptr. 2d 30, 838 P.2d 758 (1992) (same).

Finally, *L.S. Village, Inc. v. Lawrence Township*, 8 N.J. Tax 287 (June 6, 1985) (App. 129-37), merely applied the established principle that a party who has litigated an issue once to final judgment is not necessarily entitled to reopen or relitigate that judgment later. Here, of course, the validity of the purported assessment against Gilbert has never before been litigated and resolved.

time-barred, but instead expressed its concern that they may be so barred. The concurrence neither discussed nor distinguished the controlling Wisconsin authority relied upon by Gilbert.

More important, however, is the fact that *Hogan* could have no effect here even if the Court had ruled that the limitations period in that case would bar relief. Once again, the "trigger" applicable here under §71.75(5) and §71.83(1) is a constitutionally valid assessment. The limitations statute at issue in *Hogan*, however, relied upon a different trigger: the deadline for one's income taxes.

> Section 71.75(2) provides in pertinent part, "With respect to income taxes . . ., refunds may be made if the claim therefor is filed within 4 years *of the unextended date under this section on which the tax return was due.*"

Hogan, 543 N.W.2d at 835 (concurring opinion; emphasis added).

The constitutional challenge made by the claimants in *Hogan* was to the state's inclusion of their federal retirement benefits as taxable income; they did not challenge the constitutional validity of the date for filing taxes. Success on their constitutional claim would not have rendered the filing date of their taxes void, so the limitations period under §71.75(2) legally was "triggered" on the tax filing date.

Here, on the other hand, the asserted "trigger" was itself void, having no legal existence. Because the assessment which is alleged to have triggered the limitations periods under §71.75(5) and §71.83(1) had no legal effect, those periods have never begun to run and thus have never expired.[5]

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[5] The same critical distinction renders irrelevant the federal cases cited by the Department, which likewise address a limitations statute triggered, not by an assessment, but by the taxpayer's filing of a return. *See United States v. Dalm*, 494 U.S. 596 (1990); *Webb v. United States*, 66 F.3d 691 (4th Cir. 1995), *cert. denied*, 519 U.S. 1148 (1997); *Vintilla v. United States*, 931 F.2d 1444 (11th Cir.), *rehearing denied*, 942 F.2d 798 (1991); 26 U.S.C. §6511(a).

Also irrelevant on the same grounds are *Fonger v. Department of Treasury*, 1990 WL 96942 (Mich. Tax Tribunal 1990), *Bower*, *supra*; *Matter of Estate of Erdmann*, 447 N.W.2d 356 (S.D. 1989); and *Matter of Gerald E. Smalley, et al.*, 1996 WL 903469 (Iowa Dept. Rev. Fin., October 31, 1996) (App. 155-62), each of (continued...)

The Department's reference to *Burlington Railroad v. Superior*, 159 Wis.2d 434, 464 N.W.2d 643 (1991), takes the following language out of context. DOR Brief at 15.

> Although sec. 74.73 has been amended several times after *Family Hospital* and the void *ab initio* analysis may be of limited value, we agree with the result the court of appeals reached.

464 N.W.2d at 647.

That decision involved the issue of whether a particular statute granting interest at the legal rate of 5% on judgments in cases involving "unlawful" taxes applied to refunds of moneys paid under a state tax law which was unconstitutional on its face and therefore void *ab initio*. The Supreme Court previously had held that the statute did *not* apply to such cases. *See Family Hospital Nursing Home, supra.*

Far from rejecting established authority on the legal ineffectiveness of a void assessment, therefore, the *Burlington Northern* Court's reference to *Family Hospital's* "void *ab initio*" analysis as being "of limited value" merely referred to the specific context of that case. Because the statute had been amended several times since *Family Hospital*, the specific analysis of that case was of only limited value in construing the current, amended statute. *See Burlington Northern*, 464 N.W.2d at 647.

* * *

Underlying the Department's entire argument in this case is the mistaken assumption that the authorities supporting Gilbert's right to relief are somehow at odds with the deadlines set in §§71.75(5) and 71.88(1), but, that simply is not the case. Those authorities merely interpret and apply the tax statutes in light of established law that a void tax assessment, such as that at issue here, can have no legal effect and therefore cannot trigger a statutory deadline or limitations period. The required procedures remain in effect, as do the limitations periods.

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[5](...continued)
which addressed limitations periods running from either the date a return was filed or the due date of the return.

Because there has been nothing legally sufficient to trigger those limitations periods, however, they simply have not run. The requests were timely, in short, because the statutory limitations periods were never "triggered" and thus have never expired.

This principle is neither new to the law, having been established in this state for more than 100 years, nor unreasonable. A void assessment, after all, is one that was and is inherently invalid and could not be made valid. This is not a case in which the Department simply failed to follow appropriate procedures in assessing an otherwise valid tax. Rather, the tax law was constitutionally invalid, and the state thus had no power to assess the tax against Gilbert under any circumstances. *E.g.*, *Burlington Northern v. City of Superior*, 149 Wis.2d 190, 441 N.W.2d 234, 241 (Ct. App. 1989) (where authorizing statute held unconstitutional, tax assessment likewise "void ab initio or from the beginning").

Under the Department's argument, the Tax Appeals Commission and the courts are to ignore the established constitutional invalidity of an assessment and allow the state not only to retain funds which it had no authority to seize, but also to continue garnishing funds based on an unconstitutional and void assessment. In essence, the Department seeks to legitimize the theft of private property by the state. Such a result is neither rational nor consistent with Wisconsin law.

The state's throw-away suggestion that the fact the assessment is void necessarily deprives Gilbert of any right to challenge it, DOR Brief at 22, likewise is unsupported by law or logic. Indeed, it is frivolous to argue that the same defect which renders the assessment unconstitutional and void acts to deprive the tax payer of *any* procedure to challenge the Department's continued resort to that assessment as grounds to seize and retain his property and income. The Legislature clearly did not intend to place the taxpayer in a Catch-22 situation.

Whether on grounds of judicial estoppel, which bars litigants from playing fast and loose with the courts, *e.g.*, *State v. Fleming*, 181 Wis.2d 546, 181 N.W.2d 837, 840-41 (Ct. App. 1993), or by reference to the principle that laws must not be construed to produce such

patently absurd results, *e.g.*, *Campenni v. Walrath*, 180 Wis.2d 548, 509 N.W.2d 725, 729, *supplemented on denial of rehearing*, 513 N.W.2d 602 (1994), the Department's suggestion must be rejected.

The Supreme Court addressed and rejected a virtually identical claim in the following language:

> As the facts of this case demonstrate, not all taxing bodies will voluntarily refund taxes, even when the taxes are admittedly unlawful. We find that this result is absurd, unfair, and clearly not intended by the legislature.

IBM Credit Corp. v. Village of Allouez, 188 Wis.2d 143, 524 N.W.2d 132, 136 (1994). The Court held that the type of argument made by the Department here "would create not only an absurd result, but also a harsh result." *Id.* That position would "frustrate the general purpose of the taxing statutes" by "allow[ing] the Village to keep an admittedly incorrect and unlawful amount of tax." *Id.*

CONCLUSION

Because the assessment which is alleged to have triggered the limitations periods under §71.75(5) and §71.83(1) had no legal effect, those periods have never begun to run and thus have never expired. Gilbert's petition for redetermination of the assessment and his request for a refund thus were timely, and he respectfully asks that the Court affirm the circuit court's order reversing the Commission's Ruling and Order to the contrary.

Dated at Milwaukee, Wisconsin, November 10, 2000.

Respectfully submitted,

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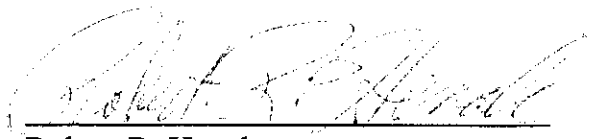

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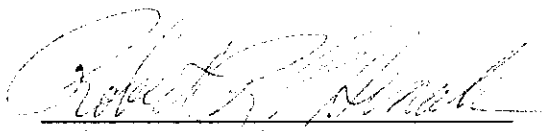
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,927 words.



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