COURT OF APPEALS
DECISION
DATED AND RELEASED

November 5, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3129

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

John D. Hennick and Jane A. Hennick,

Petitioners-Appellants,

v.

Wisconsin Department of Revenue,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. John D. Hennick and Jane A. Hennick, *pro se*, appeal from a judgment of the circuit court affirming the Wisconsin Tax Appeals Commission's decision that denied their claim for an income tax refund for taxes paid on income from a private pension. The Hennicks argue that § 71.05(1)(a), STATS. (1989-1990),[1] which exempts certain public employee

[1] Section 71.05(1)(a), STATS. (1989-1990), provides that the following shall be exempt from

pension income from taxation, violates the uniformity clause of the Wisconsin Constitution and the equal protection clauses of the United States and Wisconsin Constitutions.[2] We reject their arguments and affirm.

Mr. Hennick receives pension income due to his employment from 1956 through 1983 with a private entity, the Public Expenditure Survey of Wisconsin. In 1993, the Hennicks filed amended tax returns for the years 1989 through 1992 seeking a refund of approximately $2,000. Following the Wisconsin Department of Revenue's conclusion that Mr. Hennick's pension income was not exempt from taxation, the Hennicks sought review before the Commission.[3]

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state taxation:

> All payments received from the U.S. civil service retirement system, the U.S. military employe retirement system, the employe's retirement system of the city of Milwaukee, Milwaukee county employes' retirement system, sheriff's annuity and benefit fund of Milwaukee county, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public and employe trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963, but such exemption shall not exclude from gross income tax sheltered annuity benefits.

This section has subsequently been amended, but such amendments are not relevant to this decision.

[2] *See* Article VIII, § 1 and Article I, § 1 of the Wisconsin Constitution, and U.S. Const. amend. XIV, § 1.

[3] This was actually the Hennicks' third challenge to the State's taxation of Mr. Hennick's pension benefits. The Commission noted that the issues presented in this case were "fundamentally identical" with the issues raised in the two earlier cases, with the only real difference being the set of years under review. Although the Department of Revenue raised claim preclusion as a defense, neither the Commission nor circuit court addressed the issue. Because we address the Hennicks' constitutional arguments, we need not address the application of claim preclusion. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

When review is sought in the court of appeals on an administrative agency's ruling, we review the agency's conclusions independent of the trial court's decision. ***Davis v. Psychology Examining Bd.***, 146 Wis.2d 595, 599, 431 N.W.2d 730, 732 (Ct. App. 1988). The facts of this case are undisputed, and we are presented only with the Hennicks' constitutional challenges. "We generally accord deference to the Tax Appeal Commission's legal conclusions" on challenges regarding the constitutionality of a tax statute, "although we are not bound by those conclusions." *See* ***McManus v. DOR***, 155 Wis.2d 450, 453, 455 N.W.2d 906, 907 (Ct. App. 1990).

The Hennicks first argue that § 71.05(1)(a), STATS., violates the uniformity clause of the Wisconsin Constitution. We disagree. Our state constitution's uniformity clause applies only to taxation of property, not income. *See* ***McManus***, 155 Wis.2d at 454, 455 N.W.2d at 907.

The Hennicks next argue that § 71.05(1)(a), STATS., violates the equal protection clauses of the Wisconsin and United States Constitutions.[4] When dealing with equal protection challenges, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." ***City of Cleburne, Tex. v. Cleburne Living Center***, 473 U.S. 432, 440 (1985). When no suspect classifications are present, however, the presumption of validity is even greater. *See* ***City of New Orleans v. Dukes***, 427 U.S. 297, 303 (1976). Further, "where a tax measure is involved, the presumption of constitutionality is strongest." ***Simanco, Inc. v. DOR***, 57 Wis.2d 47, 54, 203 N.W.2d 648, 651 (1973). "The burden is upon the challenger ... to prove abuse of legislative discretion beyond a reasonable doubt." ***Racine Steel Castings v. Hardy***, 144 Wis.2d 553, 560, 426 N.W.2d 33, 35 (1988). The standard used for determining whether the legislature has abused its discretion is "not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification." ***Omernik v. State***, 64 Wis.2d 6, 19, 218 N.W.2d 734, 742 (1974).

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[4] The equal protection clauses under our state and federal constitutions are substantially the same. *See* ***State ex rel. Fort Howard Paper Co. v. Lake Dist. Bd.***, 82 Wis.2d 491, 510 n.10, 263 N.W.2d 178, 188 n.10 (1978).

First, there are no "inherently suspect distinctions" involved in § 71.05(1)(a), STATS. Second, as noted in the October 12, 1989, decision of the Tax Appeals Commission involving the Hennicks, the statute is not without a reasonable basis—"namely[,] that the exclusion was thought by its framers as desirable to correct or ameliorate pay inequities for Milwaukee municipal employees, perhaps to keep those employees from moving on to other more lucrative positions." Finally, the Hennicks' evidentiary submissions only demonstrated that Mr. Hennick's pension income was taxed differently. As the Commission accurately explained, "the mere establishment of a difference in the taxation treatment accorded certain types of incomes does not *per se* indicate that those differences result from distinctions made through legislative enactments which are not reasonable."

Therefore, we affirm the judgment of the circuit court, which affirmed the Commission's ruling that Mr. Hennick's pension income was not exempt from taxation.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.