

GIDDINGS & LEWIS INTER CORP I9904 I9905 050184 TAC

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STATE OF WISCONSIN
DEPARTMENT OF REVENUE
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STATE OF WISCONSIN
TAX APPEALS COMMISSION

* * * * *

GIDDINGS & LEWIS INTERNATIONAL CORP. *
 AND GIDDINGS & LEWIS, INC. *
 142 Doty Street *
 Fond du Lac, Wisconsin 54935 *

Petitioners, *

vs. *

WISCONSIN DEPARTMENT OF REVENUE *
 P.O. Box 8933 *
 Madison, Wisconsin 53708 *

Respondent. *

* * * * *

DOCKET NOS. I-9904
 and I-9905

RULING AND ORDER ON
 MOTION TO DISMISS
 FOR LATE FILING

(Drafted by
 Commissioner Boykoff)

on

Pursuant to this Commission's notice, this Commission convened in Room 611A of the State Office Building, 101 South Webster Street, GEF-2, Madison, Wisconsin on February 9, 1984, at 1:30 p.m., for the purpose of hearing arguments on the respondent's motions that this Commission issue an order dismissing petitioners' petitions for review for the reason that petitioners failed to file proper petitions for review within 60 days after receipt of the respondent's notice of denial of petitioners' petitions for redetermination as required by s.73.01(5)(a), Stats. and, therefore, this Commission lacks jurisdiction to review the alleged grievances of the petitioners. Petitioners also submitted motions to quash or dismiss respondent's motions for the reason that respondent's motions were untimely and invalid or, in the alternative, to dismiss petitioners' petitions for review on the grounds that respondents' notices of action were legally insufficient.

Petitioners, Giddings & Lewis International Corp. and Giddings & Lewis, Inc. (now, by merger and dissolution, AMCA International Corporation) appeared by Thomas W. Grebe, Assistant Secretary of both petitioners, and by their attorney, Robert A. Schnur of Michael, Best & Friedrich, Milwaukee, Wisconsin. Respondent, Wisconsin Department of Revenue, appeared by its attorney, James L. Greenwald. Exhibits were received into the record. Both parties then offered briefs on their motions and in opposition to the opposing party's motions.

GIDDINGS & LEWIS INTERNATIONAL CORP., DOCKET NO. I-9904

1. Under date of April 21, 1982, respondent issued petitioner Giddings & Lewis International Corp. (Docket No. I-9904) an assessment for \$36,470.20 (\$26,185.60 tax and \$10,284.60 interest) covering fiscal years ending January 31, 1974 and January 31, 1977 through 1980. That assessment was addressed to petitioner at 142 Doty Street, Fond du Lac, Wisconsin 54935.

2. Under date of June 16, 1982, this petitioner filed with respondent a petition for redetermination signed by Thomas W. Grebe, Assistant Secretary and Manager - Taxes on corporate stationary of Giddings & Lewis, Inc., containing the above address.

3. Under date of March 23, 1983, respondent issued its notice of action, addressed to the above address, denying the petition for redetermination. This document was received by petitioner on March 24, 1983.

4. Petitioner's petition for review of respondent's action on the petition for redetermination was sent by certified mail, return receipt requested, postmarked May 25, 1983 and arrived in the office of this Commission on May 27, 1983.

5. At all times relevant to these proceedings, Giddings & Lewis International Corp. operated as a domestic international sales corporation (DISC) under section 992 of the Internal Revenue Code, having no employees of its own. The corporation's gross income consisted almost entirely of commissions received by it on account of export sales made by its affiliated corporations in Wisconsin and elsewhere. This petitioner's "statutory office" (i.e., its office registered with the Secretary of State where papers can be sent) was 142 Doty Street, Fond du Lac Wisconsin 54935.

GIDDINGS & LEWIS, INC., DOCKET NO. I-9905

6. Under date of July 22, 1982, respondent issued petitioner Giddings & Lewis, Inc. (Docket No. I-9905) an assessment for \$199,845.71 (\$84,141.55 tax and \$115,704.16 interest) covering calendar years 1976 through 1979. That assessment was addressed to this petitioner at 142 Doty Street, Fond du Lac, Wisconsin 54935.

7. Under date of September 22, 1982, this petitioner filed with respondent a petition for redetermination signed by Thomas W. Grebe, Assistant Secretary and Manager - Taxes on corporate stationery containing the above address.

8. Under date of March 22, 1983, respondent issued its notice of action, addressed to the above address, denying the petition for redetermination. This document was received by this petitioner on March 23, 1983.

9. Petitioner's petition for review of respondent's action on the petition for redetermination was sent by certified mail, return receipt requested, postmarked May 25, 1983 and arrived in the office of this Commission on May 27, 1983.

BOTH APPEALS

10. In 1982 and 1983, while these appeals were being pursued, the ownership or corporate structure of each petitioner was changing. These changes, in context of the key dates involved in these appeals, are as follows:

A. June 16, 1982. Giddings & Lewis International Corp. ("International") mailed a timely petition for redetermination to the respondent.

B. June 26, 1982. Giddings & Lewis, Inc. ("Old Giddings & Lewis") owned all of International's stock and transferred all of such stock to Marshall & Huschart Machinery Company, an Indiana corporation, also wholly owned by Old Giddings & Lewis.

C. September 22, 1982. Old Giddings & Lewis mailed a timely petition for redetermination to the respondent.

D. October 4, 1982. Old Giddings & Lewis was merged into AMCA Enterprises Corp., a Delaware corporation wholly owned by AMCA International Corporation, a Delaware corporation with headquarters in Hanover, New Hampshire. AMCA Enterprises Corp. then changed its name to Giddings & Lewis, Inc. and will be referred to herein as "New Giddings & Lewis."

E. December 6, 1982. International and the respondent entered into a "Stipulation and Agreement" extending until March 31, 1983 the respondent's deadline for action with respect to International's petition for redetermination. The purpose of

entering into this extension agreement was so that both appeals here at issue could be considered together, to save time of both the petitioners and the respondent. Mr. Grebe signed the document on behalf of petitioner International and identified himself as Assistant Secretary of the corporation on that document.

F. December 31, 1982. New Giddings & Lewis was liquidated into AMCA International Corporation and became a unit thereof.

G. March 23, 1983. Respondent mailed a Notice of Action denying Old Giddings & Lewis's petition for redetermination. This was received in Fond du Lac on March 23, 1983 and at AMCA International Corporation's New Hampshire headquarters after March 31, 1983 (after being forwarded by New Giddings & Lewis' personnel).

H. March 24, 1983. Respondent mailed a Notice of Action denying International's petition for redetermination. This was received in Fond du Lac on March 24, 1983.

I. May 25, 1983. Giddings & Lewis, Inc. (now an unincorporated division of AMCA International Corporation) and International each mailed by certified mail, return receipt requested, postmarked May 25, 1983, petitions for review to the Commission; these were received by the Commission on May 27, 1983.

J. July 1, 1983. The respondent filed with the Commission Notices of Motion and supporting documents moving to dismiss the petitions for review filed by Giddings & Lewis, Inc. and International on the basis that such petitions were not filed with the Commission within 60 days after the petitioners' receipt of the respondent's Notices of Action.

K. September 13, 1983. A hearing was begun before this Commission on respondent's motion to dismiss; this was adjourned after some evidence was introduced and testimony taken.

L. November 14, 1983. Each petitioner filed a Notice of Motion and supporting documents (including the two memoranda) moving to quash the respondent's Notices of Action, or, in the alternative, to dismiss the petitions for review on the grounds that such Notices of Action were untimely and invalid.

M. February 9, 1984. Another hearing was held before this Commission, at which the earlier hearing was vacated and the parties began anew, on both the respondent's motions to dismiss and the petitioners' motions to quash or dismiss. Pursuant to an agreement of the parties and the Commission, all of the evidence submitted at the September 13, 1983 hearing was withdrawn and then reintroduced, together with additional evidence.

11. About 10 months intervened between (a) the filing of the petitions for redetermination by International (June 16, 1982) and Old Giddings & Lewis (September 22, 1982) and (b) the Department's issuance of its notices of action (March 23, 1983 to International and March 22, 1983 to Giddings & Lewis, Inc.)

12. During this time, the parties had several communications regarding these appeals. For example, respondent's Appellate Bureau wrote at least 3 letters to International (on June 30, and December 1 and 17, 1982) and at least 2 letters to Old Giddings & Lewis (on October 5 and December 17, 1982). Each letter was mailed to the same address (at 142 Doty Street, Fond du Lac, Wisconsin 53935) and to the attention of Mr. Thomas Grebe. Each

letter evoked a response from each petitioner, reasonably leading respondent to believe that it was communicating with the correct person at the correct address. In addition, a conference was held on February 15, 1983, attended by a member of the Appellate Bureau staff, one James J. Dix and John D. Schauss of Arthur Young & Company, Milwaukee. This conference was arranged, though not attended, by Mr. Grebe.

13. At no time during the above period, either in writing or during the February 15, 1983 conference, did either Mr. Grebe or Mr. Schauss inform Mr. Dix or any other Appellate Bureau conferee of (a) the 1982 corporate changes involving petitioners, nor (b) any other way to reach or give notice to either petitioner other than through Mr. Grebe at the Doty Street, Fond du Lac address.

14. Prior to respondent's issuing notices of action, Mr. Dix telephoned Mr. Grebe at the telephone number contained on both petitions for redetermination. Mr. Dix testified that he discussed the assessments briefly and advised Mr. Grebe that respondent was going to deny both petitions for redetermination; that Mr. Grebe did not ask that the notices of denial be sent to any other address than respondent had been using; and that he was not told of the changes in the corporate nature of both petitioners by either Mr. Grebe or Mr. Schauss.

15. Respondent's Appellate Bureau was acting reasonably and in accordance with its past communications with petitioners when it mailed its notices of action on the petitions for redetermination to the petitioners to the Doty Street, Fond du Lac address, to Mr. Grebe's attention.

16. Mr. Grebe testified that when he received and signed certified mail receipt cards for the 2 notices of action, neither of the petitioner corporations were in existence; that he was then employed by AMCA International Corp. at its office at an unincorporated unit at 142 Doty Street, Fond du Lac, Wisconsin 54935, the site of one of the corporation's machine tool shops; that he worked under the direction of the corporation's tax department at its corporate headquarters in Hanover, New Hampshire; that he forwarded the notices of action to the New Hampshire office for direction as he did not have the authority to decide whether or not to appeal further; that the corporation considered not appealing either matter; and that when the corporation decided to appeal both matters, he drafted the petitions for review, based on some written materials provided by Arthur Young & Company, and submitted them to this Commission. Mr. Grebe forwarded the respondent's notices of action to AMCA's New Hampshire headquarters when he received them; the date or dates on which they were received there is not ascertainable but both dates were subsequent to March 31, 1983.

17. During the 10 months between the petitioners' filing of their petitions for redetermination and the serving of respondent's notices of action on them (more specifically identified in Finding of Fact 11 above), there was additional, unrelated correspondence between respondent's Compliance Bureau and the successor to petitioner Giddings & Lewis, Inc. by which the 1982 corporate reorganizations were brought to respondent's attention:

A. Under date of October 27, 1982, respondent's Compliance Bureau sent AMCA Enterprises Corp. at a Delaware address

a form letter stating that AMCA was granted authority to transact business in Wisconsin. The form contained 3 numbered paragraphs headed "Franchise/Income Tax Return Filing Requirements", "Declarations of Inactivity" and "Estimated Tax Requirements" and was accompanied by a questionnaire to be completed and returned, titled "New Corporation Questionnaire".

B. The questionnaire was completed, signed by Mr. Grebe as Assistant Secretary and Manager-Taxes, dated November 22, 1982, and returned to respondent's Compliance Bureau. This form identified both the old business name and the new business name as "Giddings & Lewis, Inc."; identified the business acquisition date as October 4, 1982; and gave the Doty Street address as the Wisconsin address of the corporation. Virginia Kreger is a clerical assistant employe of respondent to whom this form and 300 to 400 per month like it are routed. She testified that she uses the document to send out any forms requested on it; if any questions regarding Wisconsin business are checked "yes", she sends a list of such corporations to respondent's Audit Bureau; and the document's function is to update respondent's computer records by placing the corporation on a list for receiving franchise tax returns. Nothing is done to the records of the prior corporation listed, she said.

C. Under date of December 23, 1983, Mr. Grebe wrote the Compliance Bureau about the October 4, 1983 corporate restructuring of Giddings & Lewis, Inc. and the proposed December 31, 1983 merger into AMCA International Corp. With that letter was an application for a seller's permit and employee

identification number for "AMCA International Corporation", giving "Giddings & Lewis" as the trade or business name and directing "all forms must be sent here", designating the Doty Street, Fond du Lac address. Brad Wood, supervisor of the Compliance Bureau registration unit to which such material is sent, testified that his unit received applications for and issued about 20,000 seller's permits per year, and issued 12,000-15,000 employer identification numbers per year. He stated that no other use is made of this application information by respondent until a problem arises, such as where to serve papers or a notice of amount due, except that the sales tax account of the former owner is deactivated.

18. The 60 day period provided for in s.73.01(5)(a), Stats. for Giddings & Lewis International Corporation's filing a proper petition for review with this Commission expired on May 23, 1983. (Docket No. I-9904).

19. The 60 day period provided for in s.73.01(5)(a), Stats. for Giddings & Lewis, Inc.'s filing a proper petition for review with this Commission expired on May 23, 1983. The 60th day was Sunday, May 22, 1983 and the final day for filing an appeal was extended to the following business day (Monday, March 23, 1983) by s.990.001(4)(b), Stats. (Docket No. I-9905).

20. Because the 60 day periods for appealing the notices of action here under review expired, the assessments relating to them became "final and conclusive" (s.71.12(1)(c)) prior to the filing of the petitions for review. Therefore, this Commission lacks jurisdiction to hear the matters of which the petitioners complain.

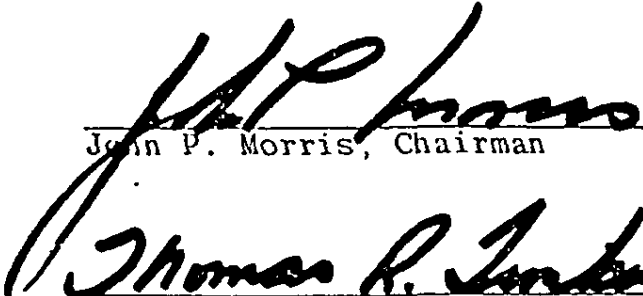
Therefore,

IT IS ORDERED


That petitioners' motions are denied and respondent's motions to dismiss the petitions in the above-entitled matters are granted and the petitions for review are dismissed.

Dated at Madison, Wisconsin, this 1st day of May, 1984.

WISCONSIN TAX APPEALS COMMISSION



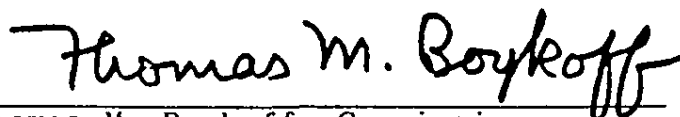
John P. Morris, Chairman




Thomas R. Timken, Commissioner

(Not Participating)

Catherine M. Doyle, Commissioner



Thomas M. Boykoff, Commissioner



William Bradford Smith, Commissioner

Attachment: "NOTICE OF APPEAL INFORMATION"

WISCONSIN TAX APPEALS COMMISSION

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

As required by s.227.11(2), Wis. Stats., created by Chapter 378, Laws of 1981 (effective May 7, 1982), the following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.12 of the Wisconsin Statutes, a copy of which is printed on the reverse side hereto. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The requirements and procedures of section 227.12 should be followed in petitions for rehearings. The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.16 of the Wisconsin Statutes, a copy of which is printed on the reverse side hereto. The requirements and procedures of section 227.16 should be followed in petitions for judicial review. The petition should be filed in circuit court and served upon the Wisconsin Tax Appeals Commission within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for judicial review should name the Department of Revenue as respondent and must be served upon that department within 30 days of filing the petition for judicial review in circuit court.

This notice is part of the decision and incorporated therein.

Note: Section 227.12 and 227.16 Wis. Stats. see reverse side.

STATE OF WISCONSIN
TAX APPEALS COMMISSION

* * * * *

GIDDINGS & LEWIS INTERNATIONAL CORP.	*	DOCKET NOS. I-9904
AND GIDDINGS & LEWIS, INC.,	*	and I-9905
	*	
Petitioners,	*	<u>O P I N I O N</u>
	*	
vs.	*	
	*	
WISCONSIN DEPARTMENT OF REVENUE,	*	
	*	
Respondent.	*	
	*	

* * * * *

The facts involving the corporate form and ownership of the petitioners in this case are lengthy and complex. The issue presented to this Commission for resolution is, however, more straightforward: did each petitioner file a timely petition for review with this Commission? I believe that neither did.

At the outset, counsel for each party should be commended for their thoughtful, thorough and well-argued briefs. They have been most helpful to this Commission.

The statutory framework for this issue is contained in ss.71.12(1)(c) and 73.01(5)(a), Stats. A portion of s.71.12(1)(c), Stats. reads as follows:

". . . If a petition (for review) is not filed with the (tax appeals) commission within the time provided in s.73.01. . . the (Department of Revenue) assessment. . . shall be final and conclusive."

If a petition for review is not timely filed with this Commission, the Department of Revenue's assessment, in the clear and emphatic statutory language, is "final and conclusive". It cannot, thereafter, be contested before this Commission or in the courts.

Section 73.01(5)(a), Stats. states this another way.

It reads, in part:

"Any person who has filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department may . . . within 60 days after the redetermination but not thereafter, file a petition for review of the action of the department. . . with. . . the (tax appeals) commission. . . ." (emphasis added)

This statute does not explicitly set out the manner for determining the precise date of receipt of a notice of redetermination, i.e., the date triggering the 60 day statutory period. However, the 60 day period has long been interpreted, by both the Department and this Commission, to begin running on the day following a taxpayer's receipt of the notice of action on the petition for redetermination. Cf., s.990.001(4)(a), Stats.

Petitioners contend that s.73.01(5)(a), relating to the 60 day period, is ambiguous in not specifying by whom or where the redetermination notice must be received to begin the 60 day period. In view of this ambiguity, petitioners assert that the period should begin the date on which the notice is received at a corporate office containing officials who are authorized to respond to the notice. In these cases, the periods would begin running some time after March 31, 1983, when the notices arrived in the Hanover, New Hampshire office of AMCA International Corp. If the Commission agrees with this, then petitioners have filed their petitions for review well within the 60 day period provided in s.73.01(5)(a), Stats.

There is no dispute over the fact that the Department's redetermination notice to Giddings & Lewis International Corp. was received at this petitioner's Fond du Lac address on March 24, 1983. There is also no dispute over the fact that the Department's redetermination notice to Giddings & Lewis, Inc. was received at the same Fond du Lac address on March 23, 1983. If these dates triggered the running of the 60 day period, as I believe they do, the last day for petitioners' filing petitions for review with this Commission was May 23, 1983. The petitions were filed 2 days later and, in the language of s.71.12(1)(c), Stats., at a time when the assessments in dispute were already "final and conclusive".

In the present case, approximately 10 months intervened between the filing of the first petition for redetermination (June 16, 1982 by Giddings & Lewis International, Inc.) and the Department's issuance of its notices of redetermination (March 22 and 23, 1983). During this period, the Department's Appellate Bureau conferee (Mr. Dix) who was considering the petitions for redetermination had several contacts with Mr. Grebe and at least one contact (a conference) with Mr. Schauss. In all of the Department's contacts with Mr. Grebe, he appeared to clearly represent and speak for both petitioners. He signed both petitions for redetermination; he received mail at the 142 Doty Street, Fond du Lac address and was reachable by telephone there. He arranged the personal conference with Mr. Schauss and Mr. Dix, although Mr. Grebe did not attend the meeting. He also signed all correspondence to the Department during this time as a corporate

officer of each petitioner. At no time during these 10 months was Mr. Dix told, either by Mr. Grebe or Mr. Schauss, to contact petitioners at any place other than at the Fond du Lac address and in any way other than through Mr. Grebe.

The Department's Appellate Bureau was, therefore, acting in accordance with an established pattern of communications, and most reasonably, when it mailed its redetermination notices to the petitioners at their Fond du Lac address to Mr. Grebe's attention. Their receipt, as evidenced by a certified mail receipt, triggered the running of the 60 day period to appeal to this Commission.

Petitioners assert that the Department sent the redetermination notices to the wrong person and to the wrong address. They contend that the Department should have been put on notice of each petitioner's correct corporate status and address (in New Hampshire) because of additional correspondence, unrelated to these appeals, between the Department's Compliance Bureau and the successor to petitioner Giddings & Lewis, Inc. This additional correspondence is described in Finding of Fact 17.

This assertion downplays the 10 month period during which the Department's Appellate Bureau was communicating with the petitioners at the Fond du Lac address and telephone number. At any time during this period, either petitioner or any of its spokespersons could have directed the Appellate Bureau to direct further communications to New Hampshire; however, they did not do so. In addition, one of the communications discussed in Finding of Fact 17 contained an express statement to direct communications to the Fond du Lac address. The Appellate Bureau conferee was

acting in accordance with an established line of communication, to a person who had long been speaking on behalf of both petitioners.

Respondent argued that this Commission is precluded from considering petitioners' motions and arguments on them because petitioners did not file timely appeals with this Commission. Respondent's position relied upon this Commission's holding in K Mart Corp. v. Wisconsin Department of Revenue, Tax Appeals Commission, Docket No. S-9867 (January 27, 1984), on appeal to Dane County Circuit Court.

In the K Mart case, the Department moved to dismiss K Mart's petition for review to this Commission because it was not timely filed. K Mart countered with a motion for an order to the effect that the Department's action on K Mart's petition for redetermination was not acted upon within the time period provided by law and, therefore, the Department's action was null and void. The Commission determined that the Department's notice denying K Mart's petition for redetermination was received by K Mart on March 10, 1983 (the date triggering the 60-day period to appeal to this Commission); that on May 10, 1983, K Mart mailed to this Commission by certified mail, return receipt requested, its petition for review to this Commission; and that the 60-day period for filing an appeal to this Commission expired on May 9, 1983. The Commission concluded that because the petition for review to this Commission was filed late, the Commission lacks jurisdiction over both the substantive merits of the appeal and the motions filed by K Mart.

The case currently before the Commission is distinguishable from the K Mart case. Here, the Commission can examine petitioners'

motions and the record relating to them.

In the K Mart case, the date on which K Mart received the Department's notice of action on its petition for redetermination was clearly March 10, 1983 and not in issue; the time period for filing a petition for review with this Commission began the next day. In the current case, petitioners are disputing the dates on which each received the Department's notice of action on their petitions for redetermination. They argued that the notices were untimely, misaddressed and invalid, and did not begin the running of the 60-day appeal period on March 23 and 24, 1983, as the Department asserted. Because the petitioners' challenged the Department's assertion as to when the time period began, it was necessary to examine the record and petitioners' arguments regarding this fact and to make a finding regarding the correct dates.

The specific holdings of this Commission in these cases are that the redetermination notices which began the 60 day appeals periods under s.73.01(5)(a) were received on March 23 and 24, 1983; that the 60 day periods for each redetermination notice began running the following day; that the last day for filing timely appeals to this Commission was May 23, 1983; and that the petitions for review were filed with this Commission on May 25, 1983. Because the present petitioners failed to comply with the 60 day requirement, the assessments about which they complain became final and conclusive before they filed their petitions for review. This Commission, therefore, does not have jurisdiction over the appeals and does not have the authority to consider the substantive merits raised in the petitions for review.

Submitted by:

Thomas M. Boykoff

Thomas M. Boykoff, Commissioner