

BRENARD NEAL 94S90 051194 TAC

Don Davis
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MAY 1994
State of Wisconsin
Department of Revenue
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Legal Staff
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STATE OF WISCONSIN
TAX APPEALS COMMISSION

 NEAL G. BRENARD *
 1609 North Prospect Ave., #202 *
 Milwaukee, WI 53202 * DOCKET NO. 94-S-90
 *
 Petitioner, * ACTION TO SET ASIDE
 * RULING AND ORDER ON
 vs. * MOTION TO DISMISS;
 *
 WISCONSIN DEPARTMENT OF REVENUE * REVISED RULING AND
 P.O. Box 8933 * ORDER ON MOTION
 Madison, WI 53708 * TO DISMISS
 *
 Respondent. *

JOSEPH P. METTNER, COMMISSIONER:

A hearing on the respondent's motion to dismiss the petitioner's petition for review, based upon the petitioner's alleged failure to file a timely petition for review with this commission, was held in Milwaukee, Wisconsin, on May 11, 1994.

The petitioner represented himself. The respondent was represented by Attorney Lili Best Crane.

At the conclusion of the May 11, 1994 motion hearing, an oral Ruling and Order was issued, denying the respondent's motion to dismiss. The petitioner and the respondent were given a copy of a MEMORANDUM OF ORAL RULING AND ORDER ON MOTION TO DISMISS. Because the Ruling and Order issued on May 11, 1994 was not dispositive of the case before the Commission, the presiding Commissioner was able to render an oral Ruling and Order in conformity with § 73.01(4) (b), Stats.; and § TA 1.31(2), Wis. Admin. Code.

Under §§ 806.07(1)(a) & (h) and 806.07(2), Stats., it is appropriate that the full Commission, acting sua sponte set aside

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the May 11, 1994 oral Ruling and Order, because that Ruling and Order was premised upon a material error of law. In construing the applicability of the limitation for action noted in § 77.59(6)(a), Stats., the presiding Commissioner incorrectly determined that the respondent's record admission of its failure to act on the petitioner's petition for redetermination within 6 months of filing cast some infirmity upon the original assessment, precluding dismissal of the petition for review on grounds of timeliness.

Although the language of § 77.59(6)(a), Stats., ostensibly mandates that the respondent act upon a petition for redetermination within 6 months of its receipt, this statute has been held to be directory in nature as applied to the respondent. Wisconsin Department of Revenue v. Vonasek & Schieffer, Inc. & Hayward Community School District, Dane County Circuit Court, Case No. 85-CV-5726, July 1, 1986, CCH Wisconsin Tax Reporter ¶202-754.

Once the directory nature of § 77.59(6)(a), Stats., is considered in light of the facts of this case, any shadow cast upon the original assessment by the respondent's failure to act on the petition for redetermination disappears, revealing only the facts forming the basis for the respondent's motion to dismiss for failure to file a timely petition for review. Accordingly, this commission makes the following revised findings:

1. A notice of assessment was issued to the petitioner by the respondent on May 14, 1991.
2. The petitioner filed a petition for redetermination with the respondent on June 21, 1991.

3. On May 13, 1992, the respondent issued its notice of action, denying the petition for redetermination. The respondent's affiant states that a copy of this notice was served on the petitioner on July 15, 1992.

4. Upon questioning by the Commission, the petitioner admitted that he personally received a copy of the respondent's notice of action letter no later than July 16, 1993.

5. The petitioner filed his petition for review with this commission on March 4, 1994.

6. Construing the facts in the light most favorable to the petitioner as non-movant, the 60-day period within which the petitioner was required to file his petition for review with this commission under § 73.01(5), Stats., expired on or around September 15, 1993.

7. Because the petition for review was not filed with this commission in a timely manner, the Commission lacks subject matter jurisdiction to hear the case. This is true in spite of any attendant confusion between the taxpayer and the respondent's Appellate Bureau. See, K Mart Corp. v. Wisconsin Department of Revenue, WTAC Docket No. S-9867 (January 27, 1984), CCH Wisconsin Tax Reporter ¶202-311, aff'd, Dane County Circuit Court, Case No. 84-CV-1012 (November 20, 1984), CCH Wisconsin Tax Reporter ¶202-517.

8. The respondent has shown good and sufficient cause for the granting of its motion.

Therefore,

IT IS SO ORDERED

1) That the Commission's May 11, 1994 oral Ruling and Order is hereby set aside; and

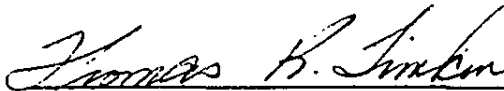
2) That the respondent's motion is hereby granted and the petition for review in this case is hereby dismissed.

Dated at Madison, Wisconsin this 18th day of May, 1994.

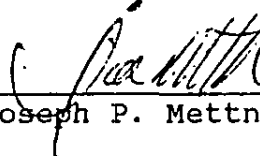
WISCONSIN TAX APPEALS COMMISSION

(Concurs In Result)

Mark E. Musolf, Chairperson



Thomas R. Timken, Commissioner



Joseph P. Mettner, Commissioner

ATTACHMENT:
"Notice of Appeal Information"