
KULAS MICHAEL 89IS05 031891 TAC

February

STATE OF WISCONSIN
TAX APPEALS COMMISSION

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MICHAEL R. KULAS
1646 South layton Blvd
Milwaukee, Wisconsin 53215

DOCKET NO. 89-I-505

Petitioner,

RULING AND ORDER

vs.

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

Respondent,

STATE OF WISCONSIN
DEPARTMENT OF REVENUE
MAR 19 1991
RECEIVED
LEGAL DIVISION

* * * * *

THOMAS R. TIMKEN, CHAIRPERSON

Appearances:

For Petitioner: Wilford W. Elliott, CPA
For Respondent: Deborah Rychlowski, Attorney

The above-entitled matter came on to be heard by this Commission at the State Office Building in Milwaukee, Wisconsin at 10:00 a.m. on November 7, 1990 pursuant to a Notice of Motion and Motion brought by the Wisconsin Department of Revenue to dismiss the petition for review on the alleged grounds that the petitioner failed to file a proper petition for review with this Commission within 60 days after the receipt of the respondent's notice of denial of the petition for redetermination as required by Sec. 73.01(5)(a) of the Wisconsin Statutes and therefore, the State of Wisconsin, Tax Appeals Commission lacks jurisdiction to review the alleged grievances of the petitioner.

Based on the record before it, including briefs of counsel, this Commission hereby rules and decides as follows:

1. That by notice from the Wisconsin Department of Revenue dated July 15, 1988, an assessment of income tax was issued against the petitioner, Michael R. Kulas, in the total amount of \$39,190.17.

2. On August 24, 1988, the petitioner filed a petition for redetermination with the respondent.

3. There is in the record an unsigned and undated Power of Attorney appointing Wilford W. Elliott as petitioner's attorney-in-fact to represent him before the Wisconsin Department of Revenue on income tax matters for the period involved. Although clouded and inclusive, the record supports the conclusion that this Power of Attorney was received by the respondent, Wisconsin Department of Revenue, during the relevant period involved herein.

4. That by notice dated August 16, 1989, mailed to the petitioner by certified mail, return receipt requested, and received by the petitioner on August 17, 1989, the respondent denied in part and granted in part the petitioner's petition for redetermination. A copy of the respondent's denial was mailed to Attorney Wilfred W. Elliott. While the record is once again unclear, it appears that Attorney Elliott received the denial on or about August 21, 1989.

5. The petitioner's petition for review of the respondent's action on the petition for redetermination was received by this Commission on August 20, 1989, and was signed by Attorney Wilfred W. Elliott.

6. Section 73.01(5)(a) of the Wisconsin Statutes provides as follows:

(5) APPEALS TO COMMISSION.

(a) Any person . . . who is aggrieved by the redetermination of the department may, within 60 days after the redetermination . . . of the department . . . but not thereafter, file with the clerk of the commission a petition for review of the action of the department. . . ."

7. On April 16, 1990 this Commission issued a Ruling and Order on a companion sales tax matter, (Michael R. Kulas vs. Wisconsin Department of Revenue, Docket No. 89-S-505), ruling that the 60-day appeal period contained above dated from receipt of the respondent's action by Attorney Elliott, under power of attorney - not the petitioner. At that time this Commission was not aware of the precedent set in the 3rd Circuit, United States Court of Appeals case of Richard T. Gallion and Audrey R. Gallion vs. United States of America 68-1 USTC par 9213 and the U. S. District Court, Western District of Arkansas in the case of John Roy Campbell and Dorothy Joe Campbell vs. United States of America 69-2 USTC par 9730.

8. In the second page of the Gallion decision (supra), the federal court of appeals stated:

"In this scrambled situation, in which all the parties, to some extent, failed to take action which might reasonably have been expected of them, is there any valid room for this court, in effect, to amend the specific command of the statute by judicially adding the words 'or by other person designated by him' immediately following 'taxpayer' in the next to the last line of the statute? We think not.

The court then went on to note:

. . . the specific command of the statute that the two year permissive period dates from the mailing of the

notice of disallowance to the taxpayer. There is no reference to a mailing to someone else, even if so requested or directed. No officer or employee of the United States is authorized to waive or vary the requirements of the statute. Finn v. United States, 123 U.S. 227. 8 S. Ct. 82, 31 L. Ed 128 (1887) A fortiori the taxpayers could not 'direct' that the notices be sent to someone else. As already pointed out, however, their request or direction was that the notices be sent to them, in care of their attorney. When they received the notices, sent to them directly, they got just what otherwise would have been relayed through the attorney."

9. While federal and state statutory time to appeal mandates are somewhat different, we find the rationale in the Gallion case (supra) controlling.

10. The 60-day period provided for in Sec. 73.01(5)(a) of the Wisconsin Statutes expired on October 16, 1989.

11. The respondent has shown good and sufficient grounds for the granting of its motion.

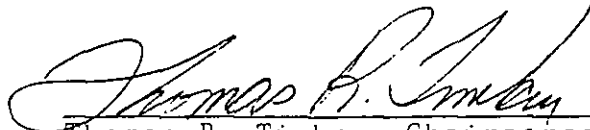
Therefore,

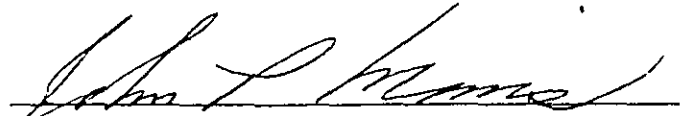
IT IS ORDERED

That the respondent's motion to dismiss the petitioner's petition for review is hereby granted.

Dated at Madison, Wisconsin,
this 18th day of March,
1991.

WISCONSIN TAX APPEALS COMMISSION


Thomas R. Timken, Chairperson


John P. Morris, Commissioner


Robert C. Junceau, Commissioner

Attachment: "NOTICE OF APPEAL INFORMATION"