

DANIEL FRANKLAND
W10632 Hwy J
Lodi, WI 53555,

**DOCKET NOS. 01-I-07
and 01-I-98**

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708,

Respondent.

THOMAS M. BOYKOFF, COMMISSIONER:

This matter comes before the Commission on two motions of respondent, Wisconsin Department of Revenue ("Department"), to dismiss petitioner's petitions for review on several grounds

Gary R. Wollack, CPA, of Wollack & Wollack, represents petitioner. Attorney Sheree Robertson represents the Department.

On February 26, 2001, the Department filed a motion to dismiss the petition for review in Docket No. 01-I-07, covering income tax years 1993 through 1996, on the ground that it was not timely filed under Wis. Stat. § 73.01(5)(a). In the same filing, the Department moved to dismiss the petition for review in Docket No. 01-I-98, involving the denial of petitioner's refund claim for income tax year 1992, on the basis that the claim was not timely filed

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under Wis. Stat. § 71.75.

On July 18, 2001, the Department also moved to dismiss Docket No. 01-I-98 on the ground that petitioner failed to state a claim upon which relief can be granted under Wis. Stat. § 802.06(2)(a). The motion reiterated that petitioner's claim for refund was not timely filed under Wis. Stat. § 71.75(2) and (5), and opposed a request in petitioner's petition for review that the Commission waive 1992 filing periods to allow a refund.

Having considered the entire record, the Commission finds, rules, and orders as follows:

FINDINGS OF FACT

Tax Years 1993 through 1996 - Docket No. 01-I-07

1. Under date of March 27, 2000, the Department issued an assessment to petitioner covering tax years 1993 through 1996, for \$12,464.91, including tax, interest, penalties, and fees.
2. Petitioner filed with the Department a petition for redetermination dated May 18, 2000.
3. Under date of October 31, 2000, the Department denied the petition for redetermination, and petitioner received the denial notice on November 2, 2000.

4. On January 11, 2001, petitioner filed with this commission a petition for review of this notice of action *and* of another notice of action¹. On January 12, 2001, petitioner submitted one \$25 filing fee.

5. The 60-day period for filing a petition for review from the notice of action letter dated October 31, 2000 expired on January 2, 2001.

Tax Year 1992 - Docket No. 01-I-98

6. Because petitioner had not filed his 1992 Wisconsin income tax return, on November 7, 1994 the Department issued an estimated assessment to petitioner for that year for \$3,518, including tax, interest, negligence penalty, and late filing fee. Petitioner did not contest this assessment and paid it on January 11, 1995.

7. On December 19, 1997, petitioner filed his 1992 Wisconsin income tax return and claimed a refund of \$3,184. This tax return was filed more than four years after its April 15, 1993 original due date.

8. By letter dated March 22, 2000, the Department denied the refund claim.

9. Under date of May 18, 2000, petitioner filed a petition for redetermination with the Department, which was denied under date of October 31, 2000.

10. On January 11, 2001, petitioner filed a petition for review of the Department's October 31, 2000 action regarding 1992. This petition for

¹ See discussion of Docket No. 01-I-98 in Findings No. 6-10.

review also appealed the Department's October 31, 2000 action on petitioner's petition for redetermination of the assessment for tax years 1993 through 1996. Only one \$25 filing fee was submitted to the Commission.

RULING

Tax Years 1993 through 1996 - Docket No. 01-I-07

Wisconsin Statutes § 73.01(5)(a) provides, 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 of revenue may, . . . within 60 days after the redetermination but not thereafter, file with the clerk of the [Tax Appeals] commission a petition for review of the action of the department At the time of filing the petition, the petitioner shall pay to the commission a \$25 filing fee

The requirement of timely filing has been strictly interpreted by the Commission and by the judiciary. For example, see *McDonald Lumber Co. v. Dep't of Revenue*, 117 Wis. 2d 446 (1984).

Petitioner did not file his petition for review with the Commission within 60 days after his receipt of the Department's notice of action on his petition for redetermination. The petition was filed nine days late. Therefore, the Commission has no jurisdiction over his appeal and must grant the Department's motion.

Tax Year 1992 - Docket No. 01-I-98

The Department asserts that petitioner's December 19, 1997 claim for refund is barred by Wis. Stat. § 71.75(2) and (5).

Section 71.75 (1991-92) is titled "Claims for refund." Subsection (2) provides, in part, ". . . refunds may be made if the claim therefor is filed within 4 years of the unextended date . . . on which the tax return was due."

Petitioner's 1992 income tax return was due on April 15, 1993. Four years after the unextended due date ended on April 15, 1997. Petitioner's December 19, 1997 income tax return was deemed a claim for refund and was filed more than seven months late. This statute, therefore, does not permit the Department to pay the refund claim.

Section 71.75(5) (1991-92) reads, in part: "A claim for refund may be made within 2 years after the assessment of a tax . . . assessed by office audit . . . and paid if the assessment was not protested by the filing of a petition for redetermination. . . ."

Because petitioner had not filed a 1992 Wisconsin income tax return, under date of November 7, 1994 the Department issued an estimated assessment for \$3,518. Petitioner did not file a petition for redetermination with the Department to contest the assessment. Instead, on January 11, 1995 he paid the assessment.

On December 19, 1997, petitioner filed his 1992 Wisconsin income tax return and claimed a \$3,184 refund. The return was not filed within two

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years of the Department's assessment (i.e., by November 7, 1996). Therefore, this statute does not authorize the Department to pay the refund claim.

In *Bower v. Wisconsin Dep't of Revenue*, Wis. Tax Rep. (CCH) ¶ 400-421 (WTAC 1999), this commission held that it lacks subject matter jurisdiction to examine the validity of a refund claim if a petitioner fails to file a refund claim within a statute's specified deadline. This principle was affirmed in *Gilbert v. Wisconsin Dep't of Revenue*, 2001 WL 614889 (Ct. App. 2001). These cases support the Department's position that a claim for refund which is not filed within the time prescribed by statute is not within the Commission's jurisdiction.

In his petition for review, petitioner requests that this commission "waive the 1992 filing periods and allow [petitioner] his refund. Also, [petitioner] request[s] that all negligence penalties and negligence interest assessments be dropped."

This commission is created by statute and has only the authority given it by the statutes. See, Wis. Stat. § 73.01. The statutes do not empower the Commission to waive "filing periods" or statutes of limitation.

The negligence penalty which was imposed by the Department under Wis. Stat. § 71.83(1)(a)1 is mandatory. That statute reads, in part:

In case of failure to file any [income tax] return . . . on the due date . . ., including any extension of time for filing, unless it is shown that the failure is due to reasonable cause

and not due to wilful neglect, there *shall* be added to the amount required to be shown as tax on the return 5% of the amount of the tax if the failure is for not more than one month, with an additional 5% for each additional month or fraction thereof during which the failure continues, not exceeding 25% in the aggregate." (Emphasis added.)

Petitioner has not alleged any facts that would show his failure to file timely was due to reasonable cause.

Petitioner has failed to file the required \$25 filing fee for each appeal. § 73.01(5)(a). He failed to comply with the Commission's Order to submit the fee by September 26, 2001. Therefore, on the Commission's own motion, petitioner's appeal must also be dismissed on the ground of not following an order of the Commission. § 805.03.

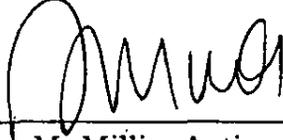
ORDERS

1. The Department's motion to dismiss petitioner's petition for review in Docket No. 01-I-07, covering income tax years 1993 through 1996, is granted on the basis of non-timely filing of the petition.

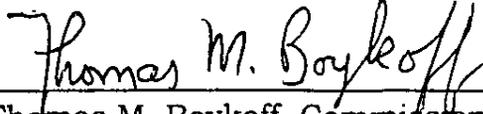
2. The Department's motion to dismiss petitioner's petition for review in Docket No. 01-I-98, covering income tax year 1992, is granted on the basis that petitioner did not file his claim for refund within the time periods prescribed by statute and on the basis that petitioner did not comply with an order of the Commission pursuant to Wis. Stat. § 805.03.

Dated at Madison, Wisconsin, this 4th day of October, 2001.

WISCONSIN TAX APPEALS COMMISSION



Don M. Millis, Acting Chairperson



Thomas M. Boykoff, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

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