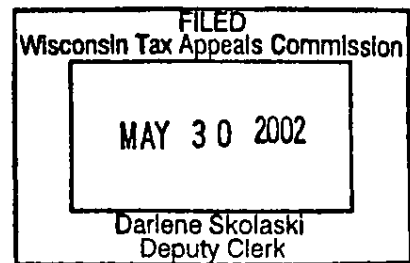


LESNIK CARRIE DAVID EA AL 00I261 00I228 231 053002 TAC



STATE OF WISCONSIN
TAX APPEALS COMMISSION

CARRIE A. LESNIK
6213 S. 13th Street, Apt. #2
Milwaukee, WI 53221

DOCKET NO. 00-I-261

DAVID G. LESNIK
DAVID G. AND TERRY ANN LESNIK
5010 S. 37th Street
Greenfield, WI 53221,

DOCKET NO. 00-I-228
DOCKET NO. 00-I-231

Petitioners,

vs.

RULING AND ORDER

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



Respondent.

THOMAS M. BOYKOFF, COMMISSIONER:

These cases come before the Commission on the motion of the respondent Wisconsin Department of Revenue ("Department") to dismiss the petition for review of petitioner Carrie A. Lesnik ("Ms. Lesnik") on the grounds that she has failed to obey orders of the Commission, failed to participate in telephone status conferences, and otherwise failed to prosecute her appeal.

The Department alternatively moves to dismiss Ms. Lesnik's petition for review on the bases of issue preclusion and claim preclusion, on the grounds that Ms. Lesnik agreed to be bound by the decision of the U. S. Tax Court on her appeal of an IRS assessment on the same issue here involved, but failed to notify the Commission and

the Department of the May 17, 2001 decision of that court.

These three dockets involve assessments in the alternative. The matters of David G. Lesnik and David G. and Terry Ann Lesnik were held in abeyance pending a ruling in Ms. Lesnik's case.

Ms. Lesnik represents herself. David G. and Terry Ann Lesnik represent themselves. Attorney Michael J. Buchanan represents the Department.

With its motion, the Department filed an affidavit, attachments, and a brief. Ms. Lesnik has filed a letter opposing the motion.

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

FINDINGS OF FACT

1. Under date of March 20, 2000, the Department issued an assessment to Carrie A. Lesnik for \$6,923.82. Under date of April 29, 2000, Ms. Lesnik filed a petition for redetermination with the Department which, under date of October 4, 2000, the Department denied. Ms. Lesnik then filed a timely appeal to the Commission.

2. Also under date of March 20, 2000, the Department issued an assessment to David G. Lesnik ("Mr. Lesnik") for \$1,958.22 and an assessment to David G. and Terry Ann Lesnik for \$3,800.18. Under date of April 4, 2000, Mr. Lesnik filed petitions for redetermination with the Department which, under date of October 4, 2000, the Department denied. Timely appeals were then filed with the Commission.

3. In Ms. Lesnik's petition for review, she indicated that the issue in

these assessments is whether she owes income tax on payments to her by Mr. Lesnik under a judgment of divorce. In her petition, Ms. Lesnik stated "the State of Wisconsin follows the same guidelines as the IRS so the judgement [sic] from the U S Tax Court should apply to both state and Federal taxes." (Petition for Review, p. 2.)

4. Four telephone conferences were held by the Commission to discuss the issues in these cases, on the following dates: February 21, 2001; March 7, 2001; June 6, 2001; and October 9, 2001. Ms. Lesnik participated in only the March 7, 2001 conference.

5. In the March 8, 2001 Scheduling Order Memorandum following the March 7, 2001 telephone conference, the Commission stated that "These matters are postponed pending a determination by the U.S. Tax Court in *Carrie A. Lesnik v. Commissioner*, Docket No. 12201-99S."

6. In the June 7, 2001 Scheduling Order Memorandum following the June 6, 2001 telephone conference, the Commission stated that if Ms. Lesnik "does not appear by telephone on August 8 [subsequently rescheduled to October 9], her appeal may be dismissed, pursuant to Wis. Stat. 802.10(7). In any event, [she] will provide the Commission and Attorney Buchanan with a copy of the U.S. Tax Court decision in her pending case when she receives it."

7. In the October 9, 2001 Status Conference Memorandum and Order following the telephone conference held on the same date, the Commission stated:

On October 8, 2001, Ms. Lesnik told a Commission representative that she would not participate in this telephone conference at her mother's home at 10:00 a.m. on October 9. When the Commission

telephoned her mother, at that time, it learned she was not there. The Commission then telephoned Ms. Lesnik at work and she declined to participate in the conference, saying she cannot receive telephone calls at work. This appears to reflect an attitude of non-cooperation in this case that is inappropriate.

The Commission then ordered: "That Ms. Lesnik arrange to participate in the next telephone conference or the Commission may dismiss her appeal under Wis. Stat. 802.10(6) and (7) (violation of a Commission pretrial order) and § 805.03 (failure to prosecute)."

8. The U. S. Tax Court filed its decision on *May 17, 2001* in *Carrie A. Lesnik v. Commissioner of Internal Revenue*, Docket No. 12201-99S. The Court concluded that, for the years 1995 through 1997, the full amount of payments received by Ms. Lesnik from Mr. Lesnik under a July 9, 1984 divorce judgment "must be included in her income." Slip op. at 6.

9. Ms. Lesnik did not provide the Commission with a copy of the U. S. Tax Court decision. Instead, it was presented to the Commission by the Department on December 17, 2001, as an exhibit to the affidavit filed with the Department's motion to dismiss Ms. Lesnik's petition for review.

10. On August 17, 2001, Ms. Lesnik sent a fax to the Commission in which she stated "Final paperwork had to be to Judge Dinan on August 20, 2001 awaiting a decision. . . ."

11. Under date of October 8, 2001, Ms. Lesnik sent a fax to the Commission in which she stated "As of today I have not received a Final decision from the Tax Court."

12. In a letter to the Commission dated March 30, 2002, Ms. Lesnik

stated "I appealed the decision on August 14, 2001"

13. In a responsive letter to the Commission dated April 5, 2002, Attorney Buchanan wrote:

The May 17, 2001 Tax Court Decision states, "This case was heard pursuant to the provisions of section 7463 of the Internal Revenue Code . . ." When a taxpayer elects to have her case heard under the provisions of section 7463, as [Ms. Lesnik] did, she agrees that the Tax Court decision is final and cannot be appealed. . . .

Attorney Buchanan's statement is supported by the language of Internal Revenue Code § 7463(b), which states "FINALITY OF DECISIONS.—A decision entered in any case in which the proceedings are conducted under this section shall not be reviewed in any other court"

CONCLUSIONS OF LAW

1. Ms. Lesnik has failed to obey orders of the Commission, failed to participate in telephone status conferences, and generally failed to prosecute her appeal.

2. By pursuing her case at the Commission after the U. S. Tax Court's May 17, 2001 decision, Ms. Lesnik's petition was frivolous and groundless, and primarily for delay.

RULING

At least two statutes require parties to cooperate with the Commission in resolving cases appealed to the Commission.¹ Under Wis. Stat. § 802.10(6), the

¹ The statutes underlie the Department's motion and are adopted for practice before the Commission by Wis. Admin. Code § TA 1.31(1), which states, in part, "Motions shall be brought in the manner provided under the rules of civil procedure in force in the circuit courts of this state"

Commission may require a party to be reasonably available by telephone to consider possible settlement of the dispute. Scheduling orders are commonly issued after consulting the parties for confirmation of their availability. Violation of a scheduling order authorizes the Commission to dismiss the action. *See* Wis. Stat. §§ 802.10(7) and 805.03. Secondly, under § 805.03, "For failure of any [petitioner] to prosecute . . . or to obey any order of [the Commission]", the Commission may dismiss a petitioner's petition for review.

Ms. Lesnik failed to comply with two scheduling orders of the Commission. The first was issued on March 8, 2001 and amended on March 22, 2001 for a June 6, 2001 telephone conference, and the second was issued on June 7, 2001 and amended on June 21, 2001 for an October 9, 2001 telephone conference. The latter date was selected on Ms. Lesnik's specific request to accommodate her schedule, but she still did not participate in the telephone conference.

Of more significance, in its June 7, 2001 order, the Commission directed Ms. Lesnik to provide the Commission and the Department's attorney with a copy of the decision in her then-pending case in the U. S. Tax Court "when she receives it." The decision was issued on May 17, 2001, and a copy was not provided by her as directed. On August 17, 2001, Ms. Lesnik sent a fax to the Commission stating that she was submitting additional paperwork to the U. S. Tax Court judge and had not received a "Final decision". On October 8, 2001, Ms. Lesnik again faxed the Commission that she had not yet received a "Final decision" from the U. S. Tax Court. It is highly likely that Ms. Lesnik received a copy of the U. S. Tax Court's May 17, 2001 decision shortly after it

was filed.

With its December 17, 2001 motion, the Department provided a copy of the U. S. Tax Court decision to the Commission. On March 30, 2002, Ms. Lesnik wrote to the Commission that she appealed the decision on August 14, 2001. This clearly indicates that she had received a copy of the decision on or prior to August 14, 2001 and did not comply with the Commission's order to supply copies to the Commission and the Department.

Ms. Lesnik wrote the Commission in August and October 2001 that she had not received a "Final decision" from the U. S. Tax Court. These words may have been intentionally chosen so she could assert that she did not believe she had to send copies of the decision because it was not "Final." This is disingenuous. The second sentence of the May 17, 2001 U. S. Tax Court decision stated that "The decision . . . is not reviewable by any other court." Slip op. at 1.

Because Ms. Lesnik did not submit copies of the U. S. Tax Court's May 17, 2001 decision as ordered, her arguments as to why her case before the Commission should continue were frivolous and groundless, and were primarily for delay under Wis. Stat. § 73.01(4)(am).

ORDERS

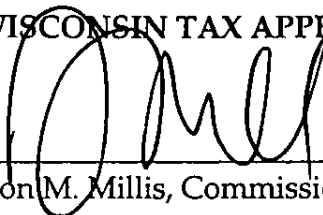
1. The Department's motion to dismiss Ms. Lesnik's petition for review is granted, and her petition for review is dismissed.
2. Ms. Lesnik is assessed an additional \$250 pursuant to Wis. Stat. § 73.01(4)(am), as it appears that her position in this proceeding after May 17, 2001 is

frivolous and groundless, and primarily for delay.

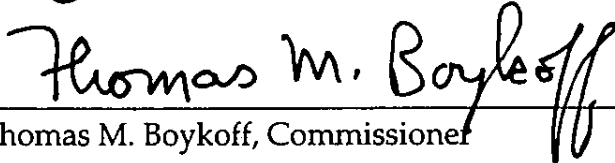
3. The Department's denials of the petitions for redetermination in the matters of David G. Lesnik, Docket No. 00-I-228, and David G. and Terry Ann Lesnik, Docket No. 00-I-231, are reversed.

Dated at Madison, Wisconsin, this 30th day of May, 2002.

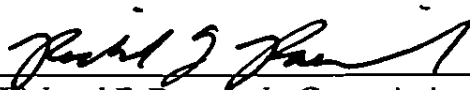
WISCONSIN TAX APPEALS COMMISSION



Don M. Millis, Commission Chairperson



Thomas M. Boykoff, Commissioner



Richard F. Raemisch, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"