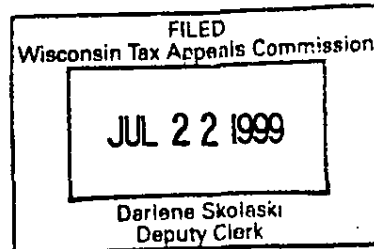


TELEMARK POINTE OWNERS ASSOC 99S08 072299 TAC

1984

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**



TELEMARK POINTE OWNER'S ASSOCIATION,

Docket No. 99-S-08

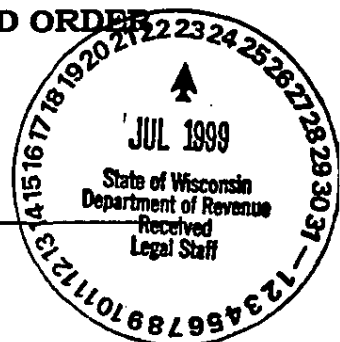
Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.



DON M. MILLIS, COMMISSIONER:

This matter comes before the Commission on respondent's motion to dismiss the petition for review. Both parties have filed submissions in support of their respective positions on respondent's motion. Petitioner is represented by Clark & Clark Law Offices, by Attorney Scott W. Clark. Respondent is represented by Attorney Linda M. Mintener.

Based on the submissions of the parties and the record in this matter, the Commission hereby finds, concludes, and orders as follows:

FACTS

Under the date of September 1, 1984, respondent issued a sales and use tax assessment against petitioner in the principal amount of \$3,104.60, plus interest (\$764.15) and penalty (\$776.16). The assessment was mailed to petitioner at the following address:

FRED VORTANZ
TELEMARK POINTE OWNER'S ASSOCIATION
HWY M
CABLE WI 54821

Under the date of October 24, 1994, petitioner's previous attorney filed with respondent a petition for redetermination objecting to the sales tax assessment. In the petition for redetermination, petitioner's previous attorney asked respondent to "direct any further correspondence in connection with this matter" to the attorney at her firm's address "in accordance with the Power of Attorney attached hereto." The record does not contain a copy of the power of attorney referred to in the petition for redetermination.

Under the date of November 4, 1998, respondent issued a notice of action letter denying the petition for redetermination. The notice of action letter was sent via certified mail, return receipt requested to:

TELEMARK POINTE OWNER'S ASSOCIATION
FRED VORTANZ
HWY M
CABLE, WI 54821

The notice of action letter was received on November 6, 1998. The signature is not legible and the record does not otherwise indicate who actually signed for the notice of action letter.

The petition for review was filed with the Commission, via personal delivery, on January 6, 1999.

RULING

The sole issue raised by respondent's motion to dismiss is whether petitioner filed the petition for review in a timely manner. A taxpayer aggrieved by respondent's action on a petition for redetermination must file petition for

review with the Commission not later than the 60th day following receipt of the notice of action letter. Wis. Stats. § 73.01(5)(a); *Mobile Transport Systems, Inc. v. Dep't of Revenue*, 1997 Wisc. Tax LEXIS 6 at 5-6 (WTAC 1997). Assuming petitioner received the notice of action letter on November 6, 1998, the 60th day to appeal respondent's determination was January 5, 1999. In such a case, the petition for review would be one day late and the Commission would lack subject matter jurisdiction over the petition for review.

Petitioner makes a number of factual assertions with respect to its receipt of the notice of action letter:

1. The address to which the notice of review was sent was that of its former agent, Lake Properties, Inc.;
2. Mr. Fred Vortanz was an employee of Lake Properties, Inc., not of petitioner;
3. Lake Properties, Inc., filed a petition for bankruptcy on July 10, 1998, and that from this date it was disorganized and negligent in its handling of petitioner's affairs;
4. As result of these problems, petitioner and Lake Properties, Inc., severed their agency relationship as of November 4, 1998;
5. The notice of action letter was received by an employee or agent of Lake Properties, Inc. on November 6, 1998; and
6. The notice of action letter was not actually received by its new authorized agent until December 30, 1998.

These and other asserted facts are contained in an unnotarized affidavit executed by petitioner's attorney. As such, they are not evidentiary facts that the

Commission may consider in opposition to respondent's motion. *See, Staples v. Young*, 142 W. 2d 194, 205 (Ct. App. 1987).

Even if these facts were in the record, however, they would not be of assistance to petitioner's case. According to petitioner, Lake Properties received the assessment and arranged for a timely petition for redetermination. In such a case, until petitioner provides actual notice to respondent of either a change or discharge of its agent or that further notices to petitioner should be sent elsewhere, receipt of a notice of action letter by the "old" agent is sufficient to constitute receipt by the taxpayer for purposes of section 73.01(5)(a). When a taxpayer changes agents, it, not respondent, bears the responsibility to make sure that the old agent promptly forwards any notices received from taxpayer.

The question remains whether petitioner gave actual notice to respondent that the notice of action letter should be sent to an address other than the assessment. Ordinarily, petitioner's failure to submit evidence of this nature would end this inquiry. However, we note that the copy of the petition for redetermination offered by respondent did not include a copy of the power of attorney referred to in the petition. The power of attorney is conspicuous by its absence.

Respondent submitted a copy of a power of attorney that was executed on behalf of petitioner on March 28, 1998. However, respondent failed to lay a foundation for this power of attorney in an affidavit. Therefore, the Commission cannot determine if this was the power of attorney referred to in the

petition for redetermination. (Since the power of attorney submitted by respondent is dated more than three years after the petition for redetermination, it appears doubtful that this was referred to in the petition for redetermination.)

In any case, if petitioner provided respondent with actual notice, either attached to the petition for redetermination or otherwise, that it changed or terminated its agent, or explicitly directed notices to petitioner be sent to an address other than the address to which the assessment was sent, and if this notice was received by respondent prior to November 4, 1998, these facts may indicate that the notice of action letter was not *received* by petitioner until sometime after November 6, 1998, within the meaning of section 73.01(5)(a). Therefore, the Commission will accept additional factual submissions from the parties on this issue alone.


ORDER

The parties shall file submissions, in accordance with the dates listed below, containing evidentiary facts tending to show whether or not petitioner provided actual notice to respondent that it had changed agents or directing notices to petitioner be sent to an address other than the address to which the assessment was sent:

Respondent	September 2, 1999
Petitioner	October 15, 1999.

Dated at Madison, Wisconsin, this 22nd day of July, 1999.

WISCONSIN TAX APPEALS COMMISSION



Don M. Millis, Commissioner
122 West Washington Ave. #800
Madison, WI 53703
(608) 266-1391

pc: Respondent
Representative