

STATE OF WISCONSIN
TAX APPEALS COMMISSION

TODD J. & GURLYS Y. BARDEN,

DOCKET NO. 20-1-225

Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

LORNA HEMP BOLL, COMMISSIONER:

This matter comes before the Commission on the Department's Motion to Dismiss. Petitioners appear *pro se*, and the Department is represented by Chief Counsel Dana J. Erlandsen. Petitioners failed to file a timely petition for redetermination within the 60-day period following receipt of the Notice of Refund. Petitioners' amended return did not revive that 60-day period or allow for a second opportunity to address the same issues. Petitioners' response to the Motion addressed only substantive issues which we cannot address without jurisdiction; Petitioners did not address their failure to request a redetermination. Because the Commission lacks jurisdiction to hear the appeal, we grant the Department's Motion to Dismiss.

FACTS

1. On February 13, 2020, Petitioners filed their 2019 Wisconsin Form 1 income tax return with the Department claiming a refund of individual income taxes in the amount of \$10,809.00. (Affidavit of Mary E. Nelson, Resolution Office Audit Supervisor, Wisconsin Department of Revenue ("Nelson Aff."), ¶ 2, Ex. A.)

2. On February 20, 2020, the Department issues a Notice of Refund which denied several of Petitioners' deductions to income and granted an adjusted refund of \$3,292.00. The Notice stated Petitioners' appeal rights. (Nelson Aff. ¶ 3, Ex. B.)

3. On February 21, 2020, the Department issued to Petitioners the adjusted refund via ETF. (Nelson Aff., ¶ 4, Ex. C.)

4. On May 21, 2020, the Department received Petitioners' amended 2019 Wisconsin Form 1 income tax return claiming the same refund of individual income taxes less the amount refunded, resulting in an amended refund claim in the amount of \$7,517.00. (Nelson Aff. ¶¶ 5-6, Ex. D.)

5. The Department treated Petitioners' amended return as a late-filed Petition for Redetermination and, in a Notice dated October 28, 2020, denied it as untimely. (Nelson Aff. ¶¶ 6-7, Ex. E.)

6. On November 23, 2020, Petitioners filed a Petition for Review with the Commission. (Commission file.)

7. On December 16, 2020, the Department filed a Motion to Dismiss with a brief, affidavit, and supporting documents. (Commission file.)

8. On January 29, 2021, Petitioners filed a timely response which addressed the merits of the case but not the jurisdictional issue which is the basis for the Department's Motion. (Commission file.)

APPLICABLE LAW

A motion to dismiss will be granted if the Commission finds it does not have proper jurisdiction. Without jurisdiction to hear this matter, the Commission has no alternative other than to dismiss the action. See *Alexander v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-650 (WTAC 2002).

The specific statutes at issue here outline the requirements for filing a valid and timely petition for review with the Commission:

Wis. Stat. § 71.75(2): With respect to income taxes and franchise taxes, except as otherwise provided in subs. (5) and (9) and ss. 71.30 (4) and 71.77 (5) and (7) (b), refunds may be made if the claim therefor is filed within 4 years of the unextended date under this section on which the tax return was due.

Wis. Stat. § 71.75(5): A claim for refund may be made within 4 years after the assessment of a tax or an assessment to recover all or part of any tax credit, including penalties and interest, under this chapter, assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination. No claim may be allowed under this subsection for any tax, interest or penalty paid with respect to any item of income, credit or deduction self-assessed or determined by the taxpayer or assessed as the result of any assessment made by the department with respect to which all the conditions specified in this subsection are not met...

Wis. Stat. § 71.88(1)(a): [A]ny person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of

refund may, within 60 days after receipt of the notice, petition the department of revenue for redetermination.

Wis. Stat. § 71.88(2)(a): *Appeal of the department's redetermination of assessments and claims for refund.* A person feeling aggrieved by the department's redetermination may appeal to the tax appeals commission by filing a petition with the clerk of the commission as provided by law and the rules of practice promulgated by the commission. If a petition is not filed with the commission within the time provided in s. 73.01 or, except as provided in s. 71.75 (5), if no petition for redetermination is made within the time provided the assessment, refund or denial of refund shall be final and conclusive.

Wis. Stat. 73.01(5)(a): 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 of the determination . . . of the department of revenue or, . . . but not thereafter, file with the clerk of the commission a petition for review of the action of the department of revenue. . . .

DECISION

The Department has moved to dismiss this case because Petitioners failed to request a redetermination from the Department within 60-days following Petitioners' receipt of the February 20, 2020 Notice of Refund.

Upon receiving a notice from the Department, a taxpayer may, within 60 days after receipt of the notice, petition the Department for redetermination. Wis. Stat. § 71.88(1)(a). If the taxpayer fails to timely do so, the taxpayer has missed the opportunity to dispute the Department's action. Except for certain claims for refund,¹ "if no petition

¹ These particular exceptions do not apply here as they relate to refund offsets for fines, fees, or other obligations for which a refund or portion of a refund is intercepted to pay those obligations.

for redetermination is made within the time provided the assessment, refund, or denial of refund shall be final and conclusive.” Wis. Stat. § 71.88(2)(a).

The Commission's jurisdiction is statutory. An appeal to the Commission can only be made by a person who has filed a petition for redetermination with the Department and who is aggrieved by the redetermination of the Department. Wis. Stat. § 73.01(5)(a). A long line of cases echoes this statutory requirement, holding that the taxpayer must first timely file a petition for redetermination in order to later obtain Commission review. *See, e.g., Hussain v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-359 (WTAC 2010).

In its moving papers, the Department correctly points out that, without Petitioners having filed a timely petition for redetermination, the Commission lacks jurisdiction to hear this appeal.

Petitioners filed an amended tax return for the 2019 tax year seeking a refund of \$7,517.00. The amended return was identical to the original return except that the refund amount was reduced by the \$3,292.00 which the Department had refunded to Petitioners on February 21, 2020.

While the Department does not provide proof of the day upon which Petitioners received the February 20, 2020 Notice, the record indicates that Petitioners received their refund on or about February 21, 2021. The amended tax return was not filed until May 21, 2021, one month beyond the time for filing a petition for redetermination.

Upon this undisputed record, Petitioners received the February 20, 2020 Notice of Refund, as well as the refund itself, and failed to respond within 60-days. After the statutory 60-day window to file a petition for redetermination had expired, the Notice of Refund became final and conclusive. Wis. Stat. § 71.88(2)(a).

Because Petitioners did not file a timely petition for redetermination with the Department, the original assessment became “final and conclusive,” so there is no redetermination of the Department by which Petitioners are aggrieved. Therefore, the Commission has no jurisdiction to hear this appeal. Wis. Stat. § 73.01(5)(a).

Petitioners have provided no response to the jurisdictional issue raised in this Motion to Dismiss. The issue of an amended return possibly reviving the opportunity to appeal has, however, been addressed by this Commission in *Kolasso v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-317 (WTAC 2019). In *Kolosso*, the Petitioner argued that the Petitioner’s (second) amended return should be sufficient to allow the issues to be relitigated, noting that amended return was filed within the 4-year period allowed for filing refund claims under Wis. Stat. § 71.75(2). The Petitioner took the position that a subsequent amended return should allow a second opportunity for review of an issue, even if the 60-day time period under Wis. Stat. § 71.88(1)(a) is missed. The Commission rejected this argument:

There is nothing in either Wis. Stat. 71.75(2) or Wis. Stat. § 71.88(2)(a) that allows for such an exception to the “final and conclusive” language of Wis. Stat. § 71.88(2)(a). We agree with the Department that creating such an exception would make the clear “final and conclusive” language of the statute meaningless.

The Commission in *Kolosso* recognized Wis. Stat. § 71.75(5) allows for a narrow exception for filing a refund claim where no petition for redetermination has been filed with the Department. If the exception applies, a claim for refund may be filed “within 4 years after the assessment of a tax or an assessment to recover all or part of any tax credit.” To fall under this exception, there must be: 1) The assessment of a tax or an assessment to recover all or part of a credit; 2) Payment of the assessment; and 3) No protest of the assessment by a petition for redetermination. In order to be eligible for this refund claim, “all the conditions specified” need to be met. Wis. Stat. § 71.75(5).

Like the Petitioner in *Kolosso*, these Petitioners failed to file a petition for redetermination of the (partial) denial of a refund claim rather than of an assessment of tax or an assessment to recover a credit. Thus, Petitioners do not fall under the limited exception described in Wis. Stat. § 71.75(5). The filing of an amended return, making the identical refund claim as the initial return, does not revive the Notice of Refund that has become final and conclusive.

CONCLUSIONS OF LAW

1. Petitioners’ statutory right to seek relief with the Department by way of a petition for redetermination expired 60 days after receipt of the February 20, 2020 Notice of Refund.
2. Because Petitioners did not file a timely petition for redetermination with the Department, the Notice of Refund became final.
3. Petitioners are not aggrieved by a redetermination decision of the Department. Because Petitioners are not aggrieved by a redetermination decision, the

Commission lacks jurisdiction to hear this case.

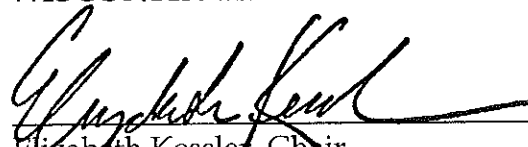
4. The filing of an amended return claiming the same refund does not revive the denied refund claim where there is no applicable exception and where the denial of the same claim has therefore already become final and conclusive.

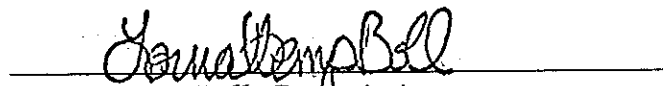
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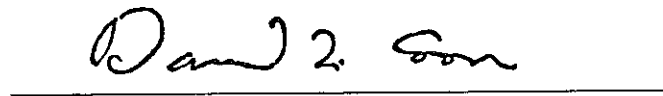
Based on the foregoing, it is the order of this Commission that the Department's Motion to Dismiss is granted and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 7th day of April, 2021.

WISCONSIN TAX APPEALS COMMISSION


Elizabeth Kessler, Chair


Lorna Hemp Boll, Commissioner


David L. Coon, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING, OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternately, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, within 30 days of this decision if there has been no petition for rehearing or, within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service, or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or, the Wisconsin Statutes. The website for the courts is <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.