

STATE OF WISCONSIN
TAX APPEALS COMMISSION

MARK S. HALBMAN,

DOCKET NO. 16-S-194

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID L COON, COMMISSIONER:

This matter comes before the Commission on the Department's Motion to Dismiss. The case concerns an assessment the Department issued against the Petitioner and his two disregarded LLCs on March 16, 2016, for sales and use taxes for the tax years 2009 to 2012.

The Petitioner is represented by Thomas H. Schmitt, CPA, who is his appointed attorney-in-fact, and the Department is represented by Attorney Julie A. Zimmer. Because the Petitioner failed to file a timely petition for redetermination in the 60-day period following assessment and failed to file any affidavits, supporting documents, or briefs opposing the Motion to Dismiss, the Commission grants the motion to dismiss as the Commission lacks jurisdiction to hear the appeal.

FACTS

1. The Department issued a Notice and Field Audit Report ("Notice") dated March 16, 2016, assessing sales and use tax due, together with interest and penalties, in the cumulative amount of \$170,948.91 for the tax years 2009 through 2012. (Affidavit of Department field auditor Tamara M. Barclay ("Barclay Aff.") ¶ 3, Ex. 1.)

2. The Petitioner had appointed Thomas H. Schmitt, CPA, as his attorney-in-fact via a Department Form A-222 (Power of Attorney) signed by Mark Halbman on November 12, 2013. On the form, Petitioner checked and initialed the box in Part 5 for notices and other written communication to be sent only to the attorney-in-fact. The form advises that, "If the Attorney-in-fact box is checked, any notices and written communications will be sent to only the attorney-in-fact, except as required by statute." (Affidavit of Department field auditor Lisa Keyes ("Keyes Aff.") ¶ 4, Ex. 4.)

3. Ms. Barclay mailed the Notice on March 16, 2016, via U.S. Postal Service Certified Mail with Return Receipt Request to Mr. Schmitt. (Barclay Aff. ¶ 5, Ex. 3.)

4. The Department received the Return Receipt Request Form back from the U.S. Postal Service showing that the Notice had been delivered to Mr. Schmitt's office on March 18, 2016, and was signed for by T. Holstad an employee of Mr. Schmitt. (Affidavit of Department Resolution Unit Supervisor Erik Reichertz ("Reichertz Aff.") ¶ 2, Ex. 5 and Ex. 8.)

5. On or about June 9, 2016, Mr. Schmitt contacted Wendy Miller, Department of Revenue Audit Bureau Director, alleging that he had appealed the

March 16, 2016 Notice in a timely manner. (Reichertz Aff. ¶ 4).

6. Mr. Reichertz was assigned to investigate Mr. Schmitt's allegation. (Reichertz Aff. ¶ 4.)

7. On June 23, 2016, Mr. Schmitt, via email, sent the Department copies of a letter bearing a date of April 12, 2016, and an envelope addressed to Lisa Keyes, Wisconsin Department of Revenue, 819 N. 6th Street, Room 408, Milwaukee, WI 53202-1682, with the private postage meter stamp bearing a date of April 18, 2016. Ms. Keyes did not receive any such letter or other appeal document. (Reichertz Aff. ¶ 7, Ex. 8; Keyes Aff. ¶ 4.)

8. Mr. Schmitt acknowledged in an email on June 23, 2016, that his communications with the Department had been through regular first class mail rather than certified mail, stating, "Throughout the entire audit, we have corresponded via non-certified letter or email." (Reichertz Aff., Ex. 9.)

9. Mr. Reichertz sent an email to Mr. Schmitt on June 23, 2016, stating, among other things, that the April 18, 2016 dated envelope was not properly addressed. The correct address was Wisconsin Department of Revenue, Resolution Unit - Mail Stop 6-173, P.O. Box 8907, Madison, WI 53708-8907. Nevertheless, Mr. Reichertz stated that, if the April 12 letter had been timely received by someone at the Department, it would have been accepted as a timely request for redetermination. (Reichertz Aff. ¶ 7, Ex. 9; Barclay Aff. ¶ 3, Ex. 1.)

10. Mr. Reichertz conducted an investigation, including interviewing Ms. Keyes and her supervisor, Ann Barnes, as well as reviewing the Department's

records. He found that no letter or Petition for Redetermination from Mr. Schmitt or the Petitioner had been timely received by the Department. He advised Mr. Schmitt of the same in his June 23, 2016 email. (Reichertz Aff. ¶ 8, Ex. 9.)

11. Mr. Reichertz determined that the Petitioner's request for redetermination was untimely as the letter dated April 12 was received by email well after the 60-day time to file for redeterminaton had expired on May 23, 2016,¹ and that the matter had become final at that time. The Department issued a Notice of Action on June 30, 2016, advising that the Petitioner had failed to file a timely request for redetermination and the assessment was final. (Reichertz Aff. ¶ 9, Ex. 10.)

12. Petitioner filed a Petition for Review with the Tax Appeals Commission on July 21, 2016. (Commission file.)

13. The Department's Answer, filed on August 12, 2016, asserted as an affirmative defense that the Commission lacks jurisdiction to hear this matter because the assessment was final and conclusive due to the Petitioner's failure to timely file a petition for redetermination. The Department filed a motion to dismiss on September 1, 2016. (Commission file.)

14. The Commission set a briefing schedule and issued an Order on September 20, 2016, with the Petitioner to file a response to the Department's motion not later than October 21, 2016. The Order was sent by mail to Mr. Schmitt and the

¹ The statute requires a request for redetermination to be postmarked within 60 days of receipt of the Notice being appealed. The request must then be received within 5 days of mailing. In this matter, 60 days from March 18, 2016, would have been May 17, 2016, with an additional 5 days being May 22, 2016. As May 22, 2016 was a Sunday, the Department calculated the final due date as May 23, 2016. Wis. Stat. § 77.61(14). Petitioner has filed nothing to dispute the May 23, 2016 deadline.

Department.² (Commission file.)

15. The Petitioner failed to file anything with the Commission by October 21, 2016. On its own motion, the Commission issued an Order granting Petitioner a second chance to file a response not later than November 9, 2016. When a response was not filed by November 9, 2016, the Commission, again on its own motion, issued another Order on November 15, 2016, granting Petitioner a third chance to file a response no later than December 6, 2016. Copies of these Orders were also sent directly to the Petitioner at the address in the Commission file, in addition to the Department and Mr. Schmitt. No response was received by the Commission from the Petitioner. (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. § 71.88(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.

² An Amended Order was issued on September 26, 2016, to correct a typographical error in the due date for the Department's reply brief, but the amendment did not affect the due date for the Petitioner's response brief.

Wis. Stat. § 71.88(1)(b): If no timely petition for redetermination is filed with the department, its determination shall be final and conclusive.

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 . . . the assessment, refund or denial of refund shall be final and conclusive.

Wis. Stat. § 77.59(6): Except as provided in sub. (4) (b), a determination by the department is final unless, within 60 days after receipt of the notice of the determination, the taxpayer, or other person directly interested, petitions the department for a redetermination. A petition is timely if it fulfills the requirements under s. 77.61 (14)....

Wis. Stat. § 77.61(14): Documents and payments required or permitted under this subchapter that are mailed are timely furnished, filed or made if they are mailed in a properly addressed envelope with the postage duly prepaid, if the envelope is postmarked, or marked or recorded electronically as provided under section 7502 (f) (2) (c) of the Internal Revenue Code, before midnight of the due date and if the document or payment is received by the department, or at the destination that the department prescribes, within 5 days after the prescribed date.... (Emphasis added)

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 after the redetermination 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 the Petitioner failed to request a redetermination from the Department following the Notice of March, 16, 2016. The Petitioner failed to respond to the Motion filed by the Department despite being ordered to do so and being given multiple opportunities to file a response. In each of the Orders, the Petitioner was warned that failing to respond would result in the case being "decided based upon the record as presently constituted."

In its Motion, the Department points out that, without the Petitioner having filed a timely petition for redetermination, the Commission lacks jurisdiction to hear this appeal. After reviewing the motion and the affidavits filed by the Department and there being no response by the Petitioner contesting the Department's assertions, we agree with the Department.

The Department assessed the Petitioner for the tax period years 2009 through 2012, by issuing the Notice. In the Notice, Petitioner was advised of his right to appeal as well as both the address and the email to which such an appeal may be sent. Petitioner was also advised that "THE APPEAL MUST BE FILED WITHIN 60 DAYS OF YOUR RECEIPT OF THIS NOTICE." (Emphasis in the original).

After the Notice was issued and after the statutory 60-day window had expired without a petition for redetermination being received by the Department, the Petitioner's representative contacted the Department on June 9, 2016, to claim that he had appealed the Notice. It was not until June 23, 2016, though, well after the statutory deadline had expired, that the Department received, via email, a copy of an appeal

letter dated April 12, 2016 (as well as a copy of an envelope with a private meter stamp dated April 18, 2016).

The Petitioner has not supplied the Commission with anything refuting the Department's assertions on these issues. Even if the Petitioner had provided an affidavit of mailing or other postal documents showing the timely mailing of the April 12, 2016 letter, that would not have been sufficient. The issue is not the mailing of the petition for redetermination, but the receipt of the request by the Department. Wis. Stat. § 77.61(14).

Further, Petitioner bears the burden of proving that the documents were received by the Department. *Gavinski v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-135 (Cir. Ct. 1995). There are ways that a Petitioner may ensure that the documents are received and have proof of that receipt, such as certified mail, as the Department utilized to prove receipt of the initial Notice in this matter. *Hussain v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-359 (WTAC 2010). Petitioner has provided no proof, nor any response, to the Commission related to the timely receipt of a request for redetermination by the Department.

The Commission's jurisdiction is statutory, and, "where a method of review is prescribed by statute, the prescribed method is exclusive." *Jackson County Iron Co. v. Musolf*, 134 Wis. 2d 95, 101, 396 N.W.2d 323 (1986). Upon receiving a notice from the Department, a person 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, "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. § 71.88(1)(b).

An appeal to the Commission under Wis. Stat. § 73.01(5)(a) can only be made by a person who has both filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department of revenue. Wis. Stats. §§ 71.88(2)(a) and 73.01(5)(a). (Emphasis added). 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).

Here, Petitioner did not file a petition for a redetermination that was timely received and, therefore, there is no redetermination of the Department by which Petitioner is aggrieved. The Petitioner has provided nothing to refute this. Because the Petitioner did not file a petition for redetermination that was timely received by the Department and the original assessment has become "final and conclusive," the Commission has no jurisdiction to hear this appeal under Wis. Stat. § 73.01(5)(a).

CONCLUSIONS OF LAW

1. The Petitioner's statutory right to seek relief within the Department by way of a redetermination expired 60 days after receipt of the March 16, 2016 Notice.
2. Because Petitioner did not file petition for redetermination that was timely received by the Department, the changes made by the Department in the Notice became final.

3. Petitioner is not aggrieved by a redetermination by the Department. Because Petitioner is not aggrieved by a redetermination, the Commission has lacks jurisdiction to hear this case.

ORDER

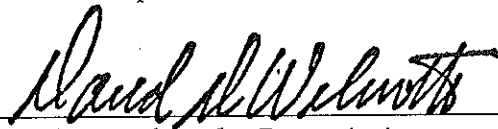
Based on the foregoing, it is the order of this Commission that the Department's Motion to Dismiss is granted and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 1st day of March, 2017.

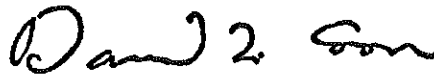
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



David D. Wilmoth, 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. Alternatively, 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 Appeals 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 <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.