

STATE OF WISCONSIN
TAX APPEALS COMMISSION

JERMAINE HILL,

DOCKET NO. 06-I-253

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DIANE E. NORMAN, ACTING CHAIRPERSON:

This case comes before the Commission on the motion of the Wisconsin Department of Revenue (“Department”) to dismiss on the basis that there is no genuine issue as to any material fact and the Department is entitled to judgment as a matter of law under Wis. Stat. § 802.08 and Wis. Admin. Code § TA 1.31.

Petitioner appears *pro se* and has filed a response to the motion. Chief Counsel Dana J. Erlandsen represents the Department and has filed an affidavit with exhibits, a brief, and a supplemental affidavit in support of the motion.

Having considered the entire record, including the motion, affidavits, exhibits, and brief of the Department, and petitioner’s response, the Commission hereby finds, rules, and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS

1. By notice dated March 6, 2006, the Department issued an assessment of individual income tax, interest, and penalties (“the assessment”) to

petitioner in the total amount of \$4,744.01. The assessment indicated that it was based upon petitioner's failure to file his 2001 and 2002 Wisconsin income tax returns. (Affidavit of Julie Lotto, 4/13/07, Exh. 1.)

2. By letter dated April 25, 2006, petitioner timely filed a petition for redetermination of the assessment and that petition for redetermination was denied by the Department in a notice dated July 31, 2006. (Affidavit of Julie Lotto, 4/13/07, Exh. 2.)

3. On September 25, 2006, the Commission received from petitioner a petition for review of the Department's denial of his petition for redetermination. The petition states as follows:

I fax and did my taxes over for 2001 and 2002 and sent them in and to Milwaukee revenue and they sent me reply back[.] I don't understand[.] [T]hey said I couldn't get anything back[.] Please can you reply.

4. Petitioner did not enclose the \$25.00 filing fee required under Wis. Stat. § 73.01(5) with his petition. The Commission notified petitioner of the \$25.00 filing fee requirement by letter dated September 25, 2006, and instructed petitioner to pay the filing fee by September 29, 2006 or risk the dismissal of his petition for review.

5. Petitioner failed to pay the \$25.00 filing fee.

6. A telephone status conference was held in this matter on March 6, 2007. A person identifying herself as petitioner's wife appeared on his behalf and stated that petitioner needed additional time to file his 2001 and 2002 Wisconsin income tax returns.

7. A Status Conference Memorandum and Order was issued by the Commission was issued on March 7, 2007, which scheduled another telephone status conference for April 12, 2007 and stated in part:

IT IS ORDERED

. . . The parties or their representatives shall participate in the next-scheduled status conference. Failure to comply with the terms of this order may result in any sanction authorized by law, including dismissal of the petition for review.

8. The next telephone status conference was held on April 12, 2007 as stated in the March 7, 2007 Order. The Department appeared by Chief Counsel Dana J. Erlandsen. Petitioner failed to appear in person or by any representative.

9. On April 17, 2007, the Department filed a motion to dismiss the petition for review on the basis that petitioner failed to pay the statutory \$25 filing fee to the Commission and that petitioner failed to state a claim upon which relief can be granted.

10. On June 15, 2007, petitioner filed a response to the Department's motion to dismiss alleging that he did file his 2001 and 2002 Wisconsin income tax returns. Also stated in the response is the address and telephone number of petitioner's tax preparer and petitioner's request that the tax preparer be called to verify that his taxes had been filed.

11. On June 29, 2007, the Department filed its reply to petitioner's response. Attached to the reply is an affidavit of Julie Lotto, the Department's paralegal, in which she states that she contacted petitioner's tax preparer as requested

in his response and was informed that petitioner's 2001 and 2002 Wisconsin income tax returns had been prepared, but petitioner had failed to come in and sign them, pay for them or pick them up. (Affidavit of Julie Lotto, 6/28/07, ¶¶ 2-7.)

12. The Department has not received petitioner's 2001 and 2002 Wisconsin income tax returns. (Affidavit of July Lotto, 6/28/07, ¶ 8.)

RULING

The Department has filed a motion to dismiss this case for petitioner's failure to state a claim upon which relief can be granted. Because the Department also filed an affidavit and a brief in support of the motion, the Commission treats the Department's motion as a motion for summary judgment. *See* Wis. Stats. §§ 802.06(3) and 802.06(2)(b); *see also Mrotek, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-315 (WTAC 1997) (where the Department submitted matters outside of the pleadings, motion for judgment on the pleadings treated as motion for summary judgment) and *City of Milwaukee v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-405 (WTAC 1999) (where parties submitted affidavits and briefs, motion to dismiss for failure to state a claim treated as motion for summary judgment).

A summary judgment motion will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Wis. Stat. § 802.08(2). A party moving for summary judgment has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. *Grams v. Boss*, 97 Wis. 2d 332,

338-39, 294 N.W.2d 473 (1980).

If the moving party establishes a *prima facie* case for summary judgment, the court then examines the affidavits in opposition to the motion to see if the other party's affidavits show facts sufficient to entitle him to trial. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis.2d 181, 188, 148 N.W.2d 641 (1967). Once a *prima facie* case is established, "the party in opposition to the motion may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." *Board of Regents v. Mussallem*, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980), citing Wis. Stat. § 802.08(3). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar*, 34 Wis.2d at 188. Where the party opposing summary judgment fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment pursuant to Wis. Stat. § 802.08(3). *Board of Regents*, 94 Wis.2d at 673.

The Department has established a *prima facie* case that petitioner's petition for review should be dismissed for failure to state a claim upon which any relief can be granted. The Department assessed petitioner based upon an estimate of his income for the years 2001 and 2002 because he failed to file his Wisconsin income tax returns for those years. Petitioner's petition for review's only stated claim is that he did file his 2001 and 2002 Wisconsin income tax returns. The Department has accompanied its motion to dismiss with affidavits and exhibits showing that petitioner did not file his 2001 and 2002 Wisconsin income tax returns.

Petitioner failed to meet his burden of setting forth specific facts by affidavit or other statutory means of showing a genuine issue of fact in this matter. Petitioner's only response to the Department's motion to dismiss is his letter filed June 15, 2007 stating that he did file his 2001 and 2002 Wisconsin income tax return and providing information about his tax preparer. Using this information, the Department called the tax preparer and verified that petitioner's 2001 and 2002 Wisconsin income tax returns had been prepared, but were never picked up by petitioner.

Petitioner has not shown by affidavit or other proof that he filed his 2001 and 2002 Wisconsin income tax returns. Petitioner's claim that he filed his 2001 and 2002 Wisconsin income tax returns was contradicted in the telephone status conference held on March 6, 2007, when petitioner's wife stated that he needed more time to file these returns. Even if petitioner's claim that he filed his 2001 and 2002 Wisconsin income tax returns were true, petitioner has not made any allegation that the assessment is incorrect in any way.

Petitioner's petition for review must also be dismissed for failure to pay the filing fee. When petitioner filed his petition for review with the Commission, he did not enclose the \$25 filing fee required by Wis. Stat. § 73.01(5)(a). The Commission instructed petitioner to pay the filing fee by letter dated September 25, 2006 informing him that failure to pay the fee could result in dismissal of his petition, but petitioner disregarded the Commission's instructions and never paid the required fee.

Petitioner has failed to abide by the Commission's statutory procedures. There is no genuine issue of material fact in this case, and the Department is entitled to

summary judgment as a matter of law.

IT IS ORDERED

The Department's motion for summary judgment is granted, and its action on petitioner's petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 31st day of July, 2007.

WISCONSIN TAX APPEALS COMMISSION

Diane E. Norman, Acting Chairperson

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"