

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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**BRAD AND JANET KAMINSKE,**

**DOCKET NO. 12-I-044**

Petitioners,

vs.

**RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE,**

Respondent.

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**LORNA HEMP BOLL, CHAIR:**

This matter comes before the Commission on the Department's Motion to Dismiss. This case concerns an assessment the Department issued against the Petitioners on July 29, 2011, for income taxes for the periods ending December 31, 2005, through December 31, 2010. The Department argues that the Commission lacks jurisdiction to review this matter as the Petitioners did not file a petition for redetermination with the Department.

The Petitioners are represented by James L. Canfield of Advanced Accounting Concepts, Inc., of Wisconsin Rapids, Wisconsin. The Department is represented by Attorney John R. Evans. Because the Petitioners failed to file a petition for redetermination in the 60-day period following assessment as required by law, the Commission lacks jurisdiction and the appeal must be dismissed.

## FACTS<sup>1</sup>

### *Jurisdictional Facts*

1. The Department issued assessments of income tax due, together with interest and penalties, by notices dated July 29, 2011, in the amounts of \$37,445.99<sup>2</sup> and \$15,600.88 as of that date. (Affidavit of John R. Evans, "Evans Aff.," Exhibits A and B.)

2. Petitioners received the Notices on August 1, 2011. (Supplemental Affidavit of John R. Evans, "Evans Supp. Aff.," Exhibit 2.)

3. The Notices were not sent to Petitioners' Power of Attorney. The Department had made unsuccessful attempts to contact the Power of Attorney prior to the issuance of the Notices and therefore sent the Notices only to the Petitioners. (Affidavit of Signe Melton Affidavit, "Melton Aff.," ¶¶ 6-8.)

4. Petitioners did not file a petition seeking a redetermination within 60 days of receipt of the July 29, 2011, notices.

5. On or about October 12, 2011, the matter was referred to the Department's Collections Section, and a Collections Section Letter was issued to the Petitioners on October 17, 2011. (Evans Aff., ¶ 4.)

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<sup>1</sup> The facts are taken from the affidavits submitted by the Department with minor edits for form. The Petitioners' proposed facts consist primarily of an allegation that notice was not served on Petitioners' representative.

<sup>2</sup> Exhibit A reflects \$37,445.99 on the Notice dated July 29, 2011; however, the Affidavit of John R. Evans states an amount of \$34,445.99.

6. The first contact from the Petitioners following the July 29, 2011, notices was from Petitioners' representative on October 25, 2011. (Evans Aff., ¶ 4; Melton Aff. ¶ 10.)

7. Petitioners submitted supporting documentation for their case to the Department on either November 15, 2011 (Evans Aff., ¶ 4) and/or January 10, 2012 (Melton Aff., ¶ 14).

8. The Department responded with a letter dated January 25, 2012, which stated that Petitioners' documents had been reviewed and that the Department still agreed with its original assessments. The letter offered to meet "to review these findings in detail" so "all parties involved understand the Final decision." (Department's Exhibit C.)

9. Petitioners filed with the Tax Appeals Commission on March 5, 2012,<sup>3</sup> a Petition for Appeal from what Petitioners described as a "determination letter" from the Department, referring to the Department's letter of January 25, 2012. (Commission file.)

### *Supplementary Facts*

10. Under cover letter of May 26, 2011, Petitioners' representative alerted the Department that Petitioners had retained counsel, forwarded Power of Attorney Form A-222, and requested that all correspondence be addressed to the

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<sup>3</sup> Petitioners Petition was received by the Commission on March 7, 2012; however, the Petition was sent by certified mail. Pursuant to Wis. Stat. § 73.01(5)(a), the Petition is deemed received on the date it was sent by certified mail which was March 5, 2012.

attorney's office with copies to the Kaminskes. (First Exhibit to Affidavit James L. Canfield.)

11. Part 5 of Form A-222 contains choices for communication. Petitioners checked the box which says, "Both." The form explains,

If the Both box is checked, all written communications . . . will be sent to only the attorney-in-fact, but final actions; for example, assessments, refunds, and refund denials will be sent to both the attorney-in-fact and the taxpayer. RECEIPT BY EITHER THE ATTORNEY-IN-FACT OR THE TAXPAYER WILL BE RECEIPT BY BOTH.

### INTRODUCTION

The Department assessed the Petitioners for the periods ending December 31, 2005, through December 31, 2010. The front pages of July 29, 2011, Notices of Amount Due clearly state, "If you disagree with the notice, see your appeal rights later in this notice and in the enclosed Publication 505, Taxpayers' Appeal Rights of Office Audit Adjustments." The third page of each notice is comprised solely of a section entitled "APPEAL RIGHTS AND PROCEDURES." In pertinent part, that section states, "**You must appeal within 60 days of your receipt of this notice.**" (boldface type in original)

After 60 days had passed from the date of the assessments without a petition for redetermination, the Department referred the assessments to its Collections Section. The Collections Section began collections proceedings against the Petitioners beginning with a letter to Petitioners dated October 17, 2011. Petitioners' representative responded on behalf of Petitioners on October 25, 2011, several weeks after the

expiration of the 60-day time frame allowed by statute for an appeal from the July 29, 2011, notices. Petitioners then followed up by submitting additional information some time later. The Department reviewed the submissions and, in a letter dated January 25, 2012, rejected Petitioners' assertions, standing by its assessments which had disallowed the certain deduction for expenses. In its letter to the Petitioners, the Department offered a meeting to answer any questions regarding its assessments. Petitioners take the position that the letter of January 25, 2012, is a redetermination. We disagree and hold that the Petitioners failed to file for redetermination within 60 days of the Notices dated July 29, 2011.

#### APPLICABLE LAW

A motion to dismiss will be granted if the Commission finds it does not have proper jurisdiction. Without jurisdiction to hear the 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.

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. § 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 Petitioners failed to request a redetermination from the Department following the notices of July 25, 2011. The Department points out that, without that step, the Commission lacks jurisdiction to hear this appeal. After reviewing the motions and the affidavits, we agree with the Department. There are arguably two jurisdictional concerns here. The first relates largely to timing. The second relates to subject matter.

### A. Jurisdiction Relative to a Timely Redetermination

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 of assessment from Respondent, a person may, within 60 days after receipt of the notice, petition Respondent for redetermination of the assessment. Wis. Stat. § 71.88(1)(a). If the taxpayer fails to do so, the taxpayer has missed the opportunity to dispute the

assessment. 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).

Because Petitioners failed to file a timely objection, the Commission has no jurisdiction to hear an appeal under Wis. Stat. § 73.01(5)(a).

An appeal under Wis. Stat. § 73.01(5)(a) can only be made by a 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. . . .” Wis. Stats. §§ 71.88(2)(a) and 73.01(5)(a). Here Petitioners were not aggrieved by a determination of the Department because the Department did not receive a timely request for a determination, so no determination was made.

A long line of cases echoes this statutory requirement, holding that the taxpayer must timely file a petition for redetermination in order to obtain Commission review. As recently as *Hussain v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-359 (WTAC 2010), the Commission has held that it lacks jurisdiction over a petition for review where the Petitioner has failed to file a timely petition for redetermination with Respondent. See also *Lyman v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-917 (WTAC 2006).

Petitioners first argue that the 60-day window never began because Petitioners were represented by counsel and the Petitioners’ counsel did not receive the Notices. In support of that position, Petitioners rely heavily on the Power of Attorney form they signed. (Petitioners’ Exhibit 1.) The form in question has “Both” checked as the preferred method of communications. The form upon which Petitioners rely explains,

If the Both box is checked, all written communications, including extension agreements, will be sent only the attorney-in-fact, but final actions: for example, assessments, refunds, and refund denials will be sent to both the attorney-in-fact and the taxpayer. RECEIPT BY EITHER THE ATTORNEY-IN-FACT OR THE TAXPAYER WILL BE RECEIPT BY BOTH.

Petitioners' Exhibit 1 (Emphasis in original).

It appears that the Department had made unsuccessful earlier attempts to contact the attorney-in-fact. Having been unable to make contact, the Department sent the assessments only to the Petitioner. There is support in the record to show that the notices were sent to and received by the Petitioners. If Petitioners wish to rely on the terms of the Power of Attorney, Petitioners' receipt of the assessments is sufficient to establish receipt by their representative as well.

Petitioners further argue the federal Declaration of Taxpayer Rights ("Taxpayer's Bill of Rights") confirms their right of representation. While this is a state tax issue rather than a federal one, we recognize that Petitioners do have the right to representation. Wis. Stat. § 244.56 outlines the functions their representative may perform on their behalf. Those potential duties do not preclude participation by the taxpayer. We further note that the Bill of Rights contains no provisions allowing for extensions of statutory time limits. More importantly, the Power of Attorney form itself (Form A-222) reminds the taxpayer that service on one is service on both.

Petitioners also claim that the Department in essence waived the 60-day deadline by appearing to consider the additional information Petitioners eventually sent to the Department in November of 2011. Petitioners' contact on October 25, 2011, and



their later document submissions did not reopen their case with the Department. Similarly, the Department's letter of January 25, 2012, did not grant a redetermination but simply explained that the Department stood by the position taken in its now delinquent assessments of July 29, 2011. The Department's letter acknowledged the Petitioners' submissions and noted further reason for rejection of Petitioners' assertions. This reiteration of its July 29, 2011, decision is not a redetermination. That decision was already final given the passage of more than 60 days. Under Wis. Stat. § 71.88(1)(b), in the absence of a timely petition for redetermination, the Department's July 29, 2011, assessments were final and conclusive. After that point, the Department had no ability to entertain a redetermination.

The Department did respond to the Petitioners with an invitation to meet to ensure Petitioners understood the final assessments against them and encouraged the Petitioners and the Resolution Officer to work out a payment plan. The offer to provide clarity and answer potential questions was an unnecessary step which recognized and responded to correspondence from a taxpayer. The overture was not a capitulation to vacate an otherwise final decision, nor can it be construed as decision on an untimely or nonexistent petition for redetermination.

Because Petitioners failed to file a timely objection, the Commission has no jurisdiction to hear an appeal under Wis. Stat. § 73.01(5)(a).

### **B. Jurisdiction Relative to Collections**

The second concern relates to subject matter jurisdiction. The Commission does not have jurisdiction over the Department's collection of delinquent

taxes. *Beck v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-275 (WTAC 1997). After the 60 days had passed following the assessments in this matter with no filing of a petition for redetermination, the Department handed it over to its collections section. The Commission does not have jurisdiction over objections to collection efforts.

Petitioners' argument here extends to ongoing garnishment proceedings. Again, the Commission has no jurisdiction over collection matters and therefore will not address the request for stay of the garnishment proceedings.

### CONCLUSIONS OF LAW

1. The Petitioners' statutory right to seek relief within the Department by way of a redetermination expired 60 days after they received the July 29, 2011, notices. Sixty days from the August 1 receipt was September 30, 2011.

2. Petitioners did not file a timely petition for redetermination of the July 25, 2011, assessments. Therefore Petitioners are not aggrieved by a redetermination by the Department. Because Petitioners are not aggrieved by a redetermination, the Commission has no statutory authority to hear this case.

3. These cases were in the collection phase when Petitioners attempted to question the assessments in October of 2011. Under Wis. Stat. § 71.92, collections are not within the purview of this Commission.

### DECISION AND ORDER

We find the Petitioners failed to file a petition for redetermination as required by state statutes and, thus, this Commission lacks jurisdiction in this matter. The Department is, therefore, entitled to dismissal as a matter of law. Based on the

foregoing, it is the order of this Commission that the Department's Motion to Dismiss is granted.

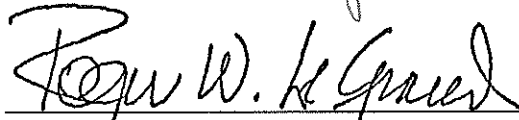
Dated at Madison, Wisconsin, this 6<sup>th</sup> day of November, 2012.

**WISCONSIN TAX APPEALS COMMISSION**



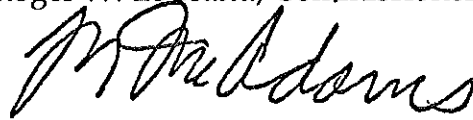
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Lorna Hemp Boll, Chair



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Roger W. LeGrand, Commissioner



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Thomas J. McAdams, 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 either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) 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.