

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ARLENE A. AND FRANK (DEC'D) KRYSZAK,	DOCKET NOS.	02-I-064, 02-I-218, 02-I-219-SC, 02-I-220-SC,
	AND	02-I-382-SC ¹

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE

Respondent.

JENNIFER E. NASHOLD, CHAIRPERSON:

These matters come before the Commission on a motion filed by respondent, Wisconsin Department of Revenue ("Department"), to dismiss the petitions for review based on petitioners' failure to prosecute their appeals before the Commission. Wis. Stat. § 805.03; Wis. Admin. Code § TA 1.39.

Petitioners are not represented and petitioner Frank Kryszak is deceased. Petitioners had been represented in proceedings before the Department and Commission by the law firm of O'Neil, Cannon & Hollman, and DeJong, S.C. ("O'Neil firm") until that firm was excused from further representation in these matters by Commission Order dated June 27, 2006. The Department is represented by Attorney Robert C. Stellick, Jr., who filed a brief and an affidavit in support of his motion to

¹ As set forth in the Commission's Order dated July 28, 2003, the parties and Commission agreed to treat all cases in these and other retiree cases as large claims cases.

dismiss.

Having considered the entire record, the Commission hereby finds, rules, and orders as follows:

FACTS

Jurisdictional Facts

1. In Docket 02-I-064, the Department, by notice dated February 27, 1995, issued petitioners an assessment for income tax in the amount of \$2,544 for tax years 1989 through 1993. The O'Neil firm filed a petition for redetermination with the Department on behalf of petitioners dated March 10, 1995. By Notice dated March 8, 2002, the Department denied the petition for redetermination. A petition for review was filed with the Commission on May 3, 2002.

2. In Docket No. 02-I-218, the Department, by notice dated March 10, 1997, issued petitioners an assessment for income tax in the amount of \$2,014.78 for tax years 1994 and 1995. The O'Neil firm filed a petition for redetermination with the Department dated March 28, 1997.

3. In Docket No. 02-I-219-SC, the Department, by notice dated July 28, 1997, issued petitioners an assessment for income tax in the amount of \$31.65 for tax year 1996. The O'Neil firm filed a petition for redetermination with the Department dated August 11, 1997.

4. In Docket No. 02-I-220-SC, the Department, by notice dated July 12, 1999, issued an assessment to petitioners for income tax in the amount of \$1,523.43 for tax years 1997 and 1998. The O'Neil firm filed a petition for redetermination with the

Department dated July 27, 1999.

5. On July 8, 2002, the Department issued a Notice of Action for each of the petitions for redetermination in Docket Numbers 02-I-218, 02-I-219-SC and 02-I-220-SC, denying each of the petitions for redetermination. On July 19, 2002, the O'Neil firm filed petitions for review with the Commission in each of these three cases.

6. In Docket No. 02-I-382-SC, the Department, by notice dated May 20, 2002, issued petitioners an assessment for income tax in the amount of \$1,753.85 for tax years 1999 and 2000. The O'Neil firm filed a petition for redetermination with the Department dated June 18, 2002. The Department issued its Notice of Action dated November 11, 2002, denying the petition for redetermination. A petition for review was filed with the Commission on November 15, 2002.

Other Material Facts

7. These cases concern assessments issued to petitioners for failure to include federal pension amounts in their Wisconsin income for Wisconsin income tax purposes for tax years 1989 through 2000.

8. As part of a general settlement reached between the Department and the O'Neil firm, the Department provided the O'Neil firm a settlement agreement in these matters, which the firm provided to Ms. Kryszak. She neither accepted the settlement offer nor otherwise communicated with the O'Neil firm. As a result, the O'Neil firm requested that it be permitted to withdraw as counsel, a request which the Commission granted by Order dated June 27, 2006.

9. The June 27, 2006 Order also set a telephone conference for July 25,

2006 and indicated that failure to participate in the telephone conference would result in dismissal of the petitions for review for failure to prosecute the appeals. Ms. Kryszak telephoned counsel for the Department, Attorney Stellick, on July 17, 2006 and indicated that she would appear at the July 25, 2006 conference.

10. Ms. Kryszak did not appear at the July 25, 2006 conference. By Order dated August 7, 2006, the Commission set a new telephone conference for August 14, 2006, which Ms. Kryszak attended. She requested an updated settlement offer, which Attorney Stellick sent the following day, along with a pre-addressed return envelope addressed to the Attorney Stellick at the Department.

11. By Order dated August 16, 2006, the Commission set a telephone conference date of September 26, 2006 and indicated that, prior to that date, Ms. Kryszak should inform Attorney Stellick whether she would accept the settlement offer.

12. By letter dated September 20, 2006, Attorney Stellick informed the presiding Commissioner and Ms. Kryszak that he had not heard from Ms. Kryszak.

13. Ms. Kryszak failed to appear at the September 26, 2006 conference. By Order dated September 27, 2006, another status conference was set for October 10, 2006.

14. Ms. Kryszak appeared at the October 10, 2006 conference and indicated that she would immediately sign the settlement agreement and send it to Attorney Stellick.

15. By Order dated October 11, 2006, another telephone conference was set for October 19, 2006, unless the signed agreement was received by the Commission

prior to the scheduled conference date. The Commission's October 11, 2006 Order again indicated that failure to participate in the telephone conference would result in sanctions, including dismissal of the petitions for review.

16. Ms. Kryszak telephoned Attorney Stellick on October 10, 2006 and left a voice mail message indicating that she needed his mailing address. Attorney Stellick returned the call on October 11, 2006 and was told that the agreement was signed and sent on October 10, 2006 using the pre-addressed return envelope Ms. Kryszak had received from the Department.

17. On October 17, 2006, Attorney Stellick telephoned Ms. Kryszak and informed her that he had not received the settlement documents. Ms. Kryszak reiterated that she had mailed them on October 10, 2006. Attorney Stellick stated that she should be available for the October 19, 2006 telephone conference and to mail him another set of signed settlement documents, using another pre-addressed return envelope she had previously received from the Department. Ms. Kryszak indicated that she would do so. Attorney Stellick sent an e-mail to the legal assistant at the Commission, confirming the contact.

18. Ms. Kryszak did not appear at the October 19, 2006 telephone conference. The Commission issued a Status Conference Memorandum on October 20, 2006 indicating Ms. Kryszak's failure to appear and further stating, "Unless Attorney Stellick receives the settlement stipulation with the next week, he will file a motion to dismiss."

19. On October 27, 2006, Attorney Stellick filed a motion to dismiss

these cases on grounds that petitioners have failed to prosecute their appeals.

20. By Briefing Order dated November 6, 2006, the Commission ordered Ms. Kryszak to file a response to the Department's motion no later than December 6, 2006. No response was filed, nor has the Commission received any further communication from Ms. Kryszak or from anyone acting on her behalf.

RULING

Wisconsin Statutes § 805.03 provides as follows:

Failure to prosecute or comply with procedure statutes. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. . . .

Wisconsin Statutes § 804.12(2)(a) provides for a number of sanctions for failure to prosecute or comply with procedure, including dismissal of the action or proceeding. In addition, Wis. Stat. § 802.10(7) states that "[v]iolations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03."

The Commission, the Department and Ms. Kryszak's former counsel have provided numerous opportunities for Ms. Kryszak to pursue her appeals before the Commission. She has failed to appear at scheduled status conferences on three occasions, despite being ordered to do so by the Commission and being informed that her appeals could be subject to dismissal for failure to appear. She has failed to follow

through on sending the settlement stipulation to the Department, despite her stated intention to do so and the numerous attempts by Attorney Stellick and the Commission to accommodate her. In addition, notwithstanding the motion to dismiss filed by Attorney Stellick, and the Commission's Order requiring a response from Ms. Kryszak by December 6, 2006, Ms. Kryszak did nothing to resist the motion to dismiss her appeals.

Accordingly, the petitions for review are dismissed in these cases for failure to prosecute and for failure to follow the Commission's orders.

IT IS ORDERED

The Department's motion is granted, and the petitions for review in these matters are dismissed.

Dated at Madison, Wisconsin, this 2nd day of March, 2007.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"