

STATE OF WISCONSIN
TAX APPEALS COMMISSION

KERRY LARSON,

DOCKET NO. 14-S-140

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING & ORDER

DAVID D. WILMOTH, COMMISSIONER:

This case comes before the Commission for decision on the Respondent's Motion to Dismiss the Petitioner's Petition for Review as untimely. The Petitioner, Kerry Larson, of Verona, Wisconsin, appears *pro se* in this matter. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Axel F. Candelaria, Madison, Wisconsin. The Department filed an affidavit, exhibits, and brief in support of its Motion. The Petitioner was offered an opportunity to respond to the Department's Motion, but he did not do so. For the reasons stated below, the Commission finds that the Petitioner did not file his Petition in a timely manner as required by statute and, therefore, concludes that dismissal is appropriate.

FACTS

Jurisdictional Facts

1. The Department issued a Notice of Amount Due to the Petitioner, dated August 2, 2013, assessing Wisconsin sales taxes, interest, and penalties, for the taxable period May 1, 2010, through August 31, 2010, in total amount of \$3,827.09. The assessment was the result of the Department's determination that the Petitioner was personally responsible for the unpaid sales taxes, interest, and penalties of Blue Chip Street Rods, LLC. (Affidavit of Attorney Axel F. Candelaria ("Candelaria Aff."), ¶ 2, Ex. 1.)

2. On or about September 4, 2013, the Petitioner submitted a timely Petition for Redetermination objecting to the Department's Notice of Amount Due. (Candelaria Aff., ¶ 3, Ex. 2.)

3. The Department denied the Petitioner's Petition for Redetermination by Notice of Action dated February 12, 2014. (Candelaria Aff., ¶ 4, Ex. 3.)

4. The Notice of Action was sent via certified mail and was received by the Petitioner on February 13, 2014. (Candelaria Aff., ¶ 5, Ex. 4.)

5. The Notice of Action stated that, if the Petitioner disagreed with the Notice, he could send a written appeal to the Commission within 60 days of receiving the Notice. The Notice of Action also stated that, if an appeal was not filed within 60 days, the action taken in the Notice would become "final and conclusive." (Candelaria Aff., ¶ 6, Ex. 3.)

6. The last day for the Petitioner to file a timely appeal to the Commission was April 14, 2014.

7. The Commission received Petitioner's Petition for Review, appealing the Department's Notice of Action, on May 9, 2014. The Petition for Review was sent by Certified Mail in an envelope postmarked May 8, 2014. (Commission file.)

Other Facts

8. On September 10, 2014, the Department filed a Motion to Dismiss the Petitioner's Petition for Review as untimely, along with an affidavit, exhibits, and a brief in support of the Motion.

9. The Commission issued a Briefing Order dated September 11, 2014, providing that no later than October 14, 2014, the Petitioner shall file with the Commission a response to the Department's Motion. The Petitioner did not file a response brief, and did not notify the Commission that his brief would not be filed.

10. The Commission issued an Order dated October 21, 2014, providing that no later than November 4, 2014, the Petitioner shall either file a brief in response to the Department's Motion or notify the Commission that no brief would be filed. The Petitioner neither filed a responsive brief nor notified the Commission that no brief would be filed.

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 statute at issue here outlines the requirements for filing a valid and timely petition for review with the Commission:

Wis. Stat. § 73.01(5)(a): Any person who is aggrieved . . . by the redetermination of the department of revenue may, within 60 days of the redetermination . . . but not thereafter, file with the clerk of the commission a petition for review of the action of the department of revenue For purposes of this subsection, a petition for review is considered timely filed if mailed by certified mail in a properly addressed envelope, with postage duly prepaid, which envelope is postmarked before midnight of the last day for filing.

ANALYSIS

The date on which a petition for review is “filed” with the Commission under Wis. Stat. § 73.01(5)(a) has consistently been held to be the date on which the petition is physically received in the Commission’s office. *See Edward Mischler v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-159 (WTAC 1983). Unless otherwise provided by statute, a document is filed on the date it is *received* by the Commission, not the date it is mailed. *See Laurence H. Grange v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-017 (Dane Co. Cir. Ct. 1993). The one exception in Wis. Stat. § 73.01(5)(a) states that a petition is timely if it is mailed: (1) by certified mail; (2) in a properly addressed envelope; (3) with postage prepaid; and (4) postmarked before midnight of the last day for filing.

In this case, Petitioner mailed his Petition by certified mail in a properly addressed envelope with postage prepaid. But the envelope in which the Petition was mailed was postmarked on May 8, 2014, which was 24 days after the time to appeal

expired. It was received by the Commission on May 9, 2014. Under any of the rules of Wis. Stat. § 73.01(5)(a) applicable to the time for filing a petition for review with the Commission, the Petition in this matter was not timely filed.

Wis. Stat. § 73.01(5)(a) establishes a statutory, date specific, bright line for filing a timely petition for review. The Commission cannot create subject-matter jurisdiction over an untimely petition for review. *McDonald Lumber Co. v. Dep't of Revenue*, 117 Wis. 2d 446, 344 N.W.2d 210 (Ct. App. 1984).

CONCLUSION

The Petitioner's Petition for Review was not timely filed as required by Wis. Stat. § 73.01(5)(a) and, thus, the Commission lacks jurisdiction in this matter.

ORDER

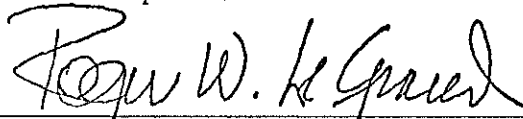
The Department's Motion to Dismiss is hereby granted, and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 7th day of January, 2015.

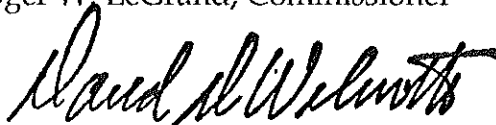
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner



David D. Wilmoth, 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.