

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ROY OSTENSON,

DOCKET NO. 09-I-131

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

This matter comes before the Commission on a Motion to Dismiss filed by Respondent. The grounds for the motion are that Petitioner has not made a claim for which relief can be granted and that the Commission therefore lacks jurisdiction to hear this appeal. As additional grounds for dismissal, the Commission considers whether this claim should be dismissed for failure to prosecute. Petitioner is *pro se*. Respondent, the Wisconsin Department of Revenue (the "Department"), appears by Attorney Peter D. Kafkas.

FINDINGS OF FACT

1. Following an office audit, the Department issued to the Petitioner an assessment and Notice of Amount Due dated May 17, 2004 of additional income tax, plus interest, in the amount of \$60,603.22 for the years 1999-2001. Affidavit of Peter D. Kafkas dated January 21, 2010 (hereinafter "Kafkas Aff.") ¶ 2, Exhibit 1.

2. The Petitioner never filed a petition for redetermination of the

assessment with the Department, and the assessment went delinquent and was eventually paid. Kafkas Aff. ¶ 3.

3. On or about May 8, 2008, the Petitioner filed a Wisconsin Form 1X amended income tax return for 1999 claiming a refund in the amount of \$19,186.00 for that year. Kafkas Aff. ¶ 4, Exhibit 2.

4. By letter dated October 31, 2008, the Department notified the Petitioner that it had denied his claim for refund for 1999 due to it being untimely pursuant to § 71.75(2) and (5), Wis. Stats. (1995-96). Kafkas Aff. ¶ 5, Exhibit 3.

5. By letter dated November 19, 2008, the Petitioner appealed the Department's denial of his claim for refund. Kafkas Aff. ¶ 6, Exhibit 4.

6. By Notice of Action dated May 19, 2009, mailed to the Petitioner by certified mail, and received by the Petitioner on May 20, 2009, the Respondent denied the Petitioner's petition for redetermination of the denial of his claim for refund. Kafkas Aff. ¶ 7, Exhibit 5.

7. On July 20, 2009, the Commission received via certified mail date-stamped July 17, 2009 the Petitioner's petition for review of the Department's denial of his petition for redetermination.

8. On November 3, 2009, the Commission ordered the Petitioner to file a clear and concise statement of the case within 45 days.

9. The Petitioner never filed the required statement of his case.

10. On January 22, 2010, the Department filed a notice of motion and motion to dismiss this petition with supporting affidavit and exhibits.

11. On January 27, 2010, the Commission issued a briefing order requiring the Petitioner to file a response to the Department's motion by February 26, 2010.

12. The Petitioner did not file a response to the motion by the deadline set in the briefing order.

13. On March 1, 2010, the Commission sent a letter to the Petitioner extending the time for filing a response to March 15, 2010. The letter stated, "If no response to this letter is filed, the Commission may find a failure to prosecute the appeal."

14. On March 16, 2010, the Commission sent a follow-up letter again requesting a response from the Petitioner.

15. The Petitioner filed no response to the motion.

CONCLUSIONS OF LAW

1. The Commission lacks jurisdiction to hear this matter.
2. The Petitioner has failed to prosecute his appeal.

RULING

1. The Commission Lacks Jurisdiction in this Matter.

The Department bases its action in this matter on Section 71.75(5), Wis. Stats (1995-1996), which provides that any claim for refund after the assessment of a tax, including penalties and interest, may be made within two years after the assessment was made by field audit and paid if the assessment was not protested by the filing of a petition for redetermination. *Kafkas Aff.* ¶ 9. According to the Department, the two-

year period provided for in § 71.75(5), Wis. Stats. (1995-96), for filing a claim for refund after the assessment of a tax, including penalties and interest, assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination, expired on May 17, 2006. *Id.* As further noted by the Department, 1997 Wis. Act 27 expanded the two-year period to four years, but the expansion became effective for taxable years beginning on January 1, 2000. Kafkas Aff. ¶ 10, Exhibit 7.

In this case, the Department sent the Petitioner an assessment dated May 17, 2004 for the 1999 tax period (Kafkas Aff. ¶ 2, Exhibit 1). The Petitioner did not protest, nor file a petition for redetermination, and the assessment was paid. On May 8, 2008, the Petitioner filed an amended 1999 tax return in which he claimed a refund of \$19,186. The Department determined that the two-year statute of limitations for refunds had expired on May 17, 2006, and thus denied the refund claim and subsequent petition for redetermination. Despite repeated requests from the Commission, the Petitioner has not responded to the Department's recitation of the facts at issue in this case and its interpretation of the applicable statutes.

Upon receiving a notice of assessment from the Department, a person may, within 60 days after receipt of the notice, petition the Department for redetermination of the assessment. Wis. Stat. § 71.88(1)(a). The Department is required to act on a petition for redetermination within six months after it is filed. *Id.* The Commission has jurisdiction to review actions of the Department pursuant to a timely petition for review filed by 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” Wis. Stat. § 73.01(5)(a). Except for certain claims for refund not at issue in this case, “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. §§ 77.59(6)(b) and 71.88(2)(a). The Commission has long held that it does not have jurisdiction under Wis. Stat. § 73.01(5)(a) to review actions of the Department where the petitioner failed to file a timely petition for redetermination with the Department. *See, Lyman v. Dep’t of Revenue*, Docket No. 05-W-143 (WTAC Aug. 4, 2006.) Because the Petitioner has failed to show that he filed a timely petition for redetermination in this case, the Commission concludes that it lacks jurisdiction to hear this appeal.

2. The Petitioner Has Failed to Prosecute His Appeal.

Assessments made by the Department are presumed to be correct, and the burden is on the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1). In order to prove that the Department’s action is incorrect, a petitioner must begin by prosecuting his or her appeal and complying with the Commission’s orders.

The Petitioner timely appealed to the Commission, but essentially stopped pursuing this matter a few months later. On January 27, 2010, the Commission issued a briefing order requiring the Petitioner to file a response to the Department’s motion to dismiss the petition. The Petitioner never filed a response to the motion or the briefing order, nor to two follow-up letters sent by the Commission warning him that the case

might be dismissed for failure to prosecute. The file indicates that Petitioner telephoned the Commission on March 18, 2010 and said he would be sending a letter, but no letter was ever received.

The failure to file a statement of the case, the failure to file a response pursuant to the briefing order, and the failure to respond to two subsequent letters requesting a response together constitute a failure to prosecute under Wis. Stat. § 805.03, which is independent grounds for dismissal. *See*, Wis. Stat. § 805.03 and Wis. Admin. Code § TA 1.39. For the reasons discussed herein, the Commission grants the Department's motion to dismiss this petition for review.

ORDER

The Department's motion to dismiss the petition for review is granted.

Dated at Madison, Wisconsin, this 22nd day of September, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"