

STATE OF WISCONSIN
TAX APPEALS COMMISSION

**LUCINDA PHILLIP-MAMAYEK
AND ESTATE OF DOUGLAS J. MAMAYEK,**

DOCKET NO. 09-I-138

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This matter comes before the Commission on a Motion to Dismiss the petition for review filed by the Respondent, the Wisconsin Department of Revenue ("the Department"). The Department is represented in this matter by Attorney Mark S. Zimmer, of Madison, Wisconsin, who has filed a brief with affidavits and exhibits. The Petitioners have appeared in this matter by Mr. Richard L. Krejcarek, C.P.A., of Brookfield, Wisconsin. The Petitioners have not filed a response to the Department's motion.

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

FINDINGS OF FACT

A. Jurisdictional Facts

1. The Department issued the assessment for \$8,977.58 to the Petitioners on April 10, 2008. Affidavit of Resolution Officer Marie Romero (“Romero Aff.”), Exhibit 6.

2. The Petitioners’ representative, Mr. Richard Krejcarek, C.P.A., filed a letter with the Department on June 2, 2008 that the Department treated as a Petition for Redetermination. Romero Aff., ¶7.

3. The Department denied the Petition for Redetermination on May 29, 2009. Romero Aff., ¶10.

4. The Petitioners filed a timely petition before this Commission on July 29, 2009. Commission File.

B. Material Facts

1. Mr. Douglas Mamayek and Ms. Lucinda Phillip Mamayek (“the taxpayers”) owned 100% of a Wisconsin corporation, Mamayek Enterprises, Inc. (“the Corporation”), which was subject to a Wisconsin corporation income and franchise tax field audit for the years 2001 through 2004. Romero Aff., ¶2.

2. The Department’s field auditor determined that the Corporation paid personal expenses for the taxpayers during the years 2001 through 2004, resulting in constructive dividends to the taxpayers during those years. Romero Aff., ¶3.

3. The matter was referred to the Department's office audit section, and the office auditor made adjustments to the taxpayers' personal income tax for the years 2001 through 2003 for constructive dividends in the following amounts:

2001.....	\$23,059
2002.....	\$21,962
2003.....	\$35,366

Romero Aff., ¶4.

4. The field auditor had requested that the Corporation provide substantiation of the business purpose of certain expenses paid by the Corporation and the June 2, 2008 letter from Mr. Krejarcek to the Department disputed certain of the adjustments. Romero Aff., ¶¶6 and 7.

5. Mr. Mamayek passed away during the pendency of the case and his estate was substituted as a party, pursuant to Wis. Stat. § 859.03. Respondent's Brief at 1.

6. The Commission issued a briefing order in this case in response to the Department's motion on February 25, 2010. The Petitioners were to have filed a response to the Department's motion on April 15, 2010. Commission File.

7. On April 16, 2010, the Commission sent a notice to the Petitioners that no response had been received and that the Commission had extended the period for a response to April 30, 2010. *Id.*

8. On May 3, 2010, the Commission sent another letter to the Petitioners indicating that no response had been received and that a response should be submitted by the Petitioners forthwith. The Commission's letter to the Petitioners

indicated that the Commission would consider dismissing the petition for failure to prosecute unless a response was received. The Commission received no response to either letter. *Id.*

9. On January 7, 2010, the Commission issued a Status Conference Memorandum which, in part, encouraged the parties to exchange information informally. The Department made several informal requests for discovery to the Petitioners after the Commission's order was issued, but the Department received no information from the Petitioners. Respondent's Brief at 4.

RELEVANT STATUTES AND CODE PROVISIONS

805.03 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. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

TA 1.39 Practice and procedures. Except as provided in s. TA 1.53, the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state.

HOLDING

This case began with a field audit the Department conducted on Mamayek Enterprises, Inc. concerning the years 2001 through 2004.¹ The Department's auditor questioned a number of expenses the corporation paid and requested documentation

¹ The record does not indicate the exact nature of the business.

for the business purpose of the expenses. When the documentation was not provided, the Department issued the assessment in April of 2008 personally to Mr. and Mrs. Mamayek, on the premise that the payment of the expenses by the corporation resulted in constructive dividends to the Mamayeks. In June of 2008, the Petitioners' representative wrote a letter to the Department in response, listing the business purpose behind a number of the expenses. When the Petition for Redetermination was denied in 2009 by the Department, Mr. Krecjarek filed a petition here on behalf of Mrs. Mamayek and the estate. After several phone conferences before the Commission, the Department filed this motion to dismiss. The Petitioners have not filed a response. The first part of this opinion will summarize briefly the law that applies to this motion. The second part of this opinion will discuss why we find a failure to prosecute.

Applicable Law

The Department has filed a Motion to Dismiss this case for Petitioners' failure to prosecute, failure to comply with the orders of the Commission, and the failure to comply with discovery requests. Respondent's Motion at 1. Because the Department also filed an affidavit and a memorandum of law 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). In brief, summary judgment is warranted where “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. Stats. § 802.08(2).

Assessments made by the Department are presumed to be correct, and the burden is upon the Petitioners 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 an assessment is incorrect, a Petitioner must begin by responding to facts and arguments presented by the Department in support of the assessment at issue. In this case, there is basically no information put forth before the Commission by the Petitioners. The only information on the basis of the Petitioners' claim is the June, 2008 letter the Petitioners' representative wrote to the Department indicating that certain of the expenses had a business purpose and promising to provide substantiation of the purpose at a later date. There are, however, at least two problems with treating the letter as a response to the Department's motion. First, the letter is not under oath and does not comply with summary judgment procedure. Second, the letter is essentially a promise to provide proof of a business purpose at a later date. Despite extensions, that proof has not arrived and, thus, there is no genuine issue of material fact here before the Commission. The Department, by way of its affidavits and exhibits, has shown that, coupled with the presumption, it is entitled to judgment.

Failure to Prosecute

As an additional basis for the Commission's decision here is failure to prosecute. This case began before the Commission on July 29, 2009 when the Petitioners filed their petition here. Since that date, the Petitioners have failed in a number of ways to present their case. First, and most notably, the Petitioners have failed to respond to the Department's Motion to Dismiss in any real way. That failure to respond is also a violation of the Commission's Briefing Order dated February 15, 2010. Second, the Petitioners have failed to provide requested documents in informal discovery as the respective Status Conference Memoranda and Orders have required. As the Department points out, the failure to comply with discovery orders may result in dismissal of an action pursuant to Wis. Stat. § 804.12(2)(a). Third, the Petitioners have failed to maintain contact with their representative in that they have not cooperated with his efforts to obtain needed documentation from them. Lastly, the Petitioners failed to appear for one of the telephone conferences held in connection with this case. Taken as a whole, this inaction demonstrates a failure to prosecute their petition under Wis. Stat. § 805.03. *Miller v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-864 (WTAC 2005).²

On a number of occasions, the Commission has determined that a taxpayer has failed to prosecute. For example, in *Fullerton v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-804 (WTAC 2005), the Commission dismissed a taxpayer's petitions

² Furthermore, Wis. Stat. §802.10(7) provides that violation of a scheduling or pretrial order constitutes a basis for a case to be dismissed.

for review because the taxpayer failed to provide documentation supporting her challenges to the assessments, and failed to respond to the Department's motion to dismiss the taxpayer's petitions for review. The Commission wrote the following:

Since Ms. Fullerton filed her appeals to the Commission on December 7, 2001, more than 3 years ago, she has repeatedly failed to provide the necessary documentation or substantiation to challenge the more than 800 adjustments made by the Department in these tax assessments. The Commission and the Department have patiently waited for Ms. Fullerton to substantiate her challenges to the Department's tax assessments with tangible records, but she has failed to provide any records at all. In spite of holding 12 telephone conferences, these cases have not progressed toward any resolution since the time Ms. Fullerton filed them with the Commission.

The Commission held that these failures constituted a failure to prosecute the appeals.

Further, in *Seema M. Lilani v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-832 (WTAC 2005), the Commission dismissed the taxpayer's appeal of a Wisconsin personal income tax assessment because the taxpayer failed to provide a current telephone number for scheduled telephone status conferences or to participate in those conferences. The Commission held that the taxpayer's lack of action constituted a failure to prosecute the appeal. Finally, in *Manowske v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-968 (WTAC 2007), a taxpayer's petition for redetermination of his personal income tax liability was dismissed for failure to state a claim and failure to prosecute his appeal. The taxpayer did not respond to the Department's motion to dismiss and never specifically denied his liability for the taxes asserted in the assessment. Therefore, the Commission held he failed to satisfy his burden of proof to show the incorrectness of the assessment against him.

Like *Fullerton*, *Lilani*, and *Manowske*, that point has been reached in this case where there is no going forward without affirmative action from the Petitioners. The Petitioners, however, have repeatedly demonstrated a lack of interest in pursuing this petition and, thereby, we find a failure to prosecute.

CONCLUSION

The pleadings and the Department's affidavits and brief show that there is no genuine issue as to any material fact in this case. Therefore, the Department is entitled to a judgment as a matter of law. In addition, as secondary grounds for dismissal, the Petitioners have failed to prosecute this appeal.

ORDER

The Department's motion is granted, and the petition for review is dismissed.

Dated at Madison, Wisconsin, this 12th day of August, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"