

STATE OF WISCONSIN
TAX APPEALS COMMISSION

WAYNE D. RODEN &
SUZANNE BALISTRERI,

DOCKET NO. 05-I-157

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DIANE E. NORMAN, ACTING CHAIRPERSON:

This case comes before the Commission on the motion of respondent, the Wisconsin Department of Revenue (“Department”), to dismiss the petition for review on the basis that petitioners have failed to comply with Commission orders, have failed to appear for telephone scheduling conferences and have otherwise failed to prosecute their appeal, pursuant to Wis. Stat. §§ 802.10(7), 805.03, and Wis. Admin. Code § TA 1.39.

Petitioners are represented by Attorney Grant R. Niehus (“petitioners’ attorney”) and have filed a response to the motion along with a supporting affidavit. Attorney Michael J. Buchanan represents the Department and has filed an affidavit with exhibits and a reply brief in support of the motion.

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

JURISDICTIONAL AND MATERIAL FACTS

1. By notice dated December 13, 2004, the Department issued an assessment of individual income/franchise tax and interest to petitioners in the total amount of \$41,479.61 for tax years 1999, 2000, 2001, and 2002, inclusive (“years at issue”). (Affidavit of Michael J. Buchanan filed January 5, 2007, Exh. 1.)

2. On February 16, 2005, petitioners filed with the Department a timely petition for redetermination of the assessment. (Buchanan Affidavit, Exh. 2.)

3. The Department issued and sent to petitioners by certified mail a Notice of Action, dated August 8, 2005, denying the petition for redetermination on the grounds that the information requested by the Department had not been provided. (Buchanan Affidavit, Exh. 3.)

4. On September 23, 2005, petitioners through their representative filed a timely petition for review with the Commission.

5. The Commission scheduled a telephone scheduling conference in regard to the petition for review on April 6, 2006. Both the Department’s attorney and petitioners’ attorney appeared at the telephone scheduling conference. Petitioners’ attorney stated, at the conference, that he would submit documentation to the Department to substantiate petitioners’ claims by April 28, 2006. The Commission also scheduled a telephone conference for May 9, 2006.

6. Petitioners’ attorney and petitioners failed to appear at the May 9, 2006 telephone conference and the Department’s attorney stated that he had not received any substantiation documentation from petitioners’ attorney. The

Commission issued a Status Conference Memorandum and Order dated May 10, 2006 scheduling another telephone conference in this case for June 8, 2006.

7. Both the Department's attorney and petitioners' attorney appeared at the June 8, 2006 telephone conference. Petitioners' attorney had not yet provided any substantiation documentation to the Department. Another telephone conference was scheduled for July 6, 2006.

8. Both the Department's attorney and petitioners' attorney appeared at the July 6, 2006 telephone conference. Petitioners' attorney stated that some documentation had been sent to the Department and another telephone conference was scheduled for August 8, 2006, to allow time for the Department to review the documentation.

9. Both the Department's attorney and petitioners' attorney appeared at the August 8, 2006 telephone conference. Petitioners' attorney acknowledged that the Department had deemed his submission of documentation inadequate and stated that he would prepare and send to the Department a cost-basis analysis of petitioners' business, along with additional bank statements as requested by the Department, prior to the next-scheduled telephone conference set for September 12, 2006.

10. Petitioners' attorney failed to appear for the September 12, 2006 telephone conference. The Department's attorney informed the Commission that petitioners had failed to provide any additional documentation to the Department. The Commission issued a Status Conference Memorandum and Order that ordered in part as follows:

- Petitioners or petitioners' representative shall participate in the October 12, 2006 telephone status conference.
- Petitioners or petitioners' representative shall provide documentation to the Department as agreed to at the August 8, 2006 telephone status conference by September 26, 2006.
- Failure to comply with the terms of this order may result in any sanction authorized by law, including dismissal of petition for review.

11. Both the Department's attorney and petitioners' attorney appeared at the October 12, 2006 telephone conference. Petitioners' attorney had not yet provided the substantiation documentation to the Department as ordered by the Commission. Petitioners' attorney stated that he would provide the documentation by November 13, 2006. Another telephone conference was scheduled for November 21, 2006.

12. Petitioners' attorney failed to appear for the November 21, 2006 telephone conference. The Department's attorney informed the Commission that petitioners' attorney had provided some, but not all of the substantiation documentation to the Department as promised at the October 12, 2006 telephone conference. The Commission issued a Status Conference Memorandum and Order scheduling another telephone conference for December 21, 2006 and ordering that petitioners' attorney provide substantiation documentation to the Department prior to the next-scheduled telephone conference and that failure to participate in the next-scheduled telephone conference may result in dismissal of the petition for review.

13. Petitioners' attorney telephoned the Commission on November 21, 2006, approximately 3 hours after the telephone conference to state that documentation would be sent to the Department.

14. Petitioners' attorney failed to appear for the December 21, 2006 telephone conference. The Department's attorney informed the Commission that petitioners' attorney had failed to provide the substantiation documentation to the Department as promised at the October 12, 2006 telephone conference.

15. On January 5, 2007, the Department filed a Notice of Motion and Motion to Dismiss, with supporting brief, affidavit and exhibits, requesting that the Commission dismiss petitioners' appeal on the basis that petitioners have failed to comply with Commission orders and have otherwise failed to prosecute their appeal, pursuant to Wis. Stat. § 805.03 and Wis. Admin. Code § TA 1.39.

16. Petitioners' attorney filed a response to the Motion to Dismiss on January 31, 2007.

17. The Department filed a reply brief on February 12, 2007.

RULING

Assessments made by the Department are presumed to be correct, and the burden is on 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 prosecuting his or her appeal and

complying with the Commission's orders.

The Commission is authorized to dismiss a petition for review for failure to prosecute. *See*, Wis. Stats. §§ 802.10(7) and 805.03; Wis. Admin. Code § TA 1.39. The statutes limit the sanction of dismissal for failure to prosecute and for failure to comply with Commission orders to those that are "just." Wis. Stat. § 805.03. To warrant dismissal, the non-complying party has to have acted egregiously or in bad faith. *Johnson v. Allis-Chalmers Corp.*, 162 Wis. 2d 261, 275, 470 N.W. 2d 859 (1991); *Furrenes v. Ford Motor Co.*, 79 Wis. 2d 260, 267-69, 255 N.W. 2d 511 (1977).

Petitioners' attorney's actions have not been so egregious so as to justify dismissal of the petition for review. His non-compliance has included failure to comply with Commission orders to appear at some telephone scheduling conferences and failure to provide substantiation documentation to the Department that may have resolved this matter. The documentation that was provided to the Department by petitioners' attorney had failed to result in a resolution of this matter.

The Department argues that the documents submitted by petitioners' attorney did nothing to prove petitioners' claims as stated in their petition for review. The Commission cannot rule here on whether the documentation submitted by petitioners substantiates their claims. This exchange of information was planned for the purpose of determining if this matter could be resolved prior to a hearing. We agree that petitioners' attorney has been insufficiently responsive, but the Department has not shown any prejudice that has been caused by his actions. While delays have resulted, they have not been extreme in time, and will not prejudice the Department in any

subsequent hearing in this matter. Since a resolution of this matter did not take place, the Commission expects to schedule a hearing in this matter to determine if petitioners can meet their burden and prove by clear and satisfactory evidence that the Department erred in its determination.

ORDER

1. The Department's motion is denied, and a telephone scheduling conference is set for **May 24, 2007 at 10:00 a.m.** to set a hearing date in this matter.

2. Failure to participate in the telephone scheduling conference may result in any sanction authorized by law, including dismissal of petition for review.

Dated at Madison, Wisconsin, this 25th day of April, 2007.

WISCONSIN TAX APPEALS COMMISSION

Diane E. Norman, Acting Chairperson

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"