

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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ROBERT AND JENNIFER SARNOWSKI,

DOCKET NO. 17-I-025

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING & ORDER**

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**DAVID D. WILMOTH, COMMISSIONER:**

This case comes before the Commission for decision on the Respondent's Motion to Dismiss the Petitioners' Petition for Review as untimely. The Petitioners, Robert and Jennifer Sarnowski, of Fontana, Wisconsin, appear *pro se* in this matter. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Chief Counsel Dana J. Erlandsen. For the reasons stated below, the Commission finds that the Petitioners did not file their Petition in a timely manner as required by statute and, therefore, concludes that dismissal is appropriate.

**FACTS**

*Jurisdictional Facts*

1. The Department issued the Petitioners a Notice of Amount Due dated April 19, 2016. (Affidavit of Department Resolution Office Audit Supervisor Mary

E. Nelson ("Nelson Aff."), ¶ 2, Ex. A.)

2. On or about June 16, 2016, the Petitioners filed a Petition for Redetermination with the Department. (Nelson Aff. ¶ 3, Ex. B.)

3. The Department denied the Petition for Redetermination by Notice of Action dated November 18, 2016, and received by the Petitioners on November 19, 2016. (Nelson Aff. ¶ 4, Ex. C.)

4. The Petitioners' Petition for Review, appealing the Department's denial of their Petition for Redetermination, was mailed by the Petitioners via certified mail on January 19, 2017, and was received in the office of the Commission on January 23, 2017. (Nelson Aff. ¶ 5, Ex. D, Commission file.)

5. The 60-day period provided in Wis. Stat. § 73.01(5)(a), for timely filing a Petition for Review appealing the action of the Department of Revenue on the Petitioners' Petition for Redetermination expired on January 18, 2017. (Nelson Aff. ¶ 5).

#### *Other Facts*

6. On February 7, 2017, the Department filed a Motion to Dismiss the Petitioners' Petition for Review as untimely, along with an affidavit, exhibits, and a Brief in support of the Motion. (Commission file.)

7. On February 8, 2017, the Commission issued a Briefing Order, directing the Petitioners to file a response to the Department's Motion to Dismiss no later than March 10, 2017. No response was filed by the Petitioners on or before such date. (Commission file.)

8. On March 14, 2017, the Commission issued a revised Briefing Order, directing the Petitioners to file a response to the Department's Motion to Dismiss no later than March 28, 2017, and stating that, if the Petitioners did not file a response, the case would be decided based upon the record as presently constituted. No response was filed by the Petitioners on or before such date. (Commission file.)

#### 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, 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 sent by certified mail postmarked before midnight of the last day for filing.

The 60-day period for timely filing a Petition for Review in this case expired on January 18, 2017. The Petitioners mailed their Petition by certified mail on January 19, 2017, one day after the final date for filing. The Petition was received by the Commission on January 23, 2017, five days after the final date for filing. Consequently, the Petition in this matter was not timely filed.

It seems a shame that the Petitioners have lost their right to Commission review by mailing their Petition for Review one day late. However, if the Petition is late, even by a day, the Commission lacks subject matter jurisdiction. This finding is not a matter for discretion; the Commission has no choice in the matter. *Alexander v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) 400-650 (WTAC 2002); *Edwards v. Dep't of Revenue.*, Wis. Tax Rptr. (CCH) ¶401-588, (WTAC 2012). As the Wisconsin Supreme Court has said: "To dismiss an appeal because it comes one day late may seem harsh. However, if statutory time limits to obtain appellate jurisdiction are to be meaningful they must be unbending." *Kohnke v. ILHR Dep't*, 52 Wis.2d 687, 690, 191 N.W.2d 1 (1971).

#### CONCLUSION OF LAW

The Petitioners' 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.

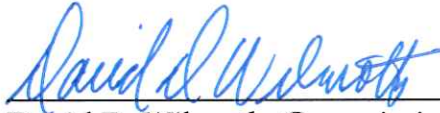
Dated at Madison, Wisconsin, this 16th day of May, 2017.

**WISCONSIN TAX APPEALS COMMISSION**



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Lorna Hemp Boll, Chair



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David D. Wilmoth, Commissioner



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David L. Coon, 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.