

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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LAWANDA TONEY,

DOCKET NO. 09-I-34

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**THOMAS J. MCADAMS, COMMISSIONER:**

This matter comes before the Commission on the Respondent's Motion to Dismiss on the grounds that the Petitioner has failed to comply with Commission orders and that the Petitioner has failed to prosecute her appeal. The Respondent in this matter (also referred to herein as "the Department") is represented by Attorney Peter D. Kafkas, of Madison, Wisconsin, and has filed exhibits and an affidavit in support of its motion. The Petitioner in this matter, Ms. Lawanda F. Toney, of Milwaukee, Wisconsin, is *pro se*. The Petitioner has not filed a response to the Department's motion.

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

## JURISDICTIONAL AND MATERIAL FACTS

### A. Jurisdictional Facts

1. The Petitioner filed timely returns for 2003, 2004, 2005, and 2006. The Petitioner's Wisconsin income was \$9,333, \$6,158, \$11,593, and \$7,031 for those respective years. After an office audit in 2008, however, the Department changed the Petitioner's filing status from head of household to single and disallowed the Petitioner's credits and exemption deductions for her four children in 2003 through 2006 and for her cousin in 2003 and brother in 2005. Respondent's Motion at 1.

2. Those two changes negated the Petitioner's earned income credits of \$1,604, \$346, \$1,892 and \$1,208 for each of the respective years. The Department's recalculation meant that the Petitioner now owed \$2,464.59 for 2003, \$477.50 for 2004, \$2,544.05 for 2005, and \$1,375.99 for 2006. Exhibit 1.

3. On February 13, 2008, a Department auditor sent the Petitioner a letter indicating what documentation she needed to provide to the Department in order to resolve her appeal. The letter requested *inter alia* the birth certificates for each child, the social security cards for the cousin and the brother, the number of days each child lived in the household, the name and address of anyone else the children may have lived with, and a statement of attendance from any school or daycare attended by the cousin and the brother during the relevant period. This letter was also included with the Answer on March 20, 2009, requesting the information and including a postage-paid return envelope to facilitate the return of the documentation. This letter was sent again on July 10, 2009, also with a postage-paid return envelope. Exhibits 5, 6, and 7.

4. On April 11, 2008, the Department issued an assessment notice to Petitioner in the amount of \$6,862.13 due to lack of substantiation. Exhibit 1.

5. By letter dated April 28, 2008, Ms. Toney petitioned the Department for a redetermination of this assessment. Exhibit 2.

6. On July 25, 2008, the Department sent a Notice of Action via certified mail denying Petitioner's petition for redetermination. Exhibit 3.

7. On February 18, 2009, the Tax Appeals Commission acknowledged receipt of Petitioner's Petition for Review via ordinary mail. Exhibit 4.

#### **B. Material Facts**

1. On May 8, 2009 the Commission issued a Notice of Telephone Status Conference for June 17, 2009. Commission File.

2. The Petitioner attended the June 17 conference and a subsequent conference was scheduled by agreement of the parties for July 23, 2010. *Id.*

3. The Petitioner attended the July 23<sup>rd</sup> conference and the matter was continued to August 25, 2009 for information to be exchanged between the parties. *Id.*

4. The Petitioner failed to attend the August 25, 2009 conference. The Commission, however, made contact with Ms. Toney on August 31 and another date was set for October 19, 2009. *Id.*

5. The Commission issued a written order, dated September 2, 2009, marked as Exhibit 8, indicating as follows:

- (1) The parties or their representatives shall participate in the next scheduled status conference. Failure to comply with the terms of this order may result in any sanction

authorized by law, including dismissal of the petition for review.

*Id.*

6. The Petitioner failed to appear on October 19, 2009. *Id.*

7. On October 22, 2009, the Commission sent a letter to the Petitioner

which stated in part as follows:

If the Commission is unable to reach you or your representative by telephone, the conference will proceed, and the petition for review will be subject to dismissal, pursuant to Wis. Stat. §§ 802.10(7) and 805.03.

*Id.*

8. On November 13, 2009, Ms. Toney called the Commission with a new address and phone number. The Commission rescheduled the conference for December 11, 2009. Ms. Toney appeared at the December 11, 2009 conference and the parties agreed that another conference would take place on March 3, 2010. *Id.*

9. On January 25, 2010, the Department sent the Petitioner a letter requesting specific information by February 8, 2010, and stating the possibility of resolving her appeal with further information. There has been no response to the Department's letter. Exhibit 10.

10. The Commission's December 14, 2009, Status Conference Memorandum and Order scheduled the next telephone status conference for March 3, 2010, and again indicated:

(1) The parties or their representatives shall participate in the next scheduled status conference. Failure to comply with the terms of this order may result in any sanction

authorized by law, including dismissal of the petition for review.

Exhibit 11.

11. The Petitioner failed to appear on March 3, 2010. Commission File.

12. On March 29, 2010 the Department filed a Notice of Motion and Motion to Dismiss with supporting affidavit and exhibits. *Id.*

13. The Commission issued a briefing order in response to the Department's Motion to Dismiss on April 19, 2010. The Petitioner was to have filed a response on May 21, 2010. When no response was filed by the Petitioner, the Commission sent the Petitioner a certified letter on May 24, 2010 granting *sua sponte* a 14-day extension of the period in which to file a response. No response was received. *Id.*

14. On June 10, 2010 the Commission sent the Petitioner another certified letter requesting a response and indicating that a consequence of not responding may be dismissal of the petition for failure to prosecute. The Petitioner has not responded. *Id.*

15. Both the May 24, 2010 and June 10, 2010 letters were returned to the Commission by the Postal Service as nondeliverable. *Id.*

16. On June 8, 2010 the Commission's legal assistant called each of the phone numbers the Petitioner had given the Commission and both numbers were no longer in service. *Id.*

## 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 in 2008 when the Department conducted an office audit of the Petitioner's 2003, 2004, 2005, and 2006 income tax returns. When the Petitioner failed to provide documentation of the exemptions she claimed for her four children for 2003 through 2006, her cousin in 2003, and her brother in 2005, the Department recalculated her income tax as a single person without the claimed exemptions, resulting in the denial of the earned income tax credit she had claimed and an income tax liability of \$6,862.13. The Petitioner then filed a timely petition<sup>1</sup> before this Commission and, on several occasions, she appeared at status conferences on her case. After she missed several more conferences, however, and the Commission was unable to contact the Petitioner, the Department filed this Motion to Dismiss. The Petitioner has not responded to the motion. The first part of this opinion will summarize briefly

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<sup>1</sup> The Petitioner's letter to the Commission in February, 2009 indicates that the Petitioner did not receive notice of the assessment until December, 2008.

the law that applies to this motion and why the Department is entitled to judgment. 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 Petitioner's failure to prosecute and for her failure to comply with the orders of the Commission. Respondent's Motion at 1. Because the Department also filed an affidavit 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 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). Moreover, it is a long-established rule of statutory construction that tax exemptions, deductions

and privileges are matters of legislative grace and tax statutes are to be construed against the granting of the same; One who claims such an exemption must point to an express provision granting such exemption and bring himself or herself clearly within the terms of the exemption. *Ramrod, Inc. v. Dep't of Revenue*, 64 Wis. 2d 499, 219 N.W.2d 604 (1974).

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, however, there is no information or substantiation properly put forth before the Commission by the Petitioner. The only information on the basis of the Petitioner's claim is the letter and attachments<sup>2</sup> the Petitioner sent to the Commission in February of 2009 which commenced this case. There are, however, at least two problems with treating the letter as a response to the Department's Motion to Dismiss for Failure to Prosecute. First, the letter is not under oath and does not comply with summary judgment procedure in that by statute the Commission cannot rely on a Petitioner's Petition for Review to discern Petitioner's arguments in opposition to the Department's motion. *See* Wis. Stat. § 802.08(3) [... "an adverse party may not rest upon the mere allegations or denials of the pleadings...]. Second, the letter is essentially a promise to provide additional proof concerning the exemptions she claimed for her brother in 2005 and her cousin in 2003. Unfortunately, that proof has not arrived and, thus, there is no genuine issue of material fact properly before the Commission. The

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<sup>2</sup> The attachments included birth certificates for her four children, a social security card for her brother, and what appears to be a letter from the Petitioner's mother explaining why it was necessary for the Petitioner's brother to stay with the Petitioner for part of 2005.



Department, by way of its affidavit and exhibits, has shown that, coupled with the presumption, it is entitled to judgment as a matter of law.

### **Failure to Prosecute**

As an additional basis for the Commission's decision here, we note that this case began before the Commission on February 18, 2009 when the Petitioner filed her petition here. Since that date, the Petitioner has failed in two ways to present her case to the Commission. First, and most notably, the Petitioner has failed to respond to the Motion to Dismiss the Department filed after the Petitioner stopped attending the teleconferences. That failure to respond is a violation of the Commission's Briefing Order dated April 19, 2010. The Commission sent the Petitioner a letter on May 24, 2010 reminding the Petitioner that her response was overdue and extending the due date *sua sponte* an additional 14 days. There was also no response to the Commission's June 10, 2010 letter which again requested a response from the Petitioner.

Second, the Petitioner has failed to appear at several teleconferences<sup>3</sup> and, therefore, stopped the progress of this case. Subsequent efforts to reach her at the numbers she had left with the Commission were unsuccessful. The Commission's rules require the parties to leave valid contact information for the Commission and, at least on one occasion while the case was pending, the Petitioner knew to call the Commission's clerk and update her contact information. In addition to the problems with the invalid phone numbers, certified letters the Commission sent to the Petitioner

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<sup>3</sup> During the teleconferences she did attend, the Petitioner expressed her frustration at the Department's requests for substantiation for the exemptions.

were returned by the U.S. Postal Service marked as “undeliverable” on April 30, 2010 and on May 14, 2010. We have not heard from the Petitioner since December 11, 2009 and now have no way to reach her.

Taken as a whole, this inaction demonstrates a failure to prosecute her petition under Wis. Stat. §805.03. *Miller v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-864 (WTAC 2005).<sup>4</sup>

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 Wisconsin Tax Appeals Commission dismissed a taxpayer's petitions 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.

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<sup>4</sup> Furthermore, Wis. Stat. §802.10(7) provides that violation of a scheduling or pretrial order constitutes a basis for a case to be dismissed.

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

Further, in *Phillip-Mamayek v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-343 (WTAC 2010), the Department filed a Motion to Dismiss for failure to prosecute after the Petitioners' representative was unable on several occasions to retrieve relevant information from the clients. Without information from the clients concerning the business purpose of certain disallowed expenses, the representative was unable to comply with discovery and the progress of the case stalled. In addition, the Petitioners failed to respond to the Department's Motion to Dismiss. Just as in this case, letters were sent reminding the Petitioners that a response was due and granting *sua sponte* extensions. Based on the lack of action after the petition was filed, the Commission stated it had little choice but to dismiss the appeal. Finally, in *Manowske v. Wisconsin 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 of Revenue's motion to dismiss and never specifically denied his liability for the taxes asserted in the assessment. Therefore, he failed to satisfy his burden of proof to show the incorrectness of the assessment against him.

Like *Fullerton*, *Phillip-Mamayek*, and *Manowske*, that point has been reached in this case where there is no going forward without action from the Petitioner.

Unfortunately, the Petitioner seems to have given up on this matter and thereby we find a failure to prosecute the petition.<sup>5</sup>

### CONCLUSION

The pleadings and the Department's affidavit 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 Petitioner has failed to prosecute her appeal.

### ORDER

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

Dated at Madison, Wisconsin, this 22<sup>nd</sup> day of September, 2010.

### WISCONSIN TAX APPEALS COMMISSION

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David C. Swanson, Chairperson

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Roger W. LeGrand, Commissioner

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Thomas J. McAdams, Commissioner

### ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

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<sup>5</sup> As mentioned above, the Petitioner submitted to the Commission original birth certificates for her four children. It is not clear from this record why the Department has challenged the exemptions for those four children. The claims for the cousin in 2003 and the brother in 2005 would be a different story, as Ms. Toney's petition admits that each of those relatives lived elsewhere during substantial parts of the relevant years.