

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

PAUL AND MARIANNE TRAPP,

DOCKET NO. 09-I-161

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This case comes before the Commission on the motion of the Wisconsin Department of Revenue (the "Department") to dismiss the petition for review on the basis that it was not timely filed under Wis. Stat. § 73.01(5)(a). Attorney Sheree Robertson represents the Department and has filed a notice of motion and motion to dismiss with a brief and affidavits with exhibits in support of the motion, and an alternative answer to the petition. John C. Noggle, CPA, represents the Petitioners and has not filed a response to the motion.

Having considered the entire record, including the motion, brief, affidavit and exhibits, the Commission hereby finds, rules and orders as follows:

FINDINGS OF FACT

1. By a Notice of Amount Due and Audit Worksheet dated October 19, 2007 issued to the Petitioners, the Department assessed the Petitioners additional income tax plus interest in the total amount of \$11,960.90 for the period 2002-2003 (the

“period at issue”). (Affidavit of Attorney Sheree Robertson dated September 17, 2009 (“Robertson Aff.”), ¶ 2, Ex. 1.)

2. By letter dated December 6, 2007, the Petitioners filed with the Department a petition for redetermination. The Petitioners subsequently also filed Department Form A-222 naming Mr. Noggle as their representative. (Robertson Aff. ¶ 3, Ex. 2-3.)

3. By Notice of Action dated May 27, 2009 (the “Notice”) sent to the Petitioners by certified mail, the Department denied the petition for redetermination based on the Department’s finding that the Petitioners had not provided the information it had requested. (Robertson Aff. ¶ 4, Ex. 4.)

4. On May 27, 2009, the Department sent a copy of the Notice to Mr. Noggle via regular U.S. mail. (Robertson Aff. ¶ 4, Ex. 4; Affidavit of Department Resolution Unit Office Audit Supervisor Mary E. Nelson dated September 17, 2009, ¶ 3.) The copy of the Notice sent to Mr. Noggle was not returned and was not resent by the Department. (Nelson Aff., ¶ 4.)

5. The Notice was delivered to the Petitioners on May 28, 2009. (Robertson Aff. ¶ 4, Ex. 4.)

6. The Notice informed the Petitioners as follows:

If you disagree with this decision, you may appeal in writing to the

**Wisconsin Tax Appeals Commission
5005 University Avenue, Ste. 110
Madison, Wisconsin 53705**

within 60 days of receiving this notice. If you appeal, you must pay a **\$25.00 filing fee** to the Commission at the time you file.

If you do not file an appeal within the 60 day period, this action will become final and conclusive and the additional liability will be payable on or before the date indicated on the attached statement.

(Robertson Aff. ¶ 4, Ex. 4) (emphasis in original).

7. By certified mail date-stamped August 17, 2009, the Petitioners filed a petition for review with the Commission.

8. On September 18, 2009, the Department filed a notice of motion and motion to dismiss the petition for review on the basis of untimely filing with a brief and affidavits with exhibits in support of the motion, and an alternative answer.

9. On September 21, 2009, the Commission issued a Briefing Order requiring the Petitioners to file a response to the motion by October 21, 2009.

10. The Petitioners filed no response to the motion.

CONCLUSION OF LAW

The Commission does not have jurisdiction to consider the Petitioners' petition for review because it was filed after the statutory due date specified in § 73.01(5)(a), Wis. Stats.

RULING

Section 73.01(5)(a) of the Wisconsin Statutes requires that a petition for review be filed with the Commission within 60 days of receipt of the Department's notice of action on a petition for redetermination. If no petition is filed within that

allotted timeframe, then the related action of the Department becomes “final and conclusive.” Wis. Stat. § 71.88(2).

When a taxpayer is represented by another party before the Department and in a related appeal to the Commission, the 60-day period for filing a petition for review with the Commission begins running on the day after the taxpayer, not its representative, receives the Department’s notice of action on the taxpayer’s petition for redetermination. *Mobile Transport Systems, Inc. v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-293 (WTAC April 22, 1997); *Kulas v. Dep’t of Revenue*, Docket No. 89-I-505 (WTAC March 18, 1991). With respect to regular mail, when it has been established that a properly addressed letter or other communication has been mailed to an addressee with the proper postage affixed thereon, a general presumption of its due receipt arises. *Mueller v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-020 (WTAC May 3, 1982).

A petition for review sent to the Commission by certified mail is considered filed on the date of its mailing. Wis. Stat. § 73.01(5); Wis. Admin. Code § TA 1.13(2). The requirement of timely filing is strictly construed. *See, McDonald Lumber Co. v. Dep’t of Revenue*, 117 Wis. 2d 446 (1984).

The Notice of Action from the Department was delivered via certified mail to the Petitioners on May 28, 2009. In addition, the Department has established the presumption of due receipt of the Notice by Mr. Noggle on or about May 28, 2009. The 60-day period permitted under Wis. Stat. § 73.01(5)(a) for the Petitioners to file a timely petition for review with the Commission began running on May 29, 2009 and expired on July 27, 2009. The Petitioners’ representative mailed their petition for review to the

Commission via certified mail date-stamped August 17, 2009, approximately three weeks after the 60-day appeal period had expired.

The Petitioners did not file a petition for review with the Commission within 60 days after their receipt of the Notice of Action on their petition for redetermination. The Commission has no authority under the Wisconsin Statutes to ignore or make exceptions to the 60-day provision. The Commission cannot act on a petition for review filed after the statutory due date other than to dismiss it for lack of timely filing.

ORDER

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

Dated at Madison, Wisconsin, this 20th day of January, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"