

FILED

OCT 31 2023

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Wisconsin Tax Appeals Commission
Nicole Ahee - Legal Assistant

R.H. COMPANIES LLC,

DOCKET NOS. 21-S-319
and 21-X-321

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

KENNETH P. ADLER, COMMISSIONER:

This case comes before the Commission for decision on Respondent's Motion to Dismiss for a failure to prosecute and a failure to comply with an order of the Commission. The Petitioner, R.H. Companies LLC, is represented by Sher K. Sharwani. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Jeremy R. Lange. The Department filed a Brief and Affidavit with exhibits in support of its Motion. The Petitioner was given multiple opportunities to file a response but failed to do so. For the reasons stated below, we find for the Department.

FACTS

1. The Department audited Petitioner's sales and use tax and exposition tax collection. The audit resulted in a sales and use tax assessment of \$328,706.19 and an exposition tax assessment of \$1,538.38. These figures did not include penalties and accrued

interest.

2. On August 24, 2020, Petitioner petitioned for redetermination of the Department's findings.

3. On August 24, 2021, the Department issued its Notices of Action on the petitions for redetermination, assessing a sales and use tax of \$533,875.58 "for the periods ending January 1, 2015 to December 31, 2018" and a local exposition tax of \$2,415.10 "for the periods ending December 31, 2015 to December 31, 2018."¹

4. On September 21, 2021, Petitioner filed an appeal with the Commission, stating "we have invoices/documentation to substantiate our claim."

5. Pursuant to an *Amended* Pre-Hearing Scheduling Order dated January 12, 2023 ("Scheduling Order"),² Petitioner was required to disclose a witness list by January 27, 2023. To date, Petitioner has not disclosed any witnesses, requested an extension, or offered any other explanation. (Affidavit of Jeremy R. Lange, April 13, 2023 (hereinafter, "Lange Aff."), ¶3., Ex. 1) The Scheduling Order stated "[t]he failure to comply with the deadlines ordered herein place Petitioner's appeal at risk of dismissal. It is Petitioner's responsibility to prosecute their claim."

6. Additionally, the Department served written discovery requests on Petitioner via mail on January 17, 2023. (Lange Aff., ¶ 4, Ex. 2.) Responses were due on

¹The Department's Notice of Action Letters dated August 24, 2021, noted the sales and use tax assessment period as "ending January 1, 2015 to December 31, 2018." This phrasing is both awkward and ambiguous. As such this Fact should be narrowly understood to mean that this is what the Department's Notice of Action letters said, with no determination as to the underlying accuracy of the statement. Petitioner filed no documentation disputing or clarifying the Department's statements.

²Petitioner's representative attended the conference at which these dates were discussed and agreed upon.

February 20, 2023, pursuant to Wis. Stat. §§ 804.08(1)(b) and 804.09(2)(b)1. Petitioner did not respond to the written discovery requests in any form. (Lange Aff., ¶ 4.)

7. On April 17, 2023, the Department submitted a Motion to Dismiss, asserting Petitioner had failed to prosecute its appeals under Wis. Stat. §§ 805.03 and 802.10(7). Upon receipt of that Motion to Dismiss, the Commission gave Petitioner the opportunity to respond.

8. On May 3, 2023, the Commission issued a Telephone Status Conference and Briefing Order giving Petitioner until June 5, 2023, to submit a response to the Department's Motion to Dismiss. The Order stated the failure to submit a response on or before June 5, 2023, would result in the Commission issuing an order based upon the information in the record as of that date. The Order further stated, "failure to abide by the terms of this order or any subsequently established deadline may result in sanctions against that party the extent permitted by law, including dismissal of the appeal." Again, as in every prior step of this appeal, Petitioner failed to respond by the June 5, 2023, deadline.

STATUTES AND ADMINISTRATIVE CODE

Wis. Stat. § 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 [the Commission], the [Commission before] which the action is pending may make such orders in regard to the failure as are just . . .

Wis. Stat. § 804.08 Interrogatories to parties.

...
(1)(b) Each interrogatory shall be answered separately and fully in writing under oath . . . The party upon whom the interrogatories have been served shall serve a copy of the

answers, and objections if any, within 30 days after the service of the interrogatories . . . The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under § 804.12 (1) with respect to any objection to or other failure to answer an interrogatory.

Wis. Stat. § 804.09 Production of documents and things and entry upon land for inspection and other purposes.

...

(2) Procedure.

...

(b)

1. The party upon whom the request is served shall serve a written response within 30 days after the service of the request The court may allow a shorter or longer time.

Wis. Stat. § 804.12 Failure to make discovery; sanctions.

. . . (1) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . .

(2) Failure to comply with order.

(a) If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

...

3. An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

...

(b) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Wis. Stat. § 802.10 Calendar practice.

...

(7) Sanctions. Violations of a scheduling or pretrial order are subject to §§ 802.05, 804.12, 805.03, and 895.044.

Wis. Stat. § 73.01 Tax appeals commission.

...

(4) Powers and duties defined.

...

(am) Whenever it appears to the commission or, in respect to hearings conducted by one commissioner, to that commissioner, that proceedings have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in those proceedings is frivolous or groundless, the commission or commissioner may assess the taxpayer an amount not to exceed \$1,000 at the same time that the deficiency is assessed. Those damages shall be paid upon notice from the department of revenue and shall be collected as a part of the tax. [underline added]

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

ANALYSIS

The Wisconsin Tax Appeals Commission ("Commission") has both statutory and inherent authority to sanction parties for the failure to comply with procedural rules and to obey Commission orders, including the failure to prosecute a claim or comply with discovery obligations. While dismissal is an extreme sanction, it is a sanction available to the Commission for use at its discretion.

The Department's Motion to Dismiss references relevant Wisconsin statutes and administrative rules including Wis. Stat. § 805.03 (failure to state a claim), Wis. Stat. § 804.08(1)(b) (answering interrogatories) Wis. Stat. § 804.09(2)(b)1 (responding to requests), Wis. Stat. § 804.12(2)(a) (failure to comply with orders), Wis. Stat. § 802.10(7) (violations of scheduling or pretrial orders) and Wis. Admin. Code § TA 1.39 (practice and procedures). In addition, the Department references Wis. Stat. § 73.01(4)(am) (sanctions for frivolous or

groundless appeals). Pursuant to that provision, the Commission may assess a \$1,000 sanction against Petitioner if the elements of the statute are met.

Petitioner has violated the provisions of each statutory section detailed above. The uncontested facts show Petitioner has failed to prosecute its claim and failed to comply with orders of the Commission.

The Commission has previously been confronted with this type of situation and dismissed matters for failure to prosecute. In *Kirschbaum v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-325 (WTAC 2010), the Commission dismissed a matter where the petitioner failed to comply with an order, as well as a "second chance" order, and failed to respond to a Motion to Dismiss for Failure to State a Claim. There, in addition to failing to comply with the Commission's orders, the petitioner, by failing to prosecute the matter, had left the Commission "bereft of information properly before the Commission to evaluate the merit of the claim."

In this case, since the filing of the Petitions for Review, Petitioner has filed no additional pleadings, has failed to comply with Commission orders including the order to respond to the Department's Motion to Dismiss, and has provided nothing in opposition to the Department's Motion to Dismiss.

As the Department succinctly noted in its Motion:

Additionally, Petitioner has repeatedly promised to provide documents supporting its appeals during the lifespan of this case. (*Id.*, ¶ 6.) Some of these promises were made during conferences with the Commission. To date, Petitioner has either failed to or refused to honor these promises. (*Id.*) This case has been pending since September 24, 2021. In the following 18 months, Petitioner has not disclosed a single document,

answer, or witness in response to informal requests, formal discovery, and the Scheduling Order. Petitioner has not shown any interest in prosecuting its appeal. [underline in original]

Unless a party can show that its conduct was either justified or harmless, sanction is appropriate. A sanction is warranted to encourage adherence to procedural statutes and pretrial orders to ensure the diligent progression of cases. *See Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 127 N.W.2d 225 (1964).

It is Petitioner's responsibility to provide information to the Department when initially contesting a Department determination, and then provide information to the Department and the Commission on appeal so the matter may be reviewed and perhaps resolved without a hearing before the Commission. The Commission and the Department have given Petitioner sufficient opportunity to prosecute its case. The record reflects that Petitioner has failed to do so. The failure to (1) provide *any* basis for contesting the Department's determination, (2) provide *any* information to resolve the issue on appeal, or (3) comply with *any* of the deadlines ordered herein results in the conclusion Petitioner has failed to prosecute its case. Based upon all of the above, we dismiss the matter for failure to prosecute.³

Additionally, Petitioner's complete failure to support its claim or provide any information to contest the Department's determination - whether during the review and redetermination process with the Department or upon its petition to the Commission - also leads the Commission to conclude that Petitioner's petition was frivolous and groundless,

³Because we grant Summary Judgment and dismiss the matter on other grounds, we do not address the Department's alternate ground of claim preclusion/*res judicata*.

and that Petitioner maintained these proceedings primarily for delay. Accordingly, the Commission finds grounds to assess a \$1,000 sanction pursuant to Wis. Stat. § 73.01(4)(am).⁴

CONCLUSIONS OF LAW

1. Petitioner has failed to prosecute the matter pursuant to Wis. Stat. § 805.03.
2. Petitioner has failed to comply with orders of the Commission pursuant to Wis. Stat. §§ 804.08(1)(b), 804.09(2)(b)1, 804.12(2)(a), and 802.10(7).
3. Petitioner's petitions to the Commission were frivolous and groundless, and these proceedings were maintained by Petitioner primarily for delay, and Petitioner is subject to a \$1,000 sanction pursuant to Wis. Stat. § 73.01(4)(am).

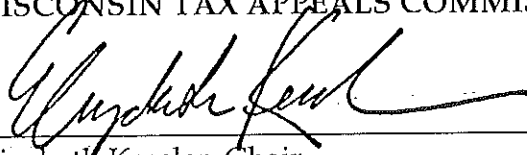
⁴See *Berglund v. Dep't of Revenue*, TAC Docket No. 99-I-91, (November 24, 1999). In that case the petitioner's written submissions did not factually disprove the accuracy of the Department's determination, but the petitioner had at least made written submissions. In the present case, the failure to provide *any* submissions to disprove the accuracy of the Department's case clearly meets the frivolous and groundless criteria.

IT IS ORDERED

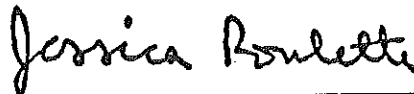
The Department's Motion to Dismiss is granted, and the Petition for Review is dismissed. Petitioner is ordered to pay a \$1,000 sanction to the Department for Petitioner's frivolous and groundless claim.

Dated at Madison, Wisconsin, this 31st day of October, 2023.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Jessica Roulette, Commissioner



Kenneth Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

cc: Mr. Sher K. Sharwani
Attorney Jeremy R. Lange

