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STATE OF WISCONSIN
TAX APPEALS COMMISSION

FILED

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Wisconsin Tax Appeals Commission
Nicole Allee - Legal Assistant

SULTAN ENTERPRISES I LLC,

DOCKET NO. 22-S-166

Petitioner,

vs.

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. The Petitioner, Sultan Enterprises I, LLC, is represented by Sher Sharwani. The Respondent, the Wisconsin Department of Revenue ("the Department"), was initially represented by Attorney Jenine Graves and is subsequently represented by Attorney Jeffrey Evans. The Department filed a Motion to Dismiss alleging the failure of Petitioner to prosecute its case under Wis. Stat. § 805.03, along with affidavits and exhibits in support of its Motion. Petitioner was given multiple opportunities to file a response supplying sufficient information and explanation necessary to support its case but failed to do so. For the reasons stated below, we find for the Department.

FACTS

1. Petitioner, Sultan Enterprises I, LLC, is located at 5758 West Appleton Avenue in Milwaukee, Wisconsin. (Petition, Commission file)
2. On May 11, 2021, the Department issued a Notice of Field Audit Amount Due - Sales and Use Tax Determination to Petitioner in the amount of \$199,488.16 for the period January 1, 2015, to December 31, 2018. (Affidavit of Justin Scott, Revenue Auditor 3, ("Scott Aff."), ¶ 11, Ex. 1)
3. On June 2, 2021, Petitioner timely filed a Petition for Redetermination with the Department regarding the Notice of Field Audit. (Affidavit of Justin Ledger, Tax Resolution Officer - Field Audit, ("Ledger Aff."), ¶¶ 3, 4, Ex. A)
4. On April 29, 2022, the Department issued a Notice of Action to Petitioner, denying Petitioner's Petition for Redetermination. The Notice specified that Petitioner had not submitted any information supporting its position that the sales and use tax assessment should be reduced. It also notified Petitioner of the right to appeal the Notice of Action to the Tax Appeals Commission. (Ledger Aff. ¶ 6, Ex. E)
5. On May 9, 2022, Petitioner timely filed a Petition for Review with the Wisconsin Tax Appeals Commission, stating "We humbly request the Tax Commissions [sic] to allow us to provide additional documents which we believe would result in a fair and equitable assessment." There were no documents attached to the Petition other than the April 29, 2022, Notice of Action. (Commission file)
6. On August 25, 2022 and November 3, 2022, telephone status

conferences were conducted by the Commission. During the November 3, 2022, telephone status conference Petitioner agreed to send a list of items in dispute regarding the Department's May 11, 2021, audit assessment. However, Petitioner did not contact the Department nor send any information or documents following the November telephone status conference. (Affidavit of Jenine Graves, Attorney, ("Graves Aff."), ¶ 5)

7. On January 11, 2023, a telephone status conference was conducted. The Department confirmed it had not heard from Petitioner since the November 3, 2022, telephone status conference. (Graves Aff. ¶ 5)

8. The January 11, 2023, Memorandum and Order documented that as of the date of the telephone status conference, Petitioner had yet to supply any information to support its appeal, and Petitioner did not contact the Commission to indicate any error in the record. The January 11, 2023, Memorandum and Order further warned:

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 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 the deadlines ordered herein place her [sic] appeal at risk of dismissal. It is the Petitioner's responsibility to prosecute their claim. [emphasis in original]

The Memorandum and Order scheduled another telephone status conference for February 15, 2023, and stated, in relevant part, as follows:

At that time, Petitioner must be prepared to discuss (1) what efforts it has made in supplying information to the Department,

(2) what efforts it has made in communicating with the Department to explain and provide a basis for its contesting the Department's determination regarding its sales and use tax assessment and (3) what information it has to present to the Commission to support its appeal. . . . Failure to comply with the terms of this order may result in any sanction authorized by law, including dismissal of the petition for review.
(Commission file)

9. On February 15, 2023, a telephone status conference was conducted. Petitioner again acknowledged it had not spoken to the Department nor submitted *any* documentation to support its appeal since the January 11, 2023, telephone status conference. The Commission questioned whether Petitioner was failing to prosecute its appeal. The Department indicated it would submit a Motion to Dismiss on or before March 31, 2023, and Petitioner was ordered to submit its reply on or before May 5, 2023. (Commission file)

10. On March 31, 2023, the Department filed a Motion to Dismiss with supporting affidavits and exhibits alleging a failure of Petitioner to prosecute its claim. The Brief in Support of the Motion specifically noted Petitioner had not, at any time between the four telephone status conferences held beginning August 25, 2022, until February 15, 2023, contacted Attorney Graves nor anyone else in the Department to discuss the case or provide further documents in support of its assertion the Department's audit assessment was incorrect. (Commission file)

11. On May 8, 2023, Petitioner filed a letter (dated May 5, 2023) with the Commission stating, in relevant part, as follows:

We are now confident that we have all the documents to show why we disagreed with the initial audit which in turn should result in substantial reduction in the taxes owed. We have in

our possession copies of leases, markup documents/inventory documents, vendor statements and POS documents which collectively, will help in finalizing this case in a short span of time. At this moment, we humbly request the courts to allow us a final 60 days so that Mr. Sharwani can review and organize all such documents to assist council [sic] and the commissioner office to seek a fair and equitable resolution. We thank the commissioner office and council [sic] for their efforts in this matter.

(Commission file)

12. On May 17, 2023, a telephone status conference was conducted. At that time, Petitioner's representative confirmed he still did not have in his possession *any* documentation to support the appeal other than lease documents. The Commissioner noted this violated the February 15, 2023, Order and could result in a dismissal of Petitioner's appeal. However, the Commissioner granted Petitioner 30 days to submit its information to the Department. The Memorandum and Order clearly stated:

1) Petitioner shall submit all copies of leases, markup documents/inventory documents, vendor statements and POS documents referenced in its May 5, 2023 submission to the Department on or before Friday, June 30, 2023.

2) If Petitioner submits copies of leases, markup documents/inventory documents, vendor statements and POS documents on or before Friday, June 30, 2023, the Department will have until Friday, July 14, 2023 to review that information to determine if it addresses all issues under appeal. The Department shall email the parties on Friday, July 14, 2023 stating its determination.

...

3) Failure to comply with the terms of this Order may result in any sanction authorized by law, including dismissal of the petition for review.

(Commission file)

13. On June 30, 2023, Petitioner submitted information to the Department

via email, attaching six documents in PDF format with a brief narrative description. Although the body of Petitioner's email stated Point of Sale (POS) documents were attached to the email, as ordered by the Commission, no POS documents were attached. Petitioner's email did attach a Lease Agreement, Vendor Statements, and a Mark Up Summary. (Ledger Supplemental Aff. ¶ 4)

Lease Agreement. Dated May 17, 2017, the lease agreement was effective for the period June 1, 2017, to May 31, 2024. The audit period under review was January 1, 2015, to December 31, 2018. (Ledger Supplemental Aff. ¶ 4, Ex. F1)

Vendor Statements. These annual summaries of products sold by Chambers & Owen to Petitioner were detailed into product categories (cigarettes, cigars, candy, coffee, etc.). However, the Vendor Statements only showed purchase prices for the items – the sales price and quantities of each item sold were missing. (Ledger Supplemental Aff. ¶ 16, Exs. F2 - F5)

Mark-up Summary. This document claimed to list the purchase price and sales price of each item in Petitioner's inventory. However, no source documentation was provided to verify the pricing and Petitioner provided no explanation as to how the Summary was prepared. (Ledger Supplemental Aff. ¶ 20, Ex. F6)

14. On August 25, 2023, the Department responded that the information provided by Petitioner on June 30, 2023 was not sufficient for purposes of resolving the issues and continued to lack necessary documentation for the years of the audit. The Commission established a timeline for the Department to submit an affidavit attesting to

the insufficiency of that information and supporting its March 31, 2023, Motion to Dismiss and for Petitioner to submit its reply. (Ledger Supplemental Aff. ¶¶ 5 - 25, Exs. F1-F6, G, H)

15. On September 30, 2023, Petitioner's representative submitted a response in rebuttal to the Department's August 25, 2023 submission. That response included the following information:

Point of Sale (POS) summary. Petitioner admitted it failed to attach that document to its June 30, 2023, email submission and requested the Commission grant Petitioner additional time to submit that document.

Lease Agreement. Petitioner admitted it had not supplied the lease agreement for tax periods prior to June 1, 2017, and requested the Commission allow Petitioner to possibly subpoena the landlord for that information. Petitioner further requested the Commission assume what rent payments were prior to June 1, 2017, based upon the 2017 lease. Finally, Petitioner acknowledged "the detail of the credits/debits or the accounting records were not clear" and requested the Commission allow Petitioner the opportunity to submit a notarized statement from the landlord. Petitioner asserted that submission would attest to the alleged common practice in Petitioner's business of reducing rent payments to the landlord by the amount of payments by the tenant to other vendors for repairs, maintenance, gas sales reimbursement/commissions and other bartering transactions.

Vendor Statements. Petitioner asserted the basic statements provided in this case had previously been provided in other audits with the Resolution Unit during which

they held a “great deal of weight thus resulting in reassessment of tax due in those audits.” Petitioner acknowledged three pieces of information required to demonstrate an error in a Department assessment - the purchase price of each item, the sale price of each item and the quantities of each item sold. However, Petitioner incorrectly asserted the purchase price and sales price were provided in the Vendor Statement and via the price list and asserted from those items “we can very accurately deduce the breakdown of the taxable sales.”

Markup Summary. Petitioner asserted “this is a source document by itself; many gas station owners have a similar database list from which they base their prices” in response to the Department’s explanation no source documents had been attached.

The end of Petitioner’s submission asserted, with no evidence, that in prior audits, “the Department has used similar documents provided by the Petitioner as authoritative as such concluding final assessments however in this particular audit the Department has deviated from its standard approach.” (Petitioner’s September 30, 2023, letter filed October 10, 2023)

APPLICABLE LAW

Statutes

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 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.

Wis. Stat. § 804.12(2)(a) Failure to comply with order. If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05(2)(e) or 804.06(1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, 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 striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

...

Wis. Stat. § 802.10 Calendar Practice.

...

(7) Sanctions. Violation of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03.

Administrative Code

Wis. Admin. Code § 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.

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 a serious 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 an administrative rule including Wis. Stat. § 805.03 (failure to prosecute), 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). Petitioner has violated the provisions of each statutory section.

Petitioner has yet to state what, specifically, it objects to with the Department's assessment. Nor has Petitioner provided clear and satisfactory evidence to support its assertion that the Department's assessments are incorrect. Finally, Petitioner has failed to comply with orders of the Commission regarding the submission of information.

Failure to Prosecute

Petitioner has failed to prosecute its case in several regards. First, the Point of Sale (POS) documents have not been provided. Second, the Lease Agreement, which only covers approximately one and one-half years of the four-year audit period is not adequate to demonstrate by what amounts, if any, the Assessment should be reduced. (Ledger Supplemental Aff., ¶ 9, Ex. F1). Third, the Vendor Statements do not include the three items necessary to calculate the mark up of items sold at retail: the purchase price of each item, the sales price of each item, and the quantities of each item sold. (Ledger Supplemental Aff., ¶ 18, Ex. F2 - F5). Finally, the Mark Up Summary does not verify the quantities of the items sold, nor does it provide other information necessary to calculate a weighted mark-up average or to determine the validity of any sale or purchase price. Without all of this information, there is no basis to reduce the Assessment. (Ledger Supplemental Aff., ¶¶ 21,

22 Ex. F6).

In addition, Petitioner has supplied no affidavits to support any of its assertions in any of its submissions during this process. Therefore, Petitioner has offered nothing the Commission can consider in response to the Department's affidavits nor contradicting the Department's sworn affidavits.¹ At no point in this process has Petitioner supplied the full information requested by the Department and ordered by the Commission.

Failure to Comply with Orders

We have been confronted with a petitioner who fails to provide evidence and fails to comply with scheduling orders of the Commission in the past, and we have dismissed other petitions to the Commission for failure to prosecute. In *Kirschbaum v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-325 (WTAC 2010)², the Commission dismissed a matter where the petitioner failed to comply with an order, and a "second chance" order, to respond to a Motion to Dismiss for Failure to State a Claim. As here, the petitioner had failed to respond and comply with the orders. In *Kirschbaum*, 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, Petitioner failed to provide the Point of Sale (POS) information ordered by the Commission and supplied no persuasive documentation or explanation to

¹ Affidavits must be taken as fact unless contradicted by a counter-affidavit. *Artmar, Inc. v. United Fire & Gas. Co.*, 34 Wis. 2d 181, 188, 148 N.W.2d 641(1967)

² *Kirschbaum* examines several appeals which the Commission dismissed for failure to prosecute. *Kirschbaum* at 9-10.

rebut the Department's Motion to Dismiss, leaving us similarly bereft of necessary information.

It is Petitioner's responsibility to provide information to the Department when initially contesting a Department determination. It remains Petitioner's responsibility to 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 a basis for contesting the Department's determination, (2) provide information to resolve the issue on appeal, and (3) comply with deadlines ordered by the Commission results in the conclusion Petitioner has failed to prosecute its case. Based upon the above, we dismiss the matter for failure to prosecute.

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. §§ 804.12(2)(a) and 802.10(7).

ORDER

The Department's Motion to Dismiss is granted, and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 8th day of February, 2024.

WISCONSIN TAX APPEALS COMMISSION


Elizabeth Kessler, Chair


Jessica Roulette, Commissioner


Kenneth P. Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION