

LEPP HERBERT 90CV0190 022090 KENOSHA CTY CIR CT BR MTD

HERBERT LEPP,

Petitioner,

v.

Case No. 90-CV-0190

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RESPONDENT'S BRIEF IN SUPPORT
OF MOTION TO DISMISS

NATURE OF THE CASE

This action is before the court for judicial review under ch. 227, Stats., of a Decision and Order of the Wisconsin Tax Appeals Commission dated January 8, 1990. Copies of the Decision and Order were mailed to the petitioner on that same date (Affidavit of Mailing, attached and incorporated herein as Exhibit A).

The Petition for Review was filed with the Clerk of the Circuit Court of Kenosha County on February 7, 1990, a copy of which was also mailed on that date by regular mail to the Wisconsin Tax Appeals Commission and received by the Commission on February 12, 1990 (Hagen Affidavit, attached and incorporated herein as Exhibit B). Because service on the Tax Appeals Commission was not timely made, the respondent moves for dismissal of the action.

ARGUMENT

Section 227.53(1)(a) (formerly sec. 227.16(1)(a)), Stats., provides that proceedings for review of an administrative decision

shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board or the consumer credit review board, the credit union review board or the savings and loan review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1 to 4.

Section 227.53(1)(b) provides further that the petition must be filed and served within thirty days after the agency decision is mailed.

Although the petitioner herein timely filed his petition with the circuit court and timely served the Department of Revenue, the Tax Appeals Commission was not timely served.

If a statutorily authorized method of service is selected, service of the petition is complete on mailing. Trojan v. Board of Regents, 104 Wis. 2d 277, 280, 311 N.W.2d 586 (1981). In this case, however, copies of the petition were mailed to the Commission by regular mail, not certified mail (Hagen Affidavit, para. 3). Since that is not a statutorily authorized method of service, attempted service did not occur until February 12, 1990 when petition was received, which is thirty-five days after the Commission's decision was mailed.

To establish subject matter jurisdiction in the circuit court, strict compliance with sec. 227.53(1), Stats., is required. Sunnyview Village v. Administration Dept., 104 Wis. 2d 396, 399, 311

N.W.2d 632 (1981); Cudahy v. Department of Revenue, 66 Wis. 2d 253, 259, 224 N.W.2d 570 (1974). This requirement applies even where the result may be harsh. In re Proposed Incorporation of Pewaukee, 72 Wis. 2d 593, 599, 241 N.W.2d 603 (1976).

It is by now well-established that timely service on the Tax Appeals Commission is indispensable to trigger judicial review of the Commission's decision. Bracht1 v. Department of Revenue, 48 Wis. 2d 184, 187, 179 N.W.2d 921 (1970). As the Wisconsin Supreme Court made clear in Cudahy, 66 Wis. 2d at 258-59:

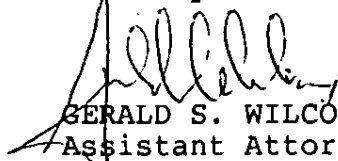
The TAC [tax appeals commission] and the department [of revenue] are two separate and distinct agencies. . . . The TAC must be served with the petition for review as the agency which made the determination sought to be reviewed and the department must be served as a party who appeared before the agency. Any confusion which might exist in the statutory procedure as to these requirements for service of the petition for review was eliminated by this court's decisions in Monahan and Bracht1. [Citations omitted.]

See also Johnsonville Sausage v. Revenue Dept., 113 Wis. 2d 7, 334 N.W.2d 269 (Ct. App. 1983), where the petition for review was served on the Tax Appeals Commission thirty-one days after the Commission's decision was mailed. The Court of Appeals concluded that because the petition was served late, the circuit court lacked jurisdiction and the appeal was dismissed. Johnsonville, 113 Wis. 2d at 11.

CONCLUSION

The petitioner has failed to comply with the service requirements of sec. 227.53(1), Stats. The circuit court therefore lacks jurisdiction and dismissal is mandated by law.

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Attorney General



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February 20, 1990

HERBERT LEPP

Petitioner(s),

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NO(s). 87-S-56

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)

) ss

COUNTY OF DANE)

Darlene Skolaski, secretary of the Wisconsin Tax Appeals Commission, Madison, Wisconsin, being first duly sworn says that on the 8th day of January, 19 90, she mailed by ordinary mail in a properly addressed envelope with postage duly prepaid, by depositing in a U.S. Postal Box, a copy of the Commission's Decision and Order in the above-entitled matter, the original of which is dated January 8, 19 90, and is on file herein, addressed to each of the parties as stated in the heading and to the following named persons, at their proper post office address set after their respective names, to-wit:

NAME

ADDRESS

None

Darlene Skolaski
 Darlene Skolaski

Sworn to before me on

January 8, 1990

Core J. Schwartz

Notary Public, Wisconsin

My Commission Expires

February 7, 1993

HERBERT LEPP,

Petitioner,

v.

Case No. 90-CV-0190

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

AFFIDAVIT

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

SUSAN F. HAGEN, being first duly sworn, on oath deposes and states:

1. I am the Clerk of the Wisconsin Tax Appeals Commission (hereinafter "Commission") and I have been so employed for approximately thirteen years.

2. My duties as Clerk include receiving, opening and handling incoming mail for the Commission, including copies of petitions for review of the Commission's decisions and orders.

3. A copy of the petition for judicial review of the Commission's Decision and Order in this matter (Docket No. 87-S-56) was served on the Commission by regular mail on February 12, 1990, which was thirty-five days after the Commission's decision was mailed.

Susan F. Hagen
SUSAN F. HAGEN

Subscribed and sworn to before me this 19th day of February, 1990.

Darlene R. Skolaski
Notary Public, State of Wisconsin
My Commission: 5-10-92