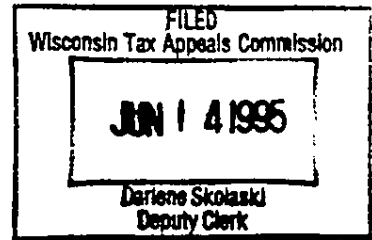


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D& S LABRATORY INC 94S47 061495 TAC



STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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D&S DENTAL LABORATORY, INC.  
505 Moravian Valley Rd.  
Waunakee, WI 53597

\*  
\* DOCKET NO. 94-S-47

Petitioner,

\*

vs.

\* RULING AND ORDER

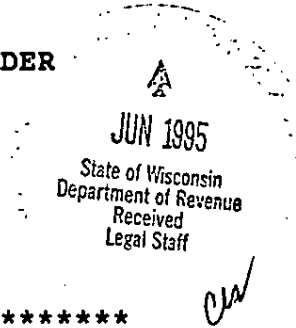
WISCONSIN DEPARTMENT OF REVENUE  
P.O. Box 8933  
Madison, WI 53708

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Respondent.

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MARK E. MUSOLF, COMMISSION CHAIRPERSON:

The above-entitled matter is before us on the respondent's motion to dismiss for lack of jurisdiction. A hearing on the motion was held at Madison on September 20, 1994. Both parties have submitted briefs with affidavits. Representing petitioner is Michael, Best & Friedrich, by Attorney Richard A. Latta; representing respondent is Attorney Donald J. Goldsworthy.

As set forth below, we grant the respondent's motion.

FACTS

1. By notice from the Wisconsin Department of Revenue dated August 1, 1991, a field audit assessment of sales tax was issued against the petitioner in the amount of \$25,954.58, including interest.

2. The petitioner paid the field audit assessment dated August 1, 1991 by its check in the sum of \$25,954.58, dated August 6, 1991 and received by the respondent on August 7, 1991.

3. The petitioner filed a refund claim for the amount of the field audit assessment, which was received by the respondent on August 6, 1993.

4. By letter dated September 13, 1993, mailed to the petitioner by certified mail, return receipt requested, and received by the petitioner on September 15, 1993, the respondent rejected the petitioner's refund claim for the reason that the refund claim was not received by the respondent within two years of the field audit assessment issued August 1, 1991, the refund claim having been received in respondent's Madison office on August 6, 1993.

5. The respondent's September 13, 1993 letter contained no appeal information, and petitioner's representative was thereafter expressly advised orally by the respondent that its refund rejection was "non appealable."

6. By letter dated November 29, 1993, mailed on November 30, 1993 and received by respondent on December 1, 1993, the petitioner made an inquiry of respondent's Appellate Bureau, objecting to the denial of refund claim and citing this commission's ruling in *Maryarski v. WDOR*, Docket No. 92-I-333 (February 23, 1993).

7. By letter to the petitioner dated December 6, 1993 from Clayton E. Seth, Director of its Appellate Bureau, the respondent advised the petitioner that the respondent was unable to accept petitioner's letter of objection dated November 29, 1993, for the reason that the petitioner had not met the statutory time

limit for filing a petition for redetermination of the sales and use tax refund claim rejection/denial determination which was sent to the petitioner by certified mail on September 13, 1993 and received by petitioner on September 15, 1993, and further explained that the respondent had nonacquiesced in this commission's *Maryarski* ruling.

8. On February 3, 1994, the petitioner filed a petition for review in the office of the Wisconsin Tax Appeals Commission.

9. Petitioner's refund claim of the field audit assessment was not received within two years of the August 1, 1991 assessment date, and petitioner's November 29, 1993 letter of objection was not filed within 60 days after petitioner received respondent's September 15, 1993 refund claim rejection.

#### RULING

Two legal issues are raised by the respondent's motion.

The first involves the meaning of § 77.59(4)(a), Stats., which provides in relevant part:

A claim for refund that is not to be passed along to customers under sub. (8m) may be made within 2 years of the determination of a tax assessed by ... field audit and paid if the tax was not protested by the filing of a petition for redetermination.

The petitioner argues that this statute allows a refund claim to be filed within 2 years after the tax payment date. The respondent maintains that the refund claim must be filed within 2 years after the assessment date.

We think the statute is relatively straightforward. It

states that a taxpayer who has been assessed on audit and chooses to pay the tax rather than petition for redetermination can nevertheless contest the assessment by filing a refund claim within 2 years of the assessment.

Stated another way, the words "and paid" make payment of the assessment a condition to filing a refund claim within 2 years "of the determination" of the assessment. Similarly, the words "if the tax was not protested by the filing of a petition for redetermination" impose a second condition to filing the refund claim. In any event, the words "and paid" are clearly not surplusage, as petitioner suggests, but are words which make explicit what is only arguably implicit without them: payment of the assessment is necessary in order to file a refund claim within 2 years of the assessment determination date. So long as the assessment is paid and no redetermination petition filed, the claim for refund may be filed at any time within this 2-year period but not beyond.

Further, the petitioner was clearly advised of this 2-year deadline following the assessment date when the respondent enclosed a copy of its Publication 506 with the assessment notice to petitioner.

Finally, the petitioner cites this commission's ruling in *Maryarski v. WDOR*, CCH Wis. Tax Rptr, ¶ 203-400 (1993), in support of its position that the 2-year period for filing a refund claim runs from the tax payment date rather than from the assessment date. But *Maryarski* was decided on another ground. Unlike the facts here, the Commission found that the Maryarskis had petitioned for

redetermination, which made them ineligible under the statute to file a refund claim at all.

However, to the extent our language in *Maryarski* can be read to interpret the 2-year permissible refund claim period as running from the payment date, it was dictum.<sup>1</sup> In any event, we reach a different conclusion here in ruling specifically on the language in § 77.59(4)(a), Stats., which is the sales tax counterpart of the income tax statute addressed in *Maryarski*, § 71.75(5).

The second issue presented by respondent's motion is whether this commission has jurisdiction where the petitioner failed to petition the respondent for redetermination following rejection of petitioner's refund claim. As a defense, petitioner asks that we apply the doctrine of estoppel because the petitioner relied on statements of respondent's employee that the refund claim rejection was not appealable and later was advised by respondent's Appellate Bureau that it was too late to comply with the 60-day requirement for petitioning for redetermination.

In light of our conclusion that petitioner's refund claim was untimely, this second issue is moot, and we decline to rule on it. We agree with the respondent's initial advice to petitioner, however, that having missed the filing deadline, there was nothing for the petitioner to appeal further within the Department of

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<sup>1</sup>The respondent's nonacquiescence in *Maryarski* was limited "to that portion of the decision interpreting [the counterpart income tax statute] § 71.75(5) ... to permit refund claims made within two years of the date of payment of an assessment."

Revenue.

But we also share petitioner's puzzlement at the subsequent letter from respondent's Appellate Bureau stating that petitioner had not met the 60-day deadline specified in § 77.59(6), Stats., for filing a petition for redetermination of the refund denial action. It appears the Appellate Bureau may have incorrectly treated the petitioner's November 29, 1993 letter as a petition for redetermination on the merits of the refund claim rather than as an inquiry relating to the statutory filing deadline, which is jurisdictional.

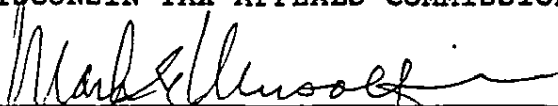
However, these inconsistent actions of respondent are of no consequence to our ruling that, because the petitioner missed the deadline imposed by § 77.59(4)(a), Stats., for filing a claim for refund, neither the respondent nor this commission has jurisdiction to consider petitioner's claim on the merits.

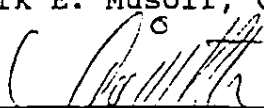
ORDER

The respondent's motion is granted, and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 14th day of June, 1995.

WISCONSIN TAX APPEALS COMMISSION

  
\_\_\_\_\_  
Mark E. Musolf, Chairperson

  
\_\_\_\_\_  
Joseph P. Mettner, Commissioner

ATTACHMENT:  
"Notice of Appeal Information"