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MOBILE TRANSPORT SYSTEMS INC 96W798 042297 TAC

STATE OF WISCONSIN
WISCONSIN TAX APPEALS COMMISSION

FILED
Wisconsin Tax Appeals Commission
APR 22 1997
Derlene Skolaski
Deputy Clerk

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MOBILE TRANSPORT SYSTEMS, INC.
RR # 1
Knapp, WI 54749,

Docket No. 96-W-798

Petitioner,

RULING AND ORDER

vs.

GRANTING

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

MOTION TO DISMISS

Respondent.

APR 1997
State of Wisconsin
Department of Revenue
Received
Legal Staff

DON M. MILLIS, COMMISSIONER, JOINED BY MARK E. MUSOLF, COMMISSION CHAIRPERSON, AND DAVID PROSSER, JR., COMMISSIONER:

This matter came before the Commission on respondent's motion to dismiss the petition for review. Both parties have filed briefs in support of their respective positions on respondent's motion. Petitioner is represented by Attorney Donald W. MacPherson. Respondent is represented by Attorney Michael J. Buchanan. For the reasons stated below, the Commission grants respondent's motion to dismiss.

RULING

Based on the record in this matter, the Commission finds, rules, and orders as follows:

Under the date of September 28, 1995, respondent assessed petitioner for \$78,806.32 in withholding taxes, penalty, and interest. On October 25, 1995, petitioner filed a petition for redetermination with respondent. At about the same time, petitioner executed and filed with respondent a power of attorney Form A-222, appointing Mr. Donald W. MacPherson as its attorney-

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in-fact. The power of attorney directed respondent to send notices and other written communications to both the petitioner and Mr. MacPherson.

By notice dated June 13, 1996, respondent denied petitioner's petition for redetermination. The notice of redetermination stated, in part:

If you disagree with this decision, you may appeal in writing to the Wisconsin Tax Appeals Commission ... within 60 days of receiving this notice.

The notice of redetermination was mailed via certified mail, return receipt requested, to:

MOBILE TRANSPORT SYSTEMS INC
AUDREY THOMAS
RR 1
KNAPP, WI 54749

Petitioner received the notice of redetermination on June 14, 1996. Mr. MacPherson received the notice of redetermination on June 17, 1996.

Petitioner's petition for review, mailed via ordinary mail, was received by the Commission on August 16, 1996. The substance of the petition for review states:

Taxpayer believes the proposed assessments may not be correct.

All of Taxpayer's records have been in possession of Internal Revenue Service and therefore, Taxpayer cannot accurately determine if the assessments are correct.

Section 73.01(5)(a), *Stats.*, provides, in pertinent part:

Any person ... who has filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department may, ... within 60 days after the redetermination but not thereafter, file with the clerk of the commission a petition for review of the action of the department... For the purposes of this subsection, a petition for review is considered timely filed if mailed by

certified mail in a properly addressed envelope, with postage duly prepaid, which envelope is postmarked before midnight of the last day for filing.

The 60th day following petitioner's receipt of the notice of redetermination was August 13, 1996. Because the petition for review was sent by ordinary mail and received by the Commission on August 16, 1996, the petition for review was not timely filed. Therefore, the Commission lacks subject matter jurisdiction to consider the petition for review. *McDonald Lumber Co. v. Dept. of Revenue*, 117 Wis. 2d 446, 447 (Ct. App. 1984).

Petitioner argues that the 60-day appeal period began when Mr. MacPherson received the notice of redetermination, because petitioner claims that the power of attorney required respondent to send the original notice of redetermination to Mr. MacPherson. Contrary to petitioner's claim, the power of attorney asked respondent to send all notices and correspondence to both the taxpayer and Mr. MacPherson, and says nothing about original notices. Nothing in the statutes or the case law supports petitioner's claim. In fact, the Commission, in *Kulas v. Dept. of Revenue*, Docket No. 89-I-505 (WTAC Mar. 18, 1991), held that the 60-day appeal period runs from the time the taxpayer receives the notice of redetermination, not from the time its attorney receives the notice. *Kulas*, Slip Op. at 3-4.

Despite the fact that there are sufficient grounds to dismiss the petition for review as untimely, respondent asks the Commission to dismiss the petition for review on two additional grounds. First, respondent asks the Commission to reverse its long held position that the 60-day appeal period provided under § 73.01(5)(a), *Stats.*, commences from the time the taxpayer

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receives notice that the respondent denied the petition for redetermination. Respondent argues that this statute should be construed to read that the 60-day period commences from the date respondent denied the petition for redetermination, regardless of when the taxpayer received the notice from respondent.

Section 73.01(5)(a), *Stats.*, does not specify whether the appeal period runs from the date of the notice of redetermination or the date the notice of redetermination is received by the taxpayer. To that extent, the statute is ambiguous. For nearly 50 years, the Commission and its predecessor, the Board of Tax Appeals, has construed § 73.01(5)(a), *Stats.*, and its predecessors, to mean that the appeal period commences the day after the taxpayer receives the notice of redetermination from respondent. *See, Stewart v. Dept. of Taxation*, 4 WBTA 21 (1948); *see also*, T. BOYKOFF, HOW TO REPRESENT A CLIENT BEFORE THE WISCONSIN TAX APPEALS COMMISSION, at p. 20 (1985).

Because the Legislature has consistently re-enacted this statute for five decades, there is a strong presumption that the Legislature adopted the Commission's construction. *Tucker v. Marcus*, 142 Wis. 2d 425, 434 (1988). Respondent has not provided the Commission with any compelling reason to overcome this presumption in favor of the long-standing construction of § 73.01(5)(a), *Stats.* Therefore, the Commission continues to construe the appeal period in § 73.01(5)(a), *Stats.*, as commencing the day following the date the notice of redetermination is received by the taxpayer.

Respondent also asks the Commission to dismiss the petition for review because the petition for review fails to set forth specifically the facts upon which the petitioner relies along with the propositions of law involved (as

for review after having been notified of the shortcomings of the petition for review. Moreover, the Commission could have dismissed the petition for review because the petitioner failed to appear at the hearing. In short, *Brown* does not stand for the proposition that dismissal is the only remedy for failing to file a petition for review in compliance with § 73.01(5)(b), *Stats.*, and TA 1.15(2)(d), *Wis. Adm. Code*.

In *Andraschko*, the petition for review consisted only of the notice of redetermination the petitioner received from respondent, with the following written on the bottom: "I would like a late afternoon appointment." *Andraschko*, 9 WTAC at 26. While the Commission noted that this did not meet the requirements of § 73.01(5)(b), *Stats.*, and the predecessor to TA 1.15(2)(d), *Wis. Adm. Code*, it appears that the basis for the dismissal was that the petition for review was not timely filed. *Id.* Again, this case does not support respondent's position.

Another case, also decided in 1971, clearly shows the approach the Commission has typically taken when confronted by petitions for review that do not comply with the statutes and administrative rules. In *Ecker v. Dept. of Revenue*, 9 WTAC 96, ¶200-761 *Wis. Tax Rptr. (CCH)* (1971), the Commission permitted a party to amend its petition for review upon a motion by respondent asserting the initial petition for review failed to comply with the appropriate statutes and administrative rules. We see no reason to deny such opportunities in the future. Nothing in § 73.01(5)(b), *Stats.*, dictates that dismissal must be the remedy for failure to comply with that statute or the administrative rules adopted pursuant to the statute.

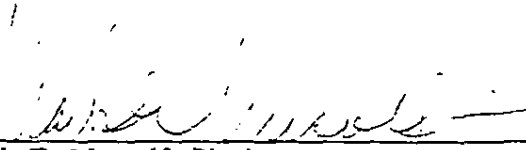
Therefore,

IT IS ORDERED

That the petition for review is dismissed.

Dated at Madison, Wisconsin this 22nd day of April, 1997.

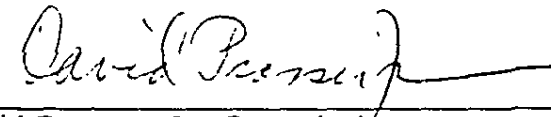
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner



David Prosser, Jr., Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

WISCONSIN TAX APPEALS COMMISSION

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW,
THE TIMES ALLOWED FOR EACH AND THE IDENTIFICATION
OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes. The petition must be filed in circuit court and served upon the Wisconsin Tax Appeals Commission and the Department of Revenue within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for judicial review should name the Department of Revenue as respondent.

This notice is part of the decision and incorporated therein.