

STATE OF WISCONSIN
TAX APPEALS COMMISSION

B & L EXCAVATING, INC.,

DOCKET NO. 09-S-143

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This case comes before the Commission on the motion of the Respondent, the Wisconsin Department of Revenue (the “Department”), to dismiss the petition for review on the basis that the Petitioner has failed to state a claim upon which relief can be granted, pursuant to Wis. Stat. § 802.06(3) and Wis. Admin. Code §§ TA 1.31(1) and 1.39. Kristina Denman represents the Petitioner and has not responded to the motion. Attorney Linda M. Mintener represents the Department and has filed an affidavit with exhibits in support of the motion.

Having considered the entire record, including the motion, affidavit and exhibits, the Commission hereby finds, rules and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS

1. By Notice of Field Audit Action dated August 5, 2008 and the Department’s sales and use tax Audit Report, the Department issued an assessment of sales and use tax and interest to the Petitioner in the total amount of \$63,329.95 for the

tax period 2003-2005 (the “period at issue”). (Affidavit of Attorney Linda M. Mintener dated September 11, 2009, ¶ 2, Ex. 1.)

2. On September 18, 2008, the Petitioner filed with the Department a petition for redetermination of the assessment. (Mintener Affidavit, ¶ 3, Ex. 2.)

3. By Notice of Action to the Petitioner dated June 15, 2009, the Department granted in part and denied in part the petition for redetermination and provided the Petitioner with an updated Audit Report and Payment Voucher showing a revised total assessment in the amount of \$66,294.88. (Mintener Affidavit, ¶ 4, Ex. 3.)

4. On August 5, 2009, the Petitioner filed a petition for review with the Commission, which states as follows: “We have trusted our accountant to handle and give us correct advice and process the taxes correctly. Apparently, the advice may not have been correct according to the auditors calculations.”

5. On August 24, 2009, the Department filed an answer to the petition and an affirmative allegation asserting that the Petitioner’s sole stated basis for this petition that any errors made in its sales/use tax payments were the fault of its accountant is insufficient to defeat the assessment as a matter of law (citations omitted).

6. On September 11, 2009, the Department filed the Notice of Motion and motion to dismiss the petition with supporting Affidavit of Attorney Mintener and Exhibits 1-3, that is the subject of this Ruling and Order.

7. On September 17, 2009, the Commission issued a Briefing Order directing the Petitioner to respond to the Department’s motion by October 19, 2009.

8. The Petitioner did not file a response to the Department's motion and has not contacted the Commission regarding this matter since filing its petition for review.

RULING

Assessments made by the Department are presumed to be correct, and the burden is on the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1). In order to prove that an assessment is incorrect, a petitioner must begin by prosecuting his or her appeal and complying with the Commission's orders.

The Petitioner filed its petition for review with the Commission on August 5, 2009. Since that date, the Petitioner has: (1) failed to respond to the Department's affirmative allegation filed on August 24, 2009; (2) failed to respond to the Department's motion filed on September 11, 2009 to dismiss the petition; (3) failed to comply with the Commission's Briefing Order dated September 17, 2009, which ordered the Petitioner to respond to the Department's motion by October 19, 2009; and (4) failed to contact the Commission regarding this matter. The Petitioner's demonstrated lack of interest in pursuing its own petition for review constitutes a failure to prosecute its appeal, and its failure to comply with the Commission's Briefing Order constitutes independent grounds for dismissal. *See*, Wis. Stat. § 805.03 and Wis. Admin. Code § TA 1.39. Therefore, the Commission grants the Department's motion to dismiss.

ORDER

The Department's motion is granted and the petition for review is dismissed.

Dated at Madison, Wisconsin, this 15th day of January, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"