

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ELLEN BARTH,

DOCKET NO. 11-I-231

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission for decision on Respondent's Motion to Dismiss Petitioner's petition for review as untimely. The Petitioner, Ellen Barth, of Milwaukee, Wisconsin, appears *pro se* in this matter. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer. The Department has filed an affidavit and a supplemental letter in support of its motion. Petitioner has filed a letter requesting acceptance of periodic payments but has not responded directly to the Department's motion. For the reasons stated below, we find that the Petitioner did not file her petition in a timely manner as required by statute and therefore we find dismissal is appropriate.

FINDINGS OF FACT

1. On January 18, 2010, the Department issued an Income Tax Assessment Notice, assessing the Petitioner additional individual income tax for tax periods ending December 31, 2004, through December 31, 2007. (Department's Exhibit 1.)

2. Petitioner's petition for redetermination was filed timely and, after consideration by the Department, it was granted in part and denied in part in the Department's notice dated June 14, 2011. (Department's Exhibit 3.)

3. The Department's notice was delivered by certified mail to Petitioner on June 15, 2011. (Department's Exhibit 4.)

4. The 60-day filing period for Petitioners' appeal formally expired August 13, 2011; because August 13, 2011, fell on a Saturday, Petitioner's deadline was extended to Monday, August 15, 2011.

5. On August 16, 2011, the Commission received via ordinary mail Petitioner's petition for review, postmarked August 15, 2011.

6. Petitioner's petition for review was not sent to the Commission by certified mail.

7. On October 18, 2011, the Department filed a motion to dismiss the Petitioner's petition as untimely, along with an affidavit with exhibits in support of the motion.

APPLICABLE LAW

A motion to dismiss will be granted if the Commission finds it does not have proper jurisdiction. Without jurisdiction to hear the matter, the Commission has no alternative other than to dismiss the action. See *Alexander v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-650 (WTAC 2002).

The specific statutes at issue here outline the requirements for filing a valid and timely petition for review with the Commission:

Wis. Stat. § 73.01(5)(a): Any person who is aggrieved . . . by the redetermination of the department of revenue may, within 60 days of the redetermination . . . but not thereafter, file with the clerk of the commission a petition for review of the action of the department of revenue.

Wis. Stat. § 73.01(5)(a): . . . For 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.

ANALYSIS

The date on which a petition for review is 'filed' with this Commission under Wis. Stat. § 73.01(5)(a) has consistently been held to be the date on which the petition has been physically received in the Commission office. See *Edward Mischler v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-159 (WTAC 1983). Unless otherwise provided by statute, a document is filed on the date it is *received* by the Commission, not the date it is mailed. See *Laurence H. Grange v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-017 (Dane Co. Cir. Ct. 1993).

The one exception in Wis. Stat. § 73.01(5)(a) states that a petition is timely if it is mailed (1) by certified mail (2) in a properly addressed envelope (3) with postage prepaid, and (4) postmarked before midnight of the last day for filing. In this case, Petitioner mailed her petition by regular mail on the day her time to appeal expired.

Looking to the statutory exception, Petitioner's filing passes the final three requirements, that the postage-paid properly addressed envelope be postmarked before midnight on the last day for filing. However, regular mail is not certified mail or its equivalent for purposes of the provision allowing for timely filing at the time of certified mailing. *McDonald Lumber Co. v. Dep't of Revenue*, 117 Wis. 2d 446, 447, 344 N.W.2d 210 (Ct. App. 1984). Thus, this petition is deemed filed when it was received by regular mail at the Commission. That receipt occurred one day after the expiration of the statutory time for filing.

We conclude that Petitioner failed to file a timely petition for review with the Commission within 60 days after receipt of the notice of action on the petition for redetermination. Thus, the Commission lacks subject matter jurisdiction over the petition for review. This is not a matter for discretion; the Commission has no choice in the matter. *Alexander v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-650 (WTAC 2002).

DECISION AND ORDER

We find the Petitioner's petition was not timely filed as defined by state statutes and, thus, this Commission lacks jurisdiction in this matter. The Department is, therefore, entitled to dismissal as a matter of law. Based on the foregoing, it is the order

of this Commission that the Department's motion to dismiss is granted.

Dated at Madison, Wisconsin, this 2nd day of March, 2012.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"