

STATE OF WISCONSIN
TAX APPEALS COMMISSION

CHARLES M. & LYNN S. BROWN,

DOCKET NO. 20-I-218

Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

LORNA HEMP BOLL, COMMISSIONER:

This case comes before the Commission for decision on Respondent's Motion to Dismiss Petitioners' Petition for Review for failure to file a timely Petition for Redetermination. The Petitioners, Charles M. and Lynn S. Brown, appear by Michael R. Breza, Olson Thielen, Roseville, Minnesota. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Jenine E. Graves. The Department has filed a brief and affidavit in support of its Motion. Petitioners failed to file a response to the Motion. For the reasons stated below, we find for the Department.

FACTS

1. On February 8, 2019, the Department issued a Notice of Refund - Individual Income Tax ("Notice") to the Petitioners regarding their Wisconsin income tax and refund claim for the 2017 tax year. (Affidavit of Mary Nelson, Resolution Office Audit Supervisor, Wisconsin Department of Revenue ("Nelson Aff.") ¶ 2, Ex. A.)

2. On or about the date of issuance, the Department sent the Notice to Petitioners via U.S. First Class Mail to the Petitioners' address on record with the Department. The mailing was not returned. (Nelson Aff., ¶¶ 4-6.)

3. The Notice contained information regarding the 60-day time-period in which to file an appeal with the Department. (Nelson Aff., ¶ 3, Ex. A.)

4. On October 28, 2019, Petitioners' representative called the Department to request a copy of the Department's "February 5, 2019 letter." (Nelson Aff., ¶ 8.)

5. The only communication to the Petitioners from the Department in February 2019 was the Notice, which the Department then provided to Petitioners' representative. (Nelson Aff., ¶ 6.)

6. On January 6, 2020, the Department received Petitioners' Petition for Redetermination dated December 31, 2019, with attachments from Petitioners' representative appealing the February 8, 2019 Notice. The Petition contained no explanation for the delay in filing. (Nelson Aff., ¶ 9, Ex. B.)

7. On August 25, 2020, the Department issued a Notice of Action denying the Petition for Redetermination as untimely. (Nelson Aff., ¶ 10, Ex. C.)

8. On November 16, 2020, Petitioners filed a timely Petition for Review dated October 30, 2020, with the Commission. (Nelson Aff., ¶ 10 and accompanying footnote; Commission file.)

9. In the Petition for Review, Petitioners' representative states,

The combination of COVID and delays with the United States Postal System has delayed this response to you. The postal service is for some reason taking a longer time to deliver mail.

We believe this is due to the rural city nature of Bay City, Wisconsin.

We received the original notice dated February 8 in November of 2019. We do not understand the reason for the delay. We appealed this notice within the 60-day time period.

10. On June 19, 2020, the Department filed a Motion to Dismiss along with an affidavit and exhibits. Petitioners failed to respond to the Motion. (Commission file.)

APPLICABLE LAW

State statutes outline the requirements for filing a valid and timely petition for redetermination:

Wis. Stat. § 71.88(1)(a): . . . any person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of refund may, within 60 days after receipt of the notice, petition the department of revenue for redetermination.

Wis. Stat. § 71.88(2)(a): [I]f no timely petition for redetermination is made within the time provided, the assessment, refund, or denial of refund shall be final and conclusive.

ANALYSIS

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).

In order to contest a notice of refund from the Department, a person must petition the Department for redetermination of the notice within 60 days after receipt of the notice. Wis. Stat. § 71.88(1)(b). Except for certain claims for refund¹ not at issue in this

¹ See Wis. Stat. § 71.75(5).

case, "if no petition for redetermination is made within the time provided the assessment, refund, or denial of refund shall be final and conclusive." Wis. Stat. § 71.88(2)(a).

The Commission has long held that it does not have jurisdiction under Wis. Stats. § 71.88(2)(a) to review actions of the Department where a petitioner fails to file a timely petition for redetermination with the Department. *See Lyman v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-917 (WTAC 2006). A petitioner must be "aggrieved" by the Department's redetermination to bring the issue to the Commission. Wis. Stat. § 71.88(2)(a). A petitioner cannot be aggrieved by the Department's redetermination when the Department's initial determination has become final because there has been no redetermination.

In this case, on or about the date of issuance, the Department mailed a Notice of Refund to Petitioners dated February 8, 2019. The Petitioners' Petition for Redetermination dated December 31, 2019, and received by the Department on January 6, 2020, was filed more than nine months after the Notice of Refund was issued.

While the Department fails to establish the actual date of receipt of the Notice, the Department's records indicated that Petitioners' representative called in October 2019 requesting a copy of February correspondence from the Department. Petitioners' knowledge of the February Notice is not contradicted by any submissions by the Petitioners. Even giving Petitioners an extreme benefit of the doubt, if they had only just received it on the day their representative made that telephone call, it was still late. October 28, 2019, to January 6, 2020, is more than 60 days.

While many due dates have been extended due to COVID, statutory

jurisdictional deadlines have not. The Petition for Redetermination was not timely and, therefore, we dismiss because the Notice is final and conclusive. 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).

CONCLUSIONS OF LAW

1. Because Petitioners failed to file a timely Petition for Redetermination, the underlying Notice is final and the Commission lacks jurisdiction to hear this appeal.
2. The Department is entitled to dismissal as a matter of law.

ORDER

Based on the foregoing, it is the order of this Commission that the Department's Motion to Dismiss is granted and the Petitioners' Petition is dismissed.

Dated in Madison, Wisconsin, this 31st day of March, 2021.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Lorna Hemp Boll, Commissioner



David L. Coon, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin 53705

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

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternately, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, within 30 days of this decision if there has been no petition for rehearing or, within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service, or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or, the Wisconsin Statutes. The website for the courts is <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.