

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

---

RYAN S. AND ERIN K. DIEL,

DOCKET NO. 18-I-023

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

---

**RULING AND ORDER**

---

**DAVID L. COON, COMMISSIONER:**

This matter comes before the Commission on Respondent's Motion for Summary Judgment. The Petitioners, Ryan S. and Erin K. Diel, of Onalaska, Wisconsin, are represented by Attorney Michael Ablan, and the Department is represented by Attorney Sheree Robertson.

For the reasons stated below, the Commission grants the Respondent's Motion.

**FACTS**

1. On December 1, 2015, the Department issued to Petitioners a Notice of Amount Due for the 2014 tax year. The subject of the Notice was treatment of the proceeds of a legal settlement as additional taxable income to the Petitioners. (Affidavit of Terri Stover-Cramer, Resolution Officer, Wisconsin Department of Revenue ("Stover-

Cramer Aff.”) ¶ 3, Ex. 2.)

2. On January 26, 2016, Petitioners submitted a Petition for Redetermination of the December 1, 2015 Notice of Amount Due, which was received and processed by the Department on January 27, 2016. (Stover-Cramer Aff. ¶ 4, Ex. 3.)

3. On April 8, 2016, the Department sent Petitioners a letter stating that the Department’s position as to the taxability of the proceeds of the legal settlement was correct. (Stover-Cramer Aff. ¶ 5, Ex. 5.)

4. On June 16, 2016, the Department issued a Notice of Action denying the Petition for Redetermination. Along with the Notice of Action, Petitioners were advised of their appeal rights. (Stover-Cramer Aff. ¶ 5, Ex. 4.)

5. The June 16, 2016 Notice of Action was sent to Petitioners via certified mail and received by them on June 21, 2016. (Affidavit of Sheree Robertson, Attorney, Wisconsin Department of Revenue, ¶ 4, Exs. 18-20.)

6. On August 16, 2016, Petitioner, Erin Diel, sent an email to Ms. Stover-Cramer stating that Petitioners wanted to withdraw their appeal and make payment of the amount due. (Stover-Cramer Aff. ¶ 7, Ex. 7.)

7. On August 17, 2016, Ms. Stover-Cramer sent a letter and payment voucher to Petitioners with instructions as to payment options. (Stover-Cramer Aff. ¶ 8, Ex. 8.)

8. On August 29, 2016, Ms. Stover-Cramer received an email from Mrs. Diel, stating in part that, “we have to pay taxes on our portion and our attorneys portion but I am wondering if there is a way to not have to pay all of that interest since we were

disputing taxes.” Ms. Stover-Cramer sent a reply email on August 30, 2016, stating that interest cannot be waived. (Stover-Cramer Aff. ¶ 9, Exs. 9-10.)

9. On September 1, 2016, the Department received Petitioners’ payment for the tax due for the 2014 tax year, as stated in the December 1, 2015 Notice of Amount Due, plus additional interest. (Stover-Cramer Aff. ¶ 9, Ex. 10.)

10. On January 12, 2017, Petitioners filed an Amended 2014 Tax Return (“Amended Return”) that, in addition to two other small issues (less than \$1000 each),<sup>1</sup> requested a refund claiming that the legal settlement proceeds, previously addressed in the December 1, 2015 Notice, should not have been included as taxable income. (Stover-Cramer Aff. ¶ 11.)

11. On August 3, 2017, the Department’s Audit Bureau sent a Notice to Petitioners denying their claim for refund in the Amended Return. (Stover-Cramer Aff. ¶ 13, Ex. 13.)

12. On August 22, 2017, Petitioners filed with the Department a Petition for Redetermination of the August 3, 2017 Notice. (Stover-Cramer Aff. ¶ 14, Ex. 14.)

13. On December 11, 2017, Ms. Stover-Cramer issued a Notice of Action denying Petitioners’ August 22, 2017 Petition for Redetermination along with a letter to Petitioners’ attorney. (Stover-Cramer Aff. ¶ 15, Exs. 15 and 16.)

14. On January 22, 2018, after denial of their August 22, 2017 Petition for Redetermination on their refund request in the Amended Return, Petitioners filed a

---

<sup>1</sup> The Department found that these small amounts canceled each other out and therefore took no action on them. These are not at issue in this matter.

Petition for Review with the Commission. (Commission file.)

15. The Department filed a Motion for Summary Judgment along with a Brief, affidavits, and exhibits. Petitioners filed a Brief opposing the Motion, along with affidavits and exhibits. The Department filed a Reply Brief. (Commission file.)<sup>2</sup>

### APPLICABLE STATUTES

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. . . . 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.

Wis. Stat. § 71.75(4): Except as provided in subs. (5) and (5m), no refund shall be made and no credit shall be allowed for any year that has been the subject of a field audit if the audit resulted in a refund or no change to the tax owed or in an assessment that is final under s. 71.88 (1) (a) or (2) (a), 71.89 (2), 73.01 or 73.015 and if the department of revenue notifies the taxpayer that unless the taxpayer appeals the result of the field audit under subch. XIV, the field audit is final. No refund shall be made and no credit shall be allowed on any item of income or deduction, assessed as a result of an office audit, the assessment of which is final under s. 71.88 (1) (a) or (2) (a), 71.89 (2), 73.01 or 73.015.

Wis. Stat. § 71.75(5): A claim for refund may be made within 4 years after the assessment of a tax or an assessment to recover all or part of any tax credit, including penalties and interest, under this chapter, assessed by office audit or field audit and

---

<sup>2</sup> While the Department's filing is called a Motion for Summary Judgment, the substance of the issues involved are jurisdictional. Even though we treat this motion as a motion to dismiss, if we had decided this case as a summary judgment motion, the result would not change as the material facts are not in dispute and the Department is, in our view, clearly entitled to judgment for the reasons stated. See *LCM Funds Five North LLC v. Dep't of Revenue.*, Wis. Tax Rptr. (CCH), ¶401-513, (WTAC 2011).

paid if the assessment was not protested by the filing of a petition for redetermination....

Wis. Stat. § 71.88(2)(a): *Appeal of the department's redetermination of assessments and claims for refund.* A person feeling aggrieved by the department's redetermination may appeal to the tax appeals commission by filing a petition with the clerk of the commission as provided by law and the rules of practice promulgated by the commission. If a petition is not filed with the commission within the time provided in s. 73.01 . . . the assessment, refund, or denial of refund shall be final and conclusive.

Wis. Stats. § 71.89(2): No person against whom an assessment of income or franchise tax has been made shall be allowed in any action either as plaintiff or defendant or in any other proceeding to question such assessment unless the requirements of ss. 71.88 and 71.90 (1) shall first have been complied with....

## DECISION

The matter before the Commission highlights the potential pitfalls for parties acting *pro se*, representing themselves, before a government body in a legal or quasi-legal proceeding. Actions taken and decisions made by *pro se* parties can have significant consequences of which the parties, not familiar with statutory or other legal procedure, may not fully comprehend.

While the Petitioners now have counsel and may have sought out some advice at points along the way, during the critical early days of the matter, they were communicating directly with the Department and acting on their own accord. Petitioners made decisions along the way which impacted the outcome of this matter.

It is well established law that the Wisconsin Tax Appeals Commission lacks jurisdiction to hear an appeal in cases where a petitioner fails to file a timely petition for

review with the Commission. *Barth v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-527 (WTAC 2012). 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).

For a petition to be timely filed, it must be received by the Commission within 60 days after a taxpayer received the Department's notice of action on the petition for redetermination. Wis. Stat. § 73.01(5)(a). Unless otherwise provided by statute, a document is filed on the date it is received by the Commission, not the date it is mailed. *Laurence H. Grange v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-017 (Cir. Ct. 1993).<sup>3</sup>

Here, the Department issued to Petitioners a Notice of Amount due on December 1, 2015 for the 2014 tax year. The subject of that Notice was the tax treatment of a \$135,000 legal settlement received by Petitioners. The Department claimed that the entire amount was subject to tax. Petitioners disagreed and filed a timely Petition for Redetermination with the Department. On June 16, 2016, the Department issued a Notice of Action denying the Petitioners' request, which was sent to the Petitioners by Certified Mail and received by the Petitioners on June 21, 2016. These basic material facts are not disputed.

---

<sup>3</sup> 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. If a party fails to file a timely Petition for Review, "the assessment, refund, or denial of refund shall be final and conclusive." Wis. Stat. § 71.88(2)(a).

From the receipt of the Notice of Action, Petitioners had 60 days to file a Petition for Review with the Commission, which was August 22, 2016.<sup>4</sup> Petitioners never filed a Petition for Review with the Commission regarding the December 1, 2015 Notice of Amount Due. Instead, Petitioners sent an email on August 16, 2016, to the Department advising that they wanted to withdraw their appeal and make payment on the full amount due. On August 17, 2016, the Department sent Petitioners a letter and payment voucher, and, on September 1, 2016, after the time to file a Petition for Review had run, Petitioners made full payment of the amount due.

The practical effect of these actions by Petitioners was that, by failing to timely file a Petition for Review with the Commission, the matter became final and conclusive. Consequently, the Commission lacks jurisdiction to hear the matters addressed in the December 1, 2015 Notice.

Further, Petitioners are barred by statute from challenging the substance of that assessment. "No person against whom an assessment of income or franchise tax has been made shall be allowed in any action either as plaintiff or defendant or in any other proceeding to question such assessment unless the requirements of ss. 71.88 and 71.90 (1) shall first have been complied with...." Wis. Stats. § 71.89(2). Petitioners failed to comply with Wis. Stat. § 71.88(2)(a) by failing to file a timely Petition for Review with the Commission. The result of that failure is that the assessment became "final and conclusive." Petitioners are barred from questioning the assessment in any "action" or

---

<sup>4</sup> Sixty-days would be August 20, 2016. As that date was a Saturday, the next business day, would be August 22, 2016.

“other proceeding.”

Petitioners did later, on January 12, 2017, file an amended 2014 tax return. On this Amended Return, Petitioners excluded the same \$135,000 legal settlement income, claiming, again, that it was not taxable and seeking a refund of money previously paid to the Department. Petitioners’ refund claim was denied, as was their Petition for Redetermination. They then filed the current Petition for Review with the Commission.

Unfortunately for the Petitioners, trying to recharacterize their challenge to the taxability of the \$135,000 settlement proceeds as a refund request, fails. Looking specifically at refund requests, “No refund shall be made and no credit shall be allowed on any item of income or deduction, assessed as a result of an office audit, the assessment of which is final under s. 71.88 (1) (a) or (2) (a), 71.89 (2), 73.01 or 73.015.” Wis. Stat. § 71.75(4). Petitioners did not file a Petition for Review of the December 1, 2015 Notice regarding this same \$135,000. That assessment became final after August 22, 2016, pursuant to Wis. Stats. §§ 71.88(2)(a), 71.89(2), and 73.01(5)(a). The Petitioners are barred under this statute from receiving any refund regarding the subject matter of the December 1, 2015 assessment, which has become final and conclusive.

The exception to Wis. Stat. § 71.75(4),<sup>5</sup> being Wis. Stat. § 71.75(5), does not save Petitioners either. While a refund request may be made within four years where an assessment is paid, the refund may not be granted where a redetermination has been “filed.” Wis. Stat. § 71.75(5). Petitioners did pay the amount due on September 1, 2016,

---

<sup>5</sup> A second exception in Wis. Stat. § 71.75(5m), relates to corporate capital loss carry-backs and is not applicable here.



but they had also filed a Petition for Redetermination on January 27, 2016, the determination of which has become final and conclusive. Having filed a Petition for Redetermination, this exception is not available.

Petitioners make some disjointed arguments about the “respondent’s subsequent revival of these appeal right” being relied upon by Petitioners. (Response Brief p. 3). They also state, “We submit that the date can be and was modified and renewed and a new date issued upon the finding of mutual mistake or a recent previously undiscovered fact or law or by the respondent’s own authority.” *Id.* Petitioners skip around and toss out dates of various correspondence between the parties and other notices issued by the Department for other assessments or actions by the Department including the December 11, 2017 Notice of Action for the above captioned matter. Almost all the dates referenced by Petitioners are after August 22, 2016, when the time period to appeal the December 1, 2015 Notice had already run and the assessment had become final.

Regardless, Petitioners’ arguments about other notices and actions after the December 1, 2015 Notice of Assessment became final does nothing to make the matter not final. “The statutes control whether an action of an agency is reviewable.” *Beck v. Dep’t of Revenue*, Wis. Tax Rptr., ¶400-275 (WTAC 1997). Mistake, error, or other action by a party cannot confer jurisdiction to the Commission. “The right of a taxpayer to appeal a determination of the Respondent must be grounded in the statutes and cannot be conferred by an erroneous statement by Respondent that the taxpayer may appeal the determination.” *Pierce Milwaukee, LLC v. Dep’t of Revenue*, Wis. Tax Rptr., ¶401-271

(WTAC 2009). Petitioners' opportunity to challenge the taxability of the settlement funds ended when they did not file a Petition for Review with the Commission in the time period specified by statute.

In their Response Brief and attached filings, especially the Affidavit of Erin Diel, Petitioners focused upon their view of the underlying merits of the matter. While we understand that Petitioners want the substance of this matter heard by the Commission, the Commission must first have jurisdiction. Unfortunately, Petitioners' actions in failing to timely file with the Commission a Petition for Review of the Notice of Action issued by the Department back in June of 2016, allowed the matter to become final and conclusive. The Commission, therefore, does not have the ability to reach the merits of the matter and must grant the Motion.

#### **CONCLUSIONS OF LAW**

1. The Notice of Action denying Petitioners' Petition for Redetermination of the December 1, 2015 Notice of Assessment became "final and conclusive" pursuant to Wis. Stat. § 71.88(2)(a) because Petitioners did not file a Petition for Review with the Commission within 60 days of receipt of the Notice of Action.


2. Petitioners are barred from obtaining a refund for a matter that has become final and conclusive under Wis. Stat. § 71.88(2)(a) pursuant to Wis. Stat. § 71.89(2) and Wis. Stat. § 71.75(4).

#### **ORDER**

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

Dated at Madison, Wisconsin, this 13th day of September, 2018.

WISCONSIN TAX APPEALS COMMISSION



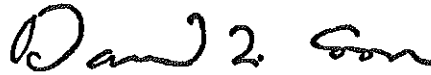
---

Lorna Hemp Boll, Chair



---

David D. Wilmoth, 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. Alternatively, 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 Appeals 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 <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.