

STATE OF WISCONSIN
TAX APPEALS COMMISSION

DENNIS AND SUSAN DREPHAL,

DOCKET NO. 18-1-032

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission for decision on Respondent's Motion to Dismiss Petitioners' Petition for Review as untimely. The Petitioners, Dennis and Susan Drephal, of Fond du Lac, Wisconsin, appear by Kurt K. Heling, CPA, having previously been represented by Michael Ellsworth. Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Sheree Robertson. The Department filed a brief and affidavit with exhibits in support of its Motion. Petitioners have responded, and the Department has filed a reply.

The Commission finds that Petitioners' Petition for Review was not filed within the required 60-day period. As such, it was not timely. The Commission lacks jurisdiction and therefore must dismiss this matter.

FACTS

1. On January 31, 2017, the Department issued to Petitioners a Notice of Amount Due regarding the 2012-2015 tax years. (Affidavit of Sheree Robertson (“Robertson Aff.”), Ex. 1.)
2. On or about April 3, 2017, Petitioners filed a timely Petition for Redetermination with the Department. (Robertson Aff., Ex. 2.)
3. On December 1, 2017, the Department issued a Notice of Action granting in part and denying in part the Petition for Redetermination. The Notice contained language indicating that the Department’s decision would be final and conclusive if not appealed within the 60-day time limit. (Robertson Aff., Exs. 3.)
4. Petitioners received that Notice on December 4, 2017. (Robertson Aff., Ex. 6.)
5. Petitioners’ deadline for filing with the Commission was 60 days from December 4, 2017. That date was Friday, February 2, 2018. Petitioners’ Petition for Review was mailed to the Commission by Certified Mail on February 3, 2018. (Commission file.)
6. The Petition was filed on behalf of the Petitioners by an accountant, Michael Ellsworth, of Elkhorn, WI. (Commission file.)
7. On March 7, 2018, with its Alternative Answer, the Department filed a Motion to Dismiss, along with an affidavit with exhibits, and a brief in support of the Motion. (Commission file.)
8. Petitioners, no longer represented by Michael Ellsworth and now represented by Kurt K. Heling, CPA, responded primarily by asserting that Mr. Ellsworth

had missed the deadline in keeping with a pattern of tardy responses and lack of diligence.
(Petitioners' Response.)

9. Petitioners' response stated, "On Saturday, February 3, 2017,¹ day 61, Mr. Ellsworth finally sent the appeal via certified mail."

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 Freeman v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-052 (WTAC 2016). 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 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. § 71.88(2): *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.

¹The actual date Petitioners mailed their Petition for Review was Saturday, February 3, 2018.

ANALYSIS

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).

Petitioners received the Notice on December 4, 2017. The Notice included language explaining that Petitioners may appeal to the Tax Appeals Commission within 60 days of receiving the notice if they were in disagreement. The 60-day deadline to file expired on February 2, 2018.

Unless otherwise provided by statute, a document is filed on the date it is received by the Commission. *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.

Petitioners' former representative mailed the Petition on February 3, 2018, by certified mail. The filing met the first three prongs, but, as acknowledged by the Petitioners, Mr. Ellsworth sent the certified envelope on "Day 61."

Petitioners focus blame on their representative. However, reliance on another person does not excuse the late filing. The onus is on the Petitioners to ensure that their filing is timely.

The Commission has long held that it is the taxpayer who is ultimately responsible for tax filings. In *Kryshak v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-084 (WTAC 1989), where "the petitioner's only excuse or defense is his misplaced reliance on

his accountant," the Commission explained, "This Commission has never accepted 'it's the accountant's fault' as a defense and will not do so in the case now before us."

This case is sadly similar to *Chang v. Dep't of Revenue*, Wis. Tax Rptr. ¶ 402-186 (CCH) (WTAC 2017). In that case, the petitioners' accountant missed the 60-day deadline for filing Petitioners' petition for review. The accountant acknowledged his error and requested that the matter be reopened. However, the Commission explained, "Although the Petitioners sought representation, this time from a CPA, that representative failed them by missing the 60-day deadline. The timely filing of a petition for review is a requirement to establish jurisdiction; without that, the Commission has no authority to act on the petition and no power to reopen the matter." In this case, as in *Chang*, the Commission has no choice but to grant the Department's Motion to Dismiss.

As an additional argument, the Petitioners assert that the Department "set a precedent in April 2017 by allowing the original appeal to fall to day 61 via the April 3, 2017 email with [the Department]." This assertion fails for two reasons. First, the Tax Appeals Commission is established as a completely separate agency independent of the Department of Revenue. A decision by the Department to grant some lenience regarding the timing of a Petition for Redetermination has no bearing on whether the Commission has jurisdiction over a subsequent Petition for Review.

Second, if, as Petitioners' brief notes, Petitioners received the original Notice of Assessment on February 1, 2017, their Petition for Redetermination was due 60 days later, which was Sunday, April 2. Because that date fell on a Sunday, the Petition

was due Monday, April 3, which is the date of the email. Wis. Stat. § 990.001(4)(b). Thus, the Petition for Redetermination was in fact timely.

In order for the Commission to be able to consider the merits of an appeal, the case must be properly before the Commission. One requirement to obtain proper jurisdiction is that the petition for review must be filed within 60 days of receipt of the denial of a petition for redetermination. Although the Petitioners were represented by Mr. Ellsworth, their representative failed them by missing the 60-day deadline, albeit by only one day.² Because the deadline is a jurisdictional requirement, as the saying goes, a miss is as good as a mile; to be properly before the Commission, close is not close enough.

Because the Petition was not timely filed, the Commission has no jurisdiction and must dismiss the Petition. 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. The Notice of Action denying Petitioners' Petition for Redetermination became "final and conclusive" pursuant to Wis. Stat. § 71.88(2)(a) because Petitioners failed to file the Petition for Review with the Commission within 60 days of receipt of the Notice.

² "To dismiss an appeal because it comes one day late may seem harsh. However, if statutory time limits to obtain appeal at jurisdiction are to be meaningful, they must be unbending." *Kohnke v. ILHR Department*, 52 Wis. 2d 687, 191 N.W. 2d 1 (1971), subsequently cited in 22 Wisconsin state tax decisions, most recently, *Sarnowski v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-152 (WTAC 2017).

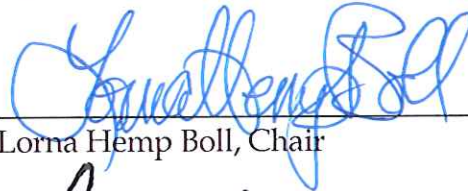
2. The Commission lacks jurisdiction over the Petition for Review under Wis. Stat. § 73.01(5) because it was untimely. Therefore, the Department is entitled to dismissal as a matter of law.

ORDER


The Department's Motion to Dismiss is granted, and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 21st day of August, 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.