

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

FRANCIS AND DONNA ELLENBECKER,

DOCKET NO. 10-I-209

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This case comes before the Commission on the motion of the Wisconsin Department of Revenue (the "Department") to dismiss the petition for review on the basis that it was not timely filed under Wis. Stat. § 73.01(5)(a). Attorney La Keisha Wright Butler represents the Department and has filed a notice of motion and motion to dismiss with supporting affidavit, exhibits, brief and reply. The Petitioners represent themselves in this matter and filed a response to the motion.

Having considered the entire record in this matter, the Commission hereby finds, rules and orders as follows:

FINDINGS OF FACT

1. By a Notice of Amount Due and Office Audit Worksheet dated April 27, 2009, the Department issued an assessment to the Petitioners in the total amount of \$10,183.84 (including additional income tax of \$6,296.00, plus \$2,030.89 in interest, \$282.95 in underpayment interest, and a negligence penalty of \$1,574.00) for the

years 2004-2007 (the “period at issue”). According to the Office Audit Worksheet, the assessment is based primarily on an earlier adjustment made by the Internal Revenue Service to the Petitioners’ federal returns for the period at issue and the Department’s disallowance of certain losses claimed on Schedule C of those returns for Wisconsin income tax purposes. (Affidavit of Department Resolution Officer Marie Romero dated September 15, 2010 (“Romero Aff.”), ¶ 2, Ex. 1.)

2. By correspondence received by the Department on September 9, 2009, the Petitioners filed a petition for redetermination of the assessment. (Romero Aff. ¶ 3, Ex. 2.)

3. By Notice of Action dated June 4, 2010 (the “Notice”) sent to the Petitioners by certified mail, the Department denied the petition for redetermination. (Romero Aff. ¶ 4, Ex. 3.)

4. The Petitioners received the Notice on June 7, 2010. (Romero Aff. ¶ 4, Ex. 4.)

5. The Notice informed the Petitioners as follows:

If you disagree with this decision, you may appeal in writing to the

**Wisconsin Tax Appeals Commission
5005 University Ave., Ste. 110
Madison, Wisconsin 53705**

within 60 days of receiving this notice. If you appeal, you must pay **a \$25.00 filing fee** to the Commission at the time you file.

If you do not file an appeal within the 60 day period, this action will become final and conclusive and the additional

liability will be payable on or before the date indicated on the attached statement.

(Romero Aff. ¶ 4, Ex. 3) (emphasis in original).

6. On August 13, 2010, the Commission received the Petitioners' petition for review sent by ordinary U.S. mail.

7. On September 17, 2010, the Department filed its answer and notice of motion and motion to dismiss the petition for review on the basis of untimely filing with supporting affidavit and exhibits.

8. On November 19, 2010, the Petitioners filed a response to the motion.

9. On December 3, 2010, the Department filed a brief and reply.

CONCLUSION OF LAW

The Commission does not have jurisdiction to consider the Petitioners' petition for review because it was filed after the statutory due date specified in § 73.01(5)(a), Wis. Stats.

RULING

Section 73.01(5)(a) of the Wisconsin Statutes requires that a petition for review be filed with the Commission within 60 days of receipt of the Department's notice of action on a petition for redetermination. If no petition is filed within that allotted timeframe, then the related action of the Department becomes "final and conclusive." Wis. Stat. § 71.88(2). Unless sent by certified mail, a petition is considered filed on the date of its receipt by the Commission. Wis. Stat. § 73.01(5); Wis. Admin.

Code § TA 1.13(2). The requirement of timely filing is strictly construed. *See, McDonald Lumber Co. v. Dep't of Revenue*, 117 Wis. 2d 446 (1984).

The Notice of Action from the Department was delivered via certified mail to the Petitioners on June 7, 2010. The 60-day period permitted under Wis. Stat. § 73.01(5)(a) for the Petitioners to file a timely petition for review with the Commission expired on August 6, 2010. The Petitioners mailed the petition via ordinary mail and the Commission received it on August 13, 2010, one week after the 60-day appeal period had expired.

In their response, the Petitioners state that Mr. Ellenbecker was “incapable of making right and good decisions” during the period at issue due to health problems. It is not clear what amount of the assessment they dispute, although they specifically request that the interest and penalties be abated. The Petitioners do not dispute the relevant dates at issue nor the Department’s position that their petition for review was untimely filed.

Regardless of the reasons for its untimely filing, the Commission is required to dismiss the petition for lack of jurisdiction pursuant to longstanding precedent. “To dismiss an appeal because it comes one day late may seem harsh. However, if statutory time limits to obtain appellate jurisdiction are to be meaningful they must be unbending.” *Currier v. Dep't of Revenue*, 288 Wis. 2d 693, 706, 709 N.W.2d 520 (Ct. App. 2005), quoting *Ryan v. Dep't of Revenue*, 68 Wis. 2d 467, 472, 228 N.W.2d 357 (1975). Moreover, even if the Commission could address the merits of this case, it could not relieve the Petitioners from the tax consequences of bad decisions made due to Mr.

Ellenbecker's ill health. If the Petitioners wish to discuss a settlement of this matter, they still may pursue that option through the Department's Petition for Compromise program regardless of the outcome of this appeal to the Commission.

The Petitioners did not file a petition for review with the Commission within 60 days after their receipt of the Notice of Action on their petition for redetermination. The Commission has no authority under the Wisconsin Statutes to ignore or make exceptions to the 60-day provision. The Commission cannot act on a petition for review filed after the statutory due date other than to dismiss it for lack of timely filing.

ORDER

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

Dated at Madison, Wisconsin, this 24th day of February, 2011.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"