

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

DILSHAD AND SHAISTA HUSSAIN,

DOCKET NO. 10-I-107

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 Respondent, the Wisconsin Department of Revenue (the "Department"), to dismiss the petition for review on the basis that the Commission lacks jurisdiction in this case under Wis. Stat. § 73.01(5)(a). The Petitioners' representative, Eugene Lombness, CPA, has filed a petition for review and a response to the motion with affidavits and exhibits. Attorney Sheree Robertson represents the Department and has filed affidavits with exhibits, a reply brief and supplemental affidavit in support of the motion.

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

FINDINGS OF FACT

1. By a Notice of Amount Due and Office Audit Worksheet dated July 27, 2009 (the "Notice"), the Department issued an assessment of additional income tax plus interest for the years 2005 through 2008 (the "years at issue") to the Petitioners in

the total amount of \$13,837.30 (the “assessment”). (Affidavit of Department Auditor Joan Kellerman, CPA, dated June 7, 2010, ¶ 3, Ex. 1.)

2. The Notice was mailed to the Petitioners by regular U.S. mail on July 27, 2009 and was not returned to the Department as undeliverable. (Affidavit of Kathleen Henry dated June 7, 2010, ¶ 2; Kellerman Aff., ¶ 4.)

3. The Petitioners admit that they received the Notice on July 29, 2010. (Affidavit of Attorney Sheree Robertson dated August 11, 2010, ¶ 3, Ex. 9, Petitioners’ Answer to Interrogatory 3(b).)

4. The Petitioners claim that they filed a petition for redetermination of the assessment with the Department by facsimile on August 26, 2009. (Affidavits of Dilshad Hussain dated March 19, 2010, ¶ 7, and July 8, 2010, ¶ 7.)

5. The Department denies receiving a fax from the Petitioners or their former representative on August 26, 2009. (Kellerman Aff. ¶ 5.)

6. On October 5, 2009, the Department received a fax from the Petitioners’ former representative that the Department treated as the Petitioners’ petition for redetermination of the assessment. (Kellerman Aff. ¶ 6, Ex. 2; Affidavit of Attorney Sheree Robertson dated June 7, 2010, ¶ 2.)

7. By a Notice of Action dated March 9, 2010, the Department denied the petition for redetermination on the grounds that it was untimely filed. (Robertson Aff., ¶ 3, Ex. 3.)

8. On May 7, 2010, the Commission received the Petitioners’ petition for review via certified mail date-stamped May 6, 2010.

9. On June 8, 2010, the Department filed a notice of motion and motion to dismiss the petition for review with supporting affidavits and exhibits in support of the motion and alternative answer.

10. On July 12, 2010, Mr. Lombness, the Petitioners' current representative, filed a response to the motion with supporting affidavits and exhibits.

11. On July 26, 2010, the Department filed a reply brief in support of the motion.

12. On August 11, 2010, the Department filed a supplemental affidavit in support of the motion.

CONCLUSIONS OF LAW

1. No genuine issues of material fact remain in dispute in this matter and the Department is entitled to judgment as a matter of law pursuant to Wis. Stat. § 802.08 and Wis. Admin. Code § TA 1.31.

2. The Commission lacks jurisdiction over this petition for review under Wis. Stat. § 73.01(5) because the Petitioners failed to file a petition for redetermination with the Department within 60 days of their receipt of notice of the assessment at issue, which thus became "final and conclusive" pursuant to Wis. Stats. §§ 77.59(6)(b) and 71.88(2)(a).

RULING

Because both parties have filed affidavits with exhibits, the Commission treats the Department's motion as a motion for summary judgment. *See*, Wis. Stat. §§ 802.06(3) and 802.06(2)(b); *see also*, *City of Milwaukee v. Dep't of Revenue*, Wis. Tax Rptr.

(CCH) ¶ 400-405 (WTAC 1999) and *Mrotek, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-315 (WTAC 1997). Summary judgment is warranted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2). The party moving for summary judgment has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). If the moving party has established a *prima facie* case for summary judgment, then the opposing party must establish that there is a genuine issue of material fact that entitles that party to a trial. *Id.* The court must view the evidence, or the inferences therefrom, in the light most favorable to the party opposing the motion. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 567, 278 N.W.2d 857, 862 (1979). In this case, the Commission concludes that the Department has established a *prima facie* case for summary judgment and that the Petitioners have not shown that a genuine issue of material fact remains in dispute.

The Department generally must notify a taxpayer of any assessment of additional income tax in writing, which must “be served as are circuit court summonses, or by registered mail, or by regular mail if the person assessed admits receipt or there is satisfactory evidence of receipt.” Wis. Stats. §§ 71.74(10)-(11). Upon receiving a notice of assessment from the Department, a person may, within 60 days after receipt of the notice, petition the Department for redetermination. Wis. Stat. §

71.88(1)(a). The Department is required to act on a petition for redetermination within six months after it is filed. *Id.*

The Commission has jurisdiction to review actions of the Department pursuant to a timely petition for review filed by any person “who has filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department of revenue” Wis. Stat. § 73.01(5)(a). Except for certain claims for refund, “if no petition for redetermination is made within the time provided the assessment, refund, or denial of refund shall be final and conclusive.” Wis. Stats. §§ 77.59(6)(b) and 71.88(2)(a). On that basis, the Commission has held that it does not have jurisdiction to consider a petition for review in a case where the petitioner untimely filed the required petition for redetermination. *See, Lyman v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-917 (WTAC 2006).

Notice of an assessment served by regular mail is adequate if the taxpayer assessed “admits receipt or there is satisfactory evidence of receipt.” Wis. Stat. § 71.74(10)-(11). In this case, the Department mailed the Notice of assessment to the Petitioners on July 27, 2009 by regular mail, and the Petitioners received it on July 29, 2009. Based on that date of receipt, the 60-day period permitted for filing a petition for redetermination expired on September 28, 2009. The Petitioners claim that they filed a petition for redetermination by fax on August 26, 2009, which the Department denies receiving. The Department further argues that the Petitioners did not file their petition for redetermination until October 5, 2009, making their petition for redetermination approximately one week late.

Other than the Petitioners' self-serving statements, there is no evidence in the record indicating that the Petitioners filed a petition for redetermination by fax on August 26, 2009. They may indeed have faxed a document to a working fax number somewhere or directed their former representative to fax such a petition, but the Department has no record of receiving their petition on August 26, 2009. Instead, the Department received their petition for redetermination by fax from their former representative on October 5, 2009.

It is the responsibility of the petitioner to ensure receipt of a petition, and there are many methods available for delivering a petition with at least some degree of certainty, such as certified mail. As in many prior cases before this Commission, "it's the accountant's fault" does not constitute a defense to an action of the Department. The Petitioners are responsible for their own actions or lack of action, as well as the actions and failures to act of their representatives.

If the Petitioners had timely petitioned the Department for a redetermination of the assessment and subsequently filed a timely petition for review with the Commission, the Commission could have addressed the substantive questions raised by the Petitioners regarding their claim. However, that is not the case here. The Petitioners filed a petition for redetermination of the assessment well after the statutory filing deadline had passed, thus depriving the Commission of jurisdiction to review this matter. *See also, Lyman v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-917 (WTAC 2006).

There is no genuine issue of material fact in this case, and the Department is entitled to summary judgment as a matter of law. Because the Petitioners did not file a timely petition for redetermination with the Department regarding the Notice of assessment, the assessment became final and conclusive, and the Commission lacks jurisdiction over the petition for review.

ORDER

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

Dated at Madison, Wisconsin, this 21st day of October, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"