

STATE OF WISCONSIN
TAX APPEALS COMMISSION

STEVE AND CATHY KIRSCHBAUM,

DOCKET NO. 09-I-144

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This matter comes before the Commission on the Respondent's Motion to Dismiss. The Petitioners in this matter, Steve and Cathy Kirschbaum, are represented by Mr. Charles DeZwarte of Janesville, Wisconsin. The Respondent (also referred to herein as "the Department") is represented in this matter by Attorney Linda M. Mintener, of Madison, who has filed a brief with supporting affidavits and exhibits. The Petitioners have not filed a response.

Based on the record before it, the Commission hereby concludes, finds, rules and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS

A. Jurisdictional Facts

1. The Department issued the assessment against the Petitioners on January 26, 2009, for \$13,222.74. Of that amount, \$8,964.15 is for the underlying tax and \$4,258.59 is interest. Affidavit of Attorney Linda M. Mintener, ¶2 and Exhibit 1.

2. The Petitioners filed a Petition for Redetermination with the Department on March 31, 2009. *Id.*

3. On June 15, 2009, the Department denied the Petition for Redetermination, stating that the Petitioners had failed to provide the information that the Department had requested. Exhibit 3.

4. The Petitioners filed a Petition for Review before the Wisconsin Tax Appeals Commission on August 5, 2009, contesting the Department's action on the Petition for Redetermination. Mintener Affidavit, ¶3.

B. Material Facts

1. The Department filed its Motion to Dismiss for Failure to State a Claim Upon Which Relief can be granted on September 30, 2009. Commission File.

2. On October 9, 2009, the Commission issued a briefing order on the motion and requested a response from the Petitioners no later than November 9, 2009. The Petitioners, however, filed no response. *Id.*

3. On January 20, 2010, the Commission's legal assistant called the Petitioners' contact number and the Petitioners' representative indicated that he had not received any correspondence from the Commission concerning this matter, including the Commission's briefing order dated October 9, 2009. During the course of the conversation, the representative indicated that the Petitioners might not be interested in pursuing the petition. *Id.*

4. On January 22, 2010, the Commission sent a letter to the Petitioners and their representative, giving the Petitioners until February 5, 2010 to file a response to the Department's motion. *Id.*

5. On February 4, 2010, Mr. Kirschbaum telephoned the Commission to verify that the Commission had received materials from the Petitioners' representative. *Id.*

6. Later that same day, the Commission received a fax from the Petitioners' representative, which stated in part the following:

The software company, [name deleted], made programming errors with interpretation of Wisconsin capital gains laws. These program errors are responsible for calculating incorrect capital gain, problematic numbers on schedule 1, and incorrect calculation of tax due.

For presentation of our claim, I have asked [name deleted] for clarification of this error. This request has been passed to several, (4) different representatives.

Although this will have limited correction value to what the Department of Revenue believes to be their claim, [the manufacturer] believes they interpreted Wisconsin tax law correctly and their software prepared a proper return.

I am requesting an extension of six months to prepare case due to the extreme time commitments of this current tax season.

Id.

7. On February 9, 2010, the Department filed a response to the February 4 letter from the Petitioners' representative, opposing any further time for the Petitioners to file a response. The Department noted that the Petitioners had failed to

comply with an order of the Commission and when given one more chance in January of 2010, the Petitioners again failed to comply with an order of the Commission by neglecting to serve a copy upon the Respondent. The Department noted that the February 4 response was simply a request for an additional six-month extension based on non-evidentiary and irrelevant facts. *Id.*

8. On February 18, 2010, the Commission granted the Petitioners and their representative one 30-day extension as the Petitioners had not previously made such a request. *Id.*

9. The Commission has received no response from the Petitioners to its February 18, 2010 order. *Id.*

RELEVANT STATUTES AND CODE PROVISIONS

805.03 Failure to prosecute or comply with procedure statutes. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

TA 1.39 Practice and procedures. Except as provided in s. TA 1.53, the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state.

HOLDING

This case comes to the Commission on the Department's Motion to Dismiss for Failure to State a Claim. In brief, the Petitioners filed a personal income tax return for the period ending December 31, 2004 which contained an alleged error in reporting capital gain income.¹ The Department issued an income tax assessment to the Petitioners based on the alleged reporting error and denied their Petition for Redetermination based on same. After filing a petition here in August of 2009, the Petitioners failed to follow up by responding to the Motion to Dismiss the Department filed here on September 30, 2009. After the Commission gave two *sua sponte* extensions of time to file, the Petitioners' representative wrote a letter to the Commission explaining that a software error had caused the inaccurate reporting on the return and requesting another six-month extension to pursue information from the firm that produced the software the Petitioners used to prepare their return. After the Commission granted a 30-day extension, the Petitioners failed to file a response to the motion. The Department, on the other hand, posits that the information would make no difference in the result here and that the Petitioners have failed to prosecute their claim here before the Commission. For the following reasons, we agree with the Department and grant the Motion to Dismiss. The first part of this opinion will summarize the laws that apply here and the second part of the opinion will state why we grant the motion.

¹ The Department's work papers also note some depreciation related adjustments, but do not elaborate further. Exhibit 1.

Applicable Law

The Department has filed a Motion to Dismiss for Failure to State a Claim Upon which Relief can be granted. Respondent's Motion at 1. Because the Department also filed an affidavit and a brief in support of the motion, the Commission treats the Department's motion as if it were a Motion for Summary Judgment. See Wis. Stats. §§ 802.06(3) and 802.06(2)(b); see also *Mrotek, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-315 (WTAC 1997) (where the Department submitted matters outside of the pleadings, motion for judgment on the pleadings treated as Motion for Summary Judgment) and *City of Milwaukee v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-405 (WTAC 1999) (where parties submitted affidavits and briefs, a motion to dismiss for failure to state a claim is treated as if it were a Motion for Summary Judgment). In brief, a 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. Stats. § 802.08(2).

Tax assessments made by the Department are presumed to be correct, and the burden is upon the Petitioners to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1). In order to prove that an assessment is incorrect, Petitioners must begin by responding to facts and arguments presented by the Department in support of the assessment at issue. In this case, there is essentially no information properly put forth before the Commission by

the Petitioners. The only information on the basis of the Petitioners' claim is the letter the Petitioners' representative wrote to the Commission requesting an extension of six months to investigate their case. There are, however, at least two problems with treating the letter as a response to the Department's motion. First, the letter is not under oath and, thus, does not comply with summary judgment procedure. Second, the letter is essentially a promise to provide an explanation at some point in the future. Unfortunately, that proof has not arrived in a timely fashion and, thus, there is no genuine issue of material fact here before the Commission.

Even if we were to consider the material put forth by the Petitioners, we would still have to find for the Department. In brief, the Petitioners state that the error on the original return was due to the error of the company that made the software they used for their return. This may or may not be so, but in any case the Petitioners are still liable for the underlying tax that comprises the assessment here and the resulting interest imposed by statute.² As the Department points out, this Commission in related contexts has never accepted "it's the accountant's fault" as a defense. *Anthony J. Kryshak, Alamo Plaza, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶203-084 (WTAC 1989), citing *William A. Mitchell v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶201-757 (WTAC 1980) and *Herfel & Herfel v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH)¶ 201-375 (WTAC 1977). In *Kryshak*, the issue in relevant part was statutory penalties imposed for the failure to file and for the substantial understatement of tax. Even though the

² In the August 24, 2009 letter accompanying the Answer, counsel for the Department notes to the Petitioners' representative that the Department did not assess any penalty in this matter and that the interest at the statutory rate of 12% could not be abated.

taxpayers argued they were not personally at fault, the Commission upheld the imposition of the additional penalties for substantial understatement. As applied to this case, if an accountant's fault is not a defense to penalties for understatement, it certainly should not be a defense where there are no penalties, merely tax and statutory interest.³ Furthermore, an alleged software error should not be a basis for keeping this case open indefinitely while information is pursued from the service that prepared the software.

In sum, the Department, by way of its brief and its affidavits and exhibits, has shown that, coupled with the presumption of correctness, it is entitled to judgment.

Failure to Prosecute

As an additional basis for the Commission's decision here, we note that this case began before the Commission on August 5, 2009 when the Petitioners sent a copy of a letter addressed to the Department requesting a meeting with them to the Commission, which we have construed as a petition for relief from the Department's assessment. Since that date, the Petitioners have failed in two ways to present their case to the Commission. First, and most notably, the Petitioners have failed to respond to the Department's Motion to Dismiss in any substantial way, leaving us bereft of information properly before the Commission to evaluate the merit of the claim. Second, that failure to respond is also a violation of the Commission's second Order for Briefing, which was issued and sent to the Petitioners on February 18, 2010.⁴ Taken as

³ In his March 30, 2009 letter to the Department, the Petitioners' representative appears to concede as much, writing that "[He] realized that the State of Wisconsin did not get a proper return in 2004 as Schedule I was in error...I also know that Steve and Cathy will owe additional 2004 tax . However, I also feel that penalty or interest charges are an unfair assessment of burden to innocent taxpayers."

⁴ The Petitioners' representative stated that he did not receive the mailing of the first Briefing Order.

a whole, this inaction demonstrates a failure to prosecute their petition under Wis. Stat. §805.03. *Miller v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-864 (WTAC 2005).⁵

The Commission has many times considered what constitutes a failure to prosecute:

-----In *Manowske v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-968 (WTAC 2007) a taxpayer's petition for redetermination of his personal income tax liability was dismissed for failure to state a claim and failure to prosecute his appeal. In that case, the taxpayer did not respond to the Department of Revenue's Motion to Dismiss and never specifically denied his liability for the taxes asserted in the assessment. The Commission held, therefore, that he failed to satisfy his burden of proof to show the incorrectness of the assessment against him.

-----In *Quinn v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-755 (WTAC 2004) a petition for review of a Wisconsin personal income tax assessment was dismissed because the taxpayer failed to prosecute the appeal and failed to comply with pretrial orders. The taxpayer had participated in two telephone conferences, but then failed to appear for the next two. Mail sent by the Commission to the Petitioners was returned. When the Department moved to dismiss for failure to prosecute and failure to comply with scheduling orders, the Petitioner did not respond.

-----In *Gala Resort & Campground, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-035. (WTAC 2007) a petition for review of a Wisconsin sales and use tax assessment was

⁵ Furthermore, Wis. Stat. § 802.10(7) provides that violation of a scheduling or pretrial order constitutes a basis for a case to be dismissed.

dismissed because the taxpayer failed to prosecute the appeal. The taxpayer did not appear at two telephone status conferences and did not comply with a Wisconsin Tax Appeals Commission order to provide a statement of facts and propositions of law involved in the case. The Petitioner did not file a response to the memorandum, and did not ever contact the Commission in any fashion after filing the petition. On its own motion, the Commission dismissed the petition.

-----In *Marv and Mary's Bar and Restaurant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-966 (WTAC 2006) the Commission dismissed a petition for review of a sales and use tax assessment issued against a restaurant because the restaurant failed to respond to the facts and arguments supporting the assessment. In the petition, the restaurant's representative (who apparently had been one of the restaurant's owner/operators) disputed only his personal liability, which was not at issue in the case against the restaurant. When the Department filed a Motion to Dismiss for Failure to State a Claim, the Petitioner did not respond to the Commission's briefing order. The Commission noted that the only question before it was the assessment against the business, and not the liability of one of those individuals involved in the business. In addition, the restaurant's failure to prosecute the appeal constituted a secondary ground for dismissal.

The Petitioners' failure to file a response here puts this case on par with *Manowske, Quinn, Gala Resort*, and *Marv and Mary's Bar*. The point is that this case too is stuck in the water and shows no prospect of ever sailing forward, despite the extensions the Commission provided. We, therefore, grant the Department's motion.

CONCLUSION

We grant the Department's Motion for two reasons. First, the uncontroverted evidence before the Commission shows that the Department is entitled to judgment and that there is no genuine issue of material fact. As an alternative basis for our decision, we find that the Petitioners have failed to prosecute their case by repeatedly not responding to the Motion to Dismiss.

ORDER

The Department's motion is granted and its action on the Petition for Redetermination is affirmed.

Dated at Madison, Wisconsin, this 17th day of June, 2010.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"