

STATE OF WISCONSIN
TAX APPEALS COMMISSION

NATIONAL PLANT LEASE,

DOCKET NO. 20-S-055

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

LORNA HEMP BOLL, COMMISSIONER:

This case comes before the Commission for decision on Respondent's Motion for Summary Judgment. The Petitioner, National Plant Lease of Orlando, Florida, appears by its President, Harris Lear. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Chief Counsel Dana J. Erlandsen. The Department filed a brief and affidavit with exhibits in support of its Motion. Petitioner has not responded.

FACTS

1. By a series of Notices issued November 1, 2017 ("November 2017 Notices"¹), the Department assessed Petitioner for estimated sales and use tax and

¹ We will refer to the underlying sales tax liability initially assessed in November 2017 as the "November 2017 Notices," although the assessments at issue appear now to extend into 2018.

franchise taxes for the periods ending March 31, 2011, through June 30, 2017.² (Affidavit of Jason Ledger, Resolution Officer for the Department of Revenue (“Ledger Aff.”), Ex. E.)

2. In a letter dated November 21, 2017, Petitioner timely appealed those assessments to the Department. (Ledger Aff., Ex. F.)

3. On May 8, 2018, the Department’s Resolution Officer contacted Petitioner’s President, Harris Lear, who informed the officer that its customers had paid use tax on the transactions at issue. The Department responded that it needed to establish some details and then “may be able to give credit for taxes remitted by other parties.” (Ledger Aff., Ex. I.)

4. When Petitioner neither signed an extension of time for the Department’s decision nor provided the requested information, on May 21, 2018, via certified mail, the Department sent a denial of the redetermination. On May 24, 2018, a notice was left at Petitioner’s address but the denial itself went undelivered because, per the USPS tracking information, “No Authorized Recipient Available.” (Ledger Aff., Exs. G, H, and I.)

5. On June 22, 2018, the Department re-sent the denial via first class USPS mail to the Petitioner. (Ledger Aff., ¶ 11.)

6. On June 28, 2018, in a telephone conversation with the Department’s Resolution Officer, Petitioner’s President, Harris Lear, confirmed that he had received the

² As noted in FN 1, the actual time period at issue apparently now extends into 2018. The franchise taxes are not an issue in this appeal.

mailed denial. At that time, the Department's representative advised Mr. Lear that, as indicated in the denial, if Petitioner wished to appeal the assessment, he needed to appeal to the Tax Appeals Commission within 60 days. (Ledger Aff., ¶ 12.)

7. Sixty days from June 28, 2018, was Monday, August 27, 2018.

8. Petitioner did not file an appeal with the Commission on or before Monday, August 27, 2018.

9. On or about September 5, 2018, Petitioner filed a Claim for Refund of Wisconsin Sales Taxes in the amount of \$9,750³ plus interest and penalties for the periods ending March 31, 2011, through March 31, 2018, with the Department. The Claim for Refund, dated August 30, 2018, specifically requested an "abatement" of \$9,500 in taxes assessed in the November 2017 Notices, noting in the Reason for Claim section that its customers had remitted the taxes to the Department, so the pending assessment was a duplicate collection by the Department. (Ledger Aff., Ex. A., section 5.)

10. By letter dated June 7, 2019, the Department denied the claim for refund on grounds that the Petitioner had not remitted any tax to the Department for the periods ending March 31, 2011 through March 31, 2018, or for any other period, and therefore, there was no overpayment of tax to refund. (Ledger Aff., Ex. B.)

11. On or about July 11, 2019, Petitioner filed a timely Petition for Redetermination dated July 8, 2019, with the Department. (Ledger Aff., Ex. C.)

³ The Claim for Refund requests \$250 to be returned, as it was being paid with the request for refund although the Department disputes receiving it, and separately requests an abatement of the \$9,500 assessed to the Petitioner.

12. In a Notice of Action dated January 10, 2020, the Department denied the Petition for Redetermination on grounds that 1) Petitioner had failed to appeal to the Commission regarding the November 2017 Notices, and 2) Petitioner had paid no sales and use taxes to the State of Wisconsin and that, consequently, there is no overpayment of such taxes to be refunded to Petitioner. (Ledger Aff., Ex. D.)

13. The allegation that another party may have paid the tax was not addressed in the January 10, 2020 Notice. (*Id.*)

14. On March 2, 2020, Petitioner filed a timely Petition for Review with the Commission. Petitioner continues to assert that the taxes assessed in the November 2017 Notices were paid instead by Petitioner's customers. For that reason, Petitioner's Claim for Refund seeks to abate the taxes assessed in the November 2017 Notices. (See Petition attachment indicating that at least some portion of the tax in question may have been paid as use tax by one of Petitioner's customers in August 2013.)

15. On April 2, 2020, the Department moved for summary judgment, providing an affidavit with exhibits in support of the motion. (Commission file.)

16. Petitioner has not responded to the Motion. (Commission file.)

APPLICABLE STATUTES

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. 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. . . .

Wis. Stat. § 77.59(4)(a) [A]t any time within 4 years after the due date of a person's Wisconsin income or franchise tax return that corresponds to the date the sale or purchase was completed . . . that person may, unless a determination by the department by office audit or field audit of a seller has been made, . . . file with the department a claim for refund of taxes paid to the department by that person. (emphasis added)

Wis. Stat. § 77.59(4)(b) A claim for refund that is not to be passed along to customers under sub. (8m) may be made within 2 years of the determination of a tax assessed by office audit or field audit and paid if the tax was not protested by the filing of a petition for redetermination. (emphasis added)

Wis. Stat. § 71.75(4) [N]o refund shall be made . . . for any year that has been the subject of a[n] . . . audit, the assessment of which is final under s. 71.88(1)(a) or (2)(a), 71.89(2), 73.01 or 73.015. (emphasis added)

ANALYSIS

The Department has requested summary judgment dismissing Petitioner's appeal, whether it be regarding the November 2017 Notices assessing additional sales tax or regarding the June 7, 2019 Notice denying Petitioner's Claim for Refund.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). We do not find any issues of material fact and rule that the Department is entitled to summary judgment as a matter of law.

November 2017 Notices

Initially, Petitioner properly appealed the November 2017 Notices to the Department. When the Department denied that redetermination, the next step in the appeal process would have been to file a Petition for Review with the Tax Appeals Commission. The Petitioner had 60 days from the date of receipt of the denial in which to file its Petition. Wis. Stat. § 73.01(5)(a).⁴ Petitioner received the denial at least by June 28, 2018, the date of the telephone conversation with the Department. Sixty days from that date was Monday, August 27, 2018.

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). Petitioner did not file a Petition for Review with the Commission on or before the expiration of the 60-day time period for appealing the redetermination of the November 2017 Notices. Therefore, the November 2017 Notices are final and conclusive as a matter of law. Wis. Stat. § 71.88(2).

June 7, 2019 Notice

On or about September 5, 2018, Petitioner then filed a Claim for Refund, dated August 30, 2018, which specifically requested abatement of the amounts assessed in the November 2017 Notices on the ground that its customers had paid use tax on the transactions in question. In a Notice dated June 7, 2019, the Department denied the refund

⁴ This case involves sales/use tax. Under Wis. Stat. § 77.59(6)(b), appeals from the Department's redeterminations involving sales/use tax are governed by the statutes applicable to income or franchise tax appeals.

based on the fact that the Petitioner had not paid any tax and, therefore, none could be refunded. The Department stated, "Your abatement request cannot be considered a claim for refund because the total amount was not paid in full," presumably meaning by the Petitioner, so there was nothing in Petitioner's account to refund. The Department's note did not address the reverse idea of considering the refund request as an abatement request.

Petitioner responded with an "Appeal to Correct" its tax account, again indicating that the sales tax in question had been paid by its customers as use tax. The Department considered the Appeal to Correct as a Request for Redetermination, which, the Department also denied on the same ground that Petitioner had not paid any sales tax. Petitioner filed a timely appeal of this second redetermination to the Commission.

On appeal, Petitioner continues to request that its tax account be corrected to remove the taxes assessed in the November 2017 Notices which it alleges were paid by its customers as use tax. Thus, the Claim for Refund, along with this appeal, is, in essence, an action to prevent the Department from collecting the same tax twice from two different taxpayers. Should Petitioner prevail in this action, its recovery would offset the assessments against it, rendering them a nullity.

The Department has moved for summary judgment alleging entitlement to judgment as a matter of law. The facts are not in dispute. The legal question in this case is whether the Petitioner can use a Claim for Refund as a procedural end-around to solve the problems caused by its failure to file a timely Petition for Review of the denial of the redetermination of the November 2017 Notices. Simply, the answer is no.

Generally, claims for a sales tax refund may be made “within 4 years after the due date of a person's Wisconsin income or franchise tax return that corresponds to the date the sale or purchase was completed... unless a determination by the department by office audit or field audit of a seller has been made.” Wis. Stat. § 77.59(4)(a). Because this tax was assessed by a determination of the Department, the 4-year window was no longer an option. Wis. Stat. § 77.59(4)(a).

At that point, a two-year window may have been available if Petitioner had paid the tax and “not protested by the filing of a petition for redetermination.” Wis. Stat. § 77.59(4)(b). Because Petitioner did file a request for redetermination on November 21, 2017, the two-year procedure in Wis. Stat. § 77.59(4)(b) was also lost.

Having filed a request for redetermination of the November 2017 Notices, the only viable avenue was for Petitioner to file a Petition for Review at the Commission within 60 days of receipt of the Department’s May 21, 2018 Notice of Action. Wis. Stat. § 77.59(6)(b). That final procedural pathway ended when Petitioner failed to appeal the redetermination of the November 2017 Notices to the Commission on or before August 27, 2018. At that point, the Department’s decision regarding the November 2017 Notices became final per Wis. Stat. § 71.88(2)(a). As a result, Wis. Stat. § 71.75(4) dictates that no refund be allowed. Therefore, we find that the Department properly denied the refund claim and properly denied Petitioner’s Request for Redetermination.

DECISION

Petitioner did not file a Petition for Review of the November 2017 Notices with the Commission, timely or otherwise, so the Notices became final. Petitioner’s more

recent Claim for Refund is barred because the underlying Notices are final. At this point, the matter is one for collections over which we have no jurisdiction. *Kaminske v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-638 (WTAC 2012).

At least at the federal level, the IRS does not recover more than 100 percent of the underlying tax. *USLIFE Title Insurance Company of Dallas v. Harbison*, 784 F.2d 1238, 1243 (5th Cir.1986); *McCray v. United States*, 910 F.2d 1289, 1290 (5th Cir. 1990); *Quattrone Accountants, Inc. v. IRS*, 895 F.2d 921, 924-25, 926 (3d Cir. 1990); *Newsome v. United States*, 431 F.2d 742, 745 (5th Cir.1970). Because sales tax and use tax are figuratively two sides of the same coin, perhaps the Department's collections division can consider the Petitioner's assertions with this principle in mind.

Because the Department's redetermination of the November 2017 Notices became final, the Commission cannot be of assistance. Without a valid appeal before us, we are barred from considering the merits, even those involving allegations of possible double collection of tax by the Department. Because we have no jurisdiction, we must dismiss this matter.

CONCLUSIONS OF LAW

1. Petitioner did not file a timely Petition for Review with the Commission of the November 2017 Notices; therefore, the November 2017 Notices are final and conclusive, pursuant to Wis. Stat. 71.88(2)(a).

2. The Commission lacks jurisdiction over the November 2017 Notices, which are now final and conclusive.

3. Petitioner's Claim for Refund is barred by the finality of the redetermination of the November 2017 Notices, pursuant to Wis. Stat. § 71.54(4).

4. The Petition must be dismissed as a matter of law.

ORDER

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

Dated at Madison, Wisconsin, this 1st day of July, 2020.

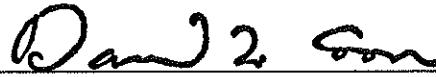
WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Lorna Hemp Boll, 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. Alternately, 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 Appeal 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 <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.