

STATE OF WISCONSIN
TAX APPEALS COMMISSION

PARISIAN, INC.
3455 Hwy. 80 West
Jackson, MS 39209-0080,

DOCKET NO. 05-S-52

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708-8907,

Respondent.

JENNIFER E. NASHOLD, COMMISSIONER:

This matter comes before the Commission on a motion to dismiss for failure to state a claim upon which relief can be granted filed by respondent, Wisconsin Department of Revenue¹ (Department). Petitioner, Parisian, Inc., is represented by Attorney Don M. Millis, of Michael Best & Friedrich, LLP. The Department is represented by Attorney Linda M. Mintener. Both parties have filed briefs with affidavits and exhibits relating to the motion.

Based upon the submissions of the parties and the record in this matter, the Commission hereby finds, concludes, rules, and orders, as follows:

¹ As stated in the Commission's October 21, 2005 Order, the Commission treats the Department's motion for dismissal based on failure to state a claim as a motion for summary judgment. *See* Wis. Stat. § 802.06(2)(b) (where motion to dismiss includes affidavit and exhibits which were not part of the pleadings, motion should be treated as one for summary judgment).

MATERIAL FACTS

1. As the result of a field audit of petitioner, the Department issued a sales and use tax assessment against petitioner on March 29, 2004, for the period of February 1, 1999 through January 31, 2003, in the total amount of \$311,377.58.

2. On May 3, 2004, petitioner filed a petition for redetermination with the Department, dated April 29, 2004.

3. The petition for redetermination stated that petitioner was requesting "an Appeal and Redetermination of tax and penalties on the following basis[fn]." Two issues were then delineated in subheadings — the imposition of a negligence penalty and the assessment of use tax on transportation services related to petitioner's purchases of advertising services. The footnote referenced above stated: "Additional errors or mistakes of fact or law may exist in the audit documents or in the Notice of Field Audit Action. By identifying these specific issues now, Parisian, Inc[.] in no way waives its rights to present further arguments or raise additional issues later as a part of this Appeal or any subsequent protest or appeal under Wisconsin law."

4. Petitioner placed the entire amount of the assessment (\$311,377.58)² on deposit, pursuant to Wis. Stat. § 77.59(6)(c).

5. In the months that followed the filing of the petition for redetermination, petitioner and the Department's resolution officer engaged in conversations concerning the petition for redetermination.

² Petitioner actually deposited \$309,850.04, an amount slightly less than the total assessment. Petitioner asserts (and the Department does not dispute) that this difference is due to the fact that the assessment amount of \$311,377.58 includes interest through the 60th day following issuance of the assessment. The deposit was paid prior to the 60th day, thus allowing payment of a smaller deposit.

6. The Department's resolution officer attempted to schedule a conference with petitioner earlier, but petitioner was unavailable to attend a conference until October 27, 2004. As a result, on September 30, 2004, the parties entered into an extension agreement, which extended the due date for the Department's Notice of Action from October 29, 2004 to April 29, 2005.

7. At an October 27, 2004 conference between the parties, petitioner's representatives indicated that petitioner would be filing a "reverse audit," *i.e.*, a claim for refund, for the audit years. The Department's resolution officer explained to petitioner's representatives that such a claim would have to go through the process at the audit level and would not be considered part of the pending appeal. The resolution officer also explained that the statute of limitations for a claim for refund had run on the first year of the audit period and that no offset was available for that first year, since it was a refund year.

8. On November 12, 2004, Ryan & Company, Inc., appeared on behalf of petitioner, serving its power of attorney on the Department's resolution officer. Ryan & Company also indicated that it intended to analyze "all tax paid to vendor and use tax accrual transactions for the audit period," and that "[u]pon completion of [its] review, [it would] submit detail schedules requesting any refunds, credits or reductions applicable." (Affidavit of Julie Chronis, ¶ 7, Ex. B, attached to Petitioner's Brief.)

9. On December 16³, 2004, an employee of Ryan & Company called the Department's resolution officer to indicate that refund schedules would be submitted within a few weeks.

10. Without receiving the refund schedules, the Department issued its Notice of Action, dated February 1, 2005. The Notice stated that it was granting the petition for redetermination "in full."

11. On February 3, 2005, the Department refunded \$106,280.91 of the amount petitioner had deposited, plus interest of \$7,075.69, for a total refund from petitioner's deposited funds of \$113,356.60, and applied the remainder of the deposited funds to pay in full the balance of the assessment.

12. Petitioner filed a timely petition for review with the Commission on April 4, 2005.

13. In its petition, petitioner does not challenge the two items approved by the Department. Rather, petitioner appealed the "implied denial of Petitioner's additional refund and audit reduction transactions." (Petition for Review, Part I.) The petition for review is entitled, "PETITION FOR REVIEW AND REQUEST FOR REFUND OF WISCONSIN SALES AND USE TAX," and alleges that petitioner "has overpaid Wisconsin sales and use taxes in the amount of \$93,000.00." (*Id.*)

³ The affidavits are in dispute as to when this conversation occurred. The affidavit submitted by the Department asserts that the conversation took place on December 16, whereas the affidavit submitted by petitioner states it occurred on December 8. Whether the conversation took place on the 8th or 16th does not affect the Commission's ruling.

CONCLUSIONS OF LAW

1. There are no claims properly before the Commission for review.
2. There are no genuine issues as to any material facts, and the Department is entitled to summary judgment as a matter of law.

RULING

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). Summary judgment procedure imposes on the moving party the burden of demonstrating both the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim. Wis. Stat. §§ 802.08(2) and (3). 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 (1979). Summary judgment is generally inappropriate when matters of complex factual proof need to be resolved before legal issues can be decided. *See, e.g., Peters v. Holiday Inns, Inc.*, 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979).

Because the Commission concludes that there is no genuine issue as to any material fact and that the Department is entitled to judgment as a matter of law, it grants the Department's motion for summary judgment.

Petitioner articulated only two claims of error, and the Department granted the petition for redetermination with respect to the issues before it.

The dispute in this case centers on how the February 1, 2005 Notice of Action issued by the Department is to be construed. The Department asserts that the Notice of Action granted petitioner's petition for redetermination "in full." As a result, the Department contends, there are no issues legitimately before the Commission at this time, and petitioner is attempting to bring a claim for refund before the Commission without having gone through the proper administrative procedure for refunds before the Department.

Petitioner asserts, however, that the Notice of Action should be properly construed as granting the petition for redetermination in part and denying it in part, because the Department only granted the petition for redetermination with respect to the two issues specifically articulated and denied the petition with respect to other issues which the Department knew were forthcoming.

Several grounds are asserted in support of petitioner's position that the Notice of Action partially denied the petition for redetermination. The Commission is not persuaded by these arguments.

The petition for redetermination raised only two issues.

Petitioner first argues that the petition for redetermination itself made it clear that petitioner objected to all elements of the assessment, rather than just the two issues discussed in the petition. Specifically, petitioner claims that the petition "sought 'an Appeal and Redetermination of tax and penalties' imposed by the assessment."

(Petitioner's Brief, p. 2). However, this assertion ignores the full text of the sentence referred to, which actually contained a significant qualifier — namely, that petitioner was requesting "an Appeal and Redetermination of tax and penalties *on the following basis*[fn]." (Emphasis added.) (Affidavit of Linda M. Mintener, Ex. 2., filed May 4, 2005.) The petition for redetermination then delineates the grounds in two separate subheadings, analyzing only two issues — imposition of a negligence penalty and the assessment of use tax on transportation services related to petitioner's purchases of advertising services. Therefore, petitioner's reliance on this language from the petition for redetermination is unavailing.

Petitioner also relies on the footnote contained in the sentence quoted above, which states: "Additional errors or mistakes of fact or law may exist in the audit documents or in the Notice of Field Audit Action. By identifying these specific issues now, Parisian, Inc[.] in no way waives its rights to present further arguments or raise additional issues later as a part of this Appeal or any subsequent protest or appeal under Wisconsin law." This language is also of little assistance to petitioner, as it only reserves petitioner's right to "present further arguments or raise additional issues later"; it does not specify any further issues or even suggest that any issues will be raised. Reserving one's right to raise an issue does not equate to actually raising an issue. Indeed, unless additional challenges were subsequently raised, it would be a fair assumption on the Department's part to conclude that petitioner did not have, or wish to pursue, any further challenges to the assessment.

Petitioner does not provide authority for its assertion that it may challenge for the first time on appeal to the Commission amounts or adjustments not challenged before the Department.

Petitioner next asserts that there is no statutorily prescribed form or required content for petitions for redetermination of sales and use tax assessments under Wis. Stat. § 77.59(6), and that the Commission and Department have liberally construed petitions for redetermination, particularly in *pro se* cases, as objecting to the entire assessment based on only the vague sentiment expressed in the petition that the taxpayer objects to the assessment.

The Commission notes, however, that Wis. Admin. Code § Tax 1.14(2) states that the petition for redetermination "shall . . . set forth clearly and concisely the specific grievances to the assessment, . . . including a statement of the relevant facts and propositions of law upon which the grievance is based." More significantly, petitioner's assertions do not address the question in this case, which is whether, when a petition for redetermination intentionally limits its scope to two issues, and no other issues are articulated prior to the Department's granting the petition for redetermination on those two issues, the taxpayer may subsequently challenge other aspects of the assessment before the Commission.

Relatedly, petitioner correctly states that the Commission has previously allowed issues not raised during the Department's administrative review to be raised before the Commission. *See, e.g., Midwest Track Associates, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-825 (WTAC 2005), *citing Nelson Bros. v. Dep't of Revenue*, 152 Wis. 2d 746, 764-65, 449 N.W.2d 328 (Ct. App. 1989), and *Republic Airlines, Inc. v. Dep't of*

Revenue, 159 Wis. 2d 247, 258, 464 N.W.2d 62 (Ct. App. 1990). Such cases are distinguishable, however, because in those cases, the newly raised issues related to items or adjustments that were contested at the lower level which the Department had the opportunity to review. Here, in contrast, petitioner limited the Department's review to only those amounts and adjustments related to the transportation charges and negligence penalties. On appeal to the Commission, petitioner attempts to do far more than raise new legal theories regarding amounts previously disputed: petitioner disputes additional amounts and adjustments, and advances legal arguments with respect to those newly raised adjustments.

The Commission has distinguished between raising a new argument pertaining to an item already contested versus challenging an item not previously disputed. In *Wissota Sand and Gravel Co. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-575 (WTAC 2001), the Commission rejected the Department's reliance on a prior Commission decision, stating:

. . . The quote excerpted by respondent pertained to an apparent attempt to add *items* to a claim for refund which were never enumerated in the taxpayer's petition for review. (citation omitted). In the present case, petitioner is not seeking to add *items* that were not listed in the petition for review. Rather, it is seeking to raise an *issue* not previously articulated with respect to *items* that have already been identified (*i.e.*, that certain purchases are exempt from the use tax under section 77.54(26m)). (Emphasis in original.)

Furthermore, the cases relied upon by petitioner involved appeals of *denials* of petitions for redetermination, not appeals in which the Notice of Action

granted the petition for redetermination. Accordingly, reliance on these decisions is misplaced.

Neither petitioner's representations that it intended to bring a refund claim nor petitioner's deposit of the full amount of the assessment was sufficient to require that the Department refrain from issuing its Notice of Action on the claims actually raised.

Petitioner also asserts that the Department, through its resolution officer, was on notice that petitioner intended to bring refund claims, and that the Department prematurely foreclosed petitioner's opportunity to do so by issuing the Notice of Action almost three months before the April 29, 2005 extended due date. Petitioner notes the power of attorney notice dated November 12, 2004, in which petitioner's representatives indicated that petitioner intended to analyze "all tax paid to vendor and use tax accrual transactions for the audit period," and that "[u]pon completion of [its] review, [it would] submit detail schedules requesting any refunds, credits, or reductions applicable." (Chronis Aff., ¶ 7, Ex. B.) Petitioner also notes the conversation between its representative and the Department's resolution officer that it asserts occurred on December 8, 2004, in which its representative indicated that refund schedules would be submitted within a few weeks.

In so arguing, petitioner neglects several relevant facts. First, petitioner had ample opportunity to submit a refund claim, or any other challenges to the Department's assessment, prior to the Department issuing its Notice of Action. Petitioner filed its petition for redetermination on May 3, 2004, nine months prior to the Department's issuance of its Notice of Action on February 1, 2005. Petitioner could have made the challenges it now wishes to raise before the Commission any time prior

to or after filing its petition for redetermination. Even in November 2004, seven months after the petition for redetermination was filed, petitioner did not affirmatively state that further claims were forthcoming — only that it would complete its review and possibly make further claims. While petitioner made an affirmative declaration in early December 2004 that it was submitting refund claims within a "few weeks," it made no refund claims between then and the more than six weeks which passed before the Notice of Action was issued. Furthermore, petitioner was told by the resolution officer that any refund claims would not be considered part of the current appeal and that petitioner would have to file refund claims with the Department's audit level.

Even if petitioner could have brought refund claims as part of its current appeal, petitioner appears to assume that it had until April 29, 2005 — the extended deadline for the Notice of Action — to raise such claims. The Department counters that the extension agreement only gave the Department until April 29, 2005 to issue its Notice of Action; it did not provide petitioner with an extension until that date to make its claims. The Department asserts that any refund claims would have had to be made sufficiently prior to April 29, 2005 so as to provide the Department with adequate time to conduct a proper review of such claims, which, pursuant to Wis. Stat. § 77.59(4)(a)⁴, would have commenced at the audit bureau rather than the resolution unit. We agree that the Department was not obligated to wait until the extended deadline to issue its Notice of Action and that it did not impermissibly foreclose petitioner from raising

⁴ This provision states, in relevant part, that a claim for refund "shall be regarded as a request for determination," and that such determinations be "made by the department." The Department asserts that determinations are made by the Department at its audit level, prior to any *redetermination* at the resolution unit.

further claims. As stated, petitioner had plenty of opportunity to raise any claims it wished to make, and it failed to do so. Petitioner cannot now argue that it lost on issues it never raised.

As further grounds for its position that its petition for redetermination and subsequent actions should have been construed as challenging the entirety of the assessment, petitioner notes that it deposited the full amount of the assessment rather than amounts related only to the two issues upon which the Department ultimately agreed with petitioner. In its petition for redetermination, petitioner stated that the funds remitted were a "Deposit of Tax Under Protest." Petitioner notes that Wis. Stat. § 77.59(6)(c) provides for both (1) deposits of amounts that are held and may be refunded, and (2) payments of any portion of the deficiency admitted to be correct. Petitioner states that the actions of both parties demonstrate an understanding that petitioner's deposited amounts reflected an objection to the entire assessment, not a concession that any part of the assessment was correct. Petitioner asserts that if the Department believed from the outset that the petition for redetermination raised only two issues and that petitioner conceded the remainder of the assessment, it would have treated the deposited funds as part deposit and part payment. Instead, petitioner argues, in its papers on file, the Department refers to the entire amount remitted by petitioner as a "deposit." Further, the Department waited until it acted on the petition for redetermination to take the funds associated with the "conceded" items. Had the Department believed that a portion of the funds represented a payment of conceded

items, petitioner contends, the Department would have immediately credited the funds associated with the allegedly conceded items upon receipt.

The Department responds that, by statute, even if the full amount is not contested, the entire amount determined to be due in the field audit may be deposited with the Department. Wisconsin Statutes § 77.59(6) allows deposit of "the entire deficiency determination." Deposits with the Department are not limited to the amounts that may be refunded. In the instant case, petitioner decided to deposit the full amount of the assessment as "Deposit of Tax Under Protest," and the Department had no authority to consider the payment as anything other than a deposit until after it took its action on the petition for redetermination. Moreover, the Department asserts, at the beginning of the redetermination process, the Department would have had no way to know what additional items might be contested in the redetermination process, and consequently did not know to what adjustments the "deposited" funds would be applied. In addition, if the Department would have treated any of the funds as agreed-to payments at the outset, applied them, and sent them to the State's general fund, petitioner would have been denied any opportunity to present further arguments on the paid adjustments or receive any refund related to them.

Finally, the Department states that there are numerous reasons for depositing the full amount of an assessment rather than just the amounts contested. For example, by depositing the full amount, the taxpayer stops the running of interest and earns an interest rate of nine percent on any amount refunded. Wis. Stat. § 77.59(6)(c). Another reason, the Department states, is that a taxpayer generally cannot calculate the

amount due — with state tax, county tax, interest, penalty, recycling fee, etc. — on the specific items it wishes to contest.

While the Commission need not address each of the Department's specific assertions, it agrees that, based on the record in this case, petitioner has not shown that its deposit of the entire assessment amount was sufficient to challenge the assessment in its entirety. Nor can such deposit serve as a substitute for raising claims with the Department that petitioner now wishes to raise before the Commission.

The Notice of Action acted on all issues before the Department and constituted a final order.

Alternatively, petitioner argues that the Department's action on the petition for redetermination could be construed as not final. Under this theory, petitioner argues, the Department granted the petition for redetermination with respect to the two issues articulated in the petition for redetermination, but "never actually acted on the remaining issues." (Petitioner's Brief, p. 8.) Petitioner then states that there is no right to appeal a non-final decision of the Department to the Commission, and that the matter therefore remains with the Department. We are not persuaded by this argument. The Department acted on the claims before it. It did not act on any further claims because, based on the record in this case, there were no further claims on which to act.

In light of the foregoing, the Commission construes the Department's Notice of Action as granting the petition for redetermination in full, just as the notice states. We also conclude, therefore, that petitioner's claims for refund are not properly

before the Commission. Pursuant to Wis. Stat. § 73.01(5), a taxpayer may appeal to the Commission if it "is aggrieved by the redetermination of the department of revenue." *See also* Wis. Stat. § 71.88(2)(a) (same). Because the Department granted petitioner's claims, we cannot conclude that petitioner is aggrieved by the Department's redetermination or that there are any issues to appeal stemming from the Notice of Action in this case.

Moreover, the Commission cannot entertain a claim for refund; consideration of such a claim is the province of the Department. Wis. Stat. §§ 77.59(4), 73.01(4), and 71.88(1)(a) and (2)(a). Allowing a claim for refund to be raised first in a petition for review to the Commission would go beyond the Commission's authority and bypass the statutory process. While the Commission may entertain an appeal from the denial of a claim for refund, no such denial is present in this case.

Accordingly, the Department has established that, as a matter of law, petitioner's claims for refund are not properly before the Commission, and that summary judgment is appropriate.⁵

ORDER

The Department's motion for summary judgment is granted, and its action on petitioner's petition for redetermination is affirmed.

⁵ In view of the Commission's conclusions in this case, it need not address the Department's alternative grounds for rejecting petitioner's appeal in this case.

Dated at Madison, Wisconsin, this 23rd day of December, 2005.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"