

STATE OF WISCONSIN
TAX APPEALS COMMISSION

MARK AND BARBARA POMASL,

DOCKET NO. 12-I-096

Petitioners,

vs.

RULING & ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission for decision on Respondent's Motion to Dismiss Petitioner's Petition for Review as untimely. The Petitioners, Mark and Barbara Pomasl, appear by Darlene Eckerman of D. Eckerman Tax Services, LLC, Antigo, Wisconsin. The Respondent in this matter, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Sheree Robertson. Respondent has filed a brief and several affidavits in support of its motion. Petitioners have filed opposing materials, and Respondent filed a reply to the Commission. For the reasons stated below, we find for the Department and dismiss for lack of jurisdiction.

FACTS

1. The Department issued an assessment of income tax due, together with interest and penalties, by notices dated December 27, 2010, in the amount of \$12,451.63 for the periods ending December 31, 2006, to December 31, 2008. (Department's Exhibit 1.)

2. Petitioner's Petition for Redetermination was filed timely and, after consideration by the Department, it was granted in part and denied in part in the Department's Notice dated March 1, 2012. (Department's Exhibit 3.)

3. The Notice of Action, dated March 1, 2012, was delivered to Petitioners by certified mail on March 2, 2012. (Department's Exhibit 4.)

4. The Petitioners' daughter, who was 15½ years old¹ at the time, signed for receipt of certified delivery of the Notice of Action.

5. The Notice was also sent to Petitioners' representative, Ms. Eckerman, who admits receiving "a letter" which she put aside until May 4, 2012. She states she received that mailing "at the beginning of March."² (Petitioners' Exhibit, Letter to Department of Revenue Attorney Robertson, dated July 3, 2012.)

6. On May 7, 2012, the Commission received Petitioners' Petition for Review; the certified mailing date was May 4, 2012. (Department's Exhibit 5.)

7. On June 7, 2012, the Department filed a Motion to Dismiss the Petitioners' Petition as untimely, along with an affidavit with exhibits in support of the motion. (Commission File.)

¹ Petitioners' daughter was born in October of 1996.

² Note that the Petitioners' representative, Ms. Eckerman, would have to have received the Notice on or after March 5, in order for the May 4 filing to be arguably timely.

APPLICABLE LAW

A motion to dismiss will be granted if the Commission finds it does not have proper jurisdiction. Without jurisdiction to hear the matter, the Commission has no alternative other than to dismiss the action. *See Alexander v. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶ 400-650 (WTAC 2002).*

The specific statutes at issue here outline the requirements for filing a valid and timely petition for review with the Commission:

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. § 73.01(5)(a): . . . For purposes of this subsection, a petition for review is considered timely filed if mailed by certified mail in a properly addressed envelope, with postage duly prepaid, which envelope is postmarked before midnight of the last day for filing.

OPINION

In this case, the Petitioners' minor child signed for delivery of the Notice of Redetermination at Petitioners' home. The Department argues that the Petitioners received the Notice when their child signed for it. The Petitioners filed their petition to

the Commission more than 60 days after that date. The Department argues therefore that the appeal to the Commission is untimely.

This appeal raises three issues. First, Petitioners seem to assert that the time to appeal did not begin because it was their minor child (age 15½) who signed for the certified mailing containing the Notice of Assessment on March 2, 2012. Petitioners claim they never saw the Notice until after May 5, 2012, when the appeal had been filed by their representative.

Second, Petitioners' representative does not know when exactly she received the Notice herself other than to say it was the "beginning of March." Assuming a date of March 5 or later, Petitioners' representative may have received the Notice on a date such that appeal might be timely. That reasoning could apply if the representative's receipt triggered the start of the time for appeal.

Third, Petitioners' representative describes an oversight and various personal and professional hardships which caused a delay in filing the appeal. This aspect of Petitioners' argument seeks an exception to the 60-day appeal time frame.

I. Receipt by Petitioners' Minor Child

The Department's Decision on Petitioners' Petition for Redetermination was sent via certified mail to the Petitioners on March 1, 2012. Petitioners' minor daughter signed for the mailing when it was delivered at their home on March 2, 2012. The statutes are silent regarding the technical requirements of delivery of the Notice of Action. Personal acceptance is not a listed prerequisite. Commission decisions have held that a notice is deemed received when it is delivered to and signed for by a

responsible person at the petitioner's proper mailing address. See *Jacobson v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) § 200-606 (WTAC 1970) (petitioners' visiting adult daughter's signature deemed receipt by petitioners). See also *Miller v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) 202-151 (WTAC 1983) (spouse's signature deemed receipt by taxpayer to trigger 60-day time limit for taxpayer's appeal); *Steenlage v. WTAC and Dep't of Revenue*, Wis. Tax Rptr. (CCH) § 203-348 (WTAC 1992) (signature by houseguest deemed receipt by taxpayer).

There is no dispute that the Notice was properly delivered to the Petitioners' permanent mailing address. Petitioners do however question whether their daughter qualifies as a competent person. They present no evidence other than her age, and we are unaware of any obvious infirmities that would make delivery to her unreasonable or inadequate. We note that 15-year-olds are believed sufficiently responsible to drive with a learner's permit in Wisconsin. Youth under the age of 15 can obtain employment outside the home. At the mere age of 12, young people in Wisconsin can obtain a babysitting certificate. Thus, we find signing for the delivery of mail to be well within the competence of a 15-year-old. We conclude that, for the purposes of this case, receipt by this 15 ½-year-old is receipt by the taxpayers.

II. Sixty days from Receipt by Petitioners' Representative

Petitioners' appeal was filed more than 60 days after they received the Notice. Petitioners assert that the appeal may nevertheless be timely as it may have been filed within 60 days of their representative's receipt of the notice. Although there is no credible evidence showing Petitioners' representative received the Notice on or

after March 5, we will assume here for the sake of argument that she did and that she filed the appeal within 60 days of her receipt.

Unfortunately, too many appeals are filed with the Commission at the last minute, so this question arises with some frequency. The Commission believes a firm decision is needed to clarify when the 60-day clock begins to tick. The Department relies on two Wisconsin cases which cite to a for unknown reasons unpublished decision, *Kulas v. Dep't of Revenue*, Docket No. 89-I-505 (WTAC March 18, 1991). As will be explained below, the legal reasoning in this line of cases is weak at best, but the holdings are reasonable.

The *Kulas* case relied on the 3rd Circuit case, *Gallion v. United States*, 68-1 USTC ¶ 9213, 389 F.2d 522 (5th Cir. 1968). In addressing service under a federal statute, *Gallion* held that service on the taxpayer is the only relevant consideration. The *Gallion* court stressed the federal statutory directive that the appeal period runs "from the mailing of the notice of disallowance to the taxpayer." The *Gallion* court explained that the statute requires notice "to the taxpayer" so no one including the taxpayer "is authorized to waive or vary the requirements of the statute." *Id.*

Without explanation, the Commission concluded in *Kulas*, "While federal and state statutory time to appeal mandates are somewhat different, we find the rationales in the *Gallion* case (*supra*) controlling." *Kulas* at ¶ 9. What troubles the current Commission is that the state and federal statutes are more than "somewhat different." Not only is the "to the taxpayer" language cited in *Gallion* entirely absent from the Wisconsin Statutes, there is no language at all about delivery to anyone. So in

Wisconsin when should the clock begin to run? There are three possible trigger dates:

1) The date of the redetermination as a literal reading of the statute would seem to imply; 2) The date the taxpayer receives notice; or 3) The date the taxpayer's representative receives the notice.

A. Date of Notice v. Date of Receipt

The Wisconsin statute allows the taxpayers 60 days "from the redetermination" to file a petition for review with the Commission. Wis. Stat. § 73.01(5). Without language regarding service or delivery, one might just as well conclude that the 60 days begins to run on the date the decision is made on the redetermination. This argument was specifically rejected however in *Mobile Transport Systems, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-293 (WTAC 1997).

Despite silence in the actual verbiage of the statute, the traditional interpretation of Wis. Stat. § 73.01(5) has been to start the time for appeal when the taxpayer receives the notice. As noted in *Mobile Transport*, this stance dates back at least as far as 1948. See *Stewart v. Dep't of Taxation*, 4 WBTA 21 (1948). The consistent re-enactment of Wis. Stat. § 73.01(5)(a) by the legislature since that time and consistent Commission holdings establishing the receipt by the taxpayer as the controlling date, has led the Commission to formally affirm that concept:

Because the Legislature has consistently re-enacted this statute for five decades, there is a strong presumption that the Legislature adopted the Commission's construction. *Tucker v. Marcus*, 142 Wis. 2d 425, 434 (1988). Respondent has not provided the Commission with any compelling reason to overcome this presumption in favor of the long-standing construction of 73.01(5)(a), *Stats*. Therefore, the Commission

continues to construe the appeal period in 73.01(5)(a), *Stats.*, as commencing the day following the date the notice of redetermination is received by the taxpayer.

Mobile Transport, Wis. Tax Rptr. ¶ 400-293. Thus Wisconsin fills the statutory silence with the “from the receipt” of the notice, similar to but different from the “from the mailing” in *Gallion*. The Department has gone so far as to indicate that taxpayers must appeal “within 60 days of receiving this notice” into appeal information on its Notices.³

B. Receipt by Taxpayer v. Receipt by Taxpayer’s Representative

Next we turn to the situation in which a taxpayer is represented by counsel. *Kulas* is the first Wisconsin tax case to address the question. The Commission in *Kulas* held that the clock began to tick when the taxpayer was served, regardless of whether the taxpayer was represented by counsel⁴ and regardless of when or even if the taxpayer’s representative was served with the redetermination. Because *Kulas* is unavailable to the general public online or in printed reporters, we append the 1991 ruling to this decision.

We are reluctant to rely on *Kulas* and the cases citing it for several reasons. First, the Commission in *Kulas* relied on the “precedent set in the 3rd [sic] Circuit, United States Court of Appeals” in *Gallion* and on a case from the U.S. District Court in the Western District of Arkansas. *Campbell v. United States*, 69-2 USTC ¶ 9730, 310 F. Supp 154 (W.D. Ark. 1969). We are uncomfortable with the precedential value of these two

³ See e.g. Department’s Exhibit 5.

⁴ In *Kulas*, the power of attorney form was neither signed nor dated.

cases. As noted above, the Wisconsin statutes do not contain the language on which these federal cases are based.

Second, the Commission in *Kulas* did not actually have a recognizable representative to consider since the Power of Attorney Form was neither signed nor dated.

Third, the two Wisconsin cases which have subsequently cited *Kulas* do so with little or no analysis. The first of the two Wisconsin cases citing *Kulas* is *Mobile Transport Systems, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-293 (WTAC 1997). As here, the taxpayer's appeal was filed more than 60 days after the taxpayer received the notice of redetermination but less than 60 days after the Petitioners' representative received it. The Commission found "nothing in the statutes or the case law [to] support[] petitioner's claim" that service on the attorney is the starting point for the time for appeal. Instead, the Commission cited *Kulas* for the proposition that "the 60-day appeal period runs from the time the taxpayer receives the notice of redetermination, not from the time its attorney receives the notice. *Kulas*, Slip Op. at 3-4."

The second case provides even less guidance; it merely cites *Mobile Transport* and *Kulas* for the proposition that the 60-day appeal period "begins running on the day after the taxpayer, not its representative, receives the Department's notice of action on the taxpayer's petition for redetermination." *Trapp v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-283 (WTAC 2010).

These earlier cases also involved powers of attorney. In the *Kulas* case cited by others, the Power of Attorney Form was unsigned and undated, so its validity was questionable at best. In *Gallion*, the taxpayers objected because their power of attorney had not received the notice. However, taxpayers had requested that the mailing be sent directly to them in care of their attorney. Their objection was merely to the addressee labeled on the envelope since the notice came to them either way. In *Mobile Transport*, the taxpayer's power of attorney asked that all notices be sent both to him and to the taxpayer; thus the taxpayer expected to receive the notice directly.

Unfortunately, Wisconsin case law provides no better guidance than these few cases, and a rule is needed. Thus, we affirm the holdings of these earlier cases. While taxpayers may be represented by counsel, the gravity of a final decision requires it to be delivered to the taxpayer directly. It is the taxpayer who needs to decide whether to accept the decision or to appeal from it. Running these important decisions through a third party, even if it is an attorney or other competent representative, can result in delay or confusion and could potentially shorten the time for filing of an appeal. We hold that receipt by the taxpayer is controlling to trigger the 60-day period in which to file an appeal.

III. Plea for Hardship Exception to Time Limit

Petitioners' representative has attempted to explain the tardy filing. First, she admits to only a cursory reading of the Notice so she did not realize it was a final decision on the Petition for Redetermination. Second, she describes the rush of catching up on client matters following the March 1 deadline for farm returns. Third, she details

several serious family health issues. As an added reason for the Commission's consideration, she also notes that there is information which had not yet been considered by the Department which she contends provides strong substantive merit to Petitioners' positions opposing the redetermination.

The previous holdings of this Commission and the judiciary have stressed the importance of the requirement of timeliness and the rigidity of the time limits outlined in the statutes. *Keith v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) § 400-694 (WTAC 2003). The Commission lacks authority to make exceptions to the time limits and lacks jurisdiction over appeals when taxpayers fail to file timely petitions for review as required by statute. *Id.*

Despite the hardships facing Petitioners' representative while the time for appeal was ticking and despite Petitioners' representative's assertions that there may be important information which had not been considered by the Department prior to its decision, the statutes simply do not allow an extension of the time to appeal. We have no discretion in the matter and are compelled to dismiss because this Commission lacks subject matter jurisdiction when an appeal is not filed within the time provided by statute.

FINDINGS OF LAW

1. The 60-day filing period for Petitioners' appeal expired May 1, 2012.
2. Signature of Petitioners' minor child, age 15½, at their home is sufficient to confer receipt by Petitioners as of the date of the signature.

3. The time for appeal begins with receipt by Petitioners, not receipt by their representative.

4. Petitioners' Petition for appeal was filed beyond the 60-day time frame provided by statute.

5. The Commission lacks jurisdiction to consider Petitioners' appeal.

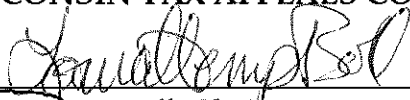
DECISION AND ORDER

We find the Petitioners' petition was not timely filed as defined by state statutes and, thus, this Commission lacks jurisdiction in this matter. The Department is, therefore, entitled to dismissal as a matter of law. This is not a matter for discretion; the Commission has no choice in the matter. *Alexander v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-650 (WTAC 2002).

Based on the foregoing, it is the order of this Commission that the Department's Motion to Dismiss is granted and Petitioners' Petition is dismissed.

Dated at Madison, Wisconsin, this 14th day of January, 2013.


WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner



Thomas J. McAdams, Commissioner

ATTACHMENTS: NOTICE OF APPEAL INFORMATION

Kulas v. Dep't of Revenue, Docket No. 89-I-505, (WTAC March 18, 1991).

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. Alternatively, 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 Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) 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 <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.

STATE OF WISCONSIN
TAX APPEALS COMMISSION

* * * * *

MICHAEL R. KULAS
1646 South Layton Blvd
Milwaukee, Wisconsin 53215

DOCKET NO. 89-I-505

Petitioner,

RULING AND ORDER

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, Wisconsin 53708

Respondent,

STATE OF WISCONSIN
DEPARTMENT OF REVENUE

MAR 19 1991

RECEIVED
LEGAL DIVISION

* * * * *

THOMAS R. TIMKEN, CHAIRPERSON

Appearances:

For Petitioner: Wilford W. Elliott, CPA
For Respondent: Deborah Rychlowski, Attorney

The above-entitled matter came on to be heard by this Commission at the State Office Building in Milwaukee, Wisconsin at 10:00 a.m. on November 7, 1990 pursuant to a Notice of Motion and Motion brought by the Wisconsin Department of Revenue to dismiss the petition for review on the alleged grounds that the petitioner failed to file a proper petition for review with this Commission within 60 days after the receipt of the respondent's notice of denial of the petition for redetermination as required by Sec. 73.01(5)(a) of the Wisconsin Statutes and therefore, the State of Wisconsin, Tax Appeals Commission lacks jurisdiction to review the alleged grievances of the petitioner.

Based on the record before it, including briefs of counsel, this Commission hereby rules and decides as follows:

1. That by notice from the Wisconsin Department of Revenue dated July 15, 1988, an assessment of income tax was issued against the petitioner, Michael R. Kulas, in the total amount of \$39,190.17.

2. On August 24, 1988, the petitioner filed a petition for redetermination with the respondent.

3. There is in the record an unsigned and undated Power of Attorney appointing Wilford W. Elliott as petitioner's attorney-in-fact to represent him before the Wisconsin Department of Revenue on income tax matters for the period involved. Although clouded and inclusive, the record supports the conclusion that this Power of Attorney was received by the respondent, Wisconsin Department of Revenue, during the relevant period involved herein.

4. That by notice dated August 16, 1989, mailed to the petitioner by certified mail, return receipt requested, and received by the petitioner on August 17, 1989, the respondent denied in part and granted in part the petitioner's petition for redetermination. A copy of the respondent's denial was mailed to Attorney Wilfred W. Elliott. While the record is once again unclear, it appears that Attorney Elliott received the denial on or about August 21, 1989.

5. The petitioner's petition for review of the respondent's action on the petition for redetermination was received by this Commission on August 20, 1989, and was signed by Attorney Wilfred W. Elliott.

6. Section 73.01(5)(a) of the Wisconsin Statutes provides as follows:

(5) APPEALS TO COMMISSION.

(a) Any person . . . who is aggrieved by the redetermination of the department may, within 60 days after the redetermination . . . of the department . . . but not thereafter, file with the clerk of the commission a petition for review of the action of the department. . . ."

7. On April 16, 1990 this Commission issued a Ruling and Order on a companion sales tax matter, (Michael R. Kulas vs. Wisconsin Department of Revenue, Docket No. 89-S-505), ruling that the 60-day appeal period contained above dated from receipt of the respondent's action by Attorney Elliott, under power of attorney - not the petitioner. At that time this Commission was not aware of the precedent set in the 3rd Circuit, United States Court of Appeals case of Richard T. Gallion and Audrey R. Gallion vs. United States of America 68-1 USTC par 9213 and the U. S. District Court, Western District of Arkansas in the case of John Roy Campbell and Dorothy Joe Campbell vs. United States of America 69-2 USTC par 9730.

8. In the second page of the Gallion decision (supra), the federal court of appeals stated:

"In this scrambled situation, in which all the parties, to some extent, failed to take action which might reasonably have been expected of them, is there any valid room for this court, in effect, to amend the specific command of the statute by judicially adding the words 'or by other person designated by him' immediately following 'taxpayer' in the next to the last line of the statute? We think not.

The court then went on to note:

. . . the specific command of the statute that the two year permissive period dates from the mailing of the

notice of disallowance to the taxpayer. There is no reference to a mailing to someone else, even if so requested or directed. No officer or employee of the United States is authorized to waive or vary the requirements of the statute. Finn v. United States, 123 U.S. 227. 8 S. Ct. 82, 31 L. Ed 128 (1887) A fortiori the taxpayers could not 'direct' that the notices be sent to someone else. As already pointed out, however, their request or direction was that the notices be sent to them, in care of their attorney. When they received the notices, sent to them directly, they got just what otherwise would have been relayed through the attorney."

9. While federal and state statutory time to appeal mandates are somewhat different, we find the rationale in the Gallion case (supra) controlling.

10. The 60-day period provided for in Sec. 73.01(5)(a) of the Wisconsin Statutes expired on October 16, 1989.

11. The respondent has shown good and sufficient grounds for the granting of its motion.

Therefore,

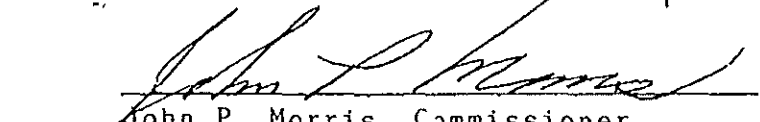
IT IS ORDERED

That the respondent's motion to dismiss the petitioner's petition for review is hereby granted.

Dated at Madison, Wisconsin,
this 18th day of March,
1991.

WISCONSIN TAX APPEALS COMMISSION


Thomas R. Timken, Chairperson


John P. Morris, Commissioner


Robert C. Junceau, Commissioner

Attachment: "NOTICE OF APPEAL INFORMATION"