

STATE OF WISCONSIN
TAX APPEALS COMMISSION

SE PROFESSIONALS, S.C.,

DOCKET NO. 12-I-224

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID K. AYMOND AND
CYNTHIANE J. MORGENWECK,

DOCKET NO. 12-I-225

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

LORNA HEMP BOLL, CHAIR:

This matter comes before the Commission on the Petitioners' Motion to Amend. The Petitioners are represented by Attorneys Robert A. Mathers and Kathy L. Nusslock, Davis & Kuelthau, s.c., Milwaukee, Wisconsin. The Respondent, Wisconsin Department of Revenue ("Department") is represented by Attorney John R. Evans.

This motion concerns an assessment the Department issued against the individual Petitioners for income taxes for the periods ending December 31, 2004, and December 31, 2005.

FACTS

1. On November 4, 2010, the Department issued two Notices¹ of Amount Due to David Aymond and Cynthiane Morgenweck ("individual Petitioners"), one for individual income tax for tax years 2004 and 2005, and a second one for individual income tax for tax years 2006, 2007, and 2008.

2. The Petitioners requested a redetermination. In two Notices of Action, one for each of the individual assessments, dated September 21, 2012, the Department granted in part and denied in part the individual assessments for years 2004-2005 and 2006-2008. (Mathers Affidavit, Ex. 6, Exhibits A and B.)

3. The individual Petitioners filed a Petition for Review of the action on its Petition for Redetermination regarding the 2006-2008 individual assessment on November 19, 2012. (Commission file.) The Petition did not address the tax years 2004-2005.

4. The individual Petitioners did not file a Petition for Review of the action on its Petition for Redetermination regarding the 2004-2005 individual assessment.

¹ It is not clear from the Commission file why the Department grouped all 5 tax years into one assessment for the S corporation Petitioner but issued two separate assessments for the individual Petitioners.

5. On July 27, 2010, the Department issued one Notice of Field Action and Computation and Summary of Additional Franchise Tax, Interest & Penalty to SE Professionals, S.C., for franchise tax for tax years 2004 to 2008.

6. SE Professionals, S.C. ("S corporation Petitioner"), requested a redetermination. By a Notice of Action dated September 21, 2012, the Department denied the S corporation Petitioner's Petition for Redetermination. (Mathers Affidavit, Ex. 6, Proposed Amended Petition for Review, Exhibit C.)

7. The S corporation Petitioner then filed a Petition for Review of the action on its Petition on November 19, 2012. (Commission file.)

8. At some point after September 21, 2012, Petitioners requested consent from the Department to amend the Petition for Review to include the 2004-2005 assessments against the individual Petitioners. The Department did not so consent.

9. On February 21, 2013, Petitioners brought a Motion for Leave to File an Amended Petition for Review and for Consolidation with the Petition for Review filed by the S corporation Petitioner.

APPLICABLE LAW

Wisconsin Statutes

Wis. Stat. § 73.01(5)(a):

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 may . . . within 60 days after the redetermination but not thereafter, file with the clerk of the commission a petition for review of the action of the department For the 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 of filing.

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(4)(b): Hearings [before the Commission] shall be conducted in accordance with rules of practice and procedure prescribed by the commission.

Wis. Stats. § 802.09:

(1) Amendments. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in the scheduling order under s. 802.10. Otherwise the party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

Wis. Stat. § 802.09(3):

(3) Relation back of amendments. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

Wisconsin Administrative Code

Wis. Admin. Code § TA 1.15(2m):

(2m) A separate petition for review shall be filed with the commission by an aggrieved party from each notice of action of the department of revenue or the department of transportation on a petition for redetermination. No petition for review may be filed by more than one person unless each person filing the petition for review is aggrieved by the same notice of action. A separate filing fee shall accompany each petition for review.

Example 2: The department of revenue denies one petition for redetermination of a corporation and its subsidiary, or a limited liability company ("LLC") and one of its members, on similar or related issues. The corporation and its subsidiary, and the LLC and its member, may file a single petition for review with the commission and pay a single filing fee.

Wis. Admin. Code § TA 1.21:

Amendments of documents filed. A petitioner or respondent may amend its petition, answer or reply at any time before the commission's hearing with the consent of the adverse party or by leave of the commission upon motion duly made. Each party shall file the proposed amendments with all motions to amend.

Wis. Admin. Code § TA 1.39:

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

ANALYSIS

I. PETITIONERS' MOTION FOR LEAVE TO FILE AN AMENDED PETITION FOR REVIEW

Under Wisconsin's statutory procedures, an appeal of a redetermination of the Department must be filed within 60 days of receipt of the redetermination. Wis.

Stat. § 73.01(5)(a). Otherwise, the redetermination becomes final and conclusive. Wis. Stat. § 71.88(2)(a).

The individual Petitioners received both of the Department's Notices of Action on September 21, 2012. The S corporation Petitioner received the Notice concerning its Petition for Redetermination on the same day. The 60-day appeal period for all Petitions for Review expired on November 20, 2012. Before that deadline, the Commission received timely Petitions for Review of the individual Petitioners' Redetermination for the for the tax years 2006-2008 and from the S corporation Petitioner's Redetermination for the tax years 2004-2008. The Commission received both filings on November 19, 2012. The November 19, 2012 filings did not include a Petition for Review of the individual Petitioners' Redetermination for the tax years 2004-2005.

The individual Petitioners have moved to amend their Petition to include the tax years 2004-2005. That motion must fail for several reasons.

A. Procedural Analysis

Under the section of the Wisconsin Administrative Code which applies to the Tax Appeals Commission, a petitioner must file one petition for review for each notice from which the petitioner appeals. Wis. Admin. Code § TA 1.15(2m). There were two separate Notices assessed to the individual Petitioners, one for 2004-2005 and one for 2006-2008. Petitioners filed a timely Petition for Review only with respect to the latter Notice.

The Wisconsin Administrative Code clearly requires the Petitioners to file one Petition for each assessment. "A separate petition for review shall be filed with the commission by an aggrieved party from each notice of action . . ." Wis. Admin. Code § TA 1.15(2m). Amending the existing Petition would not comply with the Code because it would mean one Petition would encompass multiple assessments, which is not the process outlined in the Code.

B. Relation Back

Even if a separate Petition were not required, we must deny the motion to amend as untimely. Petitioners argue that the addition of a claim for 2004-2005 should "relate back" to the date of filing of their Petition for 2006-2008. While "relation back" might apply so as not to preclude *new issue* regarding the claim already joined, an appeal of a different assessment based on different tax years is a *new claim* and as such is precluded.

The timeliness of a claim is a jurisdictional question. "If statutory prescriptions to obtain jurisdictions are to be meaningful, they must be unbending." *Grange v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-017 (Dane Co. Cir. Ct. 1993). As duly noted by the Department, the Commission has no authority to ignore, extend, or make exceptions to the 60-day statutory period. *Keith v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-694 (WTAC 2003).

The Seventh Circuit addressed this jurisdictional strategy in *Kennedy v. Commissioner*, 64-1 T.C. ¶ 9861, 339 F. 2d 335 (7th Cir. 1964). In that case, the court explained that the Tax Court's jurisdiction to redetermine deficiencies in income tax is

limited to the year or years for which Commissioner has issued and mailed a deficiency notice to the taxpayer and has received from the taxpayer a timely filed petition for redetermination. Accordingly, the court held that a petition for the taxable year 1960 did not cover the taxable year 1961. The motion to amend the petition for the year 1960 to include the taxable year 1961 did not give the Tax Court jurisdiction with respect to 1961 because the motion was not filed within the 90-day period after the mailing of the deficiency notice for 1961.

Just as in *Kennedy*, the Petitioners' Petition for the tax years 2006-2008 similarly did not cover the tax years 2004-2005. Thus, the Petitioners' Motion to Amend does not give the Commission jurisdiction over those earlier years because the Motion was not filed within 60 days of the Notice denying the redetermination for those years.

C. Joint Claim with S Corporation Petitioner

Petitioners attempt to tie a timely individual appeal to the S corporation's appeal for the same time period using the second Example to the applicable administrative code section, Wis. Admin. Code § TA 1.15(2m). That section allows an individual member of an LLC to join in one petition with the LLC to appeal from separate assessments which arise out of "similar or related issues." Although the individual assessments and the S corporation assessments do arise out of the same set of circumstances, the Code Section does not imply that one may make the claim for the other but rather that one may petition with the other by filing one petition and one paying one fee. The S corporation Petitioner filed a Petition for Appeal for 2004-2008 only on its own behalf. The individual Petitioners did not join in that Petition, although

the Code may have allowed them to do so without a separate petition and a separate filing fee. Nothing in the Code leads us to infer that the individual Petitioners are joined unless they are named jointly in the Petition, which they were not.

Because the individual Petitioners' appeals for the tax years 2005-2005 are not properly before the Commission, the Motion for Leave to Amend must be denied.

II. PETITIONERS' MOTION TO CONSOLIDATE

The Petitioners have also brought a Motion for Consolidation of the actions involving the individual Petitioners and the S corporation Petitioner. The Department opposes consolidation. The Department first argues that the actions "could not have been brought as a single action." Per the discussion above, the Code may indeed have allowed the individual and S corporation Petitioners to bring their claims together on one Petition paying one fee. Wis. Admin. Code § TA 1.15(2m), Example 2.

Regardless of the procedural possibility of these actions being joined, judicial economy leans toward consolidation when matters involve the same players and circumstances, and, in this instance, we find consolidation is appropriate. The Department argues that it is important to maintain the legal distinction between the S corporation and its shareholders. We agree, but the consolidation of cases does not affect the way the law applies to separate parties. The Commission is aware of the issues which impact each party and will evaluate the cases accordingly.

CONCLUSIONS OF LAW

1. The Motion for Leave to Amend filed by the individual Petitioners is untimely as to the assessment against the individual Petitioners for the tax years 2004-2005.

2. Because the individual Petitioners failed to file a timely Petition for Review of the Assessments for tax years 2004-2005, the Commission lacks subject matter jurisdiction over those assessments.

3. The pending appeals (individual Petitioners for the tax years 2006-2008 and the S corporation Petitioner for the tax years 2004-2008) involve the same or similar circumstances, facts, and witnesses. As such, in the interest of judicial economy, these matters may properly be consolidated.

4. The denial of the Motion for Leave to Amend to add claims regarding years not appealed within the time allowed by statute is a final order as to the assessment against the individual Petitioners for the tax years 2004-2005.²

² *InverWorld, Ltd., v. Commissioner of Internal Revenue*, 92-2 USTC ¶50,594, citing *Wilson v. Commissioner*, 78-1 USTC ¶9148, 564 F.2d 1317, 1318 (9th Cir.), in which the court found that the Tax Court's dismissal for lack of jurisdiction of one year of a multiyear petition was "a final decision on that cause of action." *Wilson* explains, "an existing petition cannot be amended to contest the Commissioner's determination of a deficiency for the additional year," citing *Kennedy v. Commissioner*, 42-1 USTC ¶9271][sic- correct cite is 64-1 T.C. ¶ 9861], 339 F. 2d 335, 337 (7th Cir. 1964); (additional citations omitted).

ORDER

Based upon the foregoing,

IT IS HEREBY ORDERED as follows:

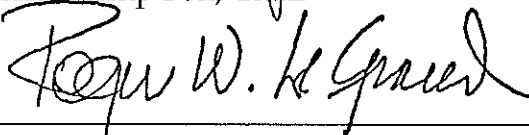
1. Petitioners' Motion for Leave to Amend is denied.
2. Petitioners' Motion for Consolidation is granted.

Dated at Madison, Wisconsin, this 1st day of November, 2013.

WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger L. LeGrand, 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. 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.