

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

---

PATRICK AND HOPE SOUTER,

DOCKET NO. 11-I-195

Petitioners,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

---

**LORNA HEMP BOLL, CHAIR:**

This case comes before the Commission for decision on Respondent's Motion to Dismiss Petitioners' petition for review as untimely. The Petitioners, Patrick and Hope Souter, Racine, Wisconsin, appear *pro se* in this matter. The Respondent in this matter, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer. Respondent has filed a brief and affidavit in support of its motion. Despite two extensions, Petitioners have failed to file any responsive pleadings. For the reasons stated below, we find that the Commission does not have jurisdiction to hear this matter because Petitioners failed to file their petition in a timely manner as required by statute, and therefore we dismiss.

**FINDINGS OF FACT**

1. On May 11, 2010, the Department issued an estimated assessment of tax due for tax period ending December 31, 2005, because the

Department had no record of having received a tax return from the Petitioners for the time period in question.

2. Having received no response from the Petitioners, the Department issued a Notice of Overdue Tax on July 29, 2010.

3. On September 10, 2010, the Department received a copy of Petitioners' 2005 tax return claiming a refund in the amount of \$4,157.00. Although the return was dated November 10, 2008, the Department does not have a record of receiving the return at any time prior to September 10, 2010.

4. In its notice dated November 1, 2010, the Department denied Petitioners' claim for refund because it had been filed more than four years after the return's original due date of April 15, 2006.

5. Petitioners' petition for redetermination was filed timely, considered by the Department, and denied in Department's notice dated April 19, 2011, which was delivered by certified mail to Petitioner on April 20, 2011. (Department's Exhibit 7.)

6. On June 20, 2011, Petitioners hand-delivered an appeal letter to the Commission after the close of business; the petition was file-stamped by the clerk of the Commission as received on June 21, 2011. (Department's Exhibit 8.) The petition had been slipped under the door of the closed office of the Commission. (Commission file.)

7. The 60-day filing period for Petitioners' appeal formally expired June 19, 2011; because June 19, 2011, fell on a Sunday, Petitioners' deadline was extended to June 20, 2011.

8. On August 2, 2011, the Department filed a Motion to Dismiss the Petitioners' petition as untimely, along with an affidavit with exhibits in support of the motion.

9. On August 8, 2011, the Commission issued a briefing order in response to the Department's Motion to Dismiss. The Petitioners were to have filed a response by September 22, 2011.

10. When no response was filed by the Petitioners, the Commission sent the Petitioners a certified letter on September 26, 2011, granting sua sponte a 14-day extension of the period in which to file a response. No response was received.

11. On October 12, 2011, the Commission sent the Petitioners another certified letter requesting a response and indicating that a consequence of not responding may be dismissal of the petition for failure to prosecute. The Petitioners have not responded.

#### **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 statute at issue here outlines the requirements for filing a valid and timely petition for review with the Commission:

Section 73.01(5)(a), Wis. Stats. (2005-06): 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.

The only exception is that 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. Section 73.01(5)(a), Wis. Stats. Petitioners' petition was personally delivered; consequently, this exception does not apply.

## ANALYSIS

### Lack of Jurisdiction

A notice of appeal must be served on the Commission within 60 days of receipt of the redetermination of the Department of Revenue in order to vest jurisdiction in the Commission to hear the appeal. *Edward Mischler v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-159 (WTAC 1983). The date on which a petition for review is 'filed' with this Commission under Wis. Stat. § 73.01(5)(a) has consistently been held to be the date on which the petition has been physically received in this Commission's office. The Commission noted in *Mischler* that "a petition is filed when it is **physically received** in this Commission's office" (emphasis added). Unless otherwise provided by statute, a document is filed on the

date it is *received* by the Commission. See *Laurence H. Grange v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-017 (Dane Co. Cir. Ct. 1993).

The one exception in Wis. Stat. § 73.01(5)(a) (2005-2006) states that, for a petition to be timely, it must be mailed (1) by certified mail (2) in a properly addressed envelope (3) with postage prepaid and (4) postmarked before midnight of the last day for filing. Petitioners did not avail themselves of this exception.

Hand-delivery is not in and of itself “filing” as required by statute. The *Mischler* case cites to numerous Wisconsin rulings which hold that filing also requires the aspect of receipt by the proper authority. Thus, a petition cannot be considered timely filed on the date it is dropped off after hours at a closed office. The *Mischler* court noted that “filing” requires the petitioner

“[t]o deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office . . . to place (as a paper or instrument) on file among the legal or official records of an office esp. by formally receiving, endorsing, and entering. (Citing *Webster's Third New International Dictionary* (unabr. 1993).)

*Mischler, supra*, citing *Hoffman v. Rankin*, 2002 WI App 189, ¶8, 256 Wis. 2d 678, 649 N.W.2d 350.

Although Petitioners delivered their petition in person before the end of the 24 hours which comprised June 20, the office was closed and the envelope was admittedly slipped under the door. The petition was therefore not received by the Commission until June 21, 2011, one day past the Petitioners' deadline.

Having found that the Petitioners' petition was not actually received by and filed with the Commission until June 21, 2010, one day after the expiration for the time to file, we must conclude that Petitioners' petition is untimely. Thus, the Commission lacks subject matter jurisdiction over the petition for review. 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).

### **Failure to Prosecute**

As an additional basis for the Commission's decision here, we note that the Petitioners have failed to respond to the Motion to Dismiss filed by the Department. That failure to respond is a violation of the Commission's Briefing Order dated August 8, 2011. The Commission sent the Petitioners a letter on September 26, 2011, reminding the Petitioners that their response was overdue and extending the due date *sua sponte* an additional 14 days. There was also no response to the Commission's October 12 letter which again requested a response from the Petitioners.

This Commission has previously held that "The failure to file a statement of the case, the failure to file a response pursuant to the briefing order, and the failure to respond to two subsequent letters requesting a response together constitute a failure to prosecute under Wis. Stat. § 805.03, which is independent grounds for dismissal. *See*, Wis. Stat. § 805.03 and Wis. Admin. Code § TA 1.39."

### **Timeliness of Refund Claim**

Having found that the Commission lacks jurisdiction over this matter, we will not address the under merits concerning the timeliness of Petitioner's claim for refund.

### **DECISION AND ORDER**

We find the Petitioners' petition was not timely filed as defined by state statutes and additionally that Petitioners have failed to prosecute their claim, thus, this Commission lacks jurisdiction in this matter.

Because this Commission lacks jurisdiction to hear this matter, we find that the Department is entitled to dismissal as a matter of law. Based on the foregoing, it is the order of this Commission that the Department's Motion to Dismiss is granted.

Dated at Madison, Wisconsin, this 10<sup>th</sup> day of January, 2012.

### **WISCONSIN TAX APPEALS COMMISSION**

---

Lorna Hemp Boll, Chair

---

Roger W. LeGrand, Commissioner

---

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"