

STATE OF WISCONSIN
TAX APPEALS COMMISSION

DANIEL AND JANET M. WEISS,

DOCKET NO. 15-I-078

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING & ORDER

DAVID D. WILMOTH, COMMISSIONER:

This case comes before the Commission for decision on the Respondent's Motion to Dismiss the Petitioners' Petition for Review on the grounds that the Commission lacks jurisdiction over the case because Petitioners failed to file a Petition for Redetermination within 60 days after receipt of Respondent's Notice of Amount Due. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Sheree Robertson, who filed affidavits, an initial brief, and a reply brief in support of the Motion. The Petitioners, Daniel and Janet M. Weiss, of Bruce, Wisconsin, are represented in this matter by Edward M. Adams, CPA, who filed an affidavit in opposition to the Motion. For the reasons stated below, the Commission finds that it lacks jurisdiction in this matter and, therefore, concludes that dismissal is appropriate.

FACTS

1. The Department issued a Notice of Amount Due, dated September 19, 2014, assessing additional income tax, interest, and penalty in the amount of \$187,055.06, for calendar years 2010 and 2011. (Affidavit of Department Revenue Agent Roxanne J. Walker (“Walker Aff.”), ¶2, Ex. 1.)

2. The Department mailed the Notice of Amount Due to the Petitioners via United States Postal Service (USPS) certified mail, and the USPS Product & Tracking information showed that the Notice was delivered and signed for by Petitioner, Janet M. Weiss, on September 24, 2014. (Walker Aff. ¶3 Exs. 2, 3 and 4.)

3. On January 28, 2015, the Petitioners filed a Petition for Redetermination with the Department objecting to the Notice of Amount Due. (Affidavit of Department Resolution Officer Terri Stover-Cramer (“Stover-Cramer Aff.”), ¶2, Ex. 5.)

4. By Notice of Action dated March 25, 2015, the Department denied the Petitioners’ Petition for Redetermination as untimely. (Stover-Cramer Aff., ¶4, Ex. 6.)

5. On April 13, 2015, the Petitioners filed a Petition for Review with the Commission objecting to the Department’s Notice of Action denying their Petition for Redetermination. (Commission file.)

6. On May 8, 2015, the Department filed a Motion to Dismiss the Petitioners’ Petition for Review for lack of jurisdiction, along with affidavits, exhibits, and a brief in support of the Motion. (Commission file.)

7. The Petitioners' representative filed a responsive affidavit to the Motion on June 11, 2015, and the Department followed with a responsive brief on June 24, 2015.

APPLICABLE LAW

Motion to Dismiss

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).*

Applicable Statutes

Wis. Stat. § 71.88(1)(a): *Contested assessments and claims for refund. ... [A]ny person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of refund may, within 60 days after receipt of the notice, petition the department of revenue for redetermination. A petition or an appeal by one spouse is a petition or an appeal by both spouses...*

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 or, except as provided in s. 71.75 (5), if no petition for redetermination is made within the time provided the assessment, refund, or denial of refund shall be final and conclusive.*

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 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

ANALYSIS

Under Wis. Stat. § 71.88(1)(a), any person feeling aggrieved by a determination of the Department may file a petition for redetermination with the Department within 60 days. If a petition for redetermination is not filed within 60 days, the assessment becomes final and conclusive.

The Commission has repeatedly ruled that it does not have jurisdiction to hear appeals of cases in which a petitioner has not filed a timely petition for redetermination. *Jones v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-730, (WTAC 2013); *Kaminske v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶401-638 (WTAC 2012); *Williams v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶400-880, (WTAC 2006). The reasoning behind these decisions is that, if a person does not timely file a petition for redetermination, the assessment becomes final and conclusive, and he or she cannot be "aggrieved by the redetermination of the Department of Revenue." Under Wis. Stat. § 73.01(5)(a), the Tax Appeals Commission only has jurisdiction over cases in which a person has timely filed a petition for redetermination and is aggrieved by the redetermination of the Department.

In this case, Petitioners received the Notice of Amount Due on September 24, 2014, which is the date that delivery of the certified mail was accepted and signed for. Petitioners had 60 days from that date to timely file a Petition for Redetermination. That date would be November 24, 2014. The record shows that Petitioners filed a Petition for Redetermination which was received by the Department on January 28, 2015. By then, the assessment had become final and conclusive, under Wis. Stat. § 71.88(2)(a), and the Commission has no jurisdiction to hear Petitioners' appeal.

In the affidavit filed by the Petitioners' representative in response to the Department's motion, he acknowledges that he received the Notice of Amount Due and did not file a timely petition for redetermination. He goes on to state that the failure to timely file was the result of significant health issues requiring urgent and ongoing treatment which kept him away from his office for an extended period.

Regardless of the reason for late filing, the Commission cannot create subject-matter jurisdiction where, by reason of a late filing, it does not exist. *McDonald Lumber Co. v. Dep't of Revenue*, 117 Wis. 2d 446, 344 N.W.2d 210 (Ct. App. 1984). The Commission has acknowledged this principle in the past, even in the face of claims of mental or physical impediment. See *Ellenbecker v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-407 (WTAC 2011).

The Commission concludes that the Petitioners failed to file a timely Petition for Redetermination within 60 days after receipt of the Notice of Amount Due from the Department. Thus, the Commission lacks subject matter jurisdiction over this case. 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).

CONCLUSION

The Petitioners' Petition for Redetermination was not timely filed as required by Wis. Stat. § 71.88(1)(a) and, thus, the Commission lacks jurisdiction in this matter.

ORDER

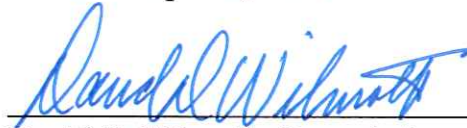
The Department's Motion to Dismiss is hereby granted, and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 17th day of September, 2015.

WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



David D. Wilmoth, 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 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 <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.