

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 20

MILWAUKEE COUNTY

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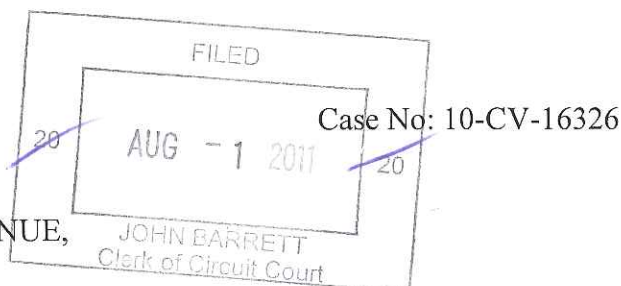
CLEVELAND LEE SR., and  
CAROLYN LEE,

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.



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**DECISION AND FINAL ORDER**

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Petitioners Cleveland Lee Sr. and Carolyn Lee appeal to the Circuit Court a decision of the State of Wisconsin Tax Appeals Commission (“the Commission”) that granted summary judgment to the Wisconsin Department of Revenue (“the Department”) on a tax assessment that stemmed from a conviction against Cleveland Lee Sr. for filing false tax returns. The Commission determined that the doctrines of claim preclusion and issue preclusion barred the petitioners’ claims challenging the tax assessment. Before this Court, the Department has filed a motion to dismiss the petition for lack of competency to proceed and for lack of personal jurisdiction. The Court has reviewed the record, and for the reasons stated herein, grants the Department’s motion to dismiss.<sup>1</sup>

**STATEMENT OF THE CASE**

On February 5, 2007, the Department issued a Notice of Amount Due to the petitioners for the years of 1999, 2000, and 2001, requiring the petitioners to pay \$34,478 in unreported

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<sup>1</sup> Since this Court is granting the motion to dismiss, the merits of the case are not addressed although fully briefed by both parties.

income based upon Cleveland Lee Sr.'s 2005 convictions for, among other things, embezzlement and filing false tax returns in those years. (See Milwaukee County Circuit Court, Case No. 2005-CF-63)). In his criminal case, Cleveland Lee Sr. was ordered to pay \$34,367.26 in restitution to the Department. The petitioners filed a petition for redetermination with the Department which was denied on October 2, 2008. On November 18, 2008, the petitioners filed a petition for review with the Commission.

The Department moved for summary judgment before the Commission based upon the doctrines of issue preclusion and claim preclusion, arguing that the material facts at issue in Cleveland Lee Sr.'s criminal case were the same at issue in this tax matter. In an order dated November 23, 2009, the Commission granted the Department's motion for summary judgment, concluding that the petitioners were precluded from raising defenses to the Department's assessment because the defenses either were raised or could have been raised in Cleveland Lee Sr.'s criminal prosecution, so there were no genuine issues of material fact in the matter.

On December 17, 2009, the petitioners submitted to the Circuit Court a document entitled "On Petition for Judicial Review to the Circuit Court of Milwaukee County on Decision of Wisconsin Tax Appeal Commission." The filing fee for this petition was not paid until August 2010, so it does not appear that the petition was filed and there was no case number assigned at the time of the submission. On September 22, 2010, the petitioners filed a document entitled "Complaint/Petition" that also sought judicial review of the Department's actions.

The Department now seeks to have these petitions dismissed. In addition, both parties have filed briefs on the merits of the Commission's grant of summary judgment.

#### **APPLICABLE LEGAL STANDARDS**

Under Wis. Stat. § 227.53,

(1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision as provided in this chapter and subject to all of the following procedural requirements:

(a)1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board, the credit union review board, or the savings institutions review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b)1. to 4. . . .

2. Unless a rehearing is requested under s. 227.49, petitions for review of contested cases shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. . . . The 30-day period for serving and filing a petition under this subdivision commences on the day after personal service or mailing of the decision by the agency.

(b) . . . The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue. . . .

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

“It is well established that strict compliance with the service requirements of sec. 227.53(1), Stats., is essential to the circuit court’s subject matter jurisdiction.” Weisensel v. Wisconsin Dept. of Health & Soc. Services, 179 Wis.2d 637, 643 (Ct. App. 1993). Compliance with Wis. Stat. § 227.53(1)(a) initiates review of an agency’s decision, and service upon the parties as

required by Wis. Stat. § 227.53(1)(c) is required to confer subject matter jurisdiction upon the circuit court. Tomah-Mauston Broad. Co., Inc. v. Eklund, 143 Wis.2d 648, 652-53 (Ct. App. 1988). Finally, a clerk may refuse to accept any submission for filing until the required filing fees are paid. Rome v. Betz, 120 Wis.2d 528, 530 (Ct. App. 1984).

### DECISION

With regard to the Department's motion to dismiss, the issue before this Court is whether the petitioners complied with the filing and service requirements of Wis. Stat. § 227.53(1) in order to confer on this Court competency to address the merits of the petition. Under that statute, the petitioners were required to (1) serve the petition upon both the Commission and the Department personally or by certified mail and (2) file the petition with the clerk of the Milwaukee Circuit Court (3) within 30 days of service of the Commission's decision granting summary judgment.

In its motion to dismiss, the Department has submitted the envelope used by the petitioners indicating that the original petition was sent by regular mail on December 19, 2009. The record also shows that while the petition was sent to the clerk of the Milwaukee Circuit Court in December 2009, the clerk refused to file the petition at that time because no filing fee was paid until August 2010. In response to the Department's motion, the petitioners have submitted evidence showing that the Commission was served by certified mail on December 17, 2009. Therefore, petitioners argue that the petition was timely filed and served.

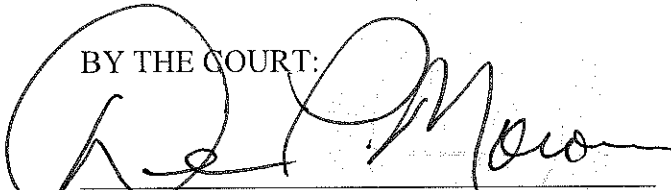
Although the petition may have been timely filed with the Commission, the only evidence in the record shows that the Department was served by regular mail. This was insufficient under the statute, which requires either personal service or service by certified mail upon both the Commission and the Department. Wis. Stat. § 227.53(1)(a)1. Further, the clerk of

the court acted within her discretion by refusing to file the petition when it was submitted without the required filing fee. See Rome, 120 Wis.2d at 530. As a result, the petition also was not timely filed within the Milwaukee County Circuit Court. This lack of compliance with the requirements of Wis. Stat. § 227.53 deprive this Court of its competency to proceed in this matter. See Weisensel, 179 Wis.2d at 643. Finally, petitioners second attempt to receive judicial review of the Commission’s decision, the “Complaint/Petition” filed on September 22, 2010, was also untimely as it was not served or filed within 30 days of the Commission’s service of its decision.<sup>2</sup>

**ORDER**

THEREFORE, it is hereby ORDERED that the motion by the Wisconsin Department of Revenue is GRANTED, and this action is DISMISSED.

Dated this 1st day of August, 2011, in Milwaukee, Wisconsin.

BY THE COURT:  
  
The Honorable Dennis P. Moroney  
Milwaukee County Circuit Court, Branch 20

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<sup>2</sup> The Department also argues that Carolyn Lee’s claims must be dismissed because she did not sign either petition and Cleveland Lee Sr. is not authorized to represent her. However, as both petitions must be dismissed in their entirety, this argument is not separately addressed.