

STATE OF WISCONSIN
TAX APPEALS COMMISSION

KRISTIE AND VINCENT MILNE,

DOCKET NO. 10-I-022

Petitioners,

vs.

RULING & ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

This matter comes before the Commission on the Respondent's Motion to Dismiss and Motion for Summary Judgment. The Petitioners in this matter, Kristie and Vincent Milne of Greendale, Wisconsin, appear in this matter *pro se*. The Respondent in this case, the Wisconsin Department of Revenue ("the Department") appears in this matter by Attorney Mark S. Zimmer, of Madison, Wisconsin. Because this matter was filed untimely, we lack jurisdiction here and must grant the Department's motion.

FINDINGS OF FACT¹

A. Material Facts

1. The Petitioners, Kristie Milne and Vincent Milne ("Petitioners"), filed a 2003 Wisconsin Form 1 income tax return, showing \$71,787.00 of Wisconsin adjusted gross income, and a net tax of \$2,725 and claiming a refund of \$967. Exhibit 1. The Department paid the claimed refund of \$967 to the Petitioners.

¹ The facts in this section come from the parties' submissions to the Commission. We have, however, edited them for clarity, form, and punctuation. The exhibits referenced in this section were filed by the Department with the Affidavit of Resolution Officer Marie Romero dated July 29, 2010.

2. The Petitioners filed a 2003 Wisconsin Form 1X amended income tax return dated May 19, 2004, showing \$22,479 of Wisconsin adjusted gross income and making claim for an additional refund in the amount of \$3,165 on line 38. Exhibit 2. The Department paid the claimed additional refund of \$3,165 to the Petitioners.

3. On April 4, 2005, the Internal Revenue Service issued an additional tax assessment by examination, increasing the Petitioners' adjusted gross income for 2003 to \$78,805.00. Exhibit 3. The Internal Revenue Service did not accept the amended return of the Petitioners or pay the additional refund claimed on their federal amended return.

4. The Petitioners did not notify the Department of the federal adjustment of their 2003 income by the Internal Revenue Service within 90 days of the final determination of the Internal Revenue Service.

5. The Petitioners used a commercial tax preparation service to file the relevant returns, but no representative of the service accompanied them to the federal audit. The Petitioners believed that the Department would be notified of the relevant information and that they did not need to do anything further after the federal audit was concluded.

B. Jurisdictional Facts

1. The Department adjusted the Petitioners' 2003 Wisconsin income tax based on the Internal Revenue Service adjustment, pursuant to an Adjustment Notice from the Department dated March 23, 2009, assessing the Petitioners for \$3,358.00 tax, plus interest and applicable penalties. Exhibit 4.

2. The Petitioners appealed the Adjustment Notice by letter dated May 25, 2009, postmarked on May 28, 2009, and received by the Department on June 11, 2009. Exhibit 5.

3. By way of a Notice of Action dated November 25, 2009, the Department denied the Petitioners' Petition for Redetermination. Exhibit 6.

4. The Notice of Action was sent to Petitioners via certified mail, No. 70092250000392934836, and according to the records of the United States Postal Service, the Petitioners received the Notice of Action on November 27, 2009. Exhibit 7.

5. The Petitioners' Petition for Review, certified mail stamped January 29, 2010, was received in the office of the Wisconsin Tax Appeals Commission on February 1, 2010. Exhibit 8.

6. The January 29, 2010 date of the certified mail stamp on the Petition for Review was 63 days after Petitioners received the Notice of Action on November 27, 2009.

DECISION

The Petitioners in this matter filed amended returns in 2004 for their 2003 Wisconsin income tax, adjusting their income from \$71,787 to \$22,479 and claiming an additional refund of \$3,165. The Department paid the additional refund claim, but on April 4, 2005, the IRS examined the Petitioners' amended federal return and issued an additional assessment against them for 2003. The Petitioners, however, did not affirmatively notify the Department of the federal adjustment as required by Wisconsin Statute § 71.76.

The Department discovered the changes to the federal return on its own and on March 23, 2009, the Department issued an additional assessment against the Petitioners for 2003 for \$3,358 in tax. When the Petitioners' Petition for Redetermination was denied by the Department on November 25, 2009, the Petitioners filed an appeal by certified mail to the Commission on January 29, 2010.

The first part of this decision will summarize the Department's arguments in support of its Motion to Dismiss for failure to state a claim. The second part of this decision will state the Petitioners' response. The third part of this decision will state why we must grant the Department's motion.

A. The Department's Legal Arguments

The Department makes several arguments in support of its Motion to Dismiss. First, the Department argues that the Petition for Review fails to state a claim and should be dismissed as the Petitioners never protest the merits of the Department's assessment of income tax against them.² Second, the Department points out that Wis. Stat. § 71.74 does not bar the Department from making an assessment here as the time under that section has not yet run. Third, the Department argues that the Petitioners cannot defeat the assessment by blaming the preparer, the IRS, or the Department. Finally, the Department points out that the Petition for Review here was not timely filed as it was received on the 63rd day after the Petitioners' receipt of the Notice of Action. Thus, the Department points out, the Commission lacks jurisdiction.

² The facts in this case are not in dispute for purposes of summary judgment.

B. The Petitioners' Arguments

Although the Petitioners never responded to the Department's motion, their Petition to the Commission and their various letters put forth several claims and we will summarize them below. First, the Petitioners state that Wis. Stat. § 71.74(8) applies to their case as there was an incorrect claim filed. Second, the Petitioners explain that their return was produced by a commercial tax preparer who filed an incorrect return resulting in an IRS audit of their business. At the audit, the preparer failed to appear. After the audit, the Petitioners asked what to do next and the reply was to do nothing. The Petitioners believed that the audit report would be sent to the State. Third, the Petitioners point out that the State did its audit without notifying the Petitioners and added interest and penalties. With no notification as per Wis. Stats. §§ 71.74(10) and 71.74(11), the Petitioners argue that they should be liable only for the adjustment, and not the interest and penalties. Fourth, the Petitioners point out that if there was an amount owing, it should have been deducted from refunds in subsequent years. As six years have gone by before the notification, the Petitioners would agree to pay the adjustment, but not the interest or penalties.

C. Why We Must Grant the Department's Motion

There are several problems with the Petitioners' case. First, the actions of the IRS and the commercial preparer are not properly before the Commission. Most importantly though, the petition is untimely.

The Commission is an independent body, but it does not supervise the Department, the IRS, or commercial preparers. A long line of case law establishes that

missteps by a preparer are not a defense to the underlying merits of an income tax assessment. *Kryshak v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶203-084 (WTAC 1989); *Parkview Sand & Gravel, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-431 (WTAC 1999), *aff'd* Wis. Tax Rptr. (CCH) ¶400-495 (Dane Co. Cir. Ct. 2000); *Wimmer Construction, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-391 (WTAC 1998); *Plaza Publications, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-668 (WTAC 2003).

However, we do not reach the merits of this case, because the petition to the Commission was filed after the statutory 60-day period elapsed. Section 73.01(5)(a) of the Wisconsin Statutes requires that a petition for review be filed with the Commission within 60 days of receipt of the Department's notice of action on a petition for redetermination. If no petition is filed within that allotted timeframe, then the related action of the Department becomes "final and conclusive." Wis. Stat. § 71.88(2). A petition is considered filed on the date of its receipt by the Commission unless sent via certified mail, in which case the filing date is the date the taxpayer sent the petition to the Commission. Wis. Stat. § 73.01(5); Wis. Admin. Code § TA 1.13(2). The requirement of timely filing is strictly construed. *See, McDonald Lumber Co. v. Dep't of Revenue*, 117 Wis. 2d 446, 344 N.W.2d 210 (1984).

The Notice of Action from the Department was delivered via certified mail to the Petitioners on November 27, 2009. The 60-day period permitted under Wis. Stat. § 73.01(5)(a) for the Petitioners to file a timely petition for review with the Commission expired on January 26, 2010. The Petitioners mailed their petition to the Commission via certified mail on January 29, 2010, which the Department points out is

63 days after their receipt of the Notice of Action. The petition was received by the Commission on February 1, 2010.

In their response to the Department's motion, the Petitioners do not dispute the relevant dates, the amounts claimed by the Department or the Department's position that their petition was not timely filed. The Petitioners' only request is to remove the penalties and interest included in the assessment.

Even though this petition for review was filed just three days late, the Commission is required to dismiss it for lack of jurisdiction pursuant to longstanding precedent. "To dismiss an appeal because it comes one day late may seem harsh. However, if statutory time limits to obtain appellate jurisdiction are to be meaningful they must be unbending." *Currier v. Dep't of Revenue*, 288 Wis. 2d 693, 706, 709 N.W.2d 520 (Ct. App. 2005), quoting *Ryan v. Dep't of Revenue*, 68 Wis. 2d 467, 472, 228 N.W.2d 357 (1975).

The Petitioners did not file a petition for review with the Commission within 60 days after their receipt of the Notice of Action on their petition for redetermination. The Commission has no authority under the Wisconsin Statutes to ignore or make exceptions to the 60-day provision. The Commission cannot act on a petition for review filed after the statutory due date other than to dismiss it for lack of timely filing.

CONCLUSION

The Department denied the Petitioners' Petition for Review on November 25, 2009. The Petitioners had 60 days from that point to file a petition before the

Commission. The Petitioners' Petition, however, was filed to the Commission on the 63rd day, depriving the Commission of statutory jurisdiction to hear this case. Based on our review of the relevant law, we must grant the motion to dismiss.

ORDER

The Department's motion is granted and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 31st day of January, 2011.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"