

STATE OF WISCONSIN
TAX APPEALS COMMISSION

LCM FUNDS FIVE NORTH LLC,

DOCKET NO. 10-M-51

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

This case comes before the Commission on the Respondent's motion to dismiss. The Petitioner in this matter is represented by Attorney Don M. Millis from the law firm of Reinhart Boerner Van Deuren, of the firm's office in Madison, Wisconsin. The Respondent in this case, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney John R. Evans, of Madison, Wisconsin. The Department argues that this matter must be dismissed because the Petitioner filed its manufacturing property report form ("the M-form") approximately 10 months late. For the reasons stated below, we agree that we lack jurisdiction and that this matter must be dismissed.

FACTS¹

1. Jurisdictional facts

1. The Department issued the 2009 notice of real property assessment for a total of \$4,250,000 to the Petitioner on June 8, 2009. (Commission File.)

2. The Petitioner filed a 2009 objection form before the Board of Assessors on July 13, 2009. (Respondent's Brief, Exh. 1.)

3. The Board issued an order for dismissal on February 19, 2010 stating that "it had been determined that the objector has not filed the prescribed standard manufacturing report form for the property." (Respondent's Brief, Exh. 3.)

4. The Petitioner filed a petition to this Commission on March 16, 2010. (Commission File.)

5. The Petitioner did not file an M-form with the Department on or before March 1, 2009. (Petitioner's Brief at 3.)

2. Other facts²

1. The Department sent a letter to the Petitioner on March 19, 2009 notifying the Petitioner that the due date for the M-form for the property at issue was March 1, 2009 and the forms for the property had not been received. The letter requested that the form be filed as soon as possible, and listed the web address on the internet where a blank form was available, along with information there as to how to

¹ Neither party filed a statement of proposed facts, but we have gathered the necessary facts from the parties' respective submissions.

² The Commission includes these undisputed facts to provide assistance and context.

file the form electronically. (Respondent's Brief, Second Affidavit of Attorney John R. Evans, Exh. 5.)

2. The taxpayer's accountant filed the form with the Department by way of an email she sent to the Department on January 25, 2010, stating that she had "just received [it] from the landlord representative." (*Id.*, Exh. 6.)

3. Effective January 1, 2008 the Department stopped mailing the Form M-P and M-R booklets to state-assessed manufacturers. (*Id.*, Exh. 6.)

RELEVANT STATUTE

70.995. State assessment of manufacturing property

(12)(a) The department of revenue shall prescribe a standard manufacturing property report form **that shall be submitted annually for each real estate parcel and each personal property account on or before March 1** by all manufacturers whose property is assessed under this section. The report form shall contain all information considered necessary by the department and shall include, without limitation, income and operating statements, fixed asset schedules and a report of new construction or demolition. **Failure to submit the report shall result in denial of any right of redetermination by the state board of assessors or the tax appeals commission.** If any property is omitted or understated in the assessment roll in any of the next 5 previous years, the assessor shall enter the value of the omitted or understated property once for each previous year of the omission or understatement. The assessor shall affix a just valuation to each entry for a former year as it should have been assessed according to the assessor's best judgment. Taxes shall be apportioned and collected on the tax roll for each entry, on the basis of the net tax rate for the year of the omission, taking into account credits under s. 79.10. In the case of omitted property, interest shall be added at the rate of 0.0267% per day for the period of time between the date when the form is required to be submitted and the date when the assessor affixes the just valuation. In the case of

underpayments determined after an objection under s. 70.995(8)(d), interest shall be added at the average annual discount interest rate determined by the last auction of 6-month U.S. treasury bills before the objection per day for the period of time between the date when the tax was due and the date when it is paid.

(b) The department of revenue shall allow an extension to April 1 of the due date for filing the report forms required under par. (a) if a written application for an extension, stating the reason for the request, is filed with the department on or before March 1.

(c) Unless the taxpayer shows that the failure is due to reasonable cause, if a taxpayer fails to file any form required under par. (a) for property that the department of revenue assessed during the previous year by the due date or by any extension of the due date that has been granted, the taxpayer shall pay to the department of revenue a penalty of \$25 if the form is filed 1 to 10 days late; \$50 or 0.05% of the previous year's assessment, whichever is greater, but not more than \$250, if the form is filed 11 to 30 days late; and \$100 or 0.1% of the previous year's assessment, whichever is greater, but not more than \$750, if the form is filed more than 30 days late. Penalties are due 30 days after they are assessed and are delinquent if not paid on or before that date. The department may refund all or part of any penalty it assesses under this paragraph if it finds reasonable grounds for late filing.

[emphasis added.]

DECISION

This appeal requires us to consider the effect of the late filing of the M-form. In brief, the taxpayer admits filing the form approximately 10 months late. The Department moves for dismissal based on the late filing. The taxpayer responds by arguing that the statute requires only that the form be filed. The first part of this opinion will set forth the arguments. The second part of the opinion will discuss the

law and will set forth the reasons we believe the Department is correct that the Commission lacks jurisdiction.

1. The Legal Arguments

A. The Department's Arguments

The Department argues that the Petitioner in this case failed to file the annual manufacturing property report as required by Wis. Stat. § 70.995(12)(a). The Department argues that the requirement is jurisdictional and, therefore, the Commission must dismiss this matter. The Department argues that the Petitioner's statutory construction argument that the M-form may be filed indefinitely into the future without forfeiting appeal rights ignores the plain language of the statute.

B. The Petitioner's Arguments

The Petitioner first argues that as the Department filed an affidavit in support of its motion that contains matters outside of the pleadings, the Commission should treat the Department's motion as if it were a motion for summary judgment.³ Second, the Petitioner argues that the untimely filing of the 2009 manufacturing property report does not preclude LCM from challenging its 2009 property tax

³ The parties here disagree whether the Department's motion to dismiss should be treated as a motion to dismiss or as a motion for summary judgment. The Petitioner argues that because the Department's filing included an affidavit that includes matters outside the pleadings, the Commission should treat the motion as if it were a motion for summary judgment. The Department responds that its affidavits simply authenticate the pleadings. After reading the cases the parties cite, we decline to treat the motion as a motion for summary judgment. First, the affidavits the parties filed in this matter are quite brief, less than two pages. Second, the affidavits do not introduce matters essential to the motion and we need not rely on them. See *CTI of Ne. Wis., LLC v. Herrell*, 2003 WI App 19, ¶¶ 6, 8, 259 Wis. 2d 756, 656 N.W.2d 794 (Ct. App. 2002) (conversion not necessary where court does not rely upon outside materials); *Wangard Partners, Inc. v. Graf*, 2006 WI App. 115, 294 Wis. 2d 507, 719 N.W.2d 523. Nevertheless, even if we had decided this case as a summary judgment motion, the result would not change as the material facts are not in dispute and the Department is, in our view, clearly entitled to judgment for the reasons stated herein.

assessment. The Petitioner argues that the section of the statute at issue does not say that failure to file a *timely* report results in the denial of any right of redetermination by the State Board of Assessors or the Commission. The Petitioner contends that any ambiguity in this statute must be construed in favor of allowing LCM to pursue its challenge.

2. Opinion

This case requires us to determine the legal effect on the Commission's jurisdiction of filing an M-Form approximately 10 months late. The Department argues that we do not have jurisdiction, and after reviewing the briefs, we agree with the Department. The first part of this opinion will set forth the rules of statutory construction that determine the answer to the question here. The second part of this opinion will state the reasons for our decision that we lack jurisdiction.

The rules concerning the Commission's statutory interpretation have been set forth many times. When interpreting a statute, we assume that the legislature's intent is expressed in the statutory language. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court*, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*; see also, Wis. Stat. § 990.01(1). Context and structure are also important factors, and construction should strive to avoid absurd or unreasonable results. "If this process of analysis yields a plain, clear statutory meaning, then there is

no ambiguity, and the statute is applied according to this ascertainment of its meaning.”

Id. “It is reasonable to presume that the legislature chose its terms carefully and precisely to express its meaning.” *State v. McKenzie*, 139 Wis. 2d 171, 177, 407 N.W.2d 274, 277 (Ct. App. 1987).

After reviewing the briefs, we believe the Department clearly has the better statutory construction argument that the taxpayer cannot file the M-form 10 months late and still challenge the assessment before the Board of Assessors and the Commission. There are two reasons for our decision. First, we believe this result is set forth by the language of the statute. When we examine the statute in question, we note that it sets a due date for the report of March 1, and states that the report “shall be submitted annually.” It further allows the taxpayer to request an extension to April 1 with *a reason* for the request. The statute also sets forth a graduated penalty structure for failure to file the form timely, with the initial penalty period set at 10 days, the second penalty period set at 11 to 30 days, and the third penalty period set at 30 days or more. Last, but not least, the statute proscribes review by the Board of Assessors or the Commission if no form is filed, stating the following in Wis. Stat. § 70.995(12)(a):

Failure to submit the report shall result in denial of any right of redetermination by the state board of assessors or the tax appeals commission.

[emphasis added.]

The issue in this case is the meaning of this sentence. Does it prohibit Commission review where the 2009 M-form (which was presumably due on March 1, 2009) is filed on January 25, 2010?

In determining the meaning of a single phrase or word in a statute, it is necessary to view it in the light of the entire statute. *Arneson v. Arneson*, 120 Wis. 2d 236, 243, 355 N.W.2d 16, 19 (Ct. App. 1984). Thus, we read the first sentence—which sets forth the March 1 filing deadline—in conjunction with the third sentence of the subsection, which prohibits review by the Commission or the Board. In sum, the statute, when read as a whole, sets up a system of annual reporting and filing the form 10 months late—in the next calendar year—is not, in our view, annual reporting.

The Petitioner points out that that the sentence in the statute denying review does not say the following:

Failure to submit the report *timely* shall result in denial of any right of redetermination by the state board of assessors or the Tax Appeals Commission.

While this is, of course, literally true, we find several faults with this argument.⁴ First, as mentioned above, we look at both of the relevant sentences together, not just the third sentence of the section in isolation. Second, the two most relevant sentences of the statute to the question here both use the term “shall” when setting forth the manufacturer’s obligation to file the March 1 report and in the denial of appeal rights. What the Petitioner’s construction does is essentially change the March 1 “shall” to “may.” Generally, the legislature’s use of the word “shall” creates a presumption the statute is mandatory, although there are admittedly circumstances in the case law

⁴ A number of Wisconsin court cases discuss the courts’ reluctance to add language to statutes to aid construction. For example, in *Lang v. Lang*, 161 Wis. 2d 210, 224, 467 N.W.2d 772 (1991), the court said that “We have long stated that we would refuse to read language into the plain language of a statute under the guise of liberal construction.”

where the word “shall” is nonetheless construed as directory if such a construction is “necessary to carry out the legislature's clear intent.” *Karow v. Milwaukee Co. Civil Serv. Comm'n*, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978). The case law states that the following factors should be considered in determining the legislature's intent when presented with the word “shall” in the statutory context regarding time limits: (1) the omission of a prohibition or a penalty; (2) the consequences resulting from one construction or the other; (3) the nature of the statute, the evil to be remedied and the general object sought to be accomplished by the legislature; and (4) whether the failure to act within the time limit works an injury or a wrong. *See id.* at 572, 263 N.W.2d 214; *see also Matlin v. City of Sheboygan*, 2001 WI App 179, ¶ 6, 247 Wis. 2d 270, 634 N.W.2d 115.

We agree with the Department that the “shalls” contained in the relevant provisions of Wis. Stat. § 70.995(12) are mandatory type “shalls.” We first note that there are indeed substantial penalties assessed against a manufacturer who files the report late. The presence of a penalty supports construing the statute as mandatory. *See Karow*, 82 Wis. 2d at 571-72, 263 N.W.2d 214. To the degree that they are relevant here, the other factors also point in the Department’s favor, as a directory construction would clearly undermine annual reporting.

The second reason we find for the Department is that the Petitioner’s construction sets up results and situations that would be incongruous. A few examples suffice. As the Department points out, the Petitioner’s construction of the statute would allow a taxpayer to file the report *at any time*, thus undermining annual reporting. We

note that this construction would also allow for filing the report after the Commission has considered the taxpayer's appeal. Also, the statute in question allows for an extension to April 1 with a reason, and there would be no need to request an extension if the period to file was not mandatory, thus rendering that particular part of the statute as something akin to surplusage. A directory construction would also allow for a bypass of the Board of Assessors, which is essentially what occurred here.⁵ We have, however, previously indicated that Board of Assessor review is necessary to review by the Commission, as the statute clearly outlines a two-step process of administrative review of which the Commission is the second step. *Pierce Milwaukee, LLC, v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-271 (WTAC 2009). In sum, the directory construction would mean no filing deadline at all. These examples lead us to the conclusion that the Department is correct that we lack jurisdiction over this appeal.

In support of its response, the Petitioner cites *State v. Bertrand*, 2003 WI 102, 263 Wis. 2d 678, 665 N.W.2d 244 for the proposition that review should be allowed here even though the form was 10 months late. In that case, a prisoner petitioned for a writ of certiorari, seeking review of procedural issues relating to prison discipline. The circuit court, however, dismissed the writ due to lack of jurisdiction, and the Court of Appeals affirmed. The Wisconsin Supreme Court, however, held that procedural rules governing service of the petition were ambiguous and that the prisoner's service of the petition on the warden, rather than on the Secretary of Corrections, was reasonable and

⁵ The Board sent a letter to the Petitioner on February 19, 2010 stating that it lacked jurisdiction to hear the appeal because of the failure to submit the report.

gave the circuit court jurisdiction to hear the petition. The Supreme Court stated the following:

In *Peterson II*, this court affirmed the court of appeals' decision, stating: "We have long adhered to the rule that 'strict compliance with procedural statutes is necessary to obtain jurisdiction to review administrative agency decisions.' However ... 'the statutes must clearly set forth the procedural requirements' necessary to pursue such review." *Peterson II*, 226 Wis. 2d at 633, 594 N.W.2d 765 (quoting *Trojan v. Bd. of Regents*, 104 Wis. 2d 277, 283-84, 311 N.W.2d 586 (1981)). Further, we noted that "where a procedural statute lacks 'specific direction' clearly indicating who is to be served with notice, 'an ambiguity exists, [such that the statute must be] liberally construed so as to permit a determination upon the merits of the controversy if such construction is possible.'" *Id.*

We believe that *Bertrand* is inapposite here for two reasons. First, the statute in this case is not ambiguous as to what must be done to secure review. Second, the context of *Bertrand* was the proper service of timely notice papers, not the extension of a filing deadline.

Our holding here is bolstered by previous cases which have held that the filing of the M-form or its equivalent is jurisdictional. For example, in *Metal Plate & Products, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶201-469 (WTAC 1978) the Commission held that a manufacturer who failed to timely submit to the Department the standard manufacturing property report, as required by Wis. Stat. § 70.995(12), was barred by those provisions from seeking redetermination of its personal property tax assessment by the Commission. Also, in *Du-Well Mfg. Co., Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-021 (WTAC 1982) a corporation failed entirely to file a

manufacturing property return. When the Department assessed tax on the taxpayer's manufacturing property, the corporation filed an objection to the assessment. The Commission held that as the failure to file a manufacturing property return is an absolute bar to a redetermination of the assessment, the taxpayer's complaint had to be dismissed.

In addition to those two cases, the Commission has ruled on numerous occasions that various other requirements of this statute are jurisdictional:⁶

*****City of West Allis v. Dep't of Revenue and Allis Chalmers*, Wis. Tax Rptr. (CCH) ¶202-656 (WTAC 1985)(appeal to the Commission untimely where city failed formally to authorize appeal in statutory time frame; informal approval not acceptable and neither is formal authorization after the fact.)

*****Quad/Graphics, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-174 (WTAC 1995)(60 day limit is jurisdictional where notice of assessment was mailed to the previous owner and new owner received the assessment for the first time several months later).

**** *Food Service Products Co., d/b/a Moore's Food Products v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-117 (WTAC 1995)(Commission dismissed the petition for review due to lack of jurisdiction where Petitioner failed to include an opinion of value in the form of objection.)

*****Seats, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-762 (WTAC 2004)(The Commission held that the Petitioner's failure to comply with Wis. Stat. § 70.995(8)(c) deprived the Commission of subject matter jurisdiction.)

⁶ On several occasions, the Commission has upheld the imposition of penalties for late filing. For example, in *Universal Forest Products, Inc., v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-082 (WTAC 1982) the Petitioner signed all three 1981 report forms under the date of February 28, 1981 but did not mail them until March 3, 1981, and they were received by the Department on March 4, 1981. The reports were due on or before March 2, 1981. The Commission stated that "The statute does not give this Commission latitude to excuse late filing in situations such as this or in any situations."

*****General Electric and GE Healthcare*, Wis. Tax Rptr. (CCH) ¶401-172 (WTAC 2009)(failure to include valuation information on the PA-132 deprived both the Board and the Commission of jurisdiction).⁷

Petitioner's brief appropriately points out that in certain circumstances construction favors a determination on the merits, and we acknowledge that in Wisconsin, there is a tradition of avoiding dismissal of civil actions based on mere technical errors and omissions. *See, Gaddis v. La Crosse Products, Inc.*, 198 Wis. 2d 396, 542 N.W.2d 454 (1996); *Rabideau v. Stiller*, 2006 WI App 155, 295 Wis. 2d 417, 720 N.W.2d 108 (setting forth a methodology for determining whether a pleading in circuit court is fatally defective). Additionally, Wis. Stat. § 805.18 requires that in certain circumstances that errors or defects in the pleadings or proceedings shall be disregarded. Filing deadlines such as that at issue here, however, do not fall into the category of a mere "technical irregularity." Instead, a long line of cases shows that time limits are often enforced to the letter in administrative and tax matters. *See, e.g., Kohnke v. ILHR Department*, 52 Wis. 2d 687, 191 N.W.2d 1 (1971); *Brachtel v. Dep't of Revenue*, 48 Wis. 2d 184, 179 N.W.2d 921 (1970) (holding that timely service by the taxpayer is indispensable to trigger judicial review of the Commission's decision); *Ryan v. Wisconsin Dep't of Revenue*, 68 Wis. 2d 467, 228 N.W.2d 357 (1975) (Strict compliance with the statutes is required); *Whistle B. Currier v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-866 (WTAC

⁷ We are aware of only one occasion where the Commission has held a provision of this statute not to be jurisdictional. In *Village of West Milwaukee v. Dep't of Revenue, and Harnischfeger Corporation, Fleischmann-Kurth Malting Co., Inc., General Electric Medical Systems Business Group, General Electric Appliances, Krause Milling Company*, Wis. Tax Rptr. (CCH) ¶203-264 (WTAC 1991) the municipality's appeal was allowed even though its petition for appeal was not verified by a member of the municipality's governing body. The Commission nevertheless held that the verification provision of Wis. Stat. § 73.01(5) was not intended by the legislature to be jurisdictional and noncurable, but was merely a directorial adjunct to the requirement of a statement that the governing body had authorized the appeal.

2005) (“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,” quoting *Kohnke*).⁸ In our view, this matter fits within this line of cases, as filing the M-form 10-months late is not merely a technical error or omission.

CONCLUSION

We grant the Department’s motion to dismiss for two reasons. First, the Department has the better statutory construction argument. Second, the Petitioner’s proposed construction would lead to results that would, in our view, be incongruous.

IT IS ORDERED

The Department's motion to dismiss this matter is granted.

Dated at Madison, Wisconsin, this 29th day of December, 2011.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: “NOTICE OF APPEAL INFORMATION”

⁸ We view our holding in this case as limited to situations where the M-form is filed the year after it is due.