

STATE OF WISCONSIN
TAX APPEALS COMMISSION

CINDY EDWARDS,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NO. 11-I-323
AND 11-I-362

(AMENDED)
RULING AND ORDER

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission for decision on Respondent's Motion to Dismiss Petitioner's petition for review as untimely. The Petitioner, Cindy Edwards, of Eau Claire, Wisconsin, appears by Attorney James G. Moldenhauer of Eau Claire, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Chief Counsel Dana J. Erlandsen. The Department has filed an affidavit and a supplemental letter in support of its motion. Petitioner has filed an affidavit in response to the Department's motion. For the reasons stated below, we find that the Petitioner did not file her petition in a timely manner as required by statute, and therefore we find dismissal is appropriate.

FINDINGS OF FACT

1. On June 3, 2011, the Department issued an Income Tax Assessment Notice, assessing the Petitioner additional individual income tax for tax periods ending December 31, 2004, through December 31, 2006. (Department's Exhibit 1.)

2. On June 3, 2011, the Department issued an Income Tax Assessment Notice, assessing the Petitioner additional individual income tax for tax periods ending December 31, 2007, through December 31, 2009. (Department's Exhibit 2.)

3. Petitioner's petition for redetermination was filed timely on or about August 2. (Department's Exhibit 3.)

4. The Department requested additional information by way of a letter to Petitioner dated August 10, 2011. Petitioner did not provide the requested information, so the Department denied her Petition for Redetermination in notices erroneously dated September 23, 2011. (Department's Exhibit 4, pp. 1 and 2.)

5. The notices were printed September 14, 2011, with the intent of mailing the following week; instead the Resolution Officer sent the notices to Petitioner and Petitioner's attorney on September 14, 2011. (Affidavit of Resolution Officer, ¶¶ 4 and 5.)

6. On September 16, 2011, Petitioner signed a return receipt for the certified delivery of the notices. (Department's Exhibit 5.)

7. On September 19, 2011, Petitioner's attorney signed a return receipt for the certified delivery of the notices. (Department's Exhibit 5.)

8. The Clerk of Circuit Court's office was closed Friday, November 25, 2011, in an extended observance of the Thanksgiving holiday. (Petitioner's Exhibit A.)

9. The Commission's office was open on Friday, November 25, 2011. (Commission records.)

10. On November 28, 2011, the Commission received Petitioner's petition for review of both notices via certified mail postmarked November 26, 2011. Thus, the petition was deemed filed on November 26, 2011. (Commission file.)

11. On January 18, 2012, the Department filed a motion to dismiss the Petitioner's petition as untimely, along with an affidavit with exhibits in support of the motion. (*Id.*)

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 statutes at issue here outline the requirements for filing a valid and timely petition for review with the Commission:

Wis. Stat. § 73.01(5)(a): 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.

Wis. Stat. § 73.01(5)(a): . . . For purposes of this subsection, 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.

Wis. Stat. § 801.14(2): Whenever under these statutes, service of pleadings is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party in person is ordered by the court.

TA 1.39 Practice and procedures. Except as provided in s. TA 1.53, the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state.

ANALYSIS

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 the Commission office. See *Edward Mischler v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-159 (WTAC 1983). The one exception in Wis. Stat. § 73.01(5)(a) states that a petition is timely if it is 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. In this case, petition was sent via certified mail and is deemed received by the Commission on its certified mailing date of November 26, 2011.

The question in this case involves the beginning date for the 60-day time period for filing the petition. The statutes indicate that appeals may be taken “within 60 days of the redetermination.” We have several dates to consider:

- 1) September 14, 2011 – the date the notice of redetermination was generated;
- 2) September 16, 2011 – the date Petitioner signed for receipt of the notice;

- 3) September 19, 2011 – the date Petitioner’s attorney signed for receipt of the notice;
- 4) September 23, 2011 – the erroneous date of the notice; and
- 5) September 26, 2011 – the erroneous date of the notice plus 3 days for mailing as is granted under Wis. Stat. § 801.15(5).

Petitioner takes the position that the erroneous date of the denial notice should control and that 3 mailing days should be added to the date of the notice. We will consider the merits of each alternative, but, regardless of which starting date applies, we find Petitioner’s filing beyond the time allowed by statute.

1) September 14, 2011 (Actual date notice was printed and mailed)

If we take the statutory provision of “60 days from the redetermination” to mean exactly that, the earliest beginning date would be the date denial notice was actually created. Using that date, September 14 as the starting date, the 60-day period in which to appeal would have expired on Sunday, November 13. Because that date fell on a Sunday, that calculated deadline would have been extended to Monday, November 14. Petitioner’s November 26 appeal was clearly filed after that deadline.

As noted above, although the statute here does not explicitly indicate the filing time begins upon receipt of the redetermination, the parties do not question that interpretation, nor does the Commission. We recognize that a notice is not always sent out for mailing on the date it is issued, and it would be unreasonable to hold that a taxpayer’s time to be appeal is essentially shortened by a delay in mailing. Moreover, the Department’s notice instructs the taxpayer, “Your appeal must be mailed or faxed within 60 days **of your receipt** of this notice.” (Department’s Exhibit 1 (emphasis added).) Thus,

absent proof of same day receipt, Petitioner's time to appeal cannot begin on the date the notice was created.

2) September 16, 2011 (Date Petitioner signed for receipt)

Although not explicitly stated in Wis. Stat. 73.01(5)(a), the beginning date is interpreted to begin on the date of receipt of the notice of redetermination. (*See* Department's Exhibit 1 - Appeal Rights and Procedures.) Petitioner signed for receipt of the denial notice on September 16, 2011. Using that date as the starting date, the 60-day period in which to appeal would have expired on Tuesday, November 15. Petitioner's November 26 appeal was clearly filed after that deadline.

3) September 19, 2011 (Petitioner's attorney signed for receipt)

Petitioner is and was represented by counsel at the time of the petition for review. Petitioner's attorney signed for receipt of the denial notice on September 19. Using that date as an arguably appropriate starting date, the 60-day period in which to appeal would have expired on Friday, November 18. Petitioner's November 26 appeal was clearly filed after that deadline.

4) September 23, 2011 (Date printed on notice)

Although we know that the Petitioner and her counsel both received the notice on earlier dates as noted above, the denial notice was erroneously dated September 23. Although we do not agree that this date is a viable candidate for a starting date, using that date, the 60-day period in which to appeal would have expired on Tuesday, November 22. Petitioner's November 26 appeal was clearly filed after that deadline.

5) September 26, 2011 (Date on notice plus 3 days)

Assuming again, *arguendo*, that the erroneous date of the notice should be used for calculating the time for appeal, Petitioner argues for a 3-day extension to the 60 days allowed applying Wis. Stat. § 801.15 (5) as guidance.¹ We note that, generally, the statutes provide a 3-day extension of time from a mailing date when service is accomplished by regular mail. However, service in this instance was accomplished by certified mail and the date of actual receipt is known; thus, the purpose of the 3-day rule is not applicable to the facts at hand. Following Petitioner's argument, using the denial notice plus 3 days for mailing as a start date, the 60-day period in which to appeal would have expired on Friday, November 25. Petitioner's November 26 appeal was clearly filed after that deadline.

Petitioner then argues for an even larger grace period because "most courts" were closed on Friday, November 25, in an extended observance of the Thanksgiving holiday. Specifically, the Dane County Clerk of Court's office was closed on that date. Thus, Petitioner asserts that the time for appeal was extended to Monday, November 28, making the appeal timely.

While the Commission's practice and procedures are said to "substantially follow" those of the circuit courts, that does not mean that the Commission's rules are those of the circuit court. To hold otherwise would, for example, require petitions for

¹ This is the most liberal possible interpretation. It should be remembered that both Petitioner and her attorney signed for actual receipt of the notice on September 16 and 19, 2011, respectively.

appeal to be filed with the clerk of courts instead of with the Commission's clerk. The procedural rules must be put into the context of this Commission.

The circuit court rules dictate the time for filing cannot end on a day when the clerk of court's office is closed. Wis. Stat. § 801.15(1)(b). Substantially following that rule at the Commission means that the time to appeal to the Commission cannot end on a day when the Commission's office is closed. The Commission's office was not closed on November 25; thus, Petitioner's filing was due on that date but it was not filed until November 26, one day after the latest possible calculation.

CONCLUSION

Under any scenario chosen above, we conclude that Petitioner failed to file a timely petition for review with the Commission within 60 days of the redetermination. This Commission notes with disappointment the frequency with which parties wait until the last minute for filing of appeals; when appeals are not timely, we do not have the opportunity to consider the merits of these matters.

In this instance, the Commission lacks subject matter jurisdiction over the petition for review. This finding 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).

DECISION AND ORDER

We find the Petitioner's petition was not timely filed as defined by state statutes and, thus, this Commission lacks jurisdiction in this matter. The Department is, therefore, 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 11th day of June, 2012.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"