

STATE OF WISCONSIN
TAX APPEALS COMMISSION

VIDUSHI VASUDEVA,

DOCKET NO. 12-S-014

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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, Vidushi Vasudeva, of Shorewood, Wisconsin, appears by Attorney Vincent J. Bobot of Milwaukee, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer. Both parties have filed briefs and affidavits in support of their respective positions. 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 May 10, 2011, the Department issued a personal liability assessment of sales and use tax against the Petitioner for the tax period beginning February 1, 2007, and ending April 30, 2010. (Department's Exhibit 1.)

2. Petitioner's Petition for Redetermination was filed timely by letter dated June 12, 2011. (Department's Exhibit 2.)

3. The Department denied the Petition for Redetermination in a notice dated November 18, 2011. (Department's Exhibit 3.)

4. On November 21, 2011, a return receipt for the certified delivery of the notice was signed at the Petitioner's usual place of abode. (Department's Exhibit 4.)

5. The filing deadline, 60 days from the date Petitioner signed for the notice, was January 20, 2012.

6. On January 23, 2012, the Commission received Petitioner's Petition for Review via U.S. Priority Mail postmarked January 15, 2012. (Commission file.)

7. On February 14, 2012, the Department filed a Motion to Dismiss the Petitioner's Petition for Review as untimely.

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. § 77.59(6)(a): The [department's] redetermination shall become final 60 days after receipt by the petitioner of notice of the redetermination unless, within that 60-day period, the petitioner appeals the redetermination under par. (b).

Wis. Stat. § 77.59(6)(b): Appeals from the department's redetermination shall be governed by the statutes applicable to income or franchise tax appeals . . .

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 . . . the assessment, refund or denial of refund shall be final and conclusive.

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. . . . 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.

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, however, the Petition for Review was sent not by certified mail but via U.S. Priority Mail. The Petitioner otherwise complied with the remaining 3

requirements for the exception. The Petition was mailed before the deadline for Petitioner's appeal but was not received by the Commission until after the expiration of the deadline. Petitioner argues that U.S. Priority Mail is at least the equivalent of certified mail so as to qualify for the exception under Wis. Stat. § 73.01(5)(a). The Department refutes that assertion. We agree with the Department.

Petitioner argues 1) the United States Post Service (USPS) guarantees U.S. Priority Mail delivery in 2-3 days so presumably the Petition should have been delivered on time, 2) the Commission encourages U.S. Priority Mail instead of certified mail, 3) U.S. Priority Mail satisfies the spirit of the certified mail exception to the requirements of Wis. Stat. § 73.01(5)(a) because mailing date and delivery dates can be determined with certainty through a tracking system, and therefore U.S. Priority mail is actually stricter than certified mail.

First, as for reliance on the USPS delivery descriptions, we find several reasons to find in the Department's favor. Most importantly, the USPS website¹ indicates that the United State Postal Service does not guarantee delivery of U.S. Priority Mail in 2-3 days. Specifically, the U.S. Priority Mail page explains that delivery occurs in 2 days "in most cases." *United State Postal Service*, <https://www.usps.com/send/priority-mail.htm> (last visited August 16, 2012). The USPS website contains a Frequently Asked Questions (FAQ) section addressing estimated delivery times for U.S. Priority Mail in what is

¹ The United States Post Office website can be found at www.usps.com. Copies of the pages referenced from this site are in the Commission file.

currently #3 of the Top 10 FAQs. The Delivery Time page displays the expectations for U.S. Priority Mail in the following portion of its chart:

Domestic Classes of Mail Estimated Delivery Time			
Class of Mail	Estimated Delivery Time	Trackable	Guaranteed (money back if not on time)
Priority Mail® service / Priority Mail Flat Rate	Typically two to three days to most locations in the US (Specific delivery standards may be available when postage is calculated). This is not a guaranteed service.	No	No

[http://faq.usps.com/eCustomer/iq/usps/request.do?session={aa931140-e7b4-11e1-6c2c-000000000000}&view\(\)=c{12adaeb0-57e2-11dc-51b6-000000000000}&varset\(source\)=sourceType:topNFAQ&tTitle=Top%20FAQ's](http://faq.usps.com/eCustomer/iq/usps/request.do?session={aa931140-e7b4-11e1-6c2c-000000000000}&view()=c{12adaeb0-57e2-11dc-51b6-000000000000}&varset(source)=sourceType:topNFAQ&tTitle=Top%20FAQ's) (last visited August 16, 2012).

Second, Petitioner cites several Department of Revenue publications as evidence that our Commission supports her position. Publications of the Department of Revenue cannot be imputed to the Commission. This Commission is a state agency which is separate from and independent of the Department of Revenue. The distinction is an important one; the Commission does not publish advice nor approve advisory publications that are issued by the Department. The Commission is charged by statute with the responsibility of hearing and deciding disputes arising between taxpayers and the Department.

Third, Petitioner asserts that using U.S. Priority Mail, like using registered mail, is actually stricter compliance with the statute than using certified mail. For this proposition, Petitioner cites a case which confers jurisdiction over a petition filed by

registered mail as though it were filed by certified mail. *Patterson v. Board of Regents*, 103 Wis. 2d 358, 309 N.W.2d 3 (Ct. App. 1981) *petition denied*, 103 Wis. 2d 701 (1981). In evaluating the nature of registered mail in the context of the need for strict compliance with the filing requirements, the Wisconsin Court of Appeals in *Patterson* held that registered mail was an even stricter form of mailing than the statute demands and was therefore an acceptable substitute for certified mail. *Id.*

The *Patterson* case correctly points out that registered mail is indeed a stricter form of compliance than certified mail. This holding is echoed in the USPS Domestic Mail Manual. (Department's Exhibit 6, section 2.2.1.) However, the USPS advises caution with other types of confirmation. For instance, as to signature confirmation, the USPS manual states the following: "Some statutes and regulations governing the mailing of documents with legal significance may require the use of Certified Mail or Registered Mail rather than Signature Confirmation." (Department's Exhibit 6, section 11.2.) Likewise, the manual cited above expressly states as to delivery confirmation, "Some statutes and regulations governing the mailing of documents with legal significance may require the use of Certified Mail or Registered Mail rather than Delivery Confirmation." (Department's Exhibit 6, section 10.2.) Such options as delivery confirmation and signature confirmation do not meet the statutory standard of certified mailing.

The Petitioner argues that U.S. Priority Mail is trackable online and therefore satisfies the concern which is solved by certified mailing. As noted in the USPS chart above, U.S. Priority Mail is not considered "trackable" although admittedly some information regarding the delivery of the item is available online. Moreover, the

description of U.S. Priority Mail lists certified mailing as an available add-on service for U.S. Priority Mail. <https://www.usps.com/send/insurance-and-extra-services.htm> (last visited August 16, 2012). The Petitioner could have but did not avail herself of this opportunity. We question, if U.S. Priority Mail were a stricter form of delivery or the equivalent of certified mail, what value would the added expense for certified mailing provide?

Commission case law shows that the Commission has been reticent to open a Pandora's Box as to when a petition for appeal is properly filed. *McDonald v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 201-858 (WTAC 1981). The Commission in *McDonald* declined to expand the allowable means of filing, pointing out that the Commission does not have inherent powers but "only those conferred upon it by statute." *Id.* This Commission emphasized in *McDonald* that Wis. Stat. § 73.01(5)(a)² is unambiguous in its language and is to be strictly construed.

Although technology may have provided us with better ways to track delivery of items since the time the statute at issue was enacted, it is not the role of this Commission to rewrite or grant exceptions to the laws or statutes to accommodate these perceived advances. The legislature could perhaps have granted this power to an administrative body such as this Commission, but it clearly did not. In fact, generally filing and timing requirements to the Commission and the courts in tax cases are strictly

² At the time of *McDonald*, Wis. Stat. § 73.01(5)(a) allowed only 30 days for the filing of a Petition for Review with the Commission. The time has since been extended to 60 days by the state legislature.

construed as “unbending.” *See Whistle B. Currier v. Dep’t of Revenue*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

It is the role of the legislature to decide if and when to broaden the description of what is an acceptable means of mailing a petition to the Commission. At this point, the statute expressly allows an exception for certified mail and caselaw has expanded that exception to include registered mail but no other manner of delivery. Clearly, we lack the authority to expand the exception further.

CONCLUSIONS OF LAW

1. The Petition for Review to the Commission, postmarked via U.S. Priority Mail before the 60th day, but not received by this Commission until after the 60th day, was not timely filed.

2. U.S. Priority Mail is not an acceptable substitute for certified mail to come within the exception of Wis. Stat. § 73.01(5)(a).

3. The Commission lacks jurisdiction to hear this matter. 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).

ORDER

The Department is 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 17th day of August, 2012.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: **“NOTICE OF APPEAL INFORMATION”**