

STATE OF WISCONSIN
TAX APPEALS COMMISSION

MICHAEL SCHRAUFNAGEL(P),

DOCKET NO. 05-I-161(P)

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

JENNIFER E. NASHOLD, CHAIRPERSON:

This matter comes before the Commission for a ruling on a motion for an order deeming matters admitted and for summary judgment filed by respondent, Wisconsin Department of Revenue (Department).

Petitioner, Michael Schraufnagel, either represents himself or is represented by Mary J. Wilcox. (As set forth below, this issue must be determined). The Department is represented by Attorney Mark S. Zimmer, who has filed a motion, a brief in support thereof, and an affidavit with attached exhibits. Petitioner has not filed any response to the motion.

Having considered the motion and the entire record herein, the Commission finds, rules, and orders as follows:

FACTS

1. By notice dated July 26, 2004, the Department issued an income tax assessment to petitioner for tax years 2000, 2002, and 2003 in the amount of \$2,444.98,

including interest and penalty.

2. The Department states, "Due to the amount in controversy, this matter does not qualify as a small claims case." (Answer, filed October 31, 2005.)

3. By letter dated September 13, 2004 from Mary J. Wilcox, petitioner filed a petition for redetermination with the Department. The last paragraph of the September 13, 2004 letter states, "Please contact the taxpayer in the event you have any other questions."

4. By notice dated August 8, 2005, the Department denied petitioner's petition for redetermination.

5. On October 7, 2005, petitioner filed a petition for review with the Commission by certified mail received on October 12, 2005. The petition is signed by petitioner. The last paragraph provides Ms. Wilcox's name and address, stating that she is "authorized to appear and act on my [petitioner's] behalf."

6. Ms. Wilcox did not file a Notice of Appearance with the Commission, and no correspondence from her has been received by the Commission.

7. On November 14, 2005, the Department sent Ms. Wilcox a copy of its First Request for Admissions via first class mail. Both the cover letter and Request for Admissions were addressed to Ms. Wilcox. Neither document indicates a copy was provided to petitioner.¹

¹ The Affidavit of Department paralegal Julie A. Lotto, attached to the Department's motion for summary judgment, states only that the Request for Admissions was sent to Ms. Wilcox and does not state that it was sent to petitioner. In the Department's brief in support of its motion, however, the Department's attorney states, in a footnote, that the Request for Admissions was also sent to the taxpayer. Because the affidavit does not support that a copy was sent to petitioner, we do not so find.

8. As of January 10, 2006, the Department had not received any response from Ms. Wilcox or petitioner, nor had the post office returned to the Department its correspondence to Ms. Wilcox.

9. On January 11, 2006, the Department filed its Notice of Motion, Motion for Order that Matters are Admitted, and Motion for Summary Judgment, addressed to Ms. Wilcox.

10. On January 12, 2006, the Commission issued its Briefing Order, giving petitioner until February 13, 2006 to file a response to the Department's motion. The Commission mailed the Briefing Order to Ms. Wilcox at the address provided on the petition for review. The Commission's correspondence was not returned to it by the post office.

11. No response to the Department's motion has been filed on behalf of petitioner.

RULING

The Department asserts that because petitioner did not respond to its Request for Admissions within the 30-day period prescribed by Wis. Stat. § 804.11(1)(b), the matters contained in the request are deemed admitted. If the matters are admitted, the Department asserts, summary judgment in favor of the Department is warranted.

Wisconsin Statutes § 804.11(1)(b) states:

804.11 Requests for Admission.

(1) REQUEST FOR ADMISSION.

* * *

(b) . . . The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may

allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or attorney. . .

Wisconsin Statutes § 804.11(2) states in part that "[a]ny matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

These provisions are made applicable to the Commission by Wis. Admin. Code § TA 1.35(1), which provides in part, "Parties may obtain discovery before the commission in the same manner and by the same methods as provided under ch. 804, Stats., unless inconsistent with or prohibited by statute, or as otherwise determined by the Commission." Wisconsin Administrative Code § TA 1.39 further provides in part, "The practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state."

The decision whether to allow a party to amend or withdraw an admission or to relieve a party from its failure to respond under Wis. Stat. § 804.11(1)(b) is within the discretion of the Commission, regardless of whether the aggrieved party has brought a motion for relief. *See Schmid v. Olsen*, 107 Wis. 2d 289, 294, 299, 320 N.W.2d 18 (Ct. App. 1982), *reversed in part on other grounds*, 111 Wis. 2d 228, 330 N.W.2d 547 (1983).

The Commission concludes that, under the circumstances of this case, the matters should not be deemed admitted at this time. We first note that the evidence in this case shows that the November 14, 2005 Request for Admissions was sent to Ms. Wilcox, and not to petitioner, despite the fact that in the September 13, 2004 petition for

redetermination, Ms. Wilcox directed the Department to "contact the taxpayer in the event you have any other questions," (Affidavit of Julie A. Lotto, Ex. 2), indicating that her representation of petitioner would not be ongoing. Although in his petition for review filed with the Commission on October 12, 2005, petitioner states that he authorized Ms. Wilcox to appear and act on his behalf, this assertion is not confirmed by Ms. Wilcox herself and appears to contradict her statement in the petition for redetermination indicating that, henceforth, the Department should deal directly with petitioner rather than Ms. Wilcox. The record does not contain any indication that the Department made any other attempts to contact Ms. Wilcox or petitioner beyond its correspondence of November 14, 2005.

Moreover, the Commission, based on the representation made by petitioner in his petition for review and without the benefit of a thorough review of the record, sent the Briefing Order to Ms. Wilcox only. There is no indication in the record that petitioner is even aware of the Department's motion to deem matters admitted and for summary judgment.

Based on the foregoing, the Commission is concerned that petitioner and Ms. Wilcox have different views as to whether the latter continued to represent him following the filing of the petition for redetermination. Assuming Ms. Wilcox is no longer representing petitioner, under the circumstances of this case, it would be an overly drastic result for the Commission to now deem matters admitted which petitioner was not even aware of and which could mandate summary judgment in

favor of the Department, even acknowledging that petitioner bears responsibility for, and takes some risk in, choosing his representative.

As a final matter, there is a question here as to whether the amount in issue renders this a small claims case, as suggested by Wis. Stat. § 73.01(b), the Assessment, and the Notice of Action, or a large claims case, as stated by the Department in its Answer, which statement the Commission initially relied upon, as is its usual practice. This question must be answered for the Commission to determine how to proceed in this case.

In view of the foregoing, the Commission orders as follows.

ORDER

(1) The Department's motion to deem matters admitted and for summary judgment is denied without prejudice, subject to renewal, if appropriate, in accordance with the orders below.

(2) A **telephone status conference shall be held on April 27, 2006 at 11:00 a.m.** If any party is unavailable to participate in the conference at that date and/or time, the party shall immediately contact the Commission so the conference can be rescheduled.

(3) **No later than April 20, 2006**, the parties shall **provide the Commission with a telephone number** where they can be reached for the April 27, 2006 telephone status conference.

(4) At the telephone status conference:

(a) Petitioner (and Ms. Wilcox, if she appears) shall state

whether Ms. Wilcox is representing him in this matter. If she is, Ms. Wilcox shall show why the matters which were the subject of the Department's Request for Admissions should not be deemed admitted under Wis. Stat. § 804.11(1)(b).

(b) The Department shall show why this matter should not be treated as a small claims case under Wis. Stat. § 73.01(1)(b).²

Dated at Madison, Wisconsin, this 12th day of April, 2006.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

² Until shown otherwise, the Commission continues to treat this case as a large claims case.