

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

WILLIAM E. LYMAN,

DOCKET NO. 05-W-143

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This case comes before the Commission on the motion of the Wisconsin Department of Revenue (“respondent”) to dismiss the petition for review on the basis that the Commission lacks jurisdiction under Wis. Stat. § 73.01(5)(a).

Attorney Scott Lawrence of Lawrence & Des Rochers, S.C., represents petitioner, and has filed a petition for review with supporting exhibits, a brief, and affidavit with exhibits in response to the motion. Attorney Michael J. Buchanan represents respondent, and has filed a brief, affidavits with exhibits, and a reply brief and affidavit in support of the motion.

Having considered the entire record, including the motion, affidavits, exhibits, and briefs of both parties, the Commission hereby finds, rules, and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS

1. By notice dated January 14, 2002, respondent issued an assessment

of delinquent withholding taxes, interest, and penalties to petitioner in the total amount of \$44,725.32 (the "Assessment"). The Assessment was sent to petitioner at 224 North Fulton Street, Princeton, Wisconsin 54968, the same address currently used by petitioner (the "home address"). (Petition for Review, Ex. B attachment.)

2. Respondent issued the Assessment against petitioner as a responsible person of Terrace Management Group, LLC ("Terrace Management"), based on his failure to remit to respondent certain taxes withheld from wages of employees of Terrace Management under Wis. Stat. § 71.83(1)(b)2. *Id.* These withholding taxes appear to relate to tax years 1997 through 1999. (Affidavit of Michael J. Buchanan, dated October 28, 2005 ("Buchanan Aff. 2"), ¶ 2 and Ex. F.)

3. Petitioner denies having been a responsible person of Terrace Management as required under the Assessment, and has submitted substantial evidence indicating that he was not such a responsible person. (Petition, ¶ 4 and Exhibits; Affidavit of William Lyman, dated December 22, 2005 ("Lyman Aff.")).

4. Petitioner denies receiving the Assessment until a meeting held with respondent's personnel on April 14, 2005. (Lyman Aff., ¶ 6.)

5. The Assessment became delinquent on March 21, 2002. (Affidavit of Michael J. Buchanan, dated September 29, 2005 ("Buchanan Aff. 1"), ¶ 2.)

6. Respondent sent a Notice of Delinquent Tax ("Notice") related to the Assessment to petitioner at his home address on each of the following dates: June 17, 2002; June 7, 2004; August 2, 2004; September 6, 2004; December 6, 2004; and January 3, 2005. (Affidavit of Dennis Wogsland, dated September 27, 2005, ¶¶ 2-8.)

Pursuant to a Power of Attorney filed with respondent by petitioner, respondent sent a Notice of Delinquent Tax related to the Assessment to petitioner in care of his attorney of record on February 7, 2005 and March 7, 2005. (Wogsland Aff., ¶¶ 9-12.)

7. The Assessment and all related notices were properly mailed to petitioner, and none were returned to respondent by the United States Postal Service. (Wogsland Aff., ¶ 13; Affidavit of John Mickelson, dated September 27, 2005, ¶ 6.)

8. From April 2002 through 2004, Thomas Sommers, a Revenue Field Agent of respondent, was responsible for collecting petitioner's delinquent tax account related to the Assessment. (Affidavit of Thomas Sommers, dated October 13, 2005 ("Sommers Aff. 2"), ¶ 2.) During that period, Mr. Sommers had numerous contacts with petitioner and his representatives during which they discussed the Assessment, and neither petitioner nor his representatives ever asserted that petitioner had not received the Notice. (*Id.*, ¶ 3.) During his conversations with Mr. Sommers, petitioner asserted that he should not have been assessed because he was not a responsible person for remitting withholding taxes of Terrace Management. (*Id.*, ¶ 5.)

9. On June 21, 2002, a tax warrant lien in the amount of \$47,762.95 for delinquent withholding taxes was filed in Green Lake County, Wisconsin (Green Lake Co. Cir. Ct., Case No. 02-TW-076), against any property owned by petitioner, and petitioner had no other delinquent tax liabilities owing to respondent at that time. (Buchanan Aff. 1, ¶ 2 and Ex. D, Complaint, ¶ 2.6.) The tax warrant states that the "judgment/lien date" is January 14, 2002, the date of the Assessment, and that the "type of tax" is withholding. (Buchanan Aff. 1, Ex. A.)

10. Petitioner “had become aware” of the tax warrant filed on June 21, 2002 sometime prior to April 14, 2005, although he is not specific as to the date he became so aware. (Lyman Aff., ¶ 6.)

11. On April 14, 2003, Lawrence Gohlke filed a foreclosure action against petitioner in Green Lake County Circuit Court (Case No. 03-CV-47), and listed respondent as a tax lien creditor of petitioner, which complaint was served on respondent. (Buchanan Aff. 1, ¶ 7.)

12. On July 24, 2003, judgment was granted to Mr. Gohlke in the foreclosure action against petitioner. (Buchanan Aff. 1, ¶ 8.)

13. On November 20, 2003, petitioner filed a Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the Eastern District of Wisconsin listing respondent as a creditor and the tax lien warrant related to the Assessment as a debt owed to respondent. (Buchanan Aff. 2, ¶ 2 and Ex. F.)

14. By letter dated April 21, 2004, respondent notified petitioner that it had been advised that his bankruptcy case had been discharged, that it had reviewed petitioner’s delinquent taxes, and that a balance remained. (Buchanan Aff. 2, ¶ 3 and Ex. G.)

15. On July 8, 2004, respondent issued a wage levy to petitioner’s employer in connection with the collection of the Assessment. (Affidavit of Thomas Sommers, dated September 28, 2005 (“Sommers Aff. 1”), ¶ 2.)

16. Between July 2004 and April 2005, petitioner’s employer deducted payments from petitioner’s pay on at least 20 separate occasions and sent these amounts

to respondent in partial payment of the Assessment. (Buchanan Aff. 1, ¶ 3.)

17. Petitioner never filed a claim for refund of any of the payments made towards the Assessment. (Buchanan Aff. 1, ¶ 6.)

18. On July 15, 2004, petitioner, his spouse, and his then-attorney met with Mr. Sommers and discussed petitioner's objections to the Assessment and the wage levy. (Sommers Aff. 1, ¶ 4.)

19. On December 10, 2004, respondent denied petitioner's request to abate the Assessment made at the previous meeting with Mr. Sommers. (Sommers Aff. 1, ¶ 5 and Ex. A.)

20. On April 14, 2005, petitioner and respondent's personnel held the meeting in Appleton, Wisconsin, where petitioner states that he first saw the Assessment dated January 21, 2002. (Lyman Aff., ¶ 6.)

21. Under date of April 18, 2005, petitioner sent by certified mail an appeal of the Assessment to respondent (the "Appeal"). (Petition, Ex. B.) Petitioner characterizes the Appeal as a petition for redetermination of the Assessment.

22. Respondent received the Appeal on April 20, 2005. (Petition, Ex. C.)

23. By correspondence to petitioner dated August 23, 2005, respondent denied petitioner's Appeal. (Petition, Ex. A.)

24. On September 6, 2005, petitioner filed his petition for review with the Commission.

25. On September 30, 2005, respondent filed a motion to dismiss the

petition for review, with attached affidavits, based on the Commission's lack of jurisdiction due to petitioner's non-filing or, in the alternative, late filing of a petition for redetermination of the Assessment.

26. On October 3, 2005, the Commission issued a Briefing Order scheduling briefs on the motion.

27. Respondent filed a brief with affidavits and exhibits in support of its motion on October 28, 2005.

28. Petitioner filed a brief with affidavit and exhibits in opposition to the motion on December 23, 2005.

29. Respondent filed a reply brief and affidavit in support of its motion on January 23, 2006.

CONCLUSIONS OF LAW

1. Respondent has provided satisfactory evidence of receipt by petitioner during 2002 of the Notice of Assessment dated January 14, 2002.

2. The Commission lacks jurisdiction over this petition for review because petitioner failed to file a petition for redetermination with respondent within 60 days of his receipt of notice of the Assessment, and thus was not aggrieved by respondent's redetermination, which is required to confer jurisdiction on the Commission under Wis. Stat. § 73.01(5).

RULING

Respondent has moved to dismiss the petition for review based on lack of jurisdiction by the Commission. Petitioner asserts that the motion must be construed as

a motion for summary judgment under Wis. Stat. § 802.08, because determinations of factual matters are involved. However, Wis. Stat. § 802.06(2) states that a motion to dismiss for lack of jurisdiction may be asserted as a defense at the option of the pleader, and includes no requirement that such motions be treated as motions for summary judgment. Wis. Stat. § 802.06(2)(a). In contrast, that section requires that motions to dismiss based on failure to state a claim upon which relief can be granted, *res judicata*, and statutes of limitations be treated as motions for summary judgment when “matters outside of the pleadings are presented to and not excluded by the court.” Wis. Stat. § 802.06(2)(b). The Commission’s long-standing practice has been to treat motions to dismiss for lack of jurisdiction as such, and petitioner has not demonstrated that this practice is incorrect. Consequently, the Commission will treat respondent’s motion as a motion to dismiss for lack of jurisdiction, as made by respondent.

The Commission’s jurisdiction is statutory, and “where a method of review is prescribed by statute, the prescribed method is exclusive.” *Jackson County Iron Co. v. Musolf*, 134 Wis.2d 95, 101, 396 N.W.2d 323 (1986). Upon receiving a notice of assessment from respondent, a person may, within 60 days after receipt of the notice, petition respondent for redetermination of the assessment. Wis. Stat. § 71.88(1)(a). Respondent is required to act on a petition for redetermination within six months after it is filed. *Id.* The Commission has jurisdiction to review actions of respondent pursuant to a timely petition for review filed by any person “who has filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department of revenue” Wis. Stat. § 73.01(5)(a). Except for

certain claims for refund, “if no petition for redetermination is made within the time provided the assessment, refund, or denial of refund shall be final and conclusive.” Wis. Stat. §§ 77.59(6)(b) and 71.88(2)(a). Finally, the Commission does not have jurisdiction over respondent’s collection of delinquent taxes. *Beck v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-275 (WTAC 1997).

With respect to the administration of withholding taxes, the provisions of Chapter 71 relating to income taxes generally apply, including assessment and hearing and appeal procedures. Wis. Stat. § 71.67(2). Regarding assessments, Wis. Stat. § 71.74(11) states, in relevant part:

71.74 Department audits, additional assessments and refunds.

* * *

(11) NOTICE OF ADDITIONAL ASSESSMENT. The department shall notify the taxpayer in writing of any additional assessment by office audit or field investigation. That notice shall be served as are circuit court summonses, or by registered mail, or by regular mail if the person assessed admits receipt or there is satisfactory evidence of receipt. . . .

The central question in this case is, when did petitioner receive the Assessment from respondent – on April 14, 2005, as petitioner claims, or on some earlier date after January 14, 2002, as respondent argues? Respondent states that the Assessment was issued on January 14, 2002 and mailed to petitioner via regular mail on or about that date. Petitioner denies receiving the Assessment until respondent provided a copy to him during a meeting between petitioner and respondent’s Revenue Agent held on April 14, 2005, over three years later.

The Assessment was not served on petitioner as are circuit court summonses, nor was it sent by registered mail. Respondent has provided evidence indicating that the Assessment was mailed to petitioner by regular mail on or about January 14, 2002, and petitioner has offered no evidence or any compelling argument disputing that the Assessment was mailed as respondent claims. Rather, their dispute focuses on the date of receipt of the Assessment by petitioner.

According to Wis. Stat. § 71.74(11), notice of an additional assessment served by regular mail is adequate if the person assessed admits receipt, which petitioner does not (prior to April 14, 2005), or if there is “satisfactory evidence of receipt.” Wis. Stat. § 71.74(11). As evidence of petitioner's receipt of notice of the Assessment, respondent offers a wide range of evidence indicating that petitioner was well aware of the existence of the Assessment as early as mid-2002. The most persuasive evidence includes the following: (1) beginning on June 17, 2002, respondent sent to petitioner at his home address – and petitioner does not deny receiving – at least eight separate notices of delinquent tax related to the Assessment prior to his claimed date of receipt of the Assessment; (2) respondent’s Revenue Agent discussed the Assessment and its basis with petitioner or his representatives on numerous occasions beginning in April 2002 and continuing through 2004; (3) the delinquent taxes claimed in the Assessment resulted in the filing of a tax warrant lien against petitioner on June 21, 2002, which specified the date of the Assessment and type of tax involved in the Assessment; (4) petitioner admits having been “aware of” the tax warrant at some later date; (5) petitioner reported the tax warrant related to the Assessment in his own

bankruptcy filing in federal court on November 20, 2003; and (6) respondent successfully levied against petitioner's wages in 2004, resulting in several payments being made towards the Assessment, none of which were claimed for refund by petitioner. These undisputed facts constitute satisfactory evidence that petitioner received the required notice of the Assessment at least as early as 2002.¹

The Commission recently considered another case involving this same issue and reached the opposite result, but the very different set of facts involved in that case are instructive here. In *Titan Int'l, Inc. v. Dep't of Revenue*, WTAC Docket No. 04-T-204 (June 7, 2006), the Commission held that there was not satisfactory evidence of receipt of the required notice of an assessment on the date claimed by respondent. The only evidence of receipt presented by respondent was (1) a statement in an affidavit by an employee of respondent that the notice had been placed in an outbox for mailing via regular mail, was stamped with "Address Service Requested," and was not returned to respondent; (2) that the petitioner received a prior correspondence at that same address; and (3) that some of the petitioner's letters to respondent were stamped by postage meter a few days after they were written. Moreover, unlike petitioner's actions in the instant case, the petitioner's actions in *Titan* consistently supported its claim of non-receipt of the original assessment. For example, upon learning of the assessment through respondent's initial attempt at collection, the petitioner immediately filed a petition for redetermination, even though, according to the date of the original assessment, the statutory filing deadline had passed approximately 10 days before.

¹ Because we hold that there is satisfactory evidence of petitioner's receipt of the Assessment during 2002, we do not reach respondent's alternative arguments for dismissal.

In the instant case, petitioner did not begin claiming that he had not received the Assessment until more than three years had passed after its mailing, even though he had communicated with respondent and other parties regarding the Assessment on many occasions during that period. Moreover, petitioner does not deny receiving subsequent Notices of Delinquent Tax sent by respondent beginning in mid-2002, all of which were sent to him by regular mail at the same home address to which the Assessment was sent.

Since we hold that there is satisfactory evidence of petitioner's receipt of the required notice of the Assessment during 2002, petitioner did not file a petition for redetermination of the Assessment within 60 days after such receipt. Determining the exact date that petitioner received the Assessment during 2002 would have no impact in this case, because his receipt on any date during 2002 rendered his 2005 petition for redetermination untimely. Assuming that petitioner's Appeal dated April 18, 2005 was a petition for redetermination of the Assessment, it was mailed long after the filing deadline had passed.

If petitioner had timely petitioned respondent for a redetermination of the Assessment and subsequently filed a timely petition for review with the Commission, the Commission could have addressed the questions raised by petitioner regarding the merits of the tax liability underlying that Assessment. However, petitioner filed a petition for redetermination of the Assessment long after the statutory filing deadline had passed. Because petitioner did not file a timely petition for redetermination with respondent with respect to the Assessment, the Assessment became final and conclusive

and subject to collection, and the Commission lacks jurisdiction over the petition for review.

ORDER

Respondent's motion to dismiss is granted on the basis that the Commission lacks jurisdiction in this matter, and the petition for review is dismissed.

Dated at Madison, Wisconsin, this 4th day of August, 2006.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"