

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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UNLIMITED SERVICES OF WISCONSIN, INC.,

DOCKET NO. 12-M-067

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**THOMAS J. McADAMS, COMMISSIONER:**

This case comes before the Commission on the Department's Motion to Dismiss. The Petitioner is represented by Attorney Robert Hill of Maplewood, Minnesota, and has filed an affidavit in response to the Motion. The Department's Attorney is LaKeisha Wright Butler. The Department alleges that the Petitioner did not file its appeal to the Board of Assessors in the required 60-day period. We agree for the reasons stated below that we lack jurisdiction and must dismiss.

**FACTS**

1. The Department issued a Notice of Assessment dated June 20, 2011.  
(Butler Aff. ¶ 2.)

2. Pursuant to Wis. Stat. § 70.995(8)(b)1, any objections to valuation, amount, or taxability must be filed with the State Board of Assessors ("the Board") within 60 days of the issuance of the Notice of Assessment, here August 19, 2011.  
(Butler Aff. ¶ 3.)

3. Petitioner's objection to the Notice of Assessment was received by the Board on August 29, 2011, in an envelope postmarked August 25, 2011, six days after the August 19, 2011 filing deadline. (Butler Aff. ¶¶ 4-5.)

4. Because the objection was not timely filed, the Board issued an Order for Dismissal, dated February 27, 2012, declining to consider Petitioner's objection and directing the Department to refund the \$45 filing fee to Petitioner. (Butler Aff. ¶ 6; Exhibit D.)

5. Petitioner filed a Petition for Review of the Board's dismissal with the Tax Appeals Commission ("the Commission") on April 2, 2012.

6. In response to the Department's Motion to Dismiss, the Petitioner filed an affidavit from [K. A.], who works in the office of the Petitioner's attorney. The affidavit states the following in paragraphs 1 through 3:

- My name is [K. A.] and I am employed by Robert Hill Law, Ltd., agent for Petitioner.
- On August 19, 2011, I placed several Objections to Real Estate Assessment in the US Post Office Box, one of which was for the Petitioner named above.
- For reasons we do not understand the Department found all other Objections to be timely but claims this one was not received until August 25, 2011. I can attest that the Objection was mailed within the 60 days allowed by Wisconsin Statute.

#### RELEVANT WISCONSIN STATUTE

The controlling statute at issue in these matters is Wis. Stat. § 70.995(8).

The relevant portions to this Motion provide as follows:

**Wis. Stat. § 70.995(8)**

(a) The secretary of revenue shall establish a state board of assessors, which shall be comprised of the members of the department of revenue whom the secretary designates. The state board of assessors shall investigate any objection filed under par. (c) or (d) if the fee under that paragraph is paid...

(b) 1. The department of revenue shall annually notify each manufacturer assessed under this section and the municipality in which the manufacturing property is located of the full value of all real and personal property owned by the manufacturer. The notice shall be in writing and shall be sent by 1st class mail or electronic mail. In addition, the notice shall specify that objections to valuation, amount, or taxability must be filed with the state board of assessors within 60 days of issuance of the notice of assessment, that objections to a change from assessment under this section to assessment under s. 70.32 (1) must be filed within 60 days after receipt of the notice, ...

**ANALYSIS**

The Department's Motion alleges that we must dismiss this manufacturing property assessment appeal because the Petitioner failed to file an objection before the Board of Assessors within the 60-day period required by Wis. Stat. § 70.995. The evidence in the case clearly shows that the Petitioner's appeal to the Board in this case was postmarked on August 25, 2011. The 60-day period, however, ended on August 19, 2011. The Board did not receive the objection until August 29, 2011, ten days after the filing deadline. (Butler Aff. ¶ 5.) On these facts, the Department is correct that the appeal must be dismissed as we lack the jurisdiction to hear it. See *Thermo Electron, LLC v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-298 (WTAC 2010)

(finding that a timely appeal to the Board is a necessary first step to review by the Commission).

In response to the Department's Motion, the Petitioner filed an affidavit from an office staff person which is reproduced above in the fact paragraphs. In that affidavit, the affiant avers that she mailed this appeal on August 19 with several others and has no explanation for the postmark for this one on August 25.

The affidavit, however, is inadequate to save this appeal to the Commission for a legal reason and a practical reason. First, the appeal was due to the Board on August 19, and even if the Petitioner mailed<sup>1</sup> the appeal form on the 19<sup>th</sup> the form would not have arrived at the Board in Madison from Minnesota until at least August 20. Thus, even in the best scenario for the Petitioner, the appeal would have been filed beyond the 60-day period.<sup>2</sup> The "mailing is filing" argument has been rejected by Wisconsin courts on numerous occasions. For example, in *Whistle B. Currier v. Dep't of Revenue*, 2006 WI App. 12, 288 Wis. 2d 693, 709 N.W.2d 520, the court wrote the following:

However, cases have repeatedly recognized that "[t]o construe or define 'mailing' as 'filing' is to ignore the plain

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<sup>1</sup> For appeals to the Commission, Wis. Stat. § 73.01(5) provides that a taxpayer may send a petition by certified mail up until midnight at the end of the 60<sup>th</sup> day and in that circumstance the date the appeal is received by the Commission does not control its timeliness.

<sup>2</sup> As the Department points out, Wisconsin courts strictly adhere to filing deadlines when the Legislature has provided for such deadlines by statute. While Wis. Stat. § 70.995(8)(b) clearly provides for a 60-day filing window, this section does not define "filing" for the purposes of objecting to a manufacturing property assessment. In situations where a statute has not provided a specific definition of "filing," courts have generally held that filing occurs when a clerk physically receives the filing. See *Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis. 2d 813, 822, 284 N.W.2d 93 (1979). The Petitioner here does not argue to the contrary, electing to argue instead that the appeal was timely filed.

meaning of the word. Mailing merely initiates the process by which an article in the due course of the post will be delivered." *E.M. Boerke, Inc. v. Williams*, 28 Wis. 2d 627, 635, 137 N.W.2d 489 (1965); *Hoffman [v. Rankin]*, 256 Wis. 2d 678, ¶ 14, 649 N.W.2d 350. Filing, as it is defined in the dictionary, contemplates delivery to the proper authority. See *E.M. Boerke*, 28 Wis. 2d at 635, 137 N.W.2d 489 (dictionary definition of to "file" entails delivery to the proper person); *Hoffman*, 256 Wis. 2d 678, ¶ 13, 649 N.W.2d 350 stating that the recognized dictionary definition of to "file" is:

[T]o deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office ... to place (as a paper or instrument) on file among the legal or official records of an office esp. by formally receiving, endorsing, and entering. (Citing Webster's Third New International Dictionary (unabr. 1993).)

Wisconsin courts have applied this distinction between mailing and filing in a variety of contexts. For example, in the context of appellate procedure, our supreme court has concluded that absent specific statutory language to the contrary filing is accomplished when the petition is physically handed to and accepted by the clerk of courts. See *Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis. 2d 813, 822, 284 N.W.2d 93 (1979) (holding that "filing, under [Wis. Stat.] § 809.10, means physical delivery of the notice of appeal to and receipt by the clerk of the trial court... [T]he notice of appeal ... shall be considered filed as of the date that the notice of appeal is actually received by the clerk."); *First Wis. Nat'l Bank of Madison v. Nicholaou*, 87 Wis. 2d 360, 364-65, 274 N.W.2d 704 (1979) (determining that filing of a petition for appeal to the Wisconsin Supreme Court under Wis. Stat. § 808.10 occurs when it is received by the clerk of courts' office). This court has held that the term "file" for purposes of the statute and relevant administrative code provisions requiring a party to file a sexual discrimination complaint within 300 days of the alleged discrimination entails delivery to the intended recipient. *Hilmes v. DILHR*, 147 Wis. 2d 48, 53-54, 433 N.W.2d 251

(Ct.App.1988) (filing does not occur until the complaint is received, meaning the physical receipt of the complaint by the department). We have also held that filing for purposes of Wis. Stat. § 655.445, a statute permitting medical malpractice patients to request mediation within fifteen days of filing a court action, means delivery of the request to the proper officer for keeping on file or among records of his or her office. *Hoffman*, 256 Wis. 2d 678, ¶¶ 12, 15, 20, 649 N.W.2d 350.

*Currier*, 2006 WI App 12, par 15-16.

Thus, even if the appeal were mailed on August 19, mailing the appeal to the Board on the 19<sup>th</sup> is not good enough.

Second, as a practical matter, the information in the affidavit is inadequate in light of the postmark. Despite what is in the affidavit, the official postmark is August 25 and, in the absence of an explanation or proof to the contrary, the postmark is something akin to *prima facie* documentary proof. Our primary difficulty with the affidavit is that it was not prepared contemporaneous to the mailing. As indicated above, the events in question occurred on or around August 19, 2011. The affidavit, however, is dated August 8, 2012---almost a year after the relevant events. Thus, what the Petitioner relies on here is not a standard affidavit of mailing which attorneys often prepare to prove that an item was properly mailed. Instead, it is an affidavit prepared approximately *a year later* to dispute an official postmark. As concise as it is, the affidavit does not provide us with any explanation for the discrepancies and it is not our job to provide one. The affidavit does not competently refute any of the facts in the Department's affidavit. To paraphrase the famous Chinese proverb, the palest contemporary ink is often preferable to the clearest memory of year old banal events.

In sum, the evidence before us on this Motion clearly shows that the objection to the Board was not properly filed within the mandatory 60 days.

**CONCLUSION**

The Department's Motion to Dismiss must be granted as the evidence shows that the Petitioner did not file its Objection to the Board of Assessors within the required 60-day period. We, therefore, lack the jurisdiction to hear this appeal, and must grant the Motion to Dismiss.

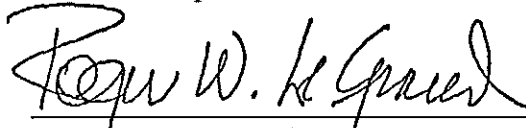
Dated at Madison, Wisconsin, this 4<sup>th</sup> day of January, 2013.

**WISCONSIN TAX APPEALS COMMISSION**



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Lorna Hemp Boll, Chair



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Roger W. LeGrand, Commissioner



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Thomas J. McAdams, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION  
5005 University Avenue - Suite 110  
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED  
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS  
RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

*Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION*

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

*Option 2: PETITION FOR JUDICIAL REVIEW*

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.