

STATE OF WISCONSIN
TAX APPEALS COMMISSION

GARY J. SIMON,

DOCKET NO. 13-I-019
AND 13-I-020-SC

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID D. WILMOTH, COMMISSIONER:

These matters come before the Commission on a Motion to Compel Discovery filed by the Respondent, the Wisconsin Department of Revenue (the "Department"). The Department is represented in these matters by Attorney Sheree Robertson, of Madison, Wisconsin. The Petitioner appears *pro se* in these matters.

Having considered the entire record, including the Department's motion, affidavits, and exhibits, the Commission hereby finds, rules, and orders as follows:

FACTS

A. Jurisdictional Facts

1. By Notice of Amount Due dated February 13, 2012, the Department assessed additional income tax against the Petitioner for the calendar years 2007 through 2009 in the amount of \$2,878.70, including interest, underpayment interest, and

negligence penalties. Affidavit of Auditor Alberto Ciarletta ("Ciarletta Aff."), ¶ 15, Exhibit 4.

2. By Notice of Amount Due dated February 13, 2012, the Department assessed additional income tax against the Petitioner for the calendar year 2010 in the amount of \$783.43, including interest and penalties. Ciarletta Aff., ¶ 16, Exhibit 5.

3. On or about March 15, 2012, the Petitioner filed a letter with the Department objecting to the additional assessments of tax, interest, underpayment interest, and penalties made by the Department in the two Notices of Amount Due. The Department treated the letter as a timely filed petition for a redetermination of the assessments. Affidavit of Office Audit Resolution Officer Ruth Abrams ("Abrams Aff."), ¶ 2, Exhibit 6.

4. The Department sent two Notices of Action, each dated November 27, 2012, denying the Petitioner's Petition for Redetermination of each of the two assessments. Abrams Aff., ¶ 6, Exhibits 9 and 10.

5. The Petitioner filed a timely Petition for Review with the Commission on January 30, 2013, requesting review of the two Notices of Action. The Department filed an Answer to the Petition on February 27, 2013.

B. Additional Facts

6. On July 5, 2013, the Department sent its First Set of Interrogatories and First Request for Production of Documents to the Petitioner. Affidavit of Attorney Sheree Robertson ("Robertson Aff."), ¶¶ 2 and 3, Exhibits 11 and 12.

7. On August 27, 2013, a telephone status conference was held in these matters before Commission Chair Lorna Hemp Boll. Attorney Robertson informed Chair Boll that the Petitioner had not responded to the Department's discovery requests, and Chair Boll provided the Petitioner an additional 45 days to answer the Department's requests. Robertson Aff., ¶ 4, Exhibit 13.

8. Attorney Robertson telephoned the Petitioner on September 13, 2013, for purposes of scheduling a conference call to discuss the appeals. On September 16, 2013, Attorney Robertson and Auditor Ciarletta discussed the appeals with the Petitioner in a conference call. Robertson Aff., ¶ 5.

9. On September 23, 2013, the Petitioner left a voicemail message for Attorney Robertson advising her that he would not be able to respond to the Department's discovery by the extended due date but would do so several days thereafter. Robertson Aff., ¶ 6.

10. On October 2, 2013, Attorney Robertson received from the Petitioner his objections to the Department's Interrogatories and Request for Production of Documents. The Petitioner lodged a general objection to the discovery requests as "over burdensome and attempt [sic] to illicit information that may be used against him." He then specifically objected to each interrogatory by stating "I reserve my right under the 5th amendment not to state anything that might incriminate myself." The Petitioner did not otherwise provide any responsive information. Robertson Aff., ¶ 7, Exhibit 14.

11. On October 18, 2013, the Department filed with the Commission and served on the Petitioner a Notice of Motion and Motion to Compel Discovery, along with affidavits and exhibits, moving the Commission for an order compelling the Petitioner to answer the Department's interrogatories and to produce the requested documents. (Commission File).

12. A telephone status conference was held before Commission Chair Boll on October 22, 2013, with Attorney Robertson and the Petitioner participating. At the conclusion of the telephone conference, Chair Boll issued a Status Conference Memorandum and Briefing Order stating in part:

Petitioner has brought a Petition for Review of the Department's Redetermination; as such, the Petitioner has the burden to prove the Department erred. Petitioner will likely have to present the types of information which were requested in discovery in order to prove his case. As a matter of pre-trial procedure, the Department is generally allowed to explore the evidence which could potentially be used at a trial in order to prepare its response.

As a result, the Commission ordered:

The Petitioner shall answer the discovery in a meaningful way or in the alternative shall set forth in writing the legal basis for his continued refusal to do so along with his argument as why the case should not be dismissed. If the information upon which the Petitioner bases his 5th amendment assertion is so sensitive as to require an in camera inspection or hearing by the Commissioner, the Department has agreed to allow Petitioner an opportunity to inform the Commission out of the presence of the Department as to the reasons for his refusal to respond to discovery. Petitioner must file his response and/or argument with an original and (3) copies to the Commission

and copy of any nonconfidential response to the Department by December 2, 2013.

Id.

13. The Petitioner did not provide any responsive information to the Department or the Commission or file any document of any kind with the Commission on or before December 2, 2013. *Id.*

14. On December 9, 2013, this Commission issued an Order directing the Petitioner to file a brief responsive to the Department's Motion to Compel or to notify the Commission that no responsive brief would be forthcoming, no later than December 26, 2013. The Order further provided that, if the Petitioner did not file a responsive brief, the case would be decided based upon the record as presently constituted. *Id.*

15. The Petitioner neither filed a responsive brief nor informed the Commission that no brief would be filed by the December 26, 2013 deadline. *Id.*

DECISION

Wisconsin Statutes § 805.03 provides as follows:

Failure to prosecute or comply with procedure statutes. For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order....

Wisconsin Statutes § 804.12(2)(a) provides for a number of sanctions for failure to prosecute or comply with procedure, including dismissal of the action or proceeding. In addition, Wis. Stat. § 802.10(7) states that “[v]iolations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03.”

The Commission and the Department have provided numerous opportunities for the Petitioner to pursue his appeals before the Commission. After having served discovery requests upon the Petitioner for production of information relevant to determining whether the Petitioner had any legal basis for objecting to the Department’s additional assessments at issue here, the Department attorney scheduled a telephone conference with the Petitioner to assist in his response. Yet, after being allowed additional time to respond, the Petitioner simply objected to every discovery request by asserting his 5th amendment rights not to incriminate himself, but with no legal explanation as to how his responses could possibly do that. Despite being offered the opportunity to provide sensitive or confidential information for an in camera review by the Commission, the Petitioner provided nothing.

Further, the Petitioner did not comply with either the order issued by the Commission in its October 22, 2013 Status Conference Memorandum and Briefing Order nor the order issued by the Commission in its December 9, 2013 Order.

CONCLUSION OF LAW

We find that the Petitioner has failed to both prosecute his appeals in these matters and comply with orders issued by the Commission. Consequently, pursuant to Wis. Stat. § 805.03, this Commission may make such orders in regard to

these failures as are just, including but not limited to an order to dismiss under Wis. Stat. § 804.12(2)(a).

ORDER

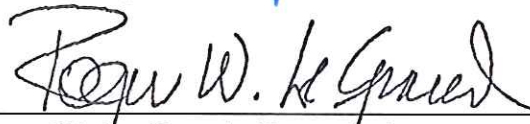
IT IS ORDERED that the Petitions for Review in these cases are dismissed pursuant to Wis. Stats. §§ 805.03 and 804.12(2)(a) for failure to prosecute the appeals and for failure to follow the Commission's orders.

Dated at Madison, Wisconsin, this 19th day of March, 2014.

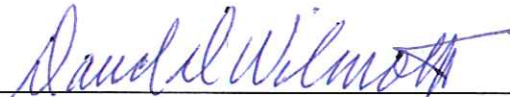
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. Le Grand, Commissioner



David D. Wilmoth, 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.