

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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MARY ARIENS & ESTATE OF MICHAEL S. ARIENS,

DOCKET NO. 18-I-020

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING & ORDER**

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**DAVID D. WILMOTH, COMMISSIONER:**

This case comes before the Commission for decision on the Respondent's Motion to Dismiss the Petitioners' Petition for Review. The Respondent asserts that the Commission lacks jurisdiction over the case because the Petitioners failed to file a Petition for Redetermination within 60 days after receipt of the Respondent's Notice of Refund. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Kelly Altschul. The Petitioners, Mary Ariens and the Estate of Michael S. Ariens, of Brillion, Wisconsin, are represented in this matter by Emo Dellanina, CPA, of Mowery & Schoenfeld, LLC. For the reasons stated below, the Commission finds that it lacks jurisdiction in this matter and that dismissal is appropriate.

## FACTS

1. By Notice of Refund - Individual Income Tax dated March 4, 2016, the Department notified the Petitioners that the refund claimed on their 2014 Wisconsin income tax return had been reduced because the Petitioners had failed to substantiate their claimed itemized deduction credit. (Kloss Aff., ¶ 7, Ex. 6.)

2. On June 26, 2017, the Department received correspondence from Petitioners' tax representative, Emo Dellanina, which constituted a petition for redetermination appealing the Department's March 4, 2016 Notice of Refund. (Kloss Aff., ¶ 9, Ex. 7.)

3. On December 26, 2017, the Department mailed via certified mail a Notice of Action Pursuant to Wis. Stat. § 71.88(1) denying the Petitioners' Petition for Redetermination dated June 26, 2016 as untimely. (Kloss Aff., ¶ 15, Ex. 12.)

4. On January 12, 2018, the Petitioners filed a Petition for Review with the Tax Appeals Commission appealing from the Department's action on their Petition for Redetermination. (Commission file.)

5. On March 28, 2018, the Department filed a Motion to Dismiss the Petitioners' Petition for Review for lack of jurisdiction, along with an affidavit, exhibits, and a brief in support of the Motion. (Commission file.)

6. Via a June 4, 2018 email message, the Petitioners' representative provided the Commission with a copy of a letter he had sent to the Department on December 11, 2017, explaining the Petitioners' position on the Department's adjustments

to the Petitioners' 2014 Wisconsin return. He stated that he did not plan on submitting anything further in opposition to the Motion. (Commission file.)

#### APPLICABLE LAW

Wis. Stat. § 71.88(1)(a): *Contested assessments and claims for refund. ... [A]ny person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of refund may, within 60 days after receipt of the notice, petition the department of revenue for redetermination. A petition or an appeal by one spouse is a petition or an appeal by both spouses...*

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 or, except as provided in s. 71.75 (5), 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. § 73.01(5)(a): *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 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 ....*

#### ANALYSIS

Under Wis. Stat. § 71.88(1)(a), any person feeling aggrieved by a determination of the Department may file a petition for redetermination with the Department within 60 days. If a petition for redetermination is not filed within 60 days, the determination becomes final and conclusive. Wis. Stat. § 71.88(2)(a).

The Commission has repeatedly ruled that it does not have jurisdiction to hear appeals of cases in which a petitioner has not filed a timely petition for redetermination. *Weiss v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶401-992 (WTAC 2015); *Jones v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-730 (WTAC 2013); *Kaminske v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶401-638 (WTAC 2012); *Williams v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶400-880 (WTAC 2006). The basis for these decisions is that, if a person does not timely file a petition for redetermination, the original determination becomes final and conclusive, and he or she cannot be "aggrieved by the redetermination of the Department of Revenue." Under Wis. Stat. § 73.01(5)(a), the Tax Appeals Commission only has jurisdiction over cases in which a person has timely filed a petition for redetermination and is aggrieved by the redetermination of the Department.

In this case, the Department issued the Notice of Refund denying the Petitioners' itemized deduction credit on March 4, 2016. The Petitioners had 60 days from their receipt of that Notice to timely file a petition for redetermination. The record shows that Petitioners filed a Petition for Redetermination with the Department on June 26, 2017, more than a year after the expiration of the 60-day appeal period. By then, the assessment had become final and conclusive under Wis. Stat. § 71.88(2)(a), and the Commission has no jurisdiction to hear the Petitioners' appeal.

In the affidavit submitted by the Department in support of its Motion, the Department's Office Audit Resolution Officer stated that the 2014 Wisconsin income tax return filed by the Petitioners did not include a copy of the Petitioners' federal return or any of the schedules to the federal return. The affidavit goes on to detail correspondence sent

back and forth between the Department and the Petitioners as the Department attempted to obtain information that would substantiate items on the Wisconsin return. Ultimately, the affidavit states that the Department did not receive information to confirm the Petitioners' Wisconsin itemized deduction credit, so they denied it.

The Petitioners' representative, for his part, offers unsworn statements in the Petition for Review and his December 11, 2017 letter to the Department that copies of the Petitioners' federal tax return with all schedules were attached to the Petitioners' 2014 Wisconsin return, and that he had provided all information requested by the Department. Consequently, he argues that the Department erred in denying the Petitioners' itemized deduction credit.

These factual representations and the arguments made from them all go to the merits of the case - whether the adjustments made by the Department in issuing the Notice of Refund were correct or incorrect. In order for the Commission to reach the merits of this case, however, it must have jurisdiction. Because the Petitioners failed to timely appeal from the Department's Notice of Refund, the Commission lacks jurisdiction.

In his December 11, 2017, correspondence and the Petition for Review, the Petitioners' representative asked the Department and the Commission to make an accommodation for the Petitioners because Mr. Ariens, who handled the family's tax matters, had passed away in 2015, and Mrs. Ariens had been dealing with her own health issues which made it difficult for her to keep up with tax correspondence during the time this matter was progressing. As a result, he states that he was not made aware of the March 4, 2016 Notice of Refund until June of 2017. We certainly empathize with the Petitioners'

situation. Unfortunately, however, the timelines drawn by the legislature are bright ones. Regardless of the reason for late filing, the Commission cannot create subject-matter jurisdiction where, by reason of a late filing, it does not exist. *McDonald Lumber Co. v. Dep't of Revenue*, 117 Wis. 2d 446, 344 N.W.2d 210 (Ct. App. 1984). The Commission has acknowledged this principle in the past, even in the face of claims of ill health or mental or physical impediment. See *Weiss v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶401-992 (WTAC 2015); *Ellenbecker v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-407 (WTAC 2011).

The Commission concludes that the Petitioners failed to file a Petition for Redetermination within 60 days after receipt of the Notice of Refund from the Department. Thus, the Commission lacks subject matter jurisdiction over this case. This is not a matter for discretion; the Commission has no choice. *Alexander v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-650 (WTAC 2002).

### CONCLUSION

The Petitioners' Petition for Redetermination was not timely filed as required by Wis. Stat. § 71.88(1)(a) and, thus, the Commission lacks jurisdiction in this matter.

### ORDER

The Department's Motion to Dismiss is hereby granted and the Petition for Review is dismissed.

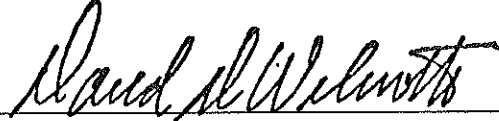
Dated at Madison, Wisconsin, this 3rd day of July, 2018.

WISCONSIN TAX APPEALS COMMISSION



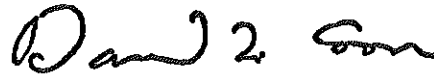
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Lorna Hemp Boll, Chair



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David D. Wilmoth, Commissioner



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David L. Coon, 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 and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier 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.