

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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JEROME KOLOSSO,

DOCKET NO. 18-I-166

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING AND ORDER**

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**DAVID L COON, COMMISSIONER:**

This matter comes before the Commission on the Department's Motion to Dismiss. The Petitioner is represented by William D. Miller, CPA, Spurlock, Runyan, Miller & Assoc., LLP, and the Department is represented by Attorney Julie A. Zimmer. The Petitioner failed to file a timely petition for redetermination within the 60-day period following receipt of the Notice of Refund. The Petitioner's second amended return did not revive that 60-day period or allow for a second opportunity to address the same issues. The Petitioner also failed to file any affidavits, supporting documents, or briefs opposing the Motion to Dismiss. The Commission grants the Motion to Dismiss as the Commission lacks jurisdiction to hear the appeal.

## FACTS

1. On December 5, 2016, the Petitioner filed an amended 2015 Wisconsin Form 1 income tax return with the Department claiming a refund of individual income taxes in the amount of \$5,305. (Affidavit of Carrie A. Kloss, Resolution Officer, Wisconsin Department of Revenue ("Kloss Aff."), ¶ 2, Ex. 1.)

2. On December 20, 2016, the Department sent a letter to the Petitioner asking him for additional information to substantiate his refund claim. (Kloss Aff. ¶ 3, Ex. 2.)

3. After receiving no response from the Petitioner, the Department denied his refund claim by a Notice dated March 14, 2017. The Notice stated the Petitioner's appeal rights and provided, "If no timely petition for redetermination (appeal) is filed with the department, this determination shall be final and conclusive."<sup>1</sup> (Kloss Aff. ¶ 4, Ex. 3.)

4. On September 29, 2017, the Department received a second amended 2015 Wisconsin Form 1 income tax return from the Petitioner claiming the same refund of individual income taxes in the amount of \$5,305. (Kloss Aff. ¶ 5, Ex. 4.)

5. The Department treated the Petitioner's September 29, 2017 amended return as a late-filed Petition for Redetermination and, on October 10, 2017, denied it as untimely. (Kloss Aff. ¶ 6, Ex. 5.)

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<sup>1</sup> The March 14, 2017 Notice did, after denying the refund claim, also advise that a separate notice of amount due would subsequently be sent to the Petitioner due to unreported gambling winnings. If such a notice was later sent to the Petitioner, that notice is not before the Commission.

6. On December 1, 2017, the Petitioner filed a Petition for Redetermination of the October 10, 2017 denial of his refund claim in the second amended return. The Petitioner admitted in his December 1, 2017 filing that he failed to provide the Department's March 14, 2017 Notice, denying his claim for refund, to his accountant before the original 60-day appeal deadline expired. The Petitioner argued that, since the deadline to amend a 2015 individual tax return had not expired, he could refile his amended return claiming the same refund. (Kloss Aff. ¶ 7, Ex. 6.)

7. On June 1, 2018, the Department issued a Notice of Action that denied the Petitioner's December 1, 2017 Petition for Redetermination. (Kloss Aff. ¶ 9, Ex. 8.)

8. On August 2, 2018, the Petitioner filed a Petition for Review with the Commission. (Commission file.)

9. On September 26, 2018, the Department filed a Motion to Dismiss with a brief, affidavit, and supporting documents. (Commission file.)

10. On October 8, 2018, the Commission issued an Order setting November 16, 2018, as the date by which the Petitioner was to respond to the Motion. The Order was sent to the Department and the Petitioner's representative. (Commission file.)

11. The Petitioner failed to file anything with the Commission by November 16, 2018. On its own motion, the Commission issued an Order on November 21, 2018, granting the Petitioner a second chance to file a response not later than December 3, 2018. The November 21, 2018 Order was sent to both the Petitioner and his

representative as well as to the Department. The Commission again received no response from the Petitioner by the December 3, 2018 deadline. (Commission file.)

### APPLICABLE LAW

A motion to dismiss will be granted if the Commission finds it does not have proper jurisdiction. Without jurisdiction to hear this matter, the Commission has no alternative other than to dismiss the action. See *Alexander v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-650 (WTAC 2002).

The specific statutes at issue here outline the requirements for filing a valid and timely petition for review with the Commission:

Wis. Stat. § 71.75(2): With respect to income taxes and franchise taxes, except as otherwise provided in subs. (5) and (9) and ss. 71.30 (4) and 71.77 (5) and (7) (b), refunds may be made if the claim therefor is filed within 4 years of the unextended date under this section on which the tax return was due.

Wis. Stat. § 71.75(5): A claim for refund may be made within 4 years after the assessment of a tax or an assessment to recover all or part of any tax credit, including penalties and interest, under this chapter, assessed by office audit or field audit and paid if the assessment was not protested by the filing of a petition for redetermination. No claim may be allowed under this subsection for any tax, interest or penalty paid with respect to any item of income, credit or deduction self-assessed or determined by the taxpayer or assessed as the result of any assessment made by the department with respect to which all the conditions specified in this subsection are not met....

Wis. Stat. § 71.88(1)(a): [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.

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 after the redetermination but not thereafter, file with the clerk of the commission a petition for review of the action of the department of revenue ....

Wis. Stat. § 77.59(6): Except as provided in sub. (4) (b), a determination by the department is final unless, within 60 days after receipt of the notice of the determination, the taxpayer, or other person directly interested, petitions the department for a redetermination....

## DECISION

The Department has moved to dismiss this case because the Petitioner failed to request a redetermination from the Department within 60-days following the Petitioner's receipt of the March 14, 2017 Notice of Refund. The Petitioner has now also failed to respond to the Motion filed by the Department, despite being ordered to do so and being given an additional opportunity to file a response. In the November 21, 2018 Order, the Petitioner was warned that failing to respond would result in the case being "decided based upon the record as presently constituted." We will do so.

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 from the Department, a taxpayer may, within 60 days after receipt of the notice, petition the Department for redetermination. Wis. Stat. § 71.88(1)(a). If the taxpayer fails to timely do so, the taxpayer has missed the opportunity to dispute the Department's action. Except for certain claims for refund,<sup>2</sup> "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. § 71.88(2)(a).

Further, an appeal to the Commission under Wis. Stat. § 73.01(5)(a) can only be made by a person who has filed a petition for redetermination with the Department and who is aggrieved by the redetermination of the Department. A long line of cases echoes this statutory requirement, holding that the taxpayer must first timely file a petition for redetermination in order to later obtain Commission review. *See, e.g., Hussain v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-359 (WTAC 2010).

In its Motion, the Department points out that, without the Petitioner having filed a timely petition for redetermination, the Commission lacks jurisdiction to hear this appeal. After reviewing the Motion and the affidavits filed by the Department and there being no response by the Petitioner contesting the Department's assertions, we agree with the Department.

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<sup>2</sup> These particular exceptions do not apply here as they relate to refund offsets for fines, fees, or other obligations for which a refund or portion of a refund is intercepted to pay those obligations.

The Petitioner filed an amended tax return for the 2015 tax year seeking a refund of \$5305. The Department denied that request by issuing a Notice of Refund on March 14, 2017. In the Notice, Petitioner was advised of his right to appeal by filing a Petition for Redetermination "within 60 days after receipt" of the Notice, as well as the address, FAX number, and the email to which such an appeal may be sent.

While the Department does not provide proof of the day upon which the Petitioner received the March 14, 2017 Notice, the Petitioner, in the December 1, 2017 letter submitted to the Department and signed by both the Petitioner and his representative, states that the Petitioner "was behind on mail correspondence and did not get the letter to his accountant's office before the deadline had expired." The Petitioner and his representative restate the same information in the Petition for Review filed with the Commission.

Upon this undisputed record, the Petitioner received the March 14, 2017 Notice and failed to respond within 60-days of receipt of that Notice. After the Notice was received and after the statutory 60-day window to file a petition for redetermination had expired, as acknowledged by the Petitioner and his representative, the matter at issue in the March 14, 2017 Notice, specifically the denial of the refund claimed in the first amended tax return, became final and conclusive.

Petitioner did not file a petition for a redetermination that was timely and, therefore, there is no redetermination of the Department by which Petitioner is aggrieved. Again, the Petitioner has provided nothing to refute this. Because the Petitioner did not file a petition for redetermination that was timely received by the

Department and the original assessment has become “final and conclusive,” the Commission has no jurisdiction to hear this appeal under Wis. Stat. § 73.01(5)(a).

While the Petitioner does not respond to this Motion to Dismiss, the Petitioner did argue to the Department and in the Petition for Review that the Petitioner’s second amended return should be sufficient to allow the issues to be relitigated. The Petitioner noted that the second return was filed within the 4-year period allowed for filing refund claims under Wis. Stat. § 71.75(2) and essentially claims that any subsequent amended return should allow a second opportunity for review of an issue, even if the 60-day time period under Wis. Stat. § 71.88(1)(a) is missed.

We reject this argument. There is nothing in either Wis. Stat. 71.75(2) or Wis. Stat. § 71.88(2)(a) that allows for such an exception to the “final and conclusive” language of Wis. Stat. § 71.88(2)(a). We agree with the Department that creating such an exception would make the clear “final and conclusive” language of the statute meaningless.

In Wis. Stat. 71.88(2)(a), there is a narrow exception under Wis. Stat. § 71.75(5) for filing a refund claim where no petition for redetermination has been filed with the Department. If the exception applies, a claim for refund may be filed “within 4 years after the assessment of a tax or an assessment to recover all or part of any tax credit.” To fall under this exception, there must be: 1) The assessment of a tax or an assessment to recover all or part of a credit; 2) Payment of the assessment; and 3) No protest of the assessment by a petition for redetermination. In order to be eligible for this refund claim, “all the conditions specified” need to be met. Wis. Stat. § 71.75(5).



In this matter, the Petitioner failed to file a petition for redetermination of the denial of a refund claim rather than of an assessment of tax or an assessment to recover a credit. The Petitioner does not fall under the limited exception described in Wis. Stat. § 71.75(5). The filing of a second amended return, making the same refund claim as the initial amended return, does not revive the prior denial of the refund claim that has become final and conclusive.

### CONCLUSIONS OF LAW

1. The Petitioner's statutory right to seek relief with the Department by way of a petition for redetermination expired 60 days after receipt of the March 14, 2017 Notice.

2. Because Petitioner did not file petition for redetermination that was timely received by the Department, the Notice denying the refund claim became final.

3. Petitioner is not aggrieved by a redetermination decision of the Department. Because Petitioner is not aggrieved by a redetermination, the Commission lacks jurisdiction to hear this case.

4. The filing of a second amended return claiming the same refund does not revive the denied refund claim where there is no applicable exception and the denial of the same claim has already become final and conclusive.

### ORDER

Based on the foregoing, it is the order of this Commission that the Department's Motion to Dismiss is granted and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 11th day of February, 2019.

WISCONSIN TAX APPEALS COMMISSION



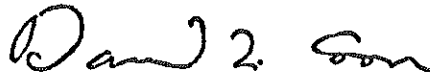
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Lorna Hemp Boll, Chair



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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. Alternately, 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 Appeal 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 <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.