

STATE OF WISCONSIN
TAX APPEALS COMMISSION

PATRICIA TYUNAITIS,

DOCKET NO. 19-I-175

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID L. COON, COMMISSIONER:

This case comes before the Commission for decision on Respondent's Motion for Summary Judgment. The Petitioner, Patricia Tyunaitis, of Malone, Wisconsin, appears *pro se*. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Sheree Robertson. The Department filed a Motion and affidavit with exhibits in support of its Motion. Petitioner was given multiple opportunities to file a response but failed to do so. For the reasons stated below, we find for the Department.

FACTS

1. On November 14, 2018, the Department issued a Notice of Refund - Individual Income Tax to Petitioner for tax year ending December 31, 2017. (Affidavit of Attorney Sheree Robertson, counsel for the Wisconsin Department of Revenue ("Robertson Aff."), ¶¶ 1-2, Ex. 1.)

2. The Department disallowed the federal Schedule C and federal Schedule E losses that Petitioner reported on her 2017 Wisconsin income tax returns, determining that Miss T's Learning Center and Pat's Enterprises are not for-profit activities. (Robertson Aff., ¶ 2.)

3. On January 7, 2019, Petitioner filed a Petition for Redetermination with the Department. (Robertson Aff., ¶ 3, Ex. 2.)

4. On April 1, 2019, the Department issued to Petitioner a Notice of Action denying her Petition for Redetermination, noting that the Department had not changed its position that "'Miss T's Learning Center' and 'Pat's Enterprises' are not engaged in for profit." (Robertson Aff., ¶ 4, Ex. 3.)

5. On May 22, 2019, Petitioner filed a Petition for Review with the Wisconsin Tax Appeals Commission. (Commission file.)

6. Petitioner previously filed a Petition for Review with the Commission, which was assigned Docket No. 18-I-056 and was related to a Notice of Refund - Individual Income Tax dated May 16, 2017. (Robertson Aff., ¶ 6, Ex. 5; Commission file.)

7. The issue addressed by the Commission in Docket No. 18-I-056 was the same as the above captioned matter, whether or not the activities Petitioner reported for Miss T's Learning Center and Pat's Enterprises on the federal Schedule C and federal Schedule E were for-profit. (Robertson Aff., ¶ 6, Ex. 5.)

8. On January 15, 2019, Petitioner's Petition for Review, Docket No. 18-I-056, was heard before the Commission. Petitioner appeared at the hearing in person and made the same arguments regarding the activities failing to make a profit as related in the current Petition for Review. At the hearing, the Commission issued an oral decision that Petitioner had failed to prove by clear and satisfactory evidence that Miss T's Learning Center and Pat's Enterprises are for-profit activities and dismissed the Petitioner's Petition for Review in Docket No. 18-I-056. (Robertson Aff., ¶ 7; Commission file.)

9. On January 18, 2019, the Commission issued a written Memorandum of Oral Ruling and Order on Motion to Dismiss in Docket No. 18-I-056, which was a final order and was not appealed. (Robertson Aff., ¶ 7, Ex. 9; Commission file.)

10. On June 21, 2019, the Department filed a Motion for Summary Judgment in the current matter with supporting affidavit and exhibits alleging failure to state a claim upon which relief may be granted and claim preclusion/*res judicata*. (Commission file.)

11. On June 27, 2019, the Commission issued a Briefing Order that required the Petitioner to respond to the Motion by August 9, 2019. Petitioner failed to respond by that date. On its own motion, the Commission issued an Amended Briefing Order on August 12, 2019, extending the Petitioner's time to respond to August 27, 2019. Petitioner again failed to respond timely. The Commission again on its own motion issued a second Amended Briefing Order on September 5, 2019, extending Petitioner's deadline to respond by September 19, 2019. Petitioner again failed to respond. The original Briefing

Order and each Amended Briefing Order warned Petitioner that, if she failed to respond, the Commission would decide the matter based upon the record in the Commission file. (Commission file.)

APPLICABLE LAW

Summary Judgment Standard

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

Failure to State A Claim

A motion to dismiss for failure to state a claim upon which relief can be granted is designed to test the legal sufficiency of the complaint. *Larson v. Burmaster*, 2006 WI App 142, 720 N.W.2d 134, 295 Wis.2d 333 (Ct. App.). A reviewing court is to “accept as true all facts pleaded and reasonable inferences that may be drawn from such facts.” *Id.* A complaint, or Petition for Review here, should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under any circumstances. *Id.* (Citations omitted).

Statutes

Wis. Stat. § 805.03 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. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

Wis. Admin. Code § TA 1.39 Practice and procedures. Except as provided in s. TA 1.53, the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state.

ANALYSIS

Failure to State a Claim

The Petitioner's claim is that the Department was wrong in its determination that her activities were not for-profit activities. The Department has requested that it be granted summary judgment as the Petitioner has "failed to state a claim upon which relief can be granted."

As background, this case involves the same parties and the same argument by Petitioner as the case *Patricia Tyunaitis v. Dep't. of Revenue*, Docket No. 18-I-056. While this matter involves a different tax year from the prior case, the same issue is being appealed here as the one Petitioner litigated in her earlier case. In the prior case, she disputed the Department's determination that her businesses, Miss T's Learning Center and Pat's Enterprises, were not for-profit activities and therefore she appealed the resulting denial of her Schedules C and E losses. The Commission issued a final order in *Patricia Tyunaitis v. Dep't. of Revenue*, Docket No. 18-I-056, on January 18, 2019, dismissing the case after a

hearing on the merits of that matter. In the instant matter, Petitioner is asserting an identical claim for a different year regarding the same enterprises and disputing the resulting denial of the Schedule C and E losses.

Here, Petitioner begins her Petition for Review by noting that she was still unsuccessful in making the activities profitable. She does not allege that, since the prior case, she has made any changes and that the businesses are profitable. In fact, she states, as to making a profit, "I am trying but not successful since I have been in connection with the IRS for over ten years." She admits that the activities are still not profit-making.

Petitioner then recites a number of reasons and arguments for her inability to be profitable. Even taking these "facts" as true and making reasonable inferences from them, Petitioner cannot prevail. The facts and arguments made are the same as previously rejected by the Commission and found insufficient in the prior case to establish that the activities were for-profit. Nothing new is provided that would allow her to prevail "under any circumstances." We find that, with Petitioner's admission of continued losses and the absence of even an assertion of profit for the tax year at issue, Petitioner has failed to state a claim.

Failure to Prosecute

Even if under some reading of her Petition, one could work out a sufficient claim, we also dismiss her Petition for failure to prosecute her claim, as well as for failing to comply with orders of the Commission. Petitioner was ordered to file a response to the Motion for Summary Judgment. She failed to do so. On its own motion, the Commission

issued two amended orders requiring her to respond to the motion, giving her a second and a third chance to comply with the Commission's orders. Again, each time, she failed to file anything with the Commission. Each of the orders warned Petitioner that failure to comply would result in a decision being made upon the record before the Commission.

We have been confronted with this type of situation in the past and dismissed matters for failure to prosecute. In *Kirschbaum v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-325 (WTAC 2010), the Commission dismissed a matter where the petitioner failed to comply with an order, and a "second chance" order, to respond to a Motion to Dismiss for Failure to State a Claim. As here, the petitioner had failed to respond and comply with the orders. In *Kirschbaum*, in addition to failing to comply with the Commission's orders, the petitioner, by failing to prosecute the matter, had left the Commission "bereft of information properly before the Commission to evaluate the merit of the claim." In this case, since the filing of the Petition for Review, Petitioner has filed nothing else, has failed to comply with three orders to respond to the Motion for Summary Judgment, and has provided nothing in defense of the Motion. Therefore, we also dismiss the matter for failure to prosecute.¹

CONCLUSIONS OF LAW

1. In the Petition, Petitioner admits that the activities are not profitable.
2. Even if taken as true, the facts in the Petition have been previously rejected, at a hearing on the merits in 18-I-056, as insufficient to establish that the activities

¹ Because we grant Summary Judgment and dismiss the matter on other grounds, we do not address the Department's alternate ground of claim preclusion/*res judicata*.

were for-profit. Petitioner cannot prevail. Therefore, Petitioner has failed to state a valid claim.

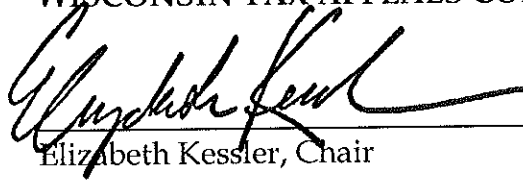
3. Petitioner has failed to prosecute the matter and failed to comply with orders of the Commission.

ORDER

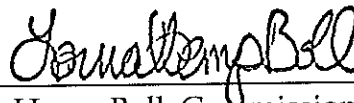
The Department's Motion for Summary Judgment is granted, and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 4th day of December, 2019.

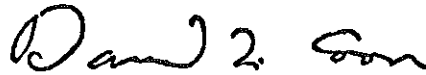
WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Lorna Hemp Boll, Commissioner



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.