

STATE OF WISCONSIN
TAX APPEALS COMMISSION

S & D DEVELOPMENT & PROTOTYPE, INC.
d/b/a PIT PAL PRODUCTS,

DOCKET NO. 07-I-171

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This matter comes before the Commission on a motion filed by respondent, the Wisconsin Department of Revenue (the "Department"), to dismiss the petition for review for lack of jurisdiction. Petitioner, S & D Development & Prototype, Inc. d/b/a Pit Pal Products, a foreign corporation ("Petitioner"), is represented by its President, David Devito, and has filed two responses to the Department's motion. The Department is represented by Attorney John R. Evans and has filed a notice of motion and motion, brief, affidavit with exhibits and reply in support of its motion.

Based on the motion of the Department, supporting documents, and the entire record in this matter, and acting pursuant to Wis. Stat. § 73.01(4)(em)2, the Commission finds, concludes, rules and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS

1. The Department sent a letter dated August 3, 2007 to Petitioner, attention Mr. Devito, at an Illinois mailing address, notifying Petitioner that the Department had determined that Petitioner was required to file Wisconsin Franchise/Income Tax Returns for tax years 2001-2006 and quarterly Wisconsin Sales and Use Tax Returns for the period January 1, 2001 through June 30, 2006 (collectively, the "returns at issue" and "period at issue") based on the Department's determination that Petitioner had engaged in certain business sales activities in Wisconsin during the period at issue (the "Determination").

2. The Department has not issued an assessment against Petitioner for either franchise/income or sales/use tax due in connection with the transactions or period at issue in this matter.

3. Petitioner has not filed a petition for redetermination of an assessment with the Department in this matter.

4. Petitioner filed a petition for review with the Commission via certified mail date stamped September 6, 2007 appealing the Department's Determination.

5. On October 8, 2007, the Department filed an answer to the petition.

6. On October 30, 2007, the Department filed with the Commission a notice of motion and motion with supporting documents to dismiss the petition for review due to the Commission's lack of jurisdiction based on the following grounds: (A) there is no amount in controversy because the Department has not issued an assessment in this matter; (B) Petitioner has not filed a petition for redetermination with the Department

pursuant to Wis. Stat. § 71.88(1)(a); and (C) Petitioner thus has not been aggrieved by the Department's redetermination pursuant to Wis. Stat. § 71.88(2)(a).

7. On December 3, 2007, Petitioner filed a response to the motion.

8. On December 13, 2007, the Department filed a reply in support of the motion.

9. On February 1, 2008, Petitioner filed an additional response to the motion.

CONCLUSION OF LAW

The Commission lacks jurisdiction over this petition for review because the Department has not issued an assessment, Petitioner has not filed a petition for redetermination with the Department in connection with an assessment, and Petitioner thus has not been aggrieved by the Department's redetermination in this matter, which is required to confer jurisdiction on the Commission under Wis. Stat. §§ 71.88(2)(a) and 73.01(5)(a).

RULING

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). Under Wis. Stat. § 71.88(1)(a), "any person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of refund may, within 60 days of receipt of the notice, petition the department of revenue for redetermination." Wis. Stat. § 71.88(1)(a). A person feeling aggrieved by the Department's redetermination may then appeal to the Commission. Wis. Stat. §

71.88(2)(a). The Commission has jurisdiction to review actions of the Department pursuant to a timely petition for review filed by 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” Wis. Stat. § 73.01(5)(a).

In its Determination dated August 3, 2007, the Department notified Petitioner that the Department had determined that Petitioner was required to file the returns at issue for the period at issue. The Department has not issued an assessment for any tax due to Petitioner in connection with this matter, and thus there is no amount in controversy. Similarly, Petitioner has not filed a petition for redetermination with the Department, and thus is not aggrieved by its redetermination.

Petitioner argues that its activities in Wisconsin were *de minimis* and exempt from state tax and filing requirements pursuant to Public Law 86-272 (15 U.S.C. 381). Petitioner asserts that it did not have nexus with Wisconsin for tax purposes during the period at issue. Petitioner further argues that preparing and filing the returns at issue would be unduly burdensome and costly, because it did not have nexus with Wisconsin during the period at issue. However, Petitioner does not dispute the Department’s characterization of the procedural posture of this matter.

The Commission previously has ruled that it does not have jurisdiction to hear a case where the Department’s action is not yet final. For example, in *W. A. Krueger Co. v. Wis. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-248 (WTAC Oct. 5, 1983), the Commission held that it did not have jurisdiction to review subpoenas *duces tecum* issued by the Department in a case where the Department was engaged in an audit of the

petitioner and had not yet issued a notice of assessment, refund or denial of a refund. Similarly, in *Greg Acker Family Trust v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-413 (WTAC June 11, 1984), the Commission held that it did not have jurisdiction to review a case where the Department had not yet denied the petitioner's petition for redetermination.

Petitioner has filed a premature appeal with the Commission, which the Commission does not have jurisdiction to hear. The Department has not issued an assessment, Petitioner has not filed a petition for redetermination with the Department, and Petitioner thus is not aggrieved by the Department's redetermination in this matter. Consequently, this matter is not within the subject matter jurisdiction granted to the Commission by Wis. Stat. § 73.01(5)(a).

ORDER

The Department's motion to dismiss is granted on the basis that the Commission lacks jurisdiction in this matter, and the petition for review is dismissed.

Dated at Madison, Wisconsin, this 12th day of March, 2008.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Acting Chairperson

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"