

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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EA RESTORATION, LLC, DBA  
CERTIFIED PROFESSIONAL RESTORATION,

DOCKET NO. 20-S-195

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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RULING AND ORDER

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**ELIZABETH KESSLER, CHAIR:**

This case comes before the Commission for decision on Respondent's Motion to Dismiss. Petitioner, Certified Professional Restoration, of Appleton, Wisconsin, is represented by Mr. Matt Everett, President of EA Restoration, dba Certified Professional Restoration. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Jenine E. Graves. Both parties filed briefs and documents in support of their positions. Additionally, Petitioner requested an in-person hearing on the facts.

The Commission finds that the Petition for Review in this matter was filed more than 60 days after Petitioner received the Notice of Action on this request for redetermination. Therefore, the Commission lacks jurisdiction and must, as a matter of

law, dismiss this matter. Because we lack jurisdiction over this matter, we do not have the authority to hold an in-person hearing and must deny Petitioner's request.

### FACTS

1. On May 21, 2019, the Department issued Petitioner a Notice of Office Audit Amount Due - Sales & Use Tax for tax years 2012-2015. (Affidavit of Mary E. Nelson ("Nelson Aff."), Ex. A.)
2. On or about July 19, 2019, Petitioner submitted a Petition for Redetermination. (Nelson Aff., Ex. B.)
3. By Notice of Action dated July 10, 2020, the Department denied the Petition for Redetermination. (Nelson Aff., Ex. C.)
4. On July 15, 2020, Petitioner received the Department's denial by certified mail. (Nelson Aff., Ex. C.)
5. The 60-day period provided for the timely filing a Petition for Review with the Commission to appeal the Department's action on the Petitioner's Petition for Redetermination expired on September 14, 2020. (Wis. Stat. § 73.01(5)(a).)
6. On September 21, 2020, the Tax Appeals Commission received the Petition for Review by regular mail. (Commission file.)
7. On October 2, 2020, the Department filed a Motion to Dismiss with a brief in support of the Motion, along with an affidavit with exhibits. (Commission file.)
8. Petitioner filed a letter in response on November 17, 2020. Respondent and Petitioner each filed an additional subsequent response. (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 the 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. § 73.01(5)(a): Any person 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 . . . . For purposes of this subsection, a petition for review is considered timely filed if mailed by certified mail in a properly addressed envelope, with postage duly prepaid, which envelope is postmarked before midnight of the last day for filing.

Wis. Stat. § 71.88(2): *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 . . . the assessment, refund, or denial of refund shall be final and conclusive.

## ANALYSIS

Unless otherwise provided by statute, a document is filed on the date it is received by the Commission. *Laurence H. Grange v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-017 (Dane Co. Cir. Ct. 1993). The one exception in Wis. Stat. § 73.01(5)(a) states that a petition is timely if it is mailed; (1) by certified mail, (2) in a properly addressed envelope,

(3) with postage prepaid, and (4) postmarked before midnight of the last day for filing. Petitioner's Petition was filed by ordinary mail, so this exception does not apply.

Petitioner received the Notice of Action on July 15, 2020, via Certified Mail. Petitioner mailed this Petition by regular, not certified, mail, and the Commission received it on September 21, 2020. The 60-day deadline to file expired on September 14, 2020. Under the rules established in Wis. Stat. § 73.01(5)(a) regarding the filing of petitions for review with the Commission, this Petition was untimely.

Petitioner points out that the Department did not render its redetermination within the 6 months required by Wis. Stat. § 77.97(6)(a). The statute, however, provides no consequence for such a failure and, therefore, we are required to follow caselaw which has held that "shall" in such circumstances is merely directory. *Dep't of Revenue v. Vonasek & Schieffer, Ins.*, Wis. Tax Rptr. (CCH) ¶ 202-754 (Cir. Ct. 1986).<sup>1</sup> Thus, the Department's tardy redetermination is valid. Petitioner was then afforded 60 days from the date of receipt in which to appeal. Petitioner failed to meet that mandatory deadline.

Because the Petition was not timely filed, the Commission has no jurisdiction and must dismiss the Petition. This is not a matter for discretion; the Commission has no choice in the matter. *Alexander v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-650 (WTAC 2002).

#### CONCLUSION OF LAW

The Petitioner's Petition for Review was not timely filed as required by Wis.

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<sup>1</sup> The concurrence below points out the weaknesses in the reasoning giving rise to the precedent we must follow on this issue.

Stat. § 73.01(5)(a) and, thus, the Commission lacks jurisdiction in this matter.

**ORDER**

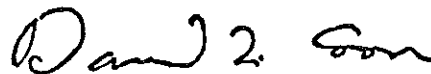
The Department's Motion to Dismiss is hereby granted, and the Petition for Review is dismissed.

Dated in Madison, Wisconsin, this 1<sup>st</sup> day of March, 2021.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



David L. Coon, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

**LORNA HEMP BOLL, Commissioner (Concurring):**

The majority's holding is legally sound. I write this concurrence, however, to point out three issues with which the Commission is uncomfortable. The first concern is that previous caselaw and poorly written statutes create the appearance of an unfair advantage for the Department vis à vis taxpayers. The second concern is that the reasoning behind the existing caselaw ignores the rules of statutory construction. Finally, the third concern is that the cavalier redefinition of commonly understood words weakens the integrity of the law itself.

Wisconsin Statute § 77.59(6)(a) indicates that the Department is to make its redetermination within 6 months, but the statute is silent in the event the Department fails to do so.

This statute came under scrutiny in 1986 in *Dep't of Revenue v. Vonasek & Schieffer, Ins.*, Wis. Tax Rptr. (CCH) ¶ 202-754 (Cir. Ct. 1986). In that case, the Commission had found that the provision was mandatory. From there, the Commission had declared that the Department's failure to render a timely redetermination "terminates the Department's jurisdiction," which meant the Department's initial sales tax assessment was null and void.

In a two-page decision, the *Vonasek* circuit court reversed the Commission. Rather than noting that the mandatory provision was unenforceable absent a statutory penalty, the circuit court, with a reference to a case from 1940<sup>2</sup> involving a similarly faulty statute (silent as to consequences for failure to comply), instead upheld the notion that "shall" was "merely directory" insofar as public officers are concerned. Too often now, *Vonasek* is now cited for the proposition that, while taxpayers must meet deadlines or face dismissal and enforcement of assessments, the Department need only make its redetermination when it gets around to it. Taxpayers should shudder at the inequity that public officials need not adhere to statutory time limits.

As to the second concern, the rules of statutory construction prohibit the reading of nonexistent words into a statute. The *Vonasek* court was correct in finding that the Commission had overstepped in fashioning a non-existent remedy against the Department. However, just as the language did not provide for the Commission's remedy, language granting the Department an indefinite extension is similarly absent. Nevertheless,

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<sup>2</sup> *State v. Industrial Comm.*, 233 Wis. 461, 289 N.W. 769 (1940).

the *Vonasek* court created an extension with no concern regarding its ramifications. If six months after the deadline is acceptable, will it be tolerable for the Department to render redeterminations years later?

The third concern is the corruption of the English language, and, by extension, our system of laws. In more formal times, "shall" was used to form the future tense for the first-person, while "will" was employed for second- and third-person. (I shall accept your invitation, shall we both go, will you attend as well, he/she/they will not attend). More recently, with the demise of grammatical formality, for future tense, "shall" has, for the most part, fallen to "will" even for first-person (I will perform a task); however, the traditional construction remains acceptable, especially in formal settings.

The use of "shall" for second- or third-person, however, has always conveyed a mandate. "You shall be on time" is not an expression of what may happen in the future. It is a directive. "Shall," in that context, means "must."

Wisconsin Statute § 77.59(6)(a) clearly mandates, "Within 6 months of the receipt by the department of the petition for redetermination, the department shall notify the petitioner of its redetermination." (emphasis added) The language is unequivocal: The Department must do this. The problem is that the directive has been rendered impotent by the absence of a consequence.

Although the practical result is the same ("shall" without consequence is unenforceable), I strongly oppose judicial linguistic gamesmanship which threatens the integrity of the English language. The legislature should use the words it means and should be called upon to repair statutes that are vague or incomplete. Courts should not have the

power to redefine "shall" to mean "should at some point when the Department has the time."

I concur to advocate for the following: Statutory language should not create, or even appear to create, an advantage to the Department over the taxpayers. The Commission and the courts should refrain from reading words into the statutory silence to create new vague time frames. And we should not be comfortable sanctioning alternative definitions which favor the government to the detriment of the unwary public, who may have to learn the hard way that English words no longer mean what reasonable speakers of the language believe.



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Lorna Hemp Boll, Commissioner



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.