

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

Appeal No. WD 65782

**STATE OF MISSOURI
Respondent,**

vs.

**MINA ELLIOTT
Appellant.**

**On Appeal from the
Circuit Court of Clay County, Division VII
Honorable Janet Sutton, Judge
Case No. CV 103-1912AC**

**BRIEF OF APPELLANT
MINA ELLIOTT**

**JAMES G. TRIMBLE
Attorney for Appellant
Mina Elliott**

TABLE OF CONTENTS

TABLE OF AUTHORITIES 1

JURISDICTIONAL STATEMENT 2

STATEMENT OF FACTS 3

POINTS RELIED ON 4

ARGUMENT 5-6

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

United States Constitution	14 th Amendment	2, 4, 6
Missouri Constitution	Article I, Section 10	6
Missouri Constitution	Article V, Section 3	2
RSMo	143.611	5
RSMo	143.621	2, 4
RSMo	621.050	2, 4, 5
Eddie Bauer, Inc. v. Director of Revenue	70 S.W. 3 rd 434 (S.Ct. En Banc 2002)	4, 5
Grannis v. Ordean	234 US 385; 34 S.Ct. 779	6
Mullane v. Central Hanover Bank & Trust Co.	339 US 306, 70 S.Ct. 652 1950	4, 6
State ex rel. Director of Rev. v. Anderson	957 S.W. 2d 957 (S.D. Mo. App. 1997)	5

JURISDICTIONAL STATEMENT

This appeal is from a final Judgement entered by the Circuit Court of Clay County on June 13, 2005 *L.F.* 24 in a proceeding to collect Delinquent Missouri Individual Income Tax *L.F.* 7.

The action involves the question of whether the failure to receive notice sent by certified mail, of assessment of individual income tax required by Section 143.621 and Section 621.050 RSMo, but undelivered, deprives Appellant Mina Elliott, of her right to appeal. The County Circuit Court entered its judgment for Plaintiff, Director of Revenue, thereby overruling the Affirmative Defense in Defendant's Answer *L.F.* 21 and Motion for Dismissal *L.F.* 22, which raised the above defense at the earliest opportunity.

This Judgement constitutes a denial of due process and hence involves the applicability of the 14th Amendment to the U.S. Constitution and comparable State of Missouri Constitutional provisions and this Court has general appellate Jurisdiction under Article V, Section 3, of the Missouri Constitution.

STATEMENT OF FACTS

This appeal arises out of a Petition for Delinquent Missouri Individual Income Tax filed by the Director of Revenue against Defendant, Mina Elliott, on March 13, 2003 in the Circuit Court of Clay County *L.F.* 7. Defendant filed her Answer and Affirmative Defense on March 10, 2005 *L.F.* 20-21. On June 13, 2005 the case was tried and the Plaintiff presented evidence that certified mail notices had been sent as required by statute to Defendant, Mina Elliott *Tr p.*12. On cross examination she stated that the official records showed that all of the notices sent by certified mail had been returned as unclaimed *Tr p.*24-25. At the close of the Plaintiff's case Defendant moved for Dismissal on grounds that failure to actually notify Defendant of a tax assessment and her right to appeal constitutes denial of Due Process Guaranteed by the 14th Amendment to the United States Constitution. The Motion was argued and overruled *Tr p.*49 and Judgement entered for \$5,712.85 *Tr* 50-51, *L.F.* 24.

POINTS RELIED ON

I

The Court erred as a matter of law in overruling Defendant's Motion for Dismissal and entered Judgement against Defendant in that:

The finding and judgment of the Court are contrary to the law, in that the undisputed evidence was that no notice was ever received by Defendant of her right to challenge Plaintiff's tax assessments. Under Section 143.621 RSMo, the assessment of taxes is final unless a protest is filed within 60 days of mailing of notice of delinquency. Under Sections 621.050 RSMo Defendant is entitled to notice of her right to appeal the decision by the Director of Revenue to the Administrative Hearing Commission. However, the time for appeal is "30 days after the decision of the Director is placed in the U.S. Mail or within 30 days after the decision is delivered, whichever is earlier". The effect of these statutes is to deny Defendant any right of appeal because she never received the required notices.

Sections 143.621 and 621.050 RSMo, as applied in this case, deny Defendant any right to challenge the tax assessment and therefore constitutes the denial of due process guaranteed by the 14th Amendment to the United States Constitution and comparable State regulations.

United States Constitution 14th Amendment

Mullane v. Central Hanover Bank & Trust Co. 70 S.Ct. 652 (1950)

Eddie Bauer, Inc. v. Director of Revenue 70 S.W. 3rd 434 (Mo. banc 2002)

ARGUMENT

The only evidence in Plaintiff's case was testimony by Sharon Norman, an Office manager for the Plaintiff, Department of Revenue, who presented evidence that Notice of Adjustment for the years 1991 through 1995 *Tr. 4, L.F. 15-19* were sent to Defendant by certified mail under the provision of Sections 143.611 and 621.050 RSMo., however all of the notices were undelivered and returned to sender.

The notices which were never delivered contained a list of taxpayers choices *L.F. 30*. This Notice states "Upon receipt of this Notice of Deficiency, you may do one of the following:" and then lists the rights of appeal.

The failure to actually notify Defendant of the Tax Adjustment and her right of appeal denied her any way to challenge the legality of the assessments. This constitutes denial of Due Process, guaranteed by the 14th Amendment to the United States Constitution. See Eddie Bauer, Inc. vs. Director of Revenue, 70 SW 3rd 434, 437 (Mo. banc 2002) which held that: Federal due process requires states to offer tax payers procedural safeguard against "unlawful exactions."

The case of St. ex rel. Director of Rev. vs. Anderson, 957 SW 2d (Mo. App. S.D. 1997) held that the right of protest and appeal to the Administrative Hearing Commission is the exclusive remedy for litigating whether the assessed tax is owed. The issues of whether Anderson actually received the Notice was not raised, therefore we can assume that, after receiving notice, he failed to protest within 60 days and to appeal the final assessment within 30 days. In this case Plaintiff's evidence was that Defendant Mina Elliott did not receive Notice of her right to appeal the assessment as required by Sections 143.611 and 621.050 RSMo.

The Courts' decision in this case constitutes the Denial of Due Process guaranteed by the 14th

Amendment to the U.S. Constitution and Article I, Section 10 of the Missouri Constitution. The U.S. Supreme Court case of Mullane v. Central Hanover Bank & Trust Co. et al. (339 U.S.306,314-70 S.Ct.652, 1950) has an extensive review of the Due Process Clause. Quoting from Grannis v. Ordean (234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L.Ed. 1363). The Court said, *The fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear of default, acquiesce or contest. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action afforded them an opportunity to present their objections.*

WHEREFORE, based on the above authority, Defendant requests that the Court rule that the Defendant must receive actual notice of the assessment of taxes before her right to appeal is exhausted and that the Circuit Court be ordered to dismiss the claim of the Missouri Department of Revenue in this case.

Respectfully submitted,

James G. Trimble #16312
1910 Erie Street, Suite 200
North Kansas City, MO 64116
Telephone (816) 283-9772
Facsimile (816) 283-9771
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above foregoing Brief plus one electronic copy on diskette was mailed this ____ day of December, 2005, to:

Dawn Schaag
Assistant Prosecuting Attorney
James G. Rooney Justice Center
11 S. Water Street
Liberty, MO 64068

James G. Trimble
Attorney for Appellant