

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

Appeal No. WD65782

**STATE OF MISSOURI,
DIRECTOR OF REVENUE,
Respondent,**

vs.

**MINA ELLIOT
Appellant.**

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

RESPONDENT'S BRIEF

**STATE OF MISSOURI,
DIRECTOR OF REVENUE
Dawn Schaag
Assistant Prosecuting Attorney, Clay County
Attorney for Respondent**

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STATEMENT OF FACTS

This appeal follows a judgment for Plaintiff/Respondent, the State of Missouri, Director of Revenue against Defendant/Appellant, Mina Elliot for her failure to pay delinquent Missouri individual income tax for the years 1991 through 1995. The Director of Revenue, by and through the State of Missouri, filed a Petition for Delinquent Missouri Individual Income Tax on March 13, 2003, in the Circuit Court of Clay County (*L.F.* 7). The case was heard by Judge Janet Sutton, in the Seventh Division of the Clay County Circuit Court on June 13, 2005 (*Tr p. 1*). Plaintiff's evidence demonstrated the Director of Revenue sent notice to the Defendant through certified mail, advising her of the amount of deficiency proposed to be assessed as well as her right to protest, as required by RSMo Sections 143.611 and 143.621 (*Tr p. 12*).

Upon completion of Plaintiff's case, Defendant moved for dismissal asserting denial of due process as guaranteed by the 14th Amendment to the United States Constitution. This motion was argued and subsequently overruled (*Tr p. 49*). A judgment for \$5,712.85 was entered against the Defendant (*Tr p. 50-51, L.F. 24*).

ARGUMENT

I. THE TRIAL COURT’S JUDGMENT AGAINST APPELLANT SHOULD BE AFFIRMED BECAUSE THE APPLICABLE STATUTORY REQUIREMENTS REGARDING NOTICE HAVE BEEN MET.

The trial court correctly held that the Director of Revenue met the statutory requirements set out by Sections 143.611 and 143.621 of the Missouri Revised Statutes. Section 143.611.1 states “the notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address.” (*A.B. A2*). Section 143.621 states that “sixty days after the date on which it was mailed (one hundred fifty days if the taxpayer is outside the United States), a notice of deficiency shall constitute a final assessment of the amount of tax specified together with interest, additions to tax, and penalties except only for such amounts as to which the taxpayer has filed a protest with the director of revenue.” (*A.B. A3*).

The evidence provided by the Director of Revenue at trial demonstrated that notice of deficiency was sent by registered mail to Appellant’s last known address (*Tr p. 4-13*). The notice of deficiency sent also explained Appellant’s choices upon receipt of notice and her

right to appeal from any assessment made by the director of revenue as provided in RSMo. Section 621.050 (*Tr p. 5, A.B. A4*).

Although Appellant maintains the failure to actually notify her of the deficiency effectively denies her the right of due process guaranteed by the United States Constitution, the applicable statute does not require actual notice of deficiency be received by the taxpayer. As previously stated, the notice must be mailed by certified or registered mail to the taxpayer's last known address (*A.B. A2*), which was the procedure followed by the Director of Revenue in this case.

On appeal, the Appellant acknowledges the statutory requirements have been met, but asserts that the effect of the applicable statutes is to deny Appellant her due process right of appeal. The Appellant quotes the court in *Grannis v. Ordean*, stating "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." (234 U.S. 385, 394; 34 S.Ct. 779, 783, 58 L.Ed. 1363).

Had the Missouri Legislature intended the statutory requirement to be actual notice, it would have made it so. Rather, it may be inferred the Legislature deemed a notice of deficiency through certified or registered mail is “notice reasonably calculated...to apprise interested parties of the pendency of the action afforded them...”*Id.* Therefore, Appellant’s Constitutional right to due process has not been violated, and the applicable statutory requirements have been met.

The Appellant also cites *Eddie Bauer v. Director of Revenue*, 70 S.W.3d 434, which states that “federal due process requires states to offer taxpayers procedural safeguards against unlawful exactions.” *Id.* at 437, citing *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). However, the court in *Eddie Bauer* found that “states may meet this requirement by offering taxpayers a pre-deprivation remedy, which allows the taxpayer a meaningful opportunity to withhold the tax and dispute the amount owed...” *Id.* The court went on to state that “Missouri’s income tax laws purport to offer both pre-deprivation and post-deprivation alternatives for contesting the validity of a tax.” *Id.* Further, the court states specifically “Section 143.631 allows a

taxpayer to withhold payment of the tax and file a written protest with the Director and to request an informal hearing on the matter.” *Id.*

Although the court in *Eddie Bauer* held the party’s right to due process had been violated, this was because that party had not been afforded either a pre-deprivation or post-deprivation remedy to a tax scheme which was ultimately deemed unconstitutional. That case is distinguishable from the present case as Appellant here was afforded a pre-deprivation remedy through Section 143.631, and she was notified of this remedy as required by Section 141.611.1. Therefore, there have been no “unlawful exactions” by the Respondent and Appellant’s due process rights have not been violated.

CONCLUSION

For the foregoing reasons, the undersigned Respondent respectfully requests this Court affirms the trial court’s judgment for the State of Missouri, Director of Revenue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above foregoing Respondent's Brief plus one electronic copy on diskette was mailed this ____ day of January, 2006, to:

James G. Trimble
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ATTORNEY FOR APPELLANT

Dawn Schaag
Attorney for Respondent

APPENDIX

RSMo. Section 143.631.....A1-2

CERTIFICATE UNDER SPECIAL RULE NO.1, RULE 84.06

Undersigned Attorney for Respondent hereby certifies, as required by Special Rule No. 1, Rule 84.06 the foregoing Brief and Argument, submitted by Respondent:

1. Includes the information required by Rule 55.03
2. Complies with the limitations contained in Special Rule No. 1 (b)
3. Contains 1,095 words, in total

Further, Undersigned Attorney for Respondent hereby certifies, as required by Special Rule No. 1 (f), that the floppy disk filed herewith, containing the Respondent's Brief and Argument in full, is fully compliant with the requirements of said Rule. Specifically, that the disk is IBM-PC-compatible 1.44 MB, 3 ½-inch size and that it is, to the Undersigned's best knowledge and belief, virus-free.

Dawn Schaag # 49760
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Missouri Revised Statutes

Chapter 143 Income Tax Section 143.631

August 28, 2005

Protest by taxpayer, effect of--request for informal hearing--payment under protest, written statement required, content--receipt of deposit, duties of director--request for return of deposit, when, effect.

143.631. 1. Within sixty days (one hundred fifty days if the taxpayer is outside the United States) after the mailing of a notice of deficiency, the taxpayer may file with the director of revenue a written protest against the proposed assessment in which he shall set forth the grounds on which the protest is based. If a protest is filed, the director of revenue shall reconsider the proposed deficiency.

2. A taxpayer's protest may include a request for an informal hearing with the director. If such a request is made, an informal hearing shall be heard. The informal hearing shall be a forum for discussion of the merits of the proposed assessment. The parties shall also consider the possibility of negotiating a settlement of the contested tax liability.

3. If a taxpayer has filed a timely protest under subsection 1 of this section, the taxpayer may, at any time before an assessment has become final, make a deposit with the director of revenue of any part or all of the tax, interest, additions to tax or penalties proposed in the notice of deficiency. The deposit shall be accompanied by a written statement setting forth:

- (1) The identification of the tax and the tax period to which the deposit applies;
- (2) The amount of tax, interest, additions to tax or penalties to which the deposit is to be applied by the director; and
- (3) Such other identifying information as the director of revenue may by regulation provide.

4. Upon receipt of a timely deposit under subsection 2 of this section, the director of revenue shall issue a receipt to the taxpayer acknowledging receipt of the deposit, and confirming the amount of tax, interest, additions to tax and penalty to which the deposit has been applied. All such deposits shall be deposited in the general revenue fund of the

state as payments of tax, interest, additions to tax and penalty, as the case may be. The director of revenue shall refuse the tender of any deposit which does not satisfy the requirements of this section, and shall return such payment to the taxpayer.

5. A taxpayer which had made a deposit under this section which has been accepted by the director of revenue may at any time before an assessment has become final or an action has been filed in the circuit court of Cole County under subsection 5 of section 143.841, request in writing that the director of revenue return the deposit to the taxpayer. The director of revenue shall return such deposit without interest if a written request is made. The taxpayer's request for return of a deposit shall not be treated under this chapter as a claim for refund for purposes of section 143.821.

6. The payment under protest provision provided by this section shall only apply to taxes imposed by this chapter and shall not be incorporated by reference to apply to taxes imposed by other chapters.

(L. 1972 S.B. 549, A.L. 1978 S.B. 661, A.L. 1983 1st Ex. Sess. H.B. 10, A.L. 1988 H.B. 1335, A.L. 1996 H.B. 1098)
