

SC95055

IN THE SUPREME COURT OF MISSOURI

HARRY FISCHER,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

**Appeal from the Missouri Administrative Hearing Commission
The Honorable Nicole Colbert-Botchway, Commissioner**

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This appeal arises from the Administrative Hearing Commission's granting of the Director of Revenue's Motion for Cross-Summary decision. (L.F. 91). This appeal involves the construction of § 143.731, RSMo¹, and § 143.741, RSMo. (App. Br. 7, 11). Because both of these statutes are revenue laws, jurisdiction lies in the Supreme Court of Missouri. Mo. Const. Art. V, § 3.

¹ All statutory citations are to Revised Statutes of Missouri as updated through the 2015 supplement.

STATEMENT OF FACTS

On April 15, 2005, Fischer requested an extension of time to August 15, 2005, in which to file his 2004 tax return. (L.F. 45, 92). He enclosed a payment of \$2,000 with the extension request. (L.F. 45, 92).

Fischer neglected to file his 2004 tax return by the new deadline. (L.F. 45, 92). Instead, he mailed his 2004 return on February 27, 2007. (L.F. 45, 92). On that 2004 return, Fischer stated that he owed no tax for that year, and entered the prior payment of \$2,000 as an overpayment that would apply to his 2005 tax liability. (L.F. 45, 92).

Fischer neglected to file his 2005 and 2006 tax returns on time. (L.F. 45-46, 92). Instead, he mailed both returns on March 31, 2009. (L.F. 45-46, 92). Because these returns were filed late, the Director of Revenue (Director) calculated and applied additions and interest to the tax owed. (L.F. 46, 92-93). The Director subtracted this amount from the \$2,000 Fischer had paid earlier, leaving a balance of \$411.83. (L.F. 46, 93). The Director credited the \$411.83 balance to Fischer as of the date Fischer filed his 2005 and 2006 returns: March 31, 2009 (L.F. 46, 93). Fischer did not protest the additions or interest at that time. (L.F. 93).

Fischer neglected to file his 2007 tax return on time. (L.F. 46, 93). Instead, he mailed his 2007 return on June 28, 2011. (L.F. 46, 93). Fischer included a payment of \$1,293 with his return. (L.F. 47, 94). Because the

return was filed more than five months late, the Director calculated and applied additions, interest, and penalties to the tax owed. (L.F. 46-47, 94). The underlying tax obligation was \$2,152, the additions were \$538, the interest was \$343.75, and the penalty was \$5. (L.F. 46-47, 94). The Director subtracted the \$411.83 balance and the \$1,293 payment from the total amount owed. (L.F. 46-47, 70, 72, 94). On August 3, 2011, the Director sent Fischer notice of the proposed changes. (L.F. 47, 70, 94).

On October 25, 2011, Fischer sent the Director \$626, which was less than half of the amount he still owed. (L.F. 47, 76, 94). On October 26, 2011, the Director sent Fischer a notice of deficiency, which Fischer timely protested. (L.F. 47, 73, 94). On February 22, 2013, the Director issued a final decision finding that Fischer still owed \$703.64, plus interest, on his 2007 income tax liability. (L.F. 94).

Fischer timely appealed that decision to the Administrative Hearing Commission (Commission). (L.F. 94). On May 11, 2015, the Commission found Fischer liable for a total of \$732.91, plus statutory interest. (L.F. 102). This appeal follows.

SUMMARY OF THE ARGUMENT

The only return in dispute in this appeal is Fischer's 2007 tax return. (L.F. 96). Fischer filed this return on June 28, 2011 (L.F. 46, 94), more than three years late. Under these facts, § 143.741.1, RSMo, requires the Director to impose additions to the taxes due on the return. The credit for a prior overpayment could not be claimed when Fischer's 2007 tax return was due, because Fischer did not have a credit of \$411.83 to apply to his 2007 return until after he had filed his 2005 and 2006 returns, which he did not file until 2009—more than five months after his 2007 return was due. Further, the Director appropriately calculated Fischer's interest due under § 143.731, RSMo, because no overpayments could be ascertained until Fischer filed his earlier returns. Finally, Fischer has failed to show that the Director's application of Missouri tax statutes conflicts with federal law.

ARGUMENT

(Responds to Fischer’s Points I, II, and III).

Standard of Review

On appeal, this Court reviews the decision of the Commission. *New Garden Restaurant, Inc. v. Director of Revenue*, --- S.W.3d ---, 2015 WL 5936600, at *2 (Mo. banc October 13, 2015); *Fred Weber, Inc. v. Director of Revenue*, 452 S.W.3d 628, 629-30 (Mo. 2015); § 621.189, RSMo. This Court will affirm the Commission’s decision “if: (1) it is authorized by law; (2) it is supported by competent and substantial evidence based on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the legislature.” *Lalani v. Director of Revenue*, 452 S.W.3d 147, 148 (Mo. 2014); § 621.193, RSMo.

The Director was required to impose additions and interest on Fischer’s 2007 tax return under § 143.741.1, RSMo, and § 143.731.7, RSMo, because Fischer filed the return more than three years after it was due, and he had no credits or overpayments available to claim at the time it was due.

Income taxation is based on taxpayers filing annual returns. *Burnet v. Sanford and Brooks Co.*, 282 U.S. 359, 365 (1931) (The only “general scheme for taxing income” is one based on regular time intervals; “Only by such a system is it practicable to produce a regular flow of income and apply

methods of accounting, assessment, and collection capable of practical operation.”); § 143.481, RSMo (requiring the filing of income tax returns); § 143.511, RSMo (requiring tax returns to be filed and taxes paid on time each year, without any assessment, notice, or demand). Consistent with this method of taxation is § 143.741.1, RSMo, which provides as follows:

In case of failure to file any return required under sections 143.011 to 143.996 on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is not for more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate.

Fischer did not show reasonable cause for failing to file his 2007 return more than five months late. (L.F. 92-95, App. Br. 13). Under these facts, the plain language of this statute requires the Director to impose a twenty-five percent addition to Fischer’s tax. § 143.741.1, RSMo. Fischer owed tax of \$2,152. (L.F.

46, 94). Twenty-five percent of this number is \$538, the exact amount which the Director added to Fischer's tax liability. (L.F. 47, 94).

Fischer argues that this \$538 amount should be reduced, claiming that the Director should not have applied the twenty-five percent addition to that part of his tax liability which was covered by his \$411.83 overpayment. (App. Br. 7-8). To support his claim, he argues that § 143.741.1, RSMo, provides an exception for overpayments. (App. Br. 7-8). The language he relies on provides as follows:

For purposes of this section, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

§ 143.741.1, RSMo. The plain language of this provision only requires the reduction of the amount of tax by taxes paid early and by credits that may be claimed. *Id.*

Fischer did not pay any of his 2007 taxes early—there is no evidence that he had any withholdings or made any partial payments that year. (*See* L.F. 92-95).

Further, at the time his 2007 return was due, and for more than five months after it was due, he could not claim any credits against the tax he owed. This is because Fischer had not yet filed his tax returns for 2005 and 2006. (L.F. 45-46, 92). He did not file those returns until 2009. *Id.* Accordingly, at the time Fischer’s 2007 tax return was due, the amount of overpayment left over from his initial \$2,000 overpayment made in 2005 could not be ascertained. Because the amount available to claim as a credit could not be ascertained, it could not be claimed on the 2007 return at the time when that 2007 return was due or anytime during the five months the statutory additions accrued. Therefore, it was not a “credit against the tax” that could have been “claimed upon the return” when the return was due to be filed and the statutory additions were required to be imposed. § 143.741.1, RSMo. Once Fischer filed his earlier tax returns, the Director credited the \$411.83 balance to Fischer’s 2007 liability, as of the date Fischer filed the 2005 and 2006 returns—March 31, 2009. (L.F. 46, 93). But, this balance could not be claimed on Fischer’s 2007 return until that time.

Because the Director correctly calculated the additions to Fischer’s 2007 tax liability under § 143.741.1, RSMo, the Commission’s decision upholding the Director’s addition is authorized by law and is not clearly contrary to the reasonable expectations of the legislature. Therefore, the Commission’s decision should be affirmed.

In Point II of his brief, Fischer claims that § 143.731.7, RSMo, prohibits the Director from assessing interest on “tax obligations satisfied by overpayment credits,” and that the Director incorrectly assessed interest on the \$411.83 overpayment. (App. Br. 11).

Section 143.731.7, RSMo, provides:

If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

The Director correctly followed the requirements of this statute. No portion of Fischer’s 2007 tax liability could be satisfied by an overpayment until the fact of an overpayment, and its amount, if any, could be ascertained. This could not be ascertained until Fischer filed his earlier returns. The Director did credit the overpayment to Fischer’s outstanding taxes as of the postmark date on the 2005 and 2006 tax returns—the returns that allowed the Director to calculate how much of the original money remained to credit to the 2007 return—and did not assess interest on that amount after that date. (L.F. 43, 46-47, 99). Therefore, the Director correctly assessed interest under § 143.731.7, RSMo.

Fischer appears to argue that § 143.731.7, RSMo, requires his overpayment to be credited as of the date his 2007 return was due. However, as explained above, there was no overpayment credit available to be claimed on that date. Therefore, Fischer's interpretation of § 143.731.7, RSMo, has no merit.

In Point III of his brief, Fischer claims that the Director's application of § 143.731, RSMo, and § 143.741, RSMo, conflicts with the interpretation the Federal government has given to similar Federal statutes. (App. Br. 12). Fischer admits that he has not cited any authority to support his assertion that the Federal government does, in fact, interpret federal law in the manner he claims, and tries to shift the burden of proof on this issue to the Director. (App. Br. 14). However, under § 621.050.2, RSMo, Fischer had the burden of proof on this issue in the proceedings before the Commission, a burden which he entirely failed to meet. (L.F. 100). Therefore, the Commission's decision was proper under § 621.193, RSMo.

Accordingly, Fischer's Points I, II, and III are without merit, and the Commission's decision must be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of Respondent's Brief was served via electronic mail and U.S. Mail, postage prepaid, on the 16th day of November, 2015, to:

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Appellant

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 2,158 words.

/s/ Linda Lemke
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