IN THE MISSOURI SUPREME COURT

CASE NO. SC95532

CHARLES & MARY ANN HARTER

Appellants

V

NIA RAY, MISSOURI DIRECTOR OF REVENUE

,

Respondent

Appeal from Decision of The Administrative Hearing Commission

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APPELLANT'S BRIEF

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CERTIFICATE OF SERVICE

TAKE NOTICE that appellant certifies that a true and correct copy of the foregoing was served electronically pursuant to Rule 43.01 for each party this 17th day of June, 2016, as follows:

Missouri Director of Revenue Nia Ray
Curtis Schube, assistant Attorney General
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JURISDICTIONAL STATEMENT

This is an appeal from a Summary Decision of the Administrative Hearing Commission of Missouri. Taxpayers Charles and Mary Ann Harter are appellants herein, who were the petitioners in the Administrative Hearing Commission (AHC) where they sought to void assessments of deficiency for tax years 2010 and 2011, and recover claims for refund for tax years 2012 and 2013.

Taxpayers /petitioners /appellants timely appealed on February , 2016 from an adverse decision of the AHC 14-1518RI on January 12, 2016, to uphold by summary decision, without hearing, the decision, also without hearing, of the respondent Missouri Director of Revenue, to deny taxpayers a property tax credit and resultant refunds. Appellants filed a Motion for Reconsideration to seek a hearing from the AHC, which issued an amended decision February 5, 2016 adverse to taxpayers. This Supreme Court of Missouri has exclusive jurisdiction to hear this appeal pursuant to section 621.189 RSMo, Article V Section 18, and Article V Section 3 of the Missouri Constitution, as it involves "the construction of

the revenue laws of this state", specifically sections 143.091, 143.781, 143.125.1, 143.124, 135.010, and 621.050.1 RSMo.

STATEMENT OF FACTS

Appellant is a disabled Missouri schoolteacher who is entitled to a Missouri Property Tax Credit, however each year since 2007, the Director has denied the credit because taxpayers did not submit a federal SSA form 1099. (R. 246) As a member of the Public School Retirement System, appellant is not in the federal social security system and does not have a form 1099. (R. 247) The MO-PTS form for the property tax credit requires disabled applicants to submit the federal form 1099 (Apx. 82) The Director knows that disabled teachers cannot provide this federal form, but year after year continues to deny them. (R. 246)

Each year appellant's husband, an attorney who formerly served as an assistant general counsel for the Director, would call the general counsel's office. (R. 3, R. 247) The attorneys would enter into a stipulation of counsel that appellants were disabled by PSRS and entitled to the credit without form 1099. (R. 3, 247) Until the spring of 2013, when the Director's counsel would not speak to appellant for tax year 2012. (R. 57) Appellants then received a denial of refund for year 2012 together with adjustments alleging deficiencies for years 2010 and 2011 in the exact amount of the refunds which had been issued pursuant to the stipulations of

counsel each year. (R. 4 R. 57) The only issue given for these adjustments was that appellant had failed to provide a form 1099 (R. 58-60)

Taxpayer appealed to the Director and provided a letter from her counsel that incorporated the stipulation of counsel. (R. 61-2) The Director then, for the first time, proposed to adjust the returns to deny the credit by adding back to taxpayers' income, items which were treated as not income by federal tax law. (R. 56) While in review before the Director, tax year 2012 was added on the same issues. (R. 2) The Director issued a Decision upholding the assessments for years 2009 and 2010 and denying the refunds for years 2011 and 2012. (R. 4) Taxpayers timely filed a complaint with the Administrative Hearing Commission. (R. 4) which set the case for hearing. (A3).

Appellants filed a Motion for Summary Decision for years 2009 and 2010 on the basis of res judicata of the stipulation of counsel, but continued to seek and demand a hearing on their claims for refund in years 2011 and 2012. (R. 54) Appellants requested a continuance of the hearing to determine their motion (R. 71), but instead the AHC ordered to "cancel" the hearing. (R. 72) The Director then filed a motion for Summary Decision against taxpayers, which motion did not include a single tax return nor adjustment notice within its 50 pages. (R.90 -144) The Director then refused to provide discovery to taxpayers concerning the period of time the stipulations of counsel were being entered (R 198) and the AHC

refused to consider or respond to four motions by appellants to enforce discovery (R. 67, 149, 198, 212, A2-3)

Appellant alleged that the stipulation of counsel was that appellants were entitled to the property tax credit and promised to produce testimony at hearing of the Director's counsels who had so stipulated. (R. 145) Appellant requested the hearing be reset on due process grounds (R. 210) which was granted on 10-1 2015 and a hearing set for February 22, 2016 (A2). Then two days before Christmas, the AHC entered an order on summary judgment (A2), and on January 16, 2016 granted summary decision in favor of the Director and denying relief to appellants. (R. 216) (A2.) The AHC reconsidered and issued an amended summary decision on February 5, 2016 with minor changes not at issue before this court. (R 276). Appellants timely appealed to this court.

POINTS RELIED ON

I. The Administrative Hearing Commission erred in dismissing appellants case by Summary Decision without hearing, because the AHC violated the mandate of its charter of 621.050.1 RSMo that in tax cases, applicants "shall be entitled to a hearing," in that this court must harmonize the conflict with 536.073.3 RSMo which, as it does not specify tax cases in authorizing the AHC to "adopt rules…for informal disposition…by ..

summary judgment" such that as 1 CSR 15-3.446, the AHC rule for summary decision, is not restricted from tax cases, it is in conflict with statute 621.050.1 and thus invalid.....

Mathews v. Eldridge 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 215 (1976).

State v. Amick, 152 S.W. 591, 247 Mo. 271 (Mo., 1912),

State Tax Com'n v. Administrative Hearing Com'n, 641 S.W.2d 69 (Mo., 1982)

621.050.1 RSMo

II. The Administrative Hearing Commission erred in dismissing appellants case by Summary Decision without hearing, because a previous agreement between the parties that taxpayers were entitled to a property tax refund credit, was res Judicata, and when alleged as fact by taxpayers, at the least, constituted a genuine dispute of material fact to as to prevent summary judgment against them.....

Beck v. Patton, 309 S.W. 3d 436, 439(Mo. App W.D. 2010

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 378 (Mo., 1993)

143.986.2(1) RSMo

III. The Administrative Hearing Commission erred in dismissing appellants case by Summary Decision without hearing, because it ignored and violated section 143.091 RSMo which requires the respondent director to give the same federal meaning of non-income to social security disability and annuity payments, such as would qualify taxpayers for their property tax refund credit, in that director's claimed authority of section 135.010 is not within "sections 143.011 to 143.996" as required by 143.091……

Goldberg v. Administrative Hearing Commission, 606 S.W.2d 176 (Mo., 1980)

Garland v. Director of Revenue, 961 S.W.2d 824, 830 (Mo., 1998)

143.091 RSMo

IV. The Administrative Hearing Commission erred in dismissing appellants case by Summary Decision without hearing, because by allowing the Director to require disabled Missouri school teachers to provide a federal form 1099, knowing that they cannot have one, the respondent Director discriminates against disabled, in that form MO-PTS is illegal, and the actions to deny appellants the credit are also illegal and void……..

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211, 191 L.Ed.2d 186, 83 USLW 4160 (2015).

Sotierescu v. Sotierescu, 52 S.W.3d 1 (Mo. App. E.D., 2001)

135.010(2) RSMo

STANDARD OF REVIEW

Our review of a grant of summary judgment is "essentially *de novo*." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id.* "The propriety of summary judgment is purely an issue of law." *Id.* "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id.* When considering an appeal from summary judgment, we review the record in the light most favorable to the party against whom judgment was entered. *Id.* "We accord the non-movant the benefit of all reasonable inferences from the record." *Id.* Summary judgment will only be upheld on appeal if: (1) there is no genuine dispute of material fact, and (2) the movant is entitled to judgment as a matter of law. *Brock v. Blackwood,* 143 S.W.3d 47, 61 (Mo. App. W.D.2004); *see also* Rule 74.04(c). *Beck v. Patton,* 309 S.W. 3d 436, 439(Mo. App W.D. 2010) "Generally, taxing statutes are to be strictly construed in favor of the taxpayer unless a contrary legislative intent

appears." *State ex rel. River Corporation v. State Tax Commission*, 492 S.W.2d 821, 824 (Mo.1973), overruled on other grounds.

ARGUMENT

I. Taxpayers "shall be entitled to a hearing"

The Administrative Hearing Commission erred in dismissing appellants case by Summary Decision without hearing, because the AHC violated the mandate of its charter of 621.050.1 RSMo that in tax cases, applicants "shall be entitled to a hearing," in that this court must harmonize the conflict with 536.073.3 RSMo which, as it does not specify tax cases in authorizing the AHC to "adopt rules…for informal disposition…by .. summary judgment" such that as 1 CSR 15-3.446, the AHC rule for summary decision, is not restricted from tax cases, it is in conflict with statute 621.050.1 and thus invalid.

The Administrative Hearing Commission erred when it denied them a hearing, in direct violation of the unconditional guarantee of section 621.050.1 RSMo. that "any person .. shall have the right to appeal to the administrative hearing commission from any finding, order, decision, assessment or additional assessment made by the director of revenue. Any person who is party to such a dispute shall be entitled to a hearing before the administrative hearing commission." The phrase "entitled to a hearing" has always been in this statute, although it was originally

enacted in 1978 as section 161.273 and transferred in 1986 to the current 621.050.1 by Senate Bill 426, the mandate is unchanged.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner" *Mathews v. Eldridge* 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 215 (1976). Taxpayers did not receive a hearing before the Director, and because appeal from the AHC goes directly to this Supreme Court by section 621.145, there is no hearing nor review in a circuit court. There is no opportunity to be heard on a matter of taxation, which as set out herein, is a particularly sensitive citizen interaction with government power.

Courts have "repeated the rule that tax statutes are to be strictly construed against the tax authority and in favor of the taxpayer. State ex rel. River Corp. v. State Tax Commission, 492 S.W.2d at 824; In re Kansas City Star Co., 142 S.W.2d at 1039. F. Burkhart Mfg. Co. v. Coale, 139 S.W.2d at 503; Artophone Corp. v. Coale, 133 S.W.2d at 347. The policy behind this rule is that a tax cannot be imposed unless enacted and levied by the legislature and the courts should find a tax only when the intent to levy is clearly expressed." *Goldberg v. State Tax Com'n*, 639 S.W.2d 796, 809 (Mo., 1982).

There is a clear statutory structure for administrative law which is focused and centered upon a hearing, at which disputes are focused by and before knowledgeable in the field at issue, and appeal the courts is available afterwards.

Without a hearing, there is no structure, and such a system without hearing is constitutionally infirm. Section 536.063(3) RSMo provides that "Reasonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised." Section 536.070(2) RSMo provides that "In any contested case, each party shall have the right to call and examine witnesses, to introduce exhibits .." Section 536.080.1 RSMo provides that "each party shall be entitled to present oral arguments or written briefs at or after the hearing."

Taxpayers are treated differently in their AHC procedure by Chapter 621 than all others. Taxpayers are "entitled" to a hearing. For Accountants, architects, barbers, cosmetologists, chiropractors, dentists, embalmers, nurses, pharmacists, realtors, veterinarians, liquor salesmen, insured's, and private investigators, among others, section 621.045.1 RSMo provides that the AHC "shall conduct hearings and make findings of facts and conclusions of law in those cases" involving licenses. It does not say these licensees are "entitled" to a hearing as in 621.050.1 RSMo. In fact, subsection 4 if the licensee provisions of 621.045 provides that "notwithstanding any other provision of this section to the contrary … in order to encourage settlement of disputes …the agency shall …(1) provide the licensee with …the agency's initial settlement offer, or file a contested case against the licensee" and also (3) …advise the licensee that the licensee may … submit (to the AHC) …for determination that the facts agreed to by the parties."

So, in cases that are not about taxes (such as barbers and chiropractors), the legislature has clearly stated a bias toward settlement and non adverse proceedings, and in fact, has placed the burden of creating a contested case on the agency, not on the applicant. Section 536.010.4 provides "(4) 'Contested case' means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Thus in a taxation case, because the taxpayer is "entitled to a hearing", his case is a "contested case" upon filing in the AHC. But for everyone else, barbers, nurses, insured's and such, the onus is on the agency that is licensing them, to institute the "contested case.'

Section 536.073.3 allows the AHC to establish rules for summary decision, and given the above legislative structure between 621.050 and 621.045, it seems inescapable that the AHC, in attempting to write the rules under 536.073.3, will experience a conflict. "Where two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect." *South Metro. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo., 2009).

Section 621.050.1 is a special law in that it only concerns taxation cases, whereas 536.073.3 is the general law applicable to any administrative procedure. As stated in *Smith v. Missouri Local Government Emp.*, 235 S.W.3d 578, 581 (Mo. App.,

2007), "If two statutes appear to conflict, we attempt to reconcile the language to give effect to both." *Maxwell v. Daviess County*, 190 S.W.3d 606, 611 (Mo. App.2006). If the conflict is irreconcilable, "the general statute must yield to the statute that is more specific." *City of Clinton v. Terra Foundation, Inc.*, 139 S.W.3d 186, 189 (Mo".App.2004)."

The parameters of how to harmonize statutes in conflict were well set out over a hundred years ago in *State v. Amick*, 152 S.W. 591, 247 Mo. 271 (Mo., 1912), which is still good and relevant law today. The court observed at page 596, that "If these two statutes are consistent and can stand together, then it is the duty of the court to harmonize rather than to hunt for conflict of statutory provisions in pari materia. In discussing this canon of statutory construction, the Supreme Court of the United States, in the case of Frost v. Wenie, 157 U. S. 58, 15 Sup. Ct. 537, 39 L. Ed. 614, used this language: 'It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the Legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute.'"

"This is true where the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day. Sutherland, Stat. Construction, § 283. And `A statute must be construed with reference to the system of which it forms a part." Both 621.050 and 536.073 concern administrative procedure. Chapter 536 is generic procedure while 621 is specific to tax cases. "Where there are two acts and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception to the latter or general act, and not a repeal of the former, and especially is this true when such general and special acts are cotemporaneous. *Amick* page 597. Thus 621.050.1 must control, hearings must be held, and no summary decisions may issue in tax cases.

"The rules are well recognized. In general, they are: the primary endeavor is to ascertain and apply the intent of the legislature in enacting the statute, generally following the words of the statute, considered in their ordinary and common meaning, unless an absurd or unreasonable result would follow; if more is needed, a taxing statute should be strictly construed against the taxing authority, where a different intent does not appear; but the doctrine of strict construction is not to be

pushed so far as to defeat the real legislative purpose by mere construction."

Mesker Bros. Industries, Inc. v. Leachman, 529 S.W.2d 153, 156 (Mo., 1975)

The legislative purpose of these laws concerning the Administrative HEARING Commission, is to provide for hearings, in particular in 621.050.1 to require a hearing for tax cases.

Another way to approach this is that no statute provides for summary decision at the AHC, only a regulation, 1 CSR 15-3.446(6). But where the regulation is in conflict with the statute, as it is here with 621.050.1, the regulation must fail. "Erroneous regulations are a nullity, 10 J. Mertens, Law of Federal Income Taxation § 60.16 (1976), as regulations may be promulgated only to the extent of and within the delegated authority of the statute involved. State ex rel. River Corporation v. State Tax Commission, 492 S.W.2d 821, 825 (Mo.1973), overruled on other grounds, International Travel Advisors, Inc. v. State Tax Commission, 567 S.W.2d 650 (Mo. banc 1978). Under traditional judicial concepts, one who has relied on an invalid rule is in substantially the same position as one who has relied on an unconstitutional statute or an erroneous opinion of counsel. F. Cooper, State Administrative Law 267-270 (1965)." *Bartlett & Co. Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo., 1983).

"The well-established rule is that regulations may be promulgated only to the extent of and within the delegated authority of the statute involved. Bartlett and

Co. Grain v. Director of Revenue, 649 S.W.2d 220, 224 (Mo.1983); State ex rel. River Corp. v. State Tax Commission, 492 S.W.2d 821, 825 (Mo.1973), overruled on other grounds, International Travel Advisors, Inc. v. State Tax Commission, 567 S.W.2d 650 (Mo. banc 1978). When there is a direct conflict or inconsistency between a statute and a regulation, the statute which represents the true legislative intent must necessarily prevail. Therefore, to the extent that 4 CSR 110-2.110 forbids an announcement of limitation of practice even when the dentist gives notice that he is not licensed, it is a nullity." *Parmley v. Missouri Dental Bd.*, 719 S.W.2d 745, 755 (Mo., 1986) . And similarly, to the extent that 1 CSR 15-3.446(6) prevents a hearing in a tax appeal in the AHC, it too is a nullity.

"Regulations may be promulgated only to the extent of and within the delegated authority of the statute involved. If the Regulation involved here is in conflict with the sense and meaning of the statute, § 143.040, it is, to that extent, invalid." *State ex rel. River Corporation v. State Tax Commission*, 492 S.W.2d 821, 824 (Mo.1973), overruled on other grounds. Because the AHC summary decision regulation conflicts with the sense and the meaning of the statute that requires tax hearings of 621.050.1, and thus the regulation is invalid.

The entire system of administrative review encompassed by chapter 536 must also accommodate the special hearing requirements of 621.050.1. "In the case of Humphries v. Davis, 100 Ind. loc. cit. 284, 50 Am. Rep. 788, the Supreme

Court of Indiana, speaking through Elliot, J., said: "A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction." *State v. Amick*, 152 S.W. 591, 596 , 247 Mo. 271 (Mo., 1912).

Because we are required to harmonize conflicting statutes, a logical and quite easy construction is available, to wit: allow for summary decisions in license cases but not in tax cases. There, all fixed. But this is not what the AHC did, and this is definitely not how the AHC is running the railroad these days. The AHC is incorrectly allowing the Taxman, the Director, to run roughshod over taxpaying citizens. The Decision states that it went against appellants because they "fail to assert" (R. 298). While 621.050 does place the burden of proof on taxpayers, it also provides the entitlement to a hearing at which to present the proof. How can the judge bemoan the failure to assert when he did not allow a forum, that is a hearing, at which to assert?

Nothing in the history of our nation is more sensitive than taxation. It primed the pump of the very creation of our country, through the eloquent plea of No taxation without Representation as set out by the American Colonies in their

"1768 Petition, Memorial, and Remonstrance" (in thought), to the Boston Tea Party (in action) and the Boston Massacre (in horror). Some would argue that the passage of the first federal income tax, to pay for the civil war, was as important an act as the civil war, to our current circumstances of government. No one risks death over their barber, but Patrick Henry's Give me Liberty or Give me death was inspired by taxation without representation. And the whiskey rebellion put down by George Washington, was created by the need of taxation to pay for the revolutionary war and helped to create our system of political parties.

In short, taxes are different, more important, more visceral, more emotional in their connection between the governed and its citizens. Isn't it any wonder that the legislature, representing the rights of the people, demand that tax disputes receive a hearing , while the barbers and chiropractors can work out their license disputes administratively?

The Decision clearly states that the hearing officer is proceeding under Regulation 1 CSR 15-3.446(6) (R. 300). This regulation is in conflict with the statute of 621.050.1 RSMo and thus is void, and of no effect. Since the Decision is based on a void regulation, the decision must also be void perforce.

Section 621.050.2 RSMo. provides that "the burden of proof shall be on the taxpayer."How can any taxpayer meet the burden placed upon them by 621.050.1 RSMo without a hearing? If there is no hearing, there is no opportunity to be

heard, no due process. Section 621.050.2 RSMo states that "the procedures applicable to the processing of such hearings shall be those established by chapter 536", as does section 621.135 RSMo. Section 536.010(4) RSMo provides that "contested case means a proceeding before an agency in which legal rights ..are required by law to be determined after hearing." Since 621.050.1 RSMo requires a hearing, this is a 'contested case" by definition.

Section 536.063(3) RSMo provides that "Reasonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised." Section 536.070(2) RSMo provides that "In any contested case, each party shall have the right to call and examine witnesses, to introduce exhibits .." How can the taxpayers "call and examine" witnesses if there is no hearing? Taxpayers have the right to do so. Section 621.189 RSMo provides that "Final decisions of the administrative hearing commission in cases arising pursuant to the provisions of section 621.050 shall be subject to review…filed in the court of appeals in the district in which the hearing .. is held." It does not say the district in which the decision was made. As such, jurisdiction of the appellate court is based on "the hearing", and because all decisions "shall be subject to review", then there can be no tax case decision from the AHC without a hearing.

Section 536.080.1 RSMo provides that "In contested cases each party shall be entitled to present oral arguments or written briefs at or after the hearing which

shall be read by each official of the agency who renders or joins in rendering the final decision." Taxpayers were not allowed to present oral arguments or briefs because there was no hearing. In fact, the Decision rails against taxpayers (r) that they "make no attempt to s how any such …credit" and that "they fail to assert what that definition is." Appellants were fully prepared to assert such facts at the hearing,. They were prepared to call an expert witness such as Heather McCreery to testify as to these terms in federal and state law concerning the matters at issue in Argument III of this brief, and taxpayers were prepared to cross examine witnesses of the state such as Maria Sanders as to their understanding of these same issues of Argument III, however taxpayers could not subpoena witnesses to a nothing that didn't happen no time no place; that is what a hearing is for, to set the date and time so taxpayers can subpoena their witnesses to appear (536.077) and give testimony, and cross examine (536.070);

Section 536.077 RSMo provides that for taxpayer subpoenas, the "date shall be filled in by such party before service." If there is no hearing, there is no date, thus if there is no date, there can be no subpoena, and thus taxpayers are deprived of their section 536.070(2) "right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses … and to rebut the evidence against him or her". Taxpayers cannot subpoena a witness to a motion attachment. The state can command its employees to sign affidavits, but taxpayers have no such

authority. Their only authority to command testimony of a witness is through a subpoena, which is why the law requires a hearing.

If taxpayers receive the hearing to which they are "entitled" by 621.050 so that they exercise the "rights" of 536.070, they will explain in great detail exactly what the federal tax meanings are of "annuity" and "social security disability income," and what the state meaning should be. Taxpayers can make a record, at a hearing, with a transcript.

As presented in Argument III of this brief, Pursuant to section 143.091 RSMo, the term "annuity" is "used" in section 143.124 RSMo and the term "Social Security Disability benefits" as "income" is "used" in section 143.125.1 RSMo. According to section 143.091, once they are "used in sections 143.011 to 143.996" (and they are so used because 143.124 and 143.125.1 are each found in sections 143.011 to 143.996), then they "shall have the same meaning" as in federal tax law. These are undeniable, uncontroverted facts of which the commission can take judicial notice as statutes. But the commission cannot refuse a hearing at which taxpayers would present their "evidence" and then berate the taxpayers for no evidence. A hearing is the linchpin of the entire system, it is the only name given to the AHC, without a hearing, the appellate courts have no record to review, if taxpayers are forced to appeal the current decision there is no

record. Motions to not produce a record, only a hearing does that. Motions are only applicable upon an agreed record. That is not here.

Section 621.050.2 RSMo provides "The administrative hearing commission shall maintain a transcript of all testimony and proceedings in hearings governed by this section." Of even greater importance as to a right lost by the failure to conduct a hearing, is that appellants were not therefore able, in the same way to address the issue of presenting evidence of what a federal meaning is, is the existence or not, and the extent of its terms, of a stipulation of counsel discussed in Argument II. Appellants were deprived of all of the safeguards set out above in not being able to cross examine Maria Sanders and Heather McCreery as to their participation, understanding and agreement that they agreed that appellants were, in law and in fact, entitled to a property tax credit.

Section 621.189 provides that "The party seeking review shall be responsible for the filing of the transcript." Since there must be a transcript, there must be a hearing. Section 536.130(3) RSMo provides that the record on appeal "shall consist of … a complete transcript" That logically follows section 536.063(1) RSMo that in a contested case "the party instituting the proceeding seeks such action as by law can be taken by the agency only after opportunity for hearing, or seeks a hearing for the purpose of obtaining a decision reviewable upon the record of the proceedings and evidence at such hearing."

Section 621.135 RSMo provides "The provisions of chapter 536, and any amendments thereto, except those provisions or amendments which are in conflict with sections 621.015 to 621.198, and any civil rule hereafter adopted which supersedes an applicable provision of chapter 536, shall apply to and govern the proceedings of the administrative hearing commission and the rights and duties of the parties involved." Since the statue emphasizes "except those provisions ..which are in conflict" with chapter 621, and since 536.073.3 allowing summary decisions, being an applicable provision of chapter 536 but also being "in conflict" with 621.050, then those provisions of 536.073.3 which allow the AHC to "adopt rules providing for … summary decisions, by force of 621.135, shall NOT apply to nor govern the AHC proceedings. The Regulation 1 CSR 15-3.446(6), being wholly dependent on 536.073.3, is thus invalid. There can be no summary decisions in tax cases because to do so would conflict with 621.050.1.

This interpretation is not only clear, and black and white as can be, but it is entirely consistent with all other statutory constructions presented in this brief, such as that tax laws are strictly construed against the state, laws in conflict must be harmonized to give meaning to both, and that special laws (such as taxation) shall be preferred over general laws (such as administrative procedure).

It is important to note a distinction between the words "decision" and "judgment" as used in 1 CSR 15-3.446(6), the AHC rule that allows summary

"Decision" and the administrative procedure statute 536.073.3 that allows the AHC to establish rules for summary "judgment." The distinction is not happenstance, and it is conclusive that 1 CSR 15-3.446(6) is void as it is in conflict. This Missouri Supreme Court held in *State Tax Com'n v. Administrative Hearing Com'n*, 641 S.W.2d 69 (Mo., 1982) at page 75, that "The declaratory judgment is a judicial remedy" such that "By purporting to give the Administrative Hearing Commission the power to render declaratory judgments regarding the validity of agency rules, the legislature has attempted to elevate the Administrative Hearing Commission to the status of a court." To parse the use of the word "judgment" in 536.073.3 in light of *State Tax Commission v. AHC,* we must ask, is a Summary Judgment akin to a declaratory judgment, such that it is an attempt "to elevate the Administrative Hearing Commission to the status of a court?"

It is clear that not even the AHC believes it can constitutionally enter judgments. That is why it uses the "decision" word. As shown above, summary judgment of Rule 74.04 is dependent upon efficient discovery. Where the movant is the respondent, this is the distinction between a motion to dismiss, which is based on pleadings, and a summary judgment, which is based on "that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements" *ITT page* 381. Because it lacks

the capability for "adequate discovery" in that it must rely on a circuit judge for enforcement, the AHC should not attempt summary judgments, not even by changing their name to "summary decision." For this reason, even though 1 CSR 15-3.446(6) directly cites 536.073.3 as authority, by changing "judgment" to "decision" , the rule is in conflict with its own authorizing statute, and, "When there is a direct conflict or inconsistency between a statute and a regulation, the statute which represents the true legislative intent must necessarily prevail." *Parmley v. Missouri Dental Bd.*, 719 S.W.2d 745, 755 (Mo., 1986).

"The legislature "has no authority to create any other tribunal and invest it with judicial power," State ex rel. Haughey v. Ryan, 182 Mo. 349, 355, 81 S.W. 435, 436 (1904), and cannot turn an administrative agency into a court by granting it power that has been constitutionally reserved to the judiciary…… We are compelled to hold that to the extent these statutes purport to authorize the Administrative Hearing Commission to render declaratory judgments, they contravene the Missouri Constitution." *State Tax Commission v. AHC page* 76. The AHC, by directly violating the mandate of 621.050.1 RSMo that taxpayers are entitled to a hearing , thus not only violates the constitutional right to due process, but violates the constitutional doctrine of separation of powers. As this Supreme Court pointed out in *State Tax Commission v. AHC*, at page 77, "Yet '[i]t is emphatically the province and duty of the judicial department to say what the law

is.' Marbury v. Madison, 1 Cranch (5 U.S.) 137, 177, 20 L. Ed. 60 (1803). The doctrine of separation of powers, which the people unequivocally embraced in adopting Article II, § 1 of the Missouri Constitution, would be reduced to a mere shibboleth were this attempted grant of power sustained."

Summary Judgment is not a favored remedy. In fact, "From its inception, such a procedure has been regarded as "an extreme and drastic remedy and great care should be exercised in utilizing the procedure." Cooper v. Finke, 376 S.W.2d 225, 229 (Mo.1964). Skepticism continues to this day. Ross v. AT & T Comm. Co., 836 S.W.2d 952, 954 (Mo.App.1992). At the foundation of this skepticism has been the suspicion that the procedure "borders on denial of due process in that it denies the opposing party his day in court." Olson v. Auto Owners Ins. Co., 700 S.W.2d 882, 884 (Mo.App.1985). Accord Miller v. United Security Ins. Co., 496 S.W.2d 871, 875 (Mo.App.1973); Kroger Co. v. Roy Crosby Co., 393 S.W.2d 843, 844 (Mo.App.1965)." *ITT* page 377.

II. Stipulation is Res Judicata and Genuine Issue of Material Fact

The Administrative Hearing Commission erred in dismissing appellants case by Summary Decision without hearing, because a previous agreement between the parties that taxpayers were entitled to a property tax refund

credit, was res Judicata, and when alleged as fact by taxpayers, at the least, constituted a genuine dispute of material fact to as to prevent summary judgment against them

The AHC Decision erred when it refused to enforce the stipulation of counsel between appellants and respondent that appellant was disabled and entitled to a property tax credit. The Director is clearly and specifically authorized by section 143.986.1 RSMo to "enter into an agreement with any person relating to the liability of such person in respect to the tax imposed by section 143.011 to 143.996 for any taxable period." The next subsection 2provides "Any such agreement shall be final and conclusive and…(1) the case shall not be reopened as to matters agreed upon." The stipulation which the director concedes by letter (R. 61-2) and the conduct of granting the refund (R. 247) is conclusive. The Director should not have "reopened" years 2010 and 2011 after entering into the agreement that taxpayers were entitled to the tax credit. This agreement operated as res Judicata for tax years 2010 and 2011 and as collateral estoppel for tax years 2012 and 2013, such that respondent could not deny taxpayers the credit. Further, of greater import, because appellants alleged as fact an agreement that taxpayers were entitled to a property tax credit (R. 145), even if respondent denies the agreement, it constitutes a genuine issue of material fact such as must defeat entry of summary decision against taxpayers.

This allegation of stipulation is not argument from attorneys, but because the agreement is made in person by the attorneys, it is , in fact, an allegation of fact. It was so stated as fact in the affidavit in the pleadings. (R . 145) There are admissions of respondent in the record that support the claim of stipulation as genuine. (R. 246). The hearing officer erred in ignoring this crucial information by rejecting it in the Decision as a philosophical matter or legal point of argument. The allegation of stipulation is neither. It is a statement of fact. It must be considered on that level.

"The burden on a summary judgment movant is to show a right to judgment flowing from facts about which there is no genuine dispute. Summary judgment tests simply for the existence, not the extent, of these genuine disputes. Therefore, where the trial court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute as to the facts underlying the movant's right to judgment, summary judgment is not proper." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 378 (Mo., 1993). The trial court in this instance, the hearing officer, overlooked the facts of the stipulation alleged by appellant (R. 4) and recognized by respondent (R. 246).

"The adage that the record is viewed "in the light most favorable to the non-movant" means that the movant bears the burden of establishing a right to judgment as a matter of law on the record as submitted; any evidence in the record

that presents a genuine dispute as to the material facts defeats the movant's prima facie showing." *ITT* page 382. Is there ANY evidence in the record that presents a genuine dispute? Yes, the allegation of a stipulation in the pleadings (R. 2)and in the Affidavit of appellant (R.63) This alone must defeat summary decision.

"Similarly, the rule that the non-movant is 'given the benefit of all reasonable inferences' means that if the movant requires an inference to establish his right to judgment as a matter of law, and the evidence reasonably supports any inference other than (or in addition to) the movant's inference, a genuine dispute exists and the movant's prima facie showing fails." *ITT* page 382 The movant does require an inference, to wit, that there was no agreement or stipulation. If the parties agreed in 2010 and 2011 that they would settle a disputed administrative case pending before the Director by determining that the appellants were, in law and in fact, eligible for the property tax credit and should receive a refund, and then the appellants did in fact, receive a refund that had been denied, that would be material. To defeat a summary motion, the non-movant need not prove this allegation. It's mere existence defeats any inference which the Director requires, such as the inference that there was no agreement.

Appellants are the petitioners at the AHC. As such, there is an additional consideration not to grant summary decision against them. "To dismiss for failure

to state a claim (or to review a dismissal on that basis), the court must test the adequacy of the allegations of the petition. It must assume that all facts alleged by the petition are true and grant the plaintiff all reasonable inferences from those facts. If those facts and inferences meet the elements of a recognized cause of action (or a cause of action that might be adopted by the court), then the case cannot be dismissed." *Thruston v. Jefferson City School Dist.*, 95 S.W.3d 131, 133 (Mo. App., 2003).

"In our review of a trial court's grant of a motion to dismiss, we consider whether the facts as pleaded and any reasonable inferences drawn therefrom state any ground for relief. *George v. Brewer,* 62 S.W.3d 106, 108-09 (Mo.App.2001). If the facts and inferences meet the elements of a recognized cause of action, including a cause of action that may be adopted by the court, then the case cannot be dismissed. *Thruston v. Jefferson City School Dist.*, 95 S.W.3d 131, 133 (Mo.App.2003)." *Meekins v. St. John's Regional Health*, 149 S.W.3d 525, 529 (Mo. App., 2004).

Of great illustration is *Beck v. Patton*, 309 S.W. 3d 436 (Mo. App W.D. 2010), where two lawyers disagreed. " Beck asserts, and Patton denies, that the attorneys had a partnership in which they agreed to split all fees from cases … In short, the nature, scope, and validity of the partnership or fee-splitting agreement between the parties, if any existed, is left entirely unsettled." *Beck 308.* Herein,

appellants assert (R. 63, 56-7) and respondent denies (R. 92), that the attorneys had an agreement which appellants call a "stipulation of counsel", that because taxpayers wife was disabled as a teacher, that even though they did not have a federal form 1099, they were in fact, and in law, entitled to a property tax refund credit. (R. 145)

In support of this, taxpayers submitted a letter they received from the director's attorney, confirming this agreement (R 145, 61-2) and admissions of auditors who also agreed and facilitated the agreements (R. 242-7), while respondent submitted records of phone calls between taxpayer, a lawyer, and DOR lawyers Heather McCreery Maria Sanders, Trevor Bossert and Jan Pritchard (R. 97 page 7 of response to motion for summary judgment). In *Beck*, "There are allegations and documents, including email exchanges, pictures, and advertisements, in the record which, when viewed in the light most favorable to Beck, indicate … a.. partnership, … However, the extent of this relationship, including any agreement as to the division of fees is simply unascertainable from the record as it currently stands."

The Hearing officer in this case boiled all this down to that appellants "want to bind the Director to something one of the Department's employees said" (R. 301). But this decision approaches from the wrong direction. It is irrelevant what appellants can prove or want. The question is whether or not it is possible that

there was a stipulation of counsel, not whether in fact there was one. In *Beck* at Page 442, "There is nothing in the record before this Court which settles the issue of Beck's or Patton's entitlement to the interpleaded funds in anything approaching a conclusive way. Whether or not Beck and Patton had an enforceable fee-splitting agreement with regard to the Poppe attorney's fee remains a disputed question of fact."

The Beck decision holds that taxpayers need not prove anything, but that, merely by alleging the agreement, as taxpayers did in their affidavit in support of their Motion to Dismiss and in their Answer Opposing the Directors Motion, in determining said Director's Motion for Summary Judgment, "We accord the non-movant the benefit of all reasonable inferences from the record." *Id.* Summary judgment will only be upheld on appeal if: (1) there is no genuine dispute of material fact, and (2) the movant is entitled to judgment as a matter of law. *Brock v. Blackwood,* 143 S.W.3d 47, 61 (Mo. App. W.D.2004); *see also* Rule 74.04(c) *Beck* p. 239.

It is irrelevant, at the stage of summary decision, whether or not taxpayers' attorney and the attorney for the Director, agreed that taxpayers were entitled to the refund. The question for this stage is, is the allegation of a stipulation of counsel a genuine issue of material fact? We may avail ourselves of the analysis of the *Beck* court. The stipulation is an issue, because the director denies it. It is material,

because, if true, it completely decides the case in the nature of settlement. It is genuine, because there is a letter stating the agreement, signed by the director's lawyer, written on the Director's counsel's letterhead, because auditors also discussed it, and because the Director acknowledges that phone calls, in which such a stipulation could have been made, did exist and are documented in department records. Simply put, as the court in Beck found at p. 440, "then it is a genuine issue of material fact. ..As this genuine issue of material fact exists in the present state of the record and carries with it legally probative force as to the just and proper release of the interpleaded funds, the trial court erred in granting summary judgment in favor of Patton." *Beck* page 441. The AHC erred in granting summary judgment for the Director in the same way.

Also of note is that in this administrative proceeding, the discovery is not provided as completely as in circuit court. Appellants were forced to make numerous motions to enforce discovery, all futile because ignored by the AHC, throughout 2015, which are evident in the record (R. 67, 149, 198, 212). Appellants sought records specifically during the period of 2009 to 2012, when they allege the stipulations were made. The Director provided only records after 2013, a time period in which appellant's agree that the worm had turned at the general counsel's office and no agreements were then forthcoming. As such, material from 2013 is irrelevant. Material from 2010 to 2012 is vital. At the AHC,

the Director simply stonewalled. This would never have been allowed in a circuit court. A judge would hear the issue and grant or deny the discovery through Rule 61. The AHC, however, refused to hear, or consider in any fashion, appellant's motions to enforce discovery. This presents a problem of due process in entering a summary decision when there is no adequate discovery, and no investigation of claims of inadequate discovery.

As set out in page 381 of *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, (Mo., 1993), "a 'defending party' may establish a right to judgment by showing (1) facts that negate any one of the claimant's elements facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." (emphasis supplied). In an AHC tax case, the Director will always be the "defending party." Appellants argue that the Director should never be the movant for summary decision. But if, as herein, they are, then there must be "an adequate period of discovery" before a motion for summary judgment may be granted. It is clear from the record that there was no adequate period of discovery regarding the issue of stipulation of counsel.

It could be argued that appellants could have taken depositions under 536.073.1, but this process comes from the Cole County Circuit Court, not the AHC, and taxpayers live in St. Louis, while respondent Director is an overwhelming presence in Jefferson City. Just one trip there (and discovery is never settled in one trip) would exceed in cost to taxpayers, the amount of taxes in dispute overall. That is why the AHC is supposed to allow for hearings in St. Louis. The best way to proceed would be a hearing in St. Louis, not a protracted series of discovery motions and depositions in Jefferson City.

Respondent refused to facilitate nor even allow any questions to be asked of her attorneys on the issue of a stipulation. (R. 198, 212) Should the Director's attorneys, as would be expected in a consistent defense, then refuse to be deposed, it would again, all get certified to a Cole County circuit judge to sort out. Since any such judge would not have the case on their docket, they would have no file and, presumably, no incentive to move such a case forward in favor of cases which are on their docket and which do have files with their judge names on it. The bottom line is that, other than in a hearing under subpoena, the most likely outcome of appellants' attempt to depose attorneys who would claim attorney client privilege before a non judicial AHC official, would be to land here in the Supreme Court with even less accomplished than has been so far in this case.

That is why it is so compelling, to have a hearing in the AHC. This is another consistent application of the law that resists, if not defeats, any summary decision in a tax case. In a tax case, the Director has all the records, the Director has taken all the actions. On "appeal" at the AHC, the Director will not be before a judicial officer and the confines of administrative discovery are murky at best. The *ITT* decision holds that there can be no summary decision before "an adequate period of discovery" has taken place. In the AHC tax cases, an adequate period of discovery is highly unlikely to ever take place. In this case, where the prime issue is testimony of the Director's lawyers as to what they said and what they meant, an adequate period of discovery is impossible. Regardless, it is clear from the record including the Motions to Enforce discovery that were ignored by the AHC, that in this case, there was no adequate period of discovery.

Taxpayers filed income tax returns for years 2010 and 2011 which constituted a claim for refund and, when taxpayers protested the denial of claims by DOR, constituted a legal proceeding *Hackman v. Director of Revenue* 771 S.W. 2d 77 (Mo en banc 1989) . See Homestake Lead Co. of Missouri v. Director of Revenue, 759 S.W.2d 847 (Mo. banc 1988), and *Director of Revenue v. Westinghouse Credit Corporation* 787 S. W. 2d 715 (Mo en banc 1990). Taxpayer, as an attorney, agreed over the phone with counsel for Director, in a Stipulation of Counsel each year, that Taxpayer was disabled and entitled to a property tax credit

that generated a refund . The Director issued the refunds accordingly, then years later, claimed taxpayer was not disabled, and assessed a deficiency in the amount of the refunds it had already granted. When the stipulation was proven to the Director, new issues suddenly arose such as the add back of annuity and social security disability benefits.

While Hackman allowed a taxpayer the option to either contest an assessment or pay the assessment and file a claim for refund, it is inconceivable that DOR should be allowed an option to grant a refund in a contested case, then change its mind to reassess a deficiency. The Director's actions in this case are absurd and must be denied, or no taxpayer can ever be safe. The Director, as a client, is bound by the Stipulation of Counsel entered into by its lawyers. As stated in *Hemphill v. State* 566 S.W. 2d 200, 204 (Mo en banc 1978) "it is important to the orderly administration of the judicial process that admissions and stipulations of counsel when acted upon be given full credence, *State v. Levy*, 262 Mo. 181, 170 S.W. 1114, 1117 (1914)"

Similarly, a client is bound by the stipulations of his counsel even if he disagrees with them; *State v. Engleman*, 634 S.W.2d 466, 470 (Mo.1982). *United States v. Bobo,* 586 F.2d at 366. "Furthermore, an accused is bound by his counsel's decision as to trial strategy, unless such decision makes a mockery of the proceedings" *Fry v. State* 504 S.W. 2d 250 (Mo. App W.D. 1973). As stated in

State v. Johnson 714 S.W. 2d 752, 766 (Mo. App. W.D. 1986), "That is because a client is not only bound by the decisions of the attorney as to the management of the trial and as to the stipulations which give effect to that strategy [*State v. Fitzpatrick*, 676 S.W.2d 831, 836 (Mo. banc 1984)], but also because a stipulation of counsel deliberately wrought and then given effect, binds not only the client but-as the orderly administration of justice demands--is given credit by a court of review [*Hemphill v. State*, 566 S.W.2d 200, 204 (Mo. banc 1978)]."

The Stipulation of Counsel herein was given credit by the Director when it issued the refunds initially and should have been restored by AHC. "An oral stipulation should be as binding as a written contract" according to *Carter v. Carter*_869 S.W. 2d 822, 829 (Mo. App. W.D. 1994), despite the requirement of a written separation agreement, where the stipulation is "spread upon the record." When the refunds issued, it necessarily embodied the determination, (which was based on the Stipulation of Counsel), that Taxpayer was disabled and entitled to a property tax credit such as created the refund,. As such, it became res judicata for the years issued of 2010 and 2011. see Griswold, Res Judicata in Federal Tax Cases,' 46 Yale L.J. 1320; Paul and Zimet, Res Judicata in Federal Taxation,' appearing in Paul, Selected Studies in Federal Taxation, 2d series, 1938, p. 104.

In years 2012 and 2013, no refunds were issued and no Stipulations of Counsel specific to those years were agreed. Appellants submit that the theory of Collateral Estoppel applies in taxpayers favor to grant their refunds. But unlike the res judicata of years 2010 and 2011, the collateral estoppel of years 2012 and 2013 would have required a hearing to determine differences and similarities between the years. Collateral Estoppel operates in different tax years to relieve both the taxpayer and the government from "redundant litigation of the identical question of the statute's application to the taxpayer's status" *Tait v. Western Md. R. Co.,* 289 U.S. 620, 624, 53 S. Ct. 706, 707, 77 L. Ed. 1405. See *The Application of the Doctrine of Estoppel Against the Government in Federal Tax Cases, 30 N.C. L. REV. 356, 359 (1952). 1016 [Vol. 59:1001 Commissioner Nonacquiesence*

III. 135.010 is not in chapter 143 and thus can't alter federal meaning

The Administrative Hearing Commission erred in dismissing appellants case by Summary Decision without hearing, because it ignored and violated section 143.091 RSMo which requires the respondent director to give the same federal meaning of non-income to social security disability and annuity payments, such as would qualify taxpayers for their property tax refund

credit, in that director's claimed authority of section 135.010 is not within "sections 143.011 to 143.996" as required by 143.091

The AHC Decision erred when it allowed the respondent Director to violate the prohibition of section 143.091 RSMo that "Any term used in sections 143.011 to 143.996 shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required by the provisions of sections 143.011 to 143.996." The Director was allowed to assert a different meaning (as income), found in section 135.010 RSMo, for the words "annuity" and "social security disability income", when they are used in section 143.124 and in section 143.125.1 RSMo to have a federal tax meaning of (not income), although section 135.010 is not within "sections 143.011 to 143.996."

What portion of social security disability payments or annuities, are to be considered income is intricately set out in federal law. The result appears for annuities in box 12a of form 1040A for year 2010 of the full annuity distribution of $8,806, but only on line 12b is there given the meaning of $1,304 of income (R. 258) This is called an "above the line" entry, meaning that the calculation is done before the adjusted gross income is calculated. Strictly construing Missouri tax law against the state and in favor of taxpayer, as we must (*River Corporation, p 824*), section 143.121.1 mandates that "The Missouri adjusted gross income of a

resident individual shall be the taxpayer's federal adjusted gross income subject to the modifications in this section." Nothing is mentioned anywhere throughout the rest of 143.121.

Thus the "meaning" of the words "Social security disability" and "annuity" as to whether or not it is "income" is absolutely set in stone, that the amounts entered for instance for year 2010, form 1040A, on line 14a and 12a do not have the meaning of income while the amounts entered in line 12b and 14(b) do. Each federal tax return at issue was filed and accepted by the IRS. Once that happens, and it did happen to each return for each year at issue, then the director loses authority to go behind that federal acceptance, and the Missouri director cannot modify the meaning or definition of income. For instance, in year 2010, there were $ 8,806 of not income annuity on line 12a, but only $ 1,304 of income from annuity on line 12b. (R. 258). For social security disability, $10,847 of not income disability benefits on line 14a, but only $2,175 income disability benefits on line 14b. Each year's amounts are similar. (R. 259, 260, 261) Those determinations became fixed when the IRS accepted the filing. These are not just markings on a page. Because they are contained in a federal tax form, they obtain meaning, derived from their placement on the page of the form. These numbers accrue a meaning of whether or not it is income. The director can't change this.

The only possible way to change the meaning, as set out in section 143.091, is "unless a different meaning is clearly required by the provisions of sections 143.011 to 143.996." In accepting the argument of the director, the decision states that section 135.010(5) provides this (R. 298). There is just one big, inescapable problem with this. Section 135.010(5) cannot be found, does not exist, among "the provisions of sections 143.011 to 143.996."

The Director is further bound to federal law by 143.961.2 which provides that "2. The rules and regulations prescribed by the director of revenue shall follow as nearly as practicable the rules and regulations of the Secretary of the Treasury of the United States or his delegate regarding income taxation. Such construction of sections 143.011 to 143.996 will further their purposes to simplify the preparation of income tax returns, aid in their interpretation through use of federal precedents, and improve their enforcement." Indeed, courts have found that for items found in Missouri's tax code, "the purpose of the Missouri income tax law (is) to simplify the preparation of income tax returns, aid its interpretation through use of federal precedents, and improve its enforcement. See § 143.961, RSMo 1978." *Bartlett & Co. Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo., 1983).

In assessing the import of the proscriptions contained in section 143.091, we must be mindful that "Generally, taxing statutes are to be strictly construed in favor of the taxpayer unless a contrary legislative intent appears." *State ex rel. River*

Corporation v. State Tax Commission, 492 S.W.2d 821, 824 (Mo.1973), overruled on other grounds. The Director, and the AHC decision that approved her, construed 143.091 in the favor of the state and against the favor of the taxpayers. This the complete opposite of what the law requires. The construction of 143.0091, strictly applied against the state and in favor of taxpayers, and in light of 143.961 to harmonize with federal law, would be, that inasmuch as 135.010 cannot be found in "the provisions of sections 143.011 to 143.996," then it cannot alter the meaning of income previously given.

It was said in *Hamacher v. Director of Revenue*, 779 S.W.2d 565, 566 (Mo., 1989), that in section 143.091 "The legislature itself provided a standard for construction of the Missouri income tax standards." "The evident purpose of section 143.091 is to promote uniformity and consistency between the state and federal tax codes." *Garland v. Director of Revenue*, 961 S.W.2d 824, 830 (Mo., 1998) At issue in this case is whether the Director may call portions of annuities and social security disability benefits "income" when federal law gives them the meaning that they are not income. A review of court decisions would suggest that the meaning of a word such as "income" cannot be altered, as the courts have construed the meaning of the words income tax. In *Goldberg v. Administrative Hearing Commission*, 606 S.W.2d 176 (Mo., 1980), the court determined that Missouri could not change when a federal court had defined "minimum tax" as

income tax, in that "This authoritative holding should be looked to in view of Section 143.091." at page 179. And in *Dow Chemical Co. v. Director of Revenue*, State of Mo., 787 S.W.2d 276, 285 (Mo., 1990), the court said "Dow argues that the Director must accord the term dividend in Section 143.431.2 the same meaning that it has in the federal income tax laws. We agree."

Often, the Director has been rebuked for incorrect use of this statute, such as when J. Robertson said in dissent "'clearly required' is not a license to roam throughout the statutes for a more pleasing alternative; it means the Court must look to federal law unless the statutes expressly define the relevant term differently. *Herschend v. Director of Revenue*, 896 S.W.2d 458, 461 (Mo., 1995).

In *King v. Procter & Gamble Distributing Co.*, 671 S.W.2d 784, 785 (Mo., 1984), the court found that "The Director's position is not sound. Section 143.091 provides that any term used in §§ 143.011 to 143.996 shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes. The United States Supreme Court has recognized that the term "income tax" is a term of art. It refers to taxes on income and does not include taxes on subjects other than income, although measured by income."

"The Director parries this argument by pointing out that we lack the express statutory language the Internal Revenue Code has, and that this circumstance would indicate that a different construction was intended. The Director's argument,

carried to its logical conclusion, would render § 143.091 substantially useless. The very language of that section connotes some incorporation of federal statutes by reference, so as to maintain a consistent pattern. *Hamacher v. Director of Revenue*, 779 S.W.2d 565, 566 (Mo., 1989).

The Court has "repeated the rule that tax statutes are to be strictly construed against the tax authority and in favor of the taxpayer. ..The policy behind this rule is that a tax cannot be imposed unless enacted and levied by the legislature and the courts should find a tax only when the intent to levy is clearly expressed."

Goldberg v. State Tax Com'n, 639 S.W.2d 796, 809 (Mo., 1982).

To demonstrate the importance of section 143.091, in the time after *United States v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 81 USLW 4633 (2013) but before *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), when as a legal matter, same sex marriage was still to be determined state by state, and in this time when the Missouri Constitution Article 1, Section 33 provided "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman," Governor Jay Nixon by Executive Order 13-14, ordered the respondent Director to allow, based on section 143.091, any taxpayers in a same sex marriage who filed a joint federal return, to file a combined Missouri return. If our government places this level of importance on maintaining federal meanings of tax terms, then the Director is clearly wrong to try to try to change the meaning from not income to

income for annuity and social security disability. The vast majority of these benefits are determined to be not income, on the order of a five to one margin. (R. 258-261). For instance, in year 2010 $8,806 of annuity was distributed but only $1,304 was determined to be income and entered as gross income above the line on taxpayers federal return. (R. 258). In 2010 although $10,847 was distributed in social security disability benefits, only $2,175 was given the federal meaning of income and entered above the line as gross income on taxpayers federal return (R. 258). Each year is similar amounts, though not identical. The annuity ended in year 2011, ten years after it began as an inheritance from taxpayer's father. Each year the Director has calculated, that by adding the amounts that are not income, back in as income, the taxpayers become disqualified as their income exceeds the credit chart. Both taxpayers are elderly and fully disabled. They each receive a small disability benefit. Neither has any other income, no investments, no interest, no stock, no employment. If the Director is allowed to interpret the statutes to produce this result, then the question remains who could possibly be eligible to receive the credit? It was designed just for taxpayers in this situation. Property taxes have only gone up since the tax credit was first instituted. As stated in *Goldberg v. STC* at page 179, "The Director's argument, carried to its logical conclusion, would render § 143.091 substantially useless." The Director's interpretation "is not to be pushed so far as to defeat the real legislative purpose by

mere construction." *Mesker Bros. Industries, Inc. v. Leachman*, 529 S.W.2d 153, 156 (Mo., 1975). The tax credit is supposed to help disabled people.

In the 1970's, Missouri became hopelessly bogged down in its attempts to collect income tax revenue. Because Missouri tax began at the beginning, the same as federal, the Director had to reinvent the wheel with each return. Taxpayers were free to report income, claim deductions or any tax status, as best they saw fit. Meanwhile, the Director could not micro-audit millions of matters in millions of returns with just literally, a handful of personnel. The revenue stream of the state was in real jeopardy. They brought in Sandy Sarasohn, a professor of law at St. Louis University. He oversaw the process to rewrite the Missouri tax code. The cornerstone of this effort was the one – two punch of 143.091 at issue herein, and 143.021, which provides that "The Missouri adjusted gross income of a resident individual shall be the taxpayer's federal adjusted gross income subject to the modifications in this section."

Now Missouri could audit returns, using its scarce resources on specific issues, and allowing the vast resources of the IRS to police the vast majority of entries made to a tax return in Missouri. Section 143.091 is vital to maintaining this system. If meanings acquired under federal tax law are not honored, as the Director attempts to do herein concerning "annuity" and "social security disability" are income or not, then Missouri will have to hire thousands of new auditors. And

even after that, if the meanings are different, also add thousands of new attorneys, who must go to court to defend the unique meanings such a Director would seek. This would lead to disaster. With the tax situation in Kansas teetering on our left, and Illinois without a budget to our right, Missouri should keep its system, which has been working fine for nearly fifty years.

IV. Director's form 1099 mandate is discriminatory to disabled class

The Administrative Hearing Commission erred in dismissing appellants' case by Summary Decision without hearing, because by allowing the Director to require disabled Missouri school teachers to provide a federal form 1099, knowing that they cannot have one, the respondent Director discriminates against disabled, in that form MO-PTS is illegal, and the actions to deny appellants the credit are also illegal and void

For purposes of the Missouri property tax credit at the heart of this case, Section 135.010(2) defines disabled as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." There is no requirement that disability be federally determined. Yet the MO-PTS form created by respondent Missouri Director of Revenue requires, under Qualifications

C. that for a taxpayer to be 100 % disabled, they must "(Attach a copy of the letter from Social Security Administration or Form SSA-1099)." (A 82) Appellant is a disabled schoolteacher. Pursuant to section 169.020 RSMo, schoolteachers in Missouri are required to participate exclusively in the School Teacher's Retirement System, with disability determined by the board under section 169.060.3 RSMo. As such, teachers are not eligible to participate in the federal social security system. Missouri disabled teachers thus do not have a Form SSA-1099 and do not have a "letter from Social Security Administration"

As a disabled Missouri schoolteacher, appellant did not have a SSA-1099. This is the sole reason that appellants were denied the property tax credit year after year. (R. 58-60, 246) Prior to 2013, respondent never said a word about annuity or social security income. Appellant's husband is an attorney who used to be an assistant general counsel at the Missouri Department of Revenue. Each year this would happen, he would call the general counsel, who would agree. (R. 145) One time, the Revenue attorney Heather L. McCreery sent a letter confirming the agreement, or stipulation, that the taxpayers were entitled to the property tax refund because "your wife was adjudged disabled by the PSRS, and not the Social Security Administration, so a Form SSA-1099 is not required." (R. 61-2) PSRS is the Public School Retirement System. It is thus documented that the attorney for the Director knew that a form 1099 should not be required. Yet the Director has

continued to require that all taxpayers submit a form 1099 in order to obtain a property tax credit. (R 247).

Email records show that the respondent was well aware that disabled state teachers were being unfairly denied benefits, and that the appellants were being specifically targeted. (R 2) Ms. McCreery the lawyer, asked the "processing Tech" why, if appellants are disabled, they are not receiving the tax credit. The Tech replies on June 16, 2010 that "He hasn't submitted a SSA-1099 to show his proof of disability. If he submits this, then we will adjust his return." (R 247). The lawyer then says "I just spoke with Mr. Harter. He says that his wife was judged disabled 100% by the Missouri Public School Retirement System so he will not have a form SSA-1099. He said he submitted the proof of the school system disability with the original return. Apparently this has happened every year since 2007, and every time he has to call us to get it straightened out. Do you know anything about this? (R. 247)

The Revenue Processing Tech III replies within two minutes that, "Yes, I know about being deemed disabled through the public school retirement system. I see a lot of these. I will fix his return for him." (R. 246). There is no legal reason for the Director of Revenue not to accept the disability determination of the teacher's retirement board and demand a federal form SSA-1099. In fact, as the

teacher disability determination is made by another arm of the state, the Director is collaterally estopped from denying that the taxpayer is disabled.

"In determining whether a claim is barred by collateral estoppel, or issue preclusion, we consider four factors: 1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; 2) whether the prior adjudication resulted in a judgment on the merits; 3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and 4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. Meckfessel v. Fred Weber, Inc., 901 S.W.2d 335, 339 (Mo. App. E.D. 1995)." *Sotierescu v. Sotierescu*, 52 S.W.3d 1 (Mo. App. E.D., 2001).

The state of Missouri had its opportunity to litigate disability at the teacher's board. The Director of Revenue has no authority nor jurisdiction to review nor to overrule the determination of a co-equal in the executive branch. The PSRS Board and the Director are both executive appointees. There is no legal reason for the Director to require disabled teachers to provide a federal form that is not possible for them to obtain. It is clearly not required by the statute 135.010.(2). The only rule covering the property tax credit has been rescinded. If there is no legal reason, the only reason left is an illegal reason – discrimination against disabled teachers.

It is a well known practice of fraudulent insurers who refuse to pay honorable

claims, memorialized in the chant "delay, deny until they die." The same precept would benefit the state to deny meritorious property tax credit claims without justification, in hopes that some will not appeal nor pursue their deserved credit and valid appeal. To be eligible for the credit one must already be elderly or disabled. 135.010. Create enough hoops and some will miss the jump or give up. The property tax credit does not bring in money to the state. Money flows out. Money is a powerful incentive for the state. There is no legal explanation.

Those taxpayers, such as disabled Missouri teachers, who because of the insistence on form SSA-1099 by the Director, might not receive the benefits to which they are rightfully entitled, are those in our society with the least power, and the most at risk; the elderly and the disabled. The elderly and the disabled are each a class protected against discrimination by both federal and state law. These are the two classes of eligibility for what was originally called "The Circuit Breaker" and now the "Property Tax Credit." It was designed to help elderly and disabled citizens remain in their homes when, lacking other assets and unable to work, they would be at risk of failing to pay real estate taxes and losing their homes. The legislature intended to prevent such tragedy by returning tax money to them.

Discrimination against the disabled by a state agency is outlawed by a Title II claim found in 42 USC 12132 which provides "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or

be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." The federal regulations 28 CFR Part 35.130 (b)(1) (iv) clarify that a "public entity, in providing any … benefit .. may not … on the basis of disability- provide different … benefits…to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with …benefits .. that are as effective as those provided to others." The Missouri disabled teachers are a class; the property tax credit is a benefit; the respondent Director is, by requiring a federal form from a state system, providing different benefits to that class on the basis of disability.

It is clear that Eleventh Amendment immunity cannot protect a state from a title II disability discrimination claim. If Missouri is rigging its tax forms to prevent a group of disabled citizens, such as school teachers, from receiving state benefits to which they would otherwise be entitled, and to which other disabled people have access, it could violate the Americans with Disability Act. "This duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts." *Tennessee v. Lane*, 541 U.S. 509, 512 (2004)

The state, through the AHC and now, through this honorable Supreme Court, cannot approve such an illegal act by an agency and its Respondent Director which creates that discriminatory form MO-PTS. "When the agency has already acted upon a rule challenged as illegal, the coercive as well as the declaratory aspect of judgment becomes appropriate to prevent the effect of the illegality. The cumulative prayers for declaration of rule illegality and injunction to prevent a continued unlawful administration under the rule were properly before the court." *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 837 (Mo. App. W.D., 1979).

Further, it is entirely appropriate that this honorable Supreme Court curb this practice by reversing the decision of the AHC and granting the appellant disabled schoolteacher the property tax credit to which she is entitled and for which she has been battling the Director for nearly a decade. Because "courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations. In such a regime, the exemption for interpretive rules does not add much to agency power. An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211, 191 L.Ed.2d 186, 83 USLW 4160 (2015).

CONCLUSION

Because the AHC failed to provide the hearing to which appellants were entitled and 1 CSR 15-3.446 the regulation which attempts to allow summary decisions against taxpayer appeals in the AHC is in conflict with the statute of 621.050.1 RSMo which requires a hearing in tax cases, the regulation is void; because there exists a genuine issue of material fact as to whether the Director's lawyers stipulated that taxpayers were entitled to a refund, the AHC Summary Decision is void; and because the Director is bound by section 143.091 to follow the federal meaning of income given to annuity and social security benefits; and because the Director is bound by the stipulation of counsel that appellants are entitled to a property tax credit refund, the claimed deficiencies for years 2010 and 2011 are void, and taxpayer appellants are due refunds as prayed for in years 2012 and 2013, with interest thereon.

CERTIFICATE OF COMPLIANCE

I certify the following:

1. The foregoing brief complies with the type and volume limitations of Rule 84.06. The typeface is Times New Roman 14 pt.

2. The signature block of the foregoing brief contains the information required by rule 55.03(a). To the extent that rule 84.06(c)(1) may require inclusions or the representations appearing in rule 55.03(b), those representations are incorporated herein by reference.

3. The foregoing brief, excluding the cover, certificate of service, this certificate and the signature block, contains 14,414 words counted by Word.

4. This brief has been prepared using Microsoft Word format.

5. Appellant has submitted electronic filing as substitute for the CD-ROM or disc as required by rule 84.06(g) and special rule 363, and has been scanned for viruses and is virus free.

CERTIFICATE OF SERVICE

I certify that I served electronically one copy of this Appellant's Brief and Appendix in the form specified by rule 43.01 by [redacted] this 17th day June, 2016 to counsel for Respondent Director Nia Ray, to Curtis Schube, assistant Attorney General
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