IN THE SUPREME COURT

STATE OF MISSOURI

HARRY FISCHER,

Appellant/Appellant

vs.

DIRECTOR OF REVENUE

Respondent

BRIEF

SC95055

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JURISDICTIONAL STATEMENT

The issues in this case and appeal involve the construction of RSMo §§143.731, 143.741, and 143.961, which are revenue laws. Because this appeal involves construction of Missouri revenue laws, this Court has exclusive jurisdiction under the Missouri Constitution, article V, §3. Because section 143.741.1 specifically excludes additions to tax on overpayment credits and section 143.731.7 excludes interest on overpayment credits, the question is whether the decision of the Missouri Administrative Hearing Commission [*hereinafter* the Commission] erred in upholding additions to tax and interest on overpayment credits that Respondent Director of Revenue [*hereinafter* the Director] assessed on Appellant's 2005, 2006, and 2007 Missouri income tax returns.

STATEMENT OF FACTS

1. Appellant paid $2000 in estimated 2004 Missouri income tax in April 2005. Appellant filed his 2004 Missouri tax return in February 2007, his 2005 and 2006 returns in March 2009, and his 2007 return in June 2011. Respondent's Cross-Motion for Summary Decision (June 6, 2014) [*hereinafter* CM], Exhibit 1, Affidavit of Dana Bernskoetter [*hereinafter* Bernskoetter Affidavit].

2. On his 2004 return, Appellant owed $0 total tax and requested the $2000 estimated tax overpayment be applied as a credit to his 2005 obligation. Bernskoetter Affidavit.

3. Appellant owed $11 total tax due in 2005 and with the credit from the 2004 return had an $1989 overpayment, which he elected to apply as a credit to his 2006 obligation.

4. Appellant had $1,125 total tax due in 2006, which with the credit from the 2005 overpayment left an $864 overpayment, which he elected to apply as a credit to his 2007 obligation. Bernskoetter Affidavit and CM, Exhibit 2.

5. With his 2007 return, appellant owed $2152 total tax, less the 2006 $864 overpayment, and paid $1293. Bernskoetter Affidavit and CM, Exhibit 3.

6. The Director at some time amended appellant's 2005 and 2006 returns without notifying appellant. The Director assessed 2005 additions to tax of

$2.75 and interest of $.68 and reduced the overpayment amount to $1985.57; it assessed for 2006 additions of $281.25 and $167.49, reducing the overpayment amount to $411.83. Bernskoetter Affidavit.

7. The Director did not notify appellant of its amendments.[1] Appellant's Motion for Summary Decision, Exhibit A, Affidavit (May 7, 2014).

8. In August 2011, The Director notified Appellant in a Notice of Proposed Changes that it was assessing $538 additions to tax and $332 interest on appellant's 2007 tax obligation. Bernskoetter Affidavit and CM, Exhibit 4.

9. Appellant mailed an Adjustment Protest letter October 27, 2011, in response to the Director's Consolidated Billing Notice, dated September 28, 2011. Appellant paid $542, which constituted the additions to tax and interest on his 2007 tax obligation that would not have been satisfied by a correct overpayment credit. Appellant also paid $84 on his 2008 tax obligation. Adjustment Protest letter at 3 (October 27, 2011) ("I am therefore now paying . . . $84 in penalties and

[1] Respondent sent Appellant a Notice of Deficiency for $1597.62 for the 2006 tax year, dated August 19, 2009. By telephone, the Department acknowledged the Notice was in error, and it was withdrawn. Appellant received no notice, and Respondent apparently never sent, any notice of the final changes Respondent made in Appellant's 2006 return. (A Notice of Proposed Changes for the 2006 tax return had also been sent in April 2009. Appellant did not receive that Notice, but as those proposed changes formed the basis of the August 2009 Notice of Deficiency, which Appellant did receive, and which was withdrawn, it is presumably irrelevant.)

interest that I owe for 2008.") Appellant's Motion for Summary Decision, Exhibit A, Affidavit (May 7, 2014).

10. The Director sent Appellant a Notice of Deficiency dated October 26, 2011. Bernskoetter Affidavit.

11. Appellant's filed a timely Deficiency Protest December 24, 2011, noting the Director's misapplication of his 2008 obligation payment to the disputed 2007 obligation, protesting the Director's additions to tax and interest assessed for 2005 and 2006, and protesting the portions of the additions to tax and interest the Director assessed on the overpayment credit amount in the 2007 return. Bernskoetter Affidavit.

12. The Director mailed its Final Decision rejecting Appellant's Deficiency Protest on February 22, 2013.

13. Although the Director's Final Decision does not address Appellant's objection to MDOR's misapplication of Appellant's $84 payment, it assumes that the $84 payment was paid on Appellant's 2007 tax obligation.

14. The Director did not correct its misapplication of Appellant's 2008 payment, but rather pursued re-collection of the $84 already paid. Appellant submitted a Review Request to MDOR July 28, 2012, which the Director did not answer. Appellant's Motion for Summary Decision, Exhibit A, Affidavit (May 7, 2014).

15. The Director mailed notices March 13, 2013, to Appellant and to the Missouri Division of Professional Registration reporting that Appellant was delinquent in payment of a 2008 tax obligation of $87.26, apparently consisting of the $84 plus an interest assessment of $3.26. Id.

16. Appellant paid the disputed $87.26 obligation to the Director to avoid action by the Missouri medical licensing board. Id.

POINTS RELIED ON

I. The Commission erred in approving assessed additions to tax that should have been reduced based on overpayment credits. This is contrary to the requirements of RSMo §143.741.1.

II. The Director assessed interest on tax obligations satisfied by overpayment credits. This is contrary to the requirements of RSMo §143.731.7.

III. Procedures of the Unites States Internal Revenue Service that implement federal statutes and regulations almost identical to Missouri statutes should be persuasive authority in Missouri. The Director has a statutory obligation to conform its rules to federal tax rules "as nearly as practicable," RSMo §143.961(2). Federal procedures are consistent with a plain language interpretation of Missouri statutes §143.731and §143.741 and contrary to the Director's implementation of those statutes.

ARGUMENT

There is very little factual dispute in this case. The Director denies that it gave no notice of its final amendments to Appellant's 2006 tax returns but has provided no evidence that it did give such notice. There is also some question as to what federal policies procedures are in regard to the issues of this case, although Appellant has provided the only evidence regarding those.

I. The Commission erred in approving assessed additions to tax that should have been reduced based on overpayment credits. This is contrary to the requirements of RSMo §143.741.1.

The only statute that authorizes additions to tax requires that additions be a percentage "of the amount required to be shown as tax" on the return, "reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment on the tax and by the amount of *any credit against the tax which may be claimed.*" RSMo §143.741.1 (italics added). The Director assessed additions to appellant's Missouri individual income tax obligation on the entire amount shown as Total Tax (Form 1040 2007, line 31).[2]

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[2] Respondent credited the overpayment amount from the prior year's return, as required by RSMo §143.801.1, but in its Notice of Proposed Changes it amended Appellant's return to remove that prior year's return's overpayment

Appellant's returns for the years in question in this case were all filed more than 5 months late. The statute therefore required the Director to assess additions of 25% of each year's tax as reduced by amounts credited and by amounts timely paid. The Director erred in assessing 25% additions to tax on the Total Tax shown instead of that total less amounts that it credited. There is no dispute as to the amount of those credits, as to when they were claimed, that they were timely, or that the Director granted them.[3] The statute contains no time limitation on credits. It mandates that additions be based on tax reduced by any credit that is properly claimed, according to §143.801.1 limits, without regard to when the credit is claimed.

The Commission erred in finding that the statute requires additions to tax on an overpayment credit if the previous year's tax return "creates" it after "the date prescribed for payment" of the current year's tax. The Director and the Commission's decision would thus require, as in this case, that if a taxpayer has filed a previous year's return after a current return's April 15 deadline for payment, and the taxpayer, as here, has filed the current return more than five

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credits from line 33 (the line on the return on which it must be claimed) and then credited the overpayment on an unnumbered line, titled "amount previously paid."

[3] See RSMo §143.801.1. See, e.g., Bernskoetter Affidavit §§6,8,10.

months late, the Director is required to assess additions to tax of twenty-five percent on the amounts she credits as overpayments on the current return.

This is error: the statute sets no time limits on reductions to additions for credits. To reach the Commission's results, one must ignore the plain language of the statute in regards to credits. This the Commission does by characterizing the overpayment credit as not a "credit" but rather as a payment that was not paid when the taxpayer paid the funds to the Director but only when the taxpayer claimed it (as a credit, of course) on the previous year's return. This is at best a tortured interpretation of the statutory language and scheme. Had the legislature intended it, the statute could have put a time limit on credit claims just as it did on payments, or it could have specified overpayment credits as an exception to its generally exclusion of credits from the tax addition calculation.

In this manner, the Director and MAHC are expanding the Director's taxing authority contrary to an explicit statutory prohibition and without support from statute, rule, or regulation. This expansion, besides being contrary to law, creates exceptionally unjust results: late-filing of one year's tax returns may thus as a consequence not only create additions in that year but also further additions to the next year's obligation. The Director adds more to tax by calling those funds "unpaid" even while it retains continuous control of those funds. Moreover, if, as in this case, the Director does not notify the taxpayer of the additions it assesses

until a net deficiency occurs, those additions may become additions based on additions based on additions – all before the taxpayer is notified. In this case, although the absolute amounts may seem small, the percentages are large. The Director has cumulatively assessed on the $2,000 that Appellant paid to the Director in 2004 over $350 in additions to tax (and on that same $2,000, which it has continuously held, more than $400 in interest).

However plausible and even reasonable the Director's taxation scheme may be, however, it is still a scheme not authorized – in fact directly contradicted – by statute. An authorizing statute like §143.741(1) should be narrowly construed. RSMo §136.300.1. A narrow construction would here require that a payment be considered as made at the latest when the Director receives it, not when the Director transfers it among its internal accounts (in this case under terms and procedures about which the Director nowhere informs prospective payers). The plain meaning of "paid" here is "paid by the taxpayer to the Director:"; it is not as the Director's Final Decision implies "paid by the Director to the Director as the Director's unpublished procedures require."

There is nothing to support the Director's conditioning the assessment of additions to tax in a given tax year on the time of filing of the previous year's tax return. To do so is a nonintuitive and expansive interpretation of respondent's authority and is inherently suspect. It is the more suspect because it is purely an

internal procedural rule, one which no regulation supports and which the Director has never published. It is a rule not publically known and not known to individual taxpayers until the Director applies it to a particular individual. (And one presumes that those to whom it is applied cannot contest, where as here, the Director has not notifed them when she modifies their returns.)

II. The Director assessed interest on tax obligations satisfied by overpayment credits. This is contrary to the requirements of RSMo §143.731.7.

Appellant assessed interest on all Total Tax (Form 1040 2005, line 30; Form 1040 2006, line 30; Form 1040 2007, line 31), not reducing that amount by credits claimed. Bernskoetter Affidavit. The Director, as with assessments of additions to tax, argues that interest assessments are required because Appellant filed his 2006 return, wherein he requested the overpayment from that year be applied to the 2007 obligation, more than a year late. Missouri statute, RSMo §143.731.1, authorizes assessment of interest. It, however, specifically exempts credits for overpayments. RSMo §143.731.7 ("If any portion of a tax is satisfied by the credit of an overpayment, then no interest shall be imposed under this section for any period during which, if the credit had not been made interest would have been allowable with respect to such overpayment.") Appellant therefore erred in assessing interest on those amounts.

III. Procedures of the Unites States Internal Revenue Service that implement federal statutes and regulations almost identical to Missouri statutes should be persuasive authority in Missouri. The Director has a statutory obligation to conform its rules to federal tax rules "as nearly as practicable," RSMo §143.961(2). Federal procedures are consistent with a plain language interpretation of Missouri statutes §143.731and §143.741 and contrary to the Director's implementation of those statutes.

"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.." RSMo §143.961(2).

RSMo §143.741(1) contains language almost identical to that of the United States Code and federal regulation: "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 on the return." 26 U.S.C. §6551(b)(1) and 26 CFR 301.6651-1(d). RSMo §143.731(7) also contains language identical to that of the United States Code and federal regulations: "If any portion of a tax is

satisfied by the credit of an overpayment, then no interest shall be imposed under this section for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment." 26 U.S.C. §6601(f) and 26 CFR 301.6601-1(1)

Despite that identity, federal interpretation and implementation of its code and regulation contradict the Director's interpretation and implementation of that identical language. That is, the federal Internal Revenue Service does not assess additions to tax or interest on the portions of the tax for which overpayments are credited. 26 U.S.C. §6551(b)(1); 26 CFR 301.6651-1(d).

Thus, Appellant's federal returns for 2005 and 2006, both filed more than two years late, requested that overpayments be applied to the subsequent tax year, and Appellant's returns for 2006 and 2007 claimed those credits. See, e.g., Appellant's Affidavit (May 7, 2014) at ¶7, Respondent's Motion for Summary Decision Exhibit B. Although Appellant's Missouri and federal 2005 and 2006 returns were filed at the same time, the federal government assessed no additions to tax. Appellant's Affidavit at ¶7. Appellant has lamentably filed several such late returns claiming an overpayment credit, but the IRS has never assessed an addition to tax on amounts so credited – as, given the plain language of the statute and regulations, it should not.) Id.

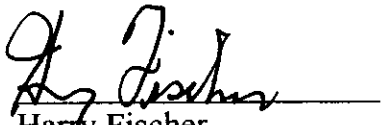
The Commission found that the Director had no obligation to accord its procedures with federal procedures in this case, as "Fischer directed us to no precedent." However, one cannot expect that there will be precedents where the policy and procedure of the Internal Revenue Service is not to assess additions to tax and interest on overpayment credits. One would not expect cases challenging the Services right not to assess those. As the Director, who one must presume has the resources to find out what Internal Revenue Service policies and procedures are, has presented absolutely no evidence as to those policies and procedures, one should presume that her policies regarding addition to tax and interest on overpayment credits are contrary to settled federal procedure. In this case, the evidence in Appellant's Affidavit should control.

That the Director ignores contrary federal interpretation and implementation of statutory language identical to Missouri's is contrary to §143.961(2). Missouri's interpretation and implementation of the statute is contrary to the requirement that it follow federal rules and regulations as nearly as practicable. The statute requires that "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." To the extent that one finds aid in "interpretation through use

of federal precedents," §143.961(2), one must conclude that the Director's internal rules interpreting §143.741(1) and §143.731(7) are in error.

CONCLUSION

The Director's Final Decision should be reversed. Additions to tax and interest on overpayment credits on Appellant's 2004, 2006, and 2007 income tax return were invalid. Appellant has no outstanding obligation for 2007 Missouri income tax. The Director should pay Appellant for the $84 plus interest for funds that it misapplied to disputed assessments.



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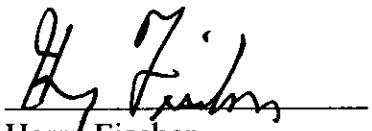

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