IN THE SUPREME COURT

STATE OF MISSOURI

HARRY FISCHER,

Appellant/Appellant

vs.

DIRECTOR OF REVENUE

Respondent

REPLY BRIEF

SC95055

This case is an appeal from a decision of the Missouri Administrative Hearing Commission [hereinafter AHC] denying Appellant's motion for summary decision and granting Respondent's cross-motion for summary decision. Appellant argues that the AHC erred not only in granting Respondent's motion but also in denying Appellant's motion. At issue are Respondent's assessments of interest and additions to tax that she contends RSMo §143.731 and §143.741 authorize.

Appellant contends that the plain meaning of those sections and the undisputed facts required granting his motion. But there are also disputed facts in this case that this Court may find relevant, even though the AHC's decision did not. Nevertheless, Appellant believes that because Respondent has presented no credible relevant evidence regarding those disputed facts, the disputes do not create a "genuine issue." See *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W. 2d 371, 382.

I Respondent's Arguments on section 143.741.1 and section 143.731.7

Section 143.741 authorizes additions to tax as a percentage of the amount of tax required to be shown on the return "reduced . . . by the amount of any credit against the tax which may be claimed upon the return." RSMo §143.741.1. Inasmuch as credits cannot be claimed upon the return without filing the return, the plain meaning of that language must be "may be claimed

upon the return when the return is filed." Contrary to the section's plain meaning, Respondent's practice in regards to overpayment credits appears to be that the "amount of tax required to be shown on the return shall be reduced" not by whatever credit may be claimed on the return, but instead be limited to whatever "credit against the tax that could have been claimed upon the return *when the return was due to be filed.*" Respondent's Brief at 11 (emphasis added and internal quotation marks omitted). Had the legislature intended that interpretation, it certainly could have used the language that Respondent prefers, but the statutory language the legislature did in fact choose is plainly inconsistent with Respondent's construction. Moreover, except for section 143.741.1 itself, Respondent cites no authority for her construction whatever.[1]

Respondent's construction is expansive. Indeed, in making only one argument to justify her not deducting the credits Appellant claimed on his 2005, 2006, and 2007 returns, Respondent necessarily confirms the expansiveness of her interpretation of section 173.741.1. By narrowing the reduction used to

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[1] Respondent does cite *Sanford and Brooks Co.*, 282 U.S. 359, 365 (1931), to the effect that the federal taxation system requires filing annual returns, but the need for annual returns is irrelevant to the question of determining additions to tax on those returns. That Appellant filed annual returns is not at issue.

calculate additions for failure to file, she greatly increases those additions. Revenue statutes are to be construed narrowly, not expansively. RSMo §136.300.1.

Respondent's construction of section 174.731.7 suffers from the same flaws. The statutory language refers to "any portion of a tax [that] is satisfied by credit of an overpayment," RSMo §174.731.7, and contains no restriction as to when the credit is satisfied. *Id.* Respondent, however, argues that the timing of when the credit is satisfied justifies her assessing interest that the plain language of section 174.731.7 would preclude her assessing. See Respondent's Brief at 12.

II Factual Procedural Disputes

Summary decision, modeled on circuit court summary judgment, is proper "if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts." *New Garden Restaurant, Inc. v. Dir. of Revenue*, __ S.W.3d __, 2015 WL 5936600, at 4 (citing *Krispy Kreme Doughnut Corp. v. Dir. of* Revenue, 358 S.W.3d 48,51 (quoting 1 CSR 15-3.446(6)(A))). To grant a motion for summary decision here, the MAHC needed to establish that there was no genuine dispute about facts that were necessary to decision as a matter of law. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W. 2d 371, 382. "The record is viewed 'in the light most

favorable to the non-movant,' [which] 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 [this]." *Id.* If the movant is otherwise entitled to judgment, "the non-movant must create a genuine dispute by supplementing the record with competent materials that establish a plausible, but contradictory, version of at least one of the movant's essential facts." *Id.*

There are facts in dispute here, which this Court may find relevant, although the MAHC's decision found none of them so. There are two such disputed facts. First, Respondent denies that Appellant received no notice of the changes that she made to his 2005 and 2006 returns. Second, and perhaps more important, Respondent disputes that her implementation of sections 143.741.1 and 143.731.7 are directly contrary to federal practice and procedure. As Appellant has produced the only evidence to support this second dispute, if that dispute is relevant, a summary decision for Respondent cannot possibly have been justified. But Appellant also believes that summary decision for Appellant is required.

Factual disputes may also affect the amounts at issue in this appeal. Respondent misstates the amount in controversy here. See Respondent's Brief at 10. Appellant does not only claim that the director erred in applying the

twenty-five percent addition to the $411.83 Respondent says it credited as an overpayment. Appellant also claims that Respondent erred in not deducting from calculation of the addition to tax the entire $864 that Appellant properly claimed on his 2007 return. See Appellant's 2007 Return, Respondent's Cross-Motion for Summary Judgment, Exhibit 4 at 3, line 33 (Legal File at 63). As Respondent also misapplied $84 of Appellant's payment on his 2008 return to his 2007 return, the amount in controversy is not only the amount that Respondent now claims Appellant owes but also the misapplied $84 that Respondent now owes Appellant. Appellant's Affidavit at 2, Appellant's Motion for Summary Decision (May 7, 2014) (Legal File 27).

The AHC decided that only the $411.83 credit that Respondent claims to have granted as a credit was at issue. AHC Decision (May 11, 2015) at 5-6 (Legal File at 95-96); Id. at 8 (Legal File at 98) ("The Director properly applied . . . Fischer's overpayment credit of $411.83 to his 2007 liability . . . ."). The AHC thought that it had no authority to question that amount, because Respondent claimed that that credit was determined by the changes to the 2005 and 2006 returns that Respondent had "imposed". Bernskotter Affidavit ¶8 and ¶11 (June 6, 2014), Respondent's Cross-Motion for Summary Decision, Exhibit 5 at 2 (Legal File at 70). Respondent has denied that Appellant received no notice of those, but the only evidence regarding that is in

Appellant's Affidavit at 3. Bernskotter's affidavit does not state, and the record contains no other evidence, when those changes were "imposed". Nor does the record contains evidence that any Notice of Deficiency, or indeed any notice of the imposed changes, was ever given.[2] Therefore, the record requires the

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[2] The Bernskotter affidavit does say that her Exhibit 2, Notice of Proposed Changes (April 22, 2009) (Legal File at 55-57), was "issued", but she does not say, and the record contains no other evidence, that it was actually sent to Appellant. As the address on that Notice was not Appellant's then and was not the address given on his returns, it would not have been received even if it had been sent. Appellant's Affidavit confirms that he never received it. Appellant's Affidavit at 1, Appellant's Motion for Summary Decision (May 7, 2014) (Legal File 26).

Bernskotter's affidavit does say that her Exhibit 3, Notice of Deficiency (August 18, 2009) (Legal File at 58-60), was mailed, and Appellant's affidavit confirms his receipt of it. Appellant's Affidavit at 1, Appellant's Motion for Summary Decision (May 7, 2014) (Legal File 26). Nevertheless, the only evidence in the record regarding the disposition of that Notice is Appellant's Affidavit at 1, Appellant's Motion for Summary Decision (May 7, 2014) (Legal File 26), indicating that it was withdrawn. If it had not been, Respondent could not have applied the overpayment credit as Bernskotter's affidavit says. The

conclusion that Notices of Deficiency, which section 143.611.3 requires, were never mailed to Appellant regarding his 2005 and 2006 returns. Of course

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Notice of Deficiency did not enumerate the changes to the 2006 return that Bernskotter says were imposed, and the deficiencies in that notice were never assessed.

Appellant did receive some minimal notice in August 2011 that Respondent had assessed deficiencies in Appellant's 2005 and 2006 returns. Respondent's Notice of Proposed Changes (August 3, 2011), Respondent's Cross-Motion for Summary Judgment, Exhibit 5 at 3 (Legal File at 71), gave that minimal notice only in that it seemed to fail to credit the overpayment amounts on Appellant's 2006 return. That Notice of Proposed Changes changed line 33 of Appellant's 2007 return, where overpayment credits must be claimed, to $0, but it appeared to include some part of that overpayment credit in an unnumbered line entitle "Amount Previously Paid." See id. Appellant received actual notice of what 2006 overpayment credit amount Respondent applied to his 2007 return with the Bernskotter Affidavit (June 6, 2014), Respondent's Cross-Motion for Summary Decision, Exhibit 5 at 2 (Legal File at 70). Except for what appears in the Bernskotter affidavit, which is the only evidence in the record that details those changes, Appellant has never received notice of the deficiencies Respondent assessed in Appellant's 2005 and 2006 returns.

because Respondent did not notify appellant of those changes, which section 143.611.3 requires, Appellant could not have responded to those changes.

This issue is equitable and evidences a due process denial. But because "[n]o deficiency shall be assessed or collected with respect to the year for which the return was filed unless the notice is mailed within the three-year period," RSMo §143.711.1, the statute of limitations on those additional assessments expired on March 31, 2012, three years after the 2005 and 2006 returns were filed. Therefore, those additions are a nullity, and Respondent's claims that Appellant did not timely protest the changes that she made to Appellant's 2005 and 2006 returns, Respondent's Brief at 5, are irrelevant.

III Disputes as to IRS Practice

Appellant has provided the only record evidence regarding IRS implementation of the United States Code and Regulations relevant here. Respondent argues that Appellant "tries to shift the burden of proof on this issue to [her]." Respondent, however, has an affirmative obligation to "follow as nearly as practical the [IRS] rules and regulations." Kidde America, Inc. v. Director of Revenue, 198 S.W.3d 153 (Mo. banc 2006) (quoting RSMo §143.961.2)

Appellant's affidavit has provided substantial evidence that Federal practice and implementation of nearly identical statutes and regulations are

exactly as Appellant argues and contrary to Respondent's constructions. See Appellant's Affidavit at 1-2, Appellant's Motion for Summary Decision (May 7, 2014) (Legal File 26-27).

Regarding interpretation of section 143.731.7, Federal regulations implementing 26 USC §6601(f), whose language is identical to the Missouri statute, include an illustrative example that clearly contradicts Respondent's construction of that statute. 26 CFR §301.6601-1(b)(2) (Example 2). Respondent seems to imply that the absence of cases contesting IRS procedure is an indication that the IRS is expansively interpreting its authority. Quite the opposite: it is difficult to imagine who would challenge the IRS's failure to assess additions to tax. It is not even clear that anyone would have standing to challenge that failure. That there are no cases contesting IRS procedure in this regard argues that it is narrowly construing its statute and not assessing additions as Respondent does.

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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CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of this document first class, postage prepaid, on November 30, 2015, to:

Linda Lemke
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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 2086 words.

Harry Fischer