

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, EX REL.,)	
CAROL RUSSELL FISHER)	
DIRECTOR OD REVENUE ,)	
)	
Respondent,)	
)	NO. SC85951
v.)	
)	
Joe R. Brooks)	
Sui Juris Status)	
)	
Appellant.)	

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, ASSOCIATE DIVISION
AT INDEPENDENCE

STATE OF MISSOURI, EX REL.)	
CAROL RUSSELL FISHER)	
DIRECTOR OD REVENUE)	
)	
Plaintiff,)	
)	
v.)	No. 03CV214199
)	Division 32
Joe R. Brooks)	
)	
Defendant.)	
)	

APPELLANT'S BRIEF

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APPELLANT
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JURISDICTIONAL STATEMENT

This action is one involving the question of whether the Plaintiff Director of Revenue for the state of Missouri has properly prescribed by regulation the place for filing any return, declaration, statement, or other document required pursuant to this chapter and for the payment of any tax concerning a Missouri individual income tax return falling within the instructions provided by Section 143.511, providing the authority to bring a collection action in the state court, and hence involves the construction of a revenue law of this state.

SUGGESTIONS IN SUPPORT

The issue now before the Court is the regulation(s) prescribed by the Director of Revenue, under the authority of §143.511, specifying **‘the place for filing any return, declaration, statement, or other document required pursuant to this chapter and for the payment of any tax’** for the activity in which the Appellant was engaged, granting subject matter jurisdiction and jurisdiction over the person pursuant to the revenue law of the state. Without the properly defined law, neither the Attorney General nor the Director of Revenue may obtain the authority of the Court to address the subject matter brought in the complaint. Even in tax cases before the court the well-established precedent of identifying the cause of action with certainty is found in the case of United States V. Menk 260 Fed. Supp. 784, at 787, wherein the court stated;

“It is immediately apparent that this section alone does not define the offence as the defendant contends. But rather, all three of the sections referred to in the information --- Sections 4461, 4901 and 7203 – must be considered together before a

complete definition of the offence is found. Section 4461 imposes a tax on persons engaging in a certain activity; section 4901 provides that payment of the tax shall be a condition precedent to engaging in the activity subject to the tax; and section 7203 makes it a misdemeanor to engage in the activity without having first paid the tax, and provides the penalty.

It is impossible to determine the meaning or intended affect of any one of these sections without reference to the others.” (Emphasis added)

In not specifying in the complaint the statute imposing the tax the statute requiring the return to be made and the regulation specifying the return is to be filed and the tax paid at a particular place to be considered together before a complete definition of the offence is found, the Appellees fail to establish the jurisdiction over the subject matter to bring the complaint.

“They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading of facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exercised in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be

maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.” McNutt v. General Motors &c. Corp. 298 U.S. 178, 189.

It is a well-known axiom that what one cannot do as the crow flies he may not do, as the fox runs. If this could be done, such rules and regulations would be but footless words, without force or life. Community Federal Savings & Loan Ass’n 128 F 2d 705, 708.

The Appellant requests the Court to take judicial notice of the Revised Statutes of Missouri section 143.861 which states in part as follows;

143.861. Collection procedures.—

1. The tax imposed by sections 143.011 to 143.996 shall be collected by the director of revenue, and he may establish the mode or time for the collection of any amount due under sections 143.011 to 143.996 if not otherwise specified.

2. Paragraph two is irrelevant in this action.

3. If the amount stated in the notice provided in subsection 2 of this section remains unpaid, the director of revenue shall certify the name of any person from whom any tax under sections 143.011 to 143.996 shall be due to the attorney general. Suit shall be instituted in any court of competent jurisdiction by the attorney general, or by the prosecuting attorney of the county at the direction of the attorney general, in the name of the state, to recover such tax and enforce the lien therefor in the same manner as provided by law in civil actions. In such action, the certificate of the director of revenue showing

the amount due shall be prima facie, but not conclusive, evidence of the amount due and the compliance with all provisions of sections 143.011 to 143.996 relating to the assessment of the tax. (emphasis added)

Paragraph 1 calls for this procedure if not otherwise specified. The mode and procedure for the place to file a return and pay the tax in the primary steps for collection are otherwise specified in section 143.511 and must take priority over section 143.861. Paragraph 3 clearly states that these procedures are prima facie, but not conclusive, evidence of the compliance with all provisions of sections 143.011 to 143.996 relating to the assessment of the tax to be collected in a civil action by the Director of Revenue.

Appellant asks this Court to take judicial notice that in the CSR, there are only 3 essential regulations for RSMo.§143.511 which are **12 CSR 10-2.190**, pertaining to “Partners and S Corporation Shareholders Composite Individual Income Tax Return Filing Requirements, Withholding of Income Tax Requirements and Partnership/S Corporation Withholding Exemptions” **12 CSR 10-2.220** pertaining to “Taxation of Nonresident Members of Professional Athletic Teams” and **12 CSR 10-2.705** pertaining to “Filing Corporation Tax Returns”. These sections are the foundation and procedural requirements to establish the subject matter jurisdiction and jurisdiction over the person for the Director of Revenue to certify to the Attorney General in order to bring any action. Only actions supported by the statutes and regulations can have any standing in the courts. *California Bankers Association v. Shultz*, cited as 39 L.Ed.2nd 812. (1974) wherein the Court stated:

"... we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone." (ibid at 820) "The Government urges that since only those who violate these regulations may incur civil or criminal penalties, it is the actual regulations issued by the Secretary of the Treasury, and not the broad authorizing language of the statute, which are to be tested against the standards of the Fourth Amendment; and that when so tested they are valid." (ibid at 830) (Emphasis added)

The Attorney General and the Director of Revenue have failed to identify how the Appellant falls within these parameters in the complaint at this time in order to obtain jurisdiction.

Neither the statute, §143.511, nor a regulation prescribed pursuant thereto provide a particular place by address such as the one specified within 12 CSR 10-2.705 Filing Corporation Tax Returns "(1) Time and Place for Filing Returns and Payment of Taxes." "Department of Revenue, P.O. Box 700, Jefferson City, MO 65105-0700."

When construing a statute, it is the court's purpose to ascertain the legislature's intent from the language used and, if possible, to give effect to that intent. Schuettenberg v. Board of Police Commissioners of the City of St. Louis, 935 S.W.2d 712, 714 (Mo. App. E.D. 1996). The statute must be viewed as a whole and read in its entirety. In statutory interpretation, the rule of ejusdem generis provides that "where general words follow specific words in a statutory enumeration, the general words are

construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Sutherland Statutory Construction section 47.17 (5th Ed.)

The administration and enforcement of the supporting regulations for RSMo. §143.511 against Appellant, in the aforesaid instant case, are arbitrary, capricious, and misapplication of law, in as much as the law has not provided a PLACE such as the one found within 12 CSR 10-2.705 Filing Corporation Tax Returns "(1) Time and Place for Filing Returns and Payment of Taxes." which pertains to the Appellant.

"Common maxim of statutory construction is that statutes are to be construed so as to give meaning to every word in them." U. S. v. F. J. Vollmer & Co. Inc., 1 F. 3d 1511, 1513 (7 th Cir. 1993).

In order to properly determine the applicability of this particular statute, and the only legitimate legislative intent, the Director of Revenue is required to draft implementing regulations, which, when approved by the appointed legislative committee is to be published in the Missouri Code of State Regulations (CSR) by the Secretary of State.

"The rules and regulations which the director of revenue is empowered by § 143.200 to prescribe are limited to procedural rules and regulations useful in the administration and enforcement of the income tax laws. In the second place, the statutory direction that the rules and regulations shall follow the federal rules and regulations as nearly as practicable does not require or authorize the director to ignore a specific, pertinent, applicable state statute and promulgate rules and regulations in conflict therewith." Mobile Oil Corporation v. State Tax Com'n of Missouri, 513 S.

W. 2d 319, 323. “The failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct.... The courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself.” Simmons v. Block, 782 F. 2d 1545, 1550

This being the case, Appellant has made an undisputed and accurate determination of the proper application of the law in his circumstance and situation, and may not be punished by Appellees for doing so, as no alleged “knowingly” culpable mental state can be established upon Appellant’s reasonable reliance upon the aforesaid official regulations governing the administration and enforcement of the statute.

The actions by Appellees against Appellant, jointly & severally, constitute impairment with specific intent to violate Appellant’s unalienable civil rights to know the specific cause for which relief may be granted as a matter of law. (See Article I, Sections 1, 2, 9 & 10, Missouri Constitution).

STATEMENT OF FACTS

1. On March 3, 2003, Respondent filed the first petition against Appellant in the Circuit Court of Jackson County, Missouri, at Kansas City, Associate Division where it was assigned to Division 26 as case # 03CV 205843 (Appendix A)

2. On April 16, 2003, the parties appeared for the first docket call in the case. Appellant submitted a Notice of Special Appearance Only For Jurisdictional Challenge on April 14, 2003. (see Appendix B)

3. On May 23, 2003, Judge Beaird issued his order dismissing the action against the Appellant. See Appendix E)

4. On June 2, 2003, Respondent re-filed a Petition for Delinquent Missouri Individual Income Tax against Appellant in Division 30 at Independence, Missouri. (LF 1-19)

5. Service was made on Appellant on July 17, 2003, by private process server Lawrence E. Freemeyer. (LF-20)

6. On July 28, 2003, Appellant filed an Application for Change of Judge. (LF-21)

7. On August 18, 2003, Respondent sent a letter to Appellant notifying Appellant to appear on September 24, 2003 in Division 32. (LF-24)

8. On September 24, 2003, Appellant appeared in Division 32 by Special Appearance to challenge the jurisdiction of Respondent to bring the action. (LF-25-39)

9. Judge Robert Trout reviewed the issue in special appearance and overruled Appellant's challenge on October 29, 2003. (LF-43)

10. Appellant filed with this Court a petition for writ of prohibition on December 5, 2003. (LF-44 through 92)

11. This Court denied the petition for writ of prohibition without prejudice on December 23, 2003.

12. On January 2, 2004, Appellant submitted a request for production of documents and list of witnesses to Respondent's attorney and filed the proper certificate of service with the court. (LF-93)

13. On January 12, 2004, Appellant filed request for admissions directed to Plaintiff Carol Russell Fisher and interrogatories directed to Plaintiff Carol Russell Fisher with Respondent's Attorney and filed the proper certificate of service with the court. (LF-94)

14. Respondent submitted the response to the request for productions and list of witnesses on January 29, 2004, to Appellant. (LF-95)

15. Respondent submitted responses to the request for admissions and interrogatories to Appellant on February 2, 2004.(LF-96)

16. Appellant had a subpoena duces tecum served on Carol Russell Fisher Director of Revenue on February 3, 2004, to appear and produce documents at trial on February 9, 2004. (LF-97)

17. Appellant notified Respondent's attorney on February 6, 2004, of the Respondent's failure to respond to the request for admissions and interrogatories directed to Carol Russell Fisher and of Appellant's intention to file a motion to compel. (LF-100)

18. A motion to enforce requested discovery was submitted to the Court at the beginning of the trial held on February 9, 2004. (TR-6)

19. Trial was held on February 9, 2004, and after testimony and evidence was presented the trial judge entered judgment in favor of Respondent.

20. Appellant submitted a Motion for New Trial on March 8, 2004. (LF-123)

21. Judge Robert Trout denied the motion for new trial on March 16, 2004. (LF-125)

22. Appellant filed Notice of Appeal and request to proceed in forma pauperis on March 24, 2004. (LF-126 through 132)

CASE HISTORY AND SUMMARY

This action is one of a civil nature for the collection of an alleged tax due and owing to the state of Missouri for the years 1992 through 1996. The Respondent first filed this action on March 18, 2003, in the Circuit Court of Jackson County, Missouri, at Kansas City, Associate Division where it was assigned to Division 26 as case # 03CV 205843 (see Appendix A)

The Summons and Petition were requested to be served by a list of process servers as listed in the application for private process server. The Summons and Petition were however, served by an individual who was not included in the order to serve process to the Defendant. April 16, 2003, was the time for the first docket call in the case. Appellant submitted a Notice of Special Appearance Only For Jurisdictional Challenge on April 14, 2003. (see Appendix B) This challenge was based upon the improper and incomplete service of process as well as the jurisdictional challenge under the revenue law of the state §143.511 and the supporting regulation.

Both parties appeared in court on April 16, 2003, where the judge first reviewed the challenge of the Appellant. Even though the attorney of record, Jacqueline A. Sommer, for the Respondent argued that there was proper service Judge Robert Beaird continued the hearing until May 21, 2003. Between the hearing on April 16, 2003, and the continued hearing of May 21, 2003, the attorney for the Respondent took it on herself to reserve the Appellant on April 29, 2003, even though she never filed for leave of court to serve additional process. (see Appendix C) At this time Appellant filed a Second Notice of Special Appearance Only For Jurisdictional Challenge on May 19, 2003, with

an additional challenge to the issue of improper service and the continued challenge to jurisdiction based on the lack of a regulation for the administration and enforcement of the place to file a return and pay the tax. (see Appendix D)

On May 21, 2003, the parties again appeared in the court of Judge Robert Beaird where the parties presented their respective arguments on the issue of service. Judge Beaird again rescheduled the hearing for another thirty days. However, on May 23, 2003, Judge Beaird issued his order dismissing the action against Appellant. (see Appendix E)

Respondent refilled this action on July 2, 2003 in the Circuit Court of Jackson County, Missouri, at Independence, Associate Division where it was assigned to Division 30 as case # 03CV214199 LF-1-19. Service was made and returned on July 18, 2003 LF-20. Appellant then filed for a change of judge LF-21. The change was made and notice given to Appellant on August 18, 2003 LF-24. Appellant then filed another Notice Of Special Appearance Only For Jurisdictional Challenge on September 22, 2003 LF-25-39. At the first docket call on the action the Judge set a date of October 29, 2003, for a hearing on the Appellant's jurisdictional arguments LF-40. Respondent's attorney of record Jacqueline Sommer submitted her Suggestions in opposition to defendant's "notice of special appearance only for jurisdictional challenge" on October 2, 2003, LF-41, wherein she stated "Plaintiff is unable to determine exactly what defense or argument Defendant is proposing".LF-42 paragraph 2. On October 29, 2003, the parties appeared in court where Judge Robert Trout heard the arguments of both parties and overruled the Appellant's challenge to jurisdiction even though the attorney of record for the Respondent could not and did not present any evidence or proof on the jurisdictional

issue of the lack of a regulation for the administration and enforcement of the revenue law of the state §143.511. LF-43.

On December 5, 2003, Appellant filed a writ of prohibition with supporting documents in this court as case #SC85708 LF-44-92. This court denied the writ of prohibition on December 23, 2003. (see Appendix F)

From January 2004, till the trial date of February 9, 2004, Appellant engaged in discovery with no meaningful response from the Respondent.

Respondent avers in the petition that Appellant “did not file a Missouri return nor pay any income tax to the state of Missouri” for any of the years in question.(LF-3,5, 6, 7 and 8) Although the Respondent alleges that Appellant did not file any return nor pay any tax the Respondent has never stated with certainty the place where the return or the tax was not made or paid pursuant to any regulation.

From the beginning of the action brought by the Respondent the Appellant has challenged the authority and jurisdiction of the Director of Revenue to bring an action without identifying the regulation prescribed by the director specifying the place to file the return and pay the tax. Each and every time Appellant has made a proper challenge to the jurisdiction under the revenue laws of the state of Missouri the trial judge has overruled the necessity for the Respondent to allege facts essential to show jurisdiction.

During the course of the trial the Respondent failed to attend and present testimony or direct evidence to support jurisdiction. Respondent also failed to respond to discovery requests directed specifically to Respondent even under a properly issued and served subpoena. LF-97-99.

POINTS RELIED ON – POINT I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S JURISDICTIONAL CHALLENGE ON OCTOBER 29, 2003, WHERE RESPONDENT FAILED TO PRODUCE EVIDENCE OR PROOF OF THE REGULATION SPECIFYING THE PLACE TO FILE THE RETURN AND PAY THE TAX PRESCRIBED BY THE DIRECTOR OF REVENUE UNDER THE REVENUE LAW OF THE STATE §143.511 TO SUPPORT JURISDICTION.

CITATION OF AUTHORITIES

McNutt v. General Motors &c. Corp. 298 U.S. 178

Fleming v. Harrison , 162 F. 2d 789

California Bankers Association v. Shultz, 39 L.Ed.2nd 812, (1974)

Schuettenberg v. Board of Police Commissioners of the City of St. Louis, 935 S.W.2d 712 (Mo. App. E.D. 1996).

Missouri Statutes and Regulations

RSMo. 143.511 Time and place for filing returns and paying tax

RSMo. 143.961 Rules and regulations

12 CSR 10-2.190 Partners and S Corporation Shareholders Composite Individual Income Tax Return Filing Requirements, Withholding of Income Tax Requirements and Partnership/S Corporation Withholding Exemptions

12 CSR 10-2.220 Taxation of Nonresident Members of Professional Athletic Teams

12 CSR 10-2.705 Filing Corporation Tax Returns

Other Authorities

Missouri Constitution Article I Section 10 Due process of law

POINTS RELIED ON – POINT II

THE TRIAL COURT ERRED BY ENTERING JUDGMENT IN FAVOR OF THE RESPONDENT ON FEBRUARY 9, 2004, WHERE RESPONDENT PROVIDED NO PROOF OR EVIDENCE TO ESTABLISH JURISDICTION IN THE ALLEGATION THAT THE APPELLANT FAILED TO FILE A RETURN OR PAY THE TAX AT A PLACE SPECIFIED BY THE DIRECTOR OF REVENUE WITHIN THE PROVISIONS OF THE REVENUE LAW OF THE STATE IN §143.511.

CITATION OF AUTHORITIES

U. S. v. F. J. Vollmer & Co. Inc., 1 F. 3d 1511 (7 th Cir. 1993)

Simmons v. Block, 782 F. 2d 1545

Mobile Oil Corporation v. State Tax Commission of Missouri, 513 S.W.2d 319

State v. Civella , 368 S.W.2d 444

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RSMo. 143.961 Rules and regulations

RSMo.536.010 Definitions

RSMo. 536.031 Code to be published

Other Authorities

Missouri Constitution Article 1 Section 2 rights of persons

Court Rule 59.01

RESTATEMENT OF POINT I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S JURISDICTIONAL CHALLENGE ON OCTOBER 29, 2003, WHERE RESPONDENT FAILED TO PRODUCE EVIDENCE OR PROOF OF THE REGULATION SPECIFYING THE PLACE TO FILE THE RETURN AND PAY THE TAX PRESCRIBED BY THE DIRECTOR OF REVENUE UNDER THE REVENUE LAW OF THE STATE §143.511 TO SUPPORT JURISDICTION.

Standard of Review: This is a de novo question of law concerning jurisdiction for a civil action under the revenue laws of the state.

ARGUMENT FOR POINT I

As a Missouri citizen, the Appellant is entitled to all the protections of the state Constitution for the taking of property without due process of law under Article I Section 10. (see Appendix N for full context) Appellant contends the equal rights and opportunity under the law for due process of law extends to the proof of jurisdiction by the director of revenue to bring a civil action for the collection of a tax under the revenue laws of the state in §143.511 when an appropriate challenge is made. (See Appendix G for the full context of §143.511) Appellant has made an appropriate challenge to jurisdiction in special appearance prior to any issues in the petition being presented before the court. (LF-25-34). In Appellant's challenge to jurisdiction on issue II, pages 29 through 34 of

the legal file, Appellant has relied on well-established case law from the Missouri Supreme Court as well as the Missouri Court of Appeals and prominent Federal Court decisions.

The requirements relied on to establish jurisdiction under the revenue laws of the state were properly challenged by Appellant.

“They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading of facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exercised in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.” McNutt v. General Motors &c. Corp. 298 U.S. 178, 189.

Even though the Respondent has stated in the “Suggestions in Opposition To Defendant’s “Notice Of Special Appearance Only For Jurisdictional Challenge”” in paragraph 2, (LF-42) “Plaintiff is unable to determine exactly what defense Defendant is proposing.” the

Respondent failed to respond on point to the jurisdictional challenge in issue II of the Appellant's NOTICE OF SPECIAL APPEARANCE ONLY FOR JURISDICTIONAL CHALLENGE .(LF-29) There has been no competent proof or evidence, submitted by the Respondent, to establish jurisdiction under §143.511 through a regulation prescribed by the director of revenue specifying the place to file a return or to pay a tax to the director of revenue in order to satisfy the due process of law requirement for jurisdiction over the subject matter or the individual for the administration or enforcement of the revenue law of the state §143.511.

“it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more particularly within his knowledge, or of which he is supposed to be cognizant.” Fleming v. Harrison et al., 162 F.2d 789, 792.

In California Bankers Association v. Shultz, 39 L.Ed.2nd 812 the Court noted; "... we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone." (ibid at 820) "The Government urges that since only those who violate these regulations may incur civil or criminal penalties, it is the actual regulations issued by the Secretary of the Treasury, and not the broad authorizing language of the statute, which are to be tested against the standards of the Fourth Amendment; and that when so tested they are valid." (1974) (Emphasis added)

Although the foregoing cite referrers to the federal secretary's responsibilities the state statute §143.961 provides for the director of revenue to prescribe regulations for the administration and enforcement of the tax imposed by sections 143.011 to 143.966. (See Appendix k for the context of §143.961)

“When construing a statute, it is the court's purpose to ascertain the legislature's intent from the language used and, if possible, to give effect to that intent.” Schuettenberg v. Board of Police Commissioners of the City of St. Louis, 935 S.W.2d 712, 714 (Mo. App. E.D. 1996).

In construing the requirements of jurisdiction to pursue an action the trial Court erred in not considering the regulations prescribed under the revenue law §143.511 by the director of revenue for the administration and enforcement of the revenue law requirement to file a return and the payment of the tax.

The trial court erred in overruling Appellant's jurisdictional challenge (LF-43) when the Respondent failed to specify any regulation other than **12 CSR 10-2.190** Partners and S Corporation Shareholders Composite Individual Income Tax Return Filing Requirements, Withholding of Income Tax Requirements and Partnership/S Corporation Withholding Exemptions, **12 CSR 10-2.220** Taxation of Nonresident Members of Professional Athletic Teams or **12 CSR 10-2.705** Filing Corporation Tax Returns pertaining to the Appellant specifying the place to file a return or pay a tax in order to establish jurisdiction under §143.511 for the requirement to file a return or pay a tax at the place prescribed by the director of revenue.

RESTATEMENT OF POINT II

THE TRIAL COURT ERRED BY ENTERING JUDGMENT IN FAVOR OF THE RESPONDENT ON FEBRUARY 9, 2004, WHERE RESPONDENT PROVIDED NO PROOF OR EVIDENCE TO ESTABLISH JURISDICTION IN THE ALLEGATION THAT THE APPELLANT FAILED TO FILE A RETURN OR PAY THE TAX AT A PLACE SPECIFIED BY THE DIRECTOR OF REVENUE WITHIN THE PROVISIONS OF THE REVENUE LAW OF THE STATE IN §143.511.

Standard of Review: This is a de novo question of law concerning jurisdiction for a civil action under the revenue laws of the state.

ARGUMENT FOR POINT II

Appellant made several challenges at the trial to the Respondent's lack of jurisdiction. The first challenge was made before the trial started in pretrial issues. (TR6)

Appellant submitted a motion to enforce discovery (TR-8 & LF-100) as a pretrial issue. The motion contained objections to the answers of the Respondent pertaining to the correctness of the documents submitted by Appellant as the answers were off point and evasive. (LF-101)

Appellant's admissions were directed to the director of revenue Carrol Russell Fisher (LF-109) but were responded to by someone other than the party directed who had no apparent knowledge of the documents specified in the admissions. Rule 59.01(a)

specifies the matter is admitted if the party to whom the request is directed fails to submit the written answer or objection addressed to the matter. No such objections were identified within the answers (LF-109-110) nor were there any denials of the exhibits submitted for admissions. In addition to the foregoing, there was no signature on the answers to admissions by the Respondent or the Respondent's attorney. The only signature was the attorney of record, Jacqueline A. Sommer, on the cover page of the alleged answers. (LF-108)

The only response was an evasive statement (LF109-110) alleging the "Form MO-1040 and the instructions to Form MO-1040" could in some way take the place of the regulation mandated within the revenue law of the state §143.511. This answer is without merit and frivolous as the RSMo. §536.031 (see Appendix M for complete context) addresses what shall be published as a state regulation and further defined within §536.010 (4) (m) as follows;

4. "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include:

(m) Income tax or sales forms, returns and instruction booklets prepared by the state department of revenue for distribution to taxpayers for use in preparing tax returns.

(Emphasis added) (See Appendix L for complete context.)

prohibits the referred to Form and instructions as having any authority of a regulation.

“Common maxim of statutory construction is that statutes are to be construed so as to give meaning to every word in them.” U. S. v. F. J. Vollmer & Co. Inc., 1 F. 3d 1511, 1513 (7 th Cir. 1993).

Appellant’s interrogatories were directed to the director of revenue Carrol Russell Fisher (LF-103) but were responded to by Sharon A. Norman, someone other than the party directed (LF-107), who had no apparent knowledge of the subject matter addressed within the interrogatories. Even though the person answering the interrogatories had no apparent knowledge of the exhibits A, B and C attached to the request for admissions (LF 111-115) she did submit responses as her legal interpretation to the regulations under oath and affirmation by affidavit.(LF-107) After brief limited discussion on the motion the trial court erred in overruling the motion with no reason specified on the refusal to compel the Respondent to answer on point to the requested discovery. (TR-9)

During the trial, the Respondent’s attorney of record, Jacqueline A. Sommer, called Sharon A. Norman as the witness for the Respondent. (TR-9) In parts of the testimony, the witness described different documents pertaining to parts of the revenue laws of the state within Chapter 143 of the Missouri Revised Statutes. (TR-9-34) Although Appellant attempted to cross-examine the witness about the legal requirements of the issue Respondent’s attorney objected to the witness’s ability to respond to legal issues which was sustained by the court. (TR-40) Where the witness has the ability to declare under oath in the affidavit attached to the responses to interrogatories (LF-103 to 107) addressing “the answers thereto and that they are true and correct to the best of his/her knowledge and belief” (LF-107) the trial court erred in sustaining Respondent’s

attorney's objection to Appellant's questions of the witness's attested knowledge. Upon completion of the testimony of witness, Sharon A. Norman, Appellant was left with no other witnesses to cross-examine on behalf of the Respondent.

Appellant proceeded to request the court to enforce a subpoena duces tecum which had been served on the Respondent.(TR-45-46) The subpoena was properly issued and had a proper notarized return of execution. (LF-97-98) as well as an affidavit of authority to receive service in the name of the director of revenue. (LF-99) The subpoena was issued to the Respondent in order to establish documentation of the currently active regulations in force pertaining to the requirements of RSMo. §143.511 and to present testimony at the trial. The trial court erred when the Respondent failed to appear in overruling the enforcement of the subpoena (TR-46) resulting in a deprivation of equal right and opportunity under the law pursuant to Missouri Constitution Article I Section 2. (see Appendix N for full context)

Appellant has made several direct challenges to jurisdiction for the Respondent to sustain a civil action for failing to file a return and pay a tax under the revenue laws of the state. Respondent has failed and refused to specify which regulation was prescribed pursuant to §143.511 in order to administer or enforce the place to file a return or to pay the tax.

“The failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct.... The courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself.”

Simmons v. Block, 782 F. 2d 1545, 1550

This court has established the authority in which the director of revenue is empowered.

. “The rules and regulations which the director of revenue is empowered by § 143.200 [now §143.961] to prescribe are limited to procedural rules and regulations useful in the administration and enforcement of the income tax laws. In the second place, the statutory direction that the rules and regulations shall follow the federal rules and regulations as nearly as practicable does not require or authorize the director to ignore a specific, pertinent, applicable state statute and promulgate rules and regulations in conflict therewith.” Mobile Oil Corporation v. State Tax Commission of Missouri, 513 S. W. 2d 319, 323. Emphasis added.

In failing to prescribe a regulation specifying the place to file the return and to pay the tax, under the revenue law of the state, the Director, Carrol Russell Fisher, is unable to identify where the Appellant has failed to file a return or to pay a tax.

“by regulation it was provided that "Returns of income must be delivered or mailed to any one of the district offices of the income tax bureau of the state tax commission," of which there were seven. The court held: "As the regulations provided that delivery of a return,* * * to any one of the district offices would be sufficient, a failure to deliver a return * * * to any of these offices would seem to constitute a violation of the law in each of the counties where the district offices were maintained. In other words, the statute gives the taxpayer the choice of seven places in which to file his return * * *, and failure to file * * * in any of these places is an act of omission occurring in each thereof. * * * As the law now stands it affords the taxpayer an

opportunity to make a return * * * in anyone of seven counties. Violation of his duty would seem to impose liability of prosecution in any of these counties."

[10] We approve of the reasoning, theory and result of the Commerford and Colbert cases. State v. Civella , 368 S.W.2d 444, 449 (see Appendix O for complete copy)

The Respondent makes no claim for which relief may be granted if there has been no regulation activated for the administration or enforcement of the revenue law of the state where a civil penalty may attach.

Given the level of education, training and knowledge of the law for the proper application of the law in order to be an associate circuit court judge and then to abuse the discretion of the position to arbitrarily rule in opposition of established basics of due process of law for the Respondent to provide proof and evidence to establish jurisdiction, the trial court erred by entering judgment in favor of the Respondent (TR-64)

SUMMARY

Appellant is a fifty-three year old man with only a high school education. Even though Appellant graduated 222 out of 264 in 1969, Appellant believes himself to be a person of reasonably common intelligence with the capability to understand and comprehend what he reads.

Appellant has reviewed the revenue law of the state in §143.511 and understands the statute to say that the director of revenue is required by legislative mandate to prescribe a regulation for the administration and enforcement of the place to file a return and to pay the tax due on any such return

“Common maxim of statutory construction is that statutes are to be construed so as to give meaning to every word in them.” U. S. v. F. J. Vollmer & Co. Inc., 1 F. 3d 1511, 1513 (7 th Cir. 1993).

If in fact the statute means what it says then the only regulations prescribed by the director of revenue at this time, Appellant has been able to locate which Respondent is not in disagreement on, are the regulations found in **12 CSR 10-2.190** Partners and S Corporation Shareholders Composite Individual Income Tax Return Filing Requirements, Withholding of Income Tax Requirements and Partnership/S Corporation Withholding Exemptions, **12 CSR 10-2.220** Taxation of Nonresident Members of Professional Athletic Teams and **12 CSR 10-2.705** Filing Corporation Tax Returns. Of these regulations Respondent further does not deny that **12 CSR 10-2.705** Filing Corporation Tax Returns is the only regulation containing the section “(1) Time and Place for Filing Returns and Payment of Taxes.” in which the director has specified the place to file only the corporation return and pay the tax is “Department of Revenue, P.O. Box 700, Jefferson City, MO 65105-0700.”

When construing a statute, it is the court's purpose to ascertain the legislature's intent from the language used and, if possible, to give effect to that intent. Schuettenberg v. Board of Police Commissioners of the City of St. Louis, 935 S.W.2d 712, 714 (Mo. App. E.D. 1996).

Respondent has a well-defined congressional mandate to perform a specific duty under RSMo. §143.511 to prescribe within a regulation the place to file a return and to pay the tax. This indicates a clear legislative intent to identify within the regulation the

individual who is required to file a return and the place for the return to be filed. The idea of assuming the notification for the place to file a return and paying a tax could be otherwise stated on some other document would constitute a massive stretch of the imagination for compliance under §143.511.

“It is a well-known axiom that what one cannot do as the crow flies he may not do as the fox runs. If this could be done, such rules and regulations would be but footless words, without force or life.” Community Federal Savings & Loan Ass’n 128 F 2d 705, 708.

Where evidence is insufficient to support finding that jurisdiction of the civil charge against Appellant was properly laid, the judgment in this civil action for the Respondent cannot stand.

If the Respondent could take a trip to the moon based on the jurisdiction established in the petition or at the trial then the Respondent would not have established enough jurisdiction to even jump up from the ground.

PRAYER

Appellant prays this court to review de novo the issue of law concerning the jurisdiction challenged from the beginning of this action where Respondent has failed to prove by evidence or testimony that any regulation has been prescribed for the administration or enforcement of the revenue law of the state RSMo. §143.511 specifying the place to file the return or to pay the tax which would grant Respondent proper jurisdiction to pursue the civil action and reverse the lower court’s judgment.

Respectfully submitted

“With explicit reservation of all rights”

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2004, the foregoing Appellant’s Brief was mailed to the following by first class mail, postage prepaid, addressed as follows:

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