

No. SC85951

IN THE MISSOURI SUPREME COURT

**STATE EX REL. CAROL FISCHER,
DIRECTOR OF REVENUE, STATE OF MISSOURI
Respondent,**

v.

**JOE BROOKS,
Appellant.**

**Appeal from the Jackson County Circuit Court
The Honorable Robert L. Trout, Associate Circuit Judge**

BRIEF OF RESPONDENT

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**ATTORNEYS FOR RESPONDENT,
DIRECTOR OF REVENUE,
STATE OF MISSOURI**

Table of Contents

Table of Authorities	2
Jurisdictional Statement	4
Statement of Facts	7
Argument	10
Conclusion	13
Certification of Service and of Compliance with Rule 84.06(b) and (c)	14

Table of Authorities

Cases:

<i>Alumax Foils, Inc. v. The City of St. Louis</i> , 939 S.W.2d 907 (Mo. banc 1997)	4, 5
<i>Farmers & Merchants Bank and Trust Co. v. Director of Revenue</i> , 896 S.W.2d 30 (Mo. banc 1995)	11
<i>Kelly v. Hanson</i> , 931 S.W.2d 816 (Mo. App. W.D. 1996)	4
<i>Paulson v. Missouri Department of Revenue</i> , 961 S.W.2d 63 (Mo. App. W.D. 1998)	5
<i>State ex rel. Director of Revenue v. Anderson</i> , 957 S.W.2d 800 (Mo. App. S.D. 1997)	11
<i>State ex rel. Fischer v. Sanders</i> , 80 S.W.3d 1 (Mo. App. W.D. 2002)	11
<i>State ex rel. Lohman v. Latimer</i> , 4 S.W.3d 560 (Mo. App. S.D. 1999)	11

Statutes:

12 C.S.R. 10-1.010(4)	12
§143.011, RSMo	11, 12
§143.183, RSMo	12
§143.241, RSMo	11
§143.511, RSMo	4-6, 8, 10-12
§143.611.2, RSMo	7
§143.631, RSMo	10
§143.861.2, RSMo	7

§143.861.3, RSMo	7
§143.861, RSMo	8, 10
§143.996, RSMo	11
§512.180.1, RSMo	9

Constitutional Provisions:

Mo. Const. Art. V, § 3	4, 6
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Jurisdictional Statement

Notwithstanding the assertions of appellant, this case does not actually involve the construction of a revenue law of this State, and thus falls outside this Court's jurisdiction.

The "revenue law" that Mr. Brooks argues must be construed is § 143.511, RSMo,¹ which addresses where a tax return must be filed: "The director of revenue shall prescribe 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." Mr. Brooks claims that the Director never promulgated such a regulation. *See* Appellant's Jurisdictional Statement, found at pp. 5-11 of his brief.

For a case to be within the exclusive jurisdiction of this Court on the ground that it calls for a construction of revenue laws, pursuant to Mo. Const. Art. V, § 3, the revenue law must be directly and primarily concerned, not merely indirectly or as an incident. *Kelly v. Hanson*, 931 S.W.2d 816, 817 (Mo. App. W.D. 1996). Further, "[t]he constitutional phrase 'construction of the revenue laws of this state' assigns original appellate jurisdiction to this Court when each of the three separate elements is present: (1) construction; (2) of revenue laws; (3) of this state." *Alumax Foils, Inc. v. The City of St. Louis*, 939 S.W.2d 907, 910 (Mo. banc 1997). Mr. Brooks' appeal will not directly concern the construction of a revenue law for three reasons.

¹ All section references are to the Revised Statutes of Missouri currently in effect, unless otherwise noted.

First, as explained in more detail *infra*, Mr. Brooks' argument about §143.511 and the regulations was not properly before the court below and will not be reached in this appeal.

Second, even if a reviewing court could reach Mr. Brooks' issues, he is not asking for the "construction" of a revenue law. To the contrary, to the extent Mr. Brooks' argument is revealed in his brief, he appears to be specifically arguing that the language of §143.511 is so clear that it bears no construction at all. *See* App. Brief, pp. 29-31. When a case involves an unambiguous statute, "there is no room for construction of the statute" and the Court of Appeals has jurisdiction even if that statute might be a revenue law. *Paulson v. Missouri Department of Revenue*, 961 S.W.2d 63, 65 (Mo. App. W.D. 1998).

Finally, to the extent that Mr. Brooks bases his appeal on an interpretation or meaning of §143.511, the case does not involve a revenue law. "A 'revenue law' directly creates or alters an income stream to the government[.]" *Alumax Foils, Inc.*, 939 S.W.2d at 910. Phrased another way, "a revenue law either establishes or abolishes a tax or fee, changes the rate of an existing tax, broadens or narrows the base or activity against which a tax or fee is assessed, or excludes from or creates exceptions to an existing tax or fee." *Id.* Section 143.511 does none of those things. Instead, it sets a date by which taxes will be paid and, in the single sentence upon which Mr. Brooks bases his appeal, it mentions a procedure by which the director of revenue can inform the public where to pay taxes. Given that the terms of §143.511 do not establish, abolish, change, or effect tax liability, the

statute does not “create or alter an income stream to the government” and is not a “revenue law” as that phrase is used in Article 5, §3.

Statement of Facts

Joe Brooks failed to file income tax returns for the years 1992,² 1993,³ 1994,⁴ 1995,⁵ and 1996.⁶ As permitted and required by § 143.611.2, the Director of Revenue estimated the taxable income and tax thereon based on figures provided by the Internal Revenue Service.⁷ For each of the tax years, the Director of Revenue mailed to Mr. Brooks a Notice of Deficiency, which included notice to Mr. Brooks of the method by which he could protest the amount of tax calculated by the Director.⁸ Mr. Brooks filed no protest for any of the years at issue.⁹ The Director sent Mr. Brooks the ten-day demand required by § 143.861.2 for each of the five years.¹⁰ When no money was paid, the Director certified the amounts owed to the Attorney General as required by § 143.861.3.¹¹

² Tr. 17.

³ Tr. 22.

⁴ Tr. 27.

⁵ Tr. 30.

⁶ Tr. 33.

⁷ Tr. 14, 17-18, 22, 27, 30, 33. L.F. 10-19.

⁸ Tr. 14-15, 20, 26, 29, 32. L.F. 10-19.

⁹ Tr. 17, 22, 27, 30, 33-34. L.F. 10-19.

¹⁰ Tr. 16, 21, 26, 29, 33. L.F. 10-19.

¹¹ Tr. 17, 21, 26, 29, 33. L.F. 10-19.

The Director filed suit under the authority of § 143.861.¹² Mr. Brooks responded by asserting that the trial court lacked jurisdiction, both because of who served him with the summons, and because he claimed no regulation existed under § 143.511 telling him where to file his tax returns.¹³ The trial court disagreed, and, taking the “special appearance” as a motion to dismiss, denied the motion.¹⁴

At trial, Mr. Brooks again argued that the absence of a regulation describing where to file his tax return excused his failure to pay income tax, or in his words:

that the issue in this case is one of whether the Director of Revenue prescribed by regulation a particular place to file a return pursuant to Chapter 143.511 . . . It’s not an issue of whether I believe I owed tax or think I owed tax, but an issue of whether the Director of Revenue performed the job legally assigned to establish the proper jurisdiction and venue over the request.¹⁵

The trial court again disagreed, and on February 9, 2004, entered judgment in favor of the Director of Revenue in the amounts of \$2,782.10, \$2,313.70, \$3,205.06, \$3,098.91, and \$1,751.93 for the years 1992 through 1996, respectively.¹⁶

¹² L.F. 3-19.

¹³ L.F. 25-34.

¹⁴ L.F. 43, 120.

¹⁵ Tr. 62-63.

¹⁶ Tr. 64. L.F. 116.

Mr. Brooks filed a notice of appeal to this Court on March 24, 2004.¹⁷ Assuming that he can aggregate the amounts to satisfy the jurisdictional threshold in 512.180.1, Mr. Brooks' appeal was timely filed.

¹⁷ L.F. 131.

Argument

Having been sued under §143.861 for failure to pay his state income taxes for the years 1992-1996, and having lost at trial in Jackson County Circuit Court on all counts, Mr. Brooks has filed this *pro se* appeal in which he argues that he should not have been required to pay any income tax at all and that this Court should reverse the trial court's judgment. This is so, he argues, because the State of Missouri failed to specify in any regulation where he should file his return or make his payments. He refers to §143.511, under which "[t]he director of revenue shall prescribe 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." Mr. Brooks is wrong for three reasons: he did not preserve this argument through timely administrative appeal; the "shall" language of the statute is directory, rather than mandatory in this instance; and the director has prescribed by regulation the place for submitting any and all documents to the Department of Revenue.

First, Mr. Brooks did not preserve his argument. He could and should have filed an administrative appeal to raise the issues he now raises in this appeal. Not having done that, his arguments are barred; he cannot collaterally attack the assessment of tax in this collection action.

If Mr. Brooks had an objection to the tax assessment, he could have protested the taxes administratively as permitted by §143.631. "The procedure set forth by statute is the taxpayer's exclusive remedy for litigating the issue of whether he owed the assessed tax."

State ex rel. Lohman v. Latimer, 4 S.W.3d 560, 562 (Mo. App. S.D. 1999). Having failed to exercise that remedy, Mr. Brooks is barred from collaterally attacking the assessment in this collection action. *Id.*; *State ex rel. Fischer v. Sanders*, 80 S.W.3d 1, 5 (Mo. App. W.D. 2002); *State ex rel. Director of Revenue v. Anderson*, 957 S.W.2d 800, 801 (Mo. App. S.D. 1997).

Second, Mr. Brooks argues at some length that he is excused from paying income tax because the director of revenue did not promulgate a regulation telling him where to file his income tax return. He bases that argument on the language of § 143.511, which says the Director of Revenue “shall prescribe by regulation the place for filing any return . . . and for the payment of any tax..”

But the word “shall” in § 143.511 is merely directory, not mandatory. “Whether the statutory word ‘shall’ is mandatory or directory is a function of context.” *Farmers & Merchants Bank and Trust Co. v. Director of Revenue*, 896 S.W.2d 30, 32 (Mo. banc 1995). It is only when the legislature includes a sanction for failure to follow the “shall” that the statute is mandatory. *Id.* at 33. And here the legislature included no penalty for the director failing to promulgate a regulation telling the public where to file a return under § 143.511.

In contrast, the “shalls” requiring, for example, employer reporting and withholding of income tax, such as those in §§ 143.011-143.996, are connected with penalties. *See* § 143.241 (“Every employer required to withhold tax under [these] sections . . . is hereby made liable for such tax.”)

Further, even if the Director had a mandatory obligation, the Director's failure does not excuse the mandatory obligations on Mr. Brooks to pay the tax. In fact, the relevant sections of the Revised Statutes imposing a tax obligation are not conditioned on the director taking any action at all. *See* §§ 143.011-143.183. Section 143.511 merely sets a date and tells the director to set a place for payment of the income tax liability unconditionally established in other sections. *See* § 143.511. That she allegedly did not do so by regulation cannot be read to excuse the payment of a tax – particularly once the assessment is final.

Finally, and most tellingly, Mr. Brooks ignores the fact that there is a regulation directing where he should file his tax return. Though phrased more broadly than Mr. Brooks may wish, 12 C.S.R. 10-1.010(4) covers returns. It provides that, “[t]he public may . . . make submissions to . . . the department in person or by mail, telephone or telegraph to the director of revenue at the Department of Revenue offices in Jefferson City, Missouri.” A tax return is a “submission.” Absent some other regulation promulgated under § 143.511, the general language of 12 C.S.R. 10-1.010(4) is sufficient.

Conclusion

For the foregoing reasons, this appeal should be transferred to the Missouri Court of Appeals, Western District, and the decision of the trial court should be affirmed.

Respectfully Submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 18th day of August, 2004, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 2,019 words according to WordPerfect software.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Trevor Bossert