IN THE MISSOURI SUPREME COURT

NO. SC86347

KIRKWOOD GLASS CO., INC.,
Appellant,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI
Respondent

Appeal from the Administrative Hearing Commission of Missouri

The Honorable June Striegel Doughty, Commissioner

BRIEF OF AMICI CURIAE MISSOURI MUNICIPAL LEAGUE, MISSOURI ASSOCIATION OF COUNTIES, ST. LOUIS COUNTY MUNICIPAL LEAGUE, CITY OF KANSAS CITY, AND CITY OF ST. LOUIS

Galen P. Beaufort #26498
City Attorney
William D. Geary #24710
Assistant City Attorney
28th Floor City Hall
414 East 12th Street
Kansas City, Mo 64106
(816) 513-3118
(816) 513-3133 (Facsimile)

ATTORNEYS FOR MISSOURI MUNICIPAL LEAGUE, ST. LOUIS COUNTY MUNICIPAL LEAGUE, AND CITY OF KANSAS CITY

Ivan L. Schraeder #35383
Crotzer, Ford, Omsby & Schraeder
222 S. Central, Suite 500
St. Louis, MO 63105
(314) 726-3040
(314) 726-5120 (Facsimile)

ATTORNEY FOR MISSOURI ASSOCIA-TION OF COUNTIES

Patricia A. Hageman
City Counselor op[#43508
Edward J. Hanlon #26405
Deputy City Counselor
314 City Hall
St. Louis, MO 63103
(314) 622-3361
(314) 622-4956 (Facsimile)

ATTORNEYS FOR CITY OF ST. LOUIS

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JURISDICTIONAL STATEMENT

Amicus Curiae Missouri Municipal League, Missouri Association of Counties, St. Louis County Municipal League, City of Kansas City, and City of St. Louis adopt the jurisdictional statement contained in the brief of Appellant Kirkwood Glass Company.

INTEREST OF AMICI CURIAE

The Missouri Municipal League is an association of 634 cities and villages representing over 95% of the urban population of the State of Missouri. It serves as a means to coordinate and promote municipal policy at all levels of government for the benefit of citizens of Missouri's cities and villages. Many members of the Municipal League have enacted a local use tax. The most recent report available of annual tax and fee distributions made by the Missouri Department of Revenue is the Comprehensive Annual Financial Report (CAFR) for the Fiscal Year Ended June 30, 2003. It reflects payments to cities of over $55 million for the local use tax. The addition of new cities since that time adopting a use tax increases that figure each year.

The Missouri Association of Counties is an association representing the interests of Missouri's 114 counties. As with the Municipal League, the Missouri Association of Counties serves as a means to coordinate and promote policy at all levels of government for the benefit of the citizens of Missouri. The League's membership includes over 1,400 county officials. Many of the state's counties have enacted a local use tax. The most recent report available of tax and fee distributions made by the Missouri Department of Revenue is for the fiscal year ending June 30, 2003. It reflects local use tax payments to counties of $11.9 million. Since that time the voters of four more counties have enacted the local use tax.

The St. Louis County Municipal League is an association composed of almost all of St. Louis County's 91 municipalities plus the County of St. Louis and the City of St. Louis. It also serves to promote the interests of the over 1.3 million residents of St. Louis

County and the City of St. Louis by coordinating and promoting policy at all levels of government for the benefit of the citizens of St. Louis County and St. Louis City.

The City of Kansas City is a home rule charter city that has enacted a local use tax. Kansas City is located in four counties, two of which have also enacted a local use tax. Kansas City anticipates in its next budget year beginning May 1, 2005, that it will receive over $30 million in local use tax revenue. Of that amount about $24 million is designated for capital improvements; $6 million is designated for fire, police and other public safety programs.

The City of St. Louis is a home rule charter city that has enacted a local use tax. The St. Louis local use tax was designated for specific uses by the voters: $5 million annually to fund health care programs; $5 million annually to fund affordable housing programs; $3 million annually to fund the demolition of derelict buildings; and the excess use tax receipts to be used for any of those purposes, as well as neighborhood preservation and public safety purposes. St. Louis anticipated about $25 million from the local use tax for its current fiscal year.

The local use tax has a tortured history, having been first enacted in 1990 as MO. REV. STAT. §144.747 (Supp. 1990):

> Other provisions of law notwithstanding, whenever a political subdivision is authorized to levy a sales tax, the political subdivision shall also be authorized to levy a use tax at the same rate which shall be applied in the same manner as the state use tax pursuant to this chapter.

Before implementation of this statute, the General Assembly repealed it and replaced it with a uniform local use tax of 1.5%. MO. REV. STAT. §144.748 (Supp. 1991). It was this statute that was eventually declared unconstitutional by the United State Supreme Court in *Associated Industries of Missouri v. Lohman,* 511 U.S. 641 (1994). On appeal after remand the Missouri Supreme Court ruled the statute could not be lawfully applied just in counties and cities in which the local sales tax was at least 1.5%, finding the use tax invalid in all jurisdictions. *Associated Industries of Mo. v. Director of Revenue,* 918 S.W.2d 780 (Mo. 1996).

To correct the defect in the prior statute the General Assembly enacted MO. REV. STAT. §144.757 (2000) allowing counties and municipalities to enact a use tax that equaled the jurisdiction's sales tax if approved by voters. Since that time the voters of one-quarter of the State's counties and of at least 90 cities have enacted local use taxes. Payments to local jurisdictions exceeded $65 million in the last fiscal year reported by the State of Missouri.

If the narrow and strained interpretation of the federal commerce clause, U.S. CONST. art. I, §8, cl. 3, urged by Kirkwood Glass Co. is accepted, Missouri's cities and counties whose citizens adopted the local use tax will be confronted with the loss of revenue exceeding tens of millions of dollars annually. In just two cities, Kansas City and St. Louis, residents and businesses will find services valued at $55 million eliminated in the next year.

Although the Amici supports the position of the Director of Revenue that the local use tax is lawful, Amici respectfully offer these additional comments and argument.

CONSENT OF PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f)(2) counsel for Amici contacted counsel for the Appellant Kirkwood Glass Co and the Respondent Director of Revenue requesting their consent to file this amicus curiae brief for the Missouri Municipal League, the Missouri Association of Counties, the St. Louis County Municipal League, the City of Kansas City, and the City of St. Louis. Counsel for Appellant and Respondent have granted their consent to the filing of this amicus curiae brief.

STATEMENT OF FACTS

Amicus Curiae Missouri Municipal League, Missouri Association of Counties, St. Louis County Municipal League, City of Kansas City, and City of St. Louis adopt the statement of facts contained in the brief of Appellant Kirkwood Glass Company.

POINTS RELIED ON

I.

THE ADMINISTRATIVE HEARING COMMISSION'S DENIAL OF APPELLANT'S APPLICATION FOR REFUND OF LOCAL USE TAX SHOULD BE AFFIRMED BECAUSE THE LOCAL USE TAX DOES NOT VIOLATE THE COMMERCE CLAUSE, U.S. CONST. ART. I, §8, CL. 3, SINCE (1) THE LOCAL USE TAX TAXES AN ACTIVITY THAT HAS A SUBSTANTIAL NEXUS WITH THE TAXING JURISDICTION – THE USE AND POSSESSION OF PROPERTY; (2) IT IS FAIRLY APPORTIONED – CREDITS ARE ALLOWED FOR SALES OR USE TAX PAYMENTS MADE IN ANOTHER STATE; (3) IT DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE – THE LOCAL SALES AND USE TAXES WITHIN A TAXING JURISDICTION ARE EQUAL; AND (4) THE AMOUNT OF THE TAX IS FAIRLY RELATED TO THE SERVICES PROVIDED BY THE LOCAL TAXING JURISDICTION – THE LOCAL USE TAX COMPENSATES FOR THE LOSS OF THE LOCAL SALES TAX, THUS MEETING THE REQUIREMENTS OF *COMPLETE AUTO TRANSIT, INC. V. BRADY*, 430 U.S. 274(1977).

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)

D. H. Holmes, Co., Ltd. v. McNamara, 486 U.S. 24, 28 (1988).

C. & A. Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994)

Associated Industries of Missouri v. Lohman, 511 U.S. 641, 649 (1994)

Associated Industries of Missouri v. Director of Revenue, 918 S.W.2d 780 (Mo. 1996).

MO. CONST. art. X, §22.

Multistate Tax Compact, art. II §8, *codified at* MO. REV. STAT. §32.200 (2000).

Multistate Tax Compact, art. V §1, *codified at* MO. REV. STAT. §32.200 (2000).

MO. REV. STAT. §32.210 (2000).

MO. REV. STAT. §144.747 (Supp.1990) (*repealed*)

MO. REV. STAT. §144.748 (Supp. 1991) (*repealed*)

MO. REV. STAT. §144.757 (2000).

II.

THE ADMINISTRATIVE HEARING COMMISSION'S DENIAL OF APPELLANT'S APPLICATION FOR REFUND OF LOCAL USE TAX SHOULD BE AFFIRMED BECAUSE EVEN IF THE LOCAL USE TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE IT IS A LAWFUL COMPENSATING USE TAX IN THAT THERE EXISTS AN INTRASTATE TAX BURDEN FOR WHICH THE GOVERNMENT IS ATTEMPTING TO COMPENSATE – THE LOCAL SALES TAX; THE TAX ON INTERSTATE COMMERCE ROUGHLY APPROXIMATES, BUT DOES NOT EXCEED, THE TAX ON INTRASTATE COMMERCE – THE LOCAL SALES AND USE

TAXES ARE EQUAL; AND THE EVENTS ON WHICH THE INTERSTATE AND INTRASTATE TAXES ARE IMPOSED ARE "SUBSTANTIALLY EQUIVALENT" – THE SALE AND POSSESSION AND USE OF PROPERTY, THUS MEETING THE TESTS OF *FULTON CORP. V. FAULKNER*, 516 U.S. 325 (1996).

Fulton Corp. v. Faulkner, 516 U.S. 325, 332-33 (1996).

Maryland v. Louisiana, 451 U.S. 725 (1981).

Associated Industries of Missouri v. Lohman, 511 U.S. 641 (1994).

Associated Industries of Missouri v. Director of Revenue, 857 S.W.2d 182, 192 (Mo. 1993), *rev. sub nom. Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994).

Henneford v. Silas Mason Co., Inc., 300 U.S. 577 (1937).

Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon, 511 U.S. 93 (1994).

D. H. Holmes, Co., Ltd. v. McNamara, 486 U.S. 24, 28 (1988).

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American Modulars Corp. v. Lindley, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978).

GA. CODE ANN. §48-8-110 (Supp. 1994) (amended and codified as §48-8-110.1).

VA. CODE ANN. §58.1-606.D (Supp. 2004)

Douglas Oliver, *Comment: A New Line for an Old Tax: Ohio's Use Tax On Individuals*, 33 U. TOL. L. REV. 621, 637 (2002).

ARGUMENT

Summary of Argument

The Appellant, Kirkwood Glass Company, argues that the local use tax established by MO. REV. STAT. §144.757 (2000) violates the federal commerce clause, U. S. CONST. art. I, §8, cl. 3, because there is not inter-county or inter-city parity. Because the local use tax regulates evenhandedly with only an incidental effect on interstate commerce, if it imposes an effect at all, it is an acceptable compensating use tax. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331-32 (1996). Furthermore, depending upon decisions made by a purchaser such as Kirkwood Glass, it is possible to avoid payment of the use tax by insuring that out-of-state purchases are delivered to Missouri locations in which no use tax has been approved by the voters. *See* 12 CSR 10-177(3)(B) ["A sale of tangible personal property subject to state use tax is subject to the local use tax in effect *where the item is first delivered in Missouri*."].

Appellant describes three transactions in which to place its challenge to the local use tax. First, Appellant purchased goods within Kirkwood, Missouri, and paid sales tax of 7.325% (State 4.225% / Local 3.100%). (L.F. 32-120 Stipulation 6) Second, Appellant purchased goods within Williamsburg, Missouri, and paid sales tax of 4.725% (State 4.225% / Local 0.500%). (L.F. 32-120 Stipulation 7) Third, Appellant purchased goods outside of Missouri which were shipped to Kirkwood, and paid a use tax of 5.475% (State 4.225% / Local 1.250%). (L.F. 32-120 Stipulation 8) But Appellant does not properly consider the possible situation that goods are shipped to Williamsburg where the

Missouri use tax of 4.225% is due, but no local use tax is imposed. (L.F. 32-120 Stipulation 9)

Limiting its argument to these three situations belies the "localness" of the local use tax. Initially, it should be noted that a business purchasing goods outside of Missouri that has the items shipped to a location within Missouri that does not assess the use tax avoids paying any use tax. 12 CSR 10-177(3)(B). This is so even if the business is located in a city and/or county in which a local use tax has been approved. Furthermore, even within Kansas City itself businesses may pay different use taxes when ordering goods from outside Missouri. Because Kansas City is located in four different counties, four different use tax rates may be assessed. But then, four different sales taxes are also assessed depending upon which county a Kansas City business is located. (L.F. 68-99 Exhibit B) The situation described by appellant is shown in the following table:

City	Sales Tax				Use Tax			
	State	Local		Total	State	Local		Total
		County	City			County	City	
Kirkwood	4.225	1.850	1.250	7.325	4.225	0	1.250	5.475
Williamsburg	4.225	0.500	0.000	4.725	4.225	0	0	4.225

(L.F. 68-99 Exhibit B) These variations do not violate the commerce clause because they reflect a lawful compensating tax reflecting local decisions that have, if at all, only an incidental impact on interstate commerce since MO. REV. STAT §144.757 (2000) meets the requirements of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331-32 (1996).

Appellant's reliance on *American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978) is misplaced because the Ohio Supreme Court

failed to use the appropriate United States Supreme Court tests to measure the Ohio use tax.

POINT RELIED ON

I.

THE ADMINISTRATIVE HEARING COMMISSION'S DENIAL OF APPELLANT'S APPLICATION FOR REFUND OF LOCAL USE TAX SHOULD BE AFFIRMED BECAUSE THE LOCAL USE TAX DOES NOT VIOLATE THE COMMERCE CLAUSE, U.S. CONST. ART. I, §8, CL. 3, SINCE (1) THE LOCAL USE TAX TAXES AN ACTIVITY THAT HAS A SUBSTANTIAL NEXUS WITH THE TAXING JURISDICTION – THE USE AND POSSESSION OF PROPERTY; (2) IT IS FAIRLY APPORTIONED – CREDITS ARE ALLOWED FOR SALES OR USE TAX PAYMENTS MADE IN ANOTHER STATE; (3) IT DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE – THE LOCAL SALES AND USE TAXES WITHIN A TAXING JURISDICTION ARE EQUAL; AND (4) THE AMOUNT OF THE TAX IS FAIRLY RELATED TO THE SERVICES PROVIDED BY THE LOCAL TAXING JURISDICTION – THE LOCAL USE TAX COMPENSATES FOR THE LOSS OF THE LOCAL SALES TAX, THUS MEETING THE REQUIREMENTS OF *COMPLETE AUTO TRANSIT, INC. V. BRADY*, 430 U.S. 274(1977).

To determine whether a use tax violates the commerce clause, the four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) should be applied. *D. H. Holmes, Co., Ltd. v. McNamara*, 486 U.S. 24, 28 (1988). Four questions are asked:

(1) Does the taxed activity have a substantial nexus with the taxing jurisdiction?

(2) Is the tax fairly apportioned?

(3) Does the tax discriminate against interstate commerce?

(4) Is the amount of the tax fairly related to the services provided by the taxing jurisdiction?

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 287-89 (1977).

Question 1: Does the taxed activity have a substantial nexus with the taxing jurisdiction? A use tax is a nonrecurring tax complementary to a sales tax, which

> is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property.

Multistate Tax Compact, art. II §8, *codified at* MO. REV. STAT. §32.200 (2000). The Compact applies to the local use tax imposed by counties and cities. MO. REV. STAT. §32.210 (2000). A substantial nexus to the local jurisdiction exists because a taxpayer's "consumption, keeping, retention, or other use" of property takes place within the taxing jurisdiction.

Question 2: Is the tax fairly apportioned? A local Missouri taxpayer is entitled to take a full credit for sales and use taxes paid with respect to the property in another state, including local sales or use taxes paid in another state. The credit is applied first to the Missouri use tax, then to the local use tax. Multistate Tax Compact, art. V §1, *codified at* MO. REV. STAT. §32.200 (2000). The existence of credits for payments made to non-

Missouri jurisdictions constitutes a fair apportionment of the tax. *D. H. Holmes, Co., Ltd. v. McNamara*, 486 U.S. 24, 28 (1988).

Question 3: Does the tax discriminate against interstate commerce? It is this point on which the Appellant, Kirkwood Glass Co., focuses its argument. Distilled to its basics, Kirkwood Glass argues that because the sales tax it pays to purchase goods in Williamsburg, Missouri is less than the use tax it pays to buy goods from outside Missouri and shipped to its location in Kirkwood, Missouri, the local use tax is discriminatory. Because the state sales and use taxes are consistent everywhere in Missouri, the difference in rates is attributable to different decisions of local voters. Kirkwood Glass makes the wrong comparison.

The appropriate comparison is between the local sales tax that would be paid by a purchaser of goods in a Missouri city or county with the local use tax that a user or possessor of goods purchased outside of Missouri would pay *in the same* city or county. The people of Missouri have decided that matters of local taxation will be directly controlled by local voters. MO. CONST. art. X, §22. Reinforcing this basic nature of our state government, the General Assembly explicitly requires any local use tax to be adopted by the voters. MO. REV. STAT. §144.757.1 (2000).

A local *regulatory* ordinance may be subject to commerce clause attack even though some non-local in-state residents may also be affected. *See C. & A. Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) [solid waste flow control ordinance]. But sales and use taxes are not regulatory matters adopted to control behavior of citizens. They are revenue measures designed to raise money to fund government activities.

Comparing Williamsburg sales taxes with Kirkwood use taxes is illogical because the inquiry does not consider the interstate commerce impact of a local use tax compared to the other taxes of the same local taxing jurisdiction.

The prior local use tax, MO. REV. STAT. §144.748 (Supp. 1991) (*repealed*), was unconstitutional as applied in some cities because it was possible for a purchaser of goods in a city to pay a lower tax rate than the purchaser of goods from an out-of-state vendor for use in the city. The United States Supreme Court noted "there is no question that, *within a locality* where the use tax exceeds the sales tax, the tax structure discriminates against interstate trade." *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 649 (1994) (emphasis added). But the Supreme Court's decision was not that different sales taxes and different use taxes throughout Missouri was unconstitutional. The Court noted that the tax scheme was "impermissibly discriminatory in some localities." 511 U.S. at 656. The statute was later ruled unconstitutional in its totality by this Court because the unconstitutional application could not be severed from the lawful application since the legislative intent was to impose a single uniform use tax. *Associated Industries of Missouri v. Director of Revenue*, 918 S.W.2d 780, 783-85 (Mo. 1996). Never was a local use tax found to be unconstitutional because there were many different amounts of local taxes within Missouri. The United States Supreme Court noted that the consideration of many different jurisdictions is not a reason to invalidate the former use tax:

> For similar reasons, the mere fact that determining the compensatory character of the use tax in this case requires consideration of the sales taxes

> levied by hundreds of local jurisdictions does not mean that the use tax should be rejected *in toto* as facially discriminatory.

Associated Industries of Missouri v. Lohman, 511 U.S. 641, 655 (1994).

Appellant, Kirkwood Glass, also notes that the current use tax is the third iteration adopted since 1991. The first, MO. REV. STAT §144.747 (Supp.1990) (*repealed*) was never implemented. It would have provided for different use taxes in each local political subdivision. In finding the second statute, MO. REV. STAT §144.748 (Supp. 1991) (*repealed*) invalid this Court noted:

> Prior to the enactment of §144.748, the General Assembly had enacted §144.747, which gave counties and municipalities the option of levying a local use tax equal to their local sales tax. Had §144.747 actually been implemented, the potential result would have been a wide variety of local use taxes across the state, some jurisdictions having them, and some not. The statute was never implemented, however, and was ultimately repealed and replaced with §144.748, a uniform statewide tax, which had the significant advantage that it would be much less difficult to administer.
>
> In view of the Supreme Court's ruling, §144.748 is reduced to something similar to what had previously been rejected, a patchwork tax scheme in which some jurisdictions have a use tax, and some do not. We refuse to speculate that the General Assembly would have approved the statute as now limited, and therefore we must strike down the statute altogether.

Associated Industries of Missouri v. Director of Revenue, 918 S.W.2d 780, 785 (Mo. 1996).

Despite the implications of Appellant's argument, there is nothing unlawful with a patchwork system of *local* sales and use taxes. By granting local governments and their citizens the power to tax themselves, the people of Missouri have opted for a patchwork system. Such system may be more difficult to administer than a uniform use tax rate, but ease of enforcement is not a factor in determining the constitutionality of a local tax.

Furthermore, and most telling, is the reaction of the General Assembly to the invalidation of MO. REV. STAT §144.748 (Supp. 1991) (*repealed*). In 1996 this Court would not speculate about how the General Assembly would react. Speculation is not necessary. The current local use tax is a clear and definitive statement that so long as the sales tax and use tax rates are identical, each local jurisdiction can determine whether: (1) to impose a sales tax; or (2) to impose a sales tax and use tax; or (3) to impose no sales tax, thus automatically prohibiting the imposition of a use tax. Despite the Appellant's characterization of the enactment of the current use tax as the result of "the counties and municipalities [ ] crying to the General Assembly to replace this lost revenue", App. Br. p. 30, the reenactment of the statutory authority allowing county and city voters to choose to impose a local use tax on themselves directly responds to this Court's refusal to speculate on the legislature's intentions. More importantly, it directly responds to the United States Supreme Court's observation that the in-state and out-of-state taxpayers must be similarly situated. *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 648 (1994) *citing Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963).

The apparent issue with the first use tax, MO. REV. STAT §144.747 (Supp.1990) (*repealed*), was the complicated administrative enforcement because of the multitude of local use taxes that could be enacted. That problem was solved with the second use tax, MO. REV. STAT §144.748 (Supp.1991) (*repealed*), but the solution was unlawful. The General Assembly chose to enact a system that is complicated to administer, but not impossible to administer fairly.

People or businesses purchasing items within the city and county in which they live or are located or purchasing goods outside Missouri for use in the city and county in which they live or are located pay the same amount of tax. There is no discrimination in the local use tax. It is wrong to compare purchases in Williamsburg with out-of-state purchases when the taxpayer is not a resident of Williamsburg. To compare Williamsburg's sales tax (or lack of sales tax) with the Kirkwood use tax is not comparing similarly situated purchases by a Kirkwood resident.

The *local* decision to enact a sales or use tax has nothing to do with economic protectionism against out-of-state business. "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C. & A. Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). A purchase within Kirkwood and a purchase from outside Missouri for use in Kirkwood are treated exactly the same.

If Missourians are to retain meaningful control over their own local taxation as provided by the Hancock Amendment, MO. CONST. art. X §22, taxation by lowest

common denominator is not possible. Because the sales tax rates and use tax rates are different – lower – in Williamsburg than in Kirkwood, the citizens of Kirkwood would be precluded from taking advantage of their local authority to establish levels of taxation acceptable to them. Economic protectionism has no part in the decisions of Kirkwood to set their tax rates higher than the citizens of Williamsburg. To compare Williamsburg *sales* taxes with Kirkwood *use* taxes is misleading and wrong.

Question 4: Is the amount of the tax fairly related to the services provided by the taxing jurisdiction? The use tax is the equivalent of a sales tax on purchases made from out-of-state sellers by Missouri buyers. MO. REV. STAT. §144.757.4 (2000). Use taxes may be placed in the general fund of a county or city to help pay for the general operation of government, or may be dedicated to specific purposes by the county or city imposing the use tax, thus freeing revenue to be devoted to other general governmental operations.

Kirkwood Glass enjoys local police and fire protection for its business. Street construction and maintenance is also a municipal service necessary for the benefit of employees and customers of Kirkwood Glass. Traffic management and other public safety services are provided to Kirkwood Glass. Land use planning and controls benefit Kirkwood Glass by rendering the development around it orderly and subject to local ordinances and codes. Code enforcement activities provide Kirkwood Glass with the assurance that building and fire code violations can be investigated. That services are received is, apparently, not an issue for Kirkwood Glass, since it suggests that a use tax could be enacted that would meet even its strained understanding of the commerce

clause. App. Br. p. 35. That admission necessarily recognizes that this element of the *Complete Auto* test is not in question.

The provision of ordinary municipal services has been said to aid business and justify a finding that the use tax is fairly related to benefits provided by the government. The United States Supreme Court has said:

> *Complete Auto* requires that the tax be fairly related to benefits provided by the State, but that condition is also met here. Louisiana provides a number of services that facilitate Holmes' sale of merchandise within the State: It provides fire and police protection for Holmes' stores, runs mass transit and maintains public roads which benefit Holmes' customers, and supplies a number of other civic services from which Holmes profits. To be sure, many others in the State benefit from the same services; but that does not alter the fact that the use tax paid by Holmes, on catalogs designed to increase sales, is related to the advantages provided by the State which aid Holmes' business.

D. H. Holmes, Co., Ltd. v. McNamara, 486 U.S. 24, 28 (1988). Likewise, the use tax paid by Kirkwood Glass to Kirkwood, Missouri, the city in which Kirkwood Glass has chosen to conduct business, assists the city in providing those necessary elements of urban living required to conduct business.

Williamsburg and Callaway County have decided that a 0.5% sales tax is sufficient to provide services to its citizens and businesses without the need for a compensating use tax. When Kirkwood Glass purchases supplies in Williamsburg the

sales tax it pays goes to provide its vendor the necessary governmental services required to conduct business *in Williamsburg*. The government and citizens in Williamsburg and Callaway County have determined that if citizens order goods from outside Missouri, that the government can still provide sufficient services to meet the Williamsburg citizens' and businesses' expectations without collecting a compensating use tax. The citizens of Kirkwood have determined that the loss of local sales tax impedes the ability of the city government to provide a level of services the citizens of Kirkwood expect and will pay for through a use tax.

The four factors of *Complete Auto* are met. The use and possession of property is fairly apportioned, therefore an activity that has a substantial nexus with the local taxing jurisdiction exists. Credits are available for sales or use taxes paid in another state, therefore the use tax is fairly apportioned. The sales and use taxes are equal therefore no discrimination exists. Finally, the local use tax compensates directly for the loss of local sales taxes. Therefore, the enactment and implementation of the local use tax, MO. REV. STAT. §144.757 (2000), does not violate the commerce clause.

POINT RELIED ON

II.

THE ADMINISTRATIVE HEARING COMMISSION'S DENIAL OF APPELLANT'S APPLICATION FOR REFUND OF LOCAL USE TAX SHOULD BE AFFIRMED BECAUSE EVEN IF THE LOCAL USE TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE IT IS A LAWFUL COMPENSATING USE TAX IN THAT THERE EXISTS AN INTRASTATE TAX BURDEN FOR WHICH THE GOVERNMENT IS ATTEMPTING TO COMPENSATE – THE LOCAL SALES TAX; THE TAX ON INTERSTATE COMMERCE ROUGHLY APPROXIMATES, BUT DOES NOT EXCEED, THE TAX ON INTRASTATE COMMERCE – THE LOCAL SALES AND USE TAXES ARE EQUAL; AND THE EVENTS ON WHICH THE INTERSTATE AND INTRASTATE TAXES ARE IMPOSED ARE "SUBSTANTIALLY EQUIVALENT" – THE SALE AND POSSESSION AND USE OF PROPERTY, THUS MEETING THE TESTS OF *FULTON CORP. V. FAULKNER*, 516 U.S. 325 (1996).

Even if it is assumed that the *Complete Auto* test puts the local use tax into question, a use tax will be allowed if:

(1) There exists an intrastate tax burden for which the government is attempting to compensate;

(2) The tax on interstate commerce roughly approximates, but does not exceed, the tax on intrastate commerce; and

(3) The events on which the interstate and intrastate taxes are imposed are "substantially equivalent."

Fulton Corp. v. Faulkner, 516 U.S. 325, 332-33 (1996).

Factor 1: There exists an intrastate tax burden for which the government is attempting to compensate. The local use tax is the mirror image of the local sales tax. MO. REV. STAT. §144.757.4 (2000). A taxpayer purchasing goods in its city of residence or where it conducts business pays taxes that support the governmental functions of that jurisdiction. In the case before the Court it is the governmental functions of the city and county in which the taxpayer lives or conducts business. When buying from an out-of-state merchant but using the goods within the city and county, the taxpayer pays for the local governmental functions.

Factor 2: The tax on interstate commerce roughly approximates, but does not exceed, the tax on intrastate commerce. The use tax must approximate – but not exceed – the local tax. That is the lesson of *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994). The former 1.5% use tax applied even in cities and counties in which the sales tax was less than 1.5%. That was found to be an impediment to interstate commerce. However, addressing that version of the use tax the United States Supreme Court said it was improper to look from county to county within Missouri. Rather, any discrimination must be "assessed with reference to the specific subdivision in which applicable laws reveal differential treatment." 511 U.S. at 650. Comparing the local use tax with the local sales tax will never result in a higher use tax. The use tax statute forbids it in these straightforward terms:

> The local use tax may be imposed *at the same rate* as the local sales tax then currently in effect in the county or municipality upon all transactions which are subject to the taxes imposed pursuant to sections 144.600 to 144.745 within the county or municipality adopting such tax; provided, however, that if any local sales tax is repealed or the rate thereof is reduced or raised by voter approval, *the local use tax rate shall also be deemed to be repealed, reduced or raised by the same action repealing, reducing or raising the local sales tax*.

MO. REV. STAT. §144.757.3 (2000) (emphasis added).

Appellant Kirkwood Glass would have the Court confuse these events. Rather than compare the sales tax applicable to transactions in Kirkwood with the use tax applicable to Kirkwood, Kirkwood Glass seeks to compare the sales tax in Williamsburg with the use tax in Kirkwood. These are not the same transactions.

Kirkwood Glass attempts to confuse *intrastate* discrimination with the equivalence brought about by the use tax statute with *interstate* commerce. The only way to show any discrimination in a transaction is for Kirkwood Glass to deal with *intrastate* comparisons. Congress, of course, has no power to regulate *intrastate* commerce.

There are three ways Congress may regulate interstate commerce:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.

> Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

United States v. Lopez, 514 U.S. 549, 558-59 (1995) (internal citations omitted). The regulation of local sales tax and use tax levels within a state has no connection whatsoever to interstate commerce. Local discrimination is recognized by the Missouri Constitution by giving local governments the option of imposing local sales and use taxes. *See* Mo. Const. art. X, §22. Statutes require discrimination when the General Assembly limits sales taxes to specific categories of counties or municipalities. For example, MO. REV. STAT. §94.1010 (2000) allows Jefferson City to enact an economic development sales tax of ? %, ¼%, ? %, ½%, ¾%, or1%. Kirksville can enact an economic development sales tax but of ¼%, ½%, ¾%, or1%. MO. REV. STAT. §94.1008 (2000). Springfield can enact a sales tax of ? %, ¼%, ? %, or ½% for capital improvement but only within its center city. MO. REV. STAT. §94.578 (2000). St. Francois County may enact a ? % sales tax to pay for county employees' retirement and health benefits. MO. REV. STAT. §67.583 (2000). Platte County may enact a special tourism tax of ½%. MO. REV. STAT. §67.2030 (2000). This "patchwork" is the direct result of conscious legislative decisions to limit or expand taxing authority – all based on local decisions.

For Kirkwood Glass to buy merchandise in Williamsburg because it will pay less local sales tax than if the merchandise was purchased in Kirkwood is a function of local political decisions made by the elected officials and citizens of those two cities. Appellant's argument carried forward would disallow different property tax rates, for

example, because of the different impacts on overhead of businesses in different jurisdictions. Among local taxing jurisdictions there is no consistency in the level of local taxation. There is simply no interstate commerce element to this scheme of taxation that respects local taxation decisions. It would, in fact, be unconstitutional for the Congress to try to make all local intrastate sales taxes uniform. Kirkwood Glass' attempt to compare lawful intrastate tax differences with a single local use tax on interstate purchases when brought to Kirkwood, is an attempt to render all local decisions with regard to taxation nugatory. The comparison is wrong and cannot obfuscate the evenhandedness displayed by the local sales tax and the local use tax permitted by MO. REV. STAT. §144.757 (2000).

Factor 3: The events on which the interstate and intrastate taxes are imposed are "substantially equivalent." Use and sales taxes have historically been recognized as substantially equivalent events. *Henneford v. Silas Mason Co., Inc*., 300 U.S. 577 (1937); *see also Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 105 (1994) ["The prototypical example of substantially equivalent taxable events is the sale and use of articles of trade."]

Even if the Court assumes discrimination under the *Complete Auto* test, the use tax permitted by MO. REV. STAT. §144.757 (2000) is a lawful compensating use tax. There is an intrastate tax burden, the sales tax, that the tax on interstate commerce complements. The tax on interstate commerce not only roughly approximates, it equals in every case, the local tax. Only by attempting to confuse lawful intrastate sales tax differences can Kirkwood Glass show unequal numbers. But those unequal numbers are irrelevant

because the only proper comparison is the sale tax and the use tax that it complements. Finally, a sales tax and a use tax have historically been recognized as substantially equivalent. For these reasons, the local use tax is a proper compensating use tax.

Appellant holds out *American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio), *cert. denied,* 439 U.S. 911 (1978), as a model. That is wrong. The Ohio Supreme Court did not use the four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) as required by *D. H. Holmes, Co., Ltd. v. McNamara*, 486 U.S. 24, 28 (1988). Nor did the Ohio Supreme Court consider the application of the tests devised by the United States Supreme Court to weigh the constitutionality of a compensating use tax even if discrimination is found under the *Complete Auto* test. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

The analysis provided by Amici uses the appropriate United States Supreme Court standards. The Ohio Supreme Court found that if any county did not impose the authorized local ½% sales / use tax, that the entire system was invalid. It did not determine if there were any compensating factors for the local use tax. Furthermore, it did not use the four-part *Complete Auto* test to determine if the difference was even permissible – if there is a difference when the appropriate local jurisdictions are used.

American Modulars Corp. relied upon a general view of any possible differences. This is not the current standard used to assess potential commerce clause violations.

In the first use tax case this Court said:

> Appellants have suggested that the tax more properly could have been excepted from sales occurring in localities with rates of sales taxes below

> 1.5%. The state might also have required that the use tax mirror the permissive local sales tax. Neither option, however, would guarantee a better result. *American Modulars* illustrates that even these types of statutes are subject to criticism, as residents of one county may travel to another for tax advantage purchases. Depending upon the actual tax rates, demographics, and purchasing patterns, they might even result in greater discrepancies.

Associated Industries of Missouri v. Director of Revenue, 857 S.W.2d 182, 192 (Mo. 1993), *rev. sub nom. Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994). The "greater discrepancies" were not condemned, but were noted as a reason to permit the statewide 1.5% tax. *Complete Auto* must be applied, and if discrimination is found or assumed the three-part determination of a lawful compensating use tax must also be applied. This new analysis is done without the use of a statewide tax. When that analysis is done, the current use tax meets all elements of the applicable tests.

The United States Supreme Court recognized this fact when it said in *Associated Industries of Missouri*:

> The State remains free to authorize political subdivisions to impose sales or use taxes, as long as discriminatory treatment of interstate commerce does not result. Other States apparently have had little difficulty in combining some local autonomy with the commands of the Commerce Clause. As the parties stipulated, App. 35, 28 States that provide political subdivisions some authority to impose use taxes have devised systems to ensure that use

> taxes are not higher than sales taxes within the same taxing jurisdiction. *See, e.g.*, GA. CODE ANN. §48-8-110 (Supp. 1994) (requiring the enactment of a local use tax to be coupled with the adoption of an equivalent sales tax).

511 U.S. at 653-54. The aspect of the Georgia use tax scheme cited by the United States Supreme Court is the system imposed by MO. REV. STAT. §144.757 (2000). The Georgia statute then read:

> (a) The procedures provided in this article within a county, the governing authority of any county in this state may, subject to the requirement of referendum approval and the other requirements of this part, impose within the special district a special sales and use tax for a limited period of time.
>
> (b) Any tax imposed under this article shall be at the rate of 1 percent. Except as to rate, a tax imposed under this article shall correspond to the tax imposed by Article 1 of this chapter. No item or transaction which is not subject to taxation under Article 1 of this chapter shall be subject to a tax imposed under this article, except that a tax imposed under this article shall apply to sales of motor fuels as that term is defined by Code Section 48-9-2 and shall be applicable to the sale of food and beverages as provided for in division (57)(D)(i) of Code Section 48-8-3.

GA. CODE ANN. §48-8-110 (Supp. 1994) (amended and codified as §48-8-110.1). This is what the Missouri local use tax does. MO. REV. STAT. §144.757 (2000). Another example

of this solution is found in Virginia's local use tax which explicitly applies to purchases outside of the state:

> The local use tax authorized by this section shall not apply to transactions to which the sales tax applies, the situs of which for state and local sales tax purposes is the city or county of location of each place of business of every dealer paying the tax to the Commonwealth without regard to the city or county of possible use by the purchasers. *However, the local use tax authorized by this section shall apply to tangible personal property purchased without this Commonwealth for use or consumption within the city or county imposing the local use tax, or stored within the city or county for use or consumption, where the property would have been subject to the sales tax if it had been purchased within this Commonwealth.* The local use tax shall also apply to leases or rentals of tangible personal property where the place of business of the lessor is without this Commonwealth and such leases or rentals are subject to the state tax. Moreover, the local use tax shall apply in all cases in which the state use tax applies.

VA. CODE ANN. §58.1-606.D (Supp. 2004) (emphasis added).

The use of Ohio precedent as a means to criticize Missouri is misplaced. The *American Modulars* decision, one not cited with approval outside of Ohio, did not use the appropriate test of *Complete Auto.* Furthermore, the enforcement of the Ohio scheme is identical to the explicit system established by Missouri. *See* Douglas Oliver, *Comment: A New Line for an Old Tax: Ohio's Use Tax On Individuals*, 33 U. TOL. L. REV. 621, 637

(2002). That Missouri chooses to allow in-state discrimination when purchases are made has been shown to be authorized under the applicable commerce clause tests for a compensatory use tax. No discrimination occurs when purchases are made within a local jurisdiction and when use of property is taxed within that same local jurisdiction.

There is an intrastate tax burden, the sales tax, which the tax on interstate commerce complements. The tax on interstate commerce not only roughly approximates, it equals in every case, the local tax. A sales tax and a use tax have historically been recognized as substantially equivalent. For these reasons, the local use tax is a proper compensating use tax which does not violate the commerce clause.

CONCLUSION

The four factors of *Complete Auto* are met. The use and possession of property is fairly apportioned, therefore an activity that has a substantial nexus with the local taxing jurisdiction exists. Credits are available for sales or use taxes paid in another state, therefore the use tax is fairly apportioned. The sales and use taxes are equal, therefore no discrimination exists. Finally, the local use tax compensates directly for the loss of local sales taxes. Therefore, the enactment and implementation of the local use tax, MO. REV. STAT. §144.757 (2000), does not violate the commerce clause.

There is an intrastate tax burden, the sales tax, which the tax on interstate commerce complements. The tax on interstate commerce not only roughly approximates, it equals in every case, the local tax. A sales tax and a use tax have historically been recognized as substantially equivalent. For these reasons, the local use tax is a proper compensating use tax which does not violate the commerce clause.

For these reasons the Amicus Curiae respectfully request that the decision of the Administrative Hearing Commission refusing Appellant a refund of local use taxes paid be denied.

Respectfully submitted,

GALEN P. BEAUFORT #26498
City Attorney
WILLIAM D. GEARY
Assistant City Attorney #24710
28th Floor City Hall
414 East 12th Street

Kansas City, Missouri 64106
816-513-3118
816-513-3133 (Facsimile)

ATTORNEYS FOR MISSOURI MUNICIPAL LEAGUE, ST. LOUIS COUNTY MUNICIPAL LEAGUE, AND CITY OF KANSAS CITY, MISSOURI

_____

IVAN L. SCHRAEDER #35383
Crotzer, Ford, Omsby & Schraeder
222 S. Central, Suite 500
St. Louis, Missouri 63105
314-726-3040
314-726-5120 (Facsimile)

ATTORNEY FOR MISSOURI ASSOCIATION OF COUNTIES

_____

PATRICIA A. HAGEMAN #43508
City Counselor
EDWARD J. HANLON #26405
Deputy City Counselor
314 City Hall
St. Louis, Missouri 63103
314-622-3361
314-622-4956 (Facsimile)

ATTORNEYS FOR CITY OF ST. LOUIS, MISSOURI

CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06(c) counsel for the Amicus Curiae certify that:

1. As required by Missouri Supreme Court Rule 55.03, counsel for Amicus Curiae are: Galen P. Beaufort, City Attorney, and William D. Geary, Assistant City Attorney, 2800 City Hall, 414 East 12th Street, Kansas City, Missouri 64106, Voice 816-513-3118 Facsimile 816-513-3133 for Missouri Municipal League, St. Louis County Municipal League, and the City of Kansas City, Missouri; Ivan L. Schraeder, Crotzer, Ford, Omsby & Schraeder, 222 S. Central, Suite 500, St. Louis, Missouri 63105, Voice 314-726-3040 Facsimile 314-726-5120 for the Missouri Association of Counties; Patricia A. Hageman, City Counselor, and Edward J. Hanlon, Deputy City Counselor, 314 City Hall, St. Louis, Missouri 63103, Voice 314-622-3361 Facsimile 314-622-4956, for the City of St. Louis. William D. Geary is authorized by all counsel for Amici to execute this certificate.

2. The Brief to which this certificate is attached complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. The Brief contains 7,778 words in Microsoft Word 2003 format.

4. Also served and filed with this Brief of Amicus Curiae is a floppy disk containing the brief, which is double-sided, high density, IBM-PC compatible 1.44 MB, 3½" size, with an adhesive label affixed identifying the caption of the case, the filing party, the disk number, and the word processing format of Microsoft Word 2003. The disk has been scanned for viruses and it is virus free.

Respectfully submitted for all Amici

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WILLIAM D. GEARY
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing Brief of Amicus Curiae and one disk containing the Brief, were mailed, postage prepaid, this 2nd day of March 2005, to the following:

James C. Owens
Katherine S. Walsh
McCarthy, Leonard, Kammerer, Owen, McGovern & Striler, L.C.
16141 Swingley Ridge Road, #300
Chesterfield, Missouri 63017

Counsel for Appellants

and

James R. Layton
State Solicitor
Supreme Court Building
207 West High Street
Jefferson City, Missouri 65102

Roger Freudenberg
Missouri Department of Revenue
Truman State Office Building
301 West High Street, Room 670
P.O. Box 475
Jefferson City, Missouri 65105

Counsel for Respondents

Respectfully submitted for all Amici

_____
WILLIAM D. GEARY
Assistant City Attorney