

IN THE SUPREME COURT OF MISSOURI

SC95003

MACON COUNTY EMERGENCY SERVICES BOARD, JAMES WILSON, in his official capacity as an MCEB member; JEFF ROBERTS, in his official capacity as an MCEB member; JEFF BIXENMAN, in his official capacity as an MCEB member; MARGIE VOSS, in her official capacity as an MCEB member; STAN EAST, JR., in his official capacity as an MCEB member; GENE WOOD, in his official capacity as an MCEB member; and CHUCK SPENCER in his official capacity as an MCEB member,

Appellants,

v.

MACON COUNTY COMMISSION, ALAN WYATT, in his official capacity as a Macon County Commissioner; DREW BELT, in his official capacity as a Macon County Commissioner; and JON DWIGGINS, in his official capacity as a Macon County Commissioner

Respondents.

**Appeal from the 41st Circuit Court of Missouri
The Honorable Frederick Tucker
Case No. 14MA-CC00026**

RESPONDENTS' BRIEF

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JURISDICTIONAL STATEMENT

This case involves a petition filed by the Macon County Emergency Services Board and its Board Members in their official capacities (hereafter referred to as the “Board”). The Board sought a declaratory ruling to determine whether the Board was entitled to a share of the Section 144.757 RSMo (Cum. Supp. 2012) use tax funds approved on November 6, 2012. The Macon County Commissioners (hereinafter referred to as the “Commission”) refused to provide the Board with any proceeds from the use tax on the basis that the Commission was not required to provide any use tax amounts to the Board from the use tax approved in the November 6, 2012, ballot measure and that the disbursement of the use tax is solely within the Commission’s discretion.

The question presented by this appeal is whether Section 144.757 RSMo and Section 144.759 RSMo, the Missouri use tax laws, require any share of the use tax to be provided to the Board by the Commission applying the applicable principles related to statutory construction.

Answering this question requires the construction of revenue laws in Section 144.757 RSMo and Section 144.759 RSMo. Therefore, this Court has exclusive jurisdiction under MO. CONST. ART. V. § 3.

STATEMENT OF FACTS

Appellants are the Macon County Emergency Services Board and its Board Members in their official capacities (hereafter jointly referred to as the “Board”) (LF 39-40, 62).¹ The Board filed a Petition for Declaratory Judgment with the 41st Judicial Circuit Court of Missouri (“Circuit Court”) requesting the Circuit Court determine that it was entitled to a proportional share of the Section 144.757 RSMo use tax beginning on November 6, 2012, the date the use tax was authorized, and continuing throughout the life of the Macon County Use Tax (LF 2-22, 39-61).

Respondents are the Macon County Commission and its Commissioners in their official capacities (hereafter jointly referred to as the “Commission”) (LF 40, 63). Macon County is a third class county (LF 82; Section 48.020 RSMo). The Commission refused to disperse any of the use tax to the Board (LF 44-45, 64-65, 84).

The Commission determined that it would present a use tax proposal as provided for in Section 144.757 RSMo on the November 6, 2012 ballot (LF 43, 64).

After the successful November 6, 2012, election, the Director of the Missouri Department of Revenue (“Missouri DOR”) began collecting the Macon County Use Tax and periodically sent those revenues to the Commission pursuant to Section 144.759 RSMo (TR 9; LF 47, 65). The Board did not receive any use tax from the Commission, and when it asked for a share of the tax, the Commission refused to give the Board any part of the Use Tax proceeds (LF 46, 65).

¹ The designation “LF __” shall refer to the appropriate page of the Legal File.

From the date the Macon County Use Tax was approved through September 2014, the Director of the Missouri DOR collected \$121,548.70 (LF 47). The Board requested in its Declaratory Judgment Petition that the Court declare that it should receive its proportional share from the Commission having set the use tax ballot question at one percent (1%). The Board further requested the Court declare it receive its proportional share thereafter (LF 47-49).

On March 23, 2015, the Circuit Court denied the Board's request to declare that the Board should receive a proportional share of the use tax (LF 82-87).

POINT RELIED ON

- I. THE CIRCUIT COURT DID NOT ERR IN DETERMINING THAT THE BOARD IS NOT ENTITLED TO A PROPORTIONAL SHARE OF THE USE TAX BECAUSE WHEN APPLYING THE APPLICABLE RULES OF STATUTORY CONSTRUCTION THERE IS NO STATUTORY AUTHORITY UNDER SECTION 144.757 RSMo AND SECTION 144.759 RSMo FOR THE COMMISSION TO DISTRIBUTE ANY OF MACON COUNTY’S USE TAX TO THE BOARD AND THERE IS NO EXPRESSED LEGISLATIVE INTENT THAT USE TAX REVENUES BELONG TO ANY ENTITY EXCEPT MACON COUNTY.**
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Section 50.160 RSMo

Section 50.525 RSMo

Section 50.630 RSMo

Section 50.740 RSMo

Section 115.557 RSMo

Section 144.757 RSMo (Cum. Supp. 2012)

Section 144.759 RSMo

Metro Auto Auction v. Dir. of Revenue, 707 S.W.2d 397 (Mo. banc 1986)

South Metropolitan Fire Protection District v. City of Lee’s Summit, 278 S.W.3d 659, 666 (Mo. banc 2009).

State of Missouri v. Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., 97 S.W.3d 54 (Mo. App. ED 2002, trns. denied March 4, 2003).

Wolff Shoe Co. v. Dir. of Rev. 762 S.W.2d 29 (Mo. banc 1988)

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ARGUMENT

STANDARD OF REVIEW

Resolution of this case depends on the interpretation of Section 144.757 RSMo. Legal questions of statutory interpretation are reviewed *de novo*. *Junior Coll. Dist. of St. Louis v. City Of St. Louis*, 149 S.W.3d 442, 446 (Mo. banc 2004); *Akins v. Director of Revenue*, 303 S.W.3d 563, 564 (Mo. banc 2010); *Norris v. Dir. of Revenue*, 304 S.W.3d 724, 726 (Mo. banc 2010). The judgment of the trial court shall be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Junior Coll. Dist. of St. Louis*, 149 S.W.3d at 446 (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). “[T]he only question before the Court ‘is whether the trial court drew the proper legal conclusions from the facts stipulated.’” *Id.* (citing *Sheldon v. Bd. of Trustees of Police Ret. Sys.*, 779 S.W.2d 553, 554 (Mo. banc 1989)). .

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I. THE CIRCUIT COURT DID NOT ERR IN DETERMINING THAT THE BOARD IS NOT ENTITLED TO A PROPORTIONAL SHARE OF THE USE TAX BECAUSE WHEN APPLYING THE APPLICABLE RULES OF STATUTORY CONSTRUCTION THERE IS NO STATUTORY AUTHORITY UNDER SECTION 144.757 RSMo AND SECTION 144.759 RSMo FOR THE COMMISSION TO DISTRIBUTE ANY OF MACON COUNTY'S USE TAX TO THE BOARD AND THERE IS NO EXPRESSED LEGISLATIVE INTENT THAT USE TAX REVENUES BELONG TO ANY ENTITY EXCEPT MACON COUNTY.

A use tax cannot be implemented in a county unless there is a local sales tax. Section 144.757 RSMo. In order to be constitutional, the use tax must be at or below the local sales tax or it would be an impermissible burden on commerce. *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647-48 (1994). Further, the use tax is required to be decreased when a local sales tax decrease is adopted in order to prevent the use tax from being a discriminatory burden on interstate commerce. *Id.* at 649. When a local sales tax is increased, the use tax amount is also increased. Section 144.757.3 RSMo.

When the Commission determined to submit a use tax ballot to the Macon County voters, its authority to do so was provided by Section 144.757 RSMo. Section 144.757 RSMo states, in pertinent part, that:

1. Any county or municipality ... may, by a majority vote of its governing body, impose a local use tax if a local sales tax is imposed

as defined in section 32.085 at a rate equal to the rate of the local sales tax in effect in such county or municipality; provided, however, that no ordinance or order enacted pursuant to sections 144.757 to 144.761 shall be effective unless the governing body of the county or municipality submits to the voters thereof at a municipal, county or state general, primary or special election a proposal to authorize the governing body of the county or municipality to impose a local use tax pursuant to sections 144.757 to 144.761.

* * *

2. The ballot of submission . . . shall contain substantially the following language:

Shall the _____ (county or municipality's name) impose a local use tax at the same rate as the total local sales tax rate, currently _____ (insert percent), provided that if the local sales tax rate is reduced or raised by voter approval, the local use tax rate shall also be reduced or raised by the same action? A use tax return shall not be required to be filed by persons whose purchases from out-of-state vendors do not in total exceed two thousand dollars in any calendar year.

The ballot language the Commission used for the use tax on November 6, 2012, election was as follows:

Shall the County of Macon impose a local use tax on out of state purchases at the same rate as the local sales tax rate, currently 1.000%, provided that if the local sales tax rate is reduced or raised by voter approval, the local use tax rate shall also be reduced or raised by the same action? A use tax return shall not be required to be filed by persons whose purchases from out of state vendors do not in total exceed two thousand dollars in any calendar year. The purpose of the proposal is to reflect the new interpretation of sale tax on motor vehicles by the Missouri Supreme Court. This proposal will also eliminate the current sales tax advantage that Non-Missouri vendors have over Missouri vendors.

(LF 60).

This language substantially tracked Section 144.757.2 RSMo.

The statute of limitations for challenging the election results when the use tax was on the ballot had long passed when this litigation commenced, resulting in the 1% use tax amount to be the valid use tax level collected in Macon County. At this point in time, the case should have been dismissed for failure to state a cause of action under Section 115.557 RSMo. *Kohrs v. Quick*, 264 S.W.3d 645, 647 (Mo. App. 2008) (*citing Clark v. City of Trenton*, 591 S.W.2d 257, 259 (Mo. App. 1979) (“The integrity of the dual concepts of finality and conclusiveness of free elections would be fatally compromised if persons wishing to contest them could wait indefinitely or an inordinate length of time to

do so.”). The Commission raised this issue successfully before the Circuit Court. As such, the Board shifted its arguments to keep the matter alive and the Circuit Court permitted the case to proceed.

Pursuant to Section 144.759 RSMo, the Director of Missouri DOR began collecting the Macon County Use Tax after the November election (LF 45, 46, 65; TR 4-7). The Director of Missouri DOR periodically sent the collected amounts to the Commission with no directions as to how to disperse the use tax revenue, unlike what the Missouri DOR is mandated to do for certain municipalities in charter counties. *Id.* The Board requested the Commission to provide it with a proportional share of the use tax (LF 46-47, 65). The Commission refused to provide the Board with any use tax (LF 46, 65). Counsel for the Board conceded that there is no mandatory statutory distribution of use tax revenues applicable to third class counties such as Macon County (TR 8-9, 19-20).

The Circuit Court supported the Commission’s position of not providing any of the use tax to the Board based on its statutory interpretation of Section 144.757 RSMo and Section 144.759 RSMo (LF 82-87). Specifically, the Circuit Court examined the language used in Section 144.757 RSMo (LF 85-87). It noted the statute provides instruction for the spending and distribution of use tax revenues to “municipalities within a county having a charter form of government within a population in excess of nine hundred.” (LF 85-87). Indeed, the statute provides instruction for the appropriate ballot language such municipalities must use (LF 85-87).

The Circuit Court compared this language with the language pertaining to third class counties (LF 85-87). It found it significant that the Missouri statute does not provide ballot language or instructions for third class counties regarding distribution of use tax revenues (LF 85-87). The Circuit Court held the Missouri legislature intentionally omitted language related to third class counties (LF 85-87). The Circuit Court stated, “[i]t would not have been a complicated effort for the legislature to direct through statutory language, or advise voters through ballot language, that the use tax shall be distributed in the same manner as other sales tax revenues or any other manner as is provided for charter forms of government.” (LF 85-87). Thus, the Missouri legislature did not intend for a third class county’s disbursement of use tax funds to be the same as its disbursement of local sales taxes (LF 85-87). The Circuit Court found the lack of statutory direction for third class counties, particularly in the ballot language and the distribution laws, meant the Missouri legislature intended the disbursement and spending of the use tax revenues in a third class county to be left to the sole discretion of the Commission (LF 85-87).

The Circuit Court’s decision is consistent with well-established Missouri law which is stated as follows: “The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning.” *South Metropolitan Fire Protection District v. City of Lee’s Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009) (citing *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. banc 2008)); see also *Hervey v. Missouri*

Dept. of Corr., 379 S.W.3d 156, 163 (Mo. banc 2012); *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683, 686 (Mo. banc 2010).

The standard of statutory construction is set out in *State v. Reprod. Health Services of Planned Parenthood of St. Louis Region, Inc.*, 97 S.W.3d 54, 61 (Mo. App. 2002). There, the Missouri Court of Appeals for the Eastern District stated: “Missouri courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning . . . As a general rule, when statutory exceptions are plainly expressed, Missouri courts will not add exceptions or exclusions beyond those explicitly provided by the legislature.” *Id.* at 60-61 (citations omitted); *Smith v. Missouri Local Gov't Employees Ret. Sys.*, 235 S.W.3d 578, 582 (Mo. App. 2007). The applicable rule of statutory construction is that “the express mention of one thing implies the exclusion of another.” *Wolff Shoe Co. v. Dir. of Rev.*, 762 S.W.2d 29, 32 (Mo. banc 1988) (citations omitted) (finding that where the taxing statute made no mention of various sales outside of Missouri, the statute implicitly excludes such sales from its embrace).

The decision of the Circuit Court in this case shows that the only direction to distribution of use tax revenues related to “municipalities within a county having a charter form of government within a population in excess of nine hundred.” If the legislature intended for a third class county’s disbursement of use tax funds to be the same as its disbursement of local sales taxes, it would have used such language. *Metro Auto Auction v. Dir. of Revenue*, 707 S.W.2d 397, 402 (Mo. banc 1986) (“courts must construe a statute as it stands . . . and must give effect to it as written . . . This Court may

not engraft upon the statute provisions which do not appear in explicit words or by implication from the words in the statute.”) (internal citation omitted). Under applicable law, the Circuit Court could not add any other entities for the use tax special distribution purposes to the single classification of entity specified in Section 144.759 RSMo and the Circuit Court refused to add any by its Judgment. Based upon the purpose of the use tax and the lack of specific direction as to how the Missouri DOR must distribute use tax revenues to third class counties, the Commission has discretion to manage the use tax revenues in Section 144.757 RSMo and Section 144.759 RSMo. This statute makes it clear that the legislative intent of the statutes leaves distribution of the use tax revenues to the discretion of the Commission. Section 50.160 RSMo; Section 50.525 RSMo *et seq.* Under applicable law, the Commission is also the exclusive authority in allocating county revenues through the county budgeting laws. Section 50.740 RSMo; Section 50.630 RSMo.

Additionally, there is no statutory provision expressly requiring the Commission to provide the Board any use tax that the voters passed. Thus, the county budget law prevails as to distribution of tax revenues, such as the use tax.

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CONCLUSION

For the foregoing reasons, the Circuit Court's decision should be affirmed. As such, the Commission shall be permitted to continue determining how the use tax will be allocated for County purposes.

Respectfully submitted,

/s/ Ivan L. Schraeder

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that I have on October 19, 2015, served a true and correct copy of the foregoing via the Court's e-filing system upon the following:

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And a true and correct copy of the foregoing was mailed, first class mail, postage pre-paid, via the United States Post Office to:

Honorable Frederick P. Tucker, Circuit Judge
Macon County Courthouse
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Macon, Missouri 63552

The undersigned further certifies that the foregoing Brief complies with the limitations contained in Rule No. 84.06(b) and that the Brief contains 3,519 words.

/s/ Ivan L. Schraeder