

TERM OF COMMISSION: May Session of the May Adjourned Term

PLACE OF MEETING: Boone County Government Center Commission Chambers

PRESENT WERE: Presiding Commissioner Don Stamper
District II Commissioner Linda Vogt
Deputy County Clerk Michelle Malaby
County Clerk Wendy S. Noren
County Collector Pat Lensmeyer
County Treasurer Kay Murray
County Recorder of Deeds Bettie Johnson
Attorney Rose Heim

The special meeting of the County Commission was called to order at 1:04 p.m.

SUBJECT: Use Tax

Commissioner Stamper stated the purpose of the meeting is to discuss previously collected use tax. The Commission asked Ms. Heim, who is substituting for County Counselor John Patton while he is out of state, to research the matter.

Ms. Heim advised the commission under section 610.021 RSMo., the commission has the right to hold a closed meeting to discuss legal actions when confidential information is discussed with its attorney. The commission can waive its right to confidentiality.

Commissioner Vogt asked is there a reason the commission should or should not waive its right to confidentiality?

Ms. Heim replied ethics prohibit her from discussing the commission's business with the public. She cannot waive the commission's right to confidentiality.

Commissioner Vogt asked could a public discussion be harmful to potential litigation?

Ms. Heim replied no.

The commission waived its right to confidentiality regarding the matter being discussed today.

Ms. Heim stated the legislature passed a 1.5 percent use tax that was contested in a lower trial court. The trial court found the tax to be constitutional. The Missouri Supreme Court also found the tax to be constitutional, although there was an extensive dissenting opinion by Chief Justice Robertson. The US Supreme Court found the tax violated the interstate commerce clause because it didn't treat in state and out of state use sales the same, resulting in various tax rate amounts across the state. The US Supreme Court quoted Robertson extensively in their opinion. The case was remanded to the Missouri Supreme Court, who unexpectedly decided that 144.748 RSMo., which authorized the tax, is unconstitutional in its totality. A provision for refunding the tax was included in the statute. Therefore, all use tax funds collected are subject to refund. The Missouri Association of Counties intends to seek an injunction to prohibit the Department of Revenue from making refunds. They believe the decision was unexpected. There is a statute that provides that if a decision is unexpected, it will only apply prospectively rather than retroactively. The facts do not wholly support that position. Use tax funds collected for Boone County have been placed in escrow and not used. The US Supreme Court decision was not unexpected because of Robertson's strong dissenting opinion. The Department of Revenue required counties to sign a waiver before moneys were distributed. The waiver apparently indicated if the tax was found to be unconstitutional, counties would pay back the funds with interest.

Ms. Noren stated she is looking for the waiver.

In response to a question from Commissioner Stamper, Ms. Noren confirmed a County Commissioner would have signed the form.

Ms. Heim stated in 1994 the legislature passed a statute permitting the Department of Revenue to withhold funds from counties for refunds if the use tax is unconstitutional. There are several indications everyone knew the tax could be found unconstitutional. She does not believe a court would accept the argument the decision was unexpected as a viable argument. However, there are facts which do support the argument. The Department of Revenue sent a letter dated June 8, 1994 to counties after the 1994 Supreme Court decision, indicating counties could keep and use the use tax money distributed to counties in the past.

Ms. Noren commented she has a copy of that letter. It basically states the US Supreme Court decision appears to be a victory and that 70 to 80 percent of use tax funds collected would meet criteria set by the US Supreme Court.

Ms. Heim stated in regard to the money in escrow, the Missouri Supreme Court recently decided charges by the Metropolitan Sewer District violated the Hancock Amendment. The appellate court required the Sewer District to refund the charges. The Missouri Supreme Court said only those who sued the Sewer District are entitled to a refund. Others would have to make their own claims. However, that opinion went on to say, in response to a rehearing argument, that illegally collected taxes do not belong to the governmental entity. According to the Department of Revenue, there are 40 million pending claims which they will begin processing in June. They are proceeding under section 144.190 RSMo. which has a three year statute of limitations. Funds collected between April 1993 and the date of the decision are subject to refund. The Department of Revenue proposes to withhold \$5 million per month from local sales tax, prorated among counties. According to the schedule she received, \$57,195 will be withheld from Boone County each month.

In response to a question from Commissioner Vogt, Ms. Heim replied the document she has indicates a use tax liability of \$2,373,339. According to Ms. Noren, the escrow account balance is \$2,179,515.

Ms. Noren commented that is as of December 31, 1995.

Ms. Heim stated based on the figures she has, there is a shortage of \$193,824.

Ms. Murray stated the County has probably received that amount this year.

Ms. Heim stated the Department of Revenue does not want the County to return escrow funds, they want to withhold the funds.

In response to a question from Commissioner Stamper, Ms. Murray replied she does not object to that method.

Commissioner Vogt asked why shouldn't the county object to that method, given an interest rate of twelve percent?

Ms. Murray asked has that interest rate been confirmed?

Ms. Heim stated the refund scheme under section 144.190 RSMo. provides that a taxpayer is entitled to a refund of illegally collected taxes as a credit toward what he owes in the future or as a refund with interest. The Director of the Department of Revenue is given authority to set the rate of interest on delinquent taxes. The government must use the same rate for refunds it makes. That is reason for the rate of twelve percent through January 1, 1997 and nine percent thereafter. Ms. Heim stated the issue as she sees it is whether the shortfall, if there is one, is an obligation of the state or the county. She does not find anything which would give the Department of Revenue authority to waive the payment of interest to taxpayers.

Ms. Lensmeyer asked has anyone raised the issue that the Department of Revenue, under the direction of Janette Lohman, aggressively pursued collection of the use tax?

Ms. Heim replied not that she is aware of.

Ms. Lensmeyer stated the county would not have had the percent of increase in use tax collection had that not occurred.

Ms. Heim stated it should be remembered all taxpayers will not prevail on their claims. Others may not file claims or follow proper procedures. They are operating under the assumption that funds in the possession of counties are theirs to do with as they wish. The problem with that assumption is, as she stated earlier, the Supreme Court's decision that illegally collected taxes do not belong to the governmental entity. Ms. Heim stated there is a class action suit pending in St. Louis for across the board refunds rather than requiring individual claims. Her research indicates State of Missouri law requires each taxpayer to make a claim with the Department of Revenue. Ms. Heim stated a bill to be sent to the Governor which gives local governments the option to pass a use tax, also contains a paragraph indicating that section 144.190 RSMo. contains the appropriate refund procedure.

In response to a question from Commissioner Stamper, Ms. Noren replied the Department of Revenue has a statutory responsibility to collect the use tax. They withhold one percent as their fee for collection on behalf of the County.

Ms. Noren asked where did the \$5 million figure come from?

Ms. Heim replied it appears representatives from the Department of Revenue, Municipal League and Missouri Association of Counties worked out the arrangement.

The withholding method and amount to be withheld was discussed.

Ms. Lensmeyer commented there should at least be an audit.

Ms. Noren agreed, noting they normally adjust for the actual amount of refunds the following month.

Ms. Heim noted a bill was signed yesterday which will allow the county to look at the Department of Revenue's records concerning the use tax.

Commissioner Vogt stated although the interest rate does not seem fair, it does seem legal.

Ms. Heim stated there are basically two decisions: whether to submit the question of approving a use tax to voters and whether to join counties and cities in a lawsuit against the Department of Revenue. One viable argument raised is that the Department of Revenue is moving too quickly when procedures are not in place or well thought out. When does withholding stop? What is the limit of liability? Who is responsible for the difference between the amount collected and the interest paid on the refunds?

In response to a question from Commissioner Stamper, Ms. Noren replied the deadline for calling an August election is up in the air. The bill making Tuesday, May 28th, the deadline has not been signed and may not be signed by Tuesday. The bill changes the date by which an election must be called.

In response to a question from Ms. Noren, Commissioner Vogt replied although the question of who would pay for a potential lawsuit against the Department of Revenue was discussed at the recent Missouri Association of Counties meeting, it was not answered. The county needs answers to the questions raised by Ms. Heim. She does not know that litigation is required to obtain them.

Following a suggestion by Commissioner Stamper, it was agreed to send a letter to the Department of Revenue requesting clarification and stating the County's objections. Ms. Heim agreed to draft the letter.

Ms. Noren stated her one concern is the blanket payment--the "deal" arrived at by the representatives from the Department of Revenue, Municipal League and Missouri Association of Counties. An additional question is whether the Department of Revenue has power to withhold money for claims they have not refunded.

The meeting adjourned at 1:56 p.m.

Attest:

Don Stamper
Presiding Commissioner

Wendy S. Noren
Clerk of the County Commission

Karen M. Miller
District I Commissioner

Linda Vogt
District II Commissioner