

1990 WL 362044  
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United States District Court, W.D. Missouri.

Kalima JENKINS, et al., Plaintiffs,  
v.  
STATE OF MISSOURI, et al., Defendants.

No. 77-0420-CV-W-4.

|  
Oct. 29, 1990.

**Attorneys and Law Firms**

Arthur A. Benson, II, Carolyn Bayer, Benson & McKay, Kansas City, Mo., for plaintiffs.

Shirley W. Keeler, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo., Allen R. Snyder, Pat Brannan, Hogan & Hartson, Washington, D.C., for defendant Kansas City, Missouri School District.

Michael Fields, Bart Matanic, Atty. General's Office, Jefferson, Mo., for defendant State of Missouri.

Doyle R. Pryor, Jolley, Wash, Hager & Gordon, Kansas City, Mo., for Intervenor American Federation of Teachers.

*ORDER*

RUSSELL G. CLARK, District Judge.

\*1 Before the Court is Property Taxpayers' "taxpayers' " motion for leave to intervene for the limited purpose of seeking a refund and motion to recover a full refund of the Court-ordered property tax. The KCMSD and plaintiffs filed a joint response in which they did not oppose the taxpayers' motion for leave to intervene. The KCMSD and plaintiffs filed a motion in opposition to the taxpayers' motion to recover a full refund. The State responded to the taxpayers' motion to recover a full refund. The KCMSD and plaintiffs filed a reply to the State's response. The taxpayers filed a reply and a second reply memorandum in support of their motion to intervene and to recover a full refund. The KCMSD and plaintiffs filed a surreply to the taxpayers' motion to recover a full refund.

The Court shall not order a hearing on this matter. The Court shall allow the taxpayers to intervene for the limited purpose of seeking to recover a full refund of the Court-ordered property tax. The Court shall order all 1987 taxes paid under protest to be refunded. The Court shall not order the 1988 or 1989 taxes to be refunded.

Also before the Court is the State of Missouri's motion for an order directing that property tax funds currently held in escrow be applied to outstanding KCMSD obligations to the State. The KCMSD and plaintiffs filed a joint response to the State's motion. The State filed a reply to the joint response of the KCMSD and plaintiffs.

*Intervention*

Property taxpayers move this Court for leave to intervene pursuant to Fed.R.Civ.P. 24 in the above-captioned case for the limited purpose of asserting their rights and interests in the refund of the property tax levy imposed on them by this Court. Applicants are KCMSD property taxpayers and as a direct result of the Court's order of September 15, 1987 imposing a \$1.95 property tax levy increase, applicants submit that they have paid an unlawful judicial property tax. Some applicants have paid these taxes under protest pursuant to Mo.Rev.Stat. § 139.031.

Applicants state that they have an immediate interest relating to the property which is the subject of the Supreme Court's April 18, 1990 decision and the Eighth Circuit's June 6, 1990 mandate to this Court. Applicants claim that they are so situated that the disposition of the court-ordered property tax refund issues will impair and impede their ability to adequately represent and protect their interests. Applicants state that neither the *Jenkins* class counsel, nor the KCMSD, nor the State of Missouri can adequately represent or protect the interests of the applicants. Applicants allege that all of these parties have made arguments contrary to the refund interests of the applicants.

Although the KCMSD and plaintiffs oppose the position of the taxpayers on the merits of the refund issue, they do not oppose the taxpayers' intervention for the limited purpose stated in their motion for leave to intervene. The KCMSD and plaintiffs emphasize that the taxpayers should be strictly limited to intervene for the purpose of asserting their rights and interests in the refund of the property tax levy recently reversed by the Supreme Court. The taxpayers shall be allowed to intervene.

\*2 Intervenors request that this Court grant their motion to recover:

(a) a refund of all 1987 KCMSD property tax payments made in compliance with the \$1.95 levy increase, whether paid under protest or not; and

(b) a refund of all 1988 and 1989 KCMSD property tax payments made in compliance with the \$1.95 levy increase, whether paid under protest or not.

Intervenors also request that a fair and expeditious refund procedure be promptly established.

#### *1987 Taxes*

On September 15, 1987 this Court ordered a \$1.95 tax levy increase which was affirmed and modified by the Eighth Circuit and reversed by the United States Supreme Court on April 18, 1990. In 1987, pursuant to Mo.Rev.Stat. § 139.031, approximately 9,000 taxpayers paid a total of \$10,695,197 under protest. Icelean Clark *et al.* Reply Memo at 3. These funds have been held in escrow by Jackson County.

On August 19, 1989 the Eighth Circuit modified the property tax increase ordering that future funding of the KCMSD desegregation liability be accomplished by the Kansas City School Board submitting a levy to collection authorities adequate to fund its desegregation budget—subject to limitations set by the District Court. *Jenkins*, 855 F.2d at 1314. The intervenors assert that it is indisputable that the 1987 KCMSD property tax levy increase from \$2.05 to \$4.00 was the result of this Court's September 15, 1987 order. The intervenors submit that the Supreme Court's decision held that the 1987 property taxes were improperly collected and should be returned to the taxpayers. The KCMSD, plaintiffs and the State of Missouri agree that the 1987 taxes should be refunded; "Icelean Clark, *et al.*, are correct insofar as they suggest that the 1987 tax levy increase has now been determined to be invalid." Opposition of KCMSD and Plaintiffs to Proposed Intervenor at 4.

Missouri statutes provide that, in the event a taxpayer is successful in his protest and recovery action, the protested tax payment—together with interest—is to be returned to the taxpayer by county collection officials. Mo.Rev.Stat. § 139.031.4 The intervenors maintain that all 1987 taxes should be refunded, whether paid under protest or not. The intervenors suggest that because of lack of knowledge or legal resources, taxpayers who paid a total of \$23,140,758 did not make use of the Missouri protest provisions. Icelean Clark *et al.* Reply Memo at 6. However, the KCMSD, plaintiffs and State argue that the Court should only order a refund of those taxes paid under protest.

The intervenors cite *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 495 U.S. —, 110 S.Ct. — (June 4, 1990) which stated that "the Due Process Clause of the Fourteenth Amendment obligates States to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." The intervenors contend that this Court must refund funds not paid under protest because specialized state protest and refund devices that usually apply only to taxes levied by the state could hardly be considered meaningful backward-looking relief for taxpayers seeking a refund of an unlawful tax levy. The intervenors suggest that principles of fundamental fairness and due process dictate a full refund for all taxpayers, regardless of whether they paid under protest.

\*3 The KCMSD, plaintiffs and the State argue that the intervenors ignore the requirements of Missouri law concerning taxes paid under protest. The KCMSD and plaintiffs argue that there is no proper legal basis for deviating from Missouri's statutory requirements. In order for a taxpayer to be eligible for a refund, the taxpayer must have protested the tax at the time of

payment and must have filed a petition seeking recovery of the taxes in the circuit court within ninety days after filing the protest. Mo.Rev.Stat. § 139.031.

Missouri law has consistently held that taxes, once paid, can only be recovered through proper statutory proceedings. *B & D Inv. Co. v. Schneider*, 646 S.W.2d 759 (Mo.1983) (en banc). In *B & D*, the court held that a taxpayer must comply with the statute requiring a property owner to file a written statement with the collector protesting all or any part of taxes so paid. The statute exclusively prescribes the manner in which a taxpayer must proceed in paying illegally imposed taxes before the taxpayer may recover such taxes by judicial action. *Id.* at 763–4. See also *Adcor Realty v. State Tax Comm’n*, 627 S.W.2d 604, 606 (Mo.1982) (en banc); *Xerox Corp. v. Travers*, 529 S.W.2d 418, 422 (Mo.1975) (en banc). Specifically, the Missouri statute provides that “[a]ny taxpayer may protest all or any part of any taxes assessed against him.... Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based.” Mo.Rev.Stat. § 139.031.(1).

The KCMSD and plaintiffs also submit that while the Court in *McKesson* reversed the Florida Supreme Court’s refusal to order a refund of money collected through a tax scheme which was found to violate the Due Process Clause, it expressly noted that Florida law did not require a taxpayer to pay under protest in order to preserve the right to challenge a remittance in a post-payment refund action. *Id.* at 4667, n. 4. Conversely, Missouri requires taxpayers to protest in order to preserve the right to bring a postpayment refund action. The Court in *McKesson* stated that the “state’s freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets [the state’s concern for fiscal stability] with respect to future cases. The state might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest.” *Id.*

Thus, as long as the state has made a protest procedure available, there is no constitutional right to a refund of unlawfully collected taxes. The Supreme Court in *McKesson* noted that “States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme’s invalidation.” *Id.* at 4674. Missouri has clearly adopted such a procedural protection by enacting a protest statute. *McKesson* emphasized that in postpayment recovery actions, the taxpayers’ interests are not the only interests at stake; countervailing state interests in fiscal stability must also be considered. *McKesson* found that a protest requirement balanced competing interests. Such procedural measures would “sufficiently protect states’ fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional tax.” *Id.*

\*4 *McKesson* illustrated that there is no blanket refund requirement for money collected under a subsequently invalidated tax scheme. A state has the power to limit the circumstances under which it will be required to provide refunds. Therefore, only those 1987 tax payments paid under protest shall be subject to a refund. The Court notes that the full refund of the income tax surcharge provides no precedent for the return of non-protested 1987 property taxes. The income-tax surcharge was not covered by the protest statute but was subject to a separate statutory refund procedure. See Mo.Rev.Stat. § 143.801; *Homestake Lead Co. v. Director of Revenue*, 759 S.W.2d 847, 849 (Mo.1988) (en banc).

The intervenors respond to the KCMSD, plaintiffs and State by suggesting that the protest provision under Mo.Rev.Stat. § 139.031 does not control this situation because the statute applies only to state taxes imposed by state and local taxing authorities—not to an unlawful judicial tax levied by a federal court. The KCMSD and plaintiffs respond that the plain language of section 139.031(1) contradicts the intervenor’s position. The statute clearly states that “any taxpayer may protest all or any part of *any* taxes assessed against him, except taxes collected by the director of revenue of Missouri.” Even if the taxes were assessed by a federal court, the plain language of the statute allows protests of “any taxes”, therefore the Missouri protest statute controls this case.

Taxpayers have routinely filed section 139.031 protests based on a variety of legal challenges, including protests that taxes were levied under an unconstitutional statute or on behalf of a governmental entity not properly meeting statutory requirements. See *Boyd–Richardson Co. v. Leachman*, 615 S.W.2d 46 (Mo.1981) (en banc). The Court agrees that the plain language of section 139.031 applies to this case and a refund is appropriate only for properly protested 1987 property taxes.

The State proposes that, if escrowed funds are insufficient, refund payments authorized by the Court should be the responsibility of the KCMSD. The State claims that under the Supreme Court’s April 18, 1990 decision, the KCMSD no longer has the option to choose not to pay its share of the remedial costs; requiring the State to make the refunds would “permit the KCMSD to simply disavow financial responsibility for the injury it has begotten while permitting it to propose, without risk, any expense and grandiose programs or facilities it might desire, without any concern for fiscal responsibility.” State’s Response at 13.

The KCMSD and plaintiffs disagree with the State's position, suggesting that it is irrelevant and incorrect to suggest that additional refund payments could be made by the KCMSD and financed by a tax increase regardless of the reasonable limits required by the Eighth Circuit. More importantly, the KCMSD and plaintiffs submit that as a matter of law, only properly protested property taxes are eligible for a refund. These funds are currently held in escrow so no question need arise about the source of a refund.

#### *1988 Property Taxes*

\*5 While the Eighth Circuit affirmed this Court's \$1.95 KCMSD property tax increase, it instructed that future funding of KCMSD's obligations under the desegregation plan be modified. *Jenkins v. Missouri*, 855 F.2d 1295, 1314 (8th Cir.1988). Future levies were to be set by the Kansas City School Board—subject to limits set by the District Court. The Eighth Circuit's August 19, 1988 opinion stated that the levy must be set by the KCMSD rather than the District Court. The Eighth Circuit's mandate was issued on October 14, 1988.

The intervenors argue that, prior to October 14, 1988 the District Court did not have jurisdiction to implement the modification set forth in the mandate. The intervenors suggest that the court did not technically implement the modification until nearly one full year later when, in its September 13, 1989 order, this Court approved the 1989 levy set by the Kansas City School Board pursuant to the August 19, 1988 opinion of the Eighth Circuit. While it may be technically correct that the district court did not have jurisdiction to implement the modification mandated by the Eighth Circuit, there is no question that the KCMSD followed the modified procedure approved by the Eighth Circuit and affirmed by the Supreme Court. The proper focus is on what action the KCMSD took.

On September 13, 1988 the KCMSD met and voted to seek approval of a cap on the district's property tax levy of no more than \$4.23 for \$100 of assessed valuation pursuant to the August 19, 1988 opinion of the Eighth Circuit Court of Appeals. The KCMSD stated that *it* would officially set the levy at the new maximum rate once the Court ruled. If the District Court did not rule on the KCMSD's motion by October 11, 1988, the Board anticipated that *it* would set the 1988–89 levy at a rate of \$4.00 per \$100 assessed valuation pursuant to this Court's September 15, 1987 ruling. This Court ordered that because the 1988 tax bills had already been sent, it was too late to authorize a new maximum levy for 1988. January 3, 1989 Order at 6–7. Thus, the Court tacitly approved as reasonable the Board's action at its October 11, 1988 meeting to set the levy at \$4.00. The intervenors argue that rejection of the proposed \$4.23 levy cannot be considered as approval of the existing \$4.00 levy.

Since the Eighth Circuit mandate had not come down, the intervenors argue that the property tax bills for 1988 were based on the court-ordered levy imposed in 1987 which was subsequently reversed by the Supreme Court. In addition, intervenors submit that the Supreme Court's opinion found that the KCMSD did not levy its own tax rate in October, 1988. Intervenors quote the language of the Supreme Court which stated that "The Court of Appeals required the District Court to use less obtrusive procedures beginning with the fiscal year commencing after the remand but did not require the District Court to reverse the tax increase that it had imposed for prior fiscal years." *Jenkins*, 110 S.Ct. at 1664, n. 18. (emphasis added). The KCMSD, plaintiffs and State suggest that the intervenors read far too much into a single "s" in the word "years." The intervenors attempt to stretch the use of the plural word "years" into a factual finding about the propriety of the 1987 and 1988 tax levies. Yet, the Supreme Court avoided dictating the precise consequences of its ruling which was that only tax increases imposed pursuant to the Eighth Circuit's revised procedures were valid.

\*6 The Supreme Court remanded the case to the Eighth Circuit to determine whether the essential elements of its revised procedures were followed in setting the KCMSD property tax levy. The KCMSD, plaintiffs and State maintain that in 1988 the KCMSD itself adopted the \$4.00 tax levy. Prior to the Eighth Circuit's decision, this Court and the KCMSD understood who must set the levy for 1988. The Board itself set the 1988 levy on October 11, 1988.

Intervenors suggest that since the Eighth Circuit mandate had not yet issued, it was impossible for the parties to follow the Eighth Circuit's guidance on October 11, 1988. While the failure of the Eighth Circuit's mandate to issue before October 11, 1988 prevented the KCMSD from obtaining a ruling from this Court on its request for a higher limit, it did not prevent the KCMSD from setting its own levy at the same rate previously approved by this Court. The KCMSD followed the essential elements of the Eighth Circuit's modifications to the district court's previous orders. At its October 11, 1988 meeting, the KCMSD, *not* the district court, set the levy at \$4.00 per \$100 assessed valuation. Also, by the time the taxes set by the KCMSD's action of October 11, 1988 were actually collected, the Eighth Circuit's modification to the district court order was in effect. The taxes were collected lawfully in accordance with the Eighth Circuit's modified procedure.

Thus, the tax levies adopted by the KCMSD in 1988 and 1989, pursuant to the Eighth Circuit's decision, were valid and should be released to the KCMSD and paid to the State in accordance with the State's Motion of May 23, 1990 and Joint Response of Plaintiffs and KCMSD. The intervenors' request for a refund of protested and unprotested property taxes collected in 1988 and 1989 pursuant to the increase established by the KCMSD shall be denied.

#### *Escrowed Taxes*

The State of Missouri requests this Court to direct the property tax funds collected in 1988 and 1989 pursuant the orders of this Court, as modified by the Eighth Circuit and affirmed by the Supreme Court, to be paid directly to the State. During 1988 and 1989, \$23,170,027 was collected and is currently held under protest by the Jackson County tax collection authority. State's Motion at 2. The State understands that the Jackson County tax collection authority intends to release those funds to the KCMSD upon instruction from the Court.

In its order of February 22, 1988, this Court held that the KCMSD owes the State a credit of \$7,427,638.77 pursuant to its reallocation of the respective obligations of the KCMSD and State for funding capital improvements under Phase I of the KCMSD Capital Improvements Plan. State's Motion at 2. The reallocation resulting in a credit to the State was a result of the Eighth Circuit's *Jenkins v. Missouri*, 807 F.2d 657, 685 (8th Cir.1986) decision. In its orders of October 18, 1989 and November 2, 1989, this Court recognized that the KCMSD owes the State a total of \$15,855,061. State's Motion at 2.

\*7 The payment which the State requests would abrogate the need for funds to be taken from the KCMSD operating budget to apply to the debts to the State. Recognizing that the KCMSD may intend to appeal the Court's determination that the base costs of the 1986-87 magnets are not properly desegregation expenses, the State requests that if the Court does not require Jackson County to immediately pay those funds over to the State to liquidate the KCMSD's debts, it should require the KCMSD to place any funds distributed by Jackson County in a new interest bearing escrow account pending resolution of any appeal. The State proposes that it would be prudent for the KCMSD to take advantage of the one-time availability of escrowed funds in order to pay off quantified past obligations to the State.

The KCMSD and plaintiffs agree, without waiving their rights under this Court's February 1, 1990 Order, that the Court should order the KCMSD to pay the State the property tax funds for years 1988 and 1989 which are currently held in escrow. With one caveat, the KCMSD would consent to such an order: the KCMSD is not willing to waive its rights under this Court's February 1, 1990 order to obtain further review of the October 18, 1989 and November 2, 1989 rulings. If these rights are preserved, the KCMSD is willing to pay the escrowed funds over to the State.

The State further argues that the KCMSD now has the capacity to obtain any funds necessary to pay all of its desegregation obligations, in full, without reliance on any other party. Specifically, the State submits that the concept of joint and several liability should no longer apply to allow the KCMSD to "stand idly by and to continue to propose even more extravagant and expensive programs for which the State would be obligated to pay some portion of the KCMSD's share." State's Motion at 7.

The KCMSD submits that the State is incorrect in its assertion that the KCMSD now has the capacity to obtain all funds necessary to pay all of its desegregation obligations in full and that joint and several liability should no longer apply in this case. The KCMSD notes that the Eighth Circuit's ruling on the tax relief ordered by this Court in *Jenkins*, 855 F.2d 1295, 1315-16 (8th Cir.1988), left no doubt that the KCMSD might continue to lack adequate revenue to completely fund its share of the desegregation programs. The Eighth Circuit indicated that the property tax should not be raised to unreasonable levels merely to cover the KCMSD's share. The Eighth Circuit also stated that the "State does have an obligation to pay any required sums which are beyond the capacity of the school district." *Id.* at 1316, n. 21. The Supreme Court affirmed the Eighth Circuit.

Thus, there is no basis for the State's assertion that the KCMSD must now pay all of its desegregation obligations, regardless of the availability of revenues to meet those obligations. This Court's orders as modified by the Eighth Circuit and affirmed by the Supreme Court provide a process for tax increases that yield desegregation revenue to offset part of the KCMSD's share. However, such orders do not eliminate the State's responsibility under principles of joint and several liability to fund whatever portion of the District's obligation there may be in excess of the revenue generated by a reasonable levy rate.

\*8 Accordingly, it is hereby

ORDERED that property taxpayers' motion to intervene for the limited purpose of seeking a full refund is granted; and it is further

ORDERED that the 1987 tax levy increase was improper under the Supreme Court's decision in *Missouri v. Jenkins*, 495 U.S. —, 110 S.Ct. — (April 18, 1990), and the protested funds collected under the 1987 tax levy and held in escrow shall be deemed available to be refunded to the affected taxpayers; and it is further

ORDERED that the parties shall file with the Court a proposed procedure to refund the affected taxpayers; and it is further

ORDERED that the tax levies set by the KCMSD in 1988 and 1989 are valid and operable and meet the constitutional requirements as set forth in the Supreme Court's decision in this matter; and it is further

ORDERED that the \$23,170,027 in escrowed taxes for 1988 and 1989, plus accrued interest, shall be paid directly to the State to the extent necessary to satisfy the obligations described in this Court's orders of February 22, 1988 (\$7,427,638.77), October 18, 1989 (7,804,780) and November 2, 1989 (8,050,281); and it is further

ORDERED that notwithstanding the above, the KCMSD and plaintiffs retain their rights under this Court's February 1, 1990 order to obtain further review of this Court's orders of October 18, 1989 and November 2, 1989; and it is further

ORDERED that the State continues to be jointly and severally liable for desegregation obligations.

**All Citations**

Not Reported in F.Supp., 1990 WL 362044

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