

IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS  
22nd JUDICIAL CIRCUIT  
STATE OF MISSOURI

THOMAS JOSEPH NEUNER, )  
 )  
 GENERAL MARINE SERVICES, INC. )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 CITY OF ST. LOUIS, )  
 )  
 Serve: Mayor Francis G. Slay )  
 Room 200 City Hall )  
 1200 Market Street )  
 St. Louis, MO 63103 )  
 )  
 CITY OF ST. LOUIS MAYOR )  
 FRANCIS G.SLAY, )  
 )  
 Serve: Room 200 City Hall )  
 1200 Market Street )  
 St. Louis, MO 63103 )  
 )  
 CITY OF ST. LOUIS )  
 COLLECTOR OF REVENUE )  
 GREGORY F.X. DALY )  
 )  
 Serve: Room 110 City Hall )  
 1200 Market Street )  
 St. Louis, MO 63103 )  
 )  
 THE ANTHEM COMPANIES, INC., )  
 F/K/A WELLPOINT COMPANIES, INC., )  
 )  
 Serve: Sheriff of St. Louis County )  
 CT Corporation System )  
 120 South Central Avenue )  
 Clayton, MO 63105 )  
 )  
 POLSINELLI PC, F/K/A POLSINELLI )  
 SHUGHART PC, )  
 )

Cause No.:

Division

Serve: Sheriff of St Louis County )  
National Registered Agents, Inc. )  
120 South Central Avenue )  
Clayton, MO 63105 )  
Defendants. )

**INTRODUCTION – NOT PART OF PETITION**

The City of St. Louis imposes a .5% “Payroll Tax”<sup>1</sup> on employers and a 1% “Earnings Tax” on wages and profits.

The Payroll Tax is unconstitutional because it has neither constitutional nor statutory authority.

Under “Refund Ordinances” the City refunds to favored businesses portions of both taxes. Those Ordinances are unconstitutional because among other things they violate the Missouri Constitution’s Art. X requirements of uniformity of taxation and use of tax proceeds only for public purposes, and the Art. VI prohibition on granting public money to private persons.

Plaintiffs seek equitable relief, including return of payroll taxes paid under protest.

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<sup>1</sup> In this suit the words “Payroll Tax” refer to taxes on an employer’s payroll due under City of St. Louis Ordinance 60737, and not to social security, medicare and/or other taxes due under the Federal Insurance Contributions Act, which are commonly referred to by the same name.

**PLAINTIFFS' PETITION FOR DECLARATORY JUDGMENT AND  
PERMANENT INJUNCTIONS:  
PAYROLL TAX UNCONSTITUTIONAL, AND  
REFUNDS OF EARNINGS AND PAYROLL TAXES UNCONSTITUTIONAL**

Come now Plaintiffs Thomas Joseph Neuner and General Marine Services, Inc., by counsel W. Bevis Schock and Hugh A. Eastwood, and state for their Petition for Declaratory Judgment under Rule 87 and RSMo. 527.010&c and for Permanent Injunction under Rule 92 and RSMo. 526.030:

**PARTIES**

1. Plaintiff Thomas Joseph Neuner is an adult resident of the City of St. Louis, (“the City”).
2. Neuner operates a for profit sole proprietorship business which is located outside the City of St. Louis.
3. Pursuant to the City’s Ordinances as outlined below, Neuner pays Earnings Tax to the City on the profits from his business.
4. Neuner owns real estate in the City and pays real estate taxes to the City on that property.
5. General Marine Services, Inc. (“General Marine”) is a Missouri for profit corporation in good standing.
6. General Marine’s headquarters are located within the city limits of the City of St. Louis.
7. General Marine has approximately five employees at that location on whom General Marine pays the “payroll expense tax” defined in more detail below.
8. General Marine is in the harbor service management business.
9. The harbor service management business is in the nature of businesses ordinarily conducted for profit.<sup>2</sup>

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<sup>2</sup> Earnings Tax, City Code, 5.22.010.B, Payroll Tax, City Code, 5.23.010.A.

10. Pursuant to the ordinances outlined below General Marine:
  - a. Withholds Earnings Tax at a 1% rate on its employee's wages, and pays over those withheld Earnings Taxes to the City of St. Louis,
  - b. Pays Earnings Tax on its own profits at a 1% rate, and
  - c. Pays to the City of St. Louis Payroll Taxes of .5% of the gross of its employees' wages.
11. General Marine receives no refund on those Payroll Taxes or on those paid over Earnings Taxes (except those allowed all taxpayers).<sup>3</sup>
12. Defendant City of St. Louis is a lawfully formed and operating State of Missouri municipality whose form of government is that of a Constitutional Charter City.<sup>4</sup>
13. Defendant Mayor Francis G. Slay is the duly elected Mayor of the City of St. Louis. He is the chief executive officer of the City<sup>5</sup>.
14. Defendant Collector of Revenue Gregory F.X. Daly, (the Collector), is the duly elected Collector of Revenue of the City of St. Louis.
15. The Office of the Collector of Revenue is what is c/k/a under Missouri law a "County Office".<sup>6</sup>
16. The ordinances at issue here state that the duties of the Collector include collection of the taxes at issue in this case.<sup>7</sup>

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<sup>3</sup> Earnings Tax, City Code, 5.22.025 allows a credit against Earnings Tax of 20% of the Payroll Tax paid, Ordinance 60879.

<sup>4</sup> Missouri Constitution Article VI § 19.

<sup>5</sup> City Charter, Art. VII, § 1

<sup>6</sup> RSMo. 52.010 and see RSMo. 52.220.

<sup>7</sup> Earnings Tax, City Code, 5.22.100, and Payroll Tax, City Code, 5.23.080.

17. Defendant The Anthem Companies, Inc., f/k/a Wellpoint Companies, Inc. is a lawfully formed Indiana corporation in good standing to do business in the State of Missouri.
18. Defendant Polsinelli PC, f/k/a Polsinelli Shugart, PC, is a lawfully formed Missouri professional corporation in good standing to do business within the State of Missouri.

### **PAYROLL TAX AND EARNINGS TAX**

19. Pursuant to Ordinance 60737, (the “Payroll Tax Ordinance”), the City imposes a one half of one percent Payroll Expense Tax on each business<sup>8</sup> which “engages, hires, employs or contracts with one or more individuals as employee, to perform work or render services in whole or in part within the City”.<sup>9</sup>
20. The Payroll Tax Ordinance was passed in 1988.
21. Pursuant to Ordinance 49540, (“the Earnings Tax Ordinance”) the City imposes:
  - a. A one percent Earnings Tax on:
    - i. Salaries, wages commissions and other compensation of residents of the City,<sup>10</sup>
    - ii. Salaries, wages commissions and other compensation of nonresidents of the City for work done or services performed or rendered in the City,<sup>11</sup>
    - iii. The net profits of associations, businesses or other activities conducted by residents.<sup>12</sup>
    - iv. The net profits of associations, businesses or other activities conducted in the City by non-residents.<sup>13</sup>

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<sup>8</sup> Payroll Tax, City Code, 5.23.010.H.

<sup>9</sup> Payroll Tax, City Code, 5.23.020.A-B.

<sup>10</sup> Earnings Tax, City Code, 5.22.020.A.

<sup>11</sup> Earnings Tax, City Code, 5.22.020.B.

<sup>12</sup> Earnings Tax, City Code, 5.22.020.C.

22. The Earnings Tax Ordinance’s original predecessor was passed in approximately the 1950’s, decades before the Payroll Tax Ordinance.

**CREDIT OF 20% OF PAYROLL TAX AGAINST EARNINGS TAX**

23. The Earnings Tax provisions allow an “individual, association, business, corporation, fiduciary or other entity” paying earnings tax on its profits to reduce the amount due, (that is, “take a credit”), against the earnings tax equal to 20% of the amount paid by that individual or entity as payroll tax.<sup>14</sup>

**EARNINGS TAX AUTHORIZED BY STATE STATUTE  
PAYROLL TAX NOT AUTHORIZED BY STATE STATUTE**

24. The Payroll Tax Ordinance is not authorized by any Missouri statute.
25. The Earnings Tax Ordinance is authorized by RSMo. 92.111.

**TAXES ARE NOT WHOLLY A MATTER OF LOCAL CONCERN**

26. Taxes are a governmental function inherent in the State and are not a matter of wholly local concern.<sup>15</sup>
27. The Missouri Constitution, Art. X, § 11(f), states:

Nothing in this constitution shall prevent the enactment of any general law permitting any county or other political subdivision to levy taxes other than ad valorem taxes for its essential purposes.

28. The Missouri Supreme Court has interpreted this provision in specific reference to earnings taxes and has concluded that an Earnings Tax is not a matter of wholly local concern:

By the clear implication of that provision, legislative permission to any city or other political subdivision to enact an earnings tax ordinance can only be granted by a general law. We can attach no other meaning to it. Of course, this does not

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<sup>13</sup> Earnings Tax, City Code, 5.22.020.D.

<sup>14</sup> Earnings Tax, City Code, 5.22.25.

<sup>15</sup> *Grant v. Kansas City*, 431 S.W.2d 89, 93 (Mo. 1968)

mean that a general law permitting the levy of such a tax would be local or special because it was operative only in the City of St. Louis, provided it was prospective in its terms so as to become operative in other cities as they come within the classification therein specified.<sup>16</sup>

29. As to on all points relevant to the local concern analysis a Payroll Tax is in no way different from the Earnings Tax.
30. A Payroll Tax is not a matter of wholly local concern.

## **PAYROLL TAX**

### **Constitutional Provisions Relevant to Payroll Tax – Legal Framework**

31. The Missouri Constitution, Art. X § 1 states:

The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes.

32. The Missouri Constitution, Art. VI § 19(a) states:

Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

33. RSMo. 71.010 states:

[a]ny municipal corporation ... having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state ... shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject.

34. Within these provisions the limitation in Art. X § 1 stating that:

The taxing power may be exercised by...political subdivisions under power granted to them by the general assembly...

trumps the grant of power in Art. VI § 19(a):

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<sup>16</sup> *Walters v. City of St. Louis*, 364 Mo. 56, 63, 259 S.W.2d 377, 382 (1953), affirmed, *Walters v. City of St. Louis, Mo.*, 347 U.S. 231 (1954).

Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state...

35. The limitation in Art. X § 1 trumps the authority of a charter city because the grant of power of Art. VI § 19(a) is limited by the phrase “consistent with the constitution of this state”, and Art. X § 1 limits the authority to tax to powers “granted by the general assembly”.
36. The power to tax is inherent in the state and any attempt by a municipality to impose a tax not authorized by General Assembly by statute is invalid.<sup>17</sup>
37. In case of doubt, the power to tax is denied.<sup>18</sup>
38. The words “consistent with” in Art. VI § 19(a) do not require exact conformity, but do require substantial harmony with the principles of the Constitution and the general laws of the state.
39. Municipal legislation may not invade the province of general legislation involving the public policy of the state as a whole.<sup>19</sup>
40. The payroll tax invades the province of general legislation involving the public policy of the state as a whole in that it is a tax not authorized by the general assembly, and the tax scheme which is authorized is by definition a statement of the public policy of the state as to what taxes shall be lawful.
41. The constitution and general laws of the state continue in force within the municipalities which have framed their own charters, and that power of the municipality to legislate is confined to municipal affairs.<sup>20</sup>

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<sup>17</sup> *Whipple v. City of Kansas City*, 779 S.W.2d 610 (Mo. App. 1989)

<sup>18</sup> *Holland Furnace Company v. City of Chaffee*, 279 S.W.2d 63, 68 (Mo.App. 1955).

<sup>19</sup> *Missouri Bankers Ass’n, Inc. v. St. Louis County*, 448 S.W.3d 267, 271 (Mo. banc. 2014)



42. A Payroll Tax therefore imposes a tax that the state law prohibits.<sup>21</sup>

43. The burden is on the City to prove the validity of the Payroll Tax Ordinance.<sup>22</sup>

**No Constitutional or Statutory Authority for Payroll Tax, Therefore Tax Unconstitutional**

44. There is no constitutional or statutory authority for the City of St. Louis to impose a .5% Payroll Tax on employers within the City of St. Louis.

45. The Payroll Tax Ordinance is not in substantial harmony with the principles of the State Constitution and/or the general laws of the state.

46. Even if the Payroll Tax Ordinance were to be interpreted to be merely some sort of extension of the Earnings Tax Ordinance, the Payroll Tax Ordinance was passed after the Earnings Tax Ordinance, and since the earnings tax is already at the maximum 1% allowed by RSMo. 92.111, the Payroll Tax is unconstitutional for being in excess of the earnings tax limit.

47. The City of St. Louis Payroll Tax Ordinance is unconstitutional.

**Construe to Uphold Unless Irreconcilable Conflict with the General Law of the State**

48. A court should construe ordinances to uphold their validity unless the ordinances are expressly inconsistent or in irreconcilable conflict with the general law of the state.

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<sup>20</sup> *Kansas City v. J. I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 200 (Mo. 1935).

<sup>21</sup> *City of St. John v. Brockus*, 434 S.W.3d 90, 93 (Mo App. 2014).

<sup>22</sup> *Carter Carburetor Corp. v. City of St. Louis*, 203 S.W.2d 438, 445 (1947): “But under art. X, Sec. 1, Const’s Mo.1945 and 1875 the taxing power is exercised solely by the General Assembly except when it *grants* the power to municipalities. Furthermore, art. VI, Sec. 31, Const.Mo.1945 continues the special charter of St. Louis ‘subject to changes and amendments provided by the Constitution or by law, and with the powers \* \* \* permitted by this Constitution or by law.’ And Sec. 23, art. IX, Const.Mo.1875, under which the St. Louis charter of 1914 was adopted, provided it should always be ‘in harmony with and subject to the Constitution and laws of Missouri.’ From this it is easy to see why the burden is cast on the city to establish the validity of its taxing laws.”

49. The Payroll Tax Ordinance is expressly inconsistent or in irreconcilable conflict with the general law of the state.<sup>23</sup>

**PAYROLL TAXES PAID UNDER PROTEST  
IF SUIT SUCCESSFUL TO BE REFUNDED TO GENERAL MARINE**

50. The payroll tax is due and payable quarterly at the end of the month first succeeding each calendar quarter.<sup>24</sup>
51. General Marine will pay its payroll tax both for the fourth quarter of 2015 and for all succeeding quarters during this litigation under protest by filing with the taxes a statement of the grounds on which the protest is based.
52. If General Marine prevails regarding the unconstitutionality of the payroll tax, General Marine will be entitled to recover all such taxes paid under protest.<sup>25</sup>

**EARNINGS TAX REFUNDS**

**Ordinances Granting Refunds - Methodology**

53. The City has passed individual ordinances (the “Refund Ordinances”) directed at the business Defendants pursuant to which the City periodically refunds to those businesses portions of:
- a. The Earnings Taxes paid on behalf of their employees, and
  - b. The Payroll Taxes paid on their own behalf.
54. The Refund Ordinances explicitly describe these arrangements as “Cooperation Agreements”, pursuant to RSMo. 70.210 - .320, which concern, inter alia, cooperation

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<sup>23</sup> *State ex rel. Teehey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 685 (Mo. 2000)

<sup>24</sup> 5.23.060.

<sup>25</sup> 5.23.060.

agreements between cities and private entities for “public improvements or facilities, or common services.”

55. In all such cases the business Defendant has spent or is spending money, called the “project costs”, to make improvements to real estate at the business’s location within the City limits.
56. Pursuant to the Refund Ordinances the City will annually refund 50% of the net increase in Earnings Taxes or Payroll Taxes over a base amount, until the entire amount of the project costs have been refunded.
57. The base amount is the amount the business was paying in such taxes before the business incurred the project costs.
58. Procedurally,
  - a. The City establishes an “Earnings and Payroll Tax Reimbursement Account”.
  - b. The City deposits to that account 50% of the incremental increase in earnings and Payroll Tax receipts received from the business over the base amount.
  - c. The business then submits semi-annually to the City a statement of the amount of that 50% of the incremental increase in earnings and Payroll Tax receipts over the base amount.
  - d. The City then refunds that stated amount of money from the account to the business.
  - e. This process goes on half year by half year until the business’s project costs have been fully reimbursed.

**Businesses Receiving These Refunds – All in Class of “For Profit Enterprises”**

59. On information and belief<sup>26</sup> the following corporations (collectively the “Cooperation Agreement Defendant Enterprises”), are receiving these refunds pursuant to the following Refund Ordinances:
- a. The Anthem Companies, Inc. f/k/a/ Wellpoint Companies, Inc., Ordinance 68432, and
  - b. Polsinelli PC, f/k/a Polsinelli Shugart, PC, Ordinance 68642.
60. Ordinance 48875, the version of the Earnings Tax Ordinance currently in effect, defines “business” for purposes of the earnings tax as:
- [a]n enterprise, activity, profession, trade or undertaking of any nature conducted for profit or ordinarily conducted for profit, whether by an individual, association or any other entity other than a corporation.<sup>27</sup>
48. Ordinance 48875 defines “corporation” for purposes of the Earnings Tax Ordinance as:
- [a] corporation or joint stock association organized under the laws of the United States, the State of Missouri or any other state, territory, or foreign country or dependency.
61. Ordinance 48875 defines a class of enterprises which are operated for profit or are ordinarily conducted for profit, (“for profit businesses”).
62. The class of for profit businesses includes limited liability companies, trusts, and/or corporations.
63. All the Cooperation Agreement Defendant Enterprises are in the class of for profit businesses.

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<sup>26</sup>Letter from David E. Meyer, Assistant City Counselor, August 1, 2013 to David Stokes at the Show-Me Institute.

<sup>27</sup> Earnings Tax, City Code, 5.22.01.B.

64. General Marine is in the class of for profit businesses.
65. General Marine rents its space but has made modest improvements to that space.
66. Hundreds of businesses in the City of St. Louis make improvements to their real estate each year.
67. The hundreds of businesses in the City of St. Louis which make improvements to their real estate each year, with the exception of the Cooperation Agreement Defendant Enterprises , receive no refunds of their paid in Earnings Taxes and Payroll Taxes in a manner or amount consistent with the “cooperation agreements” enjoyed by Cooperation Agreement Defendant Enterprises.
68. Certain companies are receiving legally valid “economic development” refunding pursuant to:
  - a. The blight statute (RSMo. 99.300-.715);
  - b. The bonding power for commercial real estate development permitted under Art VI, § 27(b) and RSMo. 100.010-.200;
  - c. Transportation development districts;
  - d. TIFS;
  - e. Federal and concomitant RSMo. 135.950 enhanced enterprise zones.
69. The Cooperation Agreements challenged in this suit are none of those things.
70. The amounts being refunded are material.

#### **Constitutional Provisions Related to Refunds of Earnings Taxes and Payroll Taxes**

71. The Missouri Constitution, Art. X § 3, states:

**Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.** All taxes shall be levied and collected by

general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this constitution, the methods of determining the value of property for taxation shall be fixed by law. (Emphasis added).

72. The Missouri Constitution, Art. VI § 25, states in relevant part:

**No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation** except as provided in Article VI, Section 23(a).<sup>28</sup>, (emphasis added).

73. The Cooperation Agreement Defendant Enterprises fall within the ambit of “association[s]” in Art. VI § 25.

74. Improvement of real estate for the benefit of a private enterprise is neither improvement of a public facility nor common service, as those words are defined either in the Missouri case law nor in Black’s Law Dictionary or in Merriam-Webster’s dictionary.<sup>29</sup>

75. The Earnings Tax and Payroll Tax amounts, once paid into the City, are “public money”.

#### **Refund Methodology a Pretext for Exemption from Taxation**

76. Refunding part of the Earnings Taxes and Payroll Taxes as reimbursement for “project costs” is a pretext for exempting the Cooperation Agreement Defendant Enterprises from taxation applicable to all other members of the same class.

77. In fact the Refund Ordinances exempt the Cooperation Agreement Defendant Enterprises from all or part of their Earnings Tax and Payroll Tax liability.

#### **Agreements Not Authorized by RSMo. 70.210-.320**

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<sup>28</sup> The exception of Article VI, Section 23(a) relates to a city, by a public vote, issuing debt to fund construction of improvement of industrial plants. The exception is irrelevant to this suit.

<sup>29</sup> *Reiser v. Meyer*, 323 S.W.2d 514, 520-21 (Mo. App. 1959) (defining “commercial purposes”); and *see also State ex rel. Washington University v. Richardson*, 396 S.W.3d 387 (Mo. App. 2013) (defining albeit in MHRA context “public accommodation,” “public facility,” “offering or holding out to the general public,” “and “open to the public”)

78. RSMO. 70.210 permits cooperation agreements with private actors if the purpose is limited to public improvements or facilities, or common services:
79. These cooperation agreements violate the statute in that Polsinelli and Anthem are private commercial businesses and their respective real estate holdings are not “public improvements or facilities” and also do not provide “common services”, as those terms are understood both under their plain and ordinary meaning and as interpreted by the Missouri courts.

**In the Alternative, Unconstitutional – Refunds Divert Levy to Private not Public Purpose**

80. The Refund Ordinances divert the Earnings Tax and Payroll Tax receipts back to private entities, that is, the Cooperation Agreement Defendant Enterprises.
81. Article X § 3 requires that “Taxes may be levied and collected for public purposes only”, and so the Refund Ordinances are unconstitutional because the diversion of the receipts is to private entities and there is no other constitutional authority allowing those taxes.
82. Although the Refund Ordinances state that they are to benefit the public through economic development, there is also a private benefit to the Cooperation Agreement Defendant Enterprises receiving the refunds.
83. Because there is a private benefit to the Cooperation Agreement Defendant Enterprises receiving the refunds, the purpose of the refunds is not “public”.
84. There is no integrated economic development plan which describes refunds of this nature.

**Unconstitutional - Uniformity of Taxation**

85. The Refund Ordinances create a taxation system which is not uniform as to the class of taxpayers which are for-profit businesses.<sup>30 31</sup>
86. Under the Refund Ordinances all persons similarly situated are not treated alike.<sup>32</sup>
87. Discrimination is permissible under rational basis review but must be reasonable<sup>33</sup>.
88. The discrimination against all companies not getting refunds is not reasonable.
89. The Cooperation Agreement Defendant Enterprises, Neuner's private business interests, and General Marine are in the same or similar circumstance, in that they are all for profit business enterprises, and no reasonable distinction between them can be found to exist.
90. In the alternative the refund ordinances have no classification scheme associated with them at all.
91. Reasonable tax classifications must be based on real and substantial differences between those taxes and not taxed.<sup>34</sup>

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<sup>30</sup> *Mid-Am. Television Co. v. State Tax Comm'n of Missouri*, 652 S.W.2d 674, 680 (Mo. 1983).

<sup>31</sup> Equal protection does not require identity of treatment, but only requires that classification rest on real and not feigned differences, that distinctions have some relevance to the purpose for which classification is made, and that different treatments be not so disparate relative to difference in classification as to be wholly arbitrary. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231 (1954). Legislative classifications drawn in a taxing scheme are subject to the ordinary, traditional test of equal protection, under which a classification is upheld if it bears a rational relationship to a legitimate governmental purpose. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). Where entities separately classed are involved in activity normally associated with one classification, even if the other class could be more clearly defined to take account of such complexity, that is not necessary to be valid under equal protection, which only requires that the more superficial distinction be based on a rational relationship between the disparity in the treatment and the objective of the law. Further, in reviewing the constitutionality of a tax classification, the threshold requirement is that the scheme be motivated by a legitimate, permissible governmental purpose. The presumption of constitutionality can be overcome only by the most explicit demonstration of the classification as a hostile and oppressive discrimination against particular persons and classes. § 44:27.Uniformity—Classifications, 16 McQuillin Mun. Corp. § 44:27 (3d ed.).

<sup>32</sup> *Bopp v. Spainhower*, 519 S.W.2d 281, 289 (Mo. banc 1975), *Dean Taylor Cadillac v. Thompson*, 871 S.W.2d 5, (Mo. App. 1993).

<sup>33</sup> *Schnorbus v. Director of Revenue*, 790 S.W.2d 241 (Mo. en banc)



92. The Refund Ordinances are unconstitutional because they violate the Article X § 3 requirement of uniformity of taxation.

**Refunds Unconstitutional - Granting Public Money to Private Businesses**

93. The refund ordinances are grants to private corporations or “associations”.
94. The refund ordinances directly violate the Art. I, § 25 prohibition of granting public money to private corporations or “associations”.
95. The Refund Ordinances are unconstitutional because they violate the Art. VI § 25 prohibition on granting public money to private corporations or “associations”.
96. These Refund Ordinances do not fall into any constitutional or statutory exception.

**Reasonableness Test**

97. The refunds are not reasonable under a standard of reasonableness test similar to the rational basis test for equal protection, as that test has been applied to the uniformity of taxation provision of the Missouri Constitution.<sup>35</sup>

**Irreconcilable Conflict with the General Law of the State**

98. Even though a court should construe ordinances to uphold their validity unless the ordinances are expressly inconsistent or in irreconcilable conflict with the general law of

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<sup>34</sup> *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1249 (2004) (when there exists no legitimate distinction between the classes, and, thus, the tax scheme imposes substantially unequal tax burdens upon persons otherwise similarly situated, the tax is unconstitutional).

<sup>35</sup> *Associated Indus. of Missouri v. Director of Revenue*, 857 S.W.2d 182, 193 (Mo. banc 1993) (“Missouri’s uniformity clause uses a similar standard of reasonableness” to the equal protection clause’s rational basis standard), *rev’d on other grounds*, 511 U.S. 641, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994) (distinction between residents and non-residents in Missouri use tax violates commerce clause), as cited in *Michael Jaudes Fitness Edge, Inc. v. Dir. of Revenue*, 248 S.W.3d 606, 611 (Mo. 2008)

the state, in this case the Refund Ordinances are expressly inconsistent or in irreconcilable conflict with the general law of the state.<sup>36</sup>

### **Claim of Authorization**

99. The refund ordinances include a statement that the City is entering into the ordinances pursuant to the authority of the Revised Statutes of the State of Missouri. These statements of authorization state:

The City is authorized to enter into this Cooperation Agreement pursuant to the provisions of Sections 70.201 to 70.320 of the Revised Statutes of Missouri, as amended, and the Charter of the City of St. Louis.

100. Sections 70.201 to 70.320 of the Revised Statutes of Missouri contain no provisions which would authorize an arrangement such as the arrangements at issue here.
101. The only conceivably relevant provision is subsection 1 of RSMo. 70.220. That section only allows development of public improvements or facilities.
102. The locations where the for profit Defendants are located are not “public improvements or facilities”.
103. RSMo. 70.220 reads in full:
- Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision.
104. RSMo. 70.220 is inapplicable to the Refund Ordinances

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<sup>36</sup> *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 685 (Mo. 2000)

### Similarly Situated Ordinances

105. Discovery may reveal that there are other equivalent ordinances for other businesses.
106. All similarly situated ordinances favoring particular individual for profit enterprises but not all for profit enterprises are unconstitutional.

### STANDING OF PLAINTIFFS

#### Payroll Tax - General Marine

107. General Marine pays the Payroll Tax.
108. General Marine is harmfully affected by having to pay the unconstitutional tax.<sup>37</sup>
109. General Marine's payment of the Payroll Tax is not hypothetical.<sup>38</sup>
110. If General Marine does not pay the Payroll Tax General Marine will be:
- a. Subject to enforcement proceedings for which the penalties are both a fine of not more than \$500.00 and jail time of not more than six months,<sup>39</sup> and
  - b. Liable for interest and penalties.<sup>40</sup>

#### Refund Ordinances – Both Plaintiffs

111. All Plaintiffs have a legally protectable interest in the proper use and expenditure of tax dollars.
112. The refunds are:
- a. A direct expenditure of funds generated through taxation, and/or
  - b. An illegal expenditure of public funds.
113. As a result of the refunds the City is suffering pecuniary losses.

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<sup>37</sup> *Stewart v. Partamian*, 465 S.W.3d 51, 60 (Mo. 2015).

<sup>38</sup> *Lester v. Sayles*, 850 S.W.2d 858, 872–873 (Mo. banc 1993).

<sup>39</sup> Payroll Tax, City Code, 5.23.110.

<sup>40</sup> Payroll Tax, City Code, 5.23.090.

114. The refunds affect the public fisc.
115. In the alternative, to the extent Sections 70.201 to 70.320 of the Revised Statutes of Missouri are relevant, Plaintiffs have standing pursuant to RSMo. 70.320 which states:

Suits affecting any of the terms of any contract may be brought in the circuit court of the county in which any contracting municipality or political subdivision is located or in the circuit court of the county in which a party to the contract resides.

### **BURDEN**

116. There is a presumption of constitutionality for ordinances which can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.<sup>41</sup>
117. The general burden of proof rule has no application where, without the necessity for extraneous evidence, it appears from the provisions of the ordinance itself that it is unconstitutional.<sup>42</sup>
118. Here the Payroll Tax Ordinance is unconstitutional on its face and so the City bears the burden of proof as to its constitutionality.
119. Here the refund ordinances are unconstitutional on their face and so the City bears the burden of proof as to their constitutionality.

### **NO ADEQUATE REMEDY AT LAW, NO OTHER STATUTORY REMEDY**

120. As to all claims Plaintiffs suffer a legal wrong and have no adequate remedy at law.<sup>43</sup>
121. Plaintiffs have no other specific statutory method of review.<sup>44</sup>

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<sup>41</sup> *Dean Taylor Cadillac-Olds, Inc. v. Thompson*, 871 S.W.2d 5, 7 (Mo. Ct. App. 1993).

<sup>42</sup> *Dean Taylor Cadillac-Olds, Inc. v. Thompson*, 871 S.W.2d 5, 7 (Mo. Ct. App. 1993), *McKay Buick, Inc. v. Love*, 569 S.W.2d 740, 743 (Mo. banc 1978)

<sup>43</sup> Rule 92 and RSMo. 526.030.

<sup>44</sup> *State ex rel. Freeway Media, L.L.C. v. City of Kansas City*, 14 S.W.3d 169, 173 (Mo. Ct. App. 2000)

**COUNT I  
PAYROLL TAX  
GENERAL MARINE V. CITY OF ST. LOUIS  
DECLARATORY JUDGMENT**

122. General Marine incorporates all prior paragraphs.
123. A Declaratory Judgment as to the constitutionality of the Payroll Tax is available because:
- a. The lawfulness of the Payroll Tax is a real, substantial and presently existing controversy because General Marine is obligated by Ordinance 60737 to pay the Payroll Tax but makes a colorable argument that the Payroll Tax is unconstitutional and therefore unenforceable.
  - b. General Marine has a legally protectable interest which is directly at issue and which is subject to immediate or prospective consequential relief, because the payments due under the Payroll Tax affect General Marine's pecuniary interests.
  - c. The lawfulness of the Payroll Tax is ripe for judicial determination because the Payroll Taxes are due from General Marine on an on-going basis.
  - d. General Marine has no adequate remedy at law because disputes over the constitutionality of taxes are not subject to suits at law.<sup>45</sup>

**Prayer**

WHEREFORE under Rule 87 and RSMo. 527.010&c General Marine prays for declaratory judgment against the City of St. Louis that Ordinance 60737 imposing the Payroll Tax, codified at Chapter 5.23 of the City Code, is unconstitutional because it violates the

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<sup>45</sup> *City of Sullivan v. Truckstop Rests*, 142 S.W.3d 181, 193 (Mo App. 2003), citing *Grewell v. State Farm*, 102 S.W.3d 33, 36 (Mo 2003), as to pecuniary interest see: *Dodson v. City of Wentzville*, 133 S.W.3d 528, 535 (Mo App. 2004)

Missouri Constitution, Art. X § 1 and Art. VI § 19(a), because it imposes a tax not authorized by the constitution or statutes, for costs, and for such other relief as the court finds to be just, meet and reasonable.

**COUNT II  
PAYROLL TAX  
GENERAL MARINE V. CITY OF ST. LOUIS  
PERMENANT INJUNCTION**

- 124. General Marine incorporates all prior paragraphs.
- 125. The Payroll Tax ordinance is unconstitutional and enforcement of the Ordinance will result in an irreparable injury to General Marine’s property rights.<sup>46</sup>

**Prayer**

WHEREFORE under Rule 92 General Marine prays for a permanent injunction against enforcement of Ordinance 60737 imposing the Payroll Tax codified at Chapter 5.23 of the City Code, because it violates the Missouri Constitution, Art. X § 1 and Art. VI § 19(a), because it imposes a tax not authorized by the constitution or statutes, for costs, and for such other relief as the court finds to be just, meet and reasonable.

**COUNT III  
REFUND ORDINANCES  
ALL PLAINTIFFS AGAINST ALL DEFENDANTS  
DECLARATORY JUDGMENT**

- 126. Plaintiffs incorporate all prior paragraphs.
- 127. A Declaratory Judgment as to the constitutionality of the Refund Ordinances is available because:

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<sup>46</sup> *J.H.Fichman Co. v. City of Kansas City*, 800 S.W.2d 24, 27-28 (Mo. App. W.D. 1990), *Metmor Fin. v. Landoll Corp.*, 976 S.W.2d 454 (Mo App. 1998).

- a. The lawfulness of the Refund Ordinances is a real, substantial and presently existing controversy because Plaintiffs make a colorable argument that the Refund Ordinances are unconstitutional and therefore unenforceable.
- b. Plaintiffs have a legally protectable interest which is directly at issue and which is subject to immediate or prospective consequential relief, because have a legally protectable interest in the proper use and expenditure of tax dollars.
- c. The lawfulness of the Refund Ordinances is ripe for judicial determination because the refunds are being paid by the City on an on-going basis.
- d. Plaintiffs have no adequate remedy at law because disputes over the constitutionality of taxes are not subject to suits at law.<sup>47</sup>

### **Prayer**

WHEREFORE under Rule 87 and RSMo. 527.010&c Plaintiffs pray for declaratory judgment against all Defendants that Ordinances 68432, 68642, 68701, 69033, 69035, 69328 which call for refunds of portions of the Earnings Tax and Payroll Taxes to the for profit enterprise Defendants but not for all for profit enterprises are unconstitutional because they violate the Art X § 3 requirements of uniformity of taxation and no diversion of tax levies for private purposes and the Art. VI § 25 prohibition on granting public funds to private persons, for costs, and for such other relief as the court finds to be just, meet and reasonable.

### **COUNT IV REFUND ORDINANCES ALL PLAINTIFFS AGAINST ALL DEFENDANTS PERMANENT INJUNCTION**

128. Plaintiffs incorporate all prior paragraphs.

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<sup>47</sup> *City of Sullivan v. Truckstop Rests*, 142 S.W.3d 181, 193 (Mo App. 2003), citing *Grewell v. State Farm*, 102 S.W.3d 33, 36 (Mo 2003.)

129. All Plaintiffs have a legally protectable interest in the proper use and expenditure of tax dollars.

130. The refunds affect the public fisc.

**Prayer**

WHEREFORE under Rule 92 and RSMo. 526.030 Plaintiffs pray for the court to permanently enjoin all Defendants from enforcing Ordinances 68432, 68642, 68701, 69033, 69035, 69328 which call for refunds of portions of the Earnings Tax and Payroll Taxes to the for profit enterprise Defendants but not for all for profit enterprises, because the Ordinances are unconstitutional under the Art. X § 3 requirements of no diversion of tax levies for private purposes and uniformity of taxation and the Art. VI § 25 prohibition on granting public funds to private persons, for costs, and for such other relief as the court finds to be just, meet and reasonable.

**COUNT V  
RECOVERY OF TAXES PAID BY GENERAL MARINE UNDER PROTEST  
GENERAL MARINE AGAINST CITY OF ST. LOUIS**

131. Plaintiffs incorporate all prior paragraphs.

132. All Payroll Taxes paid by General Marine for liability starting at the beginning of the fourth calendar quarter of 2015 have been paid under protest.

133. If Plaintiffs prevail herein on Counts I or II the City will be required to return to General Marine all such Payroll Taxes and General Marine will be entitled to recover all such Payroll Taxes.

**Prayer**

WHEREFORE General Marine prays the court for a judgment ordering the City of St. Louis to return to General Marine all Payroll Taxes paid by General Marine starting in the fourth



calendar quarter of 2015, for costs, and for such other relief as the court finds to be just, meet and reasonable.

Respectfully Submitted,  
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