REL: 01/13/2006 Bessemer v. McClain

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2005-2006

1031917

City of Bessemer et al.

v.

E.B. McClain et al.

Appeal from Jefferson Circuit Court, Bessemer Division

(CV-03-1311)

PER CURIAM.

The cities of Bessemer, Homewood, Hoover, Hueytown, Mountain Brook, Trussville, and Vestavia Hills (collectively referred to as "the Cities"), all located in Jefferson County, appeal from the judgment of the Jefferson Circuit Court declaring various taxing ordinances adopted by the Cities invalid and imposing a constructive trust on the taxes collected by the Cities pursuant to those ordinances. We reverse and remand.

Background

On September 23, 2003, E.B. McClain and the Alabama Wholesale Distributors Association filed a complaint in the Bessemer Division of the Jefferson Circuit Court. On March 1, 2004, McClain amended his complaint to add as plaintiffs W.L. Petrey Wholesale Company, City Wholesale Grocery Company, Tobacco Post, L.L.C., and Charles Lee Rackley, Jr. (The plaintiffs are hereinafter referred to collectively as "McClain.") The complaint sought a declaration that the following municipal ordinances were invalid:

1. City of Bessemer Ordinance No. 3227, effective January 1, 2004, imposing a $.10 tax per pack of cigarettes and $.10 tax per package of smoking tobacco to be collected and paid by wholesalers of tobacco products delivering to retailers within the city limits of Bessemer and also imposing taxes on cigars, chewing tobacco, and snuff products;

2. City of Birmingham Ordinance No. 03-134, effective September 1, 2003, imposing a $.10 tax per pack of cigarettes and $.10 tax per package of smoking tobacco to be collected and paid by wholesalers of tobacco products delivering to retailers within the city limits of Birmingham and also imposing taxes on cigars, chewing tobacco, and snuff products;[(1)]

3. City of Fairfield Ordinance No. 964, effective October 1, 2003, imposing a $.10 tax per pack of cigarettes and $.10 tax per package of smoking tobacco to be collected and paid by wholesalers of tobacco products delivering to retailers within the city limits of Fairfield and also imposing taxes on cigars, chewing tobacco, and snuff products;[(2)]

4. City of Homewood Ordinance No. 2182, effective January 1, 2004, imposing a $.10 tax per pack of cigarettes and $.10 tax per package of smoking tobacco to be collected and paid by wholesalers of tobacco products delivering to retailers within the city limits of Homewood and also imposing taxes on cigars, chewing tobacco, and snuff products;

5. City of Hoover Ordinance No. 03-1978, effective January 1, 2004, imposing a $.10 tax per pack of cigarettes and $.10 tax per package of smoking tobacco to be collected and paid by wholesalers of tobacco products delivering to retailers within the city limits of Hoover and also imposing taxes on cigars, chewing tobacco, and snuff products;

6. City of Hueytown Ordinance No. 03-0812-02, effective September 1, 2003, imposing a $.10 tax per pack of cigarettes and $.10 tax per package of smoking tobacco to be collected and paid by wholesalers of tobacco products delivering to retailers within the city limits of Hueytown and also imposing taxes on cigars, chewing tobacco, and snuff products;

7. City of Mountain Brook Ordinance No. 1586, effective September 8, 2003, imposing a $.10 tax per pack of cigarettes and $.10 tax per package of smoking tobacco to be collected and paid by wholesalers of tobacco products delivering to retailers within the city limits of Mountain Brook and also imposing taxes on cigars, chewing tobacco, and snuff products;

8. City of Trussville Ordinance No. 2003-034-ADM, effective October 1, 2003, imposing a $.10 tax per pack of cigarettes and $.10 tax per package of smoking tobacco to be collected and paid by wholesalers of tobacco products delivering to retailers within the city limits of Trussville and also imposing taxes on cigars, chewing tobacco, and snuff products; and

9. City of Vestavia Hills Ordinance No. 1659-C, effective October 1, 2003, imposing a $.08 tax per pack of cigarettes and $.08 tax per package of smoking tobacco to be collected and paid by wholesalers of tobacco products delivering to retailers within the city limits of Vestavia Hills and also imposing taxes on cigars, chewing tobacco, and snuff products, as well as a license tax of $150 plus 3/4 of 1% of the annual gross sales from all tobacco products to be paid by anyone distributing tobacco products within the city limits of Vestavia Hills.[(3)]

McClain argued that the above-referenced municipal ordinances were invalid because, he argued, they improperly taxed tobacco products in violation of Act No. 414, Ala. Acts 1947. The title and pertinent sections of Act No. 414 provide:

"AN ACT

"To apply in, but only in, counties which have a population of 400,000 inhabitants, or more, according to the last or any subsequent Federal Census; to fix, levy and to require the payment to such counties of a license tax, in addition to all other taxes or licenses now required by law, of two cents ($0.02) for each package of cigarettes, containing not more than 20 cigarettes and ($0.02) for each additional 20 cigarettes or fractional part thereof in such package sold, stored, or received, for the purpose of distribution to any person, firm, corporation, club, or association within such counties, and to fix and levy a tax on smoking tobacco upon each package containing not more than 1 1/8 ounces .005 (½ cent) each package over 1 1/8 ounces and not exceeding 2 ounces $0.015 (1½ cents) over 2 ounces and not exceeding 3 ounces $0.025 (2½ cents) over 3 ounces and not exceeding 4 ounces $.035 (3½ cents) and $0.01 (1 cent) additional for each ounce or fractional part thereof over 4 ounces; to provide for the payment of said tax by the purchase and sale of stamps to be affixed to each said package of cigarettes or smoking tobacco sold or distributed, in such counties; to provide for the ascertainment, collection,

payment and distribution of such license tax and for the enforcement of this act; to prescribe penalties and fix the punishment for the violation of any provisions of this act; and to repeal any existing ordinances or statutes in conflict with the provisions of this act; to prohibit future license or excise taxes by municipalities; and to provide the effective date of this act.

"Be It Enacted by the Legislature of Alabama:

"SECTION 1. This act shall apply in, but only in, counties which have a population of 400,000 inhabitants, or more, according to the last or any subsequent Federal Census; this act shall not have the effect of altering or repealing in any wise any statute now in effect, but shall be in addition to and cumulative of all laws now in effect.

"....

"SECTION 3. In addition to all other taxes now imposed by law, every person who sells, stores, or delivers any cigarettes or smoking tobacco in any county subject to the provisions of this act, shall pay a license tax to the county, subject to the provisions of this act, and a license tax is hereby fixed, created and levied in the amount of two cents ($0.02) on each package of cigarettes containing not more than 20 cigarettes and ($0.02) for each additional 20 cigarettes or fractional part thereof in such package sold, stored, or received for the purpose of distribution or sale to any person, firm, corporation, club, or association within such county; and a license tax is hereby fixed, created and levied on smoking tobacco sold, stored or received for the purpose of distribution or sale to any person, firm, corporation, club or association within such county, upon each package containing not more than 1 1/8 ounces .005 (½ cent), each package over 1 1/8 ounces and not exceeding 2 ounces $.015 (1½ cents), over 2 ounces and not exceeding 3 ounces $.025 (2½ cents), over 3 ounces and not exceeding 4 ounces $.035 (3½ cents) and $0.01 (1 cent) additional for each ounce or fractional part thereof over 4 ounces; provided, however, that when the additional license tax hereby required to be paid

shall have been paid by a wholesaler or seller of cigarettes or smoking tobacco, such payment shall be sufficient, the intent being that such license tax hereby required to be paid shall be paid but once on each package of cigarettes or smoking tobacco. The tax levied by this act shall be paid through the use of stamps as herein provided.

"....

"SECTION 9. The license tax required to be paid by this act through the purchase of tobacco stamps from the Probate Judge shall be received by him and shall be distributed by him ....

"....

"SECTION 13. Upon this act becoming effective or operative in any county, every then existing ordinance of every municipality within such county which levies or imposes a license tax on tobacco products payable by purchase and affixation of stamps shall be, ipso facto, repealed to the extent that it levies or imposes a license tax on tobacco products payable by purchase and affixation of stamps, and no municipality within such county shall have power or authority to re-enact or pass any ordinance which levies or imposes [a] license tax on tobacco products payable by purchase and affixation of stamps so long as this act is operative in such county."

(Emphasis added.)

McClain asserted that the Cities adopted the ordinances in response to a provision in Governor Bob Riley's 2003 tax and accountability package that was to be voted on in a statewide referendum on September 9, 2003. If the provision had passed in the referendum, it would have prohibited local governments from taxing tobacco products in the future. Although the Governor's tax referendum subsequently failed, the ordinances adopted by the Cities in anticipation of the passage of the tax package remained in effect.[(4)]

The Cities filed a motion to dismiss the complaint. They argued that the complaint failed to state a claim upon which relief could be granted because the plaintiffs lacked standing to pursue their claims. The Cities also argued that the language of Act No. 414, Ala. Acts 1947, did not prohibit the municipal ordinances adopted by the Cities because, they argued, those ordinances did not impose tobacco taxes and did not direct that the taxes be collected through affixing stamps to tobacco products.

Homewood, Mountain Brook, Trussville, and Vestavia Hills also argued that venue in the Bessemer Division of the Jefferson Circuit Court was improper as to them. Those cities sought a dismissal or a transfer of the action as to them to the Birmingham Division of the Jefferson Circuit Court. The trial court denied their motion, finding venue in the Bessemer Division proper as to all the Cities.

McClain then requested that the trial court order the Cities to escrow all funds collected under their respective tobacco-tax ordinances pending a final hearing in this matter. The trial court granted this request.

On March 16, 2004, Cooper Green Hospital, a not-for-profit hospital operated by Jefferson County, sought permission to intervene in the action. Cooper Green Hospital asserted that it was responsible for providing indigent health care in Jefferson County for tobacco-related diseases and that the majority, if not all, of the allegedly illegal taxes collected by the Cities had been paid by smokers in Jefferson County. Cooper Green Hospital argued that those taxpayers who had actually paid the tax could not be identified and that, therefore, the funds could not be returned to those taxpayers. Cooper Green Hospital suggested that the best use of any illegally collected funds would be to subsidize the treatment at Cooper Green Hospital of Jefferson County residents who suffered from tobacco-related diseases. The trial court granted Cooper Green Hospital's motion to intervene. McClain suggested that the Bessemer Board of Education would also be a proper recipient for the purportedly illegally collected funds.

The trial court conducted a hearing on the issues raised in the declaratory-judgment complaint. In July 2004, the trial court entered an order (1) finding that E.B. McClain and the other plaintiffs were proper parties and had standing to bring the declaratory-judgment action; (2) declaring that the municipal taxing ordinances violated Act No. 414, Ala. Acts 1947; (3) ordering that the funds collected pursuant to the municipal ordinances be held in an interest-bearing account until such time as this case becomes final; (4) ordering that a trust be established under the doctrine of cy pres from the funds collected pursuant to the municipal ordinances to be distributed in a manner to be determined; and

(5) awarding an attorney fee to counsel for the plaintiffs. The trial court relied upon language in Act No. 414 itself and language in the title to that Act to conclude that Act No. 414 prohibited the Cities from enacting and collecting taxes on tobacco products in addition to those levied by Act No. 414, regardless of whether those additional taxes were payable through the purchase and affixation of stamps.

On August 5, 2004, the trial court conducted a hearing to determine to whom the funds improperly collected under the municipal ordinances should be disbursed and on the issue of the amount of the attorney fee. The trial court awarded an attorney fee to the plaintiffs' attorneys of 33 1/3 % of the common fund created by the illegally collected taxes. The trial court concluded that, after payment of the attorney fee, the balance of the common fund should be distributed to Cooper Green Hospital and to the Bessemer Board of Education.[(5)]

The Cities filed a motion to alter, amend, or vacate the judgment, which the trial court denied. The Cities appeal, making, among others, the following arguments:

"A. The court's lack of subject-matter jurisdiction mandates dismissal.

"B. The Bessemer Division is an improper venue for the Cities of Vestavia Hills, Trussville, Homewood and Mountain Brook.

"C. The unambiguous construction of [Act. No.] 414 permits local taxation without a tobacco stamp."

Analysis

"A. The court's lack of subject-matter jurisdiction mandates dismissal."

The Cities first argue that, under the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, § 40-2A-1 et seq., Ala. Code 1975, McClain was required to exhaust his administrative remedies before filing his complaint for a declaratory

judgment. Because McClain did not do so, the Cities argue, the trial court did not have subject-matter jurisdiction of this action. We disagree.

As McClain correctly argues, a party who raises questions of law that predominate over questions of fact in a particular action need not pursue administrative remedies. A party challenging the construction given a statute is raising a question of law. An administrative agency would be without authority to make a determinative ruling on such a statutory challenge. When the administrative body is without power to redress the complained-of harm, the complaining party is not required to engage in what would be a futile process. See Mingledorff v. Vaughan Reg'l Med. Ctr., 682 So. 2d 415 (Ala. 1996) (addressing a challenge to the validity and legality of a tax statute); and Budget Inn of Daphne, Inc. v. City of Daphne, 789 So. 2d 154, 157-58 (Ala. 2000) (addressing a challenge to a zoning ordinance).

These principles apply equally in this case. McClain, the complaining party, was not required to participate in administrative proceedings when the administrative body in charge of those proceedings would have had no authority to make a determinative ruling on McClain's complaint. In short, McClain had no administrative remedies to exhaust before filing the complaint for a declaratory judgment.

"B. The Bessemer Division is an improper venue for the Cities of Vestavia Hills, Trussville, Homewood and Mountain Brook."

McClain filed this complaint in the Bessemer Division of the Jefferson Circuit Court.[(6)] However, Homewood, Mountain Brook, Trussville, and Vestavia Hills are located entirely within the geographical boundaries of the Birmingham Division of the Jefferson Circuit Court. Homewood, Mountain Brook, Trussville, and Vestavia Hills filed a motion to dismiss the complaint or, alternatively, to sever and transfer the action as to them based on improper venue. They argued that the claims asserted against them could be brought only in the Birmingham Division of the Jefferson Circuit Court. The trial court denied the motion. Homewood, Mountain Brook, Trussville, and Vestavia Hills appeal that ruling.

We begin by reviewing the history of the Bessemer Division. In 1893, Local Act No. 281 created the Bessemer Division; however, that Division was subsequently abolished. In 1919, the Bessemer Division was recreated by Local Act No. 213 ("the Bessemer Act"). Section 2 of Act No. 213 provides:

"The said Circuit Court of the Tenth Judicial Circuit, holding at Bessemer, as in this Act provided, shall have, exercise and possess all of the jurisdiction and the powers which are now or which may hereafter be conferred by law on the several Circuit Courts of this State, which said jurisdiction and powers shall be exclusive in, limited to, and extend over that portion of the territory of the County of Jefferson, which is included in the

following precincts, to wit: [a physical description of what is commonly referred to as the Bessemer Cut-Off]...."

In Glenn v. Wilson, 455 So. 2d 2 (Ala. 1984), this Court addressed whether the Bessemer Act is jurisdictional or addresses solely venue:

"We acknowledge that some of the cases are less than clear and seem to confuse venue and jurisdiction by use of the term 'territorial jurisdiction.' However, we are convinced that -- except for those cases which by their nature can be adjudicated only in a particular county, such as suits for partition of land or suits to enforce a lien on land, both of which must be brought in the county where the land lies -- suits 'arising in' the geographical boundaries of the Bessemer Cutoff but filed in Birmingham (or, vice versa, suits 'arising in' the Birmingham Division but filed in Bessemer) are subject to transfer to the proper division pursuant to the provisions of § 12-11-11, Code 1975.

"'....'

"The Bessemer Cutoff legislation does not diminish the general jurisdiction of other circuit courts, either in Jefferson or other counties. Therefore, in those Jefferson County cases subject to transfer to the other division pursuant to § 12-11-11, a claim for transfer based on the improper filing may be waived, just as in a suit filed in some other county the parties may waive claims of improper venue."

455 So. 2d at 4-5 (citations omitted).

Subsequent decisions also have concluded that the Bessemer Act controls venue between the two divisions. See Ex parte

Walter Indus., Inc., 879 So. 2d 547, 552 (Ala. 2003) ("While at times this limitation [that the Jefferson Circuit Court, sitting in the Bessemer Division, could hear only cases 'arising in' that division] has been described as jurisdictional, this Court has recognized since Glenn v. Wilson, supra, that the limitation in the [Bessemer] Act is one of venue. In sum, the voluminous caselaw on this issue clearly holds that venue for an action filed in Jefferson County is proper in the Bessemer Division only if the cause of action 'arose' in that division."); Ex parte World Omni Fin. Corp., 491 So. 2d 236, 237 (Ala. 1986)("Venue in this case is controlled by the local act creating the Bessemer Division."); Ex parte Jackson, 516 So. 2d 768, 769 (Ala. 1986)(agreeing that the Bessemer Act "should be read as venue legislation rather than jurisdiction legislation"); and Ex parte Johnson, 692 So. 2d 843, 845 (Ala. Civ. App. 1997)("It is well established that the Bessemer Division is, in fact, a separate and distinct circuit with the same power exercised by the Tenth Judicial Circuit ... and that the legislation creating the two divisions in Jefferson County is 'venue' legislation rather than 'jurisdiction' legislation.").

When the rationale of those cases is applied to the facts of this case, it is evident that the claims asserted against Homewood, Mountain Brook, Trussville, and Vestavia Hills were improperly filed in the Bessemer Division because those claims did not arise in the Bessemer Division. Those municipalities enacted their ordinances in the Birmingham Division; those ordinances applied only in the Birmingham Division; and those municipalities enforced their ordinances in the Birmingham Division and collected the allegedly invalid tax there. Because none of these events occurred within the Bessemer Division, venue in the Bessemer Division was improper as to the claims asserted against Homewood, Mountain Brook, Trussville, and Vestavia Hills.

Accordingly, the trial court improperly denied the motion filed by Homewood, Mountain Brook, Trussville, and Vestavia Hills to dismiss or to transfer the action to the Birmingham Division. Venue as to those municipalities was improper in the Bessemer Division, and the trial court should have granted their motion to transfer the claims against them to the Birmingham Division.

McClain also argues that it would be wasteful and futile to require two different courts to hear the same claims, the same evidence, and the same defenses. However, we must construe the Bessemer Act consistent with the unambiguous language in that Act. The trial court erred in denying the motion to dismiss or, alternatively, to sever and transfer the claims against Homewood, Mountain Brook, Trussville, and Vestavia Hills to the Birmingham Division.

Because of the trial court's erroneous ruling, we normally would reverse its judgment and remand the case for the dismissal of the claims asserted against Homewood, Mountain Brook, Trussville, and Vestavia Hills or for a transfer of the claims against those municipalities to the Birmingham Division. However, because of the manner in which we resolve the substantive issue presented in this action, we conclude that, in this case, reversing the judgment as to those municipalities and remanding the case on the venue issue would serve no useful purpose. Under the facts and posture of this case, the trial court's error was harmless.

"C. The unambiguous construction of [Act No.] 414 permits local taxation without a tobacco stamp."

The trial court declared the ordinances invalid under Act No. 414, Ala. Acts 1947. In reaching its decision, the trial court answered affirmatively each of the following questions:

1. Is Act No. 414 clear in its purpose and applicability?

2. Does Act No. 414 prevent other taxation of tobacco products?

3. Do the ordinances adopted by the Cities conflict with Act No. 414?

4. Do the ordinances adopted by the Cities constitute improper license or privilege taxes under § 11-51-90, Ala. Code 1975?

The Cities appeal the trial court's ruling regarding the validity of their ordinances. The Cities argue that § 11-51-90, Ala. Code 1975, empowers municipalities to impose license fees and that Act No. 414 does not prohibit municipalities within Jefferson County from taxing tobacco products so long as the municipal tax or license fee is not imposed or enforced through the use of a stamp affixed to the tobacco products. The Cities also argue that the trial court erroneously relied upon nonspecific language found in the title to Act No. 414, when the specific language in the Act itself was unambiguous. "Municipalities have no inherent power of taxation. The state, however, having the power to tax, may delegate this power to a municipality. The authority of municipalities in Alabama to place a license tax on businesses and professions is found in Code 1975, § 11-51-90." Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle, 460 So. 2d 1219, 1222 (Ala. 1984) (citation omitted). Section 11-51-90, Ala. Code 1975, states, in pertinent part:

"(a) All municipalities shall have the following powers:

"(1) To license any exhibition, trade, business, vocation, occupation, or profession not prohibited by the Constitution or laws of the state which may be engaged in or carried on in the city or town.

"(2) To fix the amount of licenses, the time for which they are to run, not exceeding one year, to provide a penalty for doing business without a license, and to charge a fee of not exceeding five dollars ($5) for issuing each license;

"(3) To require sworn statements as to the amount of capital invested, value of goods or stocks, or amounts of sales or receipts where the amount of the license is made to depend upon the amount of capital invested, value of goods or stocks, or amount of sales or receipts and to punish any person or corporation for failure or refusal to furnish sworn statements or for giving of false statements in relation thereto.

"(b) The license authorized by subsection (a) of this section as to persons, firms, or corporations engaged in business in connection with interstate commerce shall be confined to that portion within the limits of the state and where the person, firm, or corporation has an office or transacts business in the city or town imposing the license.

"(c) The power to license conferred by this division may be used in the exercise of the police powers as well as for the purpose of raising revenue, or both."

This Court has generally interpreted § 11-51-90 as an express grant of power to municipalities to adopt ordinances fixing the amount of a license to conduct a trade or business in the municipalities. See Ridgeway v. City of Bessemer, 9 Ala. App. 470, 64 So. 189 (1914) (construing earlier codification of statute). Additionally, if the power delegated to a municipality by the State is not expressly limited, that delegation of power

is construed as including all of the taxing powers possessed by the State. Town of Hackleburg v. Northwest Alabama Gas Dist., 277 Ala. 355, 170 So. 2d 792 (1964).

We now turn to Act No. 414 to ascertain whether the ordinances violate that Act.

"This Court has held that the fundamental rule of statutory construction is to ascertain and give effect to the intent of the Legislature in enacting a statute. If possible, a court should gather the legislative intent from the language of the statute itself. If the statute is ambiguous or uncertain, the court may consider conditions that might arise under the provisions of the statute and examine results that would flow from giving the language in question one particular meaning rather than another. The legislative intent may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained by its passage."

Norfolk Southern Ry. v. Johnson, 740 So. 2d 392, 396 (Ala. 1999) (citations omitted). This Court has also recognized:

"The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."

IMED Corp. v. Systems Eng'g Assocs., 602 So. 2d 344, 346 (Ala. 1992). See also Alabama Farm Bureau Mutual Casualty Insurance Co. v. City of Hartselle, 460 So. 2d at 1223, in which the Court stated:

"[T]he intention of the legislature must primarily be determined from the language of the statute itself if it is unambiguous, and clearly expressed intent must be given effect without room for interpretation. Words used in the statute must be given their natural, plain, ordinary, and commonly understood meaning."

(Citations omitted.)

After reviewing the language of Act No. 414, we conclude that that Act prohibits municipalities subject to the Act only from reenacting or passing an ordinance that levies

or imposes a license tax on tobacco products "payable by purchase and affixation of stamps." The ordinances adopted by the Cities do not purport to impose or collect taxes by the "affixation of stamps." Thus, the ordinances challenged by McClain do not run afoul of the express language of Act No. 414.

Relying on language contained in the title to Act No. 414, McClain argues that the legislature intended to prohibit counties subject to the Act and municipalities within those counties from imposing any additional taxes or license fees on tobacco products. The title or preamble may be used to remove ambiguity or uncertainty in a statute; it cannot, however, be used to contradict the plain, unambiguous terms of the statute itself. See Newton v. City of Tuscaloosa, 251 Ala. 209, 218, 36 So. 2d 487, 494 (1948) ("both the preamble and the title of an act may be looked to in order to remove ambiguities and uncertainty in the enacting clause"); United States v. McCrory, 119 F. 861 (5th Cir. 1903) (if the act is free from doubt or ambiguity, the title of an act may not be resorted to in construing the act); and Bartlett v. Morris, 9 Port. 266 (Ala. 1839) (the title of an act may explain what is doubtful, but it cannot control what is contained in the body of the act). We recognize that Ball v. Jones, 272 Ala. 305, 132 So. 120 (1961), lends support to the argument that the language in the preamble or the title of an act controls even when the language in the body of that act is plain and unambiguous. However, this approach is not in accordance with other Alabama precedents. See also 2A Norman J. Singer, Statutes and Statutory Construction § 47:04 at 221-22 (6th ed. 2000) ("[T]he settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms."). Because Ball v. Jones stands for an incorrect proposition of law, we overrule that case insofar as it states that the preamble or the title of the act controls.

Thus, the title to Act No. 414 has no legislative authority except in the event the express language in the body of that Act is found to be ambiguous.[(7)] Because Act No. 414 is unambiguous on the issue presented here, there is no need to resort to the general language of the title as an aid to construing the Act. The ordinances adopted by the Cities do not violate the language found in the Act itself.[(8)]

McClain next argues that the tax levied by the ordinances does not fall within the taxing power granted municipalities by § 11-51-90, Ala. Code 1975, because, he argues, the Cities are taxing tobacco products rather than the privilege of engaging in a business. We disagree. The ordinances made the basis of this action impose license fees applied to those engaged in the business of selling, distributing, storing, or delivering tobacco products.[(9)] See Al Means, Inc. v. City of Montgomery, 268 Ala. 31, 104 So. 2d 816 (1958); and Evers v. City of Dadeville, 258 Ala. 53, 61 So. 2d 78 (1952). Section 11-51-90, Ala. Code 1975, expressly authorizes municipalities to enact this type of license fee.

Justice Bolin's special writing, dissenting in part, argues that this Court is justified in avoiding a literal interpretation of an act when a literal interpretation would produce an unjust and absurd result inconsistent with the purpose and policy of the legislative

enactment. We agree with this general premise. This rule was expressed in Sutherland Statutory Construction and cited with approval in Ex parte Meeks, 682 So. 2d 423, 428 (Ala. 1996), as follows:

"'It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.... It is fundamental ... that departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question. A construction resulting in absurd consequences as well as unreasonableness will be avoided.'

"Norman J. Singer, Sutherland Statutory Construction § 45.11, p. 61 (5th ed. 1993)."

(Emphasis added.) However, Sutherland's treatise on statutory construction quoted in Meeks tempered somewhat the propriety of resort to the absurd-results doctrine later at § 45.11, as follows:

"It is fundamental, however, that departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question. A construction resulting in absurd consequences as well as unreasonableness will be avoided. However, the absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said."

(Emphasis added.) This language appears at § 45.12 in the sixth edition of Statutes and Statutory Construction. See also the following from 73 Am. Jur. 2d Statutes § 114 (2001):

"There is also authority for the rule that uncertainty as to the meaning of a statute may arise from the fact that giving a literal interpretation to the words would lead to such unreasonable, unjust, impracticable, or absurd consequences as to compel a conviction that they could not have been intended by the legislature."

(Emphasis added.)

Justice Scalia has written extensively on problems associated with construing legislative enactments. He has described attempts to divine unexpressed and nontextual legislative intent as "nothing but an invitation to judicial lawmaking." Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 21 (Princeton University Press, 1997). Nevertheless, in his opinions, he has shown some tolerance for the power of the judiciary to overcome the plain meaning of the language in a statute. In Green v. Bock Laundry Machine Co., 490 U.S. 504, 527 (1989), he wrote as follows in an opinion concurring in the judgment:

"We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word 'defendant' in Federal Rule of Evidence 609(a)(1) that avoids this consequence; and then to determine whether Rule 609(a)(1) excludes the operation of Federal Rule of Evidence 403."

(Emphasis added.) Later, in United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994), Justice Scalia, in a dissent, stated:

"I have been willing, in the case of civil statutes, to acknowledge a doctrine of 'scrivener's error' that permits a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result. See Green v. Bock Laundry Machine Co., 490 U.S. 504, 527 (1989) (SCALIA, J., concurring)."

Under the foregoing logic, in order to invoke the language in the title of Act No. 414 in this case, we would first have to conclude that a literal reading of § 13 of Act No. 414, which prohibits a municipality from imposing a license tax on tobacco products "payable by purchase and affixation of stamps," produces an absurd result. We cannot so conclude. "An 'absurdity' mean[s] anything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion." 1 Words and Phrases, "Absurdity" (Perm. ed. 1964). Nor can this case fit under the heading of a "'scrivener's error' that permits a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result." We, therefore, decline to ignore the plain language of the body of Act No. 414.

For these reasons, we reverse the trial court's judgment declaring invalid the taxing ordinances adopted by the Cities. We remand this case for the trial court to enter a judgment in favor of the Cities and for further proceedings consistent with this opinion. Based on our resolution of this issue, we pretermit consideration of the other issues raised on appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

Nabers, C.J., and See, Harwood, Stuart, and Parker, JJ., concur.

Smith, J., concurs in part and dissents in part.

Bolin, J., concurs in part and dissents in part as to the rationale and dissents from the judgment.

Lyons and Woodall, JJ., dissent.

SMITH, Justice (concurring in part and dissenting in part).

I concur with the holding in the main opinion that venue in the Bessemer Division of the Jefferson Circuit Court was improper for the four municipalities located within the boundaries of the Birmingham Division of the Jefferson

Circuit Court. I also concur with the holding that E.B. McClain and the Alabama Wholesale Distributors Association were not required to exhaust administrative remedies before filing the complaint for a declaratory judgment. I respectfully dissent to the construction in the main opinion of Act No. 414, Ala. Acts 1947, and instead concur with the rationale expressed in Justice Lyons's special writing.

BOLIN, Justice (concurring in part and dissenting in part as to the rationale and dissenting from the judgment).

I agree with the rationale of the main opinion that supports its holding that venue in the Bessemer Division of the Jefferson Circuit Court was improper for the four municipalities located within the geographical boundaries of the Birmingham Division of the Jefferson Circuit Court. I also agree that E.B. McClain and the Alabama Wholesale Distributors Association, the original plaintiffs, were not required to exhaust administrative remedies before filing their complaint for a declaratory judgment. However, I must dissent from the conclusion that the trial court erred in declaring the municipal ordinances invalid. I believe that the municipal ordinances imposing an additional tax on tobacco products improperly tax tobacco products in violation of Act No. 414, Ala. Acts 1947.

When interpreting a statute, a court must first give effect to the intent of the legislature. BP Exploration & Oil, Inc. v. Hopkins, 678 So. 2d 1052 (Ala. 1996).

"The fundamental rule of statutory construction is that this Court is to ascertain and effectuate the legislative intent as expressed in the statute. League of Women Voters v. Renfro, 292 Ala. 128, 290 So. 2d 167 (1974). In this ascertainment, we must look to the entire Act instead of isolated phrases or clauses; Opinion of the Justices, 264 Ala. 176, 85 So. 2d 391 (1956)."

Darks Diary, Inc. v. Alabama Dairy Comm'n, 367 So. 2d 1378, 1380 (Ala. 1979)(emphasis added). To discern the legislative intent, the Court must first look to the language of the statute. If, giving the statutory language its plain and ordinary meaning, we conclude that the language is unambiguous, there is no room for judicial construction. Ex parte Waddail, 827 So. 2d 789, 794 (Ala. 2001). If a literal construction would produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute, such a construction is to be avoided. Ex parte Meeks, 682 So. 2d 423 (Ala. 1996).

In 1947, the legislature enacted Act No. 414, a general act of local application; the Act applied to Jefferson County, among other counties. The obvious purpose of the Act is to impose in counties having a population of 400,000 inhabitants or more a single tax on tobacco products. The municipalities located within the affected counties receive a portion of the tax levied under Act No. 414. The stamps required by the Act to be affixed to each package of cigarettes or smoking tobacco are merely used as a method for payment of the tax. The distinction the main opinion makes regarding taxation through the purchase and affixation of stamps under Act No. 414 and the taxation levied by the municipal ordinances challenged in this action is a distinction without a difference -- it is the taxation by individual municipalities the legislature sought to prohibit in Act No. 414.

While I agree with the statement in the main opinion that the absurd-results doctrine should be used sparingly, the technical construction applied by the main opinion, without considering the Act as a whole, to the phrase "payable by purchase and affixation of stamps" must yield to the intent of the legislature. The method used to denote payment of the tax (stamps as set out in Act No. 414 or direct payment as in the municipal ordinances) is immaterial; it is the taxation by individual municipalities already sharing in the tax collected by the County pursuant to Act No. 414 that the legislature sought to prohibit. The main opinion ignores § 3 of Act No. 414, which sets out the taxable obligation and provides that

"every person who sells, stores, or delivers any cigarettes or smoking tobacco in any county subject to the provisions of this act, shall pay a license tax to the county, subject to the provisions of this act .... The tax levied by this act shall be paid through the use of stamps as herein provided."

Section 2, the definitional section of Act No. 414, defines the term "stamps" to mean "the stamp or stamps by use of which the tax is [sic] levied under this statute is paid." By the terms of Act No. 414, the tobacco tax is ultimately levied on the consumer, but it is the licensee who is obligated to act as the collection agent for the State under § 3½.

Section 5 of Act No. 414 provides:

"Before any cigarettes or smoking tobacco shall be sold or delivered within the limits of any county subject to the provisions of the act by any wholesaler or dealer, such wholesaler or dealer shall affix to each package of cigarettes and smoking tobacco a stamp or stamps obtained from the Probate Judge of the county ...."

Section 7 makes it unlawful for any person required by the Act to affix stamps to cigarettes or smoking tobacco to fail to do so. Section 13 prohibits a municipality within any county to which the Act applies from passing any ordinance "which levies or imposes [a] license tax on tobacco products payable by purchase and affixation of stamps so long as this act is operative in such county."

Section 13 in its entirety provides:

"Upon this act becoming effective or operative in any county, every then existing ordinance of every municipality within such county which levies or imposes a license tax on tobacco products payable by purchase and affixation of stamps shall be, ipso facto, repealed to the extent that it levies or imposes a license tax on tobacco products payable by purchase and affixation of stamps, and no municipality within such county shall have the power or authority to re-enact or pass any ordinance which levies or imposes [a] license tax on tobacco products payable by purchase and affixation of stamps so long as this act is operative in such county."

Nothing in Section 13 of Act No. 414 negates the taxable obligation imposed by the Act on "any person who sells, stores, or delivers any cigarettes or smoking tobacco."

The main opinion's interpretation of Act No. 414 also ignores history. Tobacco taxes existed before the American Revolution. In 1794, Congress passed its first tobacco tax. Stamps were affixed to tobacco products to prevent fraud. See Pace v. Burgess, 92 U.S. (2 Otto) 372, 375 (1875)("[The stamp] was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked."). Tobacco stamps were used to deter black-market tobacco and to police interstate traffic of tobacco products. While stamps were the usual method of collecting license taxes when Act No. 414 was passed, technology has advanced to a degree that taxes on tobacco products can be effectively collected without the use of stamps. It is this current ability to effectively collect taxes without the use of stamps that has allowed the municipalities to create this new scheme of taxation.

The legislature has enacted additional legislation applicable to tobacco taxes in Jefferson County since Act No. 414 was enacted in 1947. In 1949, the legislature enacted Act No. 431, amending § 5 of Act No. 414 to provide for refunds or

credits for tobacco stamps on tobacco products later determined to be unsalable and amending § 6 to provide for seizure of unstamped tobacco products by the license inspector. In 1961, the legislature enacted Act No. 847, adding an additional tax to tobacco taxes in counties with a population between 300,000 and 500,000, the proceeds to be paid to the County Board of Education. Section 2 of Act No. 847 provides that "[t]he tax herein authorized to be levied shall be paid through the use of stamps ...." Act No. 42, Ala. Acts 1963, amended Act No. 847 to clarify that the added tobacco tax was intended to be a tax on the ultimate consumer with the wholesaler merely acting as the agent of the county. Act No. 42 also provided that the additional tax should be excluded from the gross sales in computing the sales tax.

In 1964, the legislature amended § 3 of Act No. 414, making it illegal to sell or barter "sample packs" of cigarettes and imposing a license tax on small packages of smoking tobacco. Act No. 133, Ala. Acts 1964. Section 1 of Act No. 133, amending § 3 of Act No. 414, provides that "the tax levied by this act shall be paid through the use of stamps as herein provided." Act No. 133 also amended § 5 of Act No. 414 to provide credits for purchased tobacco stamps that have been damaged or are unusable and amended § 6 to provide for an appeal of an order by which unstamped tobacco is seized. In 1965, the legislature enacted Act No. 524, imposing an additional tax on tobacco in counties with a population of 500,000 or more, with the revenue from the additional tax to be used to finance the building of a civic center. In 1969, the legislature amended Act No. 414 to provide a method for including recently incorporated municipalities in a share of the county tobacco-tax revenue when that municipality had not yet been subject to a federal decennial census. Act No. 327, Ala. Acts 1969.

I note that the legislature has given the Department of Revenue the authority to eliminate the requirement of affixing stamps on tobacco products subject to the tax levied pursuant to § 40-25-1 et seq., "Tobacco Tax." See § 40-25-2(g), which provides:

"The Commissioner of Revenue shall prepare and issue stamps in denominations for the amount of the tax imposed by this article provided that if the commissioner determines that it is not economical for the state to have a stamp prepared and issued for one or more particular types of packages of tobacco products, then he may by regulation prescribe the use of a stamp in a denomination other than for the amount of tax imposed with the difference between the amount of the tax actually imposed and the amount of the tax denominated by the stamp paid with the use of a monthly report; or he may require a monthly report without use of a stamp to report the amount of taxes due."

(Emphasis added.) Counties may request that the Department of Revenue collect any "county sales, use, rental, lodgings, tobacco, or other local taxes for which there is a corresponding state levy." § 11-3-11.3(a). The Department is authorized to issue rules and regulations for making returns and for assessing, collecting, and administering such taxes as it may deem necessary. § 11-3-11.3(f).

Regulation 810-7-1-.09 of the Alabama Department of Revenue Administrative Code, "Procedure for Reporting and Payment of County Tobacco Taxes on Cigarettes" provides as follows:

"(1) The license or privilege tax specified in all legislative acts, heretofore or hereafter enacted, regarding county tobacco taxes on cigarettes, which are to be administered and collected by the State Department of Revenue, shall be paid on all sales by any qualified wholesale distributor or retailer and any other person, firm, corporation, club or association within the State of Alabama, when such sales of cigarettes are made into said counties.

"(2) Payment of the tax due, if any, and a report, on a form prescribed by the Department, shall be filed with the Department on or before the twentieth day of each calendar month showing all sales of cigarettes into said counties for the preceding calendar month. A copy of the report shall be maintained by the taxpayer, along with proper documentation which adequately differentiates and substantiates the amount of tax paid and all deductions, exemptions, or credits claimed for each reporting period by county. Failure to receive a report form does not relieve the taxpayer from filing a report on or before the due date.

"(3) Payments may be by cash, check, electronic funds transfer (subject to the electronic funds transfer provisions), or any other legal tender.

"(4) The full amount of tax due shall be paid to the State Department of Revenue, in the manner and time allowed above without any discount or offset being

allowed, except for tobacco products returned to the manufacturer for credit as described herein.

"(5) Qualified wholesalers whose tobacco products are returned to the manufacturer, or destroyed by the manufacturer's representative, due to such products becoming unfit for use or consumption or after distribution, shall be allowed a credit on their monthly tax report only in the month in which proper documentation is received from the manufacturer. The following documents are required to substantiate credits: an original affidavit from the manufacturer, a credit memorandum, an authentic credit invoice or memorandum initiated by the qualified wholesaler to the purchaser of said products, and a copy of the qualified wholesaler's invoice to the manufacturer, and such other documentation as the Department of Revenue may require.

"(6) Sales exempted from tobacco tax by law are to be excluded from the taxable measure in the month that the sales occur.

"(7) Every manufacturer, distributor, and importer shall file with the Department of Revenue a report concerning all sales, releases, and deliveries of tobacco products to qualified wholesalers and retailers of this state made or authorized by such manufacturer, distributor, or importer during the preceding calendar month. Such manufacturer, distributor, or importer shall also file a report each month showing all shipments of tobacco products from a point outside this state into this state during the preceding calendar month.

"(a) The report required from manufacturers, distributors or importers shall provide the following information concerning each sale, release, or delivery:

"1. Name and address of purchaser.

"2. Invoice or document number and invoice date.

"3. Information pertaining to cancellation of invoices.

"4. Gross billing appearing on the invoice.

"(b) Each manufacturer, distributor, or importer shall file the monthly report with the Department of Revenue by the last day of each calendar month."

The foregoing regulation, by its terms applicable to Act No. 414, provides an alternative method of payment of the tax levied rather than the affixation of stamps on sales subject to Act No. 414. The validity of the regulation is not before us. If such a method of payment were implemented by the Department of Revenue, the tax levied by Act No. 414 would be payable by a means other than "by purchase and affixation of stamps." This would lead to the inconsistent, if not absurd, result that the municipalities could impose their taxes because payment would not be made by the use of stamps, but the tax collections under Act No. 414 would no longer be effectuated by stamps either.

Section 114 of Am. Jur. 2d Statutes states:

"There is also authority for the rule that uncertainty as to the meaning of the statute may arise from the fact that giving a literal interpretation to the words would lead to such unreasonable, unjust, impracticable or absurd consequences as to compel a conviction that they could not have been intended by the legislature."

73 Am. Jur. 2d Statutes § 114 (2001) (footnotes omitted).

The main opinion concedes that "[t]he title or preamble may be used to remove ambiguity or uncertainty in a statute ...." ___ So. 2d at ___. The title to Act No. 414 indicates that the Act broadly prohibits future license or excise taxes by municipalities. To rule that such taxes are not prohibited ignores the proper, yet sparing, use of the absurd-results doctrine to prevent the joining of a mere method of tax payment to the substantive imposition of the tobacco tax itself. Doing so creates an uncertainty (at best) or absurdity (at worst), which allows reference to the title of the Act to determine legislative intent.

I recognize that § 11-51-90, Ala. Code 1975, allows municipalities to impose a license tax on the privilege of doing business within a municipality based on gross receipts. However, the municipal-tax ordinances adopted by the Cities tax the tobacco products, not the privilege of doing business. Therefore, I disagree that § 11-51-90 provides the Cities authority for imposing the taxes at issue.

LYONS, Justice (dissenting).

Section 13 of Act No. 414, Ala. Acts 1947, prohibits a municipality within any county to which the Act applies from passing any ordinance "which levies or imposes [a] license tax on tobacco products payable by purchase and affixation of stamps so long as this act is operative in such county."

Section 13 in its entirety provides:

"Upon this act becoming effective or operative in any county, every then existing ordinance of every municipality within such county which levies or imposes a license tax on tobacco products payable by purchase and affixation of stamps shall be, ipso facto, repealed to the extent that it levies or imposes a license tax on tobacco products payable by purchase and affixation of stamps, and no municipality within such county shall have the power or authority to re-enact or pass any ordinance which levies or imposes [a] license tax on tobacco products payable by purchase and affixation of stamps so long as this act is operative in such county."

I agree with the following from Justice Bolin's special writing:

"I note that the legislature has given the Department of Revenue the authority to eliminate the requirement of affixing stamps on tobacco products subject to the tax

levied pursuant to § 40-25-1 et seq., 'Tobacco Tax.' See § 40-25-2(g), which provides:

"'The Commissioner of Revenue shall prepare and issue stamps in denominations for the amount of the tax imposed by this article provided that if the commissioner determines that it is not economical for the state to have a stamp prepared and issued for one or more particular types of packages of tobacco products, then he may by regulation prescribe the use of a stamp in a denomination other than for the amount of tax imposed with the difference between the amount of the tax actually imposed and the amount of the tax denominated by the stamp paid with the use of a monthly report; or he may require a monthly report without use of a stamp to report the amount of taxes due.'

"(Emphasis added.) Counties may request that the Department of Revenue collect any 'county sales, use, rental, lodgings, tobacco, or other local taxes for which there is a corresponding state levy.' § 11-3-11.3(a). The Department is authorized to issue rules and regulations for making returns and for assessing, collecting, and administering such taxes as it may deem necessary. § 11-3-11.3(f).

"Regulation 810-7-1-.09 of the Alabama Department of Revenue Administrative Code, 'Procedure for Reporting and Payment of County Tobacco Taxes on Cigarettes' provides as follows:

"'(1) The license or privilege tax specified in all legislative acts, heretofore or hereafter enacted, regarding county tobacco taxes on cigarettes, which are to be administered and collected by the State Department of Revenue, shall be paid on all sales by any qualified wholesale distributor or retailer and any other person, firm, corporation, club or association within the State of Alabama, when such sales of cigarettes are made into said counties.

"'(2) Payment of the tax due, if any, and a report, on a form prescribed by the Department, shall be filed with the Department on or before the twentieth day of each calendar month showing all sales of cigarettes into said counties for the preceding calendar month. A copy of the report shall be maintained by the taxpayer, along with proper documentation which adequately differentiates and substantiates the amount of tax paid and all deductions, exemptions, or credits claimed for each reporting period by county. Failure to receive a report form does not relieve the taxpayer from filing a report on or before the due date.

"'(3) Payments may be by cash, check, electronic funds transfer (subject to the electronic funds transfer provisions), or any other legal tender.

"'(4) The full amount of tax due shall be paid to the State Department of Revenue, in the manner and time allowed above without any discount or offset being allowed, except for tobacco products returned to the manufacturer for credit as described herein.

"'(5) Qualified wholesalers whose tobacco products are returned to the manufacturer, or destroyed by the manufacturer's representative, due to such products becoming unfit for use or consumption or after distribution, shall be allowed a credit on their monthly tax report only in the month in which proper documentation is received from the manufacturer. The following documents are required to substantiate credits: an original affidavit from the manufacturer, a credit memorandum, an authentic credit invoice or memorandum initiated by the qualified wholesaler to the purchaser of said products, and a copy of the qualified wholesaler's invoice to the manufacturer, and such other documentation as the Department of Revenue may require.

"'(6) Sales exempted from tobacco tax by law are to be excluded from the taxable measure in the month that the sales occur.

"'(7) Every manufacturer, distributor, and importer shall file with the Department of Revenue a report concerning all sales, releases, and deliveries of tobacco products to qualified wholesalers and retailers of this state made or authorized by such manufacturer, distributor, or importer during the preceding calendar month. Such manufacturer, distributor, or importer shall also file a report each month showing all shipments of tobacco products from a point outside this state into this state during the preceding calendar month.

"'(a) The report required from manufacturers, distributors or importers shall provide the following information concerning each sale, release, or delivery:

"'1. Name and address of purchaser.

"'2. Invoice or document number and invoice date.

"'3. Information pertaining to cancellation of invoices.

"'4. Gross billing appearing on the invoice.

"'(b) Each manufacturer, distributor, or importer shall file the monthly report with the Department of Revenue by the last day of each calendar month.'

"The foregoing regulation, by its terms applicable to Act No. 414, provides an alternative method of payment of the tax levied rather than the affixation of stamps on sales subject to Act No. 414. The validity of the regulation is not before us. If such a method of payment were implemented by the Department of Revenue, the tax levied by Act No. 414 would be payable by a means other than 'by purchase and affixation of stamps.'"

___ So. 2d at ___.

From the foregoing it is apparent that, at the time of the enactment of Act No. 414 in 1947, tobacco stamps were the means by which taxes on tobacco products were collected. Today, through legislation and regulations of the Department of Revenue, stamps are no longer required. What we must decide today is whether this change in law and technology authorizes this Court to apply Act No. 414 in a manner that permits a municipality to tax tobacco products without the use of stamps and thereby to avoid the prohibition against municipal activity set forth in § 13 of the Act.

The fundamental rule of statutory construction is that this Court is to ascertain and effectuate the legislative intent as expressed in the statute. League of Women Voters v. Renfro, 292 Ala. 128, 290 So. 2d 167 (1974). In Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc., 746 So. 2d 966, 969 (Ala. 1999), this Court stated: "However, when circumstances surrounding the enactment of a statute cast doubt on the otherwise clear language of the statute, we must look to other factors in determining legislative intent." (Emphasis added.) Later, the Court stated:

"As the plaintiff correctly points out, § 6-5-60 is not, on its face, limited to transactions involving intrastate commerce. We hasten to add, however, that there is no language in § 6-5-60 that conclusively indicates an intent on the Legislature's part to regulate transactions involving the shipment of goods through interstate commerce. Because the language of § 6-5-60, standing alone, is not conclusive on the question of legislative intent, and because other factors, including the legislative history of Alabama's antitrust statutes, as well as the state of the law at the time of their enactment, cast doubt on the original intent of the Legislature, we find it necessary to look beyond the language of the statute."

746 So. 2d at 973. The foregoing rationale applies to our determination of legislative intent with respect to Act No. 414. The Cities point out that § 13, on its face, does not prohibit taxing by municipalities through means other than stamps. I hasten to add, however, that there is no language in the Act, other than by negative implication, that conclusively indicates an intent to permit such taxation. Because the Act, standing alone, is not conclusive on the question of legislative intent, and because other factors, including the legislative history of Alabama's embrace of stamps as a means of taxing tobacco, as well as the accepted means of such taxation at the time of the enactment of the Act, cast doubt on the original intent of the legislature, I "find it necessary to look beyond the language of the statute."

Under Archer Daniels Midland Co., we can look to the circumstances as they existed at the time of enactment. I submit we can also look at the title or preamble of the act. Ball v. Jones, 272 Ala. 305, 132 So. 120 (1961), holds that in case of doubt or inconsistency between language in an enacting part of a statute and language in its title or preamble, the title or preamble controls. But see 2A Norman J. Singer, Statutes and Statutory Construction § 47:04 at 221-22 (6th ed. 2000) ("[T]he settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms."). See also Hamrick v. Thompson, 276 Ala. 605, 609, 165 So. 2d 386, 390 (1964) ("While the title of an act cannot contradict the plain and unambiguous terms in the enacting clause, the recitals of the title are available aids to the removal of ambiguity or uncertainty in the enacting clause. In cases of doubt in respect to an ambiguous legislative context, the preamble of an act must be resorted to to ascertain the intent and resolve the doubt. To arrive at the intent of the law, the whole act--title and enacting clauses--must be read." (emphasis added)). While these cases may conflict, this Court's most recent pronouncement in Archer Daniels Midland Co. authorizes, in my view, resort to the title or preamble in our pursuit of legislative intent. We can ignore the title or preamble only if we are prepared to overrule not only Ball, but also Archer Daniels Midland Co., and we have been asked to overrule neither.

When we look beyond the language of the statute, it is abundantly clear that the legislature intended to displace municipalities from the collection of tobacco taxes. Taxation of tobacco by stamps was the accepted means of collecting tobacco taxes in 1947 when the Act was passed. The title to Act No. 414 indicates a broad prohibition of future license or excise taxes by municipalities. Consistent with Archer Daniels Midland Co., I would affirm the judgment of the trial court.

I express no opinion on that aspect of the main opinion dealing with venue.

Woodall, J., concurs.

1. The City of Birmingham never answered the complaint. The record does not indicate that any further action was ever taken against the City of Birmingham, and the City of Birmingham is not listed as an appellant.

2. The City of Fairfield subsequently enacted Ordinance No. 967, repealing Ordinance No. 964. The City of Fairfield also asserted that it had not collected any taxes pursuant to Ordinance No. 964 and requested that the trial court dismiss the complaint as to it. The trial court granted this motion on agreement of the parties. However, the City of Fairfield subsequently notified the trial court that it had, in fact, collected some taxes under Ordinance No. 964 but had not added those tax revenues to the city coffers. The record is not entirely clear as to how this matter was resolved by the trial court. However, the City of Fairfield is not listed as an appellant.

3. According to McClain, the above-referenced ordinances were hastily adopted in 2003 when the Governor of Alabama, Bob Riley, was seeking the enactment by the legislature and the approval by the public of a package of tax bills, particularly Act No. 2003-109, a part of the Governor's tax and accountability package. This package contained a provision that would freeze municipal tobacco taxes at the rate then in place if voters approved the package. McClain asserted that the municipalities within Jefferson County enacted additional tobacco taxes in an attempt to "beat" the enactment of Governor Riley's tax package and the caps it would place on municipal tobacco taxes.

4. The legislature subsequently amended § 40-25-2, Ala. Code 1975, to prohibit the imposition of local taxes and/or license fees on tobacco products by a county or municipal government except through the use of stamps affixed to the tobacco product. See Act No. 2004-545, Ala. Acts 2004, § 1, amending § 40-25-2(i), Ala. Code 1975.

5. The trial court ordered that the Cities remit all of the funds collected under the taxing ordinances to the circuit court clerk of Jefferson County and that those funds be held by the clerk until the case was resolved on appeal or until the time for appeal had expired.

6. Jefferson County constitutes the Tenth Judicial Circuit; that circuit is divided into two divisions, the Birmingham Division and the Bessemer Division.

7. The language of the title and the body of the Act conflict. The title provides that Act No. 414 was enacted "to repeal any existing ordinances or statutes in conflict with the provisions of this act" while the language found in Section 1 of that Act provides that "this act shall not have the effect of altering or repealing in any wise any statute now in effect, but shall be in addition to and cumulative of all laws

now in effect." Here again, unless it is ambiguous, the language of the Act itself prevails.

8. However, the legislature has since addressed the authority of a local government to impose a tax or license fee on tobacco products. See § 40-25-2, Ala. Code 1975, as amended, effective May 18, 2004. That statute provides, in pertinent part:

"(h) The increases levied by this section shall be exclusive and shall be in lieu of any other or additional local taxes and/or license fees, county or municipal, imposed on the sale or use of cigarettes and/or other tobacco products. Notwithstanding the foregoing, an act of the Legislature or an ordinance or resolution by a taxing authority passed or enacted on or before May 18, 2004, imposing a local tax and/or license fee shall remain operative, but no additional local tax and/or license fee may thereafter be levied on the sale of cigarettes and/or other tobacco products.

"(i) Local taxes and/or license fees, county or municipal, imposed on the sale or use of cigarettes shall be paid to the local government through the use of stamps affixed to the product as provided herein for the state tax. Provided, however, this requirement shall not be interpreted to require the Department of Revenue to prepare all stamps or to collect all local taxes. Local governments may contract with another entity to collect their local cigarette tax but all local taxes must be collected as provided herein."

Thus, § 40-25-2, Ala. Code 1975, now prohibits any municipality from imposing a local tax or license fee on tobacco products, unless that tax was in existence as of May 18, 2004. Section 40-25-2 also expressly requires that all taxes or license fees on tobacco products be imposed through the use of stamps affixed to the product.

9. Black's Law Dictionary 940 (8th ed. 2004) defines a license tax or fee as "[a] monetary charge imposed by a governmental authority for the privilege of pursuing a particular occupation, business, or activity."