THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin S. Dukes, III, Special Circuit Court Judge for Beaufort County

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Case No. 2012-213239

Town of Hilton Head Island, — Respondent

v.

Kigre, Inc., — Appellant

AMENDED INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED IN FINDING THE RESPONDENT'S BUSINESS LICENSE FEE ORDINANCE VALID AND CONSTITUTIONAL.

A. **Burden of Proof**: Appellant acknowledges that a properly adopted municipal ordinance enjoys a presumption of constitutionality, and that Appellant Kigre, Inc. has the burden in this appeal of proving unconstitutionality beyond a reasonable doubt. See North Charleston Land Corporation v. North Charleston, 281 S.C. 470, 316 S.E.2d 137 (S.C. 1984). The Appellant asserts that the facts of this case adduced at trial clearly meet the burden and taken together, prove unconstitutionality beyond a reasonable doubt.

B. **Apportionment required under Complete Auto**: The Respondent attempts to counter the Appellant's argument that Complete Auto Transit, Inc. v. Brady, Chairman, Mississippi Tax Commission, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977) and its progeny, such as Goldberg v. Sweet, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989), require apportionment to ensure that each state taxes only its fair share of an interstate transaction, by simply stating that because the Respondent Town included a provision in its Ordinance stating that it will not levy its license fee tax on income "on which a license tax is paid in some other municipality or a county," it avoids the apportionment requirement. (Brief of Respondent at p. 7.) Unfortunately, neither logic nor legal precedent supports that position.

In overturning the former holding of Spector Motor Service v. O'Connor, 340 U.S. 602(1951), the Complete Auto Court did abrogate the then-underlying philosophy that interstate commerce should enjoy a sort of "free trade" immunity from state taxation.

(Complete Auto, supra, 430 U.S. at 278.) However, Complete Auto certainly did not issue the States, and by extension municipalities, "carte blanche" authority to tax interstate commerce. It instead set up the four-prong test discussed extensively in the Appellant's Brief at pp 11-16, and cautioned that a tailored tax, such as the Town's Business License Fee Ordinance, "must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." Id. at 289.

Applying that "careful scrutiny" to the Respondent's attempt to avoid the apportionment prong of the Complete Auto test through the above-cited "taxes paid to other jurisdictions" caveat, shows a creative, intentional and unsupportable theory that allows taxation on all interstate commerce unless and until another jurisdiction begins levying a similar tax. That is not the test set forth by Complete Auto, and harkens back to the lengthy discussion therein by Mr. Justice Blackmun wherein he noted that the "focus" of earlier Court decisions on the particular words "privilege of doing business" merely obscures the question of whether the tax produces a forbidden effect. Id. at 288. The appropriate analysis is whether the Town ordinance seeks to tax only its fair share of an interstate transaction. "The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." Travelscape, LLC v. South Carolina Department of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011), citing Goldberg, supra, at 262.

The bottom line on this analysis may be summed up by focusing on the traditional touchstone for internal consistency: "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would

result." Goldberg, id. at 262. If every state or foreign jurisdiction were to levy a business license fee "tax" that purported to reach all income of a manufacturing business operation like Kigre, Inc., which sells its products across America and into other parts of the world, it would clearly result in multiple taxation by numerous jurisdictions. The fact that the Town has artfully attempted to dodge the internal consistency analysis by saying it won't tax that interstate income if another jurisdiction does, does not in any way lessen its unfair over-reach into income generated in interstate commerce outside any fair claim of being related to the Town of Hilton Head Island.

As is admitted by the Respondent Town at page 7 of its Brief, "The income derived from interstate commerce is treated in the same manner as any other income." The Town's ordinance admittedly violates the four-prong test of Complete Auto in that it makes no effort whatsoever to tax only those portions of revenues from the interstate activity which reasonably reflect the in-state component of the activity being taxed, and as such it must be held as violative of the Dormant Commerce Clause that prohibits state actions that unduly burden interstate commerce. See Brief of Appellant, p.11.

The Respondent's attempt to boot-strap its argument that it "does not need to provide a method for calculating the portion of Respondent's business license fee which is allocated/derived from interstate commerce" (see Brief of Respondent, p. 7) based upon the 1946 case of Triplett v. City of Chester, 209 S.C. 455, 40 S.E.2d 684 (1946), is misplaced. Triplett was decided 31 years before the U.S. Supreme Court holding of Complete Auto, had no claims in the case relating to the Commerce Clause and interstate commerce, and basically simply stands for the proposition that a municipality could impose a license or

occupation tax upon a corporation within the city limits even though a portion of the business of the corporation was conducted outside of the city limits. Triplett did not address a factual situation where a business was manufacturing products for sale outside the city limits. But as is noted at page 13 of the Appellant's Brief, the South Carolina Municipal Association, relied on by the Town of Hilton Head Island, addressed manufacturing and the Complete Auto four-prong test: [T]he tax may be levied only if all four tests in the Complete Auto Transit case are met." (R. p. 246) The Handbook then goes on to specifically address Manufacturing:

> Manufacturing of goods intended to be shipped across state lines is not interstate commerce. Interstate commerce does not commence until the goods are shipped. **However, the activity of manufacturing produces no gross income as a general rule, and a business license must be computed on gross income from an activity subject to the privilege tax. A sale in interstate commerce may be a separate activity from the manufacture of the goods. Therefore, there must be an apportionment of the sales price to the manufacturing process conducted within the taxing jurisdiction.** (Emphasis added.) A tax on the capital invested in a business is no longer authorized by state law. SCMA Handbook, page 36, Defendant's Exhibit 2. (R. p. 247)

The Town acknowledges the Handbook is "[a] guidebook we use in doing our enforcement." (R. p. 113, lines 6 - 7) The Handbook's directive concerning the necessity of apportioning the manufacturing costs of products produced by Kigre for out-of-state sales is clear, concise and totally ignored by the Town of Hilton Head Island.

Triplett does, however, teach that an ordinance of this kind "must be construed liberally in favor of the citizen and strictly against the government, and no one can be held to payment of the tax unless he comes clearly within the terms of the particular statute or ordinance." Triplett, supra, 209 S.C. at 462.

C. **Relation To Services:** In response to the Appellant's assertion that the

Town also violates the fourth prong of the Complete Auto test in that it fails to make any effort whatsoever to correlate the amount of its business license tax to the services provided to the Appellant's business, the Town claims that it does not need to provide a "detailed accounting of the services provided." See page 9 of the Respondent's Brief. While it is true that the Supreme Court in Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175, 115 S. Ct. 1331, 131 L.Ed.2d 261 (1995) did hold that Complete Auto's fourth prong did not require a "detailed accounting" of the services provided to the taxpayer, it is undisputed that the tax must be fairly related to benefits provided the taxpayer. "The fourth prong of the Complete Auto test thus focuses on the wide range of benefits provided to the tax payer, not just the precise activity connected to the interstate activity at issue." Goldberg, supra, 488 U.S. at 267. The question once again boils down to an issue of fairness: is the Town of Hilton Head Island's business license fee tax fairly related to the presence and activities of Kigre, Inc. within the municipality?

Kigre contends that the Town of Hilton Head Island's response to this issue is typical and demonstrative of the Town's overall "laissez-faire" attitude toward its obligations under the U.S. Supreme Court holdings referenced above. In direct reply to Kigre's allegation that the Town violates the fourth prong of the Complete Auto test regarding the requirement that it show a reasonable justification for the tax, the Town simply says that "Police, fire protection, along with all of the advantages conferred by the Town's maintenance of a civilized society, are all justifications for imposition of the fee." See Brief of Respondent, p. 9. However, the Town admits it makes no effort whatsoever to determine whether or not the business license fees levied upon businesses are in any way fairly related to the "benefits"

that that town provides. Brief of Appellant, p. 15-16. That admission amounts to an admission that the Town does not attempt to correlate the amount of its business license fee in any way to benefits conferred by the Town.

Justice Souter in Oklahoma Tax Commission, stated that the fourth prong of Complete Auto "asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State." Oklahoma Tax Commission v. Jefferson Lines, Inc., supra, 514 U.S. at 200. While the fourth prong of the test may be met with relatively simplistic evidence of a municipality providing basic services that are related to benefits derived by the taxpayer, it still requires the Town to perform some analysis and prove some fair relationship between the amount of the tax and the activities of the taxed business. Otherwise, the fourth prong of Complete Auto is rendered meaningless, because any taxing body will always be able to produce some evidence of services provided, even if those "services" are limited to such instances as the Town of Hilton Head Island's annual contribution to the Beaufort County Sheriff's Office's budget to patrol southern Beaufort County.

At trial of this case, the Town produced no evidence, and admitted to no attempts, to correlate the amount of the annual business license fee tax to the benefits received by Kigre. See Mr. Markiw's testimony cited in the Appellant's Brief at pp. 16-17. To now contend that such an analysis (to prove a "fair" relationship of the tax to Kigre's presence or activities in the Town) is unnecessary because the Town provides some general public safety services, is to misconstrue the holdings of the U.S. Supreme Court on this point. "Complete Auto's fourth criterion asks only that the measure of the tax be reasonably related to the taxpayer's

presence or activities in the State." Oklahoma Tax Commission, id. at 200. Is there any evidence in this Record that the business license fee tax placed upon Kigre (and most other businesses on Hilton Head Island) is "reasonably related to the taxpayer's presence or activities in the State"? The answer is a resounding "No."

What is in the record is the following: On September 8, 2009, Kigre filed its Amended Answer and Counterclaim that asserted at paragraph 42: "In conducting its business activities, the Defendant does not need, nor require, nor does it have provided to it, any fairly related services by the Plaintiff." (R.p.63.) In response to that defense, at trial, the Town tendered Mr. Markiw, who testified that the Town does nothing to determine whether or not the business license fees levied upon businesses are in any way fairly related to the interests the Town provides. (Markiw testimony, R. p. 115, lines 16-20).

Mr. Markiw did affirm that the Town collects "about 7.9 million dollars a year in business license fees," but admitted that the Town doesn't seek to analyze where any services allegedly provided by the Town relate to the amount of money it gains from the business license fee on a yearly basis: "We don't provide that analysis; no." (R. p. 116, lines 4-9, and lines 14-17). A summary of his substantive testimony (as the only witness called by the Town to address this issue), is best shown by his final answer on this topic: "Do you have testimony for this Court that will provide us any useful guidance on the amount of specific services the town provides for businesses? His answer: "No." (R. p. 116, lines 21-25.)

The fourth prong of the Complete Auto test can be met by a showing that the taxing body has established a tax amount that is reasonably related to the taxpayer's presence or activities in the State. It is not an onerous burden; indeed, Justice Souter has made it clear

that the taxing entity is not limited to offsetting the public costs created by the taxed activity. Oklahoma Tax Commission, id., at 200. But there is still a requirement that the taxing entity (here the Town of Hilton Head Island) produce some evidence that the amount of the tax is fairly related to the taxpayer's presence or activities in the State. "Finally, the Commerce Clause demands a fair relation between a tax and the benefits conferred upon the taxpayer by the State." Oklahoma Tax Commission, id., 514 U.S. at 199, citing Goldberg, supra, 488 U.S. at 266-267, among others. From the trial testimony, it is obvious and basically admitted, that the Town of Hilton Head Island make no effort whatsoever to determine if the 7.9 million dollars a year it charges businesses such as Kigre, has ANY reasonable relationship to the businesses taxed. The Town's position is (very much like its position concerning its obligation to apportion gross income generated in-state versus out-of-state): "We simply don't do that." The Town's lack of action directly violates the requirements of the fourth prong of the Complete Auto test.

Classification: The Town has chosen not to respond to the Appellant's assertion at Section 3 of its Brief that the Trial Court erred in failing to hold that the Town of Hilton Head Island is not following the Business Fee License Ordinance as written and thus should be barred from enforcing same. In that portion of the Appellant's Brief, an in-depth review of the trial transcript shows unequivocally that the Town makes no effort whatsoever to adhere to the single most important provision of the Business License Ordinance: the classification of businesses "as determined by a calculated index of ability to pay." See Brief of Appellant, pp. 20-24. The Town offers no evidence in the record to contradict that assertion. There being no argument by the Town that the Appellant is incorrect in its

assertions in Section 3, Appellant requests this Honorable Court rule that the Town may not enforce an Ordinance where the Town has made no effort whatsoever to follow the requirements of the classification of businesses "as determined by a calculated index of ability to pay."

E. **Equal Protection:** The Appellant believes the legal issues regarding the Equal Protection argument have been well argued and thoroughly fleshed out, and relies upon its Brief, Section 2, regarding the law. However, the Appellant strongly disagrees with the factual argument made by the Respondent Town that it "utilizes the Standard Industrial Classification (SIC) Manual 1987, a classification system with a rational and reasonable basis. All businesses in the same classification are treated the same." Respondent's Brief at p. 11.

There is no reference by the Respondent to any evidence at trial regarding the Town's consideration or analysis of the Standard Industrial Code system prior to the Ordinance being adopted, nor of the system having any type of rational or reasonable basis. In truth, there was no attempt made by the Respondent at trial to in any way introduce, support, examine or explain the Standard Industrial Code. See Appellant's Brief, p. 22.

The Appellant also notes that there was no evidence whatsoever proffered at trial concerning any supposed rationale or reason for the exemptions under the Ordinance of certain types of businesses as are set forth at page 17 of the Appellant's Brief. The Respondent attempts to ameliorate this lack of evidence by suggesting that "the local industry license could be viewed as enacted to promote tourism." See p. 13 of Respondent's Brief. However, this is an attempt to argue facts not in evidence and not presented for consideration

to Judge Dukes. The Respondent Town chose not to produce evidence at trial and must now defend its Ordinance based upon the record, not by assertions of what "could be". The complete exemptions awarded certain businesses in agricultural production, the sale of art products, or certain types of food products (see Brief of Appellant, p. 17), also "could be" viewed as an opportunity to exempt certain businesses because some Town Council members had a more favorable opinion of their owners. This Court will never know the reasons behind the complete exemptions because despite the fact that the Appellant in its case in chief produced direct testimony of selective enforcement and discriminatory classifications (see testimony of Jeff Myers set forth at Appellant's Brief, p. 18), the Respondent Town chose not to proffer countering evidence into the trial record.

2. THE ISSUE OF ATTORNEYS FEES WAS PRESERVED FOR REVIEW.

In its Amended Answer and Counterclaim dated September 2, 2009, the Appellant Kigre, Inc. at Paragraph 53, specifically alleges that the "business license tax ordinance as applied does not provide for attorney fees to a business which prevails against an unconstitutional ordinance and the oppressive nature of the Town's activities in its effort to force payment of the business license tax and as such denies equal protection to this Defendant...." (Amended Answer and Counterclaim, R. p. 44) Judge Dukes did not rule on that argument in his initial Order Ending Case on February 2, 2012. Appellant Kigre, Inc. then timely filed its S.C. R. Civ. P. 52 and 59 Motion To Alter or Amend Judgment that specifically contained the following language:

> e. In order to insure that all of Kigre's positions are properly preserved for appeal, Kigre moves this Court to alter or amend the Judgment to address the following claims:
>
> 7. The fact the Ordinance allows the recovery of attorneys' fees by the

> Town for prosecution of an action to collect, but does not provide for the recovery of attorneys' fees by a business that defends it (sic) actions in refusing to pay business license fees not properly due and payable, denies the equal protection of the law to the defending business.

(Motion to Alter or Amend, R. p. 81)

Judge Dukes did not address the attorneys' fee issue in his Amended Order Ending Case, and Appellant Kigre, Inc. appropriately raised it on appeal at Section 5 of its Brief. (Brief of Appellant, pp. 25-26.) Respondent Town now seeks to avoid this issue by contending (notwithstanding the above language), that the issue was "not raised at trial" and therefore allegedly not properly preserved for review. (Brief of Respondent, p. 14.)

As the quoted provisions of Kigre's Amended Answer and Counterclaim clearly show, this issue was squarely raised to the trial court. The allegation made by the Respondent that since the issue was not addressed in Kigre's Summary Judgment Motion, it somehow supports the Town's contention that is was not preserved for review, is nonsensical in that only issues that are beyond factual dispute would be raised at the Summary Judgment stage, and there is never an obligation upon a party to raise any issue at the Summary Judgment level.

It is improper argument for the Respondent Town to assert that the trial court "was not given the relevant facts, case law and arguments either for or against Appellant's theory that the attorneys fees provision of the Ordinance is unconstitutional" (Respondent's Brief at p. 14), when no portions of the closing arguments at trial nor of the argument on the Appellant's Motion to Alter of Amend were preserved for the record. Likewise, it is inappropriate to refer to a letter written by Appellant's counsel to Respondent's counsel addressing the draft of an Order, which was neither evidentiary in nature nor tendered by the

Respondent in its Designation of Matter To Be Included In The Record On Appeal. And certainly no objective reader would construe the language of Paragraph 53 of the Amended Answer and Counterclaim and Paragraph "e 7" of the Motion to Alter or Amend (quoted above), as "passing reference." (See p. 14 of Respondent's Brief.)

Generally, an issue must be raised to and ruled upon by the trial court in order to be preserved for appellate review. As such, it was incumbent upon Kigre, Inc. to make a Rule 59(e) motion, as it did. See Travelscape, supra, at p. 110, citing Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731,734 (1998), noting that "proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court." All appropriate efforts having been made by Kigre, Inc. to raise the issue and seek to have it ruled upon by the trial court, the issue was preserved for appeal to this Court. Nothing more could have been done by Kigre, Inc. to bring the issue forward.

Assuming this Court finds the issue to have been properly preserved, the Appellant relies upon its arguments set forth at Section 5 of its Brief (p. 25-26), and further notes that the decision relied upon by the Town in its Responsive Brief (Taylor by Taylor v. Medenica, 331 S.C. 575 (1998)), actually makes clear why the attorneys' fee provision of the Town's Business License Fee ordinance is a violation of Kigre's Equal Protection rights. In Taylor, the Supreme Court made clear that it would only find a "one sided" attorneys' fee recovery provision appropriate where the recovery of attorneys fees by only one party is rationally related to the policy objectives of the ordinance or statute. For example, in Taylor, the Unfair Trade Practices Act was at issue, which the Court found to be used by individuals to protect the public interest. As such, it was an appropriate use of legislative power to

authorize the recovery of attorneys' fees by a prevailing Plaintiff. It was "a legitimate tool which supports the policy objectives of the statute." Id. at 579.

The Ordinance here at issue is a revenue ordinance, neutral in purpose on its face, which simply requires a taxpayer to tender to the Town a portion of its revenues based upon a calculation of percentage of gross income. The Business License Fee Ordinance was not set up to protect the public, to discourage fraud nor to encourage landowners to rightfully pay small contractors who have performed work on the property. To assert that a "one sided" attorneys fee recoverable only by the Town somehow is rationally related to the purpose of the ordinance is simply wrong under the Supreme Court's prior holdings requiring special circumstances for such a "one sided" recovery. Denial of attorneys' fees to Kigre, Inc. in this case is a denial of the equal protection of the law without rational, legal reason or basis.

3. THE COURT ERRED IN FAILING TO HOLD THAT KIGRE HAD PAID ALL THAT IT WAS LIABLE FOR PAYING UNDER THE EXPRESS TERMS OF THE BUSINESS LICENSE FEE ORDINANCE.

Appellant Kigre, Inc. relies upon its arguments set forth in Section 4 of its Brief (p. 24) relating to this issue. This issue boils down mainly to an issue of semantics, but anticipating future action by the Town (a reasonable assumption based upon past history), Kigre urges this Court to rule that, in fact, under the Complaint as brought by the Town, Kigre paid all Business License Fees due and payable through 2006 without other, superfluous language.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Master in Equity and Special Circuit Judge, and enter its Judgment in favor of the Defendant Kigre, Inc. on all Counterclaims.

Respectfully submitted,

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August 28, 2013

Attorney for Appellant Kigre, Inc.

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PROOF OF SERVICE

I certify that I have served the Amended Initial Reply Brief of the Appellant on the Town of Hilton Head Island by depositing a copy of it in the United States Mail, first class postage prepaid, on August 28, 2013, addressed to its attorney of record, Gregory M. Alford, P.O. Drawer 8008, Hilton Head Island, SC, 29938-8008.

This, the 28th day of August, 2013.

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