

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Town of Hilton Head Island,

Respondent

v.

Kigre, Inc.,

Appellant

Appellate Case No. 2012-213239

RECEIVED

JUN 19 2014

Appeal from Beaufort County

S.C. Supreme Court

The Honorable Marvin H. Dukes, III, Special Circuit Court Judge

PETITION FOR REHEARING

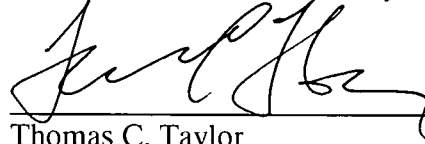
Pursuant to SCACR 221 and 240, the Appellant Kigre, Inc. respectfully petitions this Honorable Court for a rehearing in this matter. This Petition is filed within fifteen days after the filing of Opinion 27396, which was filed on June 4, 2014.

As the basis for this Petition for Rehearing, Kigre, Inc. would show unto this Honorable Court that the Court overlooked or misapprehended the following points raised by Kigre, Inc., in this appeal:

- a. The fact that the Town of Hilton Head Island's Business License Fee is an excise tax, and not an income or sales tax, does not affect the well-established premise first articulated in Complete Auto Transit, Inc. v. Brady, 430 U. S. 274 (1977), that the tax must be fairly apportioned and further, such an excise tax must pass the Goldberg v. Sweet "external consistency test."
- b. The Business License Fee ordinance violates the Equal Protection Clauses of the Federal and State Constitutions because it contains a provision that waives any fee from certain businesses, with the decision of waiver left solely to the Town Manager without any reasonable guidelines or parameters
- c. The Business License Fee ordinance denies the equal protection of the law to Kigre, Inc. and others similarly situated, in that it allows recovery of attorney's fees solely to the Town, and not to a prevailing, defending party.

Pursuant to SCACR 240, a Memorandum with citation of authorities in support of the Petition is being filed contemporaneously with this Petition for Rehearing.

Law Office of Thomas C. Taylor, LLC

A handwritten signature in black ink, appearing to read 'T. C. Taylor', written over a horizontal line.

Thomas C. Taylor

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Attorney for Appellant Kigre, Inc.

June 18, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Town of Hilton Head Island,

Respondent

v.

Kigre, Inc.,

Appellant

Appellate Case No. 2012-213239

Appeal from Beaufort County

The Honorable Marvin H. Dukes, III, Special Circuit Court Judge

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Pursuant to SCACR 240, the Appellant Kigre, Inc. files this Memorandum in Support of Kigre, Inc.'s Petition For Rehearing.

INTRODUCTION

This is an appeal challenging both the constitutionality and procedural application of the Town Of Hilton Head Island's Business License Fee Ordinance. Following its initial appeal to the Court of Appeals, the case was removed to the Supreme Court, arguments held on April 15, 2014 and a Per Curiam Opinion (No. 27396) issued on June 4, 2014. From that Opinion, a Petition for Rehearing was timely filed.

For the sake of brevity and judicial economy, Kigre, Inc. refers the Court to the background and undisputed facts of the case as are set forth in Kigre, Inc.'s Final Brief of Appellant dated May 16, 2013, as those facts are set forth therein at the "Statement Of The Case and Facts," pp. 1-10. Particularly important as to the portion of the Petition For Rehearing regarding the failure of this Court to address the issue of the "one-way" attorney's fee provision that Kigre, Inc. contends violates the Equal Protection dictates of the South Carolina and United States Constitution, Kigre, Inc. calls the Court's attention to the fact that Judge Dukes ruled that the Town "waived the right to collect on the \$41,645.81," which was the gravamen of the Town's initial action. (Record on Appeal, p.31) (See also the original Complaint by the Town, which sought the recovery of \$41,645.81 in "unpaid fees and late penalties" through causes of action labeled "Accounting" and "Recovery of Overdue Business License Fees." (Record on Appeal, pp. 32-36). Kigre, Inc. basically prevailed at the trial level, considering that the case was a collection action by the Town seeking \$41,654.81 - every penny of which was denied by Judge Dukes. Kigre, Inc. should have been entitled to seek recovery of its attorney's fees as the prevailing party at trial.

As the basis for this Petition for Rehearing, Kigre, Inc. respectfully suggests this Honorable Court overlooked or misapprehended the following points raised by Kigre, Inc., in this appeal:

- a. The fact that the Town of Hilton Head Island's Business License Fee is an excise tax, and not an income or sales tax, does not affect the well-established premise first articulated in Complete Auto Transit, Inc. v. Brady, 430 U. S. 274 (1977) that the tax must be fairly apportioned, and further, such an excise tax must pass the Goldberg v Sweet "external consistency test."

- b. The Business License Fee ordinance violates the Equal Protection Clauses of the Federal and State Constitutions because it contains a provision that waives any fee from certain businesses, with the decision of waiver left solely to the Town Manager without any reasonable guidelines or parameters.
- c. The Business License Fee ordinance denies the equal protection of the law to Kigre, Inc. and others similarly situated, in that it allows recovery of attorney's fees solely to the Town, and not to a prevailing, defending party.

ARGUMENT AND CITATION OF AUTHORITY

The Court's Per Curiam Opinion filed June 4, 2014, emphasizes the fact that the Business License Fee Ordinance is an excise tax—not an income or sales tax. The Court goes on to note that such an excise tax is a tax “on the privilege of doing business” within the Town, and reasons that as such, “it is the manufacturing activity of Appellant Kigre, Inc. which occurs wholly within the Town limits, and not Kigre's receipt of income or sales of its products in interstate commerce that is the business activity being taxed.” Kigre, Inc. (hereinafter “Kigre”) respectfully argues that this Court failed to recognize that the Complete Auto decision, the cornerstone of modern Commerce Clause jurisprudence, involved a gross receipts tax imposed on the privilege of doing business, even though it was labeled a “franchise” tax and was measured by receipts from “gross income.” The Supreme Court in Complete Auto ultimately upheld the tax because it was imposed only on in-state activity, but the Court clearly recognized that a tax on the privilege of conducting business is subject to the fair apportionment requirement. 430 U. S. 287, 97 S. Ct. 1076; see, e.g., Gwin, White & Prince v. Henneford, 305 U.S. 434, at 438-39, 59 S.Ct. 325 (1939) (gross receipts tax on the privilege of

conducting business must be properly apportioned); City of Winchester v. American Woodmark, 252 Va. 98, 471 S.E.2d 495, at 498 (same). See also O.H. Martin Co. v. Sharpsburg Borough, 376 Pa. 242, 102 A. 2d. 125, 126—127 (1954)(recognizing the important distinction between intrastate and interstate commerce when imposing a business privilege tax on gross receipts, and concluding that a Borough could impose a business privilege tax without apportionment because the ordinance taxed only those receipts derived from intrastate sales, and therefore, there was no threat of the Borough taxing outside its border); accord Wagman, Inc. v. Manchester Township, 112 Pa. Cmwlth. 357, 535 A.2d. 702, 706 (1988)(apportionment of business privilege tax not required where the ordinance specifically exempted from taxation receipts earned in interstate commerce.)

The Mississippi statute challenged in Complete Auto, Mississippi Code Annotated 1942 Section 10105 (1972 Supp), provided “There is hereby levied and assessed and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within the state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.” Id. at 275. Likewise, the Town of Hilton Head Island’s Business License Fee is specifically codified as a “privilege fee.” Final Brief of Appellant, p. 4.

The Town of Hilton Head Island, now and during the relevant time period, does not in any way apportion the gross revenues of a business to separate out revenues produced in interstate commerce. Steven Markiw, the Town Deputy Director of Finance, who was the Business License Fee administrator between 2002 and 2006, testified as follows:

Question: The Town of Hilton Head simply doesn’t care to know

whether or not Kigre's manufacturing is sold in the State of South Carolina or outside the State of South Carolina, right?

Markiw: I would agree.

Question: Your position is that they are liable for all of their sales.

Markiw: Yes.

Question: And the Town does not make any effort with anyone, Kigre or any other business, to apportion any type of tax if that entity maintains that its sales are out-of-state; is that correct?

Markiw: That's correct.

(Record on Appeal, p. 114, line 25 and page 115, lines 2-15).

During the relevant time period of this case, 2002-2006, Kigre sold more than 99.5 percent of the laser components and laser glass it manufactures on a yearly basis to out-of-state purchasers through interstate commerce. (Record on Appeal, p. 130, lines 10-23). The Town does not dispute that percentage of out-of-state sales. (Record on Appeal, p. 117, line 22- p. 118, line 10).

The "central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction." Goldberg v. Sweet, 488 U.S. 252, 260, 109 S. Ct. 582, 102 L.Ed. 2d 261 (1995). See also Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734, 55 L. ed. 2d 682, 98 S.Ct 1388 (1978)(a state tax impermissibly impedes on interstate commerce when it does not fairly reflect the income attributable to the taxing jurisdiction); Hartman, Federal Limitations on State and Local Taxation, *supra*, at Section 2.17 (the principle of "fair share" is derived from and interrelated with the Supreme Court's multiple taxation

doctrine.) When a state taxes more than its fair share, it creates the risk that the portion of value by which it exceeded its fair share will be taxed again by a state properly laying claim to its fair share of the value being taxed, thereby subjecting the taxpayer to multiple taxation. See Oklahoma Tax Commission v. Jefferson Lines, 514 U. S. 175, 184, 131 L. Ed. 2 261, 115 S. Ct. 1331 (1995)(avoidance of the risk of multiple taxation is the test of apportionment.)

The Town asserts, as a threshold argument, that apportionment is not even necessary in the instant case because the Business License Fee Ordinance, as a gross receipts tax upon the privilege of doing business, is exempt from the Commerce Clause's apportionment requirement. That is simply wrong.

As a general rule, gross receipts taxes imposed upon receipts from interstate commerce are prohibited unless the tax is apportioned to the taxpayer's activities in the state. See generally, Laurence H. Tribe, American Constitutional Law, Sections 6-19 and 6-20, at p. 465 (2nd Ed. 1988). Historically, however, the Supreme Court has not required apportionment of gross receipts from activities involving manufacturing and sales because the receipts occur in different states. In that regard, the Supreme Court of the United States has explained that unlike other business activities, manufacturing and sales are separate and discrete activities, each of which transpire completely within a single, separate jurisdiction. See, e.g., Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 107 S.Ct. 2819, 97 L. Ed.2d 199(1987). Thus, in levying a gross receipts tax, the state of origin can tax the manufacturing activity, and the state of destination can tax the selling activity, without the risk of multiple taxation for the same activity.

The Supreme Court has explained that:

A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of the sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future.

Jefferson Lines, id., 514 U.S. at 186, 115 S.Ct. 1331.

The U. S. Supreme Court has never held that gross receipts taxes as a whole are immune from apportionment. In fact, in recent years, the Supreme Court has distanced itself from the gross receipts tax and sales tax analogy, and made clear in Oklahoma Tax Commission v. Jefferson Lines that a gross receipts tax is “*simply a variety of tax on income, which [is] required to be apportioned to reflect the location of the various activities by which it [is] earned.*” 514 U.S. at 190, 115 S.Ct. 1331 (emphasis added). Thus, the Town of Hilton Head Island’s assertion that a gross receipts tax, such as the Business License Fee, is wholly immune from the Constitutional requirements of fair apportionment, is erroneous.

Tax commentators hailed the Supreme Court’s decision in Jefferson Lines for breaking the “misconceived analogy” between sales taxes and gross receipts taxes. See Piper & Eggen, Gross Receipts Taxes: General Principles, 1994, at Section 1610:0008a.

While Jefferson Lines sustained a state’s power to impose unapportioned retail sales taxes on the sale of services involving interstate activities, it strengthened taxpayer’s ability to assert the position that gross receipt taxes imposed on business activity must be fairly apportioned if they are measured by receipts from interstate business activity. By drawing a sharp line between gross

receipts taxes and retail sales taxes and characterizing the gross receipts tax in Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 68 S.Ct. 1260 (1948), as akin to an income tax, the Court called into question some of its earlier decisions that approved, with little analysis, unapportioned gross receipts taxes merely because they were imposed on a “local” subject and could loosely be analogized to retail sales taxes. Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, Section 18.08[5], at 18-65 to -66 (3d ed. 1998)(footnote omitted).

In addition, since Jefferson Lines, other jurisdictions have recognized taxpayer’s rights to apportionment of a gross receipts tax, just like all other forms of taxation on income. See, e.g., Polychrome Int’l Corp. v. Krigger, 4 F.3d 1522, 1540 (3d Cir. 1993)(“any tax—including one imposed on, or measured by, gross receipts from interstate and foreign commerce—must be apportioned to reflect only that business activity attributable to intrastate commerce.”); City of Winchester v. American Woodmark Corp., 252 Va. 98, 471 S.E.2d 495, 498(1996)(recognizing taxpayers’ right to apportionment of a gross receipts tax); Southern Pacific Transp. Co. v. Arizona Dep’t of Revenue, 202 Ariz. 326, 44 P.3d 1006, 1014 (2002)(“In our view, Jefferson Lines compels the view that gross receipts taxes ... must be apportioned to comply with the ... Commerce Clause.”); see generally Hellerstein & Hellerstein, *State Taxation*, Section 18.08[5].

Assuming this Court determines that its earlier Opinion overlooked or misapprehended these U.S. Supreme Court holdings regarding the applicability of the Complete Auto apportionment test, this Court must then apply that test to the Town of Hilton Head Island’s Business License Fee Ordinance challenged herein. To be fairly apportioned, a tax must be both internally consistent and externally consistent. See Goldberg v. Sweet, 488 U.S. at 260-61, as is discussed in the Appellant’s

Final Initial Brief at p. 13.

The Pennsylvania Supreme Court provided a detailed analysis of a similar situation in its holding The Philadelphia Eagles Football Club, Inc. v. City of Philadelphia, 573 Pa. 189, 823 A.2d 109(2003), a case where the City of Philadelphia levied a “Business Privilege Tax” on the team, which then challenged the privilege tax for failing to apportion from consideration the revenues generated by the team when it played outside of the State of Philadelphia. In a detailed, far-reaching analysis of the history of the apportionment prong of the Complete Auto test, the Pennsylvania Supreme Court held the City’s failure to apportion the team’s revenue generated out of state violated the Commerce Clause. That analysis is directly on point in this case.

After tracking the history of the Complete Auto test through Jefferson Lines, the Pennsylvania Supreme Court simply could not agree with the City’s argument that a gross receipts tax, identical in nature to the Town of Hilton Head Island’s Business License Fee, “is wholly immune from the constitutional requirement of fair apportionment.” 573 Pa. at 225.

Turning its attention to the application of the apportionment requirement to the football team’s gross receipts, the Court addressed both the internal and external consistency tests. There, as here, (see Appellant’s Final Initial Brief at p. 13), the Court properly determined that the internal consistency test would be met in the instant fact situation. (Here, the Town ordinance contains a provision stating that the Town would reduce the amount of the Business License Tax charged by Hilton Head by whatever similar tax a business paid “out of state.” Kigre presumes this Court, like the Pennsylvania Supreme Court, would find that provision would alleviate any concern about “double taxation” and thus met the standards of the internal consistency test.)

However, the Town of Hilton Head Island's Business License Fee, just like the City of Philadelphia's "Business Privilege Tax," fails the external consistency test articulated by the U.S. Supreme Court in Goldberg.

The external consistency requirement is a subjective test that asks whether a state taxed only that "portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed." Goldberg, 488 U.S. at 262, 109 S.Ct. 582. External consistency looks to the economic justification for the state's claim upon the value being taxed in order to discover whether a state is taxing economic activity that occurred in other jurisdictions. Jefferson Lines, 514 U.S. at 185, 115 S.Ct. 1331. In essence, there must be a "rational relationship between the income attributed to the [s]tate and the intrastate values" of the business being taxed. Philadelphia Eagles Football Club, id., 573 Pa. 226, citing Hunt-Wesson, Inc. v. Franchise Tax. Bd. Of California, 528, U.S. 458, 464, 120 S.Ct. 1022, 145 L.Ed. 2d 974 (2000)(citations omitted); see Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273, 57 L.Ed.2d 197, 98 S.Ct. 2340 (1978); 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law Section 13.5(3)(2nd Ed. 1992).

As the Pennsylvania Supreme Court held, an objecting taxpayer (such as Kigre), should be successful in striking down a tax if it demonstrates by clear and cogent evidence that the income attributed to the state either is "out of all appropriate proportion to the business transacted by the [taxpayer] in the state," Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123, 135, 75 L.Ed. 879, 51 S. Ct. 385 (1931), has "led to a grossly distorted result" for the taxpayer, Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n, 390 U.S. 317, 326, 19 L.Ed. 2d 1201, 8 S.Ct. 995 (1968), or is "inherently arbitrary" or "produced an unreasonable result," see

Moorman Mfg. Co. v. Bair, 437 U.S. 267, at 274 (quoting Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 121, 65 L.Ed. 165, 41 S.Ct. 45 (1920), and citing Norfolk & Western Ry. Co. 297 U.S. 682, 80 L.Ed. 977, 56 S.Ct. 625; Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S. 271, 69 L. Ed. 282, 45 S.Ct. 82 (1924). See Philadelphia Eagles Football Club, Inc., id., 573 Pa. at 227.

Applying the external consistency test in that fact scenario, the Pennsylvania Supreme Court determined that the City's levy on 100 percent of the Football Club's media receipts, when half of the games were played and televised from states outside of Pennsylvania, was "inherently arbitrary and had no rational relationship to the Football Club's business activity that occurred in Philadelphia." Id. at 227 (citations omitted). Focusing on the revenues generated outside of Pennsylvania, the Court noted that the City's business "privilege" tax actually "doubled" the Club's tax assessment, and "in this regard, the City's BPT assessment was plainly 'out of all proportion' to the Football Club's business activities in Philadelphia that generated the payment of media receipts. Id. at 228.

The Pennsylvania Supreme Court went on to hold that the trial court had erred in finding that the external consistency test asks whether the City had a justification for taxing any of the media receipts, rather than analyzing whether the City could fairly lay claim to all of the media receipts. Again referring to Jefferson Lines, the Court noted that the external consistency test looks to the economic justification for a jurisdiction's claims upon the value being taxed in order to discover whether a state is taxing economic activity that occurred in other jurisdictions. "Although domicile itself affords a jurisdiction the ability to tax the income of a domiciliary corporation, that

jurisdiction may not tax all of that income where another state taxes, or has the authority to tax, an apportioned share of that income. Id. at 230, citing Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979). Moreover, the Commerce Clause precludes a taxing jurisdiction from denying a taxpayer the right to a division of the tax base when a portion of that tax base is taxable in other jurisdictions. Id. at 231, citing Jerome R. Hellerstein & Walter Hellerstein, State Taxation, Section 8.02[4][a](3d Ed. 1998 and Supp. 2001)(a state may not restrict a taxpayer's right to divide the tax base if it conflicts with the taxpayer's rights under the Constitution). Cf. James H. Peters, Sales/Use Taxes: Is Fair Apportionment a Proper Test?, 6 State Tax Notes 105, 105(1994)(the primary objective of the fairness principle "is to confine a tax to activities or transactions occurring within the taxing state.")

From that analysis, the Pennsylvania Supreme Court ruled that "[t]he fact that the Football Club was commercially domiciled in Philadelphia and played some of its games there only meant the City was entitled to tax its fair share of the receipts, not all of the receipts as the Commonwealth Court found." Id. at 231.

[W]e disagree with the Commonwealth Court's conclusion that the imposition of the BPT in the instant matter was externally consistent, and instead find that it was grossly disproportionate to the activity that actually occurred in the City. Rather than taxing 100 % of the media receipts, the City should have apportioned the tax to exclude from the gross receipts calculation of the BPT the substantial media receipts attributable to the one out of every two football games that were played by the Eagles Team in, and telecast from, other taxing jurisdictions. As the City failed to do so, its imposition of the BPT in the instant case failed the external consistency test and violated the Commerce Clause.

Id., 573 Pa. at 232.

Applying the external consistency test to the Town of Hilton Head Island's Ordinance in the

instant case, reveals that the Town's actions against Kigre are grossly, and inequitably, over-reaching. Whereas the Court in the Eagles case found that the City's improper application of the tax to out-of-state generated revenues effectively "doubled" the amount that should have been taxed, the admitted facts of this case show that the Town's imposition of its "privilege tax" on Kigre's 99.5 percent of its income generated by out-of-state sales, effectively increased what the Town was entitled to tax by a multiple of two hundred. (As noted above, the Town does not contest that for the applicable time period, Kigre generated 99.5 percent of its gross revenues from out-of-state sales.) It would stretch credibility for the Town to argue that increasing its tax base from a legitimate \$500 to \$100,000, which is exactly the ratio at play here, would not be "inherently arbitrary" or "produced an unreasonable result" or "led to a grossly distorted result."

The requirement that a Business License Fee in South Carolina pass this "external consistency test" is the only explanation for the South Carolina Municipal Association's warning quoted at p. 14 of the Appellant's Final Initial Brief that when it comes to a manufacturing entity, such as Kigre, "there must be an apportionment of the sales price to the manufacturing process conducted within the taxing jurisdiction." The Town of Hilton Head acknowledges that this Handbook is "a guidebook we use in doing our enforcement." (Record on Appeal, p. 113, lines 6-7). The Handbook's directive concerning the requirement of apportionment of 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.

Whether due to the Court's inherent interest in supporting municipal tax measures properly promulgated and enacted, or whether due to the relatively small amount of the Business License

Fee charged by the Town of Hilton Head Island (in the broad scheme of an international business), this Court mistakenly failed to properly apply the external consistency test articulated in Goldberg, to the Town of Hilton Head Island's Business License Fee Ordinance. The result, unless this Court reconsiders its earlier holding, will be to deny all taxpayers in South Carolina who generate substantial revenue from out-of-state sales, the protection of apportionment of income required by the U.S. Supreme Court and the Commerce Clause.

As this Court considers this Petition For Rehearing, Kigre, Inc. respectfully requests the Court keep in mind Justices Powell and Blackmun's prophetic cautionary dissenting opinion in Moorman Mfg. Co.: "It is the duty of this Court 'to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers.' This duty must be performed with careful attention to the settings of particular cases and consideration of their special facts'." 437 U.S. at 283 (citations omitted). An excise tax is subject to the apportionment requirement of Complete Auto, and the Town's admitted failure to apportion any of Kigre's 99.5 percent out-of-state gross income from the effect of its Business License Fee, fails the external consistency test of Goldberg. Kigre, Inc. was and is entitled to have its gross income apportioned to in-state sales, and the Town wrongfully refuses to take that step. The Ordinance must be struck down as to its application to Kigre and other similarly situated businesses.

2. The Business License Fee Ordinance violates the Equal Protection Clauses of the Federal and State Constitutions because it contains a provision that waives any fee from certain businesses, with the decision of waiver being left solely to the Town Manager without any

reasonable guidelines or parameters.

The Town of Hilton Head Island Business License Fee Ordinance contains a provision that waives any fee from certain businesses, with the decision of waiver left solely to the Town manager without any reasonable guidelines or parameters. This provision, Section 10-1-200, states as follows:

Section 10-1-200 Local Industry License.

Any person who desires to exclusively engage in the business of offering for public sale at designated locations, **as determined by the town manager**, farm and garden products or flowers grown of the property of such person, or flower arrangements, arts or crafts produced in the home of such person, or seafood caught by such person, shall secure from the town an annual business license, but shall be exempt from the payment of a business license fee. (Emphasis added)

This provision, allowing for the complete exemption of payment of a business license fee by an undefined and unknown class of individuals, denies Kigre, Inc. and all other businesses and individuals similarly situated, the equal protection of the law. The Business License Fee Ordinance requires payment of a Business License Fee by all other similarly situated persons or businesses conducting similar operations. See the following non-exempted Standard Industrial Classification Manual rate classifications in the Ordinance (Record on Appeal, p. 153), Class 5999 “Promoter/Coordinator of Arts and Crafts Shows”; Class 53 “General Merchandise Stores”; Class 01 “Agricultural production—Crops”; Class 02 “Agricultural production—Animals”; Class 20 “Food and kindred products”; Class 09 “Fishing, hunting and trapping.”

The Equal Protection Clauses of our federal and state constitutions declare that no person

shall be denied the equal protection of the laws. U.S. Constitution, Amendment XIV, Section 1; S.C. Constitution, Article I, Section 3. “This simply means that no person, or class of persons, shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.” City of Beaufort v. Holcombe, 369 S.C. 643, 648, 632 S.E.2d 894 (2006), citing Harrison v. Caudle, 141 S.C. 407, 416, 139 S.E. 842, 845 (1927).

In evaluating whether an enactment affords equal protection, the Court must first decide what level of scrutiny to apply. In re Luckabaugh, 351 S.C. 122, 147, 568 S.E.2d 338, 351 (2002). Our courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny. See City of Beaufort v. Holcombe, id. at p. 648 and cases cited therein. If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). Inherently suspect classifications include those based on factors such as “race, religion or alienage.” Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 429, 593 S.E.2d 462, 469 (2004).

In this case, the businesses singled out for unfair exemption from the fee are not a facially “suspect” class of business, and thus it would be appropriate to use the “rational basis” test. To satisfy the equal protection clause under the rational basis test, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. Sunset Cay, 357 S.C. at 428, 593 S.E.2d at 469. So the question for this Court’s consideration is whether there is a rational basis for the *complete exemption* of certain individuals and businesses

based solely upon the Town Manager's potentially arbitrary opinions, from payment of any business license fee while all other businesses engaged in similar economic activities are forced to pay a business license fee.

Kigre's Chief Executive Officer Jeffrey Myers testified that the Ordinance as written and the Town's selective enforcement, result in discriminatory treatment to businesses. "They are charging some people business licenses and not charging others. Some of them according to the law and some them not according to the law." (Record on Appeal, p. 101, lines 13-18.)

"The thing is that every single area they don't charge some native island businesses and they do others. They don't charge some schools, they do others. They don't charge some non-profits, they do others. They charge some plantations, they don't charge others. And it's all depending on, oh, who's our friend, who has votes, who doesn't have votes. It's ridiculous."

Testimony of Jeffrey Myers, (Record on Appeal, p. 103.)

The Town admitted to this selective enforcement. Mr. Markiw, the person charged with the responsibility of enforcing the Ordinance, acknowledged that his finance office was well-aware of a number of businesses on Hilton Head set up to sell farm and garden products, flowers, flower arrangements, arts and crafts, and seafood, yet in the 27 years since the Business License Fee Ordinance had been enacted, not a single application for a business fee license had ever been made by one of them: "Now Mr. Markiw, has there ever been an instance since you've been in the finance department where there has been an application for such a business license?" Answer: "I don't believe so, no." (Record on Appeal, p. 110, lines 22-25 and p. 111, line 2.)

Mr. Markiw went on to admit (over objection) that he was personally aware of at least one

instance where there was an on-going farmers market that would require a business license (with no payment) operating routinely, but then stated that “due to staffing constraints, we can’t get to all of the businesses and we’re doing that right now.” Markiw, (Record on Appeal, p. 111, lines 19-25 and p. 112, lines 3-18.)

Kigre acknowledges that the Equal Protection Clauses are subject to a wide scope of discretion and legislative enactments are to be avoided only when they are without any reasonable basis. City of Beaufort, 369 S.C. at 649. A municipal ordinance is a legislative enactment and is presumed to be constitutional. The burden is upon Kigre to prove the unconstitutionality beyond a reasonable doubt. Id.

The Business License Fee Ordinance as written and its complete exemption for certain businesses to be determined on an apparent case-by-case basis by the Town Manager is plainly arbitrary and violates Kigre’s equal protection rights. The admitted discriminatory application of the Business Fee License likewise violates Kigre’s equal protection rights. There is no evidence in the record whatsoever that would support a “rational basis” argument for this exemption “of some but not of others” provision. As opposed to the City of Beaufort holding where this Court found that an exemption of a class of business owners from payment of a business license fee on renting their own property to themselves was appropriate because the exempted businesses were actually paying a business license fee on the business that they were operating, here, the Town Ordinance arbitrarily exempts an entire class of businesses from paying any type of business license fee, while at the same time forcing all other businesses in the Town of Hilton Head to pay a tax.

3. The Business License Fee Ordinance denies the equal protection of the law to Kigre,

Inc. and others similarly situated, in that it allows recovery of attorney's fees solely to Town, and not to a prevailing, defending party.

Section 10-1-120 of the Ordinance provides that the Town may charge a business, in addition to the fees due under the Ordinance, penalties and "costs of collection." (Record on Appeal, p. 153).

The Fourteenth Amendment to the United States Constitution and Art I, Section III, of the South Carolina Constitution forbid denial by the State of equal protection of the laws. When the constitutionality of a statute or ordinance awarding attorneys fees is questioned as a violation of equal protection, a court must determine whether the municipal classification is rationally related to the object of the statute. See Bradley v. Hullander, 277 S.C. 327, 287 S.E.2d 140 (1982).

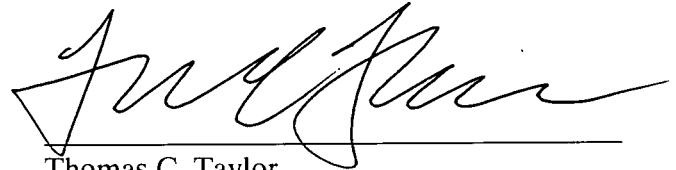
Our Supreme Court has held unconstitutional a similar statewide statute providing for the recovery of attorneys fees to successful plaintiffs in Southeastern Home Building & Refurbishing, Inc. v. V.F. Platt, Jr., 283 S.C. 602, 325 S.E.2d 328 (1985). There, as here, the classification of one of two similarly situated parties to allow for the recovery of attorneys fees, was held to reflect no rational relationship to an legitimate State (or Town of Hilton Head Island) goal. Authorizing fee awards to prevailing Defendants, as well as Plaintiffs, would not chill the Town's right to seek relief in Court. The provisions of Ordinance 10-1-120 allowing for attorneys fees under the "costs of collection" provision is an unconstitutional denial of equal protection to the Defendant Kigre, Inc.

The Town of Hilton Head Island initiated this collection action in March 2006 and it cost Kigre attorneys fees for more than six years of litigation, until Judge Dukes ruled against the Town on its request for damages on September 20, 2012 (Record on Appeal, p. 17-31.)

Kigre respectfully requests this Court hold an implied award of attorneys' fees is appropriate under the Ordinance for a business that ultimately defends itself from the Town's failed attempts to collect alleged past due taxes, penalties and collection costs under the Business License Fee Ordinance. Had the Town withdrawn the claim for damages in March 2007 when it moved to dismiss its case because of the clear waiver in failing to give Kigre its appeal hearing, much needless judicial time and private litigation costs in discovery as to the basis of the damages and amounts due could have been avoided. Because of the Town's baseless continuing collection actions, Kigre respectfully requests this Court hold that the imposition of attorneys fees against the Town would be appropriate and remand the case to Judge Dukes for further proceedings and the taking of evidence.

CONCLUSION

For the foregoing reasons, Kigre, Inc. prays that this Honorable Court reconsider its Opinion, withdraw the Opinion dated June 4, 2014, and issue a new Order holding that the Town of Hilton Head Island failed to properly apportion Kigre's out-of-state gross income, and provide such other and further relief as is requested herein.



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June 18, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Town of Hilton Head Island,

Respondent

v.

Kigre, Inc.,

Appellant

Appellate Case No. 2012-213239

Appeal from Beaufort County
The Honorable Marvin H. Dukes, III, Special Circuit Court Judge

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JUN 19 2014
S.C. Supreme Court

PROOF OF SERVICE

I certify that I have this date served a copy of the Appellant's Petition For Rehearing and Memorandum in Support of Petition for Rehearing, on the Respondent Town of Hilton Head Island, by depositing copies of same in the United States Mail, first class postage prepaid, on June 18, 2014, addressed to its attorney of record, Gregory M. Alford, P.O. Drawer 8008, Hilton Head Island, SC, 29938-8008.



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June 18, 2014