IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

LISA KRAGNES and all others similarly situated,	)	
Plaintiff,	)	Law No. CE 49273
vs.	)	
CITY OF DES MOINES, IOWA,	)	BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON REFUND ISSUE BY DEFENDANT CITY OF DES MOINES
Defendant.	)	

FACTS

The City adopts its statement of material facts not in dispute as the facts supporting this brief.

ARGUMENT

NO MEMBER OF THE PLAINTIFF CLASS IS ENTITLED TO A REFUND.

To understand why the law does not require the refunding of fees or taxes later disallowed, one need only reflect upon how a city serves its citizens.

When a citizen pays a fee or tax, the money typically goes into the general fund of the city. Iowa Code §384.3. And it is from the general fund that many city services flow. The police officer who investigates the burglary of the citizen's home is paid from the general fund. The EMT who keeps the citizen alive and transports her to the hospital after a heart attack at her home is paid out of the general fund. The public works drivers who plow the snow from her street are paid for with general fund money.

Of course, once the citizen receives those services, even if those services are paid for with fees or taxes later found to be unwarranted, one truth becomes immediately apparent: the citizen is

in no position to refund the benefits and services she received.

Therefore, says the Iowa Supreme Court, given that citizens cannot refund the services they receive from taxes or fees paid and later found to be prohibited, it "...would, under the circumstances, be unjust and mischievous in its consequences" to require the government to refund the money paid. Kraft v. City of Keokuk, 14 Iowa 86, 1862 WL 275, *1 (Iowa 1862).

In Kraft, the plaintiff paid a fee for a liquor license. The fee was based on a city ordinance. The city ordinance was based on a state statute. Later, the state statute was declared unconstitutional and void. The plaintiff sought refund of the fee. The trial court denied the plaintiff's claim, and the Supreme Court affirmed, saying:

> that the plaintiff enjoyed the same advantages from his permit and monopoly to sell liquor that he would have done if the law had been effectual and valid.

Id.

The parallels between Kraft and this case are inescapable.

Here we have franchise fees based on an ordinance based on a statute. The Supreme Court says that the fees are statutorily allowed and otherwise legal. All that is missing is for the fees to be reasonably related to the costs and incidental consequences occasioned by the presence of the gas and electric utilities in the City. Kragnes v. City of Des Moines, 714 N.W.2d 632, 643-44 (Iowa 2006). And of course, Plaintiff Kragnes and all the members of the Plaintiff class enjoyed the services they received from the franchise fees they paid.

The Kraft court articulated another policy reason for no-refund rule. The second policy reason for no refund is grounded in the old legal maxim that ignorance of the law is no excuse. The court said:

> The claim is based upon no charge of fraud, duress, deceit, or even mistake of fact, but is founded alone upon the idea of a mistake in law, unsupported by any principle of conscience, equity or morality; in other words, that the plaintiff was ignorant that the act of the legislature referred to was inoperative and void when he paid to the city of Keokuk the $200 aforesaid, for the privilege of vending intoxicating liquors for the term of six months. The law does not permit him to allege this ignorance, and make it the foundation of his right to recover back the money.

Kraft, 1862 WL at *1.

That same reasoning applies to this case. The named Plaintiff, Ms. Kragnes, makes no charge of fraud, duress, deceit or even mistake of fact on behalf of herself or any class member.

The Kraft court continued:

> The principle upon which courts refuse to relieve mistakes in law, is, we suppose, the fact that the law presumes every man to be cognizant not only of what are its provisions in force, but how far they are valid and operative.

Id.

Though the vintage of Kraft is not recent, its vitality is unquestioned. For more than a century, Iowa courts and commentators have continued to follow Kraft and cite it with approval. Espy v. Town of Ft. Madison, 14 Iowa 226, 1862 WL 317, *1 (1862); Bailey v. Incorporated Town of Paulina, 29 N.W. 418, 419 (Iowa 1886); Hawkeye Loan & Brokerage Co. v. City of Marion, 81 N.W. 718, 720 (Iowa 1900); Ahlers v. City of Estherville, 104 N.W. 453, 454 (Iowa 1905); Gronstal v. VanDruff, 261 N.W. 638, 640 (Iowa 1935); Pruss v. IA. Dept. of Revenue, 330 N.W.2d 300, 306 (Iowa 1983); 1979 Op. Atty. Gen. 42; 1982 Op. Atty. Gen. 525; 1984 Op. Atty. Gen. 137.

The rule of no refund of taxes and fees later found to be wanting is not confined to Iowa.

Indeed, it is the general rule across the country. McQuillin, Municipal Corporations, 3rd Rev. Ed., §44.180 ["...generally, in the absence of statute there can be no recovery of taxes voluntarily paid."]; 1 A.L.R. 6th 229 (2005), ["generally... a voluntary payment of a tax, even an illegal tax, is not recoverable in the absence of statutory authority providing for recovery."]

From the above authorities come not only support for the no-refund rule laid down in Kraft, but two additional policy reasons to support the rule. The first is a policy grounded in pure logic and common sense:

> As government is dependent on taxation for its maintenance, the local subdivision that levied the illegal or unconstitutional tax would have to tax the taxpayer to raise the necessary money to return to them the illegal or unconstitutional tax collected. In other words, the taxpayer would have to be paid the illegal tax, paid by them, out of their own pockets.

48 A.L.R. 1381 (2006).

The fourth policy reason behind the no-refund rule is based upon the difficulty in arriving at municipal budgets. It holds that:

> The policy...is to avoid the financial uncertainty that would be caused by taxpayer demands for refunds following the discovery that the taxing authority collected and spent monies under an illegal tax.

1 A.L.R. 6th 229 (2005).[1]

As indicated, there are exceptions to the general rule of no refund. None of the exceptions is available to the Plaintiff class here.

---

[1] The Iowa Supreme Court very recently reiterated those same policy concerns of certainty when it comes to the city budget process. Sutton, et. al v. Dubuque City Council, 85/04-1067, 86/04-1196, *9 (Iowa 9/29/06), citing Sergeant Bluff – Luton School Dist. v. City Council of Sioux City, 605 N.W.2d 294, 298 (Iowa 2000).

The first exception to the no-refund rule is when a statute explicitly authorizes a refund. Burlington Northern Railroad Co. v. Bd. of Supervisors v. Adair County, 418 N.W.2d 72, 74 (Iowa 1988). It is obvious from Burlington that the legislature knows how to pen a statute that explicitly authorizes a refund of a tax or a fee. Id.; *See also*: Iowa Code §80A.5(2) [Private investigation application fee refunded if applicant disapproved.]; Iowa Code §123.38 [Portion of liquor fee refundable when license voluntarily surrendered.]; Iowa Code §321.192(1) [D.O.T. given discretion to refund driver's license fees in certain instances.]; Iowa Code §423B.4 [Local vehicle tax not refunded even when state registration fees are refunded.]; Iowa Code §505.11 [Commissioner of Insurance given power to refund taxes and fees in certain instances.]; Iowa Code §422.73(1) [Income, corporate and franchise tax, penalty and interest subject to refund if paid when not due.]; Iowa Code §437A.14(2)(b) [Refund of replacement tax possible if paid under written protest.]; Iowa Code §445.60 [Property tax erroneously or illegally paid subject to refund if claim made within two years of due date.]

But in this case, the legislature does not make the franchise fees at issue subject to a statutory refund. Iowa Code §364.2, entitled "Vesting of Power – Franchises" contains reference to franchise fees, but no provision for refund of those fees under any circumstances. Likewise, Iowa Code §§480A.3 and 480A.6, which both mention franchise fees, are significantly silent as to the refund of those fees.

The other exception to the no-refund rule is of common law origin. It begins with Winzer v. City of Burlington, 27 N.W. 241 (Iowa 1886). There, a person paid city taxes, but only after the treasurer told the person that the person's land would be sold if he did not pay the taxes. He then paid the taxes under protest. Id. Later, he sought a refund. The district court granted the same,

declaring the tax illegal, and the Supreme Court affirmed, saying:

> We think that where a tax is not merely informal and irregular, but is illegal and void as being levied upon property not liable to taxation, and the owner of the property makes payment under protest, the better rule is that he may recover it back. Such seems to be the policy of our law.

Id. at 243.

Winzer received judicial gloss in Newcomb v. City of Davenport, 53 N.W. 232, 232-33 (Iowa 1892) where the court adopted the refund rationale of Dillon on Corporations, 4th Ed., and said a refund would be available only if authority to levy the tax was "wholly wanting" or the tax itself was "absolutely void," and the payment was made under actual compulsion (such as seizure of goods), with mere payment under protest not equaling compulsion. That case involved a sewer assessment, and the court said that since the assessment was authorized under law and since the City had authority under law to collect the assessment, no refund was available. Id.

Of course, the second prong of the Winzer/Newcomb tests is moot, as the validity of the franchise fees at issue was established by the Kragnes decision..

To begin with, the franchise fee is not wholly void. If Plaintiff Kragnes had prevailed in her claim that the franchise fees were illegal taxes, a different outcome on the refund issue might result. But she did not prevail on that issue. The Supreme Court could not have been clearer in saying that the franchise fees were not illegal taxes, but instead were statutorily permitted. Kragnes, 714 N.W.2d at 643.

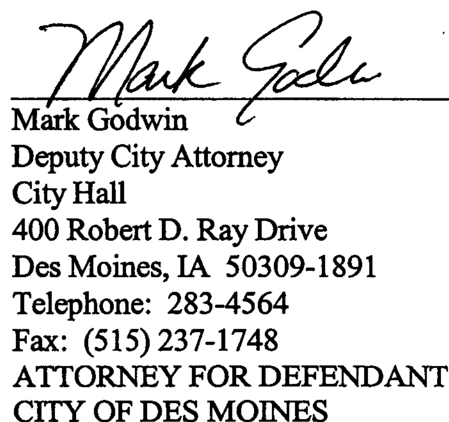
Second, in addition to statutory authority which creates the franchise fees, there is statutory (and ordinance) authority authorizing the City to collect the fees. Id.

CONCLUSION

There are at least four long-standing policy reasons which militate against refunding a fee or tax paid to a government, which fee or tax is then later found unwarranted. First, since the citizens can't refund the services they receive, the city need not refund the money it receives. Second, money paid in ignorance of the law is not refundable because ignorance of the law is not a valid claim or defense. Third, a refund of a tax or fee would require taxing or assessing fees against the very persons who would be seeking refunds. In other words, the people receiving the refund would be the same people who were paying for the refund. Fourth, if a refund was a possibility every time a fee or tax was questioned, the financial uncertainty of such a state of affairs would cripple cities and their ability to serve their citizens.

In addition, neither of the exceptions to the no-refund policy apply. There is no statute authorizing a refund of a utility franchise fee and the fee was not void at the outset.

As such, Plaintiff's claim for a refund must fail and the City's Motion for Partial Summary Judgment should be granted.



Mark Godwin
Deputy City Attorney
City Hall
400 Robert D. Ray Drive
Des Moines, IA 50309-1891
Telephone: 283-4564
Fax: (515) 237-1748
ATTORNEY FOR DEFENDANT
CITY OF DES MOINES

Original Filed.

Copies to:

Honorable Don C. Nickerson
Judge, 5th Judicial District

Mr. Brad Schroeder
Hartung & Schroeder LLP
Equitable Building, Suite 100
608 Locust Street
Des Moines, IA 50309
ATTORNEY FOR PLAINTIFF

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 10-2-06

By: ☑ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other:

Signature Diane Roscoe