

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

LISA KRAGNES,

Plaintiff,

vs.

CITY OF DES MOINES,

Defendant.

EQUITY NO. 49273

RULING ON MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT

FILED  
POLK COUNTY, IOWA  
2007 JUL 27 AM 9:11  
CLEM DISTRICT COURT

**INTRODUCTION**

The above captioned matter came before the Court for a hearing on May 4, 2007.

The parties were represented by counsel. After hearing the arguments of counsel and reviewing the court file, including briefs filed by the parties, the Court now enters the following ruling:

**PROCEDURAL AND FACTUAL HISTORY**

On this Motion for Summary Judgment, the Court will view the facts in the light most favorable to the Plaintiff. This case was reversed and remanded with directions by the Iowa Supreme Court on May 26, 2006. The Plaintiff brought an action against the City alleging that the franchise fees collected by the City as a percentage of billings imposed on gas and electric utilities provided by MidAmerican Energy Company (MidAmerican) constituted illegal taxes. Since 1960, the City of Des Moines (City) has entered into franchise agreements with utilities which have provided electric and gas utility customers within the corporate limits of Des Moines. The 1960 franchise agreement with Iowa Power and Light Company, a predecessor to MidAmerican, contained "an annual franchise, occupation or privilege tax" of one percent of the gross

receipts derived from the company's distribution and sale of electric energy to customers within the Des Moines corporate limits. In 1960, the City also entered into a similar agreement with Iowa Power and Light concerning the distribution and sale of natural gas. The franchise agreements were ultimately updated by ordinances. Iowa Power and Light Company retained the electric franchise for a fee equal to one percent of the gross receipts derived from the company's sale of electric energy. Similarly, Midwest Gas Company held the natural gas franchise for a fee of one percent of the gross receipts derived from the sale of natural gas to customers within the Des Moines corporate limits.

In 2004, in response legislation signed by the Governor that required the gradual phasing out sales and use taxes on the sale and furnishing of gas and electricity for residential use by January 1, 2006, the City replaced the phased out sales and use taxes with a higher franchise fees in order to provide improved police and fire services, upgrade streets and neighborhood services and maintain library hours. The City opted for an increase in the franchise fees in lieu of an increase in property taxes and passed ordinances amending the franchising agreements, raising the franchise fee to three percent on gas and three percent on electricity. In September 2004, the City began receiving the increased fees.

In 2005, the City revisited passed a resolution increasing the franchise fee from three percent to five percent on gas and electricity, effective June 1, 2005. Kragnes filed an action claiming that the franchise fees collected by the City were illegal taxes. Kragnes requested that she and others similarly situated receive reimbursement of franchise fees dating back to the time allowed by the applicable statute of limitations through the end of the litigation. The City ultimately filed a motion for summary

judgment contending there was no genuine issue of material fact in dispute that the franchise fees on gas and electric service were not illegal sales taxes. Kragnes simultaneously filed a motion for partial summary judgment contending there was no genuine issue of material fact in dispute that the franchise fees on gas and electric service were illegal taxes.

The District Court granted Kragnes' motion for partial summary judgment. And found the franchise fees to be illegal taxes. The City appealed the District Court decision and on May 26, 2006, the Iowa Supreme Court held that the portion of the franchises receipts related to ongoing administrative expenses in the exercise of its police power, including the costs of inspecting, supervising, and otherwise regulating the gas and electric utility franchise are not illegal taxes. Therefore, the Court reversed and remanded to the District Court for a determination of the question of class certification and what, if any, part of the franchise fees are related to the City's administrative expenses. The Court further ordered that the District Court shall enforce the ordinances up to the amount equal to fees reasonably related to City's administrative expenses in exercising its police powers. Following the reversal and remand by the Iowa Supreme Court, the District Court determined on June 26, 2006, that considering I.R.Civ.P. 1.276, the Plaintiff is able to acquire adequate financial resources to ensure the interests of class will not be harmed and that the Plaintiff will fairly and adequately protect the interests of the interests of the class, as required by I.R.Civ.P. 1.2629(c).

On October 2, 2006, the City filed a motion for partial summary judgment contending that no genuine issue of material fact exists as to whether the Plaintiff or any member of class are entitled to a refund of any portions the gas and electric franchise

fees. The matter came before the Court on December 15, 2006. Both parties were represented by counsel. The court has considered the arguments of counsel and has reviewed the court file and enters the following ruling as to the Defendant's Motion for Summary Judgment.

### **Legal Standard**

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873, 875 (Iowa 1996); Iowa R. Civ. P. 1.981(3). The Court shall determine whether summary judgment is appropriate by examining the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Iowa R. Civ. P. 1.981(3); Wilson v. Darr, 553 N.W.2d 579, 582 (Iowa 1996).

"A fact issue is generated if reasonable minds can differ on how the issue should be resolved." Schlueter v. Grinnell Mut. Reins. Co., 553 N.W.2d 614, 616 (Iowa Ct. App. 1996). "An issue of fact is 'material' only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law." Junkins v. Branstad, 421 N.W.2d 130, 132 (Iowa 1988) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "The requirement of a 'genuine' issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

The moving party has the burden to show the nonexistence of a material fact and the record must be viewed in the light most favorable to the nonmoving party. Schlueter, 553 N.W.2d at 615; Thorp Credit, Inc., v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). To

resist the motion, the nonmoving party must set forth specific facts constituting competent evidence to support a prima facie claim. Hoefler v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 339 (Iowa 1991). When the facts are undisputed and the only issue is what consequences flow from the facts, summary judgment is appropriate. Smith v. CRST Int'l, Inc., 553 N.W.2d 890, 893 (Iowa 1996). The principle question in this motion involves whether the Plaintiff class is barred from receiving a refund of any portion of the electric and gas franchise fees.

### **Analysis**

The City contends that Iowa law does not require the refunding of fees or taxes later disallowed. The City cites *Kraft v. City of Keokuk*, 14 Iowa 86, 1862 WL 275, \*1 (Iowa 1862), in support of its argument that once the citizen receives services, even if those services are paid for with fees or taxes later found to be unwarranted, the citizen is in no position to refund the benefits and services he/she received. The plaintiff in *Kraft* sought refund of a liquor license fee, after the state statute which authorized the fee was declared unconstitutional. The Court in *Kraft*, affirmed the trial court's denial of the plaintiff's claim, stating:

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 of law, 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.

Further, the City asserts that the exceptions cited in *Kraft*, fraud, duress, deceit, or mistake of fact, are not available to the Plaintiff and therefore, a refund of the portion of the franchise fees that exceeds the amount necessary to inspect, license, supervise or

regulate the activity cannot be refunded as a matter of law. This Court disagrees. In *Kragnes v. City of Des Moines*, 714 N.W.2d, 632, 641 (Iowa 2006), the Court discussed the home-rule authority of a city to impose a fees in excess of administrative expenses required to regulate the activity in exercising its police power. The Iowa Supreme Court stated:

Our decisions reveal that even after the adoption of the home-rule amendment and the enactment of the Home Rule for Cities bill, we have continued to adhere to the position that a fee imposed by a city needs to be related to the reasonable costs of inspecting, licensing, supervising, or otherwise regulating the activity in order to be permitted under a city's home-rule authority. **If a fee charged by city exceeds the amount necessary to inspect, license, supervise, or otherwise regulate the activity, it is nothing more than tax levy, which the legislature has strictly prohibited.** *Iowa Code Section, 364.3(4). Id. at, 641*(Emphasis added).

#### **Conclusion**

Therefore, a genuine issue of material fact continues to exist as to whether all or part of the franchise fees charged by City on gas and electric services are reasonably related to the City's administrative expenses in exercising its police power. Accordingly, the City's partial motion for summary judgment must be denied.

#### **Ruling and Order**

**IT IS THEREFORE ORDERED** that the Defendant's Motion for Partial Summary Judgment is denied.

**IT IS FURTHER ORDERED** costs are taxed to the Defendants.

**IT IS SO ORDERED** this 26<sup>th</sup> day of July, 2007.

  
**DON C. NICKERSON, JUDGE**  
Fifth Judicial District of Iowa

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