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Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

TAX FOUNDATION OF HAWAII, a
Hawaii nonprofit corporation, on
behalf of itself and those similarly
situated,

Plaintiff,

vs.

STATE OF HAWAII,

Defendant.

CIVIL NO. 15-1-2020-10 E CN
(Other Civil Action)

COMPLAINT FOR AN INJUNCTION
AND MANDAMUS RELIEF; SUMMONS

I do hereby certify that this is a full, true, and
correct copy of the original on file in this office.


Clerk, Circuit Court, First Circuit

COMPLAINT FOR AN INJUNCTION AND MANDAMUS RELIEF

The TAX FOUNDATION OF HAWAII, on behalf of itself and all others similarly situated, by and through its counsel, Alston Hunt Floyd & Ing, for its Complaint against Defendant, alleges as follows:

Introduction

1. This is a class action seeking an injunction and mandamus relief brought in the public interest of all taxpayers in the City & County of Honolulu (“Honolulu taxpayers”) to rectify an injustice that has damaged these taxpayers by more than a hundred million dollars and that, unless enjoined, will damage them by hundreds of millions of dollars more.

2. Under the pretense of collecting funds to administer a surcharge imposed solely on Honolulu taxpayers, the State of Hawaii, since 2007, has kept tens of millions of dollars of this surcharge money in the State general fund, rather than turning them over to the City & County of Honolulu (“Honolulu”) to use them for the purpose for which the funds were collected, that is, to fund Honolulu’s mass transit rail project. As explained below, this usurpation of Honolulu’s surcharge money violates the relevant statute and constitutional law.

3. An injunction or mandamus should issue to compel the State to follow the law and an injunction should issue to prevent the State from breaking the law, with the result that it disgorges tax revenues improperly retained in the State general fund and ends its unlawful conduct of skimming

tens of millions of dollars a year under the pretense of “administering” the surcharge money collected.

The Parties

4. Plaintiff TAX FOUNDATION OF HAWAII (“Plaintiff”) is a Hawaii nonprofit corporation with its principal office in the City and County of Honolulu, State of Hawaii. Plaintiff has paid Hawaii General Excise Tax, including the Honolulu county surcharge, in 2014.

5. Defendant STATE OF HAWAII (“State”), through its agency the Department of Taxation (DOTAX), enforces the tax laws of the State of Hawaii, including the General Excise Tax Law, Hawaii Revised Statutes (HRS) Chapter 237; and the Use Tax Law, HRS Chapter 238. Another State agency, the Department of Budget and Finance (“B&F”) is required to administer the finances of the State government.

Jurisdiction and Venue

6. Jurisdiction is proper in this court pursuant to HRS §§ 603-21.5(a)(3), 603-21.7(b), 603-21.9, 632-1, 634-35(a), and 663-1.

7. Venue is proper in the First Circuit pursuant to HRS § 603-36(5) in that Plaintiff’s claims arose there.

Factual Background

8. In 2005, the State enacted Act 247, which allowed each County to impose a county surcharge amount of one-half percent (1/2 %) on state general excise and use taxes collected by DOTAX.

9. Though made available to each County, the legislative history of Act 247 is clear that this law was passed to provide Honolulu with a source to fund its mass transit rail project.

10. In referring to the money anticipated to be collected from Honolulu's expected use of this surcharge, DOTAX testified before the State legislature that to administer the surcharge it would require a one-time appropriation of \$3.6 million for hardware, software, and equipment, and \$2.5 million annually thereafter for recurring staffing and operational costs.

11. Act 247, part of which is codified at HRS § 248-2.6, provides in pertinent part in subsection (a) that:

If adopted by county ordinance, all county surcharges on state tax collected by the director of taxation shall be paid into the State treasury quarterly, within ten working days after collection, and shall be placed by the director of finance in special accounts. Out of the revenues generated by county surcharges on state tax paid into each respective state treasury special account, the director of finance shall deduct ten percent of the gross proceeds of a respective county's surcharge on state tax to reimburse the State for the costs of assessment, collection, and disposition of the county surcharge on State tax incurred by the State. Amounts retained shall be general fund realizations of the State.

12. HRS § 248-2.6 provides in subsection (b) that:

The amounts deducted for costs of assessment, collection, and disposition of county surcharges on state tax shall be withheld from payment to the counties by the State out of the county surcharges on state tax collected for the current calendar year.

13. HRS § 248-2.6 requires in subsection (d) that "[a]fter the deduction and withholding of the **costs** under subsections (a) and (b), the director of finance shall pay the remaining balance on [a] quarterly basis to the

director of finance of each county that has adopted a county surcharge on state tax under section 46-16.8.” (emphasis added).

14. After Act 247 was enacted, Honolulu enacted Ordinance 05-027, which imposes a county surcharge on the state general excise and use taxes collected from Honolulu taxpayers as authorized by HRS § 46-16.8.

15. No other county has imposed a county surcharge on these State taxes.

16. DOTAX has collected the Honolulu county surcharge which B&F initially places in a special account.

17. From this special account, B&F deducts 10% of the gross amount and distributes the remainder to Honolulu. B&F has deducted and continues to deduct this 10% without ever determining the costs incurred by the State in assessing, collecting and disposing of the county surcharge.

18. B&F has deposited and continues to deposit and keep the entire 10% withheld from Honolulu into the State general fund.

19. The 10% deducted by B&F exceeds the costs to the State of the assessment, collection and disposition of the county surcharge.

20. During the State fiscal years ending on June 30, 2012, 2013, 2014, and 2015, DOTAX reported that it had collected approximately \$211.8, \$193.1, \$242.6 and \$248.5 million, respectively, of county surcharge funds. Thus, B&F would have deducted and diverted approximately \$21.1, \$19.3, \$24.2 and \$24.8 million to the State general fund in those years.

21. These amounts grossly exceed the cost incurred by the State to assess, collect and dispose of the county surcharge funds.

22. During fiscal years 2012, 2013, 2014, and 2015, DOTAX collected in excess of \$6 billion in state taxes of all kinds, yet its entire operating budget for those years was approximately \$23.4, \$22.8, \$24.1, and \$27.9 million respectively. This means that the 10% county surcharge diverted by the State during those fiscal years was between 87% and 100% of the **entire amount expended by the State** in assessing, collecting and disposing of **all** state taxes.

23. In calendar years 2012, 2013, 2014, and prior years, the 10% deducted and diverted to the State general fund has grossly exceeded the State's costs to assess, collect and dispose of the county surcharge.

24. Thus, the 10% retained by the State cannot properly be characterized as a fee for the administration of the county surcharge as is stated in HRS § 248-2.6. Instead, the bulk of the 10% retained by the State is an illegal and discriminatory additional general excise tax on those who are now required to pay the county surcharge.

25. The State's diversion of tax proceeds in excess of its actual costs of administration injures Plaintiff and the class it represents by increasing the gross amount of excise tax that must be collected in order to cover the cost of the Honolulu rail project and/or by exposing Plaintiff and the class it represents to an illegal tax burden.

Class Action Allegations

26. Pursuant to Haw. R. Civ. P. Rule 23, Plaintiff brings this action on behalf of itself and all others similarly situated, that is, all taxpayers upon whom the Oahu county surcharge was, is, or will be imposed during years when the State has diverted, or will in the future divert, more than the actual costs of assessment, collection and disposition into the State's coffers.

27. This action has been brought and may be properly maintained as a Class Action pursuant to Haw. R. Civ. P. Rule 23.

28. Numerosity of the Class. The Class is so numerous that joinder of all such persons is impracticable and the disposition of their claims in a Class Action, rather than individual actions, will benefit the parties and the Court.

29. Typicality. Plaintiff's claims are typical of the claims of the Class as a whole.

30. Adequacy. Plaintiff will adequately represent the Class because it will fairly and adequately protect the interest of the Class. Plaintiff knows of no conflicts of interest among members of the class. Plaintiff is committed to the vigorous prosecution of the action. Plaintiff is represented by competent counsel experienced in complex litigation and class actions and will adequately represent the interest of the entire class.

31. Existence and Predominance of Common Questions of Law and Fact. There is a well-defined community of interest in the questions of law and fact involved in this case which affect all members of the Class and which

predominate over any individual issues. Questions of law and fact common to the class members include, but are not limited to, the following:

a. Whether the State has deducted and continues to deduct 10% of the Oahu surcharge without any determination of the costs to the State of the assessment, collection and disposition of the surcharge;

b. Whether the 10% deducted for the Oahu surcharge reasonably equates to the costs to the State to administer the county surcharge;

c. The proper measure of Plaintiff's and the class members' damages; and

d. Whether Plaintiff and the class members are entitled to the injunctive and declaratory relief prayed for below.

32. Superiority. This case is the superior method for fair and efficient adjudication of this controversy because the expense and burden of individual litigation makes it impracticable for members of the class to seek redress individually of the wrongful conduct alleged herein. Further, it would be virtually impossible for the members of the class individually to redress effectively the injuries inflicted on them. This class action presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale and comprehensive supervision by a single court.

33. Risk of Inconsistent Adjudications. Prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the State in opposing

the class, or adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other class members not parties to the adjudications, or which would substantially impair or impede their ability to protect their interests.

34. Defendant's Acts and Refusals to Act Concerning the Class. This action may also be maintained as a class action because the State has acted and refused to act on grounds generally applicable to the class as a whole, thereby, making appropriate injunctive and declaratory relief with respect to the members of the class.

Count I (Injunction)

35. Plaintiff repeats and realleges each and every allegation set forth above.

36. HRS § 248-2.6(d) requires that the State pay to the county the entire balance of the county surcharge collected by DOTAX minus only the costs of administering the amounts collected by DOTAX.

37. By deducting and diverting 10% of all Oahu surcharge proceeds collected without regard to the actual cost of assessing, collecting and disposing of the amounts collected, the State has failed to follow HRS § 248-2.6(d) and has collected an amount that bears no relation to the State's costs of administering the county surcharge. As a result, Plaintiff and similarly situated class members have been and continue to be required to pay a higher state tax than that imposed on state tax payers of other counties.

38. This application of HRS § 248-2.6 constitutes a violation of the General Laws provision of the Constitution of the State of Hawaii (Article VIII, Section 1) as well as a violation of the Equal Protection Clause of the Constitution of the State of Hawaii and the Equal Protection Clause of the Constitution of the United States of America.

39. The State's violation of the Art. VIII § 1 and the state and federal Equal Protection Clauses has injured and continues to injure Plaintiff and all similarly situated class members in an amount to be determined at trial.

40. Plaintiff and all similarly situated class members are entitled to an order enjoining the State from continuing to violate the General Laws provision and the state and federal Equal Protection Clauses.

41. Plaintiff and all similarly situated class members are entitled to injunctive relief directing that the State reimburse to Plaintiffs and/or Honolulu all amounts improperly kept by the State.

Count II (Mandamus Relief)

42. Plaintiff repeats and realleges each and every allegation set forth above.

43. The State's failure to follow HRS § 248-2.6(d) has resulted in a continuing injury to Plaintiff and similarly situated class members by violating their constitutional rights as described above and by imposing on them additional taxes not imposed on State taxpayers in other counties in an amount to be determined at trial.

44. Plaintiff and all similarly situated class members have no other remedy available and are entitled to mandamus directing the State to follow HRS § 248-2.6(d), and deduct and withhold only the cost of administering the Oahu surcharge and to pay the remaining balance of the 10% county surcharge initially withheld to Honolulu.

45. Plaintiff and all similarly situated class members have no other remedy available and are entitled to mandamus directing that the State reimburse to Plaintiffs and/or Honolulu all amounts improperly kept by the State.

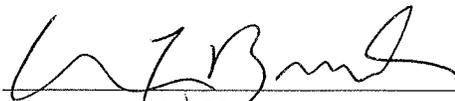
WHEREFORE, Plaintiff, on behalf of itself and the class it represents, prays that this Court give relief as follows:

1. For an order enjoining the State from collecting any Oahu surcharge amounts in violation of statutory and constitutional laws;
2. For an order directing the State to follow HRS § 248-2.6(d), and to deduct and withhold only the cost of administering the Oahu surcharge and pay the remaining balance to the City & County of Honolulu.
3. For an order directing the State to reimburse to the City & County of Honolulu and/or Plaintiff and class members any and all illegally collected Oahu surcharge amounts;
4. For an award of attorneys' fees based upon, any applicable theory, including but not limited to, the fact that this action produces a common fund and/or common benefit within the meaning of In re Water Use Permit Applications, 96 Hawai'i 27, 25 P.3d 802 (2001) and Chun v. Board of Trustees

of the Employees' Retirement System, 92 Hawai'i 432, 999 P.2d 127 (2000),
from which attorneys' fees are recoverable; and

5. For such other and further relief as is just and proper.

DATED: Honolulu, Hawaii, OCT 21 2015.



PAUL ALSTON
THOMAS E. BUSH
LORI K. STIBB
Attorneys for Plaintiff
TAX FOUNDATION OF HAWAII

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TAX FOUNDATION OF HAWAII, a
Hawaii nonprofit corporation, on
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Plaintiff,

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STATE OF HAWAII,

Defendant.

CIVIL NO. _____
(Other Civil Action)

SUMMONS

SUMMONS

STATE OF HAWAII

To the above-named Defendants:

You are hereby summoned and required to file with the court and serve upon ALSTON HUNT FLOYD & ING, attorneys for Plaintiff, whose address is 1001 Bishop Street, Suite 1800, Honolulu, Hawaii 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This Summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing on this Summons, personal delivery during those hours.

A failure to obey this Summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawai'i, OCT 21 2015

N. ANAYA



CLERK OF THE ABOVE ENTITLED COURT