

DOUGLAS S. CHIN 6465
Attorney General of Hawai'i

HUGH R. JONES 4783
NATHAN S.C. CHEE 6368
Deputy Attorneys General
Department of the Attorney General
State of Hawai'i
425 Queen Street
Honolulu, Hawai'i 96813
Telephone: (808) 586-1470

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED
2016 MAR 18 AM 10:55

J. KUBO
CLERK

Attorneys for the STATE OF HAWAII

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 ECN
(Other Civil Action)

DEFENDANT STATE OF HAWAII'S
REPLY TO PLAINTIFF'S OPPOSITION
TO DEFENDANT STATE OF HAWAII'S
MOTION TO DISMISS COMPLAINT
FILED ON OCTOBER 21, 2015;
CERTIFICATE OF SERVICE

Trial Date: None

Hearing Motion:

Hearing Date: March 23, 2016

Time: 1:30 p.m.

Judge: Hon. Edwin C. Nacino

DEFENDANT STATE OF HAWAII'S REPLY
TO PLAINTIFF'S OPPOSITION TO DEFENDANT STATE OF
HAWAII'S MOTION TO DISMISS COMPLAINT FILED ON OCTOBER 21, 2015

I. INTRODUCTION.

Defendant of Taxation's Motion to Dismiss Complaint Filed on October 21, 2015, should be granted because section 632-1, Hawaii Revised Statutes ("HRS") prohibits declaratory relief

in “any controversy with respect to taxes.” Furthermore, the mandamus relief sought in Plaintiff’s complain is outside the subject matter jurisdiction of this court. Lastly, Plaintiff lacks standing to bring the claims alleged in its Complaint. Accordingly, this Court lacks jurisdiction to hear this case and Plaintiff’s Complaint should be dismissed

II. DISCUSSION.

A. The Mandamus Relief Sought in the Complaint Is Barred By The Hawaii Rules Of Civil Procedure.

Under Rule 81.1 of the Hawaii Rules of Civil Procedure (“HRCP”) “[t]he writ of mandamus is abolished in the circuit courts, except when directed to a court of inferior jurisdiction.” Plaintiff’s Complaint seeks a mandamus *in Circuit Court* to compel an action by a public officer of the State and not on a court of inferior jurisdiction.¹ See Complaint at 9. As this Court, as limited by Rule 81.1, HRCP, cannot provide the relief sought in Plaintiff’s Complaint, the Complaint should be dismissed.

B. Plaintiff’s Complaint Raises A Controversy With Respect To Taxes.

Plaintiff argues that this Court has jurisdiction under section 632-1, Hawaii Revised Statutes (“HRS”) because this is not a “tax refund controversy.” Opposition to Mot. To Dismiss, at 9. Plaintiff claims that the State is unfairly focusing “solely on language in paragraph 41 of the Complaint” and that “Plaintiff does not seek any refund for itself or any other taxpayer.” Opposition, at 9. Plaintiff’s argument is flatly contradicted by the express terms of its own Complaint.

In paragraph 41 of the Complaint, Plaintiff states: “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.” In paragraph 45 of the Complaint, Plaintiff states: “Plaintiff and all similarly situated class members have no remedy available and are entitled to mandamus relief directing that the State reimburse to Plaintiffs and/or Honolulu all amounts improperly kept by the State.” Most significantly, in the section containing its request for relief, Plaintiff states: “WHEREFORE, Plaintiff, on behalf of itself and the class it represents, prays that this Court give relief as follows: . . . 3. For an order directing the State to

¹ Rule 21(b) of the Hawaii Rules of Appellate Procedure provides in pertinent part: An application for a writ of mandamus directed to a public officer shall be made by filing a petition with the appellate clerk . . . (Emphasis added).

reimburse to the City & County of Honolulu and/or Plaintiff and class members any and all illegally collected Oahu surcharge amounts[.]"

Therefore, this is indeed a tax refund controversy. In three separate parts of its Complaint, Plaintiff expressly requests reimbursement (i.e., a refund) on behalf of itself and/or class members. Plaintiff also requests reimbursement (i.e., a refund) on behalf of the City and County of Honolulu (which, as set forth below, additionally raises standing problems).

Lastly, Plaintiff's opposition misconstrues section 632-1, HRS, to prohibit declaratory relief in a "tax refund controversy" only. The statute actually is much broader than Plaintiff suggests—it bars declaratory relief in "any controversy with respect to taxes." (emphasis added)

Regardless of how you slice it, Plaintiff's complaint seeks a tax refund and this is most assuredly a "controversy" with respect to taxes², and therefore, this is a tax refund controversy, this Court does not have jurisdiction under section 632-1, HRS.

C. The Exclusion in Section 632-1, HRS, Still Applies Notwithstanding Plaintiff's Arguments.

Plaintiff next argues that it is not seeking to interfere with the State's ability to collect the GET or the County Surcharge. Opposition, at 9. Plaintiff argues that it is not contesting whether it must pay the GET, including the County Surcharge, or the amount of GET that it has paid or will pay. Opposition, at 10. Plaintiff argues that it is only the allocation of the monies after they are collected as taxes that it is contesting. Opposition, at 10. Therefore, Plaintiff argues that "[t]he State's reliance on authority extolling the right of the federal and state government to tax is citizens free from judicial interference completely misses the point." Opposition, at 10. Plaintiff's arguments are utterly meritless.

As state above, the exclusion for taxes in section 632-1, HRS, does not say that it is limited to the "collection" of taxes. Instead, it says "declaratory relief may not be obtained . . . in any controversy with respect to taxes[.]" The words "any controversy" mean exactly that – any controversy, which is extremely broad. The words "with respect to taxes" are also extremely broad. "With respect to" taxes certainly means something more than just the "collection" of taxes. It is a cardinal rule of statutory construction that "the fundamental starting point for statutory interpretation is the language of the statute itself. . . . [W]here the statutory language is

² It is arguably the largest tax controversy ever considered by the Circuit Courts of the State of Hawaii, over \$1.5 billion in county surcharge on State Tax has been collect by the State under section 248-6.2, HRS

plain and unambiguous, [the court's] sole duty is to give effect to its plain and obvious meaning." Haw. Gov't Employees Ass'n v. Lingle, 124 Hawai'i 197, 202, 239 P.3d 1, 6 (2010). Clearly, the plain meaning of this language in section 632-1, HRS, is broad enough to include the 10 percent deduction set forth in section 248-2.6, HRS.

Moreover, the underlying purpose of the exclusion is consistent with this interpretation. Because government functioning is dependent on tax revenue, an injunction or declaratory judgment that interferes with tax revenue will bring the wheels of government grinding to a halt. This is why the Federal Declaratory Judgments Act and Tax Injunction Act contain exclusions for taxes. Instead of seeking declaratory relief or an injunction, a taxpayer must pay the tax and then seek a refund afterwards. An after-the-fact refund can be budgeted and appropriated and is much less disruptive than an injunction that blocks the assessment of the tax in the first place. The exclusion in section 632-1, HRS was based on these federal laws and their underlying purposes. See In re Tax Appeal of Grace Business Dev. Corp., 92 Hawai'i 608, 613 n.5, 994 P.2d 554, 559 n.5 (2000). In the present case, even if Plaintiff is not interfering with the initial collection of the GET and County Surcharge, its lawsuit challenging the 10 percent deduction will disrupt the flow of tax revenue to the State, which the State needs to keep state government functioning. In other words, the "collection" of the State's portion of the County Surcharge is being blocked, which interferes with government functioning, and clearly violates the purpose behind the exclusion for taxes in section 632-1, HRS.

Therefore, the fact that Plaintiff is not challenging the collection of the GET and the County Surcharge, themselves, or the amount that it has to pay, is irrelevant. Because this case involves a "controversy with respect to taxes" and declaratory relief would interfere with the functioning of state government, this Court does not have jurisdiction under section 632-1, HRS.

C. Hawaii Insurers Council v. Lingle is Inapposite to this Case.

Plaintiff relies heavily on Hawaii Insurers Council v. Lingle, 117 Hawai'i 454, 184 P.2d 769 (App.), aff'd in part and rev'd in part, 120 Hawai'i 51, 201 P.3d 564 (2008), for its claim that it can seek declaratory relief under section 632-1, HRS. However, Plaintiff relies on the ICA decision in that case, which was largely overruled by the Hawai'i Supreme Court. The ICA held that the assessments at issue in that case were invalid taxes and not fees. Id. at 460, 184 P.3d at 775. The ICA's interpretation of section 632-1, HRS, was in turn based on its conclusion that the assessments were invalid taxes. Id. at 463, 184 P.3d 778 ("The assessments were not valid taxes

because the Insurance Commissioner did not have taxing power, but only authority to assess fees[.]") However, the Hawai'i Supreme Court subsequently reversed the ICA, instead holding that the assessments were regulatory fees rather than taxes. 120 Hawai'i at 65-69, 201 P.3d at 578-82. Consequently, the ICA's interpretation of section 632-1, HRS, is inapt and over-ruled and not stare decisis. Since the assessments in that case were, in fact, not taxes according to the Hawai'i Supreme Court, the exclusion for taxes in section 632-1, HRS, was completely irrelevant to the case.

The instant case, in contrast, very clearly deals with a tax – the GET. Therefore, the instant case is a "controversy with respect to taxes" and the exclusion for taxes in section 632-1, HRS clearly applies. Hawaii Insurers Council is simply inapposite to this case.

D. Mandamus Relief is Still Inappropriate.

Plaintiff argues that it is entitled to mandamus relief because it does not have a remedy in Tax Appeal Court. Opposition, at 10-11. Plaintiff relies on section 232-13, HRS, which provides in relevant part:

The jurisdiction of the tax appeal court is limited to the amount of valuation or taxes, as the case may be, in dispute as shown on the one hand by the amount claimed by the taxpayer or county and on the other hand by the amount of the assessment, or if increased by the board, or equivalent county administrative body, the assessment as so increased.

Plaintiff argues that this provision means that Tax Appeal Court can only handle cases where the amount of the taxes is in dispute. Plaintiff argues that because it is not challenging the overall GET amount, including the County Surcharge, and is only challenging the allocation to the State, Tax Appeal Court has no jurisdiction. Therefore, Plaintiff argues, it does not have a remedy in Tax Appeal Court and may request mandamus relief.

Plaintiff severely misinterprets section 232-13, HRS. This provision is found in a statute setting forth the procedures to be used at the hearing in Tax Appeal Court. It is merely intended to narrow the issues and avoid expanding the issues beyond the claims of the parties. So if an amount is in question, the parties are limited to the taxpayer's claim at the low end and the assessment at the high end. In the present case, the low end would be Plaintiff's claim that the

State should only receive the actual costs of the Surcharge while the high end is the State's claim that it is entitled to the full 10 percent deduction.

Plaintiff's argument that the Tax Appeal Court has no jurisdiction because it is not challenging the overall GET amount, including the County Surcharge, is without merit. First, contrary to its position now, Plaintiff expressly requested in its Complaint a refund on behalf of itself and class members. A refund alters the ultimate amount of the tax. Therefore, the amount of the tax paid by each taxpayer is indeed at issue in this case. Second, even if you accept Plaintiff's attempt to modify its request now to only request a refund from the State to the City and County, it is still a refund. Plaintiff is seeking to change the ultimate amount that goes to the State by requesting a refund from the State to the City and County. Therefore, the amount of the tax that goes to the State is still contested, even if the initial amount collected is not.

In addition, interpreting the Tax Appeal Court's jurisdiction so narrowly would violate the rules of statutory construction.

It is a canon of construction that statutes that are in pari materia may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject. Thus, laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.

State v. Kamana'o, 118 Hawai'i 210, 218, 188 P.3d 724, 732 (2008) (internal quotation marks, brackets, and citations omitted). See also HRS § 1-16 (2009) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.").

Section 632-1, HRS, contains an exclusion for "any controversy with respect to taxes[.]" Clearly, that provision in section 632-1, HRS is on the same subject matter as section 232-13, HRS – namely, taxes. Reading section 232-13, HRS, in pari materia with section 632-1, HRS, the jurisdiction of the Tax Appeal Court should be read broadly to include controversies such as the present case. If tax controversies as in the present case cannot be addressed under section 632-1, HRS, they should be addressed in Tax Appeal Court.

Moreover, section 232-16(e), HRS, provides: "An appeal to the tax appeal court shall bring up for review all questions of fact and all questions of law, including constitutional questions, necessary to the determination of the objections raised by the taxpayer or the county in the notice of appeal." This broad grant of jurisdiction over "all questions of fact and all questions of law, including constitutional questions" is inconsistent with Plaintiff's argument that the Tax Appeal Court is limited to correcting errors regarding the amount of a tax.

Because the Tax Appeal Court has jurisdiction to address the issues in the present case, Plaintiff is not entitled to the extraordinary relief of a writ of mandamus. Moreover, even if Plaintiff was entitled to mandamus relief, it would still have a problem with standing, as set forth below.

E. Plaintiff Still Does Not Have Standing Because it Lacks a Sufficient Injury.

Notwithstanding the express allegations in its Complaint, Plaintiff now claims that it is not requesting a tax refund. Plaintiff argues that it is only requesting that the State be ordered to pay the City and County the portion of the 10 percent deduction in excess of the actual costs of the County Surcharge. However, this modification of the request merely highlights the fact that standing is a significant problem in this case.

Plaintiff is requesting that the State pay additional funds to the City and County. Consequently, under Plaintiff's reading of section 248-2.6, HRS, the City and County is entitled to more than it is currently receiving. However, if this is so, then it would be the City and County that has the "injury in fact" and the legal standing to sue, not Plaintiffs. "[O]ne does not have standing to assert a violation of rights belonging to another, since the person entitled to a right is the only one who can be directly injured by its deprivation." Akinaka v. Disciplinary Board, 91 Hawai'i 51, 58, 979 P.2d 1077, 1984 (1999) (emphasis in original).

Apparently recognizing this problem, Plaintiff argues that its injury is the fact that Plaintiff and other taxpayers are not receiving the "full benefit" they are entitled to under section 248-2.6, HRS. Opposition, at 13. Plaintiff argues that it and other taxpayers will have to pay more money to compensate for the money kept by the State. Opposition, at 13. Plaintiff argues that if the money diverted by the State were given to the City and County, the Surcharge would end sooner. Opposition, at 13 n.3.

However, all of these alleged injuries are not sufficiently concrete to provide standing.

[T]he plaintiff “must show a distinct and palpable injury to himself [or herself.]” Life of the Land v. Land Use Commission of State of Hawai‘i, 63 Haw. 166, 173 n.6, 623 P.2d 431, 446 n.6 (1981). The injury must be “distinct and palpable, as opposed to abstract, conjectural, or merely hypothetical.” Doyle v. Oklahoma Bar Ass’n, 998 F.2d 1559, 1566 (10th Cir.1993) (citations omitted).

Hanabusa v. Lingle, 119 Hawai‘i 341, 347, 198 P.3d 604, 610 (2008) (quoting Mottl v. Miyahira, 95 Hawai‘i 381, 389, 23 P.3d 716, 724 (2001)).

[U]nless [a plaintiff] [can] show some concrete injury, [the party] [is] merely asserting a "value preference" and not a legal right. The proper forum for the vindication of a value preference is in the legislature, the executive, or administrative agencies, and not the judiciary. For it is in the political arena that the various interests compete for legal recognition.

Mottl, 95 Hawai‘i 392, 23 P.3d at 727 (quoting Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 283-84, 768 P.2d 1293, 1299 (1989)).

The "full benefit" that Plaintiff claims the State should pay would go to the City and County, not to Plaintiff or the other taxpayers. Whether Plaintiff and other taxpayers will have to pay more money to compensate for the money kept by the State is conjectural and hypothetical. Whether the County Surcharge would end sooner if funds were not deducted by the State is also conjectural, speculative, and hypothetical. There is no distinct and palpable, concrete injury for Plaintiff in this case. Plaintiff is asserting a "value preference" in that it prefers more money to go to the City and County and less money to go to the State. However, that is a matter more properly addressed to the Legislature. Plaintiff's remedy is to lobby the Legislature to amend section 248-2.6, HRS, so as to reduce the specified percentage rather than file a lawsuit.

For all these reasons, this case should be dismissed for lack of standing.

F. Inability of the State to Provide a Remedy.

As discussed in the State's Motion to Dismiss the alleged injury cannot be addressed because, even if the Department of Taxation (“Department”) could implement a cost accounting system prospectively at great expense, it would be extremely difficult if not impossible to determine the actual costs incurred for past years. No agency of the State, the Department or

Department of Budget and Finance maintained maintain any tax specific timekeeping or cost accounting systems that would allow it to determine even an approximate cost for assessing, collecting and disposing of the County Surcharge. See Department of Taxation’s Report to Legislature under Act 213, §121 (2007) (“[t]he Department of Taxation does not have the resources or ability to perform cost accounting” relating to the County Surcharge); See Mot. To Dismiss (Ex. 1). Likewise, the director of finance who is responsible for depositing the 10 percent deduction into the general fund has no cost accounting system for this function. See Mot. To Dismiss; Dec. of Judy Dang, ¶ 7. Not having the forensic or historical data to necessary to perform a cost accounting for the past years make it unfeasible to determine the relief sought by Plaintiff. Furthermore, the Department does not currently have the resources to implement such cost accounting systems going forward.

III. CONCLUSION.

The State’s Motion to Dismiss should be granted as this Court lacks jurisdiction over the matters raised in Plaintiff’s Complaint for the following reasons:

- (1) Plaintiff’s Complaint is barred by the Hawaii Rules of Civil Procedure;
- (2) Plaintiff’s Complaint raises a controversy with respect to taxes and this Court lacks jurisdiction pursuant to section 632-1, HRS;
- (3) Mandamus relief is inappropriate under section 632-1;
- (4) Plaintiff lacks standing to make the claims in its Complaint; and
- (5) Plaintiffs concerns are properly addressed to the Legislature.

For the foregoing reasons we respectfully ask this Court to grant the State’s Motion.

DATED: Honolulu, Hawai‘i, March 18, 2016.

DOUGLAS S. CHIN
Attorney General

By: 

HUGH R. JONES
NATHAN S.C. CHEE
Deputy Attorneys General

Attorneys for the STATE OF HAWAI‘I

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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 ECN
(Other Civil Action)

CERTIFICATE OF SERVICE

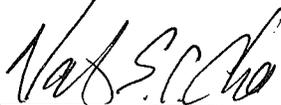
CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2016, a copy of the foregoing DEFENDANT STATE OF HAWAII'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT STATE OF HAWAII'S MOTION TO DISMISS COMPLAINT FILED ON OCTOBER 21, 2015, was duly served by hand delivery to:

PAUL ALSTON, ESQ.
THOMAS E. BUSH, ESQ.
LORI K. STIBB, ESQ.
Alston Hunt Floyd & Ing
1001 Bishop Street, Suite 1800
Honolulu, Hawaii 96813

Attorneys for Plaintiff

DATED: Honolulu, Hawai'i, March 18, 2016.



NATHAN S.C. CHEE
Deputy Attorney General

Attorney for the STATE OF HAWAI'I