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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)

DEFENDANT STATE OF HAWAII'S **REPLY** TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT STATE OF HAWAII'S CROSS-MOTION FOR SUMMARY JUDGMENT FILED MARCH 4, 2016; 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 MEMORANDUM IN OPPOSITION TO
DEFENDANT STATE OF HAWAII'S CROSS-MOTION FOR SUMMARY JUDGMENT
FILED MARCH 4, 2016; CERTIFICATE OF SERVICE

I. INTRODUCTION.

The State's Motion should be granted because the Plaintiff's opposition fails to raise any issues of material fact, and the State is entitled to Summary Judgment as a matter of law. Section 248-2.6, Hawaii Revised Statutes ("HRS") clearly requires the State to retain ten percent of the County Surcharge.

II. ARGUMENT.

A. Mandamus Is Not Allowed Here.

Plaintiff still asserts mandamus relief is available in the Circuit Courts despite rule 81.1, of the Hawaii Rules of Civil Procedure ("HRCP") that unequivocally states: "[t]he writ of *mandamus is abolished* in the circuit courts, except when directed to a court of inferior jurisdiction." (Emphasis added). Taxpayer relies on the following to support its position: "relief heretofore available by mandamus may be obtained *by appropriate action or by appropriate motion.*" (Emphasis added). Opp'n. at p. 3. As noted in Plaintiff's motion, the appropriate action or motion is to file a petition with the clerk of the Appellate Court per Rule 21 of the Hawaii Rules of Appellate Procedure.[1] Plaintiff relies on Nam Sing Shak v. McVey, 54 Haw. 274, (1973) to support its claim that this Court has jurisdiction in the case. The State notes that the Hawaii Rules of Appellate Procedure, including rule 21, were adopted by order of the Hawaii

[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).

Supreme Court on April 16, 1984 and became effective on June 1, 1984 which is after the decision in Nam Sing Shak.

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

Plaintiff relies 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. See Opp'n. at p. 4. 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.

C. The Statute Requires the State to Withhold Ten Percent.

Section 248-2.6, HRS, provides in relevant part:

> (a) 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 per cent** 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.
>
> (b) 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.
>
> . . .
>
> (d) After 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. . . .
>
> (Emphases added).

The statute clearly states the State "shall deduct ten percent of the gross proceeds" "to reimburse the State . . ." Here, the Legislature has determined that ten percent of the gross proceeds is the amount necessary to charge the respective counties for the costs of assessment, collection, and disposition of the County Surcharge. The references in subsection (b) to the "costs of assessment, collection, and disposition of county surcharges on state tax" and subsection (d) to "costs under subsection (a) and (b)" must be read as referring to ten percent described in subsection (a). A principle rule of statutory construction is that "each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole." State v. Davis, 63 Haw. 191, 196, 624 P.2d 376, 380 (1981). Subsections (b) and (d) are part of the same statute as subsection (a) and should be interpreted in the same manner, as part of a whole. Even if they were parts of different statutes, the three provisions would have to be interpreted together:

> 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."). All three provisions deal with the County Surcharge and the deduction to be made from it. Consequently, the specific ten percent amount set by the Legislature should prevail under subsections (b) and (d) as well as under subsection (a). Any other interpretation would be absurd. See HRS § 1-15(3) (2009) ("Every construction that leads to an absurdity shall be rejected."). It would make no sense to apply different standards under subsections (a), (b), and (d) when all three provisions involve the same subject matter.

Moreover, Plaintiff ignores the fact that subsection (d) expressly incorporates by reference subsection (a). Therefore, the ten percent figure specified by the Legislature in subsection (a) also applies to subsection (d) by the express terms of subsection (d) itself. In addition, subsection (d) also refers to subsection (b). This further suggests that subsections (a), (b), and (d) should be interpreted together.

Plaintiff may argue that subsections (b) - (d) are rendered superfluous by this interpretation. This is not true. While subsection (a) requires the State to deduct ten percent from the County Surcharge, subsection (b) authorizes the State to retain that amount for the current calendar year and subsection (d) requires the State to pay the remaining balance of the Surcharge to the County on a quarterly basis. So in spite of the fact that subsections (b) and (d), when read in light of subsection (a), do not require calculation of the actual costs, they still accomplish other things essential to the statute – namely, authorizing retention of the funds by

the State and payment of the remaining balance to the County. Subsection (c) provides a very expansive justification for the ten percent reimbursement. Thus, they are not rendered superfluous.

For these reasons, the ten percent figure specified by the Legislature prevails as a specific provision and it applies to all three subsections in section 248-2.6, HRS.

D. The State's Reading of Section 248-2.6, HRS, is Consistent with Legislative Intent.

Even if the statute was ambiguous, its legislative history reveals the unmistakable intention of the Legislature to withhold ten percent of the County Surcharge.

Section 248-2.6, HRS was enacted by Act 247. Act 247 was introduced as H. B. No 1309. As it moved throughout the 2005 legislative session H.B. No. 1309 was amended twice by the House and twice by the Senate before it was amended a fifth time by a conference committee and was passed out in its final form and submitted to the Governor as H.B. No. 1309, H.D. 2, S.D. 2, C.D. 1. In every draft *prior* to the conference draft section 248-2.6(a), HRS, contained the following with regard to how much the State should retain:

> ". . . the director of finance shall retain, from time to time, sufficient amounts to reimburse the State for the costs of assessment, collection, and disposition of the county surcharge on state tax incurred by the State . . ." (Emphasis added).

See Motion, Chee Dec. Exhibit "B." Unlike the language used in Act 247, this language does require the State to retain only "sufficient amounts to reimburse the State." Plaintiff's claims would have some merit if the statute read as it does here. However, the conference committee deleted these words and replaced them with:

> [T]he director of finance shall deduct ten per cent 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."

The conference committee describing the amendment stated:

> ("After careful consideration, your Committee on Conference has amended this measure by . . [i]nserting a provision allowing for the deduction of ten percent of the gross proceeds of a respective county's surcharge on state tax to reimburse the State for costs of assessment, collection, and disposition of the county surcharge on state tax incurred by the State."[2]

The amendments made by the conference committee would be illogical if the committee intended for the State to only retain actual costs, and the conference committee report is the most reliable evidence of legislative intent.[3] The changes made by the conference committee deleting the requirement that the State only retain actual costs and setting the reimbursement amount at ten percent, along with the comments in the conference committee report show a clear legislative intent to set the reimbursement costs for assessment, collection, and disposition of the County Surcharge at ten percent of the gross proceeds. Therefore, the State's retention of the entire 10 percent is consistent with the legislative intent.

E. The State Does Not Admit the 10 Percent Retained Is An "Administrative Fee."

Plaintiff make the claim that the State admits the 10 percent retained is a "flat administrative fee." Opp'n. at p. 6. Plaintiff goes so far as to put the phrase "flat administrative fee" in quotation marks as if quoting the State's motion directly, however, the State does not anywhere in its motion even use the term "fee" much less admit the amounts retained are fees.

F. There is No Disparate Treatment Of the Counties.

Plaintiff claims that because the difference between the ten percent retained and the actual cost is placed in the general fund, the residents of the City and County of Honolulu ("Honolulu County") are unfairly subjected to a tax that residents of other counties are not. This

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[2] See Conf. Comm. Rep. No 186, 23rd Leg., 2005 Reg. Sess., Haw. H.J. 1828-29 (2005)
[3] See 2A N. Singer, Sutherland's Statutory Construction, § 48.8 ("[t]he report of a conference committee is the most reliable evidence of legislative intent as it represents the final statement of terms agreed to by both houses").

argument ignores the fact under Act 247 all counties are treated the same. Any county that elected to implement the County Surcharge would be subject to the same ten percent charge as Honolulu County even if the ten percent exceeded actual costs as alleged here. See HRS § 46-16.8 (2012). Accordingly, there is no disparate treatment of Honolulu County residents even if other counties have not chosen to implement the County Surcharge, because they had the opportunity to adopt a surcharge but chose not to.

G. The Holding in Hawaii Insurers Council v. Lingle, 120 Haw. 51 (2008) Is Not Applicable Here.

Plaintiff attempts to draw parallels between the facts in Hawaii Insurers Council v. Lingle, 120 Haw. 51 (2008) and those here where it incorrectly summarizes the Hawaii Supreme Court's holding:

> . . .but it invalidated the transfer of $3.5 million from the DCCA "insurance division" to the general fund. Those transfers were found to be "taxes," which were imposed in violation of the separation of powers doctrine because they exceeded the amount that ultimately went to support the overhead of the DCCA and the Department of Budget and Finance.

Opp'n. at p. 8. Plaintiff then argues the same result should occur here. Plaintiff is wrong for the following reasons. First, the Hawaii Supreme Court did not invalidate the transfers because they were "taxes," they were invalidated because the monies were, in fact, not taxes. In HIC, the insurance commissioner of the Department of Commerce and Consumer Affairs collected various fees from insurance companies operating within the State and deposited these fees into a special fund. The Legislature passed a bill that transferred these fees into the general fund. A suit was filed seeking to block the transfer. The Hawaii Supreme Court described this issue as "whether monies from a fund made up entirely of assessments, fees, fines, penalties, and reimbursements can be transferred to the general fund." (Emphasis added). Id. at 70, 201 P.3d at 582. In invalidating the transfer the Hawaii Supreme Court stated "We therefore hold that the

transfer bills unlawfully transform $3,500,000 of legitimate regulatory fees into general tax revenue." Id. at 69, 201 P.3d 583. Contrary to Plaintiff's opposition, the Hawaii Supreme Court invalidated the transfer of lawful fees collected under the authority of the executive branch, not the legislature, to the general fund. This contrasts sharply with the facts present where the county surcharge is part of the general excise tax and is imposed on virtually all business conducted on Oahu. The Hawaii Supreme Court has described the breadth of business transactions captured by the general excise tax when it stated "[i]n enacting Chapter 237, the legislature cast a wide and tight net." Matter of Island Holidays, Ltd., 59 Haw. 307, 316, 582 P.2d 703, 708 (1978).[4] As such, the entire County Surcharge is unquestionably a tax. Furthermore, the Legislature itself imposed the County Surcharge, including the ten percent retained by the State. In HIC, the various fees were imposed by the insurance commissioner under his executive powers. By putting the fees into the general fund the Legislature was effectively transferring the power to tax to the executive branch in violation of the Hawaii Constitution. HIC at 67, 201 P.3d 580. Here, the Legislature imposed the County Surcharge, in conjunction with Honolulu County, and expressly directed the amounts retained by the State to be placed in the general fund.

H. Plaintiff Fails To Negate the Rational Bases Proffered By the State.

As argued in the State's Motion, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]'" FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (emphasis added). "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." Id. (Emphases added). In its Motion, in addition

[4] The general excise tax is imposed under chapter 237, HRS.

to the actual dollar figures of costs incurred, the State has provided numerous additional rational bases for any disparate treatment of Honolulu County residents on pages 12-14 of its memorandum in support of its Motion. Plaintiff's Reply does not address, or even attempt to negate, any of those rational bases. Having failed to "negative every conceivable basis" offered by the State, the State's rational bases must stand for any disparate treatment of Honolulu County.

III. CONCLUSION.

For the foregoing reasons and the arguments made in the State's Motion, the State respectfully requests this Court grant Summary Judgment against Plaintiff.

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

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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 MEMORANDUM IN OPPOSITION TO DEFENDANT STATE OF HAWAII'S CROSS-MOTION FOR SUMMARY JUDGMENT FILED MARCH 4, 2016; CERTIFICATE OF SERVICE, was duly served by hand delivery to:

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

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