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itself and those similarly situated

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 HAWAI`I,

Defendant.

Civil No. 15-1-2020-10 ECN
(Other Civil Action)

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

Hearing Motion:
Date: March 23, 2016
Time: 1:30 p.m.
Judge: Honorable Edwin Nacino

Trial Date: Not Yet Set

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

Plaintiff TAX FOUNDATION OF HAWAII, a Hawaii nonprofit corporation, on behalf of itself and those similarly situated ("Plaintiff"), by and through its counsel Alston Hunt Floyd & Ing, hereby submits its Memorandum in Opposition to Defendant State of Hawaii's ("State") *Motion for Summary Judgment* ("Motion"), filed March 4, 2016.

I. INTRODUCTION

For three reasons, the State's cross-motion for summary judgment fails and should be denied and Plaintiff's cross-motion for summary judgment should be granted

First, the State misrepresents to this Court its jurisdictional powers to issue a writ of mandamus against a government actor. Further, even if the Court was not empowered to issue a writ of mandamus against a government actor (which it is), the Court unquestionably has jurisdiction to issue an injunction compelling compliance with H.R.S. § 248-2.6.

Second, the State misreads HRS §248-2.6. Plaintiff's interpretation gives force and effect to all parts of the statute. The State's interpretation ignores both the calculations prescribed by subsection (b) and subsection (c)'s definition of the "costs of assessment, collection and disposition."

Third, the State's constitutional argument is flatly wrong. Even if the State could impose an added GET burden on the people of Oahu, nothing in §248-2.6 allows it to do so, and the undisputed evidence shows that the State can, in fact, determine the costs of "assessment, collection, and disposition." It pretends otherwise because those costs are small compared to the $184.2 million it concedes have been withheld from the City & County of Honolulu. (Declaration of Judy Dang at ¶).

II. RELEVANT FACTS

In the interest of brevity, Plaintiff incorporates by reference the "Relevant Facts" portion of its *Cross-Motion for Summary Judgment,* filed on January 21, 2016 as if the same were fully set forth herein.

III. ARGUMENT

A. This Court Has the Power to Issue Writ of Mandamus And Retains Jurisdiction to Issue an Injunction

The State asserts that this Court lacks the power to issue relief in the nature of mandamus because HRCP 81.1 forbids it. That is false. Although HRCP 81.1 says the "writ of mandamus" is abolished "except when directed to a court of inferior jurisdiction," it further states that, "Relief heretofore available by mandamus may be obtained by appropriate action or by appropriate motion . . . ." Under HRS §§ 603-21.7(b)[1] and 603-21.9(6),[2] this Court has jurisdiction to hear claims and compel government actors to perform their statutory duties. *See, e.g., Nam Sing Shak v. McVey*, 54 Haw. 274, (1973)(holding that "original jurisdiction to hear claim that city examiner should be compelled to issue chauffeur's license to applicant was in the circuit court.")

Further, even if this Court did not have the ability to issue relief in the nature of mandamus (which it does), this Court does have jurisdiction to issue an injunction.

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[1] This section confers jurisdiction over "actions or proceedings in or in the nature of . . . mandamus . . . and all other proceedings in or in the nature of applications for writs directed to . . . to corporations and individuals, as may be necessary to the furtherance of justice and the regular execution of the law."

[2] This section confers power "to make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them."

This case is similar to *Hawaii Insurers Council v. Lingle*, 117 Hawai`i 454, 184 P.2d 769 (App.), *aff'd in part and rev'd in part on other grounds* 120 Hawai`i 51 (2008), in which an insurance trade association sued the State challenging the transfer of assessments paid by insurers under HRS § 431:2-215 to the State general fund. The State argued that there was no jurisdiction, in part, because the lawsuit violated the prohibition against declaratory relief actions regarding taxes under HRS § 632-1. The Intermediate Court of Appeals ("ICA") rejected that argument. It held that the prohibition against actions regarding taxes under HRS § 632-1 did not apply because plaintiff was not attempting to prohibit the State from assessing and collecting taxes. *Id.* at 462, 184 P.2d at 777, *aff'd in part and rev'd in part on other grounds*, 120 Hawai`i 51 (2008). It upheld the injunction against the collection of the disputed assessments. Although it reversed part of the ICA's ruling, the Supreme Court did not disagree with this jurisdictional analysis and it upheld the ICA's judgment in that respect.

Here, Plaintiff seeks an injunction compelling the State to turn over to Honolulu all amounts improperly kept by the State after it has calculated and retained the actual cost of assessing, collecting and disposing of the Oahu surcharge.

B. The State Mis-Reads the Statute—It Must Calculate the Actual Cost of Assessing, Collecting and Distributing the Oahu Surcharge.

"It is a cardinal rule of statutory construction that courts are bound, if rational and practical, **to give effect to all parts of a statute,** and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute." *Dines v. Pacific Insurance Co.*, 78 Hawai`i 325, 331, 893 P.2d 176, 182 (1995)(emphasis added.) (quoting *Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984) (citations omitted).

HRS §248-2.6 is clear and unambiguous. After the State sequesters 10% of the total tax collected in accordance with subsection (a), it withholds from payment to the counties only the costs it incurred in assessing, collecting, and disposing of the surcharge before returning the "remaining balance" to the counties. However, as the State's witness, Ted Shiraishi, admitted in his deposition,[3] the State has kept the entire 10% even though it knows that that amount does not reflect the actual costs of assessing, collecting and disposing of the County Surcharge.

The State's reading of §248-2.6 is flawed because it renders subsections (b)-(d) entirely superfluous. It simply takes its 10% off the top and puts it in the State general fund. But, doing that cannot be squared with either the definition of the covered costs in subsection (c) or the requirement to pay the "remaining balance" after the deduction of the costs, as required under subsections (b) and (d).

In an attempt to address subsection (c), the State suggests subsection (c) provides "a very expansive justification for the ten percent reimbursement." Motion at page 6. Subsection (c) does nothing of the sort unless the enumerated items, fairly calculated, total 10% of the surcharge. If they fall short of that percentage, then nothing entitles the State to claim more.

In contrast, Plaintiff's analysis of the entire statute is the proper statutory interpretation. The plain and unambiguous language of HRS §248-2.6 instructs the State in subsection (a) to initially deduct 10% of the gross proceeds of the County Surcharge "to **reimburse** the State for the costs of assessment, collection, and disposition of the county surcharge on State tax incurred by the State." In subsection (b), the statute requires that the

[3] A true and correct copy of Ted Shiraishi's deposition transcript is attached as Exhibit K to Plaintiff's cross-motion for summary judgment.

"amounts deducted for costs of assessment, collection, and disposition of the county surcharge shall be withheld from payment to the counties by the State." Subsection (c) defines which costs may be deducted. Subsection (d) then provides that "after the deducting and withholding of the costs under subsections (a) and (b), "the director of finance shall pay remaining balance" to the counties.

C. The State Admits that the 10% Retained is more an "Administrative Fee" and not Actual Reimbursement for the Costs Associated with Collection of the County Surcharge

The State argues that the Legislature intended the 10% deduction to be akin to a "flat administrative fee" to cover the costs of assessment, collection, and disposition of the County Surcharge. Motion at 4 and 5. The State's position is then that (1) it is not required to calculate the costs despite the requirement to do so from subsection (b) and (c); and (2) the Legislature intended for the 10% deduction to have no relation to the amount of actual costs associated with the administration of the County Surcharge. The 10% deduction is merely the price Plaintiff and the Honolulu Taxpayers must pay for the State to collect, administer, and dispose of the County Surcharge. This analysis renders the 10% an administrative fee – or an additional tax upon Plaintiff and the Honolulu Taxpayers.

D. The State's Interpretation Frustrates the Legislative Intent Underlying Act 247 and Has No Rational Basis for an Additional Tax upon Plaintiff and therefore, the State's Interpretation Violates the Equal Protection Clause of the Hawai`i and US Constitutions

1. The Purpose of the Act 247 Was to Assist Counties in Raising Funds for County Specific Needs

The primary purpose of HRS §248-2.6 was to assist the County of Honolulu in raising funds for its mass transit rail system. To that end, the Legislature granted Honolulu (as well as other counties) taxing authority to raise capital to fund public transportation improvements. Since the Surcharge was added to a State tax (GET), the Legislature reasonably

concluded that for efficiency purposes the State agencies – DOTAX and Budget & Finance – would collect, assess, and administer the Surcharge. The State would be reimbursed for the additional costs associated with the Surcharge.

Honolulu exercised this taxing authority by imposing the Surcharge to fund its ambitious rail transit system. The State can point to no law or testimony that the purpose of the statute was, instead, simply to increase the monies into the State's general fund to be used for statewide programs.

The purpose of Act 247 was not to tax one county and use portions of such tax to benefit another statewide programs.

2. The State Fails to Show the Rational Basis for the 10% Deduction to a Legitimate State Interest

The State argues that because the 10% deduction (or rather Administrative Fee), at least, pays – or rather *paid* – for the costs which have undisputably occurred in association with the administration of the County Surcharge. Motion at 11. The State then argues the State has met its burden to show the rational relationship to a legitimate State interest in collecting $184.2 million dollars *only* from the Honolulu Taxpayers. Motion at 9 and 10. It has not.

The proper approach to this issue was explained by the Supreme Court in *Hawai`i Insurers Councill v. Lingle,* 120 Haw. 51, 61, 201 P. 3d 564, 574 (2008)("*Insurers Council*"). There, the Supreme Court distinguished "fees" from "taxes" and explained that the former must meet a three-part test: the charge must be (1) applied to the direct beneficiary of a particular service; (2) . . . allocated directly to defraying the costs of providing the service, and (3) . . . reasonably proportionate to the benefit received.[4] On this basis, the Court upheld the general

[4] The Supreme Court distinguished "user" fees from "regulatory fees," which are based upon "the police power to regulate particular businesses or activities." *Id.* at 120 Haw. 60, 201 P.3d 573. Obviously, this case involves, at best for the State, only a user fee.

scheme under which insurers were required to pay fees to the DCCA, 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.

So, the question then becomes whether there is any basis on which the director of finance can, by refusing to calculate the costs of assessing, collecting and disposing of the surcharge, take the entire 10% and put it into the general fund, when the actual costs are demonstrably lower (as shown by comparing the total budget of the Department of Taxation for ALL its work to the amount withheld from the Oahu Surcharge. This is exactly the kind of overreaching condemned in *Insurers Council.* The excess over actual costs must be paid over to the City & County for the benefit of Oahu taxpayers.

But, the tax in this case also violates the equal protection clause, for the State is imposing an added GET burden on the taxpayers of Oahu for no rational reason. The fact that Oahu is building a transit system is no cause for the State to skim most part of the tax revenue under the guise of taking funds for "assessing, collecting and disposing" of the Surcharge. While the State is surely entitled to cover its costs, it is not entitled to claim amounts that are far, far in excess of those costs, fairly calculated. This is not a case like *Insurers Council*, where the tax covered only "a substantial portion of the administrative costs" of running the "insurance division and its supporting offices and divisions." There was, therefore, a rational basis for imposing "the entire burden" upon the industry. Here, in contrast, the amounts diverted from the Oahu Surcharge is vastly more than can be justified by the resulting costs. As a result, those who pay the Oahu Surcharge are paying excessive GET to the State. That discrimination can be

corrected only by turning the amounts in excess of the State's costs over to the City & County so they can be used for constructing the rail project.

The State's burden to show a rational basis to a legitimate State interest is not discharged simply because something was incurred and paid for by the 10% deduction. The State must show to the slightest degree why a 10% deduction -- or $184.2 million dollars -- is **rationally related** to the State's interest in collecting, administering, and disposing of the County Surcharge. The State would have the Court believe that because it incurred $6,492,075.00 through 2009 [Motion at 11.] plus $5,999,008[5] for staffing totaling approximately $12.4 million, these costs justify and rationally relate to the $184.2 million dollars that it has retained from the County. It does not.

IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court deny Defendant's MSJ against Plaintiff.

DATED: Honolulu, Hawai`i, March 15, 2016.

PAUL ALSTON
THOMAS E. BUSH
LORI K. STIBB

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

[5] Using the State's higher number for the additional staff reportedly needed in 2008 of $749,876 [Motion at 10.] Plaintiff calculated this for the last 8 years ($749,876 x 8 years = $5,999,008.00). This, of course, assumes no economies of scale and no improved efficiency.

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 HAWAI`I, Defendant.	Civil No. 15-1-2020-10 ECN (Other Civil Action) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I caused a true and correct copy of the foregoing document to be served on the following persons by facsimile, hand-delivery or U.S. mail, postage prepaid (as indicated below) to their respective addresses:

	HAND-DELIVERED	FAXED	MAILED
DOUGLAS CHIN, ESQ. Attorney General, State of Hawai`i HUGH R. JONES, ESQ. NATHAN S.C. CHEE Deputy Attorney General Department of the Attorney General 425 Queen Street Honolulu, Hawai`i 96813 Attorney for Defendant STATE OF HAWAII	☒	☐	☐

DATED: Honolulu, Hawai`i, March 15, 2016.

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