No. CAAP-16-0000462

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI`I

TAX FOUNDATION OF HAWAI`I, a Hawai`i non-profit corporation, on behalf of itself and those similarly situated,

Plaintiff/Appellant,

vs.

STATE OF HAWAI`I,

Defendant/Appellee.

Civil No. 15-1-2020-10

APPEAL FROM THE:

(1) FINAL JUDGMENT FILED JUNE 1, 2016 AND (2) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COMPLAINT FILED ON OCTOBER 21, 2015 (FILED ON NOVEMBER 10, 2016), FILED MAY 16, 2016

FIRST CIRCUIT COURT, STATE OF HAWAII

The Honorable Edwin C. Nacino, Judge

PLAINTIFF/APPELLANT TAX FOUNDATION OF HAWAI`I'S APPLICATION FOR TRANSFER TO THE HAWAI`I SUPREME COURT

CERTIFICATE OF SERVICE

Of Counsel:
ALSTON HUNT FLOYD & ING
Attorneys at Law
A Law Corporation

PAUL ALSTON 1126
LORI KING STIBB 9670
1001 Bishop Street, Suite 1800
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail: brogers@ahfi.com
lstibb@ahfi.com
Attorneys for Plaintiff-Appellant
TAX FOUNDATION OF HAWAI`I

PLAINTIFF/APPELLANT TAX FOUNDATION OF HAWAI`I'S APPLICATION FOR TRANSFER TO THE HAWAI`I SUPREME COURT

I. REQUEST FOR TRANSFER TO THE SUPREME COURT

Plaintiff-Appellant Tax Foundation of Hawaii (the "Foundation") requests this Honorable Court to accept transfer over this appeal pursuant to Hawai`i Revised Statutes ("HRS") § 602-58 and Rule 40.2 of the Hawai`i Rules of Appellate Procedure ("HRAP").[1]

This appeal presents important matters of public policy and statutory interpretation, as it requires a decision about the impact of HRS §248-2.6 on the State of Hawai`i, and its agents the Department of Taxation ("DOTAX") and the Director of Finance. Specifically, the question presented is whether DOTAX and the Director of Finance have violated HRS § 248-2.6 by retaining 10% of the Oahu GET Surcharge – totaling more than $177 million; and nearly 100% of the cost of operating all of DOTAX for the entire period since the surcharge was first collected in 2007. The State claimed this huge fund as compensation for administering and collecting the Surcharge even though the amount collected bears no relation to the actual costs associated with its efforts. The State asserts that it is entitled to collect the entire 10% deduction and has no requirement to calculate the costs; the Foundation contends HRS § 248-2.6 permits the State retain only to the amount necessary to cover the actual direct and indirect costs of assessing, collecting and disposing of the Surcharge.

The Circuit Court dismissed the Foundation's Complaint on the grounds that it did not have jurisdiction to rule on a declaratory relief action involving a "controversy with respect to taxes," even though the Foundation does not seek a refund of its own taxes; rather it seeks to have the disputed amounts paid to the City & County of Honolulu.

[1] The Foundation asked the State to make a joint request for transfer. The State refused, saying it will explain its refusal in an opposition memorandum.

While the statute at issue involves a fund derived from tax collections, the dispute is in regard to the portion of the amount collected that the State retains and places in its general funds. The tax itself is not being challenged. Therefore, the action is not a "controversy with respect to taxes" and prohibited from review by the Circuit Court. This is action is analogous to *Hawaii Insurers Council v. Lingle,* 117 Hawai`i 454, 184 P.2d App.), *aff'd in part and rev'd in part on other grounds* 120 Hawai`i 51 (2008) where the Intermediate Court of Appeals specifically addressed HRS § 632-1's prohibition of declaratory judgments on taxes as inapplicable if a party does not attempt to keep the State from assessing and collecting tax. This issue involves over $177 million and is, as explained below, a matter of fundamental public importance. Therefore, there are grounds for mandatory transfer to the Supreme Court. *See* HRS § 602-58(a)(1).

In the alternative, discretionary transfer is appropriate under HRS § 602-59(b)(2). Whether the State, DOTAX, and the director of finance's retention of the entire 10% deduction from the Surcharge is constitutionally allowed is an important question of first impression. *See* HRS 602-58(b)(1).

II. PRIOR PROCEEDINGS AND SHORT STATEMENT OF RELEVANT FACTS

The Foundation filed its lawsuit in October 2015 in the Circuit Court of the First Circuit, seeking declaratory and injunctive relief in the nature of mandamus to force the State of Hawai`i (the "State") to follow HRS § 248-2.6 and only retain the actual costs associated with collecting, assessing, and disposing of the Surcharge. The Foundation contends the State is violating HRS § 248-2.6 ("Section 2.6") by retaining the entire 10% of the half-percent (0.5%) surcharge (the "Surcharge") on the General Excise Tax ("GET") and Use Tax that the Department of Taxation ("DOTAX") assesses and collects on behalf of the

City and County of Honolulu ("Honolulu") to fund Honolulu's multi-billion dollar rapid transit project. Section 2.6 requires the State to (1) collect 10% of the Surcharge (the "10% Fee"), (2) calculate its costs and then (3) pay the Surcharge to the County minus **only** an amount sufficient to cover the costs it actually incurred in assessing, collecting, and disbursing the Surcharge. The State contends no cost calculation is required, and it can keep the entire 10% Fee, even though, year in and year out, the amount it has kept is all, or nearly all, of DOTAX's entire budget. To date, the State has retained over $177 million, which is over $150,000,000.00 too much based upon the available data. ROA[2] 1:145, 148, and 150-51.

On November 10, 2015, the State moved to dismiss Petitioner's Complaint for lack of standing and lack of subject matter jurisdiction. ROA 1:40-86. On January 4, 2016, the Foundation deposed the State's 30(b)(6) representative – Ted Shiraishi. *Id.* at 181. On January 21, 2016, the Foundation moved for summary judgment on the Complaint. *Id.* at 1:195-282. On March 4, 2016, the State filed its cross-summary judgment motion. *Id. at 286-537.* On March 23, 2016, the Court heard the State's Motion to Dismiss and the two motions for summary judgment. Court Tr.[3] 2:24-25 and 3:1-2.

Taking the State's Motion to Dismiss first, Judge Nacino ruled that the Complaint is a "[HRS §] 632-1 argument" and "it's a controversy arising out of a tax." Court Tr. 31:14-19. Judge Nacino (mis)applied the *San Juan Cellular Telephone Co. v. Public Comm'n of Puerto Rico* 967 F.2d 683 (1st Cir. 1992) test which this Court applied in the *Hawaii Insurers Council* to determine that Petitioner's claim is "a tax, an imposition of a tax

[2] The Record on Appeal ("ROA") has two volumes. The ROA will be cited according to volume and PDF page number.

[3] The Transcript of the hearing ("Court Tr.") is filed as Dkt #23.

upon – well, a tax. And because of that [the complaint] it does invoke [HRS §] 632-1." *Id*. at 2:15-17. While never asserting which court the Foundation's claims could be addressed, Judge Nacino dismissed the Complaint without leave to amend. *Id*.at 34:14-16.

On May 16, 2016, the Circuit Court entered its Order Granting the Motion for Summary Judgment. ROA at 1:573-74. On June 1, 2016, the Circuit Court entered the Final Judgment. *Id.* at 575-76.

On June 14, 2016, the Foundation timely filed its Notice of Appeal. Dkt #1.

On August 25, 2016, the Foundation filed its Opening Brief. Dkt #25.

On November 16, 2016, the State filed its Answering Brief. Dkt #43.

III. STATEMENTS OF POINTS OF ERROR TO BE RAISED

The Foundation identifies the following points of error:

(A) The Circuit Court erred in granting the State's motion to dismiss on the premise that the Circuit Court had no jurisdiction because the Foundation's complaint involved a controversy seeking declaratory relief was respect to taxes, despite the ruling in *Hawaii Insurers Council v. Lingle,* 117 Hawai`i 454, 184 P.3d 769 (Ct. App. 2008), *aff'd in part and rev'd in part on other grounds* 120 Hawai`i 51, 201 P.3d 564 (2008).

(B) The Circuit Court erred by misreading HRS § 248-2.6.

(C) Finally, at minimum, the Circuit Court erred in not allowing the Foundation the opportunity to amend its complaint, if any amendment was needed to present this dispute.

IV. STATUTORY QUALIFICATIONS FOR MANDATORY TRANSFER

The Supreme Court is authorized to entertain applications for both mandatory and discretionary transfer of cases from the Intermediate Court of Appeals ("ICA"). *See*

HRS § 602-58. Transfer is mandatory when an appeal involves a question of fundamental public importance. *Id.*at (a)(1). Transfer is optional when an appeal presents a question of first impression. *Id.* at (b)(1). This case satisfies the requirements for both mandatory and discretionary transfer.

First, this case involves questions of fundamental public importance, as it affects how millions of taxpayer dollars are handled and distributed by those agencies charged to follow the law. Indeed, this appeal is akin to the ICA's and this Court's decision in the *Insurance Council* cases. There, an insurance trade association filed an action challenging, among other things, a legislative raid on the DCCA's compliance resolution fund ("CFR") which led to regulatory assessments imposed on insurers under HRS § 431:2-215 being diverted into the State's general fund. As here, the State argued that the Circuit Court lacked jurisdiction, in part, because the lawsuit violated the prohibition against declaratory relief actions regarding taxes under HRS § 632-1. The Intermediate Court of Appeals rejected that argument holding that the prohibition against actions regarding taxes under HRS § 632-1 did not apply because the Council was not attempting to keep the State from assessing and collecting taxes. *Id.* at 462, 201 P.3d at 777.[4]

Inexplicably, here, the Circuit Court ignored that ruling. The Foundation sought to compel the transfer of funds (as in *Insurance Council*) and the Foundation did not (and does not):

[4] This Court upheld part of the ICA's ruling and determined that the funds raided from the CRF and transferred to the State's general fund had to be returned to the CRF. Having given this substantive relief, the Supreme Court declined to address the State's argument under HRS § 632-1. *See* 120 Hawai`i at 72 n. 15.

- Dispute that the Surcharge is legal;
- Dispute its obligations; or
- Seek a ruling that will in any way interfere with the State's ability to impose and collect the Surcharge.

Rather, this action seeks only to stop the State from keeping more than its share of the Surcharge and force it to disgorge the funds that rightly belong to Honolulu. The issues presented now are of greater size and public importance than those in the Insurers Council cases;[5] which only affected a small group of companies. Therefore, the Hawai`i Supreme Court should decide these issues in the first instance on appeal.

Second, the legal issue presented in this case is of continuing significance and an early final resolution will serve the public interest. The State has retained over $177 million – and nearly all of that belongs to the City & County. The State will continue to illegally retain the 10% deduction as long as the Surcharge is in place to pay for Honolulu's rail project. Prompt resolution of the proper allocation of 10% deduction is in the interests of all parties including the State.

In addition, the legal issue presented is a question of first impression that warrants discretionary transfer under HRS § 605-58(b)(1).

[5] In the complaint, the prayer included, as one alternative, a partial refund. ROA 1:21. Subsequently, the Foundation abandoned that request. *See* ROA 1:112

V. CONCLUSION

For the foregoing reasons, this appeal qualifies for either mandatory or discretionary transfer under HRS § 602-58. Accordingly, it is respectfully request that this Court grant the Foundation's Application.

DATED: Honolulu, Hawai`i, December 9, 2016.

/s/ PAUL ALSTON
PAUL ALSTON
LORI KING STIBB

Attorneys for Plaintiff/Appellant
TAX FOUNDATION OF HAWAI`I, a Hawai`i nonprofit corporation, on behalf of itself and those similarly situated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document will be served on counsel of record indicated below through JEFS upon the filing hereof:

DOUGLAS CHIN, ESQ.	Douglas.S.Chin@hawaii.gov
HUGH R. JONES, ESQ.	Hugh.R.Jones@hawaii.gov
NATHAN S. C. CHEE, ESQ.	Nathan.S.Chee@hawaii.gov
ROBERT T. NAKATSUJI, ESQ.	Robert.T.Nakatsuji@hawaii.gov

DATED: Honolulu, Hawai`i, December 9, 2016.

/s/ PAUL ALSTON
PAUL ALSTON
LORI K. STIBB

Attorneys for Plaintiff/Appellant
TAX FOUNDATION OF HAWAI`I, a Hawai`i nonprofit corporation, on behalf of itself and those similarly situated