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NO. SCAP-16-0000462

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

TAX FOUNDATION OF HAWAI‘I, a Hawai‘i nonprofit corporation, on behalf of itself and those similarly situated, Petitioner/Plaintiff-Appellant, vs. STATE OF HAWAI‘I, Respondent/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, 2015), filed May 16, 2016 FIRST CIRCUIT COURT HONORABLE EDWIN C. NACINO Judge

RESPONDENT/DEFENDANT-APPELLEE STATE OF HAWAII’S RESPONSE TO PETITIONER/PLAINTIFF-APPELLANT TAX FOUNDATION OF HAWAII’S APPLICATION FOR TRANSFER TO THE HAWAI‘I SUPREME COURT

CERTIFICATE OF SERVICE

On December 9, 2016, Petitioner/Plaintiff-Appellant TAX FOUNDATION OF HAWAIʻI ("Plaintiff") filed an Application for Transfer to the Hawaiʻi Supreme Court in the instant case. Respondent/Defendant-Appellee STATE OF HAWAIʻI ("the State") opposes Plaintiff's Application for the reasons set forth below, pursuant to Hawaiʻi Rules of Appellate Procedure ("HRAP") Rules 40.2(d) and 27(a).

I. STATEMENT OF PRIOR PROCEEDINGS AND RELEVANT FACTS

In 2005, the Hawaiʻi State Legislature passed Act 247, 2005 Haw. Sess. Laws Act 247, §§ 1-9 at 770-75 ("Act 247"). Act 247 became law without the Governor's signature and, among other things, it amended HRS Chapter 46 to authorize any county to adopt a surcharge on Hawaii's General Excise Tax ("GET") and Use Tax by passing a county ordinance. Act 247, § 2 at 770 (codified at Hawaiʻi Revised Statutes ("HRS") § 46-16.8(a) (2012)). Counties were authorized to use the surcharge proceeds for purposes such as "a mass transit project," "public transportation," and expenses in complying with the Americans with Disabilities Act. *Id.* (codified at HRS § 46-16.8(c) & (d)).

When the Legislature was drafting Act 247, the conference committee appointed to work out differences between the House and Senate versions of House Bill No. 1309 amended the bill *to require* the Director of Finance to deduct ten percent of the surcharge to reimburse the State for its costs in the assessment, collection, and disposition of the surcharge. *See* State's Cross-Motion for S.J., Exhibit "B," ICA 6 at 317-69.[1] Therefore, the final version of Act 247 included

[1] Citations to documents in the record will be abbreviated as follows: "[description of document], ICA ___ at PDF ___." The ICA reference is to the JEFS online document number at which a scanned copy of the actual filing is located. The PDF reference is to the specific PDF page number(s) of that ICA document. Transcripts will be abbreviated as follows: "Tr. [date], ICA ___ at PDF ___." Documents filed in the Hawaiʻi Supreme Court will be abbreviated as: "[description of document], SCT ___ at PDF ___."

a provision in HRS Chapter 248 that stated: "[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." Act 247, § 5 at 773 (codified at HRS § 248-2.6(a) (Supp. 2015)) (emphasis added).

Only the City and County of Honolulu adopted a county surcharge, which was set at .5 percent and was to be used for Honolulu's rail project. *See* Revised Ordinances of Honolulu ("ROH") §§ 6-60.1 & 6-60.2. Since January 1, 2007, the State has collected $1.658 billion in surcharge taxes (after the ten percent deduction) for the City and County of Honolulu. The State has deposited ten percent of the gross proceeds, or $184.2 million, into the general fund, through January 2016 as required by HRS § 248-2.6. *See* State's Cross-Motion for S.J., Declaration of Judy Dang & Exhibit "A," ICA 6 at PDF 309-12.

On October 21, 2015, Plaintiff filed a Complaint against the State, seeking to declare, based on HRS § 632-1 (1993), that the State's retention of ten percent of the surcharge pursuant to HRS § 248-2.6 was unconstitutional and seeking injunctive and mandamus relief. Plaintiff requested: (1) an order directing the State to deduct and withhold only the actual costs of administering the surcharge; (2) an order directing the State to reimburse to the City and County of Honolulu and/or Plaintiff and similarly situated class members all amounts improperly collected by the State; and (3) an award of attorneys' fees. Complaint, ICA 6 at PDF 11-22.

On November 10, 2015, the State filed Defendant State of Hawaii's Motion to Dismiss Complaint Filed on October 21, 2015 ("State's Motion to Dismiss"). State's Motion to Dismiss, ICA 6 at PDF 40-86. The State argued that the circuit court lacks subject matter jurisdiction

under HRS § 632-1,[2] that mandamus relief is not appropriate, and that Plaintiff lacks standing to sue. State's Motion to Dismiss, ICA 6 at PDF 45-54.

On January 21, 2016, Plaintiff filed Plaintiff's Cross-Motion for Summary Judgment Against Defendant State of Hawai'i ("Plaintiff's Cross-Motion for Summary Judgment"). Plaintiff's Cross-Motion for S.J., ICA 6 at PDF 195-282. Plaintiff argued the merits of the case, including its claim that HRS § 248-2.6 requires the State to calculate the actual costs of the surcharge. Plaintiff's Cross-Motion for S.J., ICA 6 at PDF 210-11. Plaintiff further argued that HRS § 248-2.6 is unconstitutional and mandamus relief is appropriate. Plaintiff's Cross-Motion for S.J., ICA 6 at PDF 211-19.

On March 4, 2016, the State filed Defendant State of Hawaii's Cross-Motion for Summary Judgment ("State's Cross-Motion for Summary Judgment"). State's Cross-Motion for S.J., ICA 6 at PDF 286-537. The State reiterated its argument that the circuit court lacks subject matter jurisdiction and further argued that HRS § 248-2.6 unambiguously requires the State to retain ten percent of the surcharge, that this interpretation is consistent with legislative intent, that there is no equal protection violation (including that there is a rational basis for the statute), that there is no violation of the General Laws provision of the Hawai'i Constitution, and that this matter belongs in the Legislature and not in the courts. State's Cross-Motion for S.J., ICA 6 at PDF 294-307.

The circuit court held a hearing on both the State's Motion to Dismiss and the parties' Cross-Motions for Summary Judgment on March 23, 2016. Tr. 3/23/16, ICA 23 at PDF 1-36. The court ultimately ruled that it lacked subject matter jurisdiction because the instant case is a

[2] HRS § 632-1 provides in relevant part: "[C]ourts of record . . . shall have power to make binding adjudications of right . . . provided that declaratory relief may not be obtained . . . ***in any controversy with respect to taxes***[.]" (Emphasis added.)

"controversy with respect to taxes" and also that mandamus relief was inappropriate. *Id.*, ICA 23 at PDF 31-35. The court, however, made no finding as to standing. *Id.*, ICA 23 at PDF 33. The court also denied Plaintiff's request to amend the complaint. *Id.*, ICA 23 at PDF 34.

On May 16, 2016, the circuit court entered its Order Granting Defendant's Motion to Dismiss Complaint Filed on October 21, 2015 (Filed on November 10, 2015). Order, ICA 6 at PDF 573-74. The Order granted the State's Motion to Dismiss, denied Plaintiff's oral motion to amend the complaint, and ruled that the parties' Cross-Motions for Summary Judgment were moot. *Id.*, ICA 6 at PDF 574. Final Judgment was entered on June 1, 2016 dismissing all claims in the Complaint for lack of jurisdiction and entering judgment in favor of the State and against Plaintiff. Final Judgment, ICA 6 at 575-76. Plaintiff filed its Notice of Appeal on June 14, 2016. Notice of Appeal, ICA 1 at PDF 1-2.

On August 25, 2016, Plaintiff filed its Opening Brief ("O.B."). O.B., ICA 25 at PDF 1-31. On October 18, 2016, Amicus Curiae GRASSROOT INSTITUTE OF HAWAI'I, INC. ("the Grassroot Institute") filed its Motion for Leave to File Amicus Curiae Brief in Support of Plaintiff/Appellant Tax Foundation of Hawai'i. Motion, ICA 33 at PDF 1-45. The Intermediate Court of Appeals ("ICA") granted the Motion on November 1, 2016. Order, ICA 35 at PDF 1-2. In its Order, the ICA directed the State to respond to the Grassroot Institute's Amicus Brief in the State's Answering Brief and extended the State's filing deadline to November 17, 2016. *Id.*, ICA 35 at PDF 1. Grassroot Institute filed its Amicus Brief on November 2, 2016. Amicus Brief, ICA 37 at PDF 1-40. On November 4, 2016, the State filed its Motion for Leave to File Enlarged Answering Brief. Motion, ICA 39 at PDF 1-10. On November 10, 2016, the ICA granted the Motion in part and allowed the State to file a 40-page Answering Brief. Order, ICA 41 at PDF 1. On November 16, 2016, the State filed its Answering Brief ("A.B."). A.B., ICA 43

at PDF 1-76. On December 9, 2016, Plaintiff filed its Reply Brief ("R.B."). R.B., ICA 49 at PDF 1-14.

On December 9, 2016, Plaintiff filed the instant Application for Transfer to the Hawai'i Supreme Court. Application, SCT 1 at PDF 1-9.

II. ARGUMENT

The State believes that this case would benefit from being fully litigated in the ICA. The State is confident that the ICA is more than capable of addressing the issues in this case. In addition, the ICA has already been involved in deciding appellate motions in this case. *See* Grassroot Institute's Motion for Leave to File Amicus Curiae Brief in Support of Plaintiff/Appellant Tax Foundation of Hawai'i, ICA 33 at PDF 1-45; Order, ICA 35 at PDF 1-2; State's Motion for Leave to File Enlarged Answering Brief, ICA 39 at PDF 1-10; Order, ICA 41 at PDF 1. And even if, following a decision by the ICA, one party or the other applies for and is granted certiorari, the Hawai'i Supreme Court would benefit from having the prior analysis of the ICA as a starting point for its own analysis. This is the ordinary process and works well in the majority of cases, and the State sees no reason to change the process in the instant case.

Furthermore, the State believes that this case does not meet the statutory requirements for either mandatory transfer or discretionary transfer under HRS § 602-58 (Supp. 2015). HRS § 602-58 provides:

> **§602-58. Application for transfer to the supreme court.** (a) The supreme court, in the manner and within the time provided by the rules of court, shall grant an application to transfer any case within the jurisdiction of the intermediate appellate court to the supreme court upon the grounds that the case involves:
>
> (1) A question of imperative or fundamental public importance;
> (2) An appeal from a decision of any court or agency when appeals are allowed by law:
> (A) Invalidating an amendment to the state constitution; or
> (B) Determining a state statute, county ordinance, or agency rule to

> be invalid on the grounds that it was invalidly enacted or is unconstitutional, on its face or as applied, under either the constitution of the State or the United States; or
>
> (3) A sentence of life imprisonment without the possibility of parole.
>
> (b) The supreme court, in a manner and within the time provided by the rules of court, may grant an application to transfer any case within the jurisdiction of the intermediate appellate court to the supreme court upon the grounds that the case involves:
>
> (1) A question of first impression or a novel legal question; or
>
> (2) Issues upon which there is an inconsistency in the decisions of the intermediate appellate court or of the supreme court.
>
> (c) The grant or denial of an application for transfer under subsection (b) shall be discretionary and shall not be subject to further review. Denial of an application for transfer under subsection (b) shall not prejudice a later application for a writ of certiorari.

Contrary to Plaintiff's claim, this case does not present a "question of imperative or fundamental public importance[.]" This case actually involves the narrow jurisdictional question of where tax disputes should be litigated. *See* A.B. at 1, 5-14, ICA 43 at PDF 11, 15-24. The circuit court dismissed the case on subject matter jurisdiction grounds because HRS § 632-1 expressly prohibits declaratory judgment actions for "any controversy with respect to taxes[.]" Order, ICA 6 at PDF 573-74; Tr. 3/23/16, ICA 23 at PDF 31-35. The exception for tax controversies in HRS § 632-1, persuasive case law, and the general scheme set forth in Hawaii's statutes and case law indicate that these kinds of tax disputes belong, if anywhere, in tax appeal court rather than in regular circuit court. *See* A.B. at 5-14, ICA 43 at PDF 15-24.

Plaintiff repeatedly argues that this case involves "more than" or "over" "$177 million" in an effort to demonstrate how important this case is. Application at 2-4, 7, SCT 1 at PDF 2-4, 7. Although the merits of this case do involve the ten percent deduction from the county surcharge, the merits were never addressed by the circuit court. *See* A.B. at 20-21, ICA 43 at PDF 30-31. The circuit court dismissed the case on jurisdictional grounds, ruled that the parties' Cross-Motions for Summary Judgment were moot, and never addressed the merits. *See id.*;

Order, ICA 6 at PDF 573-74. Therefore, even if Plaintiff were to prevail on the jurisdictional issues, the case should be remanded to the circuit court for a ruling on the merits rather than the appellate court addressing the merits now. *See AFL Hotel & Restaurant Workers Health & Welfare Trust Fund v. Bosque*, 110 Hawai'i 318, 320-27, 132 P.3d 1229, 1231-38 (2006). The merits, which involve the "over $177 million," are not actually at issue in this appeal. *See* A.B. at 20-21, ICA 43 at PDF 30-31.

Moreover, Plaintiff's reliance on the "over $177 million" figure is extremely disingenuous. The "over $177 million" figure represents the ***total amount*** of funds collected pursuant to HRS § 248-2.6. However, HRS § 248-2.6 was enacted back in 2005, and ***Plaintiff waited 10 years before filing its lawsuit in 2015***. Therefore, the "over $177 million" figure is the result of Plaintiff waiting so long. In fact, the average per year of the funds collected pursuant to HRS § 248-2.6 is only about $20 million, which is much less impressive. *See* State's Cross-Motion for Summary Judgment, Declaration of Judy Dang & Exhibit "A," ICA 6 at PDF 309-12. The fact that Plaintiff waited so long before filing its lawsuit also suggests that Plaintiff itself did not think this matter was "imperative" or "importan[t]".

This appeal also does not involve a decision from a court or agency invalidating a state constitutional amendment, a decision from a court or agency determining that a state statute, county ordinance, or agency rule is invalid, or a sentence of life imprisonment without the possibility of parole.

Therefore, mandatory transfer is not appropriate under HRS § 602-58(a).

Discretionary transfer is also not appropriate in this case. This case does not involve a "question of first impression or a novel legal question[.]" This case is primarily a statutory construction matter. It involves the proper construction of the exclusion for tax controversies in

HRS § 632-1. *See* A.B. at 5-14, ICA 43 at PDF 15-24. It also involves mandamus relief precluded by Hawai‘i Rules of Civil Procedure ("HRCP") Rule 81.1, HRS § 602-5(a)(3), and HRAP Rule 21(b), which again involves the proper construction of statutes/rules. *See* A.B. at 15-17, ICA 43 at PDF 25-27. Even if an appellate court decides to address the merits of this case (notwithstanding the fact that the circuit court never ruled on the merits), the merits involve the proper construction of HRS § 248-2.6 (Supp. 2015). *See* A.B. at 21-24, ICA 43 at PDF 31-34. Statutory construction is not a question of first impression or a novel legal question, especially when the plain meaning of the statutes is so clear. *See Haw. Gov't Employees Ass'n v. Lingle*, 124 Hawai‘i 197, 202, 239 P.3d 1, 6 (2010) (holding that "the fundamental starting point for statutory interpretation is the language of the statute itself. . . . [W]here the statutory language is plain and unambiguous, [the court's] sole duty is to give effect to its plain and obvious meaning"). The Equal Protection issue raised by Plaintiff is also governed by well-settled case law on the rational basis test. *See* A.B. at 24-31, ICA 43 at PDF 34-41; *Maeda v. Amemiya*, 60 Haw. 662, 668-70, 594 P.2d 136, 140-41 (1979); *Daoang v. Dep't of Education*, 63 Haw. 501, 506, 630 P.2d 629, 632 (1981); *Nagle v. Board of Education*, 63 Haw. 389, 396, 629 P.2d 109, 114 (1981). And interpretation of the General Laws provision of the Hawai‘i Constitution is governed by well-settled Hawai‘i law. *See* A.B. at 31-32, ICA 43 at PDF 41-42; *Bulgo v. County of Maui*, 50 Haw. 51, 58, 430 P.2d 321, 326 (1967).

There are also no inconsistencies in the decisions of the ICA or Hawai‘i Supreme Court relevant to this case. Plaintiff relies heavily on *Hawaii Insurers Council v. Lingle*, 117 Hawai‘i 454, 184 P.2d 769 (App. 2008) ("*Hawaii Insurers Council I*"), and *Hawaii Insurers Council v. Lingle*, 120 Hawai‘i 51, 201 P.3d 564 (2008) ("*Hawaii Insurers Council II*"). However, any analysis by the ICA in *Hawaii Insurers Council I* regarding HRS § 632-1 is no longer good law

and is not binding because the Hawaii Supreme Court in *Hawaii Insurers Council II* held that the assessment in that case was a "regulatory fee" rather than a "tax." Moreover, Plaintiff's argument that the circuit court misapplied the *San Juan Cellular* test from *Hawaii Insurers Council II* is incorrect because the GET and the surcharge at issue in the present case are very clearly taxes and not regulatory fees. This case does not involve inconsistencies among Hawai'i cases.

Therefore, discretionary transfer is not appropriate under HRS § 602-58(b).

III. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Plaintiff's Application and allow this case to proceed in the normal course before the ICA.

DATED: Honolulu, Hawai'i, December 15, 2016.

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NO. SCAP-16-0000462

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

TAX FOUNDATION OF HAWAI‘I, a Hawai‘i nonprofit corporation, on behalf of itself and those similarly situated, Petitioner/Plaintiff-Appellant, vs. STATE OF HAWAI‘I, Respondent/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, 2015), filed May 16, 2016 FIRST CIRCUIT COURT HONORABLE EDWIN C. NACINO Judge

CERTIFICATE OF SERVICE

I certify that Respondent/Defendant-Appellee State of Hawaii’s Response to Petitioner/Plaintiff-Appellant Tax Foundation of Hawaii’s Application for Transfer to the Hawai‘i Supreme Court was either served electronically (through the Court’s JEFS system), or conventionally (by mailing a copy via USPS, first class, postage prepaid), upon the following on December 15, 2016:

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