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Supreme Court
SCAP-16-0000462
15-SEP-2017
09:23 AM

Counsel for Defendant-Appellee
STATE OF HAWAI'I

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,

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, 2015), filed May 16, 2016

FIRST CIRCUIT COURT

HONORABLE EDWIN C. NACINO
Judge

**DEFENDANT-APPELLEE STATE OF HAWAI'I'S MOTION TO STRIKE
PLAINTIFF-APPELLANT TAX FOUNDATION'S HRAP RULE 28(j) RESPONSE**

DECLARATION OF ROBERT T. NAKATSUJI

EXHIBITS "A" & "B"

CERTIFICATE OF SERVICE

**DEFENDANT-APPELLEE STATE OF HAWAII'S MOTION TO STRIKE
PLAINTIFF-APPELLANT TAX FOUNDATION'S HRAP RULE 28(j) RESPONSE**

Defendant-Appellee STATE OF HAWAII ("the State"), by and through its attorneys, ROBERT T. NAKATSUJI, HUGH R. JONES, and NATHAN S.C. CHEE, Deputy Attorneys General, State of Hawai'i, hereby move this Honorable Court to strike Plaintiff-Appellant TAX FOUNDATION OF HAWAII's ("Tax Foundation's") response to the State's Hawai'i Rules of Appellate Procedure ("HRAP") Rule 28(j) letter.

HRAP Rule 28(j) expressly provides:

Parties may, by letter to the appellate clerk, bring to the appellate court's attention pertinent and significant authorities published after a party's brief has been filed, but before a decision. A copy of the letter, setting forth the citations, shall be served at or before the time of filing as provided by Rule 25(b) of these Rules. The letter shall provide references to either the *page(s) of the brief* or to a point argued orally *to which the citations pertain*. The letter shall, *without argument, state the reasons* for the supplemental citations. *Any response* shall be made promptly and *shall be similarly limited*.

(Emphasis added.)

The State's HRAP Rule 28(j) letter was filed on September 7, 2017 and cited new pertinent and significant authority that had arisen after the conclusion of briefing, specifically Act 1 (S.B. 4), 29th Leg., 1st Spec. Sess. (2017), available at [http://www.capitol.hawaii.gov/splsession2017a/GM102 .pdf](http://www.capitol.hawaii.gov/splsession2017a/GM102.pdf). The State's letter referenced pages 1, 30, 31, and 38 of the State's Answering Brief. The reason for the citation was that those pages of the brief address whether the matter at issue in this case properly belongs in the Legislature or in the courts, and Section 5 of Act 1 pertains to that issue. The State's letter contained no argument.

In contrast, Tax Foundation's HRAP Rule 28(j) response, which was filed on September 13, 2017, consists entirely of argument. Tax Foundation makes a specific argument relying on Section 20 of Act 1; argues that Act 1 did not amend HRS § 248-2.6(b), (c), and (d); and argues

that Section 9 of Act 1 recognizes the Court’s role, discriminates against Honolulu taxpayers, and is unconstitutional. Very clearly, all of this is argument. In addition, other than a single reference to pages 20-21 of the Opening Brief, Tax Foundation does not relate these arguments to any specific issues previously addressed in their briefs. Furthermore, Tax Foundation’s characterization of the State’s HRAP Rule 28(j) letter as “argument” is completely incorrect, as well as constituting improper argument itself.¹

Consequently, Tax Foundation’s HRAP Rule 28(j) response violates the express terms of HRAP Rule 28(j) and should be stricken.

This Motion is made pursuant to HRAP Rules 27(a) and 28(j) and is based on the attached Declaration of Robert T. Nakatsuji and Exhibits “A” and “B”.

DATED: Honolulu, Hawaii, September 15, 2017.

/s/ Robert T. Nakatsuji
ROBERT T. NAKATSUJI
HUGH R. JONES
NATHAN S.C. CHEE
Deputy Attorneys General

Attorneys for Defendant-Appellee
State of Hawai‘i

¹ Of course, the State disagrees with Tax Foundation on these matters, but in compliance with HRAP Rule 28(j), the State will not here respond to Tax Foundation’s argument on the merits with an (improper) argument of its own.

DECLARATION OF ROBERT T. NAKATSUJI

I, Robert T. Nakatsuji, declare the following:

1. I am a Deputy Attorney General in the Department of the Attorney General. I am one of the attorneys who has been assigned to the instant appeal.

2. On behalf of Defendant-Appellee STATE OF HAWAI‘I (“the State”), I filed a letter on September 7, 2017 pursuant to Hawai‘i Rules of Appellate Procedure (“HRAP”) Rule 28(j) that cited new pertinent and significant authority that had arisen after the conclusion of briefing, specifically Act 1 (S.B. 4), 29th Leg., 1st Spec. Sess. (2017), available at http://www.capitol.hawaii.gov/splsession2017a/GM102_.pdf.

3. A true and correct copy of the State’s HRAP Rule 28(j) letter (excluding the copy of Act 1 itself) is attached as Exhibit “A.”

4. On September 13, 2017, Plaintiff-Appellee TAX FOUNDATION OF HAWAI‘I (“Tax Foundation”) filed its response to the State’s HRAP Rule 28(j) letter.

5. A true and correct copy of Tax Foundation’s HRAP Rule 28(j) response is attached as Exhibit “B.”

I, Robert T. Nakatsuji, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai‘i, September 15, 2017.

/s/ Robert T. Nakatsuji
ROBERT T. NAKATSUJI

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DAVID Y. IGE
GOVERNOR



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**STATE OF HAWAII
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425 QUEEN STREET
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(808) 586-1360
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September 7, 2017

Chief Clerk
Supreme Court of Hawai'i
417 S. King Street
Honolulu, HI 96813

Re: *Tax Foundation of Hawai'i v. State of Hawai'i*, No. SCAP-16-0000462
Hawai'i Rules of Appellate Procedure Rule 28(j)

Dear Chief Clerk:

This appeal has been fully briefed and oral argument was held on July 6, 2017. Pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule 28(j), Defendant-Appellee State of Hawai'i wishes to inform the Court of pertinent and significant authority arising after the conclusion of briefing. That authority is Act 1 (S.B. 4), 29th Leg., 1st Spec. Sess. (2017), available at http://www.capitol.hawaii.gov/splsession2017a/GM102_.pdf, which took effect upon being signed by Governor David Y. Ige on September 5, 2017.

Section 5 of Act 1 pertains to pages 1, 30, 31, and 38 of the State's Answering Brief, where the State addresses whether the matter at issue in this case properly belongs in the Legislature or in the courts.

EXHIBIT "A"

Chief Clerk, Supreme Court of Hawai'i
September 7, 2017
Page 2

A complete copy of Act 1 is attached to this letter for the Court's convenience.

Respectfully,

/s/ Robert T. Nakatsuji
Robert T. Nakatsuji
Hugh R. Jones
Nathan S.C. Chee
Deputy Attorneys General

Attorneys for Defendant-Appellee
State of Hawai'i

Attachment

cc: Paul Alston, Esq.
Lori King Stibb, Esq.
Attorneys for Plaintiff-Appellant
Tax Foundation of Hawai'i

Michael A. Lilly, Esq.
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SCAP-16-0000462
13-SEP-2017
10:06 AM**

September 13, 2017

Chief Clerk
Supreme Court of Hawai'i
417 South King Street
Honolulu, Hawai'i 96813

Re: ***Tax Foundation of Hawai'i v. State of Hawai'i,***
No. SCAP-16-0000462

Dear Honorable Court:

Pursuant to Hawai'i Rules of Appellate Procedure Rule 28(j), the Tax Foundation of Hawaii (the "Foundation"), through its counsel, hereby responds to the State of Hawai'i's ("State") September 7, 2017 letter ("Letter") regarding the newly signed Act 1 of the 2017 Special Session (the "Act").

The Letter is disingenuous, at best in seeking to convince this Court that this Appeal is no longer appropriately before this Court.

The Foundation respectfully submits that the Act is pertinent to this Appeal for entirely different reasons than those submitted by the State:

- Section 5 of the Act, both expands the purposes for which the State can "skim" collections (now including administration of the amounts collected) and diminishes the percentage "skimmed" (from 10% to 1%) – highlighting the excessive mature of the amounts previously skimmed. Contrary to the Letter, Section 5 is irrelevant to skimming which occurred before the effective date of the Act. The State ignores Section 20 of the Act which says that the Act **does not affect** rights that matured or **proceedings that were begun** before the effective date of the Act.

EXHIBIT "B"

- Moreover, Section 5 of the Act, amending HRS § 248-2.6(b), (c), and (d) left intact the key language that the Foundation relied upon on pages 20-21 of its Opening Brief – specifically that the State is not properly interpreting that whole of the statute.

And, perhaps most importantly:

- Section 9 of the Act adds a HRS § 237D-2(e)(2), which states:

If a court of competent jurisdiction determines that the amount of county surcharge on state tax revenues deducted and withheld by the State, pursuant to Section 248-2.6, violates statutory or constitutional law and, as a result, awards moneys to a county with a population greater than five hundred thousand, then an amount equal to the monetary award shall be deducted and withheld from the tax revenues deposited under paragraph (1) into the mass transit special fund, and those funds shall be a general fund realization of the State.

By this language, the Legislative and Executive Branches:

- Explicitly recognize that this Court has a role, in an appropriate case within its jurisdiction, in assessing the size and validity of the skimming of surcharge revenues;
- Perniciously discriminate against the taxpayers of the City & County of Honolulu in violation of Hawai'i Const. Article VII § 1 (which requires the legislature to adopt “general laws”) by exposing only those taxpayers to the obligation to pay back any court awarded refund of prior amounts skimmed at the 10% rate from amounts collected from them;¹ and

¹ This Court's decision in *Sierra Club v. DOT*, 202 P.3d 1226, 2009 LEXIS 118 (2009) teaches that “general laws” are ones that “probably” will apply to more than one county. There is nothing to suggest that the population of the Neighbor Island Counties will ever grow to more than 500,000, only Honolulu has suffered from skimming at 10%, and there is nothing in the purpose of the Act to justify singling out the City and County of Honolulu for the obligation to indemnify the State against having to repay excess amounts skimmed in the past. Indeed, by blocking reimbursement, the legislature has immediately and permanently condemned those who paid the Oahu surcharge to having to bear a disproportionate GET burden (in the form of excessive

- Create a new constitutional problem by disregarding Hawai'i Const. Article VIII § 4 which forbids laws that require counties to pay any "previously accrued claims."²

For these reasons, the Act is pertinent to this appeal but it cannot be a reason for deeming this appeal to be moot. If the Court believes further briefing to expand on these issues would be helpful, Plaintiff-Appellant would be pleased to provide a supplemental brief whenever necessary.

Respectfully submitted,



PAUL ALSTON
Lori King Stibb

PA:LKST:rjqp

cc: All Counsel

amount skimmed) and provides both the certainty and immediacy needed to provide standing—if, indeed, the existence of standing was otherwise in doubt.

² The record of the 1950 constitutional convention shows that the framers adopted this provision

to curb some legislative practices found obnoxious by local units. One of these practices is compelling county government to pay accrued claims. This form of legislation it was urged, usurped the judgment of the courts and interfered unnecessarily with local affairs and finances. It was for the purpose of preventing such continued practice that the sentence, 'No laws shall be passed mandating any political subdivision to pay any previously accrued claim,' was incorporated into the provision on local government.

Proceedings of the Constitutional Convention of Hawaii, Vol. I, Committee of the Whole Report No. 21 (1950). See *Fasi v. City & County of Honolulu*, 50 Haw. 277, 282, 439 P.2d 206, 209-10 (1968).

Although the provision does not require the City & County to cut a check to the State, it has the same economic effect – namely, moneys otherwise due to the City & County are permanently redirected to the State's general fund.

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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 Defendant-Appellee State of Hawaii's Motion to Strike Plaintiff-Appellant Tax Foundation's HRAP Rule 28(j) Response 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 September 15, 2017:

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Attorney for Amicus Curiae
THE GRASSROOT INSTITUTE OF HAWAI'I, INC.

DATED: Honolulu, Hawai'i, September 15, 2017.

/s/ Robert T. Nakatsuji
ROBERT T. NAKATSUJI
HUGH R. JONES
NATHAN S.C. CHEE
Deputy Attorneys General

Attorneys for Defendant-Appellee
STATE OF HAWAI'I