SCAP-16-0000462

IN THE SUPREME COURT OF THE STATE OF HAWAII

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 SUPPLEMENTAL BRIEFING PURSUANT TO ORDER OF THE COURT [DKT # 25]

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PLAINTIFF/APPELLANT TAX FOUNDATION OF HAWAI'I'S SUPPLEMENTAL BRIEFING PURSUANT TO ORDER OF THE COURT [DKT # 25]

Plaintiff/Appellant Tax Foundation of Hawai'i (the "Foundation") hereby submits its Supplemental Briefing, as directed by the Order of this Court [DKT # 25] ("Order").

I. ISSUE PRESENTED

As the Court specified, the purpose of this supplemental brief is to address one issue: "The relevance, if any, of Act 1(S.B. 4), 29th Leg., 1st Spec. Sess. (2017) (the "Act"), to the disposition of this case?" Order at 2.

II. ARGUMENT

The Act —which intended to facilitate completion of the Oahu rapid transit system—is relevant to the present action in three ways, all of which strengthen the Plaintiff's position in this litigation:

A. Section 5 of the Act

Section 5 of the Act expands the array of expenses that the State seeks to cover by "skimming" a portion of GET surcharge. At the same time, the Act slashes the amount skimmed by 90% (from 10% to 1% of the total surcharge collected). These changes highlight the excessive nature of the percentage previously skimmed and the disproportionate and discriminatory amount of GET that those who pay the surcharge ("Oahu Taxpayers") are actually paying for the State's benefit, under the guise of a surcharge intended to fund the Oahu rapid transit project.

If, as the Legislature now says, a mere 1% of the surcharge is sufficient to cover all the expenses associated with the current ***larger*** set of responsibilities, then the inescapable conclusion—as the Foundation has argued—that the State was unjustified in retaining nearly all

of the amounts it previously skimmed (which totaled or exceeded the total operating budget of the Department of Taxation). *See* Opening Brief ("Op. Br.") at 20-21.[1]

Moreover, Section 5 left intact the key language that underlies the Foundation's argument that the State misread and misapplied Section 2.6 in a manner that violates the constitution by diverting a portion of the surcharge (*i.e.,* the amounts in excess of the actual costs of performing the prescribed services) into the state general fund. Op. Br. 20-22 (specifically, that the State ignored statutory requirements that the Director of Finance send the "balance" of the amounts collected to the counties after deducting the "costs" defined in subsection (c)).

B. Section 9 of the Act

Section 9 of the Act adds a HRS § 237D-2(e)(2) 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.

Id. (emphasis added.)

This language explicitly recognizes that potential for judicial oversight—when jurisdiction exists—of the State's actions in skimming surcharge revenues.

[1] Notably, the change in Section 5 does not absolve the State of liability for the amounts that were wrongfully skimmed prior to the effective date of the Act. Section 20 of the Act specifically states that the Act does not affect rights that matured or proceedings that were begun before the effective date of the Act. And, it is not clear that skimming precisely 1% is not excessive. The record shows lower amounts were calculated by the Department of Taxation in the past, [Op. Br. 10-11], but the State's new oversight role may make that percentage appropriate. That is a question for another day (but it will be resolved if, as the Foundation contends, the State must send to the County all amounts in excess of its costs).

The Act strengthens the Foundation's arguments in favor of both standing to seek declaratory relief and taxpayer standing. The former is strengthened because the Act makes clear that Oahu Taxpayers have borne a huge financial burden that the taxpayers in other counties will never have to shoulder, for only they will ever have had 10% of their surcharge payments skimmed by the State's misapplication of Section 2.6. The *sine qua non* of standing to seek declaratory is that an actual controversy exists "involving the interpretation of …statutes, municipal ordinances, and other governmental regulations…" HRS § 632-1. An actual controversy exists between the Oahu Taxpayers and the State about the propriety of the amounts skimmed to date under Section 2.6. By blocking reimbursement, the legislature has immediately and permanently condemned Oahu Taxpayers to bearing a disproportionate GET burden (in the form of excess amount skimmed), which provides both the certainty and immediacy needed to establish standing.

The latter argument, relating to taxpayer standing, is strengthened because the Act makes permanent the impact of the 10% skimming practice. The essential prerequisites for taxpayer standing are: "(1) plaintiff is a taxpayer who contributes to the particular fund from which the illegal expenditures are allegedly made; and (2) plaintiff must suffer a pecuniary loss, which, in cases of fraud, are presumed." *Hawaii's Thousand Friends v. Anderson*, 70 Hawai'i 276, 282, 768 P.2d 1293, 1298 (1989). Indisputably, the Foundation has paid the Surcharge, and the Surcharge was subject to skimming. The State has argued that the Foundation's injuries were speculative; Section 9 of the Act (if allowed to stand) effectively makes these injuries permanent, so that both prerequisites to taxpayer standing are indisputably met.

As the Foundation has previously argued, the Circuit Court erred in ruling that it had no jurisdiction over this dispute because HRS § 632-1 forecloses declaratory relief in

"controvers[ies] with respect to taxes." *See* Op. Br. at 6-8, 13, 16-18. Unless there is a judicial remedy, for the present and through completion of the rail project, Oahu Taxpayers are—and will be— forced to finance and eventually pay tens of millions of extra dollars for State general fund expenditures that have absolutely nothing to do with the Oahu rail project. Indeed, if the currently authorized rate is sufficient, the State's windfall, placed squarely on the backs of Oahu Taxpayers, is likely in excess of $150 million (i.e., 90% of past collections retained by the State). The Court should not condone that burden.

Section 9 is important for two additional reasons: first, it discriminates against Oahu Taxpayers in violation of Article VIII § 1 of the Hawai'i State Constitution, which requires the legislature to deal with counties only by "general laws". Section 9 exposes only them to pay back any court awarded refund of prior amounts skimmed at the 10% rate. "General laws" are ones that "probably" will apply to more than one county. *See Sierra Club v. Department of Transportation,* 120 Hawai'i 181, 202 P.3d 1226 (2009). There is no evidence to suggest that the populations of the neighboring counties will ever grow to more than 500,000 and the County of Honolulu is well over that population cutoff now. Nothing in the purpose of the Act justifies singling out Oahu Taxpayers for the obligation to indemnify the State against past misconduct. Second, Section 9 creates a new constitutional problem by violating Article VIII § 4, which forbids laws that requires counties to pay any "previously accrued claims." The record of the Hawai'i 1950 constitutional convention shows that the framers adopted this provision

> …to curb some legislative practice 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 in the provision on local government.

Proceedings of the Constitutional Convention of Hawai'i, 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 Section 9 does not require Honolulu to pay *directly* to the State, it has the same economic effect and suffer from the same defect: moneys otherwise due to Honolulu will be permanently redirected to the State's general fund to satisfy a previously accrued claim. In other words, even of Oahu Taxpayers have been forced to pay illegal GET into the State's coffers, the Act the State will force the city to bear the cost of that accrued claim—unless this Court acts now to protect the rights of the Foundation and others similarly situated.

III. CONCLUSION

In sum, the Act is relevant because it: (1) gives strong support to the Foundation's argument that the amounts previously skimmed were excessive and, therefore illegal; (2) leaves intact the portion of H.R.S. §248-2.6 which, when properly interpreted, invalidates the State's past actions; and (3) makes permanent the economic harm caused by the State's past actions, thus bolstering the Foundation's standing to pursue this action. Now, more than ever, the Court needs to address these issues on the merits.

DATED: Honolulu, Hawai'i, October 12, 2017.

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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:

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