

SCAP No. 17-0000367

IN THE SUPREME COURT OF THE STATE OF HAWAII

Electronically Filed

Supreme Court

SCAP-17-0000367

14-NOV-2017

11:56 AM

IN THE MATTER OF THE TAX APPEAL

OF

PRICELINE.COM, INC., *et al.*,
Appellants.

T. X. No. 13-1-0269

(AND CONSOLIDATED CASES)

13-1-0261 through 13-1-0270;

14-1-0001 through 14-1-0010;

14-1-0243 through 14-1-0251)

APPEAL AND CROSS-APPEAL FROM THE
STIPULATED ORDER AND FINAL
JUDGMENT DISPOSING OF ALL ISSUES
AND CLAIMS OF ALL PARTIES FILED ON
APRIL 25, 2017 (AND UNDERLYING
ORDERS)

TAX APPEAL COURT

HONORABLE GARY W.B. CHANG

**APPELLANT/CROSS-APPELLEE DIRECTOR OF TAXATION, STATE OF
HAWAII'S RESPONSE TO TAX FOUNDATION OF HAWAII'S AMICUS CURIAE
BRIEF IN SUPPORT OF APPELLANTS [SIC]**

CERTIFICATE OF SERVICE

DOUGLAS S. CHIN 6465

Attorney General

CYNTHIA M. JOHIRO 5445

HUGH R. JONES 4783

Deputy Attorneys General

Department of the Attorney General

425 Queen Street

Honolulu, Hawai'i 96813

Phone: (808) 586-1473

WARREN PRICE III 1212

KENNETH T. OKAMOTO 2068

ROBERT A. MARKS 2163

Special Deputy Attorneys General

707 Richards Street, Suite PH 4

Honolulu, Hawai'i 96813

Phone: (808) 538-1113

E-mail: wprice@pohlhawaii.com

kokamoto@pohlhawaii.com

ram@pohlhawaii.com

GARY CRUCIANI admitted *pro hac vice*

STEVEN D. WOLENS admitted *pro hac vice*

Special Deputy Attorneys General

300 Crescent Court, Suite 1500

Dallas, Texas 75201

Phone: (214) 978-4000

E-mail: gcruciani@mckoolsmith.com

swolens@mckoolsmith.com

Attorneys for Appellee-Appellant/Cross-Appellee Director of Taxation, State of Hawai'i

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

IN THE MATTER OF THE TAX APPEAL
OF
PRICELINE.COM, INC., *et al.*,
Appellants.

T. X. No. 13-1-0269
(AND CONSOLIDATED CASES:
13-1-0261 through 13-1-0270;
14-1-0001 through 14-1-0010;
14-1-0243 through 14-1-0251)

APPEAL AND CROSS-APPEAL FROM THE
STIPULATED ORDER AND FINAL
JUDGMENT DISPOSING OF ALL ISSUES
AND CLAIMS OF ALL PARTIES FILED ON
APRIL 25, 2017 (AND UNDERLYING
ORDERS)

TAX APPEAL COURT
HONORABLE GARY W.B. CHANG

**APPELLANT/CROSS-APPELLEE DIRECTOR OF TAXATION, STATE OF
HAWAI‘I’S REPLY TO TAX FOUNDATION OF HAWAI‘I’S MOTION AMICUS
CURIAE BRIEF IN SUPPORT OF APPELLANTS [SIC]**

**I. THE CASES CITED IN THE TAX FOUNDATION OF HAWAI‘I’S BRIEF DO
NOT SUPPORT APPLICATION OF RES JUDICATA IN THIS CASE**

The Director has extensively briefed the issue of res judicata. See, e.g., Answering Brief of Director of Taxation, State of Hawai‘i, to Appellants/Appellees-Cross Appellants’ Opening Brief (“Dir. AB”) at 5-16. The Tax Foundation of Hawai‘i’s (“TFH’s) Amicus Curiae Brief in Support of Appellants (“Amicus Brief”) adds nothing to the discussion. The Amicus Brief cites a total of four cases in support of its argument that res judicata precludes adjudication of the online travel companies’ (“OTCs”)¹ liability for GET on their car rental transactions. None of the cases cited by TFH is on point. However, some contain language supporting the Director’s position.

¹ The OTCs to this appeal and cross-appeal are Appellants-Appellees/Cross-Appellants Expedia, Inc., Hotwire, Inc., Orbitz, LLC, Trip Network, Inc. (d/b/a Cheaptickets.com), and priceline.com, Inc.

THF relies on Kauhane v. Acutron Co., 71 Haw. 458, 795 P.2d 276 (1990) and Bremer v. Weeks, 104 Haw. 43, 85 P.3d 150 for a general statement regarding the doctrine of res judicata. Amicus Brief at 2, 4. Neither case addresses the special circumstances of tax appeals. Kauhane involved successive actions by a discharged employee for violation of an employment agreement. Bremer involved right of way over a trail. Thus, these cases shed no light on the issue presented for the Court's determination – whether the OTCs, who filed no GET returns for the periods at issue,² and thereby failed to disclose both the fact and extent of their Hawai'i car rental transactions, can escape GET liability for those transactions.

TFH relies on In re Island Holidays, Ltd., 59 Haw. 307, 582 P.2d 703 (1978) and In re 711 Motors, Inc., 56 Haw. 644, 547 P.2d 1343 (1976) as illustrating the Court's application of "federal income tax concepts" to the GET. Neither case involved applying federal res judicata decisions in income tax cases. Moreover, in quoting these cases, THF omitted the introductory clause of the quoted sentence. The entire sentence reads:

The incorporation of the Internal Revenue Code into the net income tax law by Chapter 235 *does not make the provisions of the Code directly applicable in determining gross income for general excise tax purposes*, although the general excise tax law and the net income tax law deal with sufficient similar subject matter to require construction in relation to each other.

Island Holidays 59 Haw. at 311-12, 582 P.2d at 706 (emphasis added). In Island Holidays, it was the Director who was arguing for application of federal income tax law, which the court *rejected*. Id. at 311, 582 P.2d at 706. The Court did not apply federal income tax law in that case. Instead, the case turned on application of HRS § 237-20. Id. at 314, 582 P.2d at 707.

In 711 Motors, the Court considered federal regulations regarding the depreciable life of automobiles for income tax purposes, but ultimately decided the case based upon the parties' stipulation regarding depreciable life. 56 Haw. at 653-54, 547 P.2d at 1349. Therefore, although the Court made note of federal income tax law, it did not apply it in 711 Motors.

THF cites Commissioner v. Sunnen, 333 U.S. 591, 68 S. Ct. 715, 92 L.Ed. 898 (1948), as establishing that res judicata applies to federal income tax cases. In fact, that case did not apply

² The OTCs' res judicata argument applies only to the years 2000-2011. OTC Opening Brief at 2. The OTCs admit that they filed no tax returns for calendar years 2000 through 2010 (R19:200-201, 349-50; R29:345). The OTCs' 2011 returns did not reflect any income for car rentals (id.) and were not timely filed. R25:115.

res judicata. Rather, the U.S. Supreme Court held that the tax court *should not have applied* collateral estoppel. *Id.* at 602, 606. (“It is readily apparent in this case that the royalty payments . . . are free from the effects of the collateral estoppel doctrine. . . . [C]ollateral estoppel should not have been used by the Tax Court in the instant proceeding . . .”).

The Sunnen Court’s discussion of res judicata makes clear that, even under federal law, res judicata would not apply in this case. In order for a prior judgment to bar a subsequent action on any claim that might have been raised in the first, the parties and the cause or demand must be identical. *Id.* at 597-98. Where a different cause or demand is involved, the estoppel is applied much more narrowly.

In this situation, the judgment in the prior action operates as an estoppel, *not as to matters which might have been litigated and determined*, but “only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.”

Id. at 598. (Citations omitted; emphasis added.) Res judicata, or collateral estoppel, is limited to the situation where the subsequent action “is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.” *Id.* at 599-600. For the reasons stated in the Director’s Answering Brief, this action is not “identical in all respects” to any prior action. *See*, Dir. AB at 8-9. Furthermore, the applicable statute in this action, HRS §237-18(f), was not an issue in any prior action.³

II. THE AUTHORITIES TFH RELIES UPON DO NOT INVOLVE TAXPAYERS WHO NEVER FILED RETURNS

Despite the spirit of Halloween’s invasion of TFH’s brief in its reference to “demons, ghouls or devils incarnate,” TFH fails to address the legal consequence of the OTCs’ failure to file tax returns, including “annual reconciliation returns,” for the periods to which any res judicata argument might apply.⁴ The broad principles of res judicata that TFH urges the Court to adopt are not properly asserted when taxpayers utterly fail to meet their filing obligations.

³ The Director incorporates her argument that the federal cases construing federal taxes reported annually are distinguishable, because the GET is reported monthly or quarterly. *See*, Dir. AB at 12-13.

⁴ The OTCs’ res judicata argument applies only to the years 2000-2011. OTC Opening Brief at 2. The OTCs admit that they filed no tax returns for calendar years 2000 through 2010 (R19:200-201, 349-50; R29:345). The OTCs’ 2011 returns did not reflect any income for car rentals (*id.*) and were not timely filed. R25:115.

Principles of res judicata should have no application to taxpayers who entirely flaunt their duty to file returns, like the OTCs here.

Nonfilers impose unique and significant burdens on the Director's ability to collect taxes, and it is inappropriate to protect such scofflaws with a res judicata defense, if only for this reason.

DATED: Honolulu, Hawai'i, November 14, 2017.

DOUGLAS S. CHIN
Attorney General

By: /s/ Robert A. Marks
CYNTHIA M. JOHIRO
HUGH R. JONES
Deputy Attorneys General
WARREN PRICE III
KENNETH T. OKAMOTO
ROBERT A. MARKS
GARY CRUCIANI
STEVEN D. WOLENS
Special Deputy Attorneys General

Attorneys for Appellee-Appellant/Cross- Appellee
Director of Taxation, State of Hawai'i

CERTIFICATE OF SERVICE

I certify that on November 14, 2017, a copy of the *Appellant/Cross-Appellee Director of Taxation, State of Hawai‘i’s Response to Tax Foundation of Hawai‘i’s Amicus Curiae Brief in Support of Appellants (sic)*, was served on the following persons via JEFS at the following email addresses:

RONALD I. HELLER
Rheller@torkildson.com

PAUL ALSTON
palston@ahfi.com
PAMELA BUNN
pbunn@ahfi.com

Attorneys for Appellants-Appellees/Appellees-Cross Appellants Online
Travel Companies

Thomas Yamachika
tom@tfhawaii.org

Attorney for Amicus Curiae Tax Foundation of Hawai‘i

Dated: Honolulu, Hawai‘i, November 14, 2017.

DOUGLAS S. CHIN
Attorney General

By: /s/ Robert A. Marks

CYNTHIA M. JOHIRO

HUGH R. JONES

Deputy Attorneys General

WARREN PRICE III

KENNETH T. OKAMOTO

ROBERT A. MARKS

GARY CRUCIANI

STEVEN D. WOLENS

Special Deputy Attorneys General

Attorneys for Appellee-Appellant/Cross- Appellee
Director of Taxation, State of Hawai‘i