

FSM SUPREME COURT TRIAL DIVISION

CONTINENTAL MICRONESIA, INC.,)	CIVIL ACTION NO. 2010-1021
)	
Plaintiff,)	
)	
vs.)	
)	
CHUUK STATE GOVERNMENT and JESSE MORI,)	
Director of Administrative Services of the Chuuk)	
State Government, in his official capacity,)	
)	
Defendants.)	
)	

ORDER GRANTING DECLARATORY JUDGMENT AND A PERMANENT INJUNCTION

Dennis K. Yamase
Associate Justice

Hearing: February 16, 2011
Decided: June 3, 2011

APPEARANCES:

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HEADNOTES

Civil Procedure - Summary Judgment - Grounds

Summary judgment is only proper when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 529 (Chk. 2011).

Civil Procedure - Summary Judgment - Procedure

In order to succeed on its summary judgment motion a movant plaintiff must also overcome all affirmative defenses that the defendant has raised. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 530 (Chk. 2011).

Civil Procedure – Summary Judgment – Procedure

Where the court has rejected, either explicitly or implicitly, the defendants' affirmative defenses when it earlier denied the defendants' motion to dismiss, the movant's failure in its summary judgment motion to address the defendants' affirmative defenses is not fatal. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 530 & n.2 (Chk. 2011).

Federalism – National/State Power; Taxation

The unconditional 50% transfer of national taxes to the state treasuries is part of the constitutional framework that, through mandatory revenue sharing, allows the states a high degree of fiscal autonomy while at the same time avoiding undesirable vertical multiple taxation. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 530 n.3 (Chk. 2011).

Taxation – Constitutionality

When the FSM Supreme Court appellate division has held that if a state wishes to obtain funding from a consumption tax, it can avoid a constitutional confrontation by making the taxable incident the sale or rental transaction, and by expressing the requirement that the tax be paid by the consumer and when the Chuuk service tax makes the taxable incident the purchase of a plane ticket or the purchase of freight service and expresses the requirement that the tax be paid by the purchaser, the Chuuk service tax, as applied to Continental, is not an unconstitutional income tax. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 531 (Chk. 2011).

Commerce; Constitutional Law – Foreign and Interstate Commerce; Taxation

The Constitution expressly grants the national government, not the state governments, the power to regulate foreign and interstate commerce, and taxation is a form of regulation. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 531 (Chk. 2011).

Aviation; Constitutional Law – Foreign and Interstate Commerce; Taxation – Constitutionality

The Chuuk service tax on plane passengers does not have only an incidental effect on foreign commerce. Its main effect (and its sole intended effect) is on foreign commerce. By its terms, it is to be imposed only on those passengers whose "final destination" would be "outside of the FSM." The Chuuk service tax on outgoing paying airline passengers is thus an unconstitutional regulation of foreign commerce. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 531-32 (Chk. 2011).

Civil Procedure – Summary Judgment – Grounds

Summary judgment cannot be granted if genuine issues of material fact are present, but the factual issues cited by the defendants are not material because what matters is that the service tax on passenger tickets constitutes regulation of foreign commerce, and, as such, is an impermissible exercise by the state of a national power, summary judgment may be granted. The factual issues of how burdensome the state's regulation is, is not material to the question of the regulation's constitutionality. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 532 (Chk. 2011).

Constitutional Law – Foreign and Interstate Commerce; Taxation – Constitutionality

The tax on shipping air cargo or air freight on Continental affects only foreign commerce or interstate commerce, and since state governments are prohibited from imposing taxes which restrict interstate commerce, to the extent that it is imposed on freight or cargo shipped from Chuuk to other FSM states, the Chuuk service tax would be specifically barred by the Constitution, and to the extent the tax is imposed on cargo or freight shipped elsewhere, it would be regulation of foreign commerce – an export regulation and tax. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 533 (Chk. 2011).

Administrative Law

A regulation cannot impermissibly extend or limit the reach of the statute that authorizes it. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 533 (Chk. 2011).

Aviation

"Courier services" is a much more limited concept than all freight and cargo. Courier services are generally those services that provide expedited delivery of small, high-value goods or documents. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 533 (Chk. 2011).

Administrative Law

An unconstitutional statute may not be redeemed by voluntary administrative action. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 533 (Chk. 2011).

Administrative Law; Aviation; Taxation – Constitutionality

Even if the Chuuk service taxes on air passenger tickets and courier services were not unconstitutional taxes, they would still be invalid when the regulatory enforcement and interpretation of the service tax statute exceeded or limited that statute's reach. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 533 (Chk. 2011).

Aviation; Treaties

Article 15 of the 1944 Convention on International Aviation, which bars fees, dues or other charges being imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons thereon, does not bar a tax only on outgoing passengers, freight, or cargo from Chuuk. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 526, 533-34 (Chk. 2011).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

On February 16, 2011, the court heard argument on the plaintiff's Motion for Summary Judgment with supporting exhibits, filed December 28, 2010; the defendants' Opposition and Counter Motion for Summary Judgment, filed February 1, 2011; and the plaintiff's reply to Opposition to Motion for Summary Judgment; Opposition to Chuuk State's Motion for Summary Judgment, with supporting exhibits, filed February 15, 2011. The plaintiff's motion and the defendants' motion are each granted in part and denied in part. The plaintiff is granted a declaratory judgment and permanent injunction in its favor. The reasons follow.

I. BACKGROUND

Chuuk State Law No. 10-09-13¹ took effect December 25, 2009. It imposed a 5% "service tax" on, among other things, "air . . . transportation services . . . for outgoing passengers of Chuuk where their final destination" would be "outside of the FSM irrespective of where payment of the service is made," Chk. S.L. No. 10-09-13, § 1(5) (to be codified at § 11(5)), and on "Courier Services," *id.* § 1(17) (to be codified at § 11(17)). The tax was to be paid "by the customer, person, company or entity

¹ It amended Chuuk State Law No. 10-09-11 (enacted Nov. 9, 2009), which had repealed and amended parts of Truk S.L. No. 5-119, as previously amended.

obtaining the services, and which shall be collected by the person, company or entity providing the services." *Id.* § 2 (to be codified at § 11-A).

Under the Emergency Regulation to Implement Service Tax (promulgated Feb. 17, 2010), the 5% tax on outgoing passengers would be levied on the "deemed service price" of transportation to the four non-FSM destinations with direct scheduled air service from Chuuk – Guam, Kwajalein, Majuro, and Honolulu. The "deemed service price" was calculated from the average price of all tickets purchased anywhere in the world for air passenger service that departed Chuuk and terminated in or changed planes in any of those four destinations. The 5% of the "deemed service price" – the tax to be imposed – was set by regulation as a \$12.74 tax on each paid ticket to Guam, \$16.92 on tickets to Kwajalein, \$19.64 on tickets to Majuro, and \$42.86 on tickets to Honolulu. Emergency Reg. to Implement Serv. Tax pt. 3(i) (Feb. 17, 2010). The "deemed service price," and thus the applicable tax, is to be recalculated annually. *Id.*

"Courier Services" is not defined in the statute. The emergency regulation defines the term as "services for transport of goods by air, land or sea shipping, but does not include excess baggage or similar charges for accompanied luggage." *Id.* pt. 3(p).

On February 25, 2010, Chuuk Department of Administrative Services Director Jesse Mori informed Continental Micronesia, Inc. ("Continental") that Continental was to start collecting and remitting the passenger service tax in the amounts as set forth in the emergency regulation. On March 25, 2010, Director Mori reminded the Continental station manager of the criminal penalties imposed by the statute on those who failed to collect the tax and stated that to avoid the penalties Continental had to start collecting the outgoing passenger service tax by April 12, 2010.

On April 12, 2010, Continental filed this lawsuit seeking a declaratory judgment that the service tax that Chuuk wants Continental to collect is unlawful and also seeking injunctive relief restraining Chuuk from requiring Continental to collect the tax and from imposing any penalties on it or its employees for the tax's non-collection. Continental alleges that the Chuuk service tax, as applied to Continental, violated various provisions of the FSM Constitution and international treaty obligations of the FSM government.

On June 17, 2010, the court granted a preliminary injunction contingent upon Continental posting a \$157,500 bond. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 152 (Chk. 2010). That bond was later posted and the preliminary injunction is in effect.

II. THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

Continental now moves for summary judgment that the Chuuk service tax is an unconstitutional tax based on income; is an unconstitutional restriction on interstate commerce; and is an unconstitutional restriction on foreign and interstate commerce. Continental also moves for a summary judgment granting declaratory relief and asks that the preliminary injunction be made permanent. The defendants move for summary judgment in their favor on all of Continental's causes of action including the two for which Continental's motion does not seek summary judgment – Continental's 11 F.S.M.C. 701 civil rights claim and its claim that the Chuuk service tax violates the FSM's international treaty obligations.

Summary judgment is only proper when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 108 (Pon. 2010); Bank of the FSM v. Truk Trading Co., 16 FSM Intrm. 281, 284-85 (Chk. 2009). The

parties assert generally that there are no facts in dispute.

In order to succeed on its summary judgment motion a movant plaintiff must also overcome all affirmative defenses that the defendant has raised. Saimon v. Wainit, 16 FSM Intrm. 143, 146 (Chk. 2008); Zion v. Nakayama, 13 FSM Intrm. 310, 312 (Chk. 2005). The defendants raised as affirmative defenses that the court lacked jurisdiction because Continental was not a taxpayer under Truk State Law No. 5-119, subsections 22(1) and (2) and had not exhausted its administrative remedies under those subsections. Since the court had rejected those defenses² when it earlier denied the defendants' motion to dismiss, Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 152, 157-59 (Chk. 2010), Continental's failure in its summary judgment motion to address the defendants' affirmative defenses is not fatal.

III. THE MOTIONS' MERITS

A. Chuuk Service Tax as an Income Tax

Continental contends that the Chuuk service tax is an unconstitutional income tax. Continental asserts that the service tax statute, as enacted, imposes an unlawful tax on its ticket sale income and, as courier services are defined by the regulation, also imposes an unlawful tax on its freight or cargo income.

Continental argues that the analysis should not change merely because the statute purports to impose the tax on the passenger buying the ticket or on the person shipping the freight or cargo from Chuuk, since, in Continental's view, that tax would be the same as a 5% tax on its Chuuk-related ticket income or as a 5% tax on its freight income. For this premise, Continental relies on a Micronesian Constitutional Convention committee report explaining the constitutional allocation of taxing powers between the national and state governments and that the various taxing powers be exclusive to either to the national government or to the state governments, and not concurrent. The reasons were that "to avoid the conflicts and tangles of overlapping tax jurisdiction, the duplication of collection agencies, and clashes of fiscal policy, the concurrent right of taxation [was] widely avoided, and tax sources [were] nearly always . . . assigned exclusively to one level of government or the other." SCREP No. 38, II J. of Micro. Con. Con. 863. It was also "to avoid future legal disputes between national and state governments over the 'reach' of their respective taxing authorities," *id.* at 865; and to eliminate "vertical multiple taxation" – overlapping taxation by two levels of government, *id.* at 864.

Continental asserts that Chuuk's 5% service tax on passenger tickets and on Chuuk-originated freight shipments is vertical multiple and overlapping taxation on the same revenue stream as that taxed by the national government's gross revenue tax (50% of which must be unconditionally transferred to the Chuuk state government)³ and that this is contrary to the framers' intent in allocating tax powers. Continental's argument may seem fairly persuasive.

² The other affirmative defense – that Continental had unclean hands or was equitably estopped – seems based on Continental's failure to first collect the tax and then pursue its administrative remedies. As such, it was also implicitly rejected when the court rejected the subsection 22(1) ground.

³ This unconditional 50% transfer of national taxes to the state treasuries, FSM Const. art. IX, § 5, is part of the constitutional framework that, through mandatory revenue sharing, allows the states a high degree of fiscal autonomy while at the same time avoiding undesirable vertical multiple taxation. SCREP No. 38, II J. of Micro. Con. Con. 864.

But the FSM Supreme Court appellate division has held that "[i]f a state wishes to obtain funding from a consumption tax, it can avoid a constitutional confrontation by making the taxable incident the sale or rental transaction, and by expressing the requirement that the tax be paid by the consumer." Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm. 117, 120 (App. 1995) (difference between a sales tax and an income tax is "that a sales tax, paid by the consumer, is a tax on consumption, while a gross revenue tax paid by the seller, renter, or supplier is a tax . . . on that person's income"; thus a state tax on gross receipts is an unconstitutional tax on income). The Chuuk service tax makes the taxable incident the purchase of a plane ticket or the purchase of freight service and expresses the requirement that the tax be paid by the purchaser. The Chuuk tax statute thus complies with the Truk Continental Hotel holding. Under that holding, the Chuuk service tax, as applied to Continental, is not an unconstitutional income tax.

Continental asserts that by basing its argument on SCREP No. 38 it is following a different line of argument than that considered by the Truk Continental Hotel court. Continental contends that the Truk Continental Hotel court erred in allowing "multiple vertical taxation" on the same revenue stream by holding that a state could tax the buyer as a sales tax while the national government would tax the revenue from the same transaction as an income [or gross revenue] tax. If the Truk Continental Hotel court erred, that is an argument Continental is welcome to pursue in the appellate division. Until such time as the appellate division overrules Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm. 117 (App. 1995), the Chuuk service tax is, as a matter of law, a sales tax and not an income tax. The defendants are thus entitled to summary judgment that the Chuuk service tax, or at least the part of the tax at issue here, is not unconstitutional as an income tax.

B. *Chuuk Service Tax and Foreign and Interstate Commerce*

The defendants contend that the service tax does not regulate foreign or interstate commerce or restrict interstate commerce and is permissible because it only incidentally affects foreign and interstate commerce and directly taxes only a service performed in Chuuk – transportation of a person from Chuuk to a foreign destination or the shipping of freight or cargo from Chuuk to another destination.

1. *Air Transportation Tickets*

The Constitution expressly grants the national government, not the state governments, the power "to regulate . . . foreign and interstate commerce . . ." FSM Const. art. IX, § 2(g). Taxation is a form of regulation. See Actouka v. Kolonia Town, 5 FSM Intrm. 121, 122 (Pon. 1991) (ordinance imposing a different tax rate on banking and insurance businesses than imposed on other kinds of businesses, is an effort to regulate banking and insurance); see also Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 96, 48 S. Ct. 100, 103, 72 L. Ed. 177, 181 (1927) ("Taxation is regulation just as prohibition is.").

The defendants contend that the service tax is neither a tax on interstate commerce because it does not tax persons traveling only between the four FSM states, nor a tax on foreign commerce because, in the defendants' view, Continental remains free to conduct its foreign commerce from Chuuk and Continental's only obligation is to collect the tax as an agent of the state. The defendants also contend that there are factual matters to be resolved about Continental's assertion that the tax's imposition would result in administrative expenses that will need to be recovered through a general increase in ticket prices (and for cargo shipments) on flight routes through Chuuk or throughout the region.

The Chuuk service tax on plane passengers does not have only an incidental effect on foreign

commerce. Its main effect (and its sole intended effect) is on foreign commerce. By its terms, it is to be imposed only on those passengers whose "final destination" would be "outside of the FSM," Chk. S.L. No. 10-09-13, § 1(5) (to be codified at § 11(5)).

Continental further asserts that the Chuuk service tax would present an administrative nightmare whose expenses for notifying all of the world's computer passenger reservation systems of the special pricing requirements for paying passengers leaving Chuuk; for compensating those reservation systems for their reprogramming expenses; for a new computer system for its cargo or freight shipping service to handle the percentage surcharge required under the service tax; for compliance costs; for tax collection costs; and for remittance costs, would have to be included in raised ticket prices that may also affect the number of passengers who, because of the increased ticket costs, choose not to fly to or in Micronesia. The defendants dispute the amount, the size, and how burdensome these costs would be and argue that Continental cannot be granted summary judgment while these factual issues are still in dispute.

Summary judgment cannot be granted if genuine issues of material fact are present. The factual issues cited by the defendants are, however, not material. What matters is that the service tax on passenger tickets constitutes regulation of foreign commerce, and, as such, is an impermissible exercise by the state of a national power. How burdensome the state's regulation is, is not material to the question of the regulation's constitutionality.

The defendants further contend that if the Chuuk service tax is considered restrictive of or a regulation of foreign commerce then Continental also should not pay landing fees for its aircraft, rent for its Chuuk airport office, and other costs because those would also be restrictive of or a regulation of foreign commerce. This argument overlooks that these are fees, not taxes, and are payments to Continental for services rendered to it by the state government by virtue of the state's ownership, control, and maintenance of the Chuuk airport facilities.⁴

Although the state statute purports to levy the service tax on passengers leaving Chuuk for a non-FSM destination, it is unclear whether the regulation (and perhaps the tax statute) would tax travelers from Chuuk to Yap because those travelers must change planes in Guam and Chuuk-Guam tickets would be subject to the "deemed service price" and the \$12.74 tax thereon. The defendants, in their written opposition, appear to concede that the \$12.74 tax would be levied on Yap-bound passengers that changed planes in Guam but not on Yap-bound passengers who took those rare and occasional flights that go directly from Chuuk to Yap without transiting Guam. Either way, the Chuuk service tax on airline passenger tickets to destinations "outside of the FSM" is unconstitutional.

There being no genuine issue of material fact, Continental is entitled, as a matter of law, to judgment that the Chuuk service tax on outgoing paying airline passengers is an unconstitutional regulation of foreign commerce.

2. "Courier Services"

The defendants make the same contentions for the constitutionality of the Chuuk service tax on "courier services" that they did for passenger tickets. The result is the same although the analysis differs somewhat because the "courier services" tax is not limited to destinations "outside of the FSM."

⁴ Similarly, Continental passengers departing Chuuk also pay for Chuuk's airport services through a \$20 departure fee collected at the airport. See *Tafunsak v. Kosrae*, 7 FSM Intrm. 344, 348-49 (App. 1995) for the legal character of passenger departure fees.

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17 FSM Intrm. 526 (Chk. 2011)

The tax on shipping air cargo or air freight on Continental affects only foreign commerce or interstate commerce. Continental does not fly to anywhere in Chuuk except Weno. Since "[s]tate and local governments are prohibited from imposing taxes which restrict interstate commerce," FSM Const. art. VIII, § 3, to the extent that it is imposed on freight or cargo shipped from Chuuk to other FSM states, the Chuuk service tax would be specifically barred by the Constitution. To the extent the tax is imposed on cargo or freight shipped elsewhere, it would be regulation of foreign commerce – an export regulation and tax. *Cf. Stinnett v. Weno*, 6 FSM Intrm. 312, 313-14 (Chk. 1994) (tax aimed solely at a travel agency is restrictive of foreign and interstate commerce and therefore cannot be levied by a state or local government).

3. Service Tax and Implementing Regulation

Continental also contends that the statutory language and the regulatory provisions conflict and that where they conflict the regulation would be invalid. The defendants do not address this point.

A regulation cannot impermissibly extend or limit the reach of the statute that authorizes it. *Braiel v. National Election Dir.*, 9 FSM Intrm. 133, 138 (App. 1999); *Klavasru v. Kosrae*, 7 FSM Intrm. 86, 91 (Kos. 1995). "Courier services," as referred to in the statute is a much more limited concept than its regulatory definition which includes all freight and cargo. Courier services are generally those services that provide expedited delivery of small, high-value goods or documents, such as the well-known Federal Express (FedEx) and DHL. See BLACK'S LAW DICTIONARY 404 (9th ed. 2009) (a courier is "[a] messenger, esp. one who delivers parcels, packages, and the like."); *DHL Corp. v. Civil Aeronautics Bd.*, 659 F.2d 941, 946 (9th Cir. 1981) ("Couriers receive a unique service, freight service with handling advantages enjoyed only by passengers.").

Also, limiting the air ticket passenger tax to only four foreign destinations differs from the statutory language which applied to any foreign destination. The defendants' expert witness testified that this limitation was because they looked at what was the service provided in Chuuk that was being taxed and concluded that the taxed service could only extend as far as there was direct plane service. If, at Guam, Honolulu, Majuro, or Kwajalein, the passenger continued onward to a destination other than those four, the passenger would change planes; so the Chuuk-provided service would end there and a new service begin. This regulatory limitation may have been done to limit the reach of the service tax statute to what the defendants thought was constitutionally permissible. But an unconstitutional statute may not be redeemed by voluntary administrative action. *Suldan v. FSM (II)*, 1 FSM Intrm. 339, 357 (Pon. 1983).

Thus, even if the Chuuk service taxes on air passenger tickets and courier services were not unconstitutional taxes, they would still be invalid because the regulatory enforcement and interpretation of the service tax statute exceeded or limited that statute's reach.

C. Chuuk Service Tax and International Treaty Obligations

Continental, in its fourth cause of action, relies on Article 15 of the 1944 Convention on International Aviation and, noting that the Federated States of Micronesia is a party to this Convention, alleges that the Chuuk service tax violates this Article. The defendants contend that the international treaty does not bar the type of service tax that Chuuk is imposing.

Article 15 provides that "[n]o fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons . . . thereon." The court reads this article as barring levying any fees, charges, or taxes on transiting passengers. For instance, Article 15 would bar Chuuk from taxing the

Chuuk-Guam portion of a passenger's Pohnpei-Guam through ticket for a passenger that boarded the plane on Pohnpei and deplaned on Guam.

The defendants have not tried to impose the Chuuk service tax on passengers other than those boarding the plane on Chuuk. This is a fair reading of both the statute and the regulation – that the service tax was intended to be imposed only on those passengers boarding the plane on Chuuk ("outgoing passengers of Chuuk," Chk. S.L. No. 10-09-13, § 1(5)) and also on those shipping freight or cargo from Chuuk, and not on those passengers merely traveling through Chuuk from somewhere else to somewhere else or persons shipping cargo or freight on a flight from somewhere else to somewhere else on a plane that lands in Chuuk.

Accordingly, the defendants are entitled to summary judgment that the Chuuk service tax and service tax regulation, as interpreted, are not barred by Article 15 of the 1944 Convention on International Aviation.

D. *Civil Rights Claim*

The defendants seek summary judgment on Continental's claim that the Chuuk service tax and regulation violates Continental's civil rights. The defendants contend that since the enactment of Chuuk State Law No. 10-09-13 was a lawful exercise of the State's power to tax, an attribute of all sovereign states, the statute could not be considered a form of oppression, threat, or intimidation because it was a general, non-selective tax law that provided for exceptions and other forms of due process. The defendants argue that if passing state taxes could be construed as a violation or threat to civil rights, then no sovereign state could freely exercise its power to tax without being cowed by possible lawsuits. Continental did not respond to the defendants' motion on this issue.

The defendants offer no authority for the proposition that they advocate. Nor do they address whether it was the attempted enforcement of what the court has just ruled is an unconstitutional tax that would give rise to liability under the civil rights statute. Since this is an important issue which could have future ramifications in other cases, and since it does not alter or affect whether Continental can obtain the declaratory judgment and permanent injunction that it seeks, the court will defer ruling on this portion of the defendants' summary judgment motion and request further briefing. Either side may file and serve, within twenty days of entry of this order, a further memorandum on the defendants' motion for summary judgment or recommend further proceedings on Continental's civil rights statute cause of action. Replies to those memorandums may be filed ten days after service.

E. *Declaratory and Injunctive Relief*

Continental also asks that the court render a declaratory judgment in its favor and grant it permanent injunctive relief. Continental, having prevailed on its claim that the Chuuk service tax, as applied to it, is an unconstitutional regulation and restriction on foreign and interstate commerce, is entitled to a declaratory judgment to that effect. And, having obtained a declaratory judgment, Continental is also entitled to have the preliminary injunction replaced by a permanent injunction. Accordingly, a declaratory judgment and a permanent injunction shall issue in Continental's favor.

IV. CONCLUSION

Summary judgment is granted in the defendants' favor that the Chuuk service tax, Chk. S.L. No. 10-09-13, §§ 1(5), 1(17), does not violate Article 15 of the 1944 Convention on International Aviation and is not an unconstitutional income tax. Continental Micronesia, Inc. is granted summary judgment that the Chuuk service tax on airline tickets, Chk. S.L. No. 10-09-13, § 1(5), and on air freight or air

cargo, *id.* § 1(17), is an unconstitutional tax on foreign, and, in the case of cargo or freight, interstate commerce. Continental Micronesia, Inc. is granted a declaratory judgment to that effect and the defendants are enjoined from enforcing Chuuk State Law No. 10-09-13, § 1(5) and § 1(17). There being no just cause for delay, the clerk is expressly directed to enter judgment in Continental Micronesia, Inc.'s favor.

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FSM SUPREME COURT TRIAL DIVISION

CHUUK HEALTH CARE PLAN,)	CIVIL ACTION NO. 2010-1036
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Plaintiff,)	
)	
vs.)	
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PACIFIC INTERNATIONAL, INC.,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Martin G. Yinug
Chief Justice

Decided: June 7, 2011

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HEADNOTES

Civil Procedure – Summary Judgment – Procedure

Under Rule 56, the court must deny a summary judgment motion unless it, viewing the facts and inferences in the light most favorable to the nonmovant, finds that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. In order to succeed on a summary judgment motion, a movant plaintiff must also overcome all affirmative defenses that the defendant has raised. Chuuk Health Care Plan v. Pacific Int’l, Inc., 17 FSM Intrm. 535, 538 (Chk. 2011).

Equity – Laches

Laches is the passage of a nonspecific amount of time during which the plaintiff engages in