

FSM SUPREME COURT TRIAL DIVISION

GENESIS CORPORATION d/b/a Genesis
Medical Clinic and Pharmacy (Chuuk) and
d/b/a Genesis Pharmacy (Pohnpei),

Plaintiff,

vs.

EUGENE AMOR, in his capacity as
Secretary of the Department of Finance and
Administration of the Federated States of
Micronesia, and FEDERATED STATES OF
MICRONESIA through its Department of
Finance and Administration,

Defendants.

ISAMU NAKASONE STORE and BARGAIN
CENTER,

Plaintiffs,

vs.

EUGENE AMOR, in his capacity as
Secretary of the Department of Finance and
Administration of the Federated States of
Micronesia, and FEDERATED STATES OF
MICRONESIA through its Department of
Finance and Administration,

Defendants.

CIVIL ACTION NO. 2021-005
consolidated with
Civil Action No. 2021-006

ORDER REVERSING ADMINISTRATIVE DECISIONS AND GRANTING SUMMARY JUDGMENT

Larry Wentworth
Associate Justice

Hearing: April 26, 2022
Decided: May 18, 2022

APPEARANCES:

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HEADNOTES

Civil Procedure – Motions – Unopposed

Although the failure to oppose a motion is generally deemed a consent to the motion, the court still needs good grounds before it can grant the motion. Genesis Corp. v. Amor, 23 FSM R. 580, 583 (Pon. 2022).

Taxation – Sales Tax

The Chuuk State Tax Act of 2012 explicitly states that for the absence of doubt, the Chuuk sales tax is a tax imposed on the buyer notwithstanding that this act may impose collection, or withholding and payment or remitting obligations on the seller. Genesis Corp. v. Amor, 23 FSM R. 580, 584 n.1 (Pon. 2022).

Taxation – Constitutionality

A vertical taxation constitutional issue does not need to be reached if the matter is resolved in the taxpayers' favor on statutory grounds. Genesis Corp. v. Amor, 23 FSM R. 580, 586 (Pon. 2022).

Taxation – Sales Tax

An argument that the sales tax is imposed on the transaction itself and not on the buyer or seller makes no sense because the "transaction" does not possess any money of its own. A "sales" tax can only be paid with either the buyer's money or the seller's money, not money from some other fictitious source. Genesis Corp. v. Amor, 23 FSM R. 580, 586 (Pon. 2022).

Courts; Judgments

Even if another trial court's statement was not dicta, the court is still not bound to follow it because a trial court decision is not a binding precedent or controlling law, but only persuasive authority since it is not binding precedent on either a different trial court, the same trial court, or even on the same judge in a different case. Genesis Corp. v. Amor, 23 FSM R. 580, 586 n.2 (Pon. 2022).

Federalism – National/State Power; Taxation – Constitutionality; Taxation – Gross Revenue Tax; Taxation – Sales Tax

Under well-settled FSM constitutional law, a state sales tax is unconstitutional if it is levied on the seller because then it is a tax on the seller's gross income and only the national government has the authority to tax income because taxing income is an exclusive power of the national government. Genesis Corp. v. Amor, 23 FSM R. 580, 586 (Pon. 2022).

Taxation – Constitutionality; Taxation – Sales Tax

If a state wishes to obtain funding from a consumption (sales) 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 buyer (the consumer). Genesis Corp. v. Amor, 23 FSM R. 580, 586 (Pon. 2022).

Taxation – Constitutionality; Taxation – Sales Tax

The hallmark of a constitutionally sound state sales tax is that the sale is the taxable incident and the tax is paid by the buyer – the customer or consumer – and not by the seller; otherwise it is an unconstitutional income tax. Genesis Corp. v. Amor, 23 FSM R. 580, 586 (Pon. 2022).

Taxation – Constitutionality; Taxation – Gross Revenue Tax; Taxation – Sales Tax

If the seller pays the state “sales tax,” it is not a constitutionally-compliant sales tax, but is an unconstitutional state gross income tax. Genesis Corp. v. Amor, 23 FSM R. 580, 586-87 (Pon. 2022).

Taxation – Constitutionality; Taxation – Sales Tax

When under the Pohnpei sales tax is “levied on the first commercial sale in Pohnpei,” the court must presume that this provision is constitutional – that is, that it levies the Pohnpei sales tax on the buyer, not the seller because it is a fundamental principle of statutory interpretation that when a statute can be read in two ways, one raising constitutional issues and the other not, the latter interpretation should prevail so that the constitutional issue is avoided. Genesis Corp. v. Amor, 23 FSM R. 580, 587 (Pon. 2022).

Statutes – Construction; Taxation – Constitutionality

As a general principle, statutes are presumed constitutional until challenged, with the burden on the challenger to clearly demonstrate that a statute is unconstitutional. A tax statute (and the tax it imposes) is also presumed to be constitutional. Genesis Corp. v. Amor, 23 FSM R. 580, 587 (Pon. 2022).

Statutes – Construction

It is a fundamental principle of statutory interpretation that when a statute can be read in two ways, one raising constitutional issues and the other not, the latter interpretation should prevail so that the constitutional issue is avoided. Genesis Corp. v. Amor, 23 FSM R. 580, 587 (Pon. 2022).

Taxation – Constitutionality; Taxation – Sales Tax

The court can only conclude that the Pohnpei sales tax is imposed on the buyer, instead of the seller. It cannot conclude that the Pohnpei sales tax statute unconstitutionally imposes the sales tax on the seller instead of constitutionally imposing it on the buyer. Genesis Corp. v. Amor, 23 FSM R. 580, 587 (Pon. 2022).

Taxation – Gross Revenue Tax; Taxation – Sales Tax

Chuuk sales tax receipts and Pohnpei sales tax receipts are funds held in a fiduciary capacity, since they are paid by the buyer and the seller collects them as the state’s agent and remits them to the state. Genesis Corp. v. Amor, 23 FSM R. 580, 587 (Pon. 2022).

Taxation – Gross Revenue Tax

Gross revenue does not include moneys held in a fiduciary capacity. Genesis Corp. v. Amor, 23 FSM R. 580, 587 (Pon. 2022).

Taxation – Gross Revenue Tax

The “taxes” that are taxes are not deducted from a business’s gross revenue for gross revenue taxation purposes are the taxes that the business (seller) pays – that are business expenses, not the taxes the business’s patrons pay, which are the buyers’ expenses. Genesis Corp. v. Amor, 23 FSM R. 580, 587-88 (Pon. 2022).

Taxation – Sales Tax

A business (seller) acts as an agent for the state when it collects the state sales tax from the buyer. That is clearly stated in the Chuuk sales tax statute, and implied in the Pohnpei sales tax statute if the sales

tax is imposed on the buyer. Genesis Corp. v. Amor, 23 FSM R. 580, 588 (Pon. 2022).

Statutes – Construction; Taxation – Gross Revenue Tax

The exclusion from gross revenue of “moneys held in a fiduciary capacity” is a more specific statutory provision than the general provision that taxes are not deducted, and one principle of statutory construction is that the specific provision prevails over and controls the more general. Genesis Corp. v. Amor, 23 FSM R. 580, 588 (Pon. 2022).

Taxation – Gross Revenue Tax; Taxation – Sales Tax

The Pohnpei or Chuuk state sales tax money received by sellers of goods and services from the buyers of goods and services are moneys held in a fiduciary capacity by the sellers until they are remitted to the state tax authorities. Those state sales tax moneys are excluded from the FSM national gross revenue tax as moneys held in a fiduciary capacity. The levying of a gross revenue tax on those state sales taxes was therefore illegal, as a matter of law. Genesis Corp. v. Amor, 23 FSM R. 580, 588 (Pon. 2022).

Taxation – Recovery of Taxes

Taxes paid under duress and under protest must be refunded when it is determined that those taxes were unlawful. Genesis Corp. v. Amor, 23 FSM R. 580, 588 (Pon. 2022).

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COURT’S OPINION

LARRY WENTWORTH, Associate Justice:

This came before the court on April 26, 2022, to hear the plaintiffs’ Motion for Summary Judgment, filed September 24, 2021. No opposition was filed even though enlargements had been granted. Although the failure to oppose a motion is generally deemed a consent to the motion, FSM Civ. R. 6(d); Eot Municipality v. Elimo, 20 FSM R. 7, 9 (Chk. 2015); Helgenberger v. Mai Xiong Pacific Int’l, Inc., 17 FSM R. 326, 330 (Pon. 2011); Actouka v. Etpison, 1 FSM R. 275, 276 (Pon. 1983), the court still needs good grounds before it can grant the motion. Senda v. Mid-Pacific Constr. Co., 6 FSM R. 440, 442 (App. 1994). Good grounds existing, the motion is granted, as explained below.

I. BACKGROUND

This consolidated case arises from appeals from two administrative decisions by the Secretary of Finance and Administration, Eugene Amor. Jurisdiction over this matter is conferred on the court by 54 F.S.M.C. 156, which provides that a taxpayer may appeal an adverse Secretary of Finance decision to the FSM Supreme Court within one year of that decision.

A. *Isamu Nakasone Store and the Bargain Center*

On June 12, 2020, Secretary Amor ruled that two Pohnpei taxpayers, the Isamu Nakasone Store and the Bargain Center, could not exclude the Pohnpei state sales taxes, that they had collected, from their gross revenue totals, but must include those sales taxes in their total gross revenue and pay gross revenue taxes on them. Amor first reviewed the statutory definition of gross revenue, noting that gross revenue included all compensation and receipts that accrued to a business without any deductions for the costs of goods sold, the costs of materials used, or taxes, royalties, or interest paid, or any other expenses. Amor decided that the Pohnpei sales tax collected by the taxpayers was a tax included in the statutory definition of gross revenue in 54 F.S.M.C. 112(5) and not a deductible expense under 54 F.S.M.C. 112(8). Amor, referring to Genesis Pharmacy v. Department of Treasury & Administration, 18 FSM R. 27 (Pon. 2011), further reasoned that the Pohnpei sales tax was a tax paid by the seller, not the buyer, and therefore was not money that the Isamu Nakasone Store or the Bargain Center could have held in a fiduciary capacity before paying it to

Pohnpei.

Civil Action No. 2021-006 is these two taxpayers' appeal from that administrative decision. In it, they seek reversal of Secretary Amor's decision and a refund of gross revenue taxes paid on their sales tax receipts; a declaratory judgment that state sales tax receipts are not subject to the FSM gross revenue tax, plus attorney's fees under the private attorney general theory; and a ruling that the Department of Finance and Administration ("Finance") violated their due process civil rights by imposing the gross revenue tax on their sales tax receipts without any prior notice and opportunity to be heard about this policy change, plus their attorney's fees and expenses under 11 F.S.M.C. 701(3). These claims are made against both the Secretary of Finance and Administration and the Federated States of Micronesia, although, by law, only the Secretary of Finance and Administration can be named the defendant in a judicial review of a tax assessment decision. 54 F.S.M.C. 156(1); *Fuji Enterprises v. Jacob*, 20 FSM R. 279, 281 (Pon. 2015) (statute requires that, in an action for judicial review of a tax assessment, the Secretary of Finance be the named defendant; deletion of other named defendants is proper).

B. *Genesis Corporation*

On September 8, 2020, Secretary Amor ruled that taxpayer Genesis Corporation ("Genesis") could not exclude from its gross revenue totals the Pohnpei state sales tax and the Chuuk state sales tax receipts it had collected, but must include those amounts in the total gross revenue on which Genesis pays gross revenue taxes. Amor rejected Genesis's contention that its Pohnpei state sales tax receipts were moneys held in a fiduciary capacity. Amor, however, conceded that Chuuk state law clearly imposed the Chuuk state sales tax on the buyer, not the seller, that the seller only collected the tax on Chuuk's behalf, and that therefore Chuuk state sales tax receipts were moneys held in a fiduciary capacity.¹ Amor ruled that, even so, the Chuuk state sales tax was still a tax and therefore, since the statute said taxes were not to be excluded from gross revenue, it was subject to the FSM gross revenue tax. Amor also rejected Genesis's argument that including the sales tax in gross revenue and then taxing it, was an instance of vertical multiple taxation that the Constitution's framers sought to avoid and generally prohibit. Amor thought that that was an issue best addressed by Congress.

Civil Action No. 2021-005 is Genesis's appeal from that administrative decision. In it, Genesis seeks reversal of Secretary Amor's decision and a refund of gross revenue taxes paid on Pohnpei and Chuuk sales tax receipts; a declaratory judgment that state sales tax receipts are not subject to the FSM gross revenue tax, plus attorney's fees under the private attorney general theory; and a ruling that Finance violated its due process civil rights by imposing the gross revenue tax on their sales tax receipts without any prior notice and opportunity to be heard, plus its attorney's fees and expenses under 11 F.S.M.C. 701(3).

II. TAXPAYERS' SUMMARY JUDGMENT MOTION

The Isamu Nakasone Store, the Bargain Center, and Genesis Corporation (collectively "the taxpayers") have all, since they were first required in 2020 to pay gross revenue tax on their state sales tax receipts, been paying those taxes under duress and under protest. Their appeals, Civil Actions No. 2021-005 and 2021-006, were consolidated. The three plaintiff-taxpayers now move for summary judgment that FSM gross revenue taxes cannot be levied on the Chuuk and Pohnpei state sales tax receipts which they remit to those state governments.

The taxpayers assert that, for a period of about seventeen years, they had been following Finance's instructions and policies that businesses held state sales taxes in trust for remittance to the state and that no gross revenue tax was to be assessed on the sales taxes collected. But, as admitted in the defendants'

¹ That is because the Chuuk State Tax Act of 2012 explicitly states that "[f]or the absence of doubt, sales tax is a tax imposed on the buyer notwithstanding that this act may impose collection, or withholding and payment or remitting obligations on the seller." Chk. S.L. No. 11-12-07, § 6(4).

discovery responses, Finance, in 2020, abruptly and without prior written notice to any retailer, changed this policy so that state sales taxes were now included in a business's gross revenue subject to taxation. The taxpayers further assert that this new policy is not enforced uniformly against all retailers on Pohnpei and Chuuk.

The taxpayers raise six grounds for reversal of Secretary Amor's decisions: 1) procedural due process; 2) contractual issues; 3) substantive due process; 4) equal protection; 5) sales taxes are funds held in a fiduciary capacity; and 6) that imposing gross revenue taxes on sales taxes is an impermissible or unconstitutional incidence of multiple vertical taxation. During the hearing, they asserted that they only need to prevail on any one of these issues to be granted summary judgment.

The taxpayers claim that their procedural due process rights to be given prior notice and an opportunity to be heard before administrative rules or policies are changed was violated, and they question whether, as was likely here, a deputy secretary can unilaterally, after seventeen years, make such changes. (They also note that Finance's website still lists state sales taxes as deductions from gross revenue before the gross revenue is taxed.) The taxpayers further argue that the uneven enforcement of the new interpretation violates due process.

The taxpayers also contend that Finance violated a stipulated judgment in Truk Trading Co. (Pohnpei) v. Department of Treasury, Civ. No. 2003-005, in which, among other things, the FSM agreed that the money collected to pay a Pohnpei state sales tax was levied on the transaction itself and was money held in a fiduciary capacity and exempt from the definition of gross revenue. The taxpayers, noting that a stipulated judgment is essentially a contract, contend that they are the third party beneficiaries of the contractual stipulation about fiduciary capacity, and that the FSM must be held to the terms of its contractual obligations to their benefit.

The taxpayers further contend that their substantive due process rights to a non-arbitrary decision-making process were violated because Finance's two decisions were made on different, contradictory grounds and thus were without a rational basis because Finance was in a bind since if it uniformly applied the rationale of the first decision (seller pays sales tax) then it would have to exempt Chuuk sales taxes but not Pohnpei sales taxes. The taxpayers thus argue that equal protection concerns arise if would arise if businesses in one state (Chuuk) could exempt state sales tax from gross revenue but could not in another (Pohnpei).

The taxpayers further contend that Finance wrongly interpreted the applicable statutes and that the state sales tax money is money held in a fiduciary capacity, which by statute, is not included in gross revenue. The taxpayers argue that the statement in Genesis Pharmacy v. Department of Treasury & Administration, 18 FSM R. 27 (Pon. 2011) that the Secretary referred to in his decision (tax is imposed on seller) was merely dicta and not binding precedent.

The taxpayers further argue that the national government does not have the power to levy a surtax on a tax because the Constitution's framers sought to eliminate vertical multiple taxation and avoid overlapping tax jurisdictions.

III. ANALYSIS

A. *Method of Disposition*

The facts that court relies upon below are not in dispute. The relevant affirmative defenses in the defendants' answer – 54 F.S.M.C. 112 precludes the remedies sought; statutory compliance; and statutory misconstruction – are, as seen from the analysis below, all overcome by the proper application of 54 F.S.M.C. 112 and state tax statutes. The other affirmative defenses are inapplicable. The court concludes that statutory interpretation of the fiduciary funds issue is dispositive, and requires that the taxpayers'

summary judgment motion be granted.

The due process and equal protection grounds would not be dispositive since, at best, they would only hold the taxpayers' payments of gross revenue taxes on the state sales taxes improper until such time as the FSM has followed proper notice and comment procedures and imposed it uniformly on all retailers, but would leave the basic issue of the taxpayers' appeals unresolved – whether the gross revenue tax can be imposed on state sales tax receipts. The third-party beneficiary contractual claim has little merit. And the vertical taxation constitutional issue does not need to be reached if the matter is resolved in the taxpayers' favor on statutory grounds. Department of Treasury v. FSM Telecomm. Corp., 9 FSM R. 575, 579 (App. 2000) (a court will not decide a question on a constitutional ground if it may be resolved on a statutory or other basis); see Pohnpei v. AHPW, Inc., 14 FSM R. 1, 25-26 (App. 2006) (general principle is that constitutional adjudication should be avoided unless necessary; trial court should first consider any non-constitutional grounds that might resolve the issue).

B. Resolution of the Statutory Issue

1. Who Pays the Pohnpei Sales Tax?

The Secretary's decision that the Pohnpei sales tax was paid by the seller and not the buyer relied on the trial court's statement in Genesis Pharmacy v. Department of Treasury & Administration, 18 FSM R. 27 (Pon. 2011) "that the Pohnpei first commercial sales tax is assessed against the seller." *Id.* at 31. This is dicta. It supposedly avoided a [non-existent] constitutional problem of whether the State of Pohnpei could tax the State of Chuuk on a purchase made by the State of Chuuk, *id.*, but it was dicta because it was unnecessary to that court's ruling since that court held that the locus of the first commercial sale (the location where the sale took place) of the goods was in Chuuk, not Pohnpei, and therefore the Pohnpei sales tax did not attach, *id.* at 33-34. Presumably, Chuuk could have collected sales tax on the transaction.

Nor is the court persuaded by an argument that the sales tax is imposed on the transaction itself and not on the buyer or seller. That makes no sense. The "transaction" does not possess any money of its own. A "sales" tax can only be paid with either the buyer's money or the seller's money, not money from some other fictitious source.

The Genesis Pharmacy dicta was also an error of law.² Under well-settled FSM constitutional law, a state sales tax is unconstitutional if it is levied on the seller because then it is a tax on the seller's gross income and only the national government has the authority to tax income. Truk Continental Hotel, Inc. v. Chuuk, 7 FSM R. 117, 120 (App. 1995). Taxing income is an exclusive power of the national government. FSM Const. art. IX, § 2(e). If a state wishes to obtain funding from a consumption (sales) 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 buyer (the consumer). Truk Continental Hotel, 7 FSM R. at 120. Thus, a state tax on the gross rental receipts of a landlord or a hotel was an unconstitutional tax on (gross) income, not a sales tax. *Id.*

"The hallmark of a constitutionally sound state sales tax is that the sale is the taxable incident and the tax is paid by the buyer – the customer or consumer – and not by the seller; otherwise it is an unconstitutional income tax." Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 154 (Chk. 2013); *cf.* Continental Micronesia, Inc. v. Chuuk, 17 FSM R. 152, 160 (Chk. 2010) (by making the taxable incident the purchase of a plane ticket or of freight service and making the tax payable by the buyer, Chuuk

² Even if the Genesis Pharmacy statement that the sales tax was imposed on the seller was not dicta, the court is still not bound to follow it. A trial court decision is not a binding precedent or controlling law, but only persuasive authority. Setik v. Mendiola, 21 FSM R. 537, 560-61 (App. 2018). A trial court decision is not binding precedent on either a different trial court, the same trial court, or even on the same judge in a different case. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 51-52 (Chk. 2020).

avoided a constitutional confrontation – the service tax is not an income tax since the service tax is a tax on the buyer, not the seller). In other words, if the seller pays the state “sales tax,” it is not a constitutionally-compliant sales tax, but is an unconstitutional state gross income tax.

The Pohnpei sales tax statute does not explicitly express the requirement that the tax be paid by the consumer – the buyer – but does state that the Pohnpei sales tax is “levied on the first commercial sale in Pohnpei.” 12 Pon. C. § 2-102. As a general principle, statutes are presumed constitutional until challenged, with the burden on the challenger to clearly demonstrate that a statute is unconstitutional. Parkinson v. Island Dev. Co., 11 FSM R. 451, 453 (Yap 2003). A tax statute (and the tax it imposes) is also presumed to be constitutional. See, e.g., Tanque Verde Enterprises v. City of Tucson, 691 P.2d 310, 311-12 (Ariz. Ct. App. 1983).

The court thus must presume that Section 2-102 is constitutional – that is, that it levies the Pohnpei sales tax on the buyer, not the seller. It is a fundamental principle of statutory interpretation that when a statute can be read in two ways, one raising constitutional issues and the other not, the latter interpretation should prevail so that the constitutional issue is avoided. Jano v. FSM, 12 FSM R. 569, 572-73 (App. 2004); FSM v. Boaz (II), 1 FSM R. 28, 32 (Pon. 1981). The court therefore can only conclude that the Pohnpei sales tax is imposed on the buyer, instead of the seller. It cannot conclude that the Pohnpei sales tax statute unconstitutionally imposes the sales tax on the seller instead of constitutionally imposing it on the buyer.³

Therefore, like the Chuuk sales tax receipts which the Secretary concedes are funds held in a fiduciary capacity, the Pohnpei sales tax receipts are also funds held in a fiduciary capacity since they are paid by the buyer and the seller collects them as the state’s agent and remits them to the state.

2. Moneys Held in a Fiduciary Capacity

The Secretary decided (at least for the Chuuk state sales tax) that even if state sales taxes were moneys held in a fiduciary capacity, they still had to be included in gross revenue subject to taxation because the statute does not allow any deductions from gross revenue for “taxes.” The pertinent parts of the applicable statute provide:

(5) “Gross revenue” means . . . the gross receipts of the taxpayer derived from trade, business, commerce, or sales and the value proceeding or accruing from the sale of tangible personal property, or services, or both, and all receipts, actual or accrued by reason of the capital of the business engaged in, including interest, rentals, royalties, fees, or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor cost, taxes, royalties, or interest paid or any other expenses whatsoever. Gross revenue shall not include the following:

- (a) refunds and rebates;
- (b) moneys held in a fiduciary capacity;

54 F.S.M.C. 112(5).

The court cannot agree with the Secretary’s reasoning. The clause denying any deductions for “the cost of property sold, the cost of materials used, labor cost, taxes, royalties, or interest paid or any other expenses whatsoever” all involve a business’s cost of doing business – business expenses. The “taxes” in

³ As an aside, the court would not have been willing to hold the Pohnpei sales tax unconstitutional (hold that it was imposed on the seller) without first giving the State of Pohnpei the opportunity to defend the constitutionality of its sales tax statute (and its revenue source), especially since Pohnpei is not a party.

that clause are taxes that the business (seller) pays⁴ – that are business expenses, not the taxes the business’s patrons pay, which are the buyers’ expenses. The business (seller) acts as an agent for the state when it collects the state sales tax from the buyer. That is clearly stated in the Chuuk sales tax statute, see *supra* note 2, and implied in the Pohnpei sales tax statute if the sales tax is imposed on the buyer.

Furthermore, the exclusion from gross revenue of “moneys held in a fiduciary capacity” is a more specific statutory provision than the general provision that taxes are not deducted.⁵ One principle of statutory construction is that the specific provision prevails over and controls the more general. In *re Engichy*, 12 FSM R. 58, 64, 69 (Chk. 2003); see also *FSM Dev. Bank v. Tropical Waters Kosrae, Inc.*, 18 FSM R. 378, 380 (Kos. 2012).

Accordingly, the Pohnpei or Chuuk state sales tax money received by sellers of goods and services, such as the taxpayers here, from the buyers of goods and services are moneys held in a fiduciary capacity by the sellers until they are remitted to the state tax authorities. Those state sales tax moneys are excluded from the FSM national gross revenue tax as moneys held in a fiduciary capacity. 54 F.S.M.C. 112(5)(b). The levying of a gross revenue tax on those state sales taxes was therefore illegal, as a matter of law.

IV. CONCLUSION

The court therefore concludes that the gross revenue taxes that the taxpayers paid, under duress and protest, on their Chuuk and Pohnpei state sales tax receipts were unlawfully paid and that the taxpayers are thus entitled to refunds of those payments. Taxes paid under duress and under protest must be refunded when it is determined that those taxes were unlawful. *GMP Hawaii, Inc. v. Ikosia*, 19 FSM R. 285, 289 (App. 2014); *Chuuk Chamber of Commerce v. Weno*, 8 FSM R. 122, 125 (Chk. 1997).

The court expects that the parties will be able to easily agree on the refund amounts. The court cannot determine these amounts from the current court filings because further tax payments have been made since then. The court also expects that these refunds can be easily accomplished as credits to the taxpayers to be set off against their future gross revenue tax payments.

The Department of Finance and Administration also must allow the exclusion of Chuuk and Pohnpei state sales taxes from all future computations of gross revenue subject to the FSM gross revenue tax.

There being no just cause for delay, the court hereby directs the clerk to issue a final declaratory judgment to that effect. FSM Civ. R. 54(b). This leaves unresolved the plaintiffs’ claims for attorney’s fees under the private attorney general theory and the plaintiffs’ damages claims for alleged due process civil rights violations under 11 F.S.M.C. 701(3). The plaintiffs may inform the court, within thirty days of this order, how and whether they intend to proceed on these claims.

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⁴ These would include taxes such as import duties, occupational taxes, business taxes, property taxes, etc.

⁵ Technically, moneys held in a fiduciary capacity are moneys that are exempt or excluded from the gross revenue calculation, not deducted from it. Exclusions from gross income are listed in 54 F.S.M.C. 112(5)(a) through (k). Permissible deductions are listed in 54 F.S.M.C. 112(8).