

ALTHEA BING & CO., INC., Defendant-Appellant
v.
MUNICIPALITY OF DARRIT, ULIGA, DALAP, Plaintiff-Appellee
Civil Appeal No. 410
Appellate Division of the High Court
Marshall Islands District
April 28, 1986

Action for unpaid sales taxes filed by municipality against corporation doing business in the Marshall Islands and engaged in selling alcoholic beverages. The Appellate Division of the High Court, Munson, Chief Justice, affirmed the trial court's judgment on remand in favor of the municipality, holding that the trial court properly had subject matter jurisdiction to hear the case and properly limited its hearing on remand from an appellate court to the amount of tax owed.

⁵ The original opinion of the aforementioned case attached is not published herein due to limited space, but it is available for review on Saipan at the United States District Court for the Northern Mariana Islands, the Commonwealth of the Northern Mariana Islands Trial Court and the High Court of the Trust Territory of the Pacific Islands.

1. Taxation—Sales Tax—Jurisdiction

In action for unpaid sales taxes filed by municipality, trial court had subject matter jurisdiction to hear the case on remand, since the trial judge in his discretion determined that the case was still in active trial.

2. Appeal and Error—Case on Remand—New Trial

In action for unpaid sales taxes filed by municipality, it was clear from its opinion that appellate court did not reverse and remand case for new trial but only for trial court to determine amount of tax due.

3. Appeal and Error—Case on Remand—Matters Presented

In action for unpaid sales taxes filed by municipality, trial court on remand properly refused to allow evidence regarding an alleged set-off, where the assertion of an alleged set-off was first made at the remand hearing.

4. Appeal and Error—Case on Remand—Matters Presented

In action for unpaid sales taxes filed by municipality, motion for a continuance of the hearing on remand to allow for the introduction of evidence regarding an alleged set-off was properly denied, where the matter of a set-off was not an issue properly before the court.

*Counsel for Defendant-
Appellant:*

R. BREWSTER THOMPSON, ESQ.,
WHITE, NOVO-GRADAC & THOMP-
SON, P.O. Box 222 CHRB, Sai-
pan, CM 96950

*Counsel for Plaintiff-
Appellee:*

WILLIAM J. BLAIR, ESQ., KLEMM,
BLAIR, STERLING & POPPE, 1008
PDN Building, Agana, Guam
96910

Before MUNSON, *Chief Justice*, LAURETA*, *Associate
Justice*, BENSON**, *Associate Justice*

MUNSON, *Chief Justice*

This case involves an action for unpaid sales taxes filed
by appellee Municipality of Darrit, Uliga, Dalap (DUD)

* United States District Court Judge, District of the Northern Mariana Islands, designated as Temporary Associate Justice by the United States Secretary of the Interior.

** Associate Justice, Federated States of Micronesia Supreme Court, designated as Temporary Associate Justice by the United States Secretary of the Interior.

of the Marshall Islands on October 16, 1980, against appellant Althea Bing & Co., Inc. (Bing). Bing is a corporation doing business in the Marshall Islands and engaged in selling alcoholic beverages. On September 20, 1977, DUD enacted Ordinance 77-1 imposing sales taxes on beer, wine, and other alcoholic beverages within the Municipality of DUD. DUD filed its complaint claiming that Bing has refused to pay sales taxes owed to DUD.

Before the case went to trial, several developments occurred. The Marshall Islands *Nitijela*¹ enacted Local Government Act 1980 which provided in part for amalgamation of local governments. The Act became law on February 18, 1981. On August 13, 1981, the Cabinet of the Government of the Marshall Islands ordered the municipalities of DUD and Laura to voluntarily amalgamate within six months. DUD failed to amalgamate voluntarily with Laura Municipality and subsequently was ordered pursuant to the Act to do so by the Minister of Internal Affairs. DUD refused to comply and was further ordered by the Trust Territory High Court to comply.²

On February 28, 1983, the trial court found that any taxes imposed by DUD prior to February 18, 1981 under Ordinance 77-1 were due and payable. The court also held that any taxes imposed subsequent to that date were invalid. The court held that "[DUD] was deprived of its governmental functions, including taxing power under 77-1, by the passage of Local Government Act 1980 on the effective date of February 18, 1981." DUD appealed. The appellate court consolidated this case with two similar appeals involving delinquent taxpayers. On January 19, 1984, this court determined that the trial court erred in consider-

¹ "Nitijela" is the legislature of the Marshall Islands.

² See *Birash Joash v. Cabinet of the Government of the Marshall Islands*, Civil Action No. 12-82. *Birash Joash* was recently decided by this court, wherein the Act was held to be valid. *Birash Joash v. Cabinet of the Government of the Marshall Islands*, 8 T.T.R. 498 (App. Div. 1985).

ing the applicable law, and reversed the trial court's decision. The appellate court held:

It is uncontradicted that neither the local governments nor the Cabinet has taken action to complete the amalgamation. Indeed, pursuant to Section 21 (8) and (9) of the Act, it appears that only upon the effective date of the new constitution would the appellant be abolished. Since neither of these events has occurred, the conclusion is inescapable that *the appellant remains a viable municipality with taxing powers*.

Since each appellee has different tax liabilities to be reduced to judgment, each case is reversed and remanded for the trial court to enter an appropriate judgment consistent with this Opinion. (Emphasis added.)

Municipality of DUD v. Althea Bing & Co., 8 T.T.R. 415 (App. Div. 1984).

In issuing its judgment on remand in favor of appellee, the trial court relied on Plaintiff's Exhibit 1. Exhibit 1 was a statement of account showing the amount of taxes due from August 14, 1979 to November 1, 1982, and was received into evidence by the trial court at a pretrial conference by stipulation of both trial counsel on November 15, 1982. Reporter's Transcript of Hearing, November 15, 1982, p. 19, lines 9 to 23, and p. 22, lines 2 to 12. The exhibit showed that the total amount of taxes owed was \$84,522.23. The trial court, on remand, entered judgment in favor of appellee for the entire amount plus costs. Bing appealed.

The issues presented to the court for determination are:

1. Whether the trial court had subject matter jurisdiction to hear the case on remand;
2. Whether this case was reversed and remanded by the appellate court for a new trial;
3. Whether the trial judge erred by not allowing appellant to introduce evidence of an alleged set-off; and

4. Whether the trial court erred in refusing counsel for appellant a continuance.

The first matter we must consider is whether the trial court had subject matter jurisdiction to hear the case on remand. An objection based on a court's lack of subject matter jurisdiction cannot be waived and may be raised at any time. Such an objection may be raised for the first time on appeal and it must be considered by the court. 20 Am. Jur. 2d Courts § 95.

When the trial court addressed the issue of whether to transfer the case to the Marshall Islands courts pursuant to Secretarial Order 3039 on November 15, 1982, the trial judge determined that the case was to remain within the jurisdiction of the High Court of the Trust Territory. Reporter's Transcript of Hearing, November 15, 1982, p. 10, lines 2 to 21.

Secretarial Order 3039, § 5(a) provides that:

. . . all cases, except for suits against the Trust Territory of the Pacific Islands Government or the High Commissioner, currently pending but not in active trial before the Community Courts, the District Courts, and the High Court shall be transferred to the functioning courts of such jurisdiction, provided that the legal rights of the parties in any case in controversy . . . shall in no way be impaired by this Order.

Determination as to whether a case is in "active trial" shall be made by the judge before whom such case is pending. (Emphasis added.)

The Secretarial Order provides that there will be circumstances when a case should be retained rather than transferred to another court as such a transfer could act to impair a party's legal rights. The trial judge's determination that the case was in active trial and that the High Court should retain jurisdiction was a matter of discretion and it is not the function of the appellate court to second-guess the trial judge's discretionary ruling.

[1] Appellant also argues that the trial court lacked jurisdiction on remand to hear the case because "Once [the] appellate court remanded the case, it was no longer in active trial" and therefore should have been transferred to the Marshall Islands courts. We disagree. When the appellate division remanded this case to the trial division to enter judgment not inconsistent with its opinion, the trial judge at that time had the discretion to determine if the case was in active trial, which he so determined. Further, the first time appellant moved the court to transfer the case was during the July 3, 1984 hearing by oral motion. The order for trial was sent to the parties on March 20, 1984. The trial court in its discretion might have seen fit to transfer the case if the application had been timely made by written motion pursuant to Rule 7(b)(1) of the Trust Territory Rules of Civil Procedure. To have orally applied on the day of trial, however, supports the trial court's determination that the case was in active trial. Because the trial judge's determination was discretionary, we will not disturb it.

We must next determine whether the appellate court reversed and remanded the case for a new trial. Appellant urges that since the amount of taxes owed by appellant was already ascertained, the failure of the appellate court to issue a judgment for that amount meant that the case was remanded for a new trial.

The appellate court reversed the trial court's finding that taxes imposed by DUD after February 18, 1981 were invalid pursuant to Local Government Act 1980. In reversing that finding, the appellate court limited its opinion to the issue of appellee's power to tax. The court stated that "only upon the effective date of the new constitution would [DUD] be abolished," and until such time, appellee retained the requisite authority to tax appellant. After the appellate court determined that the trial court erred in considering the applicable law, the case was "reversed and remanded

for the trial court to enter an appropriate judgment consistent with [its] opinion.” After conducting a hearing on July 3, 1984, the trial court entered judgment in accordance with the appellate court’s mandate for the amount of taxes due as proven by plaintiff’s Exhibit No. 1.

[2] With regard to the appellate mandate, there was no doubt as to what the future proceedings were for the trial court. The case was reversed on the grounds that the appellee did have authority to tax the appellant. The only matter remanded was for the trial court to enter judgment. The reason the appellate court did not enter a judgment was that the instant case was consolidated with two other cases on the first appeal. The appellate court held:

Since each appellee has different tax liabilities to be reduced to judgment, each case is reversed [with respect to the issue of appellee’s power to tax under the Act] and remanded for the trial court to enter an appropriate judgment consistent with this Opinion.

This is precisely what happened in this case.

[3] We now consider whether the trial court, at the July 3, 1984 hearing, erred by not allowing evidence of an alleged set-off. Rule 13(a) of the Trust Territory Rules of Civil Procedure, which is identical to the Federal Rules of Civil Procedure, provides that a claim arising out of the same “transaction or occurrence that is the subject matter of the opposing party’s claim” must be pleaded by appellant. A counterclaim is defined as:

. . . any claim, including set-off and recoupment, which one party has against an opposing party, whether legal, equitable or maritime.

3 Moore’s Federal Practice, § 13.02 (2d ed.). Plaintiff’s Exhibit No. 1 was not objected to by appellant at the first trial and the matter of a set-off was not raised as an issue in the first appeal. Further, no motion to amend the appellant’s pleadings was ever made. Appellant’s assertion of an

alleged set-off was first raised orally at the July 3, 1984 hearing. As noted earlier in the opinion, the trial date had been set for over three months and it was incumbent upon appellant during this period to file a written motion with the court according to Rule 7(b)(1) of the Trust Territory Rules of Civil Procedure. The trial court did not err on remand in refusing to allow testimony regarding the set-off, as the question of set-off was not an issue before the court.

[4] Finally, we affirm the trial court's denial of appellant's motion for a continuance of the hearing on remand to allow for the introduction of evidence regarding the set-off, as a matter of a set-off was not in issue before the court.

For the reasons stated herein, the judgment of the trial court is AFFIRMED.