KSG v. ROP v. Tmetuchl, 3 ROP Intrm. 314 (1993)

KOROR STATE GOVERNMENT,
KOROR STATE PUBLIC LANDS AUTHORITY,
Appellants,

v.

REPUBLIC OF PALAU,
Appellee,

v.

PACIFICA DEVELOPMENT CORP.,
ROMAN TMETUCHL, et al.,
Appellees.

CIVIL APPEAL NO. 24-91
Civil Action No. 28-84

Supreme Court, Appellate Division
Republic of Palau

Appellate opinion
Decided: October 5, 1993

Attorneys for Koror State Govt.: Mark Doran and Antonio Cortes

Attorneys for Republic of Palau: Ernestine Rengiil, AG
Nicholas Mansfield, AAG

Attorney for Pacifica Dev. Corp.: Johnson Toribiong

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; and LARRY W. MILLER, Associate Justice.

PER CURIAM:

In this appeal, Koror State Public Lands Authority ("KSPLA") challenges the constitutionality of 35 PNC § 217, the section of the Palau Public Lands Authority Act which apportions the revenues generated by lands held by a state public lands authority between the state and the national government. KSPLA ⊥315 contends that the national government's retention of a share of such revenues amounts to an unconstitutional tax on land. The trial court rejected KSPLA's constitutional argument, holding that 35 PNC § 217 does not impose a tax on land. We affirm.

BACKGROUND

KSG v. ROP v. Tmetuchl, 3 ROP Intrm. 314 (1993)

To understand the procedural context of this case, it is necessary to delve into the complicated facts surrounding the decade-long dispute between the Republic of Palau ("ROP"), Koror State Government, and Pacifica Development Corporation ("PDC") over who owns various parcels of land in Koror. As these facts have been canvassed in previous opinions of this Court and of the trial division of the Supreme Court, our discussion today will highlight only those facts salient to the present appeal. For additional background information, the Court directs the reader's attention to *ROP v. Pacifica Development Corp.* , 1 ROP Intrm. 383 (1987) and *ROP v. Tmetuchl, et al.*, 1 ROP Intrm. 214 (Tr. Div. 1985).

On June 25, 1981 a "Land Exchange Agreement" ("Agreement") was executed between Roman Tmetuchl, who heads PDC, and Yutaka Gibbons, in Gibbons' capacity as head of Idid Clan, Mayor of Koror State, and Chairman of the Koror Municipal Land Authority. In addition to exchanging particular parcels of land in Koror, the parties agreed that PDC could operate the Malakal Quarry as long as it paid Gibbons $.40 for every cubic yard of aggregate processed. At the time of the Agreement, title to the quarry was still vested in the government of the Trust Territory of the Pacific Islands ("TTPI").

⊥316 In February, 1984, ROP filed suit against PDC to quiet title to lands that had been deeded to PDC through the Agreement. Koror State intervened in this action, seeking an accounting and rental arrearages from PDC for its use of the quarry. In its June, 1985 decision, the trial court held, inter alia, that Koror State did not own the quarry and therefore had no right to lease it to PDC. The trial court voided the lease and directed Koror State to deposit with the Clerk of Courts any lease payments previously made by PDC. The trial court also ordered PDC to deposit all accrued but unpaid lease payments, as well as future lease payments, with the Clerk of Courts. *See ROP v. Tmetuchl, et al.*, 1 ROP Intrm. at 228.

On June 23, 1986 TTPI deeded the quarry site to the Republic of Palau.

In April, 1987 the Appellate Division determined that the quarry lease's validity was not properly before the trial court. It therefore vacated the trial court's voiding of the quarry lease and remanded the case for further proceedings. *See ROP v. Pacifica Development Corp.* , 1 ROP Intrm. at 393. On remand, the trial court ordered the Clerk of Courts to distribute any money it held pursuant to its previous order to the Republic of Palau. The trial court also rescinded its order requiring PDC to deposit future lease payments with the Clerk of Courts. In response to this order, the Clerk of Courts remitted $2,599.51 to the national government in April, 1987. Although it was no longer required to ⊥317 do so, PDC continued to deposit money intermittently with the Clerk of Courts. By September, 1990, this sum totaled $14,370.20.

In April, 1989 ROP quitclaimed the quarry site to KSPLA. The deed, which was executed by President Ngiratkel Etpison on behalf of ROP, conveyed ROP's present "interests, claims, rights, and title" to the quarry as well as "any, every, and all interest, claims, rights, and title hereto after acquired by the Republic of Palau and its assigns, agencies, and successors from the Trust Territory of the Pacific Islands or other legal entities through and by operation of law, deed, or otherwise."

On January 11, 1991 KSPLA moved for an order requiring the Clerk of Courts to release to it all of the money PDC had deposited with the Clerk. It also requested an accounting to determine what PDC owed pursuant to the 1981 Agreement and how much of that amount PDC had actually paid. At a hearing on the matter, ROP argued that it was entitled to 25% of the money held by the Clerk, pursuant to 35 PNC § 217. *See infra* for text of statute. The KSPLA responded that section 217 was unconstitutional and that therefore it was entitled to 100% of funds on deposit. As noted above, the trial court rejected KSPLA's constitutional argument. KSPLA appeals this decision.

DISCUSSION

The provision KSPLA challenges is part of the Palau Public Lands Authority Act ("Act"). The Act creates the Palau Public Lands Authority, which is empowered to "administer, manage, and regulate the use of lands and income arising therefrom in trust ⊥318 for the people of the Republic." 35 PNC § 210(c). Individual states are entitled to establish their own public lands authorities. These state authorities (such as KSPLA) derive their powers, duties and obligations by grant from the Palau Public Lands Authority. *Id.* at 215(a),(c). Once a state has established its own lands authority, the Palau Public Lands Authority may convey to it public land within that state. *Id.* at § 210(j). Section 217 of the Act explains how revenue generated from public lands should be disbursed:

> All revenue realized and received by the Authority generated from the administration and management of public lands shall be transmitted to the Director of the Bureau of the National Treasury for inclusion in the National Treasury; provided that whenever a state authority is created pursuant to section 215 of this title, then three-fourths of all revenue generated from the state authority's administration and management of public lands shall inure to the treasury of that state government, with the balance of one-fourth inuring to the National Treasury.

Id. at § 217. KSPLA challenges the apportionment scheme of section 217. It contends that the 25% portion of the revenues which inure to the National Treasury is an unconstitutional tax on land. *See* Palau Constitution Art. XIII § 9 ("No tax shall be imposed on land.").

The 25% portion of the revenues which inure to the National Treasury pursuant to section 217 is not a tax, and, even if it is, it is not an unconstitutional tax on land. We agree with ⊥319 the trial court[1] that the financial arrangement created by section 217 is better viewed as profit, or revenue sharing. We reach this conclusion based on the plain language of the statute, the section's placement in the Code, and from a basic understanding of the purpose behind the Palau Public Lands Authority Act. Taking these factors into account, we find that section 217's revenue sharing arrangement is not a tax, but a means by which the national government can retain some

[1] We are not, of course, bound by the legal conclusions of the trial court. *See Etpison v. Rdialul*, 2 ROP Intrm. 211, 217 (1991) (Appellate Division can review questions of law de novo.).

revenue "in trust for the people of the Republic." *See* 35 PNC § 210(c).

More fundamentally, even if section 217's revenue sharing arrangement could be considered a tax, it would not constitute an unconstitutional tax on land. The land itself is not taxed. If the land does not generate revenue, nothing must be paid to the national government. It is the existence of revenue that triggers the obligation to pay. Article XIII § 9 does not prohibit taxes on the revenue derived from land:

> This Section prevents any taxation on the ownership of land within Belau. The Committee members recognized that many Belauan citizens who own lands have no financial means of support but depend on the use of their land to provide food and shelter. If taxes could be imposed on land, the Committee felt that many citizens would be forced to sell their land because they could not afford to pay taxes . . . . This section, however, does not prohibit taxation on revenue derived from the land such as revenue from office buildings, apartment buildings, or stores on said land since taxation of such activities would not be a direct tax on the land itself. Also, this ⊥320 Section would not prohibit taxation of profits from the sale of land, crops, plants, or trees.

Standing Committee Report No. 30 (March 4, 1979).

The legislative history thus is clear that Article XIII § 9 does not prohibit a tax, if that is what section 217 is, on the revenue generated from the operation of the quarry. The taxation of such activity is simply not "a direct tax on the land itself." We reject KSPLA's conceptualization of section 217's revenue sharing arrangement as an unconstitutional tax on land.

KSPLA argues alternatively that by the express language of the quitclaim deed ROP conveyed all of its interest to KSPLA, including any section 217 rights to revenue generated from the quarry. [2] But the quitclaim deed, whatever its language, cannot override the express language of section 217. *See* 23 Am. Jur. 2d *Deeds* § 188 (1983) (A deed which seeks to effectuate a prohibited transaction is void.). Certainly the executive branch, by execution of a deed, cannot modify a revenue statute enacted by the legislature.

It is true, the Palau Public Lands Authority may assign to a state authority all of the "rights, interests, powers, responsibilities, duties and obligations" it has under the Act. *See* 35 PNC § 210(j). However, the choice of where to direct revenue generated by the management of public lands is not one of ⊥321 the Authority's "powers". Section 217 does not give the Authority any discretion in the matter. It plainly and unambiguously orders three-fourths of the revenue generated from such lands to inure to the state government, and one-fourth to inure to the National Treasury. Thus, by the terms of section 217, the Authority is without power to divert the revenue to another source. KSPLA has not directed us to any statute purporting to give the President any authority to divert the revenue. In this sense, then, even if ROP intended to

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[2] We note that, under 35 PNC § 215(a), states are empowered to create legal entities to receive public lands from the Palau Public Lands Authority. Because the parties do not question the propriety of ROP's transfer in this case, we decline to do so.

assign the national government's 25% share of the revenues, [3] its intent is irrelevant. *Cf.* Palau Constitution Art. XII § 1 ("All revenues derived from taxes or other sources shall be deposited in the appropriate treasury. No funds shall be withdrawn from any treasury except by law."); *see generally* 16 Am. Jur. 2d *Constitutional Law* § 305 (1979) ("The executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his conduct is tantamount to a repeal, enactment, variance, or enlargement of legislation."); *see also Groves v. City of Los Angeles*, 256 P.2d 309, 315 (Cal. 1953) (an erroneous executive branch statutory construction is not binding on a court); *Schiaffo v. Helstoski*, 350 F. Supp. 1076, 1094 (D. New Jersey 1972) (a legislative act cannot be changed by practice or usage); *Freeman v. Morton*, 499 F.2d 494, 501 (D.C. Cir. 1974) ("Any ⊥322 conflicting administrative interpretation to the contrary must yield to the clear provisions of the act.").

KSPLA's remaining arguments can be disposed of summarily. KSPLA argues that it "has not had anything to do with the administration and management of the Quarry as contemplated by 35 PNC § 217 so all the money should have been given to the KSPLA." The Court understands KSPLA to mean that revenues should only be apportioned under section 217 if KSPLA is actually operating the quarry, as opposed to merely acting as the quarry operator's landlord. It is unlikely the legislature intended such a narrow application as this would greatly reduce the amount of land to which section 217 applies. It is reasonable to conclude that "administration and management" includes the leasing of public lands to private concerns. Funds generated from such a lease, like the funds in the present case, are therefore subject to section 217.

KSPLA also contends that section 217's revenue sharing provision amounts to an unconstitutional taking without compensation. This argument was not raised below and is therefore waived. *See Eriich, et al. v. Republic of Palau Reapportionment Commission*, 1 ROP Intrm. 150, 151 (App. Div. 1984). Next, KSPLA argues that the money paid to ROP as a result of the trial court's April 26, 1987 Order Following Remand should have been paid to KSPLA. The time for appealing this issue has long since run. *See* ROP App. Pro. 4(a).

⊥323 Finally, KSPLA argues that the trial court should have ordered an accounting to determine what lease payments PDC has made, and what payments it still owes. Because the trial court did not address this issue in its Order, we will not address it here. *See* 5 Am. Jur. 2d *Appeal and Error* § 725 ("The proceedings on appeal are ordinarily strictly limited to review of matters directly affecting the judgment, order, or decree appealed from"). KSPLA is free to raise the accounting issue in *KSPLA v. PDC*, Civil Action Nos. 127-91/198-91.

CONCLUSION

We hold that any revenue received by KSPLA under the quarry lease or otherwise by

[3] We are not sure that it did. The portion of the deed KSPLA relies on purports to assign all interest, claims, rights, and title which ROP might later acquire from TTPI. It is logical to read this provision, then, not as an assignment of ROP's section 217 rights, but as a catch-all, boilerplate assignment of any incidents of ownership in the quarry which TTPI had not yet transferred to ROP.

KSPLA's administration and management of the quarry is subject to section 217's revenue sharing requirement.

The judgment of the trial court as to the constitutionality of 35 PNC § 217 is AFFIRMED.