

TAX APPEAL COURT  
STATE OF HAWAII  
FILED

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KATHLEEN M. ...  
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IN THE TAX APPEAL COURT  
STATE OF HAWAII

IN THE MATTER OF THE TAX )  
APPEAL )  
of )  
BRADLEY PROPERTIES, LTD., )  
a Hawaii corporation )  
Appellant. )  
\_\_\_\_\_ )

TAX APPEAL CASE NO. 96-5208  
TRIAL DATE: December 2, 1997  
  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
JUDGMENT

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Notice of Appeal was filed by Bradley Properties, Ltd. on May 29, 1996. A hearing on this appeal was held on December 2, 1997. Representing Appellant Bradley Properties, Ltd. was Patrick Hanifin. Representing Appellee Director of Taxation was Cynthia Johiro.

### FINDINGS OF FACT

The facts in this matter have been stipulated to. As such there are no factual disputes. Notwithstanding the adoption of this stipulation the following facts are noted.

1. On March 29, 1996, the attorney for Appellant Bradley Properties, Ltd. (Appellant/Taxpayer) wrote to the Appellee Director of Taxation, State of Hawaii "to object to and dispute tax assessments." Stipulation, paragraph 15 and Exhibit B.

2. On March 30, 1996, Appellee sent five final notices Of assessment for tax years 1987, 1988-06, 1990, 1992 and 1993 to Appellant's last known business address. Stipulation, paragraph 16 and Exhibit C.

3. On April 3, 1996, Appellee received Appellant's attorney's March 29th letter dated March 29, 1996.

4. On April 30, 1996, Appellant paid the amounts assessed by the six notices of assessment sent to them by Appellee. Stipulation, paragraph 17.

5. On May 14, 1996, Appellant's attorney wrote to the Appellee requesting that the Appellee treat the April 30, 1996 payment as paid under protest. Stipulation, paragraph 18 and

Exhibit E.

6. On May 29, 1996 Appellant filed a Notice of Appeal of their tax assessment with the Tax Appeal Court. Stipulation, paragraph 12.

7. The subject of the taxation on appeal in this case were directly passed on to salespeople. Appellant advanced funds to its salespeople by paying for certain costs for them, such as advertising, business cards, nametags, and telephone bills. Stipulation, paragraphs 26 - 46.

#### CONCLUSIONS OF LAW

1. It is the Appellee's contention that this court lacks jurisdiction of this matter because the Appellants have not complied with the time constraints mandated by rules and statute relating to the filing of the notice of this Appeal.

2. Hawaii Revised Statute (1994 Revision) ("HRS") § 40-35 states that payments must be made under protest in order to preserve the right to appeal the assessment. However, there is no specific language regarding how or when the protest must be made.

The Appellee's were fully advised and given constructive notice that the Appellant's payment was being made under protest. This is evidenced by: 1) Appellant's letter to Appellee dated March 29, 1996, objecting to and disputing the assessments; and 2) Appellant's letter to Appellee dated May 14, 1996, requesting that the payment be treated as under protest. Therefore the payments are construed as made under protest.

3. Appellee further contends that the notice of appeal was untimely filed. Appellant relies on HRS § 40-35 for the proper filing deadline, while Appellee relies on the Rules of Tax Appeal Court, Rule 2 for the proper filing deadline.

HRS § 40-35 requires that the taxpayer file notice of appeal within 30 days of payment. This filing requirement was met. Rules of Tax Appeal Court (1996 Revision), Rule 2 required that notice of appeal be filed within 30 days of final notice. This filing requirement was not met.

4. While there is a conflict between HRS § 40-35 and Rule 2 of the Rules of Tax Appeal Court as to the time of notice filing requirement, this court must resolve the conflict in favor of finding proper jurisdiction. According to HRS § 602-11, "[s]uch rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitation." By following Rule 2 Tax Appeal Court, the substantive rights of Appellant would be abridged from the substantive rights created under the Hawaii Revised Statutes (where the Appellant would have filed within the time requirement and jurisdiction would be found), and thus be circumvented. As such, the court must follow HRS § 40-35 and find proper jurisdiction and timeliness of appeal for Appellant. See In the Interest of Jane Doe, (Hawaii, 1994) 77 Haw. 109, 113-114. For these reasons, this court has jurisdiction to hear Appellant's appeal.

5. In support of its claim for the exemption under HRS

§ 237-20, the Appellants have relied upon In re Tax Appeal of Pacific Machinery (Haw 1982), 65 Haw. 45. In Pacific Machinery, Pacific Machinery was taxed on funds advanced to a third party on behalf of Caterpillar. Third parties billed Pacific Machinery for the advertising costs for both Pacific Machinery and Caterpillar. Pacific Machinery according to this agreement billed Caterpillar for one-half of the total advertising costs for advertisements specifically approved by Caterpillar in advance. This agreement to split advertising costs was the only relationship between Pacific Machinery and Caterpillar; Pacific Machinery did not invoice Caterpillar for costs for "overhead, salaries, or other internal expenses or profit incurred by the appellee, nor were there payments for services . . . or reimbursement for internal costs incurred by appellee in connection with advertising Caterpillar products." Pacific Machinery, 65 Haw. 45, 46.

Pacific Machinery did not profit or gain additional monetary consideration from this relationship with Caterpillar, nor did Caterpillar profit or gain additional monetary consideration from this relationship with Pacific Machinery.

The Supreme Court of Hawaii held that this type of advancement of costs is exempt from taxation. As a matter of law, the taxpayer, Pacific Machinery gained no additional monetary consideration from this advancement of costs.


Pacific Machinery, like the instant matter, focused upon the relationship between the two parties as relates to HRS § 237-20. HRS § 237-20 looks to the relationship. In Pacific Machinery, the

taxpayer did not receive additional monetary consideration pursuant to this cooperative advertisement agreement. In the instant case, however, the Appellant gains additional monetary consideration from its relationship with its salespeople. Appellant profits by virtue of its salespeople selling products for Appellant. Appellee receives additional monetary consideration in this case in the form of commissions and volume discounts, which are not passed on to the salespeople. The advancement of funds is directly related to the fact that the salespeople earned money for both themselves as well as Appellant. The court therefore finds that the expenses incurred were for Appellee's own benefit and consequently constitute taxable gross income.

JUDGMENT

Appeal is denied. Judgment is entered in favor of Appellee Director of Taxation.

DATED: Honolulu, Hawaii December 18, 1997.

  
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JAMES R. AIONA, JR.  
Judge of the Above-Entitled Court