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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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TAX FOUNDATION OF HAWAIʻI, a Hawaiʻi non-profit corporation, on behalf of itself and those similarly situated,
Plaintiff-Appellant,

vs.

STATE OF HAWAIʻI,
Defendant-Appellee.

SCAP-16-0000462

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-16-0000462; CIV. NO. 15-1-2020)

MARCH 21, 2019

DISSENTING OPINION BY NAKAYAMA, J.

Plaintiff-Appellant Tax Foundation of Hawaiʻi (Tax Foundation) filed a class action lawsuit on behalf of all taxpayers in the City and County of Honolulu (the City), alleging that Defendant-Appellee State of Hawaiʻi (the State) violated Hawaiʻi Revised Statutes (HRS) § 248-2.6 and several provisions in the Hawaiʻi and United States Constitutions by retaining 10%

of the gross proceeds of the City's surcharge on state general excise and use taxes as reimbursement for the costs of administering the surcharge on the City's behalf. On motion by the State, the Circuit Court of the First Circuit (circuit court) dismissed Tax Foundation's complaint, ruling that it lacked subject matter jurisdiction to entertain the dispute pursuant to HRS § 632-1.

We are faced with the following issues on appeal: (1) whether the circuit court correctly concluded that it lacked subject matter jurisdiction over the present case; (2) whether Tax Foundation demonstrated that it had standing to challenge the State's administration of HRS § 248-2.6; (3) whether the State violated HRS § 248-2.6 in retaining 10% of the surcharge proceeds as reimbursement for the costs of administering the surcharge on the City's behalf; and (4) whether the State's implementation of HRS § 248-2.6 was unconstitutional.

I join the Majority in its threshold holdings that: (1) Tax Foundation's requested relief does not constitute a tax refund claim; and (2) that HRS § 632-1 does not bar subject matter jurisdiction in this suit. Majority at Part I.

Justice McKenna, writing for the Majority on the issue of standing, next holds that Tax Foundation has standing under HRS § 632-1. Majority at Part II. I dissent from Part II, as I agree with the Chief Justice's dissent to the extent that the

Chief Justice concludes HRS § 632-1 does not eliminate the requirement that a plaintiff establish an "injury in fact" in a declaratory judgment, and therefore does not establish a distinct test for standing.

I disagree with the Chief Justice to the limited extent that I believe that Tax Foundation did not raise taxpayer standing, and that the Chief Justice considers whether Tax Foundation has taxpayer standing sua sponte. I believe that the Chief Justice's sua sponte consideration of whether Tax Foundation possessed taxpayer standing is inappropriate for two reasons. First, I believe that the Chief Justice's decision to address whether Tax Foundation possessed taxpayer standing sua sponte is inconsistent with our case law. This court has previously declined to entertain whether a plaintiff possesses standing as a taxpayer when the plaintiff does not expressly rely upon such a basis for standing. Second, I believe that by effectively raising an alternative theory of standing on Tax Foundation's behalf, the Chief Justice undermines the principle of party presentation that lies at the core of the adversarial process. Therefore, I write separately because, as Tax Foundation itself proffers no other basis for standing, I would hold that Tax Foundation has failed to establish that it has standing to challenge the State's implementation of HRS § 248-2.6.

Finally, the Majority addresses Tax Foundation's arguments on the merits. Majority at Part III. I cannot join the Majority's holding in Part III because as I believe Tax Foundation lacks standing, I would not reach the merits of Tax Foundation's arguments.

I. DISCUSSION

A. This court should not sua sponte consider taxpayer standing.

The State raised standing as an issue at trial and on appeal, but no party elected to raise taxpayer standing specifically. The Chief Justice nevertheless concludes that Tax Foundation "directly invokes the principles of taxpayer standing,"[1] and proceeds to apply the two-part test[2] that governs

[1] Generally, where the parties themselves have not raised or otherwise challenged whether the plaintiff has standing in the first instance, this court has the authority to address the matter on its own accord where necessary. See State v. Armitage, 132 Hawaiʻi 36, 55, 319 P.3d 1044, 1063 (2014) ("Although not explicitly argued by the parties, this court must consider the issue of standing sua sponte, because a plaintiff without standing is not entitled to invoke a court's jurisdiction.") (brackets and internal quotation marks omitted) (emphasis added) (citing Sierra Club v. Haw. Tourism Auth., 100 Hawaiʻi 242, 250, 59 P.3d 877, 885 (2002)).

Here, however, the State raised the issue of whether Tax Foundation has standing to challenge its implementation of HRS § 248-2.6 before the trial court and on appeal. Therefore, rather than sua sponte raising the issue of standing in and of itself, the Chief Justice considers an alternative legal theory upon which Tax Foundation could have, but has not, relied to establish that it had standing. In my view, this court's duty to independently consider the issue of standing where the matter has not been raised does not include a duty to sua sponte raise alternative theories of standing where a party has expressly called the plaintiff's standing into question, but the plaintiff's arguments have failed to establish that it has standing.

[2] To establish taxpayer standing, two requirements must be met: "(1) plaintiff must be a taxpayer who contributes to the particular fund from which the illegal expenditures are allegedly made; and (2) plaintiff must suffer a pecuniary loss, which, in cases of fraud, are presumed." Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 282, 768 P.2d 1293, 1298 (1989).

whether an individual has standing as a taxpayer to the facts in this case. Dissenting Opinion by Recktenwald, C.J., at 7-9. The Chief Justice then determines that Tax Foundation satisfied both requirements, and thus, has taxpayer standing to challenge the State's application of HRS § 248-2.6. Dissenting Opinion by Recktenwald, C.J., at 7-11. I respectfully disagree.

I do not believe Tax Foundation effectively raised taxpayer standing. The Chief Justice points to statements made by Tax Foundation such as, "as a taxpayer, [Tax Foundation is] continuously injured by the State[,]" and "[t]he Foundation has paid the Surcharge and is vitally invested in its proper use considering it will be continually taxed for the same until the rail project is finished." Dissenting Opinion by Recktenwald, C.J., at 7. However, this court has consistently declined to consider taxpayer standing as a basis for standing where plaintiffs do not explicitly allege taxpayer standing. See infra. Such an explicit allegation of taxpayer standing is absent here. Therefore, in my view, the Chief Justice addresses the issue of taxpayer standing sua sponte.

Respectfully, I believe that the Chief Justice's sua sponte consideration of taxpayer standing is misguided for two reasons. First, the Chief Justice's decision is inconsistent with our case law. Second, the Chief Justice's decision undermines the principle of party presentation that is

fundamental to our adversarial process.

This court has previously declined to consider whether a plaintiff has standing as a taxpayer when the plaintiff has not expressly alleged taxpayer standing. For example, in Mottl v. Miyahira, this court suggested that where plaintiffs do not explicitly allege taxpayer standing as a basis for standing, such a theory will not be considered in determining whether they have standing. See 95 Hawaiʻi 381, 391 n.13, 23 P.3d 716, 726 n.13 (2001). There, the plaintiffs, consisting of a labor union representing University of Hawaiʻi (University) faculty members, several University faculty members, and a member each of the Hawaiʻi State Senate and the Hawaiʻi State House of Representatives, filed a complaint against the defendants, the director of finance of the State and the governor of the State. Id. at 383-85, 23 P.3d 718-20. In brief, the plaintiffs alleged that the defendants had illegally encumbered $6.4 million that should have been allocated to the University's budget, and sought, inter alia, declaratory and injunctive relief whereby the previously withheld funds would be distributed to the University. Id. at 385, 23 P.3d at 720. One of the issues on appeal was whether the plaintiffs had shown that they had suffered an "injury in fact" as a result of the defendants' conduct. See id. at 388-95, 23 P.3d at 723-30.

This court held that the plaintiffs lacked standing to

seek the disbursement of the allegedly improperly encumbered funds on behalf of the University, explaining:

> The plaintiffs do not attempt to prove any specific and personal injury but, rather, press their general proposition that, in any organization, a loss of six million dollars from its budget must have some negative effect on its operations, ultimately affecting all of its employees. Their argument calls for assumptions or inferences that are not supported by the record or any case law that the plaintiffs cite. Accordingly, the injury that the plaintiffs assert is "abstract, conjectural, or merely hypothetical."

Id. at 395, 23 P.3d at 730 (emphasis in original).

Though this court's conclusion that the plaintiffs lacked standing rested on their arguments that they met the traditional three-prong "injury in fact" test, the Mottl court also noted that the plaintiffs could not rely upon a theory of taxpayer standing to establish that they had standing to invoke judicial intervention. Id. at 391 n.13, 23 P.3d at 726 n.13. Acknowledging the two-part test that governs whether a plaintiff has taxpayer standing, this court reasoned:

> The individual plaintiffs in the present matter alleged in their complaint that they were taxpayers, but they did not expressly claim general taxpayer standing, let alone any recognized "special circumstances." Insofar as they have not alleged that they suffered any pecuniary loss as a result of [the defendants'] actions, the circuit court's exercise of jurisdiction over their complaint may not be justified on the ground that they were taxpayers.

Id. (emphasis added). Put differently, inasmuch as the plaintiffs neither explicitly claimed that they had standing by way of taxpayer standing, nor alleged any facts or arguments supporting that they had standing as taxpayers, this court did

not consider taxpayer standing as a means for establishing that they had standing to seek declaratory and injunctive relief. See id.

More recently, in Corboy v. Louie, 128 Hawaiʻi 89, 283 P.3d 695 (2011), this court reiterated that it will not consider whether a plaintiff has taxpayer standing when the issue has not been expressly raised. In Corboy, the plaintiffs alleged that real property tax exemptions awarded to Hawaiian homestead lessees under the Hawaiian Homes Commission Act (HHCA) involved unconstitutional discrimination on the basis of race, insofar as the HHCA provided that only native Hawaiians were eligible to become homestead lessees. 128 Hawaiʻi at 90, 283 P.3d at 696.

This court held that the plaintiffs did not have standing to challenge the constitutionality of the real property tax exemption or the HHCA generally because they "have failed to allege an injury-in-fact with regard to the HHCA's native Hawaiian ancestry qualification for homestead lessees." Id. at 103, 283 P.3d at 709. Additionally, having determined that the plaintiffs were unable to establish standing on traditional grounds, the Corboy court refrained from considering the issue of taxpayer standing, reasoning: "We decline to reach the issue . . . of whether [the plaintiffs] have general taxpayer standing to assert their claims. Although each of the individual plaintiffs allege that they are taxpayers, they do not expressly

claim general taxpayer standing. Accordingly, we need not address this theory." Id. at 106 n.32, 283 P.3d at 712 n.32 (citations omitted) (emphasis added). Consequently, given that the plaintiffs did not demonstrate that they had standing by virtue of the three-part "injury in fact" test, nor did they allege that they had standing as taxpayers, this court concluded that the plaintiffs lacked standing to bring their constitutional challenges, and that it need not consider the plaintiffs' claims on the merits. See id. at 103, 106 n.32, 108, 283 P.3d at 709, 712 n.32, 714.

Thus, Mottl and Corboy instruct that where a plaintiff does not expressly allege that the plaintiff has standing on the basis of taxpayer standing, this court should not consider the issue, but should resolve the issue of standing based upon the arguments that the parties actually present. Here, as in Mottl and Corboy, although Tax Foundation has alleged that it is a taxpayer, it has not, at any point, expressly averred that it has standing by way of taxpayer standing. Rather, Tax Foundation has consistently and exclusively argued that it has standing to challenge the State's implementation of HRS § 248-2.6 because it satisfied the three requirements of the traditional "injury in fact" test for standing. Accordingly, Mottl and Corboy instruct that this court need not and should not address whether Tax Foundation has taxpayer standing.

Moreover, this court has never sua sponte raised the issue of taxpayer standing to conclude an entity had standing on that basis. In Mottl and Corboy, this court held that the entities lacked standing based on the traditional test, and declined to consider taxpayer standing because the parties failed to expressly raise the issue. Mottl, 95 Hawaiʻi at 391 n.13, 23 P.3d at 726 n.13; Corboy, 128 Hawaiʻi at 106 n.32, 283 P.3d at 712 n.32. This court raised, sua sponte, the issue of taxpayer standing in Wilson v. Stainback to conclude that the entity did not have standing. 39 Haw. 67, 70 (Haw. Terr. 1951). In Bulgo v. Cty. of Maui and Hawaii's Thousand Friends v. Anderson, this court ruled on whether an entity had taxpayer standing after the issue had been properly raised by the parties. See Bulgo, 50 Haw. 51, 55, 430 P.2d 321, 324 (1967) (holding the entity had taxpayer standing); Hawaii's Thousand Friends, 70 Haw. 276, 281, 768 P.2d 1293, 1298 (1989) (holding the entity lacked taxpayer standing). These cases suggest that this court should, if it sua sponte raises the issue of taxpayer standing, do so only to determine an entity lacks standing. The Chief Justice's decision to sua sponte consider the matter and conclude that Tax Foundation has taxpayer standing is therefore inconsistent with our case law on this point.

Additionally, I believe that the Chief Justice's sua sponte consideration of whether Tax Foundation has taxpayer

standing undermines the principle of party presentation that lies at the heart of our adversarial process. Under the principle of party presentation, courts "rely on the parties to frame the issues for decision" and are "assign[ed] . . . the role of neutral arbiter of matters the parties present." Greenlaw v. United States, 554 U.S. 237, 243 (2008); Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts . . . [sit as] arbiters of legal questions presented and argued by the parties before them."). In circumstances where a court appears to raise arguments on behalf of one of the parties, "the court may cease to appear as a neutral arbiter, and that could be damaging to our system of justice." Burgess v. United States, 874 F.3d 1292, 1300 (11th Cir. 2017).

The Chief Justice invokes taxpayer standing as alternative grounds for satisfying Tax Foundation's burden to illustrate that it has standing. See Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, Inc., 113 Hawaiʻi 77, 95, 148 P.3d 1179, 1197 (2006) ("[A]lthough lack of standing is raised by the defendant, the plaintiff bears the burden of establishing that he or she has standing." (emphasis added)). In so doing, the Chief Justice supplies Tax Foundation with a legal theory upon which it could have, but did not, rely to show that it had standing to challenge the State's implementation of HRS § 248-2.6.

By raising such a legal theory on Tax Foundation's behalf and effectively shouldering Tax Foundation's burden to demonstrate that it has standing, the Chief Justice appears to stray from acting as a "neutral arbiter of matters the parties present" in this case. Greenlaw, 554 U.S. at 243; see also Burgess, 874 F.3d at 1300. I fear that such action runs the risk of "disincentiviz[ing] vigorous advocacy," United States v. Oliver, 878 F.3d 120, 127 (4th Cir. 2017), and undermines the principle of party presentation. See Greenlaw, 554 U.S. at 243. In light of these concerns, and because the Chief Justice does not adequately explain how this case presents an exceptional circumstance that warrants a departure from the bedrock principle of party presentation,[3] I cannot join his decision to sua sponte consider whether Tax Foundation possessed taxpayer standing.

II. CONCLUSION

I agree with the Chief Justice's analysis of HRS § 632-1. HRS § 632-1 does not set forth a new test for establishing standing in the context of declaratory relief and does not dispense with the "injury in fact" requirement of the traditional standing analysis.

However, because Tax Foundation itself does not proffer

[3] See Koprowski v. Baker, 822 F.3d 248, 259 (6th Cir. 2016) ("Only in exceptional cases or particular circumstances or when the rule [of party presentation] would produce a plain miscarriage of justice do we exercise our discretion to entertain arguments not raised [by the parties.]" (quoting Rice v. Jefferson Pilot Fin. Ins. Co., 578 F.3d 450, 454 (6th Cir. 2009)).

an alternative basis for satisfying its burden of demonstrating that it has standing, I would hold that Tax Foundation does not have standing to challenge the State's implementation of HRS § 248-2.6.

Accordingly, I join Part I of the Majority opinion, but do not reach the merits of Tax Foundation's argument, which the Majority addresses in Part III. I agree with the Chief Justice's dissenting opinion to the extent that the Chief Justice concludes HRS § 632-1 does not establish a distinct test for standing. However, I write separately to express my concerns regarding the Chief Justice's sua sponte consideration of taxpayer standing, and therefore cannot join that part of his opinion.

/s/ Paula A. Nakayama