IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ELM'S, INC., d/b/a TOWN & COUNTRY AMUSEMENT,	**Civil Action No. 01-054B**
Petitioner,	
vs.	**ORDER ON MOTION FOR SUMMARY JUDGMENT**
LUCY DLG NIELSEN, Secretary of Finance,	
Respondent.	

I. INTRODUCTION

¶1 The Commonwealth assesses an annual license fee for the commercial operation of amusement machines. Pursuant to 4 **CMC** § 1507, Respondent Secretary of Finance is charged with the duty of issuing the licenses. For amusement machines, other than poker or similar machines, whose major element is skill and whose only reward or prize is limited to additional games or other use of the machine, the Commonwealth assesses an annual license fee of $150 per machine. See 4 CMC § 1503(1). For amusement machines, including poker and pachinko slot machines,[1] whose major element is chance and which provide a reward or prize of value, the annual license fee is $8,000 per machine. See 4 CMC § 1503(a)(5), as amended by Public Law 1 l-25 and Saipan Local Law 1 l-2.

[1] "Pacbinko slot machines" are amusement machines characterized by an outer structure having three reels with symbols to be matchedby pressing three buttons to stop the rotation of the spinning reels. 4 CMC § 1503(5). Pachinko slot machines also require "a degree of skill in order for the winner to win a prize."

¶2 Petitioner Elm's Inc. ("Elm's") is in the business of placing amusement machines known as the "Cherry Master" [hereinafter, the "Cherry Master Machines"] in public places such as bars and restaurants. In this dispute, Petitioner claims that the appropriate license fee for the commercial operation of Cherry Master Machines is $150.00 per machine. Respondent Secretary of Finance, on the other hand, contends that pursuant to 4 CMC § 1503(a)(5), as amended, Cherry Master Machines qualify as "pachinko slot machines," and thus the proper license fee is $8,000.

¶3 Jay Sorensen, Esq. appeared for the Plaintiff, and Assistant Attorney General Sheila N. Trianni represented the Secretary of Finance. The court, having reviewed the record in this proceeding, including the memoranda, declarations, and exhibits, now issues its written decision DENYING the motion.

II. FACTUAL BACKGROUND

¶4 The facts giving rise to this controversy are straightforward and undisputed. Petitioner is the owner of a number of Cherry Master Machines. See Declaration of Robert McCausland ("McCausland Decl."), attached to Petitioner's Motion for Summary Judgment at ¶3. According to Petitioner, none of these machines have yet been issued a license, Prior to attempting to license its machines, Petitioner learned of a dispute involving the licensing of Cherry Master Machines by one of Petitioner's business competitors, Pacific Amusement, Inc.. *Id.* at ¶ 4. Pursuant to an Administrative Order issued on March 16, 2000, Pacific Amusement obtained a ruling that its Cherry Master Machines qualified as "amusement machines" within the meaning of 4 CMC § 1503(1) and did not fall within the statutory definition of "pachinko slot machines" commanding the higher license fee. See *In re Pacific Amusement, Inc.* (Amusement Machine Case No. l-99) [hereinafter, the "Administrative Order"]."

¶3 After learning of the Administrative Order, Petitioner endeavored to obtain a license for one of its Cherry Master Machines. When Petitioner attempted to tender a fee of $150, the Secretary of

---

[2/] On March 16.2000. Respondent filed a petition for judicial review of the Administrative Order contending that Cherry Master machines qualified as "pachinko slot machines" and should be licensed at the higher fee. That matter. Civil Action No. 00-189D, is still pending.

Finance, refused to accept the application and insisted on payment of the higher license fee of $8,000. McCausland Decl. at ¶ 6.

¶4 On October 26, 2000, Petitioner filed a petition for a writ of mandamus against the Secretary, asking the court to order Secretary Nielsen to license Petitioner's "Cherry Master" machines as "amusement machines" and impose the lower license fee. See *Elm's Inc.. d/b/a Town & Country Amusement,* Civil Action No. 00-0478E. (Oct. 26, 2000). In a decision rendered on January 25. 2001, however, the court dismissed the case on grounds that Petitioner had an alternate remedy of declaratory relief available under the Commonwealth's Administrative Procedure Act.

¶5 Shortly thereafter, Petitioner sought a declaratory ruling from the Secretary of Finance pursuant to 1 CMC § 9107. In denying Petitioner's request, the Secretary took the position that the Cherry Master Machines qualify as pachinko slot machines. See Letter dated March 13, 2001 from Secretary of Finance to Robert W. McCausland re: SFL 2001-184. The Secretary further contended that Petitioner failed to demonstrate that its machines are characterized by a major element of skill and that the only reward or prize is limited to additional games or use of the machine. See Declaration of Lucy DLG Nielsen, attached to Response to Pet. Mot. for Summary Judgment as Exhibit "A. "

¶6 Petitioner subsequently filed the instant petition for writ of mandamus to compel the Secretary to accept Petitioner's application for licensing any Cherry Master Machine as an"amusement machine. " In support of its entitlement to the writ, Petitioner raises essentially three arguments: (1) that under principles of collateral estoppei and res judicata, the Secretary is bound by the Administrative Order, (2) that it has no other plain, speedy and adequate remedy at law because during the pendency of the petition for review of the Administrative Order, the Secretary has agreed to license Pacific Amusement's Cherry Master Machines at $150 per machine; and (3) Pacific Amusement has obtained an effective monopoly in the Cherry Master Market.

¶5 Respondent, on the other hand, contends that there is a genuine dispute as to whether the Cherry Master Machines qualify as "amusement machines" taxable at the annual rate of $150.00. Respondent further asserts that the Administrative Order does not qualify as a final adjudication

during the pendency of an appeal and because the effective date of the Order, by its terms, was postponed pending judicial review.

III. QUESTIONS PRESENTED

¶6 What, if any, preclusive effect must be given to an Administrative Order, the terms of which are currently awaiting review by the Superior Court.

¶7 Whether Petitioner is entitled to a writ of mandamus directing the Secretary to accept its application for licensing any Cherry Master Machine at the annual rate of $150.00.

IV. ANALYSIS

¶8 The Commonwealth does not dispute that where all the elements of issue preclusion are satisfied, principles of res judicata and collateral estoppel apply to final determinations by an administrative agency acting in a judicial capacity. See, e.g., *Muna* v. *CNMI*, Appeal Nos. 98-031 and 98-035 (N.M.I. Feb. 14, 2000); ***see also United States v. Utah Construction & Mining Co., 384*** U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966) (factfinding of the Advisory Board of Contract Appeals was binding in a subsequent contract dispute between the same parties). Since administrative orders that are being appealed are not "final" orders, however, the Commonwealth maintains that the doctrine of collateral estoppel clearly cannot attach to an administrative order which is, in effect, on appeal.

¶9 The court agrees. Although Petitioner contends that the Administrative Order should continue to have collateral effect until it is overturned, the plain language of the Order postpones the effective date and leaves open the possibility for further review. See Administrative Order at 8: 19-20 to 19: 1 & n.5 (quoting 1 CMC § 9112(e)). "Finality," for purposes of administrative collateral estoppel. requires that the decision be final as to the agency and free from direct attack: that is, when the agency possesses no further power to rehear or reconsider the claim, and an appeal has not been taken. ***See Long Beach Unified School Dist. v. State of California,*** 225 Cal. App.3d 155, 275 Cal. Rptr. 449, 457 (1990). Since the Administrative Order is also awaiting judicial review, it plainly does not qualify as a final order and therefore has no preclusive effect. Se ***In re Tariff Filing of Central Vermont Public Service Corp., 769*** A.2d ***668*** (Vt. 2001); ***M & A4 Management Co. v. Industrial Claims Appeals Office of the State*** of *Colo.*, 979 P.2d 574 (Colo.App. 1998) (judgment

leaving open further litigation of the issue and based on preliminary grounds is not final judgment on the merits). Accordingly, Petitioner is not entitled to a writ of mandamus on collateral estoppel or res judicata grounds.

¶10 The Superior Court is, however, expressly empowered to issue a writ of mandamus to an administrative agency to compel the agency to exercise the powers entrusted to it, to perform ministerial acts, and to enforce its rules and regulations. See *Govendo* v. *Micronesian Garment Mfg.,* Inc., 2 N.M.I. 270, 286-287 (1991); see *also* 1 CMC § 3202. To insure that writs of mandamus are used only in the most extraordinary of situations, three factors must be met before a writ will issue to compel an administrative agency to perform a duty owed to a particular person. Petitioner must establish: (1) a clear legal right to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. See, *e.g., Fallini v. Hodel,* 783 F.2d 1343, 1345 (9th Cir. 1986) ("Mandamus is available only when the plaintiff has a dear right to relief, the defendant has a clear ministerial duty to act, and no other adequate remedy is available"); *State ex rel. Kucera* v. *City of Wheeling,* 153 W.Va. 538, 170 S.E.2d *367* (1969). *See also Pipe Trades Dist. Council No.* 51 v. *Aubry*, 41 Cal.App.4th 1457, 1468-1470, 49 Cal.Rptr.2d 208 (1996); *Klostermann v. Cuomo,* 61 N.Y.2d 525, 475 N.Y.S.2d 247,463 N.E.2d 588 (19) (mandamus will not be awarded to compel an act with respect to which an administrative agency may exercise judgment or discretion).?'

¶11 After examining the briefs, the documents and declarations attached thereto, and ail other matters of record with the court, the court finds that the Petitioner has not demonstrated the existence of a clear right to a writ of mandamus. For an amusement machine to be licensed at all, it must fall within the categories created by 4 CMC § 1503. Only "amusement machines" whose major element is skill and whose only reward or prize is limited to additional games or other use of the machine

---

[3/] In reviewing a writ petition pursuant to the court's supervisory mandamus authority, the court considers five factors: (1) whether the party seeking the writ has other adequate means, such as a direct appeal, to attain the relief requested: (2) whether the party seeking the writ will be damaged or prejudiced in a manner not correctable on appeal: (3) whether the order is clearly erroneous as a matter of law; (4) whether the order qualities as an "oft-repeated error" or manifests a persistent disregard of applicable rules. or (5) whether the order raises new and important problems. or issues of law of first impression. See *Bank of Saipan v. Superior Court*, Orig. Action No. 2000-003 (Feb. 2 I, 200 1).

may be licensed at the annual rate of $150.00. See 4 CMC § 1503(a)(l). In its petition, Petitioner asserts only that it is the "owner of certain amusement devices generally referred to as Cherry Master machines" (¶ 4) and that Pacific Amusement, Inc. is currently operating various Cherry Master machines at the license fee of $150 (¶7). Petitioner has failed to provide any evidence to the court, however, establishing that its machines are identical to those owned by Pacific Amusement, Inc. and that its machines come within the statutory defmition of "amusement machines." Further, Petitioner has introduced no evidence demonstrating that its machines require skill as a "major element," and that the only reward or prize offered by the machines is limited to additional games or use of the machine. See Nielsen Decl. at ¶¶ 8-10. Under these circumstances, the Administrative Order is of questionable use to Petitioner, since the Order only determined that the Pacific Amusement's Cherry Master Machines did not fall within the statutory definition of "pachinko slot machines." Since there is no record or other competent evidence before the court establishing that Petitioner's Cherry Master Machines qualify as "amusement machines" that are taxable at the $150.00 rate, there is no factual basis upon which the court can conclude that Respondent has a clear ministerial duty to license the machines as "amusement machines" under 4 CMC § 1503(a)(l). Accordingly the court must deny the relief requested.

¶11 This is not to say, however, that Petitioner is without a remedy. Petitioner is certainly free to intervene in Civil Action 00-189D, or to proceed independently to develop the necessary factual record. Alternatively, it can petition for judicial review of the Secretary's decision or otherwise establish the necessary factual basis demonstrating a clear right to have its "Cherry Master Machines" licensed for a fee of $150.00 per machine. The court is concerned about what may well prove to be arbitrary and capricious administrative action and the disparate treatment of two similarly situated taxpayers. Absent undisputed facts demonstrating that Petitioner's machines qualify as § 1503(a) "amusement machines," however, Petitioner is not entitled to summary disposition. See *Cabrera v. Heirs of De Castro, 1* N.M.I. 172, 176 (1990).

CONCLUSION

¶21 For the foregoing reasons, the court concludes that Petitioner has not demonstrated as a matter of law its entitlement to the extraordinary relief of mandamus. The motion for summary judgment is, therefore, DENIED,

Dated this 29 day of November, 2001.

TIMOTHY H. BELLAS, Associate Judge Pro Tempore