IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

FOR PUBLICATION

FRANK B. VILLANUEVA, SECRETARY OF FINANCE, CNMI DEPARTMENT OF FINANCE, DIVISION OF CUSTOMS,
Plaintiffs/Appellees,

v.

TINIAN SHIPPING and TRANSPORTATION, INC., formerly known as TINIAN SHIPPING COMPANY,
Defendant/Appellant.

Supreme Court Appeal No. 02-034-GA
Civil Action No. 02-0574-C

OPINION

Cite as: ***Villanueva v Tinian Shipping and Transp., Inc.,*** **2005 MP 12**

Argued and submitted on October 9, 2003
Saipan, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

DEMAPAN, Chief Justice:

¶1 The Secretary of Finance, Frank B. Villanueva ("Villanueva"), and the CNMI Department of Finance, Division of Customs (collectively, the "Government") brought this action to collect taxes after Tinian Shipping and Transportation, Inc. ("Tinian Shipping") failed to pay the excise tax assessed on two commercial vessels it purchased in Singapore and imported into the Commonwealth. The trial court issued a temporary restraining order, prohibiting Tinian Shipping from wasting the vessels or removing them from the Commonwealth. Subsequently, the court granted a preliminary injunction against Tinian Shipping to preserve the status quo. Tinian Shipping appeals both the temporary restraining order and the preliminary injunction.

¶2 We find that this Court lacks jurisdiction to review the propriety of the temporary restraining order. However, we AFFIRM the trial court's grant of a preliminary injunction.

I.

¶3 On October 3, 1996, Tinian Shipping purchased two commercial vessels, M/V Saipan Express and M/V Tinian Express. Tinian Shipping paid $5,440,000.00 for each of the vessels. Pursuant to 4 CMC § 1402(a)(14), the vessels were assessed with an excise tax upon their entry into the Commonwealth. Tinian Shipping failed to pay the excise tax. On October 25, 2002, Villanueva filed a complaint and Petition for a Temporary Restraining Order against Tinian Shipping to collect the unpaid excise tax and interest. That same day, the Commonwealth Division of Customs Service filed a tax lien on "all property and rights to property belonging to [Tinian Shipping] for the amount of taxes and any additional penalties, interest, and costs that may accrue." Excerpts of Record at 36.

¶4 Although Villanueva's October 25, 2002 petition for a temporary restraining order had not been granted or denied, a hearing on the preliminary injunction had nonetheless been scheduled for November 7, 2002. With both parties present, as well as counsel for Debis

Financial Services, Inc. ("Debis"), which holds a first mortgage interest in the vessels, the trial court conducted a hearing, granted Villanueva a temporary restraining order, and ordered Villanueva to prepare the order for the court's signature. The court also ordered Villanueva to file a verified complaint, which he filed on November 12, 2002. In the current appeal, the November 7, 2002 transcript was included in the record while the November 13, 2002 transcript of the preliminary injunction hearing was not.

¶5 On November 14, 2002, the trial court issued a preliminary injunction against Tinian Shipping to preserve the status quo pending the outcome of the underlying tax collection action.

II.

¶6 This Court has jurisdiction, pursuant to Section 3102(a) of Title 1 of the Commonwealth Code, to review interlocutory orders.[1]

III.

¶7 The following are the issues on appeal:

1. Should this appeal be dismissed for failure to strictly adhere to Rule 10(b)(2) of the Commonwealth Rules of Appellate Procedure?
2. Does this Court have jurisdiction to review the trial court's issuance of a temporary restraining order?
3. Did the trial court have jurisdiction to proceed considering the statute of limitations for this action?
4. Did the trial court have authority to grant a preliminary injunction against Tinian Shipping?
5. Was the grant of a preliminary injunction against Tinian Shipping an abuse of discretion?

IV.

1. Dismissal of Appeal for Non-compliance with Com. R. App. P. 10(b)(2)

¶8 At the outset, Villanueva argues that this appeal should be dismissed on the basis that Tinian Shipping did not file a transcript from the hearing that took place on November 13, 2002,

[1] Article IV, Section 3 of the Commonwealth Constitution vests this Court with jurisdiction over final judgments and orders of the Commonwealth Superior Court; there is no constitutional prohibition against our review of interlocutory orders.

as required pursuant to Rule 10(b)(2) of the Commonwealth Rules of Appellate Procedure. Failure to include a transcript in an appellate record in violation of Rule 10(b)(2) is a ground for the appellate court to presume sufficient evidence existed below in support of appellee or dismiss an appeal outright. *In re Estate of Deleon Castro*, 4 N.M.I. 102, 107 (1994). Because Tinian Shipping submitted the trial court's written decision without the transcript of the November 13, 2002 hearing, we review it with the presumption that Tinian Shipping accepts any evidentiary findings made by the judge, which might have been challenged by use of that transcript. *Id.*

2. Jurisdiction Over Appeal of Temporary Restraining Order

¶9 Tinian Shipping argues that the trial court abused its discretion when it treated the November 7, 2002, hearing as one for a temporary restraining order ("TRO"). In response, Villanueva argues that this Court lacks jurisdiction to review the propriety of the TRO because temporary restraining orders are not appealable and even if they were, this Court could not review an expired TRO.

¶10 Generally, a grant or denial of a TRO is not an appealable order. *See Commonwealth v. Hasinto*, 1 N.M.I. 377, 384-85 (1990); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002).[2] The exception to this rule is if the TRO was extended beyond the required statutory time period or if it effectively decided the merits of the action. *Northern Stevedoring & Handling Corp. v. Int'l Longshoremen's and Warehousemen's Union, Local No. 60*, 685 F.2d 344, 347 (9th Cir. 1982).

¶11 After a TRO has expired, it cannot be appealed because the matter is moot. *Norita v. Norita*, 4 N.M.I. 381, 385 (1996). The only exception to this prohibition is if a TRO "is of public importance, is likely to recur, and is likely to become moot again prior to appellate review." *Id.*

[2] While a TRO cannot be appealed, our law does provide a remedy in the form of an "extraordinary writ" to challenge a TRO. *See Commonwealth v. Superior Court*, 1 N.M.I. 287 (1990).

¶12 Here, the expired TRO meets none of the above exceptions. It was not extended beyond the statutorily required time period of ten days, as it was granted November 7, 2002, and the preliminary injunction was issued November 14, 2002. In addition, the TRO did not in any way decide the merits of the action: it merely prevented the removal of property subject to the excise tax upon which there was already a lien. In addition, there is no issue of public importance that the TRO implicates. This TRO is unlike an order of protection, for example, which may be sought over and over again during the course of litigation. Here, a preliminary injunction has already issued, which covers exactly the same subject matter, so there will be no more TRO applications for the same relief in the course of this action. Accordingly, we decline to review the instant expired TRO.

3. Preliminary Injunction: Statute of Limitations

¶13 Initially, Tinian Shipping argues that the preliminary injunction should be vacated and the action dismissed on the basis that it was filed after the expiration of the applicable statute of limitations. As a prerequisite to this argument, Tinian Shipping would like this Court to infer from the three-year record-keeping requirement of 4 CMC § 1807 that the Legislature intended a similar three-year limitation on actions to collect tax. This argument is unpersuasive.

¶14 Section 2505 of Title 7 of the Commonwealth Code provides: "[a]ll actions other than those covered in 7 CMC §§ 2502 [actions upon a judgment; actions for recovery of land], 2503 [actions for assault and battery, false imprisonment, slander; actions against police officers and other officials; actions for malpractice, error or mistake against physicians, surgeons, dentists, medical or dental practitioners, and medical or dental assistants; actions for wrongful death or against a bank for a forged check], and 2504 [actions against executor, administrator or other representative of a deceased person for a cause of action in favor of, or against, the deceased] shall be commenced within six years after the cause of action accrues." It is a basic rule of construction that the court look first to the plain meaning of statutory language. *Hasinto*, 1

N.M.I. at 382; *Estate of Faisao v. Tenorio*, 4 N.M.I. 260, 265 (1995). Section 2505 could not be more clear. It specifically discusses time limitations for "all actions." On the other hand, 4 CMC § 1807 does not contain any type of statute of limitations for an action. Instead, 4 CMC § 1807 provides only that records must be kept and provides penalties for violations of the record keeping requirements. There is no legislative history that might demonstrate that there was any intent to shorten the statute of limitations for tax actions. As a result, we find that the statute of limitations for a tax collection action, brought pursuant to 4 CMC § 1813, is six years. Accordingly, the six-year statute of limitations is not a basis to vacate the preliminary injunction or dismiss this action.

4. Preliminary Injunction: Superior Court's Authority to Grant

¶15 Turning to the preliminary injunction, Tinian Shipping argues that the trial court lacked authority to grant the preliminary injunction because the Government's claim is for money damages. In support, Tinian Shipping cites *Grupo Mexicano de Desarrollo, S.A.*, a case that holds that a preliminary injunction cannot be issued to prevent a defendant from disposing of assets pending adjudication of an unsecured creditor plaintiff's contract claim for money damages. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 340, 119 S. Ct. 1961, 1978, 144 L. Ed. 2d 319 (1999). We find that *Grupo Mexicano de Desarrollo, S.A.*, is not applicable here. First, the Government secured a lien, unlike the unsecured creditor in *Grupo Mexicano de Desarrollo, S.A.* Second, this is not an ordinary, contract dispute case as in *Grupo Mexicano* because the underlying action here was brought for the enforcement of a tax assessment.

¶16 Taxes are not ordinary debts; rather, they are imposts levied for the support of the government. *Price v. United States*, 269 U.S.492, 499, 46 S. Ct. 180, 181, 70 L. Ed. 373 (1926). Taxes are of a higher order than debts, even than debts due to the Government, and in respect to them the Government is not a creditor. *Id.* Examining our statute, it is clear that the

Government has the power to force a forfeiture when taxes have not been paid. Section 1411(c) of Title 4 of the Commonwealth Code provides that unpaid taxes may result in a forfeiture pursuant to 6 CMC § 2150. Accordingly, the collection of tax is not the same as the collection of a debt and *Grupo Mexicano* does not apply.

¶17 Instead, the Government is authorized to utilize the courts to collect taxes which have been imposed or authorized under the Commonwealth Code. 4 CMC § 1813 provides: "[a]ny taxes imposed or authorized under this division may also be collected by a civil suit brought by the Attorney General either in the name of the Commonwealth or in the name of the [Secretary of the Department of Finance] . . . ." Furthermore, Commonwealth Rule of Civil Procedure 65 permits the Superior Court to issue preliminary injunctions using its sound discretion. *See B. W. Photo Utils. v. Republic Molding Corp.*, 280 F.2d 806 (9th Cir. 1960) (Ninth Circuit Court of Appeals finding that the United States District Court did not abuse its discretion in granting a temporary injunction). Accordingly, the Government is properly before the Superior Court, which has full authority to grant preliminary injunctions.

5. Preliminary Injunction: Analysis

¶18 The grant or denial of a preliminary injunction is reviewed for abuse of discretion or misapprehension of the law. *Norita*, 4 N.M.I. at 383. A court that has issued or denied a preliminary injunction has abused its discretion if it has based its decision on clearly erroneous factual findings and has misapprehended the law if it has based its decision on an erroneous legal standard. *See Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999). We find that the trial court properly granted the preliminary injunction against Tinian Shipping.

¶19 The purpose of a preliminary injunction is not to determine the merits of the case. *Id.* Rather, it is to preserve the status quo between parties to an action pending a final determination on the merits. *Pacific Am. Title Ins. & Escrow (CNMI), Inc. v. Anderson*, 1999 MP 15 ¶ 8, 6 N.M.I. 15, 17.

¶20 The trial court employed the correct legal standard for a preliminary injunction. The factors, which must be examined when a trial court determines whether to grant a preliminary injunction, are: (1) whether the plaintiff has a strong likelihood of success on the merits; (2) the level of the threat of irreparable harm to the plaintiff if the relief is not granted; (3) the balance between the harm the plaintiff will face if the injunction is denied and the harm the defendant will face if the injunction is granted; and (4) any effect the injunction may have on the public interest. *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (*citing Dollar Rent A Car v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985)). "Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable harm, or the existence of serious questions going to the merits and a balance of hardships tipping in its favor." *Villanueva v. Tinian Shipping and Transp., Inc.*, Civ. No. 02-0574 (N.M.I. Super. Ct. Nov. 14, 2002) ([Unpublished] Opinion at 3) (*citing Johnson*, 72 F.3d at 1430).

¶21 In analyzing the facts of this case, the trial court did not make any clearly erroneous factual findings. Using the "alternative" standard, the lower court found that the Government demonstrated probable success on the merits and the possibility of irreparable harm. We agree. The Government submitted documentation of the demand for taxes as well as the lien. Section 1813 of Title 4 of the Commonwealth Code (as continued from ¶17 above) provides: "[I]n such civil suit a written statement by the [Secretary of the Department of Finance] or his delegate as to the amount of tax due, the fact that it is unpaid, and who is authorized to collect it, shall be sufficient evidence of these matters unless it is expressly shown to the contrary." While the parties are in disagreement over the actual amount due, there is no question that the Government has put forward a case which shows a probability of success on the merits.

¶22 In addition, the Government's argument that the subjects of the tax lien, the two commercial vessels, can be removed from the Commonwealth or be allowed to fall into disrepair

is compelling. While we are fully aware that there is no documentary evidence that Tinian Shipping intends to proceed in a way which would make true any of the Government's concerns, we believe that these concerns are justified to the extent that a preliminary injunction is appropriate. In addition, as we have already discussed in ¶ 8, Tinian Shipping has not demonstrated any factual errors the lower court may have made through submission of the transcript, and thus we have presumed that Tinian Shipping does not contest any underlying factual findings that the judge may have used in crafting his written opinion. Tinian Shipping has not shown this Court how it would be damaged by continuing its operation here in the Commonwealth and maintaining the status quo pending the outcome of this action.

V.

¶23 In conclusion, we decline to review the TRO granted by the Superior Court and we AFFIRM the Superior Court's grant of a preliminary injunction against Tinian Shipping. All other issues raised by the parties in their briefs are left for determination by the trial court.

¶24 **SO ORDERED** this 4th day of August 2005.

/s/_____
MIGUEL S. DEMAPAN
Chief Justice

/s/_____
ALEXANDRO C. CASTRO
Associate Justice

/s/_____
JOHN A. MANGLONA
Associate Justice