

fact, the same as parties in pari delicto. Both parties are equally at fault—the plaintiff, for engaging in the prohibited services, and the defendant for using and benefiting from those prohibited services. In such a case, the law will leave the parties where it finds them. 17 Am.Jur.2d, p. 594–601. Therefore, any sums the defendant has paid the plaintiff shall remain the plaintiff's money.

It is therefore the Judgment of this Court that:

1. Plaintiff recover nothing from the defendant.
2. Any sums received by the plaintiff from defendant by virtue of their agreement shall be retained by plaintiff.
3. Neither party shall recover costs.

PONAPE FEDERATION OF COOPERATIVE ASSOCIATIONS,
et al., Petitioners

v.

RONALD T. PETERSON, Director of the Department of Finance,
Trust Territory of the Pacific Islands, Respondent

Civil Action No. 5-74

Trial Division of the High Court

Ponape District

May 19, 1975

Action by cooperative associations for refund of gross revenue taxes paid on ground that they were not subject to the tax. The Trial Division of the High Court, Brown, Associate Justice, held that under gross revenue tax statute's definition of "business" as any profession, trade, manufacture or other undertaking carried on for pecuniary profit, including all activities carried on for economic benefit either direct or indirect, cooperative associations which made sales and rendered services for valuable consideration to members and nonmembers, and made patronage refunds and granted dividends to its members, was a "business".

1. Judgments—Summary Judgment—Particular Cases

Entry of summary judgment was proper where all parties moved for summary judgment and conceded that there were no genuine issues of fact.

2. Taxation—Gross Revenue Tax—Construction

In interpreting gross revenue tax statute, the primary rule was to ascertain and declare the intent of the Congress of Micronesia and carry such intent into effect in the fullest degree. (77 TTC § 251 et seq.)

3. Taxation—Gross Revenue Tax—Construction

Statutes defining "business" and "gross revenue", and imposing a tax upon gross revenue, are not ambiguous, and it was thus the court's duty to apply their explicit provisions. (77 TTC §§ 251(7), (8), 258)

4. Courts—Jurisdiction—Legislative Functions

Courts must scrupulously avoid engaging in judicial legislation, any usurpation of legislative powers, or an entry into the legislative field.

5. Taxation—Gross Revenue Tax—Construction

Where gross revenue tax statute did not indicate an exemption for cooperative associations, argument that they were impliedly excluded by the Congress of Micronesia was to no avail. (77 TTC § 251 et seq.)

6. Taxation—Gross Revenue Tax—Exemptions

Gross revenue tax is on entire operative income, not on profits, gross profits or net income; thus, argument that non-profit associations were not subject to the tax was to no avail. (77 TTC § 258)

7. Corporations—Non-Profit Corporations—Cooperative Associations

Cooperative associations which paid dividends to members and extended their services to nonmembers as well as members but gave patronage refunds and dividends only to members could not be classed as nonprofit associations.

8. Taxation—Gross Revenue Tax—Applicability

Under gross revenue tax statute's definition of "business" as any profession, trade, manufacture or other undertaking carried on for pecuniary profit, including all activities carried on for economic benefit either direct or indirect, cooperative associations which made sales and rendered services for valuable consideration to members and nonmembers, and made patronage refunds and granted dividends to its members, was a "business". (77 TTC § 251(8))

BROWN, *Associate Justice*

[1] All parties herein move for summary judgment and concede that there is no genuine issue of fact before the court. Thus it is proper to enter summary judgment at this time. *Evanenko v. Farmers Union Elevator*, 191 N.W.2d 258 (N.D.), 50 A.L.R.3d 428, 430.

The facts upon which judgment is based are pursuant to stipulation contained in the Pre-Trial Order and set forth below.

Petitioners are cooperative associations duly organized and existing under and by virtue of the laws of the Trust Territory of the Pacific Islands. Each has paid taxes based upon its gross revenue as required under 77 TTC 251 et seq. By this action they seek refunds of all such taxes paid for the calendar year 1972, together with interest from the date of payment. There is no evidence of any delinquency charged against Petitioners as to said taxes which were paid pursuant to the specific provisions of 77 TTC 258, which imposes a tax upon the "gross revenue" of any Trust Territory "business" as those quoted terms are defined, respectively, in 77 TTC 251(7) and (8). Thereafter, and in accordance with the provisions of 77 TTC 267(1), Petitioners filed individual applications for refunds of said taxes, and Respondent denied in writing each of the said applications.

Copies of the Charter, Articles of Incorporation, as amended, and By-Laws of Petitioner, Ponape Federation of Cooperative Associations, and copies of the Charter, Articles of Incorporation, and By-Laws of Petitioner, Kolonia Consumers Cooperative Association, have been received in evidence. With the exception of Petitioner, Ponape Federation of Cooperative Associations, the Charters, Articles of Incorporation, and By-Laws of the remaining Petitioners are the same in all material respects as the Charter, Articles of Incorporation, and By-Laws of Kolonia Consumers Cooperative Association.

At all times relevant, each Petitioner conducted its separate operation as authorized by its Charter, Articles of Incorporation, By-Laws, and regulations of the Trust Territory of the Pacific Islands, including but not limited to the making of sales and/or the rendering of services for

valuable consideration both to its members and to non-members, making patronage refunds, and declaring returns upon capital (dividends) to its members.

[2] The law that is applicable to the foregoing facts requires the court to interpret the statutes which control herein. In doing so, the court must recognize that the all important factor is the will of the Congress of Micronesia, for its intention constitutes the law. The primary rule of consideration and interpretation is to ascertain and declare the intent of the Congress and to carry such intention into effect in the fullest degree. The statutory construction adopted by the court must not be such as to nullify, destroy, or defeat the clear intent of the Congress. *United States v. N. E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 86 L.Ed. 671; *Jones v. New York Guaranty & Indem. Co.*, 101 U.S. 622, 25 L.Ed. 1030; *United States v. Cooper Corp.*, 312 U.S. 600, 85 L.Ed. 1071; *United States v. American Trucking Assoc.*, 310 U.S. 534, 84 L.Ed. 1345; *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 37 L.Ed. 2d 207; *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 37 L.Ed.2d 688.

[3] A reading of the pertinent statutes can lead only to the conclusion that both statutory language and legislative intent are crystal clear. There is no ambiguity; and where no ambiguity appears, the clear and explicit terms of the statutes express the legislative intention. Where, as here, a statute is plain and unambiguous, it speaks for itself; and it is the duty of the court to apply it, not to interpret it. *United States v. American Trucking Assoc.* (supra); *Helvering v. New York Trust Co.*, 292 U.S. 455, 78 L.Ed. 1361.

[4] It cannot be stated too strongly that courts have no legislative authority and must scrupulously avoid engaging in judicial legislation, any usurpation of legislative powers,

or an entry into the legislative field. It is not to be inferred that this court questions in any way the wisdom of the legislation with which we are concerned, but it should be stated that even if a court should question the wisdom of any particular statute, it is not the court's function to change that legislation by judicial process; instead, it is its duty to apply the law as found. *Ebert v. Poston*, 266 U.S. 548, 69 L.Ed. 435; *Board of Education v. Public School Employees' Union*, 45 N.W.2d 797, 29 A.L.R.2d 424 (Minn.).

[5] In answer to the contention that the statutes in question do not apply to Petitioners solely by reason of the fact that they are cooperative associations and thus impliedly excluded by the Congress, it need only be said that had Congress intended to exempt cooperative associations from taxation upon their gross revenue it would have done so. There is nothing before the court that would give any indication that such was the intent of the Congress. To the contrary, the legislative intent is manifest in that the Congress did specifically exempt unincorporated copra producers. 77 TTC 251(8).

[6, 7] It is urged that Petitioners are non-profit associations and thus not subject to the taxation. This argument must fall. First, the tax with which we are concerned is not intended to be, nor is it a tax upon profits. It is a tax upon gross revenues. 77 TTC 258. These consist of the entire operative income of a cooperative association (excluding, of course, any refunds, rebates and returns received by it, as provided in 77 TTC 251(7)(a)), without deductions of any sort; and a tax upon gross revenues is not a tax upon either gross profits or net profits. *Pacific Gas & Electric Co. v. Roberts*, 167 P. 845 (Cal.). Second, cooperative associations such as Petitioners cannot be regarded as non-profit organizations. To determine whether or not a given corporation or association is a non-profit organization, the

usual test that is applied is whether dividends or other pecuniary benefits are paid to its members. *Associated Hospital Service, Inc. v. Milwaukee*, 109 N.W.2d 271 (Wis.), 88 A.L.R.2d 1395. Additionally, Petitioners extend their services to members and non-members alike, but only the members may receive both patronage refunds and returns upon capital. Non-members do not share in such benefits. This fact lends further strength to the position taken by Respondent that Petitioners are not and cannot be entitled to tax exemption as non-profit cooperative associations. *Riverdale Co-op Creamery Ass'n v. Commissioner*, 48 F.2d 711 (CA9).

It will be noted that the members of the cooperative associations which are parties herein have no vested interest in any sums or amounts that they may receive as patronage refunds or as returns of capital, or as dividends. It is necessary only to read the Charters, Articles of Incorporation, and By-Laws received in evidence to learn that the making of such payments lies largely in the discretion of their Boards of Directors, a situation strikingly analogous to the usual practice of declaring dividends out of after-tax profits retained by the typical private corporation organized and existing with the purpose of generating profits for its shareholders.

[8] Petitioners' contention that cooperative associations are not businesses as defined in the Trust Territory Code and therefore not subject to tax is a contention without merit. As used in Chapter 11 of Title 77 of the Trust Territory Code, "business" means any profession, trade, manufacture or other undertaking carried on for pecuniary profit and includes all activities whether personal, professional or incorporated, carried on within the Trust Territory of the Pacific Islands for economic benefit, either direct or indirect, and excludes casual sales, as determined by the Director. Each Petitioner is an under-

taking carried on for pecuniary profit and for direct or indirect economic benefit. Each Petitioner falls squarely within the definition of a business. Further discussion of this contention is unnecessary.

The relief sought by Petitioners is to be found only with the Congress of Micronesia and not with the Judiciary, and therefore Petitioners' Motion for Summary Judgment must be, and it is denied; Respondent's Motion for Summary Judgment is granted; and

Judgment is in favor of Respondent and against Petitioners, together with costs incurred.

PETER SANDBARGEN, Plaintiff

v.

**CHUTARO GUSHI, Defendant and TRUST TERRITORY
GOVERNMENT, Intervenor**

Civil Action No. 313

Trial Division of the High Court

Marshall Islands District

July 7, 1976

Action for ejectment, restoration of property, mandatory injunction and damages. The Trial Division of the High Court, Brown, Associate Justice, held that where plaintiff offered no documentary evidence of title, there was no record of sale of the land to plaintiff or his alleged predecessor in title, and testimony regarding the history of the property and its possession was not in plaintiff's favor, title in plaintiff was not established.

1. Real Property—Adjudication of Ownership—Evidence

The Grundbuch, published in 1913 during the German administration, is strong, although not conclusive, evidence of ownership of land.

2. Evidence—Weight

In weighing conflicting evidence, court must be guided by the principle that a judgment cannot rest upon conjecture, speculation or guess.

3. Evidence—Preponderance

A party who asserts the affirmative of an issue has the burden of proving it by a preponderance of the evidence, which is that evidence which, when weighed against that opposed to it, has more convincing