ROP v. Airai State Pub. Lands Auth., 9 ROP 201 (2002)

REPUBLIC OF PALAU,
Appellant,

v.

AIRAI STATE PUBLIC LANDS AUTHORITY, CHARLES OBICHANG, DONALD HARUO, and JOHN K. RECHUCHER,
Appellees.

CIVIL APPEAL NO. 01-43
Civil Action Nos. 99-186 & 99-209

Supreme Court, Appellate Division
Republic of Palau

Argued: May 28, 2002
Decided: September 16, 2002
Amended: September 18, 2002

[1] **Appeal and Error:** Preserving Issues; **Public Funds**

Courts may examine issues not briefed by the appellant when the subject matter of the dispute involves public funds.

[2] **Appeal and Error:** Preserving Issues

Courts may consider issues not adequately presented on appeal when the case raises an issue of great public importance, the case involves a matter of first impression regarding statutory interpretation, the issue was discussed by the parties in the motions relating to summary judgment, and to avoid a misleading application of the law, particularly when the appellant fails to discuss the fundamental basis for the trial court's decision.

[3] **Public Funds**; **Words and Phrases**

"Revenue", which is a term generally ⊥202 interchangeable with "public funds", represents moneys raised by the operation of law for the support of the government or for the discharge of its obligations.

[4] **Public Funds**

It is not the purpose to which the funds are to be put that determines their public nature, but, rather, the fact that a government official holds the funds in an official capacity.

[5] **Public Lands Authorities**

State public lands authorities while entities separate from the state governments themselves, are still official government entities.

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Counsel for Airai State Public Lands Authority: Oldiais Ngiraikelau

Counsel for Obichang: Yukiwo Dengokl

Counsel for Rechucher: Pro Se

Counsel for Haruo: J. Roman Bedor, T.C.

BEFORE: KATHLEEN M. SALII, Associate Justice; DANIEL N. CADRA, Associate Justice Pro Tem; J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

SALII, Justice:

In this appeal, the Republic of Palau ("Republic") challenges the grant of summary judgment to defendants Airai State Public Lands Authority ("ASPLA"), Charles Obichang, Donald Haruo, and John Rechucher ("defendants"). The Republic specifically contests the Trial Division's conclusion that, as a matter of law, funds that a private Japanese company, Resort Trust, Inc. ("RTI"), dispensed into a separate ASPLA account instead of into the Republic and Airai State's treasuries, do not constitute, pursuant to 35 PNC § 217, "revenue generated from the state authority's administration and management of public lands." Because we disagree with the Trial Division's definition of revenue, we reverse the grant of summary judgment for the defendants and remand the matter for further proceedings.

Background

In January 1997, Haruo and then-Airai State Governor Obichang entered into an agreement whereby Haruo would help the state negotiate with RTI regarding the development of a golf course resort in Airai. Approximately one month later, ASPLA adopted a resolution approving Haruo, as ASPLA's consultant, to "negotiate to secure funds which shall be called 'Lease Contract Fee' for the purpose of paying all costs and expenses to complete the necessary preliminary ground work to allow the [golf] development project to commence." In addition, the resolution authorized the ASPLA Chairman, who was then-Governor Obichang, to open a bank account and deposit into it "all the money that is earned by the ASPLA including the lease contract fee and rent." The resolution further commanded the Chairman to "pay out upon receipt of the lease contract fee into a separate trust account to be administered by [Haruo] with the consultation of the Chairman for the purpose of paying all costs and expenses to complete the

necessary preliminary ground works [sic] to allow the development project to commence." On February 21, 1997, Haruo and ASPLA agreed ⊥203 that Haruo would receive a contingency fee of 20% of the yet-to-be-determined Lease Contract price.

ASPLA passed another resolution on March 25, 1997, which authorized the dispersal of anticipated funds from the Lease Contract Fee to Rechucher's law office. Specifically, the resolution authorized the payment to Rechucher for "ASPLA's long overdue account [$152,525] from Lease Contract Fee if and when such fund is secured and becomes available." In addition, ASPLA authorized the issuance of money to Isidoro Rudimch (now deceased), in his capacity as Chief Ngirachitei, which was to be used by the council of chiefs of Oikull for housing development.

On March 26, 1997, RTI and ASPLA signed a Memorandum of Understanding ("MOU") which provided for a "Lease Contract Fee" of $1,600,000 to be paid in three instalments of $500,000, $300,000 (less a $13,000 boundary survey fee), and $800,000. Furthermore, the MOU specified the annual rent due to ASPLA upon "the opening of the golf course," which is "10% of the . . . 'green fee' annual income or US$100,000 whichever is larger." [1] The MOU did not state, however, whether the total amount of the Lease Contract Fee should be devoted to a particular purpose. Nor did the MOU define the meaning of the words "Lease Contract Fee." Indeed, the sole mention of development costs in the MOU relates to obtaining appropriate licenses and approvals from Palau's Foreign Investment Board, the Environmental Quality Protection Board, and the like.

Pursuant to the terms of the MOU, on April 20, 1997, RTI deposited the first instalment of the Lease Contract Fee, or $500,000 into an account which Haruo had opened on behalf of ASPLA. Obichang withdrew $300,000 from that account on June 11, 1997, and paid it to Haruo. On August 6, 1997, Obichang withdrew $120,000 from the ASPLA account to pay Rechucher. A $75,000 payment from the account was made to Rudimch on January 23, 1998.

On June 30, 1999, the Republic and the Palau Public Lands Authority ("PPLA") filed lawsuits (which were later consolidated) contesting the validity of the deposit of the Lease Contract Fee into the separate ASPLA bank account and the payments made to Haruo, Rechucher, and Rudimch. They mainly alleged that, pursuant to § 217, the Lease Contract Fee was revenue, of which 75% must be deposited into the Airai State Treasury, with the remainder to be deposited into the National Treasury. The Republic and PPLA also sought the return of the money given to Haruo, Rechucher, and Rudimch, but after Rudimch passed away, did not pursue any claim against his estate. After considering the motions for summary judgment filed by the defendants and the Republic, the Trial Division granted the defendants' motions. The court concluded that RTI's Lease Contract Fee payment was not "revenue" pursuant to § 217 because the money was used to pay legitimate development costs as opposed to compensation for rental fees, which ostensibly would be considered revenue under the statute. Only the Republic appealed.

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[1] A year after the MOU was signed, RTI and ASPLA completed a lease agreement pursuant to these same terms.

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Analysis

On appeal, the Republic primarily challenges the Trial Division's conclusion that the Lease Payment Fee was not revenue ⊥204 "generated from the administration and management of public lands" under § 217 because the ASPLA used the money to pay legitimate development costs. The gist of its appellate argument is that there is no evidence in the record documenting that the payments to Haruo, Rechucher, and Rudimch were related to development costs. Furthermore, based on the Republic's brief and representations at oral argument, it appears that the Republic explicitly waived challenging the Trial Division's legal analysis of the word "revenue" as the word appears in § 217.

[1, 2] Despite this waiver, however, we do not believe that our review of the Trial Division's analysis of the word revenue as it appears in § 217 is barred. United States courts have examined issues not briefed by the appellant when, like here, the subject matter of the dispute involves public money. *See Platis v. United States*, 409 F.2d 1009, 1012 (10th Cir. 1969); *see also* 5 Am. Jur. 2d *Appellate Review* § 557 (1995) (courts may review issue not adequately presented on appeal "when the case involves public funds"). Indeed, courts may consider issues insufficiently presented on appeal where the case raises an issue of great public importance, *see Hatley v. Lockhart*, 990 F.2d 1070, 1073 (8th Cir. 1993) (Courts "have discretion to consider issues not raised in the briefs, particularly where substantial public interests are involved." (citation and internal quotations omitted)), the case involves a matter of first impression regarding statutory interpretation, *see United Transp. Union v. Dole*, 797 F.2d 823, 827 (10th Cir. 1986), the issue was discussed by the parties in the motions relating to summary judgment, *see id.*, and to avoid a misleading application of the law, particularly when the appellant fails to discuss the fundamental basis for the trial court's decision, *see Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991) (court would examine unraised issue because dispositive on whether summary judgment correctly granted). Because all of these prudential considerations are present in the arguably waived issue of the Trial Division's interpretation of the word "revenue," we will decide this important legal matter of first impression. *See Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 446-47 (Mo. 1994) (en banc) ("Questions of law are matters reserved for the independent judgment of the reviewing court.")

Having concluded that we will examine the correctness of the trial court's definition of "revenue" as it applies to § 217, we begin by reviewing the lower court's decision. The pertinent clause of § 217 provides that "whenever a state [public lands] authority is created . . . then three-fourths of *all revenue generated from the state authority's administration and management of public lands* shall inure to the treasury of that state government, with the balance of one-fourth inuring to the National Treasury." 35 PNC § 217 (emphasis added). Looking to the most recent version of Black's Law Dictionary and to Webster's Third New International Dictionary, the Trial Division decided that the word revenue, as it appears in § 217, "should be given a . . . narrow scope, limited . . . to the money [the ASPLA] receives for the use of its lands." The court thus went on to distinguish money that ASPLA receives for using the land, such as the rent RTI agreed to pay for leasing the land, from money ASPLA receives "to cover costs preliminary and requisite to their use."

[3, 4] United States Courts, however, do not make the above distinction in determining whether funds constitute government revenue, and likewise we do not believe that such a distinction is tenable. Rather, revenue, a term ⊥205 which is generally interchangeable with "public funds," *see* 63C Am. Jur. 2d *Public Funds* § 1 (1997), "represent[s] moneys raised by the operation of law for the support of the government or for the discharge of its obligations." *Id.* Moreover, "private money held by state officials in their official capacities" also has been held to constitute public funds. *Id.*; *see also Arizona v. Mecham*, 844 P.2d 641, 648 (Ariz. Ct. App. 1992) ("'public money' includes not only state-owned funds but also private money held by State officials in their official capacity."); *La. Licensing Bd. of Contractors v. La. Civil Serv. Comm'n* , 110 So. 2d 847, 851 (La. Ct. App. 1959) (funds controlled by state agencies are public, not private, irrespective whether placed in private bank accounts or in state treasury). Finally, and perhaps most relevant to the case at hand, "that the government has taken possession of moneys . . . is sufficient to constitute them government funds, even though they are held for a special purpose." 63C Am. Jur. 2d *Public Funds* § 1; *see also Motor Coach Indus., Inc. v. Dole* , 725 F.2d 958, 965 (4th Cir. 1984) (funds held in trust by U.S. federal agency were public because agency benefitted from trust and held prominent role in trust's administration); *City of Phoenix v. Superior Ct.* , 514 P.2d 454, 456-57 (Ariz. 1973) (en banc) (money held in trust for city project with legitimate public purpose constituted public funds); *Money v. Florida* , 206 So. 2d 436, 438 (Fla. Dist. Ct. App. 1968) (Funds from private source "public funds" because "borrowed from private sources by a body politic to be used for a public purpose."); *Kentucky v. Howard* , 379 S.W.2d 475, 478 (Ky. Ct. App. 1964) (Although funds at issue came from private developers, such funds became public when paid to the government agency responsible "for them and their proper disbursement."). In sum, it is not the purpose that the funds are to be put to that determines their public nature, but, rather, the fact that a government official holds the funds in an official capacity. This definition fits squarely with the funds at issue in this case in that a government office, i.e., ASPLA, held the funds from the Lease Contract Fee to pay for its legal obligation to RTI to make the golf course site suitable for development. More precisely, the fact that the ASPLA, a governmental entity, controls the funds makes those funds public.

Furthermore, a brief comparison of the public lands authority statute at issue here, § 217, to other statutes establishing Palauan agencies supports the conclusion that *all* funds that a state public lands authority receives must be deposited into the appropriate treasuries. For example, the enabling statute for the Palau Visitor's Authority ("PVA"), 28 PNC § 552, provides that the PVA "shall have full charge of its financial affairs, including but not limited to establishing its own bank accounts." Similarly, the statutes establishing the Palau Community College, 22 PNC § 323(b), and the Palau National Communications Corporation, 15 PNC § 317(a), provide that the respective governmental entities are to have full charge of their finances subject to national accounting oversight. In contrast, nowhere in the enabling statute of the state public lands authorities, 35 PNC §§ 201-219, does the Olbiil Era Kelulau ("OEK") grant the authorities sole command over their financial affairs, except, as provided in § 217, to deposit 75% of funds received into the authority's state treasury with the remaining 25% to go to the National Treasury. Absent an explicit directive from the OEK, we decline to expand an authority's power to govern its finances beyond what is provided in § 217.

[5] As a final matter, to the extent that the defendants contend that the Lease Contract ⊥206

Fee moneys are not public funds because ASPLA is not a government office, their argument lacks legal support. The cases that the defendants point to say merely that a state public lands authority is a separate entity from the state government itself, not that state public lands authorities are not official government entities. *See Dilubech Clan v. Ngeremlengui State Gov't* , 8 ROP Intrm. 106, 112 (2000); *KSPLA v. Diberdii Lineage* , 3 ROP Intrm. 305, 308-09 (1993). The Appellate Division has recognized the governmental nature of public lands authorities, and held that one cannot claim adverse possession to obtain land held by an authority on the basis that "one cannot assert a claim of adverse possession against the government." *PPLA v. Salvador*, 8 ROP Intrm. 73, 74 (1999). Accordingly, the defendants' arguments that ASPLA is not a governmental entity lack merit.

Conclusion

We therefore reverse the Trial Division's grant of summary judgment for the defendants and remand for further proceedings in light of this opinion.