MEMO

TO: Legal Team

FROM: Bernard Zimmerman

DATE: June 16, 1995

Attached is a copy of Lana Buffington's memorandum on taxpayers' actions in the Commonwealth of the Northern Mariana Islands. She concludes that deleting Article X, Section 9, will have little direct affect on taxpayers' actions. She cites Commonwealth authority for such actions which predates the enactment of Section 9 in 1985. Repeal of Section 9 may affect awards of attorneys' fees and would permit the Legislature to restrict such actions.

There is some recognition of taxpayers' actions in the Commonwealth's Federal Court. Repeal of Section 9 should not affect federal actions.

Her memorandum is thorough and well written. I see no need for further research at this time. If any of you think otherwise, please advise.

Attach.

cc: Lana Buffington

MEMORANDUM

To: Bernard Zimmerman

From: Landon Buffington

Date: June 12, 1995

Re: Implications of Proposed Amendment to Article X, Section 9 of the CNMI Constitution to Eliminate the Taxpayer's Right of Action

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QUESTIONS PRESENTED

Certain Constitutional Convention delegates have proposed removing Article X, Section 9 of the CNMI Constitution and thus eliminating the express standing of CNMI taxpayers to bring suit against the government in Commonwealth courts. At your request, I have researched the following questions relating to this proposed constitutional amendment:

1) If the Constitution is amended, would CNMI taxpayers have standing to file local actions challenging the government even absent express constitutional or statutory authorization?

2) What is the current general status of taxpayer suits in the federal courts?

3) What is the status of CNMI taxpayer standing to bring actions in federal court?

4) What effect would removal of Article X, Section 9 have on taxpayer actions filed in federal court?

SHORT ANSWERS

1) Yes. Like the majority of states, the Commonwealth courts, even before the addition of Section 9 to Article X of the Constitution, have recognized taxpayer standing. The right, however, would not necessarily be as broad as the one now existing under the Constitutional provision.

2) In federal courts, in general, taxpayers do not have standing. Taxpayer status alone is too attenuated of an interest within the U.S. population at large to satisfy the "case or controversy" jurisdictional requirement of the U.S. Constitution.

3) The Ninth Circuit has not spoken directly to the issue of taxpayer standing in the CNMI[1]. The District Court has allowed taxpayer standing, following *Reynolds v.*

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[1] There is one Ninth Circuit case with CNMI litigants that is arguably on point as referred to by a district court appellate division (prior to existence of CNMI Supreme Court) decision.

Wade, 249 F.2d 73 (9th Cir. 1957)(allowing taxpayer standing in the then territory of Alaska) and in accord with similar cases in other districts encompassing U.S. territories. The Supreme Court has not addressed the territorial situation/distinction.

4) Since Article X, Section 9 is a local constitutional provision, its removal would likely have little inherent effect on a CNMI resident's taxpayer standing in federal court. The provision is not cited in the reasoning of the one District Court opinion allowing taxpayer suits. Of course, the presence probably has at least some positive influence on encouraging the Ninth Circuit to affirm such a right and conversely, its purposeful removal could be viewed as a persuasive policy argument that the Ninth Circuit should follow suit.

ANALYSIS

CNMI Cases Before Addition of Article X, Section 9

Prior to the 1985 Con Con, the District Court Appellate Division (the then highest Commonwealth court prior to the 1989 creation of the Commonwealth Supreme Court) had already found standing in taxpayers in local cases. See *Manglona v. Camacho,* 1 CR 820(taxpayer standing found in Rota legislators as taxpayers who sought to prevent the Governor from continuing employment of certain resident department heads whose appointments had been disapproved instead of confirmed and to recover the salaries paid to them after they were not confirmed) In *Manglona*, the court declined to follow general Supreme Court holdings denying standing. The court reasoned that the rationale behind Supreme Court decisions was that out of the millions of people in the U.S. any individual taxpayer lacks a sufficient individual pecuniary interest in the U.S. Treasury to justify standing and that any action is really just one of general public concern rather than individual concern. The court found the Commonwealth taxpayer's position as distinct from this reasoning because of the small population of the Commonwealth. The court said, "The smaller the population, the greater the pecuniary interest of its taxpayers in the treasury." 1 C.R. at 825.

Manglona was subsequently relied on by the Commonwealth Trial Court (now the Superior Court) which stated, "Additionally, this court has fairly recently accorded standing to taxpayers even though the taxpayers could not show injury beyond that of an ordinary taxpayer." *Romisher v. MPLC,* 1 C.R. 843 (citing *Manglona v. Camacho*).

CNMI Cases with Article X, Section 9

At the 1985 Constitutional Convention, Section 9 was added to Article X of the Constitution which reads as follows:

> Section 9: Taxpayer's Right of Action. A taxpayer may bring an action against the government or one of its instrumentalities in order to enjoin

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However, the only District Court original jurisdiction case follows another Ninth Circuit case and ignores the case mentioned by the appellate division as presumably not on point and this is the better analysis. Both cases are discussed later in this memo.

the expenditure of public funds for other than public purposes or for a breach of fiduciary duty. The court shall award costs and attorney's fees to any person who prevails in such an action in a reasonable amount relative to the public benefit of the suit.

There have been two controlling decisions of the local appellate court after this amendment - *Pangelinan v. CNMI*, 2 C.R. 1148 and *Mafnas v. CNMI*, 1 N.M.I. 248. In *Pangelinan*, the District Court Appellate Division upheld the standing of a taxpayer to challenge an appropriations bill that exceeded the Legislature's constitutionally set budget ceiling. The court's decision was clearly based on precedent as an independently sufficient source of standing in addition to the constitutional provision. The court said, "The Commonwealth Trial Court and this Court (in both the trial and appellate divisions) have consistently supported the principle of taxpayer standing in suits to prevent the government from abusing its authority." 2 CR at._ The court stated later, "Pangelinan also asserts that she has standing based on Constitutional Amendment 31.[. . .] Because this panel has found that Pangelinan has standing based on case precedent, it will not address the constitutional issue." 2 CR at 1157.

In *Mafnas*, a taxpayer brought an action essentially in the nature of quo warranto seeking a declaratory judgment that the Presiding Judge of the Superior Court was not properly holding office and to have him return a portion of his salary. In holding that Mr. Mafnas had standing, the court never clarified whether the existing CNMI precedents on taxpayer suits would be broad enough to encompass the subject action. The court cited the general taxpayer suit right in the CNMI without drawing any conclusions from it. Instead, the court stated, "Our constitutional provision explicitly recognizes the right of Commonwealth taxpayers to call their government to account in matters pertaining to expenditures of public funds. It is remedial in nature and should be liberally construed." 1 NMI at 261.

Effect of Removing Section 9 on CNMI Taxpayer Standing

It is not clear that the case law right to taxpayer standing would be as liberally construed as the constitutional right has been. The constitutional provision is quite broad in language and indeed expressly reaches all facets of government, which is broader than the traditional concept of suits about actions stemming from legislative taxing and spending enactments. In fact, though the litigant must technically be a taxpayer, the activities covered make this right more analogous to the general public interest/citizenship based suits that have traditionally always been denied in federal courts.

The practical effects of the proposed amendment on taxpayer suits brought in local court are two. First, and more immediately, the constitutional provision dictates that attorneys fees shall be paid to a prevailing party and thus serves as an incentive to bring meritorious suits in the public interest even if the plaintiff's resources are limited. The local court cases are not clear on this subject. The 1985 Con Con's Committee on Finance and Other Matters which reviewed the amendment obviously viewed this provision as an important added benefit over the common law right, because the Committee specifically mentions it in its report (Committee Recommendation No. 59) which states: "Because the private person upheld a significant public "right, privilege, or immunity," the person would not be required to pay his court costs or his reasonable attorney's fees."

Second, as in the case of all constitutional provisions, the existence of Article X, Section 9 guarantees that the right to taxpayer standing will be maintained and not subject to judicial or legislative change. Specifically, if the provision is removed, the Commonwealth Legislature could pass a law expressly denying general taxpayer standing. Judging by the Committee Recommendation No. 59 at the 1985 Con Con, the delegates viewed taxpayer standing as a right and thus something that should not be subject to the whims of the courts or the legislature.

Taxpayer Standing in Federal Courts - Generally

In the seminal case of *Frothingham v. Mellon*, 262 U.S. 4[illegible] (1923) the Supreme Court denied standing to a citizen who asserted a right as a taxpayer to challenge the constitutionality of an appropriation act. The Court invoked a separation of powers analysis in denying standing, saying:

> The functions of government under our system are apportioned. [. . .] We have no power per se to review and annul acts of Congress on the grounds that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. [. . .] The party who invokes the power [of the court to ascertain the law applicable to a controversy and to disregard unconstitutional laws] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of the enforcement and not merely that he suffers in some indefinite way in common with people generally.

262 U.S. at 488.

In applying this standard in the federal situation the court found that "[A taxpayer's] interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a curt of equity." at 487. In the context of the whole national population, such a complaint is "essentially a matter of public, and not of individual, concern." 262 U.S. at 487.

Frothingham was the first Supreme Court ruling on "the right of a taxpayer to enjoin the execution of a federal appropriation act." 262 U.S. at 486 With one narrow exception[2], the Supreme Court has followed *Frothingham* in denying federal taxpayers standing. *See U.S. v. Richardson*, 418 US 166 and *Allen v. Wright*, 468 US 737. One federal taxpayer in the sea of federal taxpayers simply cannot show enough individual concrete harm to satisfy the "case or controversy" standard for federal jurisdiction.

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2 See *Flast v. Cohen*, 392 US 83 allowing taxpayer standing to challenge a direct action by Congress (appropriating money to parochial schools) exceeding its enumerated taxing and spending power by virtue of the fact that the establishment clause represents a direct Constitutional limit on that power. *Flast* is really effectively limited to its facts because a subsequent establishment clause plaintiff was denied standing in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 US 464.

CNMI Taxpayer Status for Federal Standing [this section in draft form]

The status of CNMI taxpayers for standing in the federal courts is distinguishable from the general case and has received more favorable treatment. In addition, though the issue is not settled, a true taxpayer suit (versus a general citizenship type of suit) would likely be upheld by the Ninth Circuit.

The right of Commonwealth taxpayers is more analogous to that of municipal taxpayers than to that of federal taxpayers and as stated in *Frothingham* municipal taxpayer standing is routinely upheld by the Supreme Court. The Court explained:

> The interest of a taxpayer of a municipality in the application of its money is direct and immediate, and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court.

262 U.S. at 486.

The standard likely to be applied to taxpayer actions in the CNMI is that of *Reynolds v. Wade*, 2 F.2d 73(9th Cir. 1957) (federal court standing granted to Alaska taxpayer in action to restrain officials from unlawful expenditure of territorial funds and from administering a territorial statute providing transportation funds to non-public schools). In allowing standing the court reasoned:

> The principle announced in Commonwealth of Massachusetts (Frothingham) v. Mellon has no application to the instant case; here, justiciable controversy is present. The basis of the Mellon doctrine lies in the infinitesimal relationship between the Federal taxpayer and the Federal Treasury. When we compare the interest of a Federal taxpayer, who is one of over one hundred and sixty million, with the interest of an Alaska taxpayer with a population of less than 130,000, the distinction, though one of degree, is obvious. The rationale of the cases allowing taxpayers' actions against municipalities is clearly applicable in the Alaska situation.

249 F.2d at 76. *See also Buscaglia v. District Court of San Juan*, 145 F.2d 274 (1st Cir. 1944)(allowing taxpayer action against Puerto Rico officials and similarly distinguishing *Frothingham*).

This line of cases was followed locally by the District Court in *Lizama v. Rios*, 2 C.R. 569 (1986)(allowing taxpayer standing in federal court following the population based distinction in *Reynolds*). The court stated, "This reasoning is even more compelling here in the Commonwealth which has only a fraction of the taxpayers that existed in Alaska in 1957." *Id.* at 572.

There is one Ninth Circuit opinion that is troubling, not so much for what it actually says but for how it has been discussed in subsequent cases before the District Court Appellate Division. In *Taisacan v. Camacho*, 660 F.2d 411 (9th Cir. 1981), a Rota resident was denied standing to challenge the legality of two vetoes that the CNMI Governor exercised over bills appropriating Covenant C.I.P. funds to Rota. It is also important that the line of U.S. cases cited in *Taisacan* is to those denying general citizenship/public interest claims rather than the taxpayer/taxing and spending cases. *See Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 and *Ex Parte Levitt*,

302 U.S. 633. These cases refer to "the injury all persons share" as lacking the concreteness to give standing.

Covenant funds have nothing to do with CNMI taxes or raised revenues. They are federal funds appropriated from the U.S. Treasury to the CNMI. The Ninth Circuit also seems to hint that the outcome might have been different if Mr. Taisacan had been able to plead a better case. The court says:

> He does not even contend, for example, that he had a contract to build one of the halted capital projects . . . . An examination of the complaint reveals that Taisacan merely asserts that all citizens of Rota will be denied the benefit of improved services. This sort of generalized injury to the quality of life presents the type of abstract harm that typifies many citizen complaints against governmental action. But the Supreme Court has emphatically closed the federal courthouse door to those who wish to air their generalized grievances in a judicial forum.

660 F.2d at 414.

The more distressing facet to this case is that the District Court Appellate Division has twice implied that they think *Taisacan* may necessitate a *Frothingham* analysis in federal court.
One of these was in the *Pangelinan* case which post-dates *Lizama* by a year. Specifically, instead of citing *Lizama* or saying that *Taisacan* is not on point, the court says in refusing to apply *Taisacan*, "Reliance on *Taisacan* is misplaced. *Taisacan* dealt with a plaintiff seeking standing in federal court."
So, there may be a narrow distinction in the CNMI that you can only have taxpayer standing in federal court to challenge expenditure/disposition of Commonwealth funds/assets in contravention of a Commonwealth Constitutional provision.
"The great majority of states allow a taxpayer to sue to enjoin state officials from alleged unlawful expenditure of tax-derived state funds." 249 F.2d at 76.[3]

In fact *Lizama*, which was decided after *Taisacan*, does not even mention it as pertinent Ninth Circuit precedent, presumably showing by negative implication that it was not considered applicable. Instead the court says, "The Ninth Circuit has adopted this [*Frothingham* view of municipal taxpayer standing] reasoning in *Reynolds v. Wade*, 249 F.2d 73 (9th Cir. 1957). [. . .] This reasoning is even more compelling here in the Commonwealth which has only a fraction of the taxpayers that existed in Alaska in 1957."

In addition the Commonwealth is extremely suited to this line of reasoning due to its tax structure. Under Article VII, Section 703(b) of the Covenant, all taxes raised in the CNMI are paid into the CNMI Treasury for Commonwealth government use and not commingled with general federal funds.

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3 "The estimates of commentators as to how many jurisdictions have specifically upheld taxpayers' suits range from 32 to 40." *Flast v. Cohen*, 392 US 83, 109 (fn. 4, J. Douglas concurring).

Effect of Deletion of Article X, Section 9 on CNMI Taxpayer Standing in Federal Court

Deletion of Article X, Section 9 would have no immediate effect on a CNMI taxpayer's right to bring suit in federal court. The one pertinent District Court case, *Lizama* does not refer to the provision in its reasoning. In addition, the Ninth Circuit did not rely on any similar Alaska provision in *Reynolds* nor did the First Circuit in *Buscaglia*. in granting taxpayer standing in Puerto Rico. Instead, these cases rely on the fact that the *Frothingham* rationale is not applicable in the territories where the population is small and the harm to an individual taxpayer is more than infinitesimal and indeterminate.

Since the issue is not definitively settled in the Ninth Circuit as to the CNMI, however, on a practical level, removal could have some negative persuasive effect on the federal court's reasoning in future cases. This negative effect would be more likely if the real intent and therefore manner of removal is such as to show intent to actively preclude taxpayer standing in local courts.