

Excise tax violates U.S. Constitution, Gomez rules

By BRIAN O'CONNOR
Daily News Staff



Curtis Gomez

A federal judge's ruling could imperil \$45 million in government tax revenues, court records show.

U.S. District Court Judge Curtis Gomez ruled on Sept. 28 that the excise tax — levied against items and goods imported into the Virgin Islands — violated the Commerce Clause of the U.S. Constitution. The tax is worth \$45 million in revenue for the territorial government, budget documents show.

It wasn't clear whether the ruling would free businesses from excise tax obligations, or create new taxes for businesses not currently covered by the tax.

The government, represented by VI. Attorney General Claude Walker, has filed for an appeal with the 3rd U.S. Circuit Court of Appeals.

The Commerce Clause gives the federal government sole power to regulate commerce among the states.

The lawsuit that sparked the ruling

involves Reefco Services Inc., represented by Alex Golubitsky. Reefco specializes in installing refrigeration units, air conditioners, ice makers and water makers on local boats, according to Gomez's ruling. The VI. Internal Revenue Bureau — which collects taxes for the government — charged Reefco for importing various items over a number of years.

Territorial law allows an exemption to the excise tax for boats, boat engines and boat parts.

Reefco sued the government, arguing that the tax collected was improper. The government argued that the parts in question — including small refrigerators and ice makers — were not boat parts.

In an amended complaint, Reefco also argued that the excise tax

was unconstitutional. Gomez initially dismissed that portion of the complaint, in part because the government is neither a person, nor a federal agency, which are covered under other sections of federal law.

However, the Commerce Clause — and constitutional law generally — allows for claims against governments, so Gomez reversed his dismissal.

Excise taxes in the territory — created in VI. Code Title 33, Section 42 — date back at least as far as 1980, when Congress passed a law allowing for the collection of the tax whenever an item is brought into the territory. Two years later, Congress instructed federal officials to assist in the collection of the tax.

In 1987, a case challenging the excise tax as an illegal barrier to commerce made it to the U.S. Supreme Court.

Justices judged the case moot, in part because of a 1984 change to the law that required excise tax to be levied against goods made

in the Virgin Islands, in addition to goods imported into the Virgin Islands.

However, Internal Revenue Bureau employees testified during a deposition that the government has not charged local businesses the excise tax, despite the change in law, Gomez wrote.

The opinion quotes Glenford Hodge, the supervisor of excise tax for the Internal Revenue Bureau, as representative of the government position.

"We have no basis to charge a tax on something that's not imported into the territory," Hodge is quoted as saying.

Government regulations relating to the excise tax have not been updated since 1983, Gomez wrote in his opinion.

The government "ignores the corrective amendment to Section 42 and continues to implement the pre-1984 statute that the Third Circuit held was invalid under the Commerce Clause," he wrote.

The law thus represents illegal

economic protectionism, Gomez wrote.

The government "has not asserted any 'legitimate local purpose' for this scheme, let alone evidence or argument that 'this purpose could not be served as well by available nondiscriminatory means,'" Gomez wrote, quoting earlier case law. "Accordingly, the Court holds that the Section 42 — as interpreted and enforced by the GVI — violates the Commerce Clause."

Gomez ordered \$5,287.74 in collected excise taxes returned to Reefco.

Internal Revenue Bureau Director Marvin Pickering directed questions to Walker.

Walker declined to comment, citing the ongoing legal case.

The case is tentatively scheduled for hearing during a December 2019 visit by the 3rd Circuit judges, court documents show.

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Yacht Haven Grande, EDA come to terms over benefits

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Thomas Mukamal

ST. THOMAS — The VI. Economic Development Authority and the owners of Yacht Haven Grande have settled over the company's tax exempt status, officials said.

The disagreement prompted EDA officials to hold a "show cause" hearing last week, in which the company was ordered to show cause why its status should not be revoked, suspended or modified.

Officials from Yacht Haven USVI, which is owned by Island Global Yachting, had taken the position that in-kind contributions — donations of time and space for events for community groups — should count financially toward community contribution obligations required to maintain the company's Economic Development Commission program status. EDA staff said they were bound by the letter of the law to consider only monetary contributions toward the total.

Thomas Mukamal, CEO of Island Global Yachting, said the company routinely offers space at Yacht Haven Grande for community events. Those events come at a cost to his company, Mukamal said.

"We donate the venue and then provide the cleaning services, security staff, if it's an indoor event," he said. "All of that stuff can be quite expensive."

The dispute reached the Economic Development Commission in part

because EDA officials had been unclear about whether or not in-kind contributions could be counted, Mukamal said.

"It would have been cheaper to pay the fine a year ago," he said. "We wanted to force them to take a position."

The dispute over contributions is the second time this year financial tensions between EDA and Island Global Yachting have spilled into public. IGY-AYH St. Thomas Holdings, another subsidiary company, was placed under a lien for \$49,036.90 in unpaid gross receipts taxes on June 25. The company was released from the lien — indicating the taxes had been paid or administratively waived — on Oct. 4.

The AYH stands for American Yacht Harbor, another EDC beneficiary, Mukamal said. The Red Hook-based retail location was awaiting renewal of its EDC benefits for two years, at which point the Internal Revenue Bureau mistakenly charged the company gross receipts tax it was exempted from, Mukamal said.

"They must have liened us up for that period," he said.

The taxes were waived on renewal, Mukamal said.

Community contributions, minimum employment standards, and lo-



Daily News file photo

The VI. Revive Festival in December draws a large crowd to Yacht Haven Grande on St. Thomas. The Economic Development Authority and the property's owners have settled a dispute over the company's tax-exempt status and whether in-kind contributions of space for events for community groups should count toward its obligations under the Economic Development Commission program.

cal hire requirements are all part of the EDA's EDC program. In exchange for meeting those criteria — required community contributions can vary from company to company and number in the tens of thousands of dollars — EDC beneficiaries receive the following tax benefits:

- 90 percent reduction in corporate income tax
- 90 percent reduction in personal

income tax

- 100 percent exemption on gross receipt tax
- 100 percent exemption on business property tax
- 100 percent exemption on excise tax payments
- Reduction in the customs duty from the standard 6 percent to 1 percent

EDA Assistant Executive Director Wayne Biggs Jr. said officials were

required by Yacht Haven's certificate — which lists the company-specific requirements for the program — to count monetary donations instead.

"We follow the certificate," he said. "The certificate, when it's done, is a contract between the EDC and the company."

Island Global has filed an application to modify its certificate to count in-kind contributions in addition to monetary contributions, Biggs said. EDA staff are in the process of reviewing the application, Biggs said.

Similar settlements are a regular part of the EDC program, Biggs said.

"I think we're moving ahead," he said. "Settlements are all part of the process."

Once additional monetary contributions are made, the company will be fully renewed, Biggs said. The EDA welcomes in-kind contributions, but officials are bound to follow the letter of the law, Biggs said.

"Now that we've settled, we consider them to be in full compliance," he said.

However, Mukamal said the company will have to scrutinize community events to host at Yacht Haven as a result of the decision.

"Now we know," he said. "When somebody asks us to do it. We'll likely have to be a little more selective in how we do it. That's a potential and unfortunate."

EDA board members Jose Penn, Haldane Davies, Juan Figueroa and Eugene Farrell voted unanimously for the settlement.