



3. reasonable attorney's fees in the amount of \$1,139.70;
4. filing fee in the amount of 100.00;
5. service fee in the amount of \$5.00; and
6. post-judgment interest on the above at 9% per annum from December 11, 2012,

until paid.

### **Procedural Background**

In its January 30, 2012 "Complaint," MISSA claimed that Holly owed contributions (and interest thereon) under the MISSA Act and the Health Fund Act in the amount of \$31,199.25 for the 21 calendar quarters ending March 31, 2005, through March 31, 2010. Additionally, MISSA claimed that Holly owed \$20,437.86 in penalties, pre-judgment interest at 12% per annum, \$105.00 in costs, reasonable attorney's fees, and post-judgment interest at 9% per annum.

In his February 16, 2012 "Answer to Complaint and Motion for Summary Judgment," Holly claimed that he had filed and paid MISSA taxes for the quarters ending September 30, 2005, through March 31, 2011, and that for this, and other reasons, he did not owe MISSA more.

The Court scheduled argument on Holly's motion for summary judgment (MSJ) for March 20, 2012. Defendant Holly was present. Counsel for MISSA was not present, nor did he file an opposition to the motion. After hearing argument from Holly, the Court granted his motion with respect to the contributions due for 2009 and 2010, dismissing MISSA's Complaint as to those eight quarters. The Court, however, denied Holly's MSJ with respect to contributions MISSA claimed were due by Holly for 2005 through 2008.

After receiving the Court's March 20, 2012 order regarding the MSJ, counsel for MISSA on March 21, 2012, moved the Court to reconsider and set aside its order.<sup>3</sup> MISSA's Counsel claimed that MISSA's verified Complaint raises material issues of fact so that summary judgment was not appropriate.

On April 19, 2012, the Court heard argument by the parties on MISSA's motion to reconsider the MSJ order. In an April 19, 2012 order, the Court deferred the ruling on the motion to reconsider and, in consultation with the parties, took the matter off-calendar pending settlement discussions. The parties, however, failed to settle the matter. After two continuances the matter came before the Court for trial on December 10 and 11, 2012.

#### **Findings of Fact and Conclusions of Law**

After carefully considering the parties' evidence, argument, and written submissions, the Court makes the following findings of fact and conclusions of law.

1. For the 17 calendar quarters ending March 31, 2006, through March 31, 2010,<sup>4</sup> Holly owned and operated a marine services business in Majuro, Marshall Islands, under the name "Marshall Islands Aquatics."
2. With respect to his marine services business, Holly is a self-employed worker and is deemed to be his own employer and employee for purposes of paying worker and employer

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<sup>3</sup>Apparently, MISSA's counsel believes that if the parties agree to a continuance, the Court bound to grant one, and that the parties need not appear at the scheduled time, even if the Court has not granted the continuance. The undersigned believes otherwise.

<sup>4</sup>By Plaintiff's [April 29, 2013] 2<sup>nd</sup> Post-Trial Brief, at p. 1, MISSA limited its claim to amounts due from Holly for the 17 quarters ending March 31, 2006, through March 31, 2010, apparently abandoning claims for the four quarters in 2005. Accordingly, the Court will use the first quarter of 2006, rather than first quarter of 2005, as the starting quarter of MISSA's claim.

contributions (taxes) under both the MISSA Act and the Health Fund Act. *See* Section 103(kk) of the MISSA Act<sup>5</sup> and Section 202(gg) of the Health Fund Act.<sup>6</sup>

3. For the 17 quarters at issue, MISSA claimed that pursuant to Section 103(kk) of the MISSA Act and Section 202(gg) of the Health Fund Act Holly was liable for contributions on 75% of his gross revenue pursuant to MISSA’s authority under Section 119(2)(i) of the MISSA Act<sup>7</sup> to “assess on the employer the appropriate amount of contribution due.” In making its

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<sup>5</sup>Section 103(kk), 49 MIRC 103(kk), reads as follows:

“Self-Employed Worker” means a person who engages in any trade or business, and is deemed to have earned twice the amount of earnings paid to the highest paid worker reported by him within a quarter or the earnings he actually received, or, if there is no other worker, he shall be deemed to have earned within a quarter seventy-five (75) percent of his gross revenue for that quarter. *A self-employed worker shall be deemed to be both his own employer and worker and, accordingly, is required to pay to the Fund for himself both the worker and employer contributions pursuant to Sections 129 and 130 of this Chapter respectively. (Emphasis added.)*

<sup>6</sup>Section 202(gg), 7 MIRC 202(gg), reads as follows:

“Self-employed worker” means a person who engages in any trade or business and is deemed to have earned twice the amount of earnings paid to the highest paid worker reported by him within a quarter, or, if there is no other worker he shall be deemed to have earned within each of the calendar quarters seventy-five per cent (75%) of his gross revenues for that calendar quarter. *A self-employed person shall be deemed to be both his own employer and employee and, accordingly, is required to pay the Health Fund for himself both the worker and employer contributions pursuant to sections 216 and 217 of this Chapter. (Emphasis added.)*

<sup>7</sup>Section 119(2)(i), 49 MIRC 119(2)(i) reads as follows:

[MISSA] may file a quarterly report for any employer who fails to file the prescribed report within thirty (30) days after the

assessment, MISSA calculated Holly's earnings based upon deposits into Holly's accounts at the Bank of the Marshall Islands and the Bank of Guam. These deposits included quarterly proceeds Holly received from a sub-sub-lease to EZ Price and "unexplained bank deposits." MISSA's argument fails for the following reasons.

a. First, proceeds from land leases are not "earnings" for purposes of the MISSA Act and the Health Fund Act. Section 103(r) of the MISSA Act<sup>8</sup> and Section 202(k) of the Health Fund Act<sup>9</sup> define "earnings" as compensation to or on behalf of a worker. A lessor (or sub-sub-lessor as in this case) is not a worker. Nor has it been the practice of MISSA to consider lease payments as "earnings."<sup>10</sup>

b. Second, MISSA failed to file quarterly reports for Holly as Section 119(2)(i) of the MISSA Act provides. As a result, MISSA did not perfect its purported assessment for MISSA contributions, and Holly is not bound by the assessment.

c. Third, MISSA has not established that its authority to make assessment under Section 119(2)(i) of the MISSA Act applies to the Health Fund Act.

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Administration has notified him of his failure to file and may levy and assess on the employer the appropriate amount of contributions due; such assessment shall be presumed correct until it is proven incorrect by the employer; and such assessments may be amended by the Administration to correct any error.

<sup>8</sup>49 MIRC 103(r).

<sup>9</sup>7 MIRC 202(k).

<sup>10</sup>See Holly's Exhibit A attached to Defendant's Second Supplementary Brief . . . filed February 7, 2013, an email reply to James McCaffrey from MISSA's Tax Compliance Officer Bryan Edejer.

d. Fourth, based upon the evidence presented (including testimony by Holly's witnesses), the Court finds that at all times relevant, Holly had (in addition to himself) one employee, Aki Mike (Mike). Holly belatedly filed MISSA reports and paid MISSA and Health Fund contributions for Mike. MISSA did not rebut Holly's claims that he employed Mike and that he paid Mike as reported. If fact, MISSA accepted Holly's reports and contributions for Mike and is paying Mike's wife survivor benefits based upon the contributions. Under Section 103(kk) of the MISSA Act and Section 202(gg) of the Health Fund Act, Holly is deemed to have made twice the earnings paid to the highest paid worker or, under Section 104(kk) of the MISSA Act, the earnings he actually received, whichever is greater. Holly reported earning twice what he claimed to have paid Mike, not more. MISSA did not establish that Holly earned more for purposes of the MISSA Act.

e. Fifth, although the Court in principle will consider un-explained deposits in determining an employee's earnings, enough of the deposits into Holly's accounts were shown at trial not to be earnings. Accordingly, the Courts accepts Holly's claim of having earned twice what he paid Mike. If later MISSA unearths evidence that Holly earned more or that he had other employees (such as his children), then the Court will address that issue when it comes before the Court.

4. Although, the Court accepts Holly's calculation of his and Mike's earnings, the Court does not accept his calculation of penalties and interest. By Holly's own admission, he failed timely to pay the subject MISSA and Health Fund Act contributions by the 10<sup>th</sup> day after

each quarter as required under Section 131 of the MISSA Act<sup>11</sup> and Section 218 of the Health Fund Act.<sup>12</sup> Holly was late paying the contributions from between 13 months to a little more than six years.<sup>13</sup>

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<sup>11</sup>Section 131, 49 MIRC 131, provides as follows:

No later than the tenth (10<sup>th</sup>) day after the end of each quarter, every employer, including every self-employed worker, shall:

- (a) submit to the Administrator a report of the wages and salaries paid by him and the contributions due from him under Sections 129 and 130 of this Chapter; and
- (b) pay into the Fund the contributions due.

<sup>12</sup>Section 218, 7 MIRC 218, provides as follows:

No later than the 10<sup>th</sup> day after each quarter, every employer, including every self-employed workers:

- (a) shall submit to the Board a report of the wages and salaries paid by him and the contributions due under Sections 216 and 217 above; and
- (b) shall pay into the Health Fund the contributions due.

<sup>13</sup>See Holly's Exhibit F.

5. Accordingly, Holly is liable for a penalty of not more than 100% of the contribution due or \$250.00, whichever is greater, pursuant to Section 149(1) of the MISSA Act<sup>14</sup> and Section 232(1) of the Health Fund Act.<sup>15</sup>

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<sup>14</sup>Section 149(1), 49 MIRC 149(1), provides as follows:

Any employer, or self-employed worker, who fails to report any amount of earnings paid or fails to pay any amount of contributions due to the Administration is, at the discretion of the Administration, liable for a penalty of not more than one hundred percent (100%) of the total amount of the contributions withheld, including worker's and employer's shares, or two hundred and fifty dollars (US \$250), whichever is greater.

<sup>15</sup>Section 232(1), 7 MIRC 232(1), provides as follows:

Any employer who fails to report any amount of earnings paid or fails to pay any amount of contributions due to the Health Fund is, at the direction of the Board, liable for a penalty of not more than one hundred per cent (100%) of the total amount of contributions withheld, including worker's and employer's shares, or two hundred and fifty dollars (US\$250), whichever is greater.



6. Further, Holly is liable to MISSA for interest under Section 153(1) of the MISSA Act<sup>16</sup> and Section 236(1) of the Health Fund Act<sup>17</sup> at 12% per annum from the date the contributions were due until paid.

7. In Appendix A to the Plaintiff's [April 29, 2013] 2<sup>nd</sup> Post-Trial Brief, MISSA credited Holly for paying a penalty of \$5.00 per contribution (for both Mike and Holly) and limited its claim for penalties. That is, instead of claiming a penalty of \$250.00 when the 100% penalty due for Mike or Holly was less than \$250.00, MISSA only sought the 100% penalty.

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<sup>16</sup>Section 153(1), 49 MIRC 153(1), provides as follows:

If the contributions or the penalty imposed by this Chapter are not paid on or before the date prescribed for such payment, there shall be collected, in addition to such contributions and penalties, interest levied on the unpaid balance of the contributions and/or penalties at the rate of twelve percent (12%) per annum from its due date until the date it is fully paid. In the event that the unpaid balance of contributions, penalties, or interest due under this Chapter is referred to an attorney for collection, whether or not suit is brought for the collection thereof, the employer or the self-employed worker shall additionally be liable for all reasonable attorney's fees and costs of collection, plus court costs.

<sup>17</sup>Section 236(1), 7 MIRC 236(1), provides as follow:

If the contributions and/or the penalty imposed by this Chapter are not paid on or before the date prescribed for such payment, there shall be collected in addition to such contributions and penalties, interest levied on the unpaid balance of the contributions and/or penalties at the rate of twelve per cent (12 %) per annum from the due date until the date it is paid in full. In the event that the unpaid balance of contributions, penalty or interest due under this Chapter is referred to an attorney for collection, whether or not suit is brought for the collection thereof the employer shall additionally be liable for all reasonable attorney fees, costs of collection and court costs.

This concession reduces the penalty by \$4,705.00 and the interest due proportionally (about \$2,809.21).

8. Using MISSA's Appendix A and a judgment date of December 11, 2012 (the date the Court announced its judgment in court), the Court finds that the amount due MISSA by Holly for the 17 calendar quarters ending March 31, 2006, through March 31, 2010, is as follows:

- a. penalties in the amount of \$3,799.00<sup>18</sup>;
- b. interest on the penalties in the amount of \$1,924.68<sup>19</sup>;
- c. plus reasonable attorney's fees;
- d. filing fee in the amount of 100.00;
- e. service fee in the amount of \$5.00; and
- f. post-judgment interest on the above at 9% per annum from December 11,

2012, until paid.

9. MISSA has requested attorney's fees in the amount of \$4,547.80.<sup>20</sup> In his February 2, 2013 post-trial brief, Holly opposes the imposition of any attorney's fees. In determining attorney's fee, the Court has considered General Order 2005-001, "The Awarding of

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<sup>18</sup>The amount of the contributions Holly belatedly paid for the 17 quarters in question, less \$170.00 he paid in penalties at the time he made his late payments (\$5.00 per quarter for 17 quarters for Holly and \$5.00 per quarter for 17 quarters for Mike).

<sup>19</sup>See the instructions for calculating interest, Item #9, on the back of the MISSA Employer's Quarterly Tax Return, Holly's Exhibit A, which the Court treats as an admission.

<sup>20</sup>See MISSA's Exhibits P-16 and P-18 and the Plaintiff's Post-Trial Brief filed January 30, 2013.

Reasonable Attorney's Fees," including the eight factors set forth on page 2 of the order.<sup>21</sup>

Having considered the parties' submissions and General Order 2005-001, particularly the time-involved factor, the Court concludes that reasonable attorney's should not exceed 30% of the penalties (\$3,799.00) plus pre-judgment interest (\$1,924.68) awarded MISSA. Accordingly, the Court concludes that MISSA is entitled to reasonable attorney's fees in the amount of \$1,139.70 (30% of \$5,723.68 (\$3,799.00 in penalties plus \$1,924.68 in interest)).

10. The Court has considered Holly's defenses and has rejected them.

11. In his defense, Holly claims that MISSA's suit is barred under the doctrine of laches. This claim is without merit for three reasons: (1) Holly has not established the grounds for laches (MISSA's lack of diligence and prejudice to Holly); (2) MISSA, as a government agency collecting taxes for the public's benefit, is not subject to the doctrine of laches; and (3) Holly hands are not clean, precluding him from asserting laches.

a. For the doctrine to laches to apply, "[t]he court must find (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense." *Langijota v. Alex*, 1 MILR (Rev.) 216, 222 (1990), citing *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9<sup>th</sup> Cir. 1980). In the present case, the Court does not find a lack of diligence on MISSA's part once MISSA became aware Holly was not paying his MISSA and Health Fund contributions. Holly arrived in the Marshall Islands in 1979. For about 30 years, Holly did not file MISSA reports or pay MISSA contributions as required under the law. In December 16, 2009,

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<sup>21</sup>General Order 2005-001, The Awarding of Reasonable Attorney's Fees, can be found on the Judiciary's website at [www.rmicourt.org](http://www.rmicourt.org).

MISSA and the Secretary of Finance served on Holly a joint notice to file and pay taxes. Between December 2009 and January 2012, the parties engaged in sporadic negotiations. In January 2012, MISSA filed the present suit. Holly has not established that MISSA's failure to catch and sue him was the result of a lack of diligence. Moreover, even if MISSA were not diligence in ferreting Holly out, Holly has not established that he was prejudiced by the time lag. The Court has accepted Holly's figures on earnings and contributions due for himself and his employee Mike. Holly has not shown that the death of Mike, or Holly's failure to recall salary transactions (because, as Holly claims, he does not keep written records and was not required to do so beyond three years), has in anyway harmed his defense.

b. Because MISSA is a government entity and is seeking to enforce a governmental claim to contributions for the benefit of the public (i.e., to pay retirement and survivor benefits and to fund public healthcare costs), the defense of laches is not available to Holly. *See generally* 30A C.J.S. Equity § 141. As a general rule, the doctrine of laches does not apply to government enforcement public or government rights or claims. There are exceptions to the this general rule, such as where the government sues for the use and benefit of an individual, to enforce a private and proprietary right, and others. However, Holly has not established any exception to rule that the doctrine of laches does not apply to MISSA's claims, and the Court has not in its research found one.

c. Holly hands are not clean. From 2006 through 2010, Holly failed timely to file returns with MISSA and pay the MISSA and Health Fund contributions as required by MISSA Act and the Health Fund Act. In fact, Holly had not timely paid taxes since he

arrived in 1979. Holly cannot now assert the defense of laches. His hands are not clean. “A party with unclean hands may not assert laches. *E.g., Hot Wax, Inc.*, 191 F.3d at 825; *see also GoTo.com, Inc.*, 202 F.3d at 1209 (applying unclean hands doctrine to Lanham Act trademark infringement action). The unclean hands doctrine ‘closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.’ *Precision Instr. Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945). The party must have ‘acted fairly and without fraud or deceit as to the controversy in issue.’ *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 877 (9<sup>th</sup> Cir. 2000) (internal quotation marks omitted).” *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841 (9<sup>th</sup> Cir. 2002).

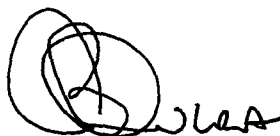
12. In his defense, Holly also asserts that because MISSA accepted his late filings and payments without objections, MISSA is barred from claiming Holly owes more than he already has paid. However, before Holly tendered payment at the MISSA service desk, he was on notice that MISSA sought more in contributions, penalties, and interests than what he was paying. Although the amount of the contributions is moot (as the Court has accepted Holly’s figures for the contributions), MISSA’s claims for penalties and interests there on remain at issue.

Holly claims he owes no more than the \$5.00 late fee and interests he paid with respect to his and Mike’s contributions for the 17 quarters in question. However, prior to tendering payment for the quarterly contributions (one payment in 2011 and the rest in 2012, *see* Holly’s Exhibit F), Holly was aware that MISSA sought interest at 12% per annum and a 100% civil

penalty.<sup>22</sup> Holly has failed to establish that at the time he tendered and MISSA received his payments for the 17 quarters, the parties had reached an accord that would support the defense of accord and satisfaction. “An ‘accord and satisfaction’ is a method of discharging a contract or a claim or cause of action whereby the parties agree to give and accept something other than that which is due in settlement of the claim and to perform the agreement.” 1 Am. Jur. 2d Accord and Satisfaction § 1 (internal citation omitted). In the present case, there was no agreement between MISSA and Holly for MISSA to accept less than a 100% civil penalty and interest at 12% per annum. Holly did not establish any other legal basis for not paying the penalty and interest due.

13. For the above reasons, the Court awards MISSA judgment against Holly as set forth above. Further, to the extent that the Court’s summary judgment order is inconsistent with the judgment set forth herein, it is vacated.

Date: May 23, 2013.



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Carl B. Ingram  
Chief Justice, High Court

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<sup>22</sup>See MISSA’s Exhibit P-7, a May 5, 2010 letter to Holly from MISSA, which predates payment for all 17 of the subject quarters; MISSA’s Exhibit P-8, a May 8, 2011, letter to Jim McCaffrey (Holly’s counsel) from David Strauss (MISSA’s counsel); and what was erroneously labeled P-15 and attached to the February 5, 2013 Post-Trial Affidavit of David M. Strauss Regarding Penalty Correspondence, an April 19 and 21, 2011, exchange of emails between Holly and Strauss one month before Holly’s payment for 12 quarters.