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For The Northern Mariana Islands
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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

LINO M. OLOPAI, and PLASIDO M. TAGABUEL, Plaintiffs, v. LORENZO I. DE LEON GUERRERO, Governor, Commonwealth of the Northern Mariana Islands, Defendant.	Civil Action No. 93-0002 MEMORANDUM OPINION AND ORDER

The pending cross-motions for summary judgment raise the question of the enforceability of a specific provision of a public law enacted by the Congress of the United States and applicable to the Commonwealth of the Northern Mariana Islands. The Court heard oral argument on July 16, 1993. For the reasons stated below, Defendant's motion is DENIED, and Plaintiffs' motion is GRANTED.

BACKGROUND

Plaintiffs are two citizens of the Commonwealth of the Northern Mariana Islands ("CNMI") seeking enforcement of section 3(b) of Public Law Number 98-213, 97 Stat. 1459, enacted by Congress on December 8, 1983. That provision provides that, with respect to the rebate of income taxes collected by the CNMI government: "Notwithstanding any other provision of law, effective January 1, 1985, the Commonwealth of the Northern Mariana Islands shall maintain, as a matter of public record, the name and address of each person receiving such a rebate, together with the amount of the rebate, and the year for which such rebate was made." Plaintiffs sought access to this information from the government of the CNMI, and after they were denied such access, they filed this suit seeking an injunction to force the Governor of the CNMI to comply with the mandate of the statute.

In order to accurately portray the nature of the rebate information which is the subject of the above-quoted statute, a brief overview of the CNMI tax system is necessary. The CNMI employs what is known as a "mirror-image" tax system to collect income taxes from its taxpayers. Pursuant to this system, the CNMI has adopted wholesale the Internal Revenue Code of the United States, including all subsequent amendments to it, as a territorial income tax. 4 Commonwealth Code § 1702(a)-(c) (Supp. 5/86). Taxpayers of the CNMI are not required to pay federal income taxes to the United States Internal Revenue Service. However, over the course of a tax year, a CNMI taxpayer pays the exact same amount of tax to the CNMI government, through either payroll withholding deductions or quarterly payments, as a citizen of one of the several States with the same income would pay to the United States government.

Each year, the CNMI taxpayer is entitled to a rebate of up to 95% of the total taxes he has paid into the CNMI Treasury for the preceding year. Id. § 1708.[1/] Subtracted from that rebate is the taxpayer's CNMI tax liability, which is calculated by multiplying his gross earned income, with no deductions or exemptions, by a flat tax rate. Id. § 1201. That rate varies from 0% to 9% depending on the amount of income earned. Id.

On January 21, 1993, Plaintiffs filed a complaint seeking an injunction ordering the Governor of the CNMI (the "Governor") to maintain as a public record the list of those taxpayers who have received rebates along with the amount of the rebate, in compliance with Public Law 98-213, and to allow Plaintiffs access to that list. Plaintiffs filed a motion for summary judgment on May 17, 1993, and the Governor filed his response and cross-motion for summary judgment on June 4, 1993.

DISCUSSION

In his response and cross-motion, the Governor raises several objections to the enforceability of the disclosure provision of Public Law 98-213, and specifically, to the release of the above-described list to the plaintiffs in this case. The bases of his objections can be summarized as follows: 1) that Plaintiffs lack standing to bring this action; 2) that Public Law 98-213 does not create a private right of action; 3) that Public Law 98-213 contravenes 26 U.S.C. ("I.R.C.") § 6103 regarding the confidentiality of tax return information; 4) that Public Law 98-213 violates the equal protection rights of the CNMI citizenry, and thus is

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[1/] Title 4 Commonwealth Code § 1708 provides that a wage earner is entitled to a rebate of 95% of the first $7,500,000 of taxes paid. For amounts between $7,500,000 and $20,000,000, 50% is rebated, and 25% of any excess over $20,000,000 is rebated.

unconstitutional; 5) that Public Law 98-213 violates the right of privacy guaranteed to CNMI citizens by the CNMI Constitution; and 6) that Public Law 98-213 violates the CNMI's right to local self-government provided for by Sections 103 and 105 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (hereinafter "the Covenant"). Each of these objections will be addressed separately.

1. Standing.

The Governor asserts that Plaintiffs lack standing to bring this action because the injury they allege, denial of access to the rebate information, is a generalized grievance held by all members of the public. According to the Governor, that generalized grievance is not a "concrete injury" of the type required as an element of standing. The case law is plain, however, that Plaintiffs do have standing to bring this action.

The public has both a First Amendment and a common law right of access to public records. Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988); United States v. Beckham, 789 F.2d 401, 419 (6th Cir. 1986) (Contie, J., dissenting); Society of Professional Journalists v. Briggs, 675 F. Supp. 1308, 1310 (D. Utah 1987). Any member of the public is injured by the abridgement of that right. For example, in El Dia, Inc. v. Hernandez Colon, 783 F. Supp. 15, 20 (D.P.R. 1991), rev'd on other grounds, 963 F.2d 488 (1st Cir. 1992), the court held that by virtue of her being a citizen, the plaintiff had standing to challenge an executive order issued by Puerto Rico's governor which restricted access to public documents. Accord Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254, 256 (Minn. 1977) (holding that "any member of the public is an injured or aggrieved party by the operation of orders preventing accessibility" to public records). In this case, Plaintiffs have

an even more particularized injury than other members of the public, because they attempted to exercise their constitutional right to view the rebate lists.

The United States Supreme Court in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992), set forth the three elements of standing which must be present as an "irreducible constitutional minimum":

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 112 S. Ct. at 2136 (alterations in original) (citations omitted). The Governor contends that Plaintiffs have not suffered an injury in fact, and therefore they have not satisfied the first element of the Lujan test. The Governor points out that at their depositions neither of the Plaintiffs could state with particularity how their lives have been affected by the Governor's refusal to release the rebate information.[2/] But the Court need not inquire into why Plaintiffs want the information to determine whether they have incurred injury sufficient to give them standing. The Court will not:

[2/] Each Plaintiff did, however, state that he wished to use the information to lobby local leaders on matters relating to taxation and rebate rates. That is precisely the type of use that is often cited as the purpose for maintaining government documents as public records, i.e., to promote the fair and honest administration of government. Limitations on access to public records have been struck down as "repugnant to the spirit of our democratic institutions." Nowack v. Fuller, 219 N.W. 749, 750 (Mich. 1928). Other courts have held that "no sound reason [could be] advanced for depriving a citizen of his right [to access to public records]; for it is evident that the exercise thereof . . . will serve as a check upon dishonest public officials, and will in many respects conduce to the betterment of the public service." State ex rel. Colescott v. King, 57 N.E. 535, 538 (Ind. 1900).

> condition the enforcement of this right [of access to public records] on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies. . . .

Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978).

The denial of access to the rebate information is a sufficient injury in and of itself because it constitutes an invasion of a "legally-protected interest" -- the constitutional right to inspect public records. The Court finds that that interest is "concrete," "particularized," and "actual," as required by Lujan.

Plainly, the other two elements set forth in Lujan, causation and redressability, are also both met. There is a distinct causal connection between the CNMI's refusal to release the rebate information to Plaintiffs and Plaintiffs' constitutional deprivation. Similarly, it is clear that Plaintiffs' deprivation would be redressed if Plaintiffs succeed in obtaining the injunction they seek. Accordingly, I find that Plaintiffs have standing to bring this action.

2. Whether Public Law 98-213 creates a private right of action.

The Governor claims that because Public Law 98-213 does not contain an express enforcement provision, it does not create a private right of action in favor of Plaintiffs as individuals. Thus, according to the Governor, Plaintiffs can proceed under the statute only if it creates an implied private right of action. The Governor argues that the Court must apply the four factors set forth by the Supreme Court in Cort v. Ash, 422 U.S. 66 (1975), to determine whether that implied right of action exists. It has been widely recognized, however, that the Supreme Court has essentially abandoned the four part test it established in Cort in favor of a test that is stricter, yet easier to apply. Thompson v. Thompson, 484 U.S. 174,

179-80, 188 (1988) (the analysis of "Cort v. Ash [has] been effectively overruled by our later opinions.") (Scalia, J., concurring); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23-24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979); Roberts v. Wamser, 883 F.2d 617, 623 n.17 (8th Cir. 1989); Asch v. Philips, Appel & Walden, Inc., 867 F.2d 776, 777 (2d Cir.), cert. denied, 493 U.S. 835, reh'g denied, 493 U.S. 985 (1989); Burroughs v. Hills, 741 F.2d 1525, 1539 (7th Cir. 1984) (Posner, J., concurring), cert. denied, 471 U.S. 1099 (1985); Noe v. Metropolitan Atlanta Rapid Transit Auth., 644 F.2d 434 (5th Cir.), reh'g denied, 650 F.2d 284 (5th Cir.), cert. denied, 454 U.S. 1126 (1981); SCFC ILC, Inc. v. VISA U.S.A., Inc., 784 F. Supp. 822, 826 & n.1 (D. Utah 1992); Artist M. v. Johnson, 747 F. Supp. 446, 450 (N.D. Ill. 1989); Park Nat. Bank of Chicago v. Michael Oil Co., 702 F. Supp. 703, 704 (N.D. Ill. 1989); Jiffy Lube Int'l, Inc. v. Grease Monkey Holding Corp., 671 F. Supp. 1275, 1276 n.1 (D. Colo. 1987); Fidelity Fin. Corp. v. Federal Home Loan Bank, 589 F. Supp. 885, 892 (N.D. Cal. 1983); McGhee v. Housing Auth., 543 F. Supp. 607, 609-10 (M.D. Ala. 1982); Rich v. New York Stock Exchange, Inc., 509 F. Supp. 87, 89 (S.D.N.Y. 1981).[3/]

[3/] Notwithstanding the Supreme Court's retreat from its analysis in Cort, the Governor's reliance on Cort is misplaced. The Governor maintains that: "[t]he same issues present in Cort are presented here and the same four part test should govern the analysis of P.L. 98-213." Governor's Brief of June 4, 1993, at 7. But the same issues are not present here as were present in Cort. The issue in Cort was whether a criminal statute which prohibited corporations from donating corporate funds to a presidential election campaign also created a private right of action so as to allow a shareholder to bring a derivative claim against a corporation for a violation of the statute. The Supreme Court found that the statute relied upon by the shareholder was a "bare criminal statute, with absolutely no indication that civil enforcement was available to anyone." Cort, 422 U.S. at 79-80. Public Law 98-213 is not a criminal statute. The section with which we are concerned simply requires the Governor to maintain the rebate information as a public record.

Under the current test, "the central inquiry [is] whether Congress intended to create, either expressly or by implication, a private cause of action." Touche Ross & Co., 442 U.S. at 575. The Ninth Circuit has further narrowed the inquiry by holding that: "the sole factor to be considered in deciding whether a private right of action should be implied under a statute is whether Congress intended that the statute's provisions be enforced through private litigation." Osborn v. American Ass'n of Retired Persons, 660 F.2d 740, 743 (9th Cir. 1981); accord Thompson, 484 U.S. at 179 ("The intent of Congress remains the ultimate issue."). To determine Congress' intent, the court should look to "the language and focus of the statute, its legislative history, and its purpose." Touche Ross & Co. 442 U.S. at 575-76; accord Thompson, 484 U.S. at 179.

The plain language of the statute requiring the CNMI to maintain the rebate information as a public record evinces an intent to grant to the public the right of access to the rebate information. Moreover, the legislative history provides that Congress intended to require "public disclosure of rebate[]" information. H.R. Rep. No. 174, 98th Cong., 1st Sess. 3 (1983), reprinted in 1983 U.S.C.C.A.N. 2210, 2211. As the analysis of the standing issue demonstrates, Public Law 98-213 creates a federal right of access to the rebate information in favor of the members of the public. Congress' creation of that right is indicative of its intention to create a private cause of action to enforce the right. See Thompson, 484 U.S. at 189 (Scalia, J., concurring). This privately instituted lawsuit seeks an injunction to enforce the statute, and thus fulfill Congress' intention that the rebate information be disclosed to the

public. Accordingly, Public Law 98-213 creates a private right of action in favor of the Plaintiffs in this case.[4/]

3. Whether Public Law 98-213 amends the Internal Revenue Code.

Public Law 98-213 requires that the CNMI maintain certain tax rebate information as a public record. I.R.C. § 6103(a) provides that "returns and return information shall be confidential," and prohibits the disclosure of "any return or return information" by any "officer or employee of any State." The CNMI is included in the definition of the term "State." I.R.C. § 6103(b)(5). Thus, the tax rebate information identified in Public Law 98-213 is clearly covered by the definitions of "return" and "return information" included in I.R.C. § 6103(b)(1) & (2). The Governor contends that the tax record confidentiality dictates of I.R.C. § 6103 validate the CNMI's refusal to comply with the disclosure provision of Public Law 98-213. Because these two congressional pronouncements are directly in conflict, the Governor asserts, this case requires the Court to determine whether Public Law 98-213 amends I.R.C. § 6103. I agree.

If Public Law 98-213 expressly referred to I.R.C. § 6103, the answer to that question would certainly be apparent. But the absence of expressly amendatory language presents only

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[4/] It is worthy of note that in virtually all of the cases where courts have declined to find an implied private right of action in a statute, the plaintiffs were seeking money damages to redress an alleged violation of a statute that did not expressly provide for such damages. See, e.g., Lewis, 444 U.S. at 13 (seeking money damages for violation of Investment Advisers Act, 15 U.S.C. § 80b-1, *et seq.*); Touche Ross & Co., 442 U.S. at 564 (seeking money damages for violation of Securities Investor Protection Act, 15 U.S.C. § 78aaa, *et seq.*). But cf. Thompson, 484 U.S. at 175 (seeking declaratory and injunctive relief under Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, to determine which of two conflicting state custody decrees was valid). In this case, Plaintiffs seek enforcement of the express terms of a statute, rather than a determination that the statute is implicitly money-mandating.

a minor hurdle. When reconciling two different but applicable statutes, the starting point is the language of the statute itself. Watt v. Alaska, 451 U.S. 259, 265 (1981). The portion of Public Law 98-213 at issue, while not expressly mentioning I.R.C. § 6103, begins with the phrase: "Notwithstanding any other provision of law, ..." If Congress did not intend that Public Law 98-213 would have some amendatory effect, such a phrase would be superfluous.

It is a well-settled rule of statutory construction that "[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment."[5/] Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987). That rule applies with special force when the specific statute is in conflict with a small portion of a complex and intricate statute, such as the confidentiality provisions of I.R.C. § 6103. See Bigger v. American Commercial Lines, 862 F.2d 1341, 1344 (8th Cir. 1988) (applying the rule to interpret the effect of a specific provision of ERISA). The disclosure provision of Public Law 98-213 applies only in one specific jurisdiction, and it orders that only a specific portion of return information be disclosed. There is no expression of congressional intent, clear or otherwise, that the general rule of confidentiality contained in I.R.C. § 6103 will control over this specific disclosure provision. To the contrary, Public Law 98-213 provides that its disclosure provision is effective "[n]otwithstanding any other provision of law."

The Court is not troubled by the fact that Public Law 98-213 has not been codified in the United States Code. "By 1 U.S.C. § 54(a), the Code establishes 'prima facie' the laws of

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[5/] Moreover, if two statutes conflict, the later enacted specific statute controls over the previously enacted general statute. Boudette v. Barnette, 923 F.2d 754, 757 (9th Cir. 1991). I.R.C. § 6103 was enacted in 1954 and took on its present form in 1976; Public Law 98-213 was enacted in 1983.

the United States. But the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent." Stephan v. United States, 319 U.S. 423, 426 (1943); see, e.g., New York, Chicago & St. Louis Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, 358 F.2d 464, 468 (6th Cir. 1966) ("A specific act of the nature of Public Law 88-108 is generally held to amend by implication any preceding general statute of the nature of the Norris-Laguardia Act (29 U.S.C. § 101) in conflict therewith."). Moreover, as this Court held in United States ex rel. Richards v. Guerrero, No. 92-0001, slip op. at 44, 1992 WL 321010, at *18 (D.N.M.I., July 24, 1992), aff'd Nos. 92-15884, 92-16372, 1993 WL 328705 (9th Cir., Sept. 1, 1993) (hereinafter "the Inspector General case"), "it would not be appropriate [for Congress] to amend the disclosure provisions of the Internal Revenue Code solely for the sake of the U.S. possessions: Congress need not amend a general statute for a much more specific rarity."

In arguing that Congress did not intend to amend I.R.C. § 6103, the Governor claims that the primary purpose of Public Law 98-213 was to urge the CNMI closer to a mirror tax code with the United States. The Governor submits that the disclosure provision of the statute was not aimed at that purpose and was merely "tacked on," because there is very little discussion of the provision in the legislative history. However, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence it is the duty of the courts, absent a clearly expressed intention to the contrary, to regard each as effective." Muller v. Lujan, 928 F.2d 207, 211 (6th Cir. 1991) (quoting Morton v. Mancari, 417 U.S. 535, 550-51 (1974)). Even if the disclosure provision of Public Law 98-213 was "tacked on," as the Governor suggests, it does not make that provision any less binding than any other duly enacted law.

The Governor's argument, however, is that the 98th Congress could not have meant to include a provision in Public Law 98-213 that is so clearly repugnant to the dictates of I.R.C. § 6103, and seemingly forgot that the earlier Congress had restricted access to tax return information. The Supreme Court, however, has succinctly delineated the role of a court presented with conflicting statutes. Where, as here, the language of a subsequently enacted statute is plain and unambiguous, "it is not our function to eliminate clearly expressed inconsistency of policy, and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional 'forgetfulness' cannot justify such a usurpation." West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1148 (1991). The Governor suggests that this Court should usurp the law-making authority of Congress by not enforcing a plain and unambiguous statute. This I decline to do. I find that the disclosure provision of Public Law 98-213 operates to amend I.R.C. § 6103 to not only allow, but to require the CNMI to maintain as a public record the rebate information described by the disclosure provision.[6/]

4. Whether the disclosure provision of Public Law 98-213 is unconstitutional.

The Governor argues that the disclosure provision of Public Law 98-213 unconstitutionally discriminates against the taxpayers of the CNMI by opening up a portion of

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[6/] Public Law 98-213 is not the first statute to amend I.R.C. § 6103 by implication. The Insular Areas Act, codified at 48 U.S.C. § 1681b, which authorized the Inspector General of the Interior Department to conduct an audit of the CNMI's tax records, "implicitly amended the confidentiality provisions of 26 U.S.C. § 6103 to authorize disclosure of confidential tax information to the Inspector General." United States ex rel. Richards v. Guerrero, Nos. 92-15884, 92-16372, 1993 WL 328705, at *7 (9th Cir., Sept. 1, 1993).

their tax records to public scrutiny while allowing other United States taxpayers to continue to take full advantage of the I.R.C. § 6103's confidentiality provisions. The Governor contends that Public Law 98-213 "clearly treats U.S. citizens of the CNMI differently from citizens of the several states," and thereby violates the CNMI's citizens' right to equal protection[7/] because the statute "does not treat alike all persons similarly situated." Governor's Brief of June 4, 1993, at 16. Thus, the Governor maintains that Public Law 98-213 creates a classification comprised of the citizens of the CNMI, and that the classification denies equal protection of the laws to the members of the class.

The United States Court of Appeals for the Ninth Circuit has held that:

> Classifications challenged as denying the equal protection of the laws are generally sustained if they rationally further a legitimate governmental interest. Only if the classification operates to the peculiar disadvantage of a suspect class, or interferes with a fundamental right, will it be subjected to strict scrutiny by the courts.

United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986) (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976)). The Governor does not allege that the citizens of the CNMI constitute a suspect class. He does argue, however, that Public Law 98-213 infringes upon the CNMI's citizenry's right of privacy by requiring the public disclosure of portions of their tax return information. Thus, it must be determined whether the right to privacy in tax return information is a "fundamental right" so as to trigger a strict scrutiny analysis.

[7/] Classifications established by a federal statute such as Public Law 98-213 are reviewed under the implied equal protection guarantee of the Fifth Amendment due process clause. United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986).

The definition of a fundamental right is different in the CNMI than in the rest of the United States. The question of what constitutes a fundamental right in the CNMI was squarely presented and vigorously discussed by the Ninth Circuit in Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir.) (amending 898 F.2d 1381 (9th Cir. 1990)), cert. denied, 113 S. Ct. 675 (1992). That case concerned the constitutionality of a provision in the Covenant and a similar provision in the CNMI Constitution that restricted land alienation to persons of Northern Mariana Islands ("NMI") descent. Section 805 of the Covenant provides that, notwithstanding federal law, the CNMI government will regulate "the alienation of permanent and long term interests in real property so as to restrict the acquisition of such interests to persons of [NMI] descent." Article XII of the CNMI Constitution, which implements Section 805 of the Covenant, declares that any transaction in which a person not of NMI descent acquires a permanent or long-term interest, i.e., a leasehold of more than 55 years, in land in the CNMI is void ab initio. The plaintiffs in Wabol argued that these provisions were unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment.

The Ninth Circuit began its analysis by defining the exact issue it was called upon to decide. The court stated that because Congress' powers derive from and are limited by the Constitution, the initial inquiry was "whether Congress could, under the territories clause, properly exclude the [Equal Protection Clause] of the United States Constitution from operation in the Commonwealth." Wabol, 958 F.2d at 1459. The court then further narrowed the issue to this: "Is the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress' power to exclude from operation in the territory under Article IV, section 3 of the Constitution?" Id. at 1460. The Ninth Circuit thus recognized that a similar land alienation restriction based on

national origin would not pass constitutional muster if it were imposed within one of the several States, and that this restriction could only be upheld by applying a different constitutional standard in the CNMI than that which is applied throughout the rest of the United States.

The court noted that in Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir.), cert. denied, 467 U.S. 1244 (1984), it held that the Sixth Amendment right to a trial by jury does not apply in the CNMI, because that right was "primarily a procedural right designed to safeguard the broader and more fundamental right to a fair trial protected by the due process clause." Wabol, 958 F.2d at 1460. The Wabol court stated that the Ninth Circuit in Atalig had thus "rejected the broad proposition that those guarantees incorporated into the Fourteenth Amendment for application to the states must also be incorporated for application to the Commonwealth." Id. Instead, the Wabol court held that: "[i]n the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this *international* sense." Id.

The court then undertook to define what standard should be applied by courts presented with the problem of determining what rights are fundamental in the "international sense." The court noted that in the territorial context, it should aspire to "preserv[e] Congress' ability to accommodate the unique social and cultural conditions and values of a particular territory. Moreover, [the court] should be cautious in restricting Congress' power in this area." Id. Relying on language from King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975), the court decided that in order to "find[] a delicate balance between local diversity and constitutional

command," it would "consider whether the claimed right would be impractical or anomalous in the NMI." Wabol, 968 F.2d at 1461. Using this standard, the court held that because of the cultural connection between the people of the NMI and the land, it would be both impractical and anomalous to enforce the right of equal access to land, embodied in the equal protection clause of the Fourteenth Amendment, in the CNMI. Id. at 1462. Thus, the court held that "this particular aspect of equality is [not] fundamental in the international sense." Id.

The Ninth Circuit's decisions in Wabol and Atalig establish the analytical framework that this Court must apply when presented with claims of equal protection violations by Congress in the CNMI. Those decisions plainly hold that the question of whether a right is "fundamental" is determined by a different standard in the CNMI and other non-state entities associated with the United States than that same question is determined within the 50 States. To wit, the Wabol court held: "What is fundamental for purposes of the Fourteenth Amendment incorporation is that which 'is necessary to an Anglo-American regime of ordered liberty.' In contrast, 'fundamental' within the territory clause are 'those . . . limitations in favor of personal rights which are the basis of all free government." Wabol, 958 F.2d at 1460 (citations omitted). Thus, in this case, the question raised by the Governor's equal protection argument, framed using the Ninth Circuit's language in Wabol, becomes whether the asserted right to privacy in certain tax information is "fundamental in th[e] *international* sense." Id.

This case is much easier, however, than Wabol. There, the claim was that Congress had waived the substantive constitutional right of equal access to land in order to allow, and in fact, to mandate a law restricting land alienation on the basis of national origin. The status of the right of equal access to land as a fundamental right is unquestionable throughout the rest of the United States. Shelley v. Kraemer, 334 U.S. 1, 10-11 (1948); Buchanan v. Warley, 245

U.S. 60, 74 (1917). Moreover, the classification in Wabol proceeded along suspect lines, i.e., national origin. See Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (noting that classifications based on nationality are "inherently suspect and subject to close judicial scrutiny."). Thus, the Wabol court was forced to "balance between local diversity and constitutional command." Wabol, 958 F.2d at 1461. Here, the claimed right is a right to privacy in tax records springing not from the Constitution, but from a statute, I.R.C. § 6103. The Governor has not cited, nor has the court found, any law or precedent which would support a finding that the right of privacy in a person's tax records is a fundamental right in the international or any other sense.

It can hardly be said that such a right is one of the "'personal rights' which are the 'basis of all free government.'" Wabol, 958 F.2d at 1460. Nor is it a right derived from the "shared beliefs of diverse cultures." Id. To the contrary, the notion of a *constitutional* right to privacy is a distinctly American creation, born within the last 30 years. See Griswold v. Connecticut, 381 U.S. 479 (1965) (holding for the first time that the "penumbras" and "emanations" of several guarantees of the Bill of Rights established a right of privacy of married persons to use contraceptives). Furthermore, it has only been in selected arenas such as marital and reproductive rights and Fourth Amendment search and seizure cases, that courts have recognized a constitutional right of privacy to exist. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (holding that right of privacy encompassed right to abortion); Griswold, supra; Jones v. United States, 357 U.S. 493 (1958) (stating that purpose of Fourth Amendment was "to shield the citizen from unwarranted intrusions into his privacy."). Thus, the claimed right to privacy in tax records cannot be characterized as fundamental in any sense.

Because Public Law 98-213 does not affect a fundamental right, this Court is not forced to "balance between local diversity and constitutional command." Wabol, 958 F.2d at 1461. Consequently, the balancing test set forth in King and used by the Wabol court is inapplicable to the constitutional analysis of the statute. It is unnecessary for this Court to determine "whether the claimed right is one which would be impractical or anomalous in the NMI." Id. The claimed right is not a fundamental right protected by the Fourteenth Amendment, so it cannot be an "international" fundamental right under the looser constraints placed on Congress by the territory clause. Accordingly, I find that the right to privacy in tax records is not a fundamental right in the international sense.

As Public Law 98-213 neither creates a suspect classification nor impinges upon a fundamental right, it is not to be subjected to strict judicial scrutiny. Avendano-Camacho, 786 F.2d at 1394. Once again, a recent Supreme Court decision specifically defines the standard of review this Court must apply to the challenged statute:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Federal Communications Comm'n v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993) (citations and footnote omitted). Thus, this case requires the utmost of judicial restraint. The classification must be upheld unless there is no "reasonably conceivable state

of facts that could provide a rational basis for the classification." If there are any "plausible reasons" for the challenged classification, this Court's "inquiry is at an end."

According to the Governor, Congress enacted Public Law 98-213 for two purposes: 1) to extend the deadline for the CNMI to implement its mirror tax code; and 2) to put an end to the CNMI's practice of abating taxes, rather than collecting and later rebating them. The Governor does not contest the legitimacy of either of these purposes. It is certainly plausible that requiring public disclosure of the tax rebate information would further the legitimate purpose of ensuring that the CNMI is no longer abating the taxes of any residents of the Commonwealth.[8/]

The Supreme Court's decision in Beach Communications also provides us with further guidance as to the presumptions and burdens that bear on the inquiry into the validity or invalidity of the challenged classification:

> On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

Beach Communications, Inc., 113 S. Ct. at 2102 (citations omitted).

In this case, the Governor has not met this burden.[9/] The Governor alleges that:

[8/] See citation to State ex rel. Colescott v. King, 57 N.E. 535, 538 (Ind. 1900), supra, note 2.

[9/] In fact, the Governor's equal protection argument does not analyze the statute under either the rational basis or the strict scrutiny tests. The Governor simply argues that the statute "treats U.S. citizens of the CNMI differently from citizens of the several states," and thus "does not treat alike 'all persons similarly situated.'" Governor's Brief of June 4, 1993, at 16 (continued . . .)

> The legislative history of P.L. 98-213 . . . suggests that [the disclosure] provision bears no logical relationship to any of the other provisions of the statute or to the expressed purpose of Congress in enacting those provisions. Instead, it appears that Congress, by including the rebate publication requirement as part of P.L. 98-213, sought retribution against the CNMI for what it believed was a violation by the CNMI of the Covenant.

Governor's Brief of June 4, 1993, at 18. The Governor further alleges that: "it seems that the apparent purposes of P.L. 98-213 easily could have been achieved without resort to the draconian measure of requiring public disclosure of confidential tax return information." Id.[10/]

As the Supreme Court held in Beach Communications, these allegations are "entirely irrelevant for constitutional purposes." Beach Communications, Inc., 113 S. Ct. at 2102. Similarly, the fact that the disclosure provisions received only passing mention in the legislative history is also irrelevant, "because we never require a legislature to articulate its reasons for enacting a statute." Id. The statute is clear on its face; there is no need to resort to legislative history. See generally Conroy v. Aniskoff, 113 S. Ct. 1562, 1567-72 (1993) (Scalia, J.,

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[9/](. . . continued)
(quoting City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985)). But as is clear from the above discussion of the CNMI tax rebate system, CNMI taxpayers and other United States taxpayers are not at all "similarly situated." Residents of the CNMI pay no taxes to the United States government whatsoever, yet they receive many of the benefits of United States citizenship. Citizens of the several States are not automatically entitled to a 95% rebate of all of the taxes they pay into the government fisc. Thus, the taxpayers of the CNMI enjoy a special privilege conferred upon them by Congress which is not shared by United States citizens not living in the CNMI. The disclosure requirement of Public Law 98-213 does treat alike all persons similarly situated, i.e., all persons receiving a 95% rebate of taxes they paid to the CNMI.

[10/] As is stated in footnote 9, the Governor's brief does not apply this equal protection analytical framework. These arguments are taken from a section of the Governor's brief in which he argues that Public Law 98-213 violates the due process clause of the Fifth Amendment.

concurring) (extolling the evils of judicial reliance on legislative history, especially when "[t]he statutory command . . . is unambiguous, unequivocal, and unlimited.").

In sum, Public Law 98-213 does not require strict equal protection scrutiny because it does not establish a classification that proceeds along suspect lines, nor does it impinge upon a right which is fundamental in the international sense. The statute passes rational basis scrutiny because there exist "plausible reasons" for its enactment. Moreover, the Governor has not met his burden of "negativ[ing] every conceivable basis which might support" the statute. Accordingly, I find that Public Law 98-213 does not violate the CNMI's citizens' right to equal protection of the laws.

5. Whether the disclosure provision of Public Law 98-213 violates the CNMI Constitution.

The Governor contends that the public disclosure provision of Public Law 98-213 violates Article I, Section 10 of the CNMI Constitution, which provides that: "The right of individual privacy shall not be infringed except upon a showing of compelling interest." According to the Governor, that provision of the CNMI Constitution operates to prevent the application of the disclosure provision of Public Law 98-213. However, Section 102 of the Covenant provides that: "The relations between the Northern Mariana Islands and the United States will be governed by this Covenant, which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands." Public Law 98-213 is a "law[] of the United States applicable to the Northern Mariana Islands," and thus is "the supreme law of the Northern Mariana Islands." Support for this reading of Section 102 can be found in the "Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern

Mariana Islands," ("Analysis") drafted by the Marianas Political Status Commission ("MPSC") and issued February 1, 1975. The MPSC negotiated the Covenant on behalf of the people of the Northern Mariana Islands. The Analysis provides that:

> Section 102 is similar to Article VI, Clause 2 of the Constitution of the United States, which makes the Constitution, treaties and laws of the United States the supreme law in every state of the United States. This means that federal law will control in the case of a conflict between a local law (even a state's constitution) and a valid federal law.

Analysis at 10. See Perez v. Campbell, 402 U.S. 637 (1971) ("[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."). Accordingly, Article I, Section 10 of the CNMI Constitution does not prevent the enforcement of the disclosure provision of Public Law 98-213.

6. Whether the disclosure provision of Public Law 98-213 violates the Covenant.

Finally, the Governor argues that the disclosure provision of Public Law 98-213 violates Section 103 of the Covenant, which provides that: "The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption." The Governor contends that the procedures concerning rebate of taxes are a matter of local law by virtue of Covenant § 602, which provides that: "The Government of the Northern Mariana Islands may by local law . . . provide for the rebate of any taxes received by it. . . ." Thus, the Governor claims that because Public Law 98-213's disclosure provision purports to affect the CNMI's tax rebate procedures, and those procedures are governed by local law, then Public Law 98-213 interferes with the CNMI's right to local self-government.

The Governor raised a similar argument first before this Court and then the Ninth Circuit in the Inspector General case, mentioned above. There, the Inspector General of the United States Interior Department attempted to audit the financial records of the CNMI pursuant to the authority granted him by the Insular Areas Act, codified at 48 U.S.C. § 1691b. After the CNMI government refused to grant the Inspector General access to the records necessary to conduct the audit, the Inspector General served an administrative subpoena on the Governor. On July 24, 1992, this Court issued an order enforcing that subpoena.

On appeal to the Ninth Circuit, the Governor argued that the self-government provision of Section 103 and mutual consent provision of Section 105, which prohibit the United States from unilaterally modifying the "fundamental provisions" of the Covenant, served to "carv[e] out an area of 'local affairs' immune from federal legislation." Inspector General case, 1993 WL 328705, at *6 (9th Cir., Sept. 1, 1993). According to the Governor's interpretation of those provisions of the Covenant, Congress was without authority to "pass any legislation 'affecting' the internal affairs of the CNMI." Id.

The Ninth Circuit, citing Covenant § 101, which provides that the CNMI is under the sovereignty of the United States, and Section 102, which makes the Covenant and all applicable federal laws the supreme law of the CNMI, rejected the Governor's broad interpretation as "untenable." Id. Instead, the court held that where it is claimed that a piece of legislation infringes the CNMI's right to self-government, it is "appropriate to balance the federal interest to be served by the legislation at issue against the degree of intrusion into the internal affairs of the CNMI." Id. In the Inspector General case, the court held that due to the large amount of financial support provided to the CNMI by the United States, the federal government has "a significant interest in ensuring that federal funds are being used properly and in determining

the efficacy of the CNMI's revenue collection to assess future amounts of assistance." Id. As to the degree of intrusion into the CNMI's internal affairs, the court stated that:

> Although the Governor would like to characterize this case as one involving unwarranted federal interference with the CNMI's internal fiscal affairs, the fact is that the financial assistance provided by the United States inextricably links federal and CNMI interests. This financial support was deemed to be such an integral part of the relationship and so essential to the economic development of the CNMI that it was embodied in the Covenant itself rather than in separate legislation. See Articles VI, VII. In view of the fact that a substantial portion of the CNMI budget is comprised of direct and indirect federal financial assistance, we cannot say that a federal audit impermissibly intrudes on the internal affairs of the CNMI.

Id.

Applying this balancing test to Public Law 98-213, I find that the statute does not violate the CNMI's right to self-government. In light of the CNMI's practice of rebating 95% of the taxes it collects, the United States has a substantial federal interest "in determining the efficacy of the CNMI's revenue collection to assess future amounts of assistance." Id. Rather than authorizing an audit of the rebate information, as it did in the Inspector General case, Congress enacted Public Law 98-213 which requires public disclosure of that information. Because the CNMI rebates most of the taxes it receives while relying so heavily on federal financial assistance, it cannot be said that requiring public disclosure of information related to those rebates impermissibly intrudes on the internal affairs of the CNMI.

Covenant § 105 expressly grants the United States the authority to pass laws specific to the CNMI. The exercise of that authority is limited only with respect to Articles I, II, and III, and Sections 501 and 805 of the Covenant. Covenant § 105. No limits are placed on Congress' authority to legislate with respect to Article VI of the Covenant, dealing with "Revenue and Taxation." The Covenant also expressly provides that United States income tax

law will apply with full force in the CNMI as a mirror image of the United States federal system. Covenant § 601. Further, the CNMI has adopted the entire Internal Revenue Code, including all amendments thereto. 4 Commonwealth Code § 1702. Thus, the disclosure provision of Public Law 98-213, which amends by implication I.R.C. § 6103, does not violate the CNMI's right to self-government guaranteed by Section § 103 of the Covenant.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment, or in the alternative, motion to dismiss, is DENIED, and Plaintiffs' motion for summary judgment is GRANTED. Accordingly, the Court orders that the Governor of the Commonwealth of the Northern Mariana Islands, in compliance with Public Law No. 98-213, 97 Stat. 1459, Section 3(b), shall maintain, as a matter of public record, the name and address of each person receiving a rebate of taxes paid pursuant to 4 Commonwealth Code § 1708, together with the amount of the rebate, and the year for which such rebate was made. The Governor shall have 14 days within which to comply with this order.[11/]

[11/] This information has already been compiled and released to the Committee on Interior and Insular Affairs (which has since been renamed the Committee on Natural Resources) of the United States House of Representatives. See Letter from Governor Guerrero to Congressman George Miller, Chairman, Committee on Interior and Insular Affairs, of July 4, 1992, attached to the complaint as Exhibit "G". The committee also relied on Public Law 98-213 as the basis for its claim for access to the rebate information. See Letter from Chairman Miller to Governor Guerrero of June 24, 1992, attached to the complaint as Exhibit "E".

IT IS SO ORDERED.

DATED this 24th day of September, 1993.

ALEX R. MUNSON
Judge

Received copy of Memorandum Opinion and Order for the ATTORNEY GENERAL, CNMI

By _____
Date: 9/24/93

Received copy of Memorandum Opinion and Order for THEODORE MITCHELL

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Date: _____