

IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN )  
MARIANA ISLANDS, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
ZHENG, HONG XIANG, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Criminal Case No. 98-0477

**ORDER**

**I. PROCEDURAL BACKGROUND**

This matter came before the court on April 19, 2000 in Courtroom 223A at 9:00 a.m. on Defendant's motion to dismiss. Assistant Attorney General Harold Pickering, Esq., appeared on behalf of the Commonwealth. David A. Wiseman, Esq., appeared on behalf of the Defendant, Hong Xiang Zheng. The court, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its decision.

**II. FACTS**

On December 16, 1998, the Commonwealth filed an Information charging Defendant with four counts of "Illegal Deductions," in violation of 3 CMC § 4434(c) and made punishable by 3 CMC § 4447(e). The Information alleges that between March, 1997 and October 13, 1998, Defendant unlawfully deducted expenses from the salary of Yu Shu Zheng, a non-resident worker. Count I charges Defendant with making an illegal deduction for insurance. Count II charges Defendant with making an illegal deduction for a transfer fee. Count III charges Defendant with making an illegal deduction for a health permit. Count IV charges Defendant with making an illegal deduction for a plane ticket.

**FOR PUBLICATION**

### III. ISSUES

1. Whether the court should grant Defendant's motion to dismiss on the ground that Counts I through IV of the Information charge Defendant with multiple counts for a single offense in violation of the rule against multiplicity.

2. Whether the court shall grant Defendant's motion to dismiss on the ground that the court lacks jurisdiction to hear this matter because 3 CMC § 4434(c) is not a penal statute.

### IV. ANALYSIS

#### A. Multiplicity of Counts in the Information.

The Commonwealth filed an Information charging Defendant with four counts of "Illegal Deductions," in violation of 3 CMC § 4434(c) and made punishable by 3 CMC § 4447(e). The Information alleges that between March, 1997 and October 13, 1998, Defendant unlawfully deducted expenses from the salary of Yu Shu Zheng. Count I charges Defendant with making an illegal deduction for insurance. Count II charges Defendant with making an illegal deduction for a transfer fee. Count III charges Defendant with making an illegal deduction for a health permit. Count IV charges Defendant with making an illegal deduction for a plane ticket.

Defendant contends that each count of the Information derives from a single transaction, the employment contract and employment relationship between Defendant and Yu Shu Zheng. Therefore, Defendant contends that he may only be lawfully charged with one count of "Illegal Deductions." The Commonwealth, however, asserts that each deduction was a separate and distinct violation of 3 CMC § 4434(c) and that each is punishable by 3 CMC § 4447(e).

An indictment or information may not charge a single offense in several counts without offending the rule against multiplicity. *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9<sup>th</sup> Cir. 1976) *cert denied*, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977). The purpose of the rule against multiplicity, which is derived from double jeopardy concerns, is to protect against

multiple [p. 3] punishments for a single offense. *State v. Sperry*, 945 P.2d 546, 549 (Or. App. 1997). The court looks to the information itself to determine whether it may fairly be read to charge but one crime in each count. *United States v. Bryan*, 868 F.2d 1032, (9<sup>th</sup> Cir. 1989), citing *United States v. Morse*, 785 F.2d 771, 774 (9<sup>th</sup> Cir. 1986), cert. denied, 476 U.S. 1186, 106 S.Ct. 2925, 91 L.Ed.2d 553 (1986). Also, a significant factor to be considered in determining whether the statute creates separate and distinct offenses is the language of the statute itself. *United States v. UCO Oil Co.*, supra at 836.

Here, Count I charges Defendant with making an illegal deduction for insurance, Count II charges Defendant with making an illegal deduction for a transfer fee, Count III charges Defendant with making an illegal deduction for a health permit, and Count IV charges Defendant with making an illegal deduction for a plane ticket. Each count in the Information charges Defendant with violating 3 CMC § 4434(c), which states, in pertinent part:

No deductions may be levied against a nonresident worker unless:

- (1) The expenses are specifically included in the employment contract entered between the employer and the nonresident worker and executed at the time of and place of recruitment of the nonresident worker;
- (2) Expenses incurred by the employer for room and board are no more than the expenses actually incurred by the employer in providing such benefits; and
- (3) Deductions of such expenses from employees compensation is not in violation of any applicable federal or Commonwealth law or regulation promulgated by the director.

3 CMC § 4434(c).

Each count, as stated, alleges a violation of 3 CMC § 4434(c). Each specific count, however, involves a distinct underlying violation involving a different subsection of the Nonresident Workers Act or a different underlying factual background. Count I charges Defendant with making an illegal deduction for insurance. 3 CMC § 4437(c) states, in pertinent part, that “[a]ll nonresident employment contracts under this chapter shall provide that the employer is responsible and liable for the insurance or payment of all medical expenses of the nonresident worker.” 3 CMC § 4437(d). As such, any deductions for medical insurance appear

to violate this provision. Count III charges [p. 4] Defendant with making an illegal deduction for a health permit. 3 CMC § 4438(b) states, in pertinent part, that “[t]he cost of any examination of a nonresident worker shall be borne by the employer.” 3 CMC § 4438(c). As such, any deduction by the employer for the costs of a medical examination appears to violate this provision. Counts II and IV, relating to the deduction of a transfer fee and of the cost of a plane ticket, do not violate any specific provision other than 3 CMC § 4434(c). However, these costs were imposed between March, 1997 and October 13, 1998, and “[w]here offenses are committed separately and severally at different times and at different places, they cannot be said to arise out of a single wrongful act.” *State v. Scott*, 827 P.2d 733, 739 (Kan. 1992).

Therefore, for the foregoing reasons, the court finds that Defendant has been properly charged with four separate counts of alleged illegal deductions. As such, Defendant’s motion to dismiss on the ground that the Information violates the rule against multiplicity is **DENIED**. The court notes, however, that Counts I and III could have more specifically referenced the subsections of the Nonresident Workers Act which were allegedly violated and which were not referred to until such time as the Commonwealth submitted its Opposition to Defendant’s Motion to Dismiss.

B. 3 CMC § 4434(c) as a Penal Statute.

Defendant contends that the court lacks jurisdiction over the present matter because 3 CMC § 4334 is not a “penal statute.” Defendant contends that this is a civil matter that should be dealt with by the Division of Labor in a civil context. The Commonwealth, however, asserts that the Legislature has mandated that any violation of the Nonresident Workers Act may be punished as a crime pursuant to 3 CMC § 4447(e), regardless of the availability of any civil remedies.

It is well settled that the government may have both a civil and a criminal cause of action as a result of a single fact situation. *See Commonwealth v. Aguon*, No. 97-004 (N.M.I. Oct. 30, 1997) (slip op.), *see also, United States v. National Ass’n of Real Estate Bds.*, 339 U.S. 485, 493, 70 S.Ct. 711, 716-717, 94 L.2d. 1007 (1950); *Helvering v. Mitchell*, 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917 (1938). Here, the Commonwealth has elected to bring a criminal action

against Defendant for alleged violations of the Nonresident Workers Act. The Commonwealth has the discretion to bring such a criminal action because the Legislature has chosen to make any violation of the [p. 5] Nonresident Workers Act a crime punishable by fine and by incarceration.

Pursuant to 3 CMC § 4447(e):

**Any person who violates any provision of this chapter** or any regulation or order issued under this chapter, or who makes any false statement to the chief or his authorized representative, or to the director, during the course of any investigation, hearing, or other proceeding under this chapter, **shall, upon conviction, be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year or both.**

3 CMC § 4447(e) (emphases added). Here, Defendant is charged with making illegal deductions in violation of 3 CMC § 4434(c), which states, in pertinent part, that:

No deductions may be levied against a nonresident worker unless:

- (1) The expenses are specifically included in the employment contract entered between the employer and the nonresident worker and executed at the time of and place of recruitment of the nonresident worker;
- (2) Expenses incurred by the employer for room and board are no more than the expenses actually incurred by the employer in providing such benefits; and
- (3) Deductions of such expenses from employees compensation is not in violation of any applicable federal or Commonwealth law or regulation promulgated by the director.

3 CMC § 4434(c). The court finds that 3 CMC § 4434(c), though appearing regulatory in nature, is a penal statute by virtue of the application of 3 CMC § 4447(e). The court, absent constitutional problems, is required to apply penal statutes as written because the power to decide what shall be offenses against the law rests with the legislative branch of the government. *See State v. Birgen*, 651 P.2d 240, 242 (Wash. Ct. App. 1982), *citing Morgan v. Devine*, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153 (1915). As such, Defendant's motion to dismiss on the ground that 3 CMC § 4434 is not a penal statute is **DENIED**.

## V. CONCLUSION

For the foregoing reasons, the court finds that each count of the Information relates to a separate and distinct occurrence and does not charge Defendant with multiple counts for a single

offense. As such, Defendant's motion to dismiss on the ground that the Commonwealth violated the rule against multiplicity is **DENIED**.

**[p. 6]** For the foregoing reasons, the court finds that 3 CMC § 4434(c), though appearing regulatory in nature, is a penal statute by virtue of the application of 3 CMC § 4447(e). As such, Defendant's motion to dismiss on the ground that 3 CMC § 4434(c) is not a penal statute is **DENIED**.

Trial on this matter is set for April 28, 2000, in courtroom 223A at 9:00 a.m.

So ORDERED this 24<sup>th</sup> day of April, 2000.

/s/ Juan T. Lizama  
JUAN T. LIZAMA, Associate Judge