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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. HYON OK LEE and TOWER CONSTRUCTION CORP., Defendants.	Criminal Case No. 98-379 **ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

I. PROCEDURAL BACKGROUND

This matter came before the Court on May 12, 1999, in Courtroom D on Defendants' motion to dismiss. Robert Goldberg, Esq., appeared on behalf of the Commonwealth. Reynaldo Yana, Esq., appeared on behalf of Defendants Hyon Ok Lee and Tower Construction Corporation. The Court, having heard the arguments of counsel and being fully informed of the premises, now renders its decision.

II. FACTS

On June 4, 1998, the Department of Labor and Immigration conducted a special operation at a construction site operated by Defendants which resulted in the apprehension of twenty-two nonresident workers who were allegedly performing labor or services as construction workers without nonresident worker contracts or Temporary Work Authorizations.

[p. 2] On September 24, 1998, a Stipulated Administrative Order was entered in which Defendants agreed that a civil penalty of $500 would be paid for each of the twenty-two

nonresident workers allegedly found to be working illegally for Defendants. The total sum of $11,000 was to be paid in monthly installments of $500.

On October 1, 1998, the Commonwealth filed a Criminal Information charging Defendants Hyon Ok Lee and Tower Construction Corporation with sixteen counts of providing unlawful employment in violation of 3 CMC § 4361(e). The sixteen employees involved in this present criminal action were among the twenty-two nonresident workers for which Defendants agreed to pay a civil penalty pursuant to the earlier Stipulated Administrative Order.

On February 17, 1999, a second Administrative Order was entered in which the Hearing Officer granted Defendants' request for a reduction in the amount of the monthly payments. Payments were reduced from $500 to $300 per month, beginning retroactively in January, 1999, with $500 payments to resume in October, 1999.

III. ISSUE

1. Whether the Court should dismiss the present criminal action against Defendants on the grounds that to allow such action would violate the Double Jeopardy Clause of the United States and NMI Constitutions.

IV. ANALYSIS

The Double Jeopardy Clause of the United States Constitution provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amdt. 5. The Double Jeopardy Clause of the NMI Constitution provides that "[n]o person shall be put twice in jeopardy for the same offense regardless of the governmental entity that first institutes prosecution." N.M.I. Const. art. I, § 4(e).

Defendants argue that to charge Defendants with a crime for the alleged illegal employment of nonresident workers would violate the Double Jeopardy Clause of the United States and NMI Constitutions because Defendants have already agreed to pay a civil penalty pursuant to a Stipulated Administrative Order for the alleged illegal employment of nonresident **[p. 3]** workers. Therefore, if the Government were allowed to prosecute Defendants in a criminal action then Defendants would be subjected to multiple punishments for the same conduct.

The Double Jeopardy Clause "protects only against the imposition of multiple criminal punishments for the same offense." Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 493, 138 L.Ed.2d (1997). However, a civil penalty may qualify as a "criminal punishment" for purposes of double jeopardy analysis where: (1) the legislature indicated either expressly or impliedly that a penalty should be characterized as criminal rather than civil; or (2) where the statutory scheme is so punitive in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. Id.

Regardless of the characterization of the penalty as civil or criminal in nature, the Commonwealth Supreme Court has stated that "in most civil actions, in order for double jeopardy to attach, **the government must collect the penalty or at least attempt to collect the penalty**." Commonwealth v. Aguon, No. 97-004 (N.M.I. Oct.30, 1997) (slip op. at 4) (emphasis added). In Aguon, the Division of Fish and Wildlife (DFW) held a hearing in which the defendant was assessed a civil fine in the amount of $3,000 for violating Fish and Wildlife Laws of the Commonwealth. Defendant did not pay the $3,000 fine and DFW never took any action to collect the penalty. The Commonwealth subsequently filed a Criminal Information in the Superior Court charging defendant with violating Fish and Wildlife Hunting Regulations. The Aguon Court held that double jeopardy did not attach to prevent the subsequent criminal action against the defendant as the Commonwealth never took any steps to collect the original penalty nor did the defendant ever pay such penalty. Id., at 5.

Here, Defendants agreed to a civil penalty pursuant to a Stipulated Administrative Order entered on September 24, 1998, whereby Defendants were to pay a civil penalty in the amount of $500 for each of the twenty-two illegally employed nonresident workers. On February 17, 1999, a second Administrative Order was entered for the purpose of amending the payment schedule set forth in the first order. Defendants argue that this second Order constitutes an attempt by the Government to collect the penalty assessed in the first order. Therefore, pursuant to the Aguon **[p. 4]** decision, Defendant argues that double jeopardy has attached and thus precludes the Government from bringing the present criminal action.

The Court finds that the second Administrative Order entered on February 17, 1999, was not an attempt by the Government to collect a penalty and that double jeopardy does not attach. The second Administrative Order was entered by the Hearing Officer only at the request of Defendants. The sole purpose of the second Administrative Order was to grant Defendants' request to reduce the monthly payments for the civil penalty from $500 to $300. A hearing held to address Defendants' request to reduce monthly payments cannot be deemed an "attempt to collect a penalty." Furthermore, 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. United States v. Ursery, ____ U.S. ____, 116 S.Ct. 2135, 2140, 135 L.Ed.2d 549 (1996); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 493, 70 S.Ct. 711, 716-717, 94 L.Ed. 1007 (1950); Helvering v. Mitchell, 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917 (1938). For the foregoing reasons, the present criminal action does not violate the Double Jeopardy Clause of the United States and CNMI Constitutions and as such, Defendants' motion to dismiss is **DENIED**.

V. CONCLUSION

For the foregoing reasons, the Court finds that the second Administrative Order entered on February 17, 1999, was not an attempt by the Government to collect a penalty and that double jeopardy does not attach, therefore Defendants' motion to dismiss is **DENIED.**

So ORDERED this 14 day of May, 1999.

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