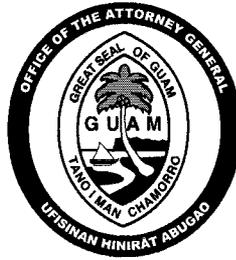


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## OFFICE OF THE ATTORNEY GENERAL

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August 13, 2009

### LEGAL MEMORANDUM

Ref:DOA 09-0613

TO: Director, Department of Revenue and Taxation  
Director, Department of Administration

FROM: Attorney General *ALS*

SUBJECT: **PL 29-18 – Use of COLA Certificates to Pay Taxes**

### Introduction

On September 29, 2007, PL 29-18, “The COLA Relief Act” was signed into law. Section 1 of the law, entitled “Legislative Intent” provides in part as follows:

This Act compels issuance of a transferable, interest-bearing document stating the settlement amount due each claimant that can be used to secure loans, pay taxes, sell for case, *or* otherwise conveyed in an open market.

(Emphasis in original).

Section 2, which adds a new Subsection (d) to §6404 of Chapter 6 of Title 5 Guam Code Annotated makes no further reference as to any legal authority for using COLA certificates for payment of taxes. Rather, it only authorizes issuance of certificates for the COLA settlement.

### Question Presented and Short Answer

You have asked whether the COLA certificates may in fact be used as payment for taxes. No, the COLA Certificates may not be used as payment for income tax, or for payment of other local taxes under PL 29-18, as presently drafted.

### Discussion

Guam imposes several taxes on its residents and businesses, those being specifically the U.S. income tax laws in force in the United States, as well as several “local” taxes imposed pursuant to Guam Code Annotated Title 11.

A. Guam Territorial Income Tax (“GTIT”)

The U.S. income tax laws in force in the United States are applicable to Guam pursuant to 48 USCA §1421i. 48 USCA §1421i(a) provides:

The income-tax laws in force in the United States of America and those which may hereafter be enacted *shall* be held to be likewise in force in Guam: *Provided*, That notwithstanding any other provision of law, the Legislature of Guam may levy a separate tax on all taxpayers in an amount not to exceed 10 per centum of their annual income tax obligation to the Government of Guam.

(Emphasis added).

This income tax, payable to the government of Guam, is referred to as the “Guam Territorial Income Tax” (“GTIT”). 48 USCA §1421i(b). In applying the GTIT, except as manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1986 and 1939, shall be read to substitute “Guam” for the “United States”, “Governor or his delegate” for “Secretary or his delegate”, as well other applicable substitutions as specified in the Organic Act. 48 USCA §1421i(e). This substitution process is commonly referred to as “mirroring”. *Sayre & Co. v. Riddell*, 395 F2d 407 (9<sup>th</sup> Cir. 1968).

As further noted in *Sayre*:

The general conclusion that we draw from the available evidence, then, is that Congress intended that Guam should apply the Internal Revenue Code (with those deletions prescribed by section 1421i(d)(1)) to persons and income within its territory just as the United States applies the Code to persons and income within its territory.

The interpretative omissions and substitutions of language authorized by section 1421i(d)(1) and (e) are those which are necessary to effectuate this intention. We may not adopt a construction inconsistent with it, as we did in *Atkins-Kroll*, simply because we consider the result more equitable. *Deviations from the intended dual structure by substantive revision of the basic scheme of the Code as applied to Guam must be left to Congress.*

*Sayre & Co. v. Riddell*, 395 F.2d 407, 412 -413 (9<sup>th</sup> Cir. 1968) (fn omitted; emphasis added).

As such, the Government of Guam does not have authority to amend, or deviate from the GTIT. Only the U.S. Congress may amend such provisions. Therefore, use of COLA Certificates to pay income taxes will not be permitted under the mirror form of the internal revenue code unless specifically allowed pursuant to the GTIT.

GTIT §6311(a) provides as follows:

It shall be lawful for the Secretary to receive for internal revenue taxes (or in payment for internal revenue stamps) any commercially acceptable means that the Secretary deems appropriate to the extent and under the conditions provided in regulations prescribed by the Secretary.

The Secretary of the Treasury has promulgated Treasury Regulation §301.6311-1 to address the acceptable means in which income taxes may be paid. Specifically, it provides that the Government:

may accept checks or drafts drawn on any financial institution incorporated under the laws of the United States or under the laws of any State, the District of Columbia, or any possession of the United States, or money orders in payment for internal revenue taxes, provided the checks, drafts, or money orders are collectible in United States currency at par, and subject to the further provisions contained in this section.

26 C.F.R. §301.6311-1.

Section 301.6311-1(b) indicates that the term “check” may be certified or uncertified, cashier’s, treasurer’s or other form of check or draft. Notably, the term “check” does not specifically include the Guam COLA Certificates.

The Secretary of the Treasury has not provided that the Guam COLA Certificates are an acceptable means of paying income taxes. Furthermore, as discussed above, the local Legislature is not authorized to amend the income tax laws of the United States, as applicable in Guam pursuant to the Organic Act, and as such, cannot authorize the use of COLA Certificates for income tax payments.

#### B. Use for Payment of “Local Taxes”

The Government of Guam imposes other taxes in addition to the income tax. These taxes include, but are not limited to, the Real Property Tax, the Business Privilege Tax and the Excise Tax on Occupancy of Hotel and Similar Lodging House Facilities.

11 GCA §15101(b) provides in part as follows:

No real property or property other than money may be accepted by Department of Revenue and Taxation as settlement for any outstanding tax liability nor may be received by the government of Guam pursuant to §38101 of the Government Code of Guam without prior specific statutory authority for the transaction.

(Emphasis added).

Generally, a Court will not treat the purpose clause of a statute as part of the operative law. As explained by one court:

It is one thing to construe the statutory language "to see whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1311 (9th Cir.1992). It is quite another to treat the purpose, and not the operative words of the statute, as the law.

*Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433, 436 (9<sup>th</sup> Cir. 1994).

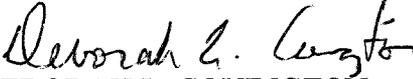
As further explained in *Governors Office of Consumer Services v. Illinois Commerce Com'n*, 220 Ill.App.3d 68, 74, 580 N.E.2d 920, 923, 162 Ill.Dec. 737,740 - 741 (Ill.App. 1991):

"Prefatory language \* \* \* generally is not regarded as being an operative part of statutory enactments. The function of the preamble of a statute is to supply reasons and explanations for the legislative enactments. The preamble does not confer powers or determine rights. [Citation.] A declaration of policy contained in a statute is, like a preamble, not a part of the substantive portions of the act. Such provisions are available for clarification of ambiguous substantive portions of the act, but may not be used to create ambiguity in other substantive provisions. [Citation.]" *Illinois Independent Telephone Association v. Illinois Commerce Comm'n* (1988), 183 Ill.App.3d 220, 236-37, 132 Ill.Dec. 154, 163, 539 N.E.2d 717, 726.

The Legislative intent section which indicates that the COLA certificates can be used to pay taxes should not be regarded as being an operative part of the statutory enactment. That particular section does not confer powers or determine rights. As such, under 11 GCA §15101(b), there is no "prior specific statutory authority" for accepting anything other than money for payment of taxes. Therefore, the COLA Certificates may not be used for payment of local taxes.

### Conclusion

The use of COLA Certificates to pay for income tax obligations is not permitted under the Guam Territorial Income Tax Code. Nor may the COLA Certificates be used to pay other "local" taxes. 11 GCA §15105(b) requires only that "money" be used to pay taxes unless there is "prior specific statutory authority." Because the preamble or Legislative Intent section is not part of the main body of the statute, there is no "prior specific statutory authority" to pay for taxes in a means other than money.

  
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