FSM SUPREME COURT TRIAL DIVISION

FUJI ENTERPRISES, Plaintiff/Counter-Defendant, vs. EUGENE AMOR, in his official capacity as the Secretary of Finance, Government of the Federated States of Micronesia, Defendant/Counterclaimant.	)	CIVIL ACTION NO. 2014-044

ORDER DECIDING SUMMARY JUDGMENT CROSS-MOTIONS

Larry Wentworth
Associate Justice

Hearing: October 12, 2020
Submitted: December 16, 2020
Decided: January 22, 2021

APPEARANCES:

For the Plaintiff: Yoslyn G. Sigrah, Esq.
P.O. Box 3018
Kolonia, Pohnpei FM 96941

For the Defendant: Josephine Leben James, Esq.
Assistant Attorney General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Summary Judgment – Cross-Motions

Summary judgment is proper when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The rule is no different where there are cross-motions for summary judgment. That is, the summary judgment standard is not changed when the parties bring cross-motions for summary judgment, each nonmovant receiving the benefit of favorable inferences. Fuji Enterprises v. Amor, 23 FSM R. 130, 137 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions

An FSM court must first look to FSM sources of law rather than begin with a review of other courts' cases, but when it has not previously construed an FSM procedural rule that is identical or similar to a U.S. counterpart, the court may consult U.S. sources for guidance in the rule's application, such as when the FSM summary judgment rule mirrors the U.S. rule, and the court has not explicitly addressed how to approach cross-motions for summary judgment, although it has previously entertained cross-motions. Fuji Enterprises v. Amor, 23 FSM R. 130, 137 n.2 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions

Merely because the parties have filed cross-motions for summary judgment does not mean that summary judgment for one side or the other is appropriate because each cross-motion must be independently assessed on its own merit. Fuji Enterprises v. Amor, 23 FSM R. 130, 137 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions

Even when both parties move for summary judgment, asserting the absence of any genuine issues of material fact, a court need not enter judgment for either party. Rather, each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration. Fuji Enterprises v. Amor, 23 FSM R. 130, 137 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions

Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. If any such issue exists it must be disposed of by a plenary trial and not on summary judgment. Fuji Enterprises v. Amor, 23 FSM R. 130, 137 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions

On cross-motions for summary judgment, each motion is reviewed separately, drawing the facts and the inferences in favor of the non-moving party. When these cross-motions are filed simultaneously, or nearly so, the court ordinarily should consider the two motions at the same time, thereby applying the same standards to each motion. But even then the court must mull each motion separately, drawing inferences against each movant in turn. Fuji Enterprises v. Amor, 23 FSM R. 130, 137-38 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions

When a court is presented with cross-motions for summary judgment, it must view each motion separately, in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor. This is true even for cross-motions filed simultaneously. Fuji Enterprises v. Amor, 23 FSM R. 130, 138 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions

A cross-motion for summary judgment does not concede the factual assertions of the opposing

motion, and separate motions for summary judgment from each party are not an admission that no material facts remain at issue. Fuji Enterprises v. Amor, 23 FSM R. 130, 138 (Pon. 2021).

Civil Procedure – Frivolous Actions; Judgments – Final Judgment

Any attempt to resurrect a claim against a party that has been dismissed and that dismissal made a final judgment that was affirmed on appeal is either misguided, meritless, or frivolous. Fuji Enterprises v. Amor, 23 FSM R. 130, 138-39 (Pon. 2021).

Torts – Damages – Punitive; Torts – Governmental Immunity

As a matter of public policy, governments are generally not liable for punitive damages. Fuji Enterprises v. Amor, 23 FSM R. 130, 139 (Pon. 2021).

Sovereign Immunity; Torts – Damages – Punitive; Torts – Governmental Immunity

The FSM's waiver of sovereign immunity does not include a waiver permitting punitive damages. No punitive damages are possible against the FSM or its officers or agencies. Fuji Enterprises v. Amor, 23 FSM R. 130, 139 (Pon. 2021).

Civil Procedure – Discovery

A party has a duty to seasonably amend a prior discovery response if the party learns, or becomes aware, that its prior response was incorrect or insufficient when made. Fuji Enterprises v. Amor, 23 FSM R. 130, 139 (Pon. 2021).

Civil Procedure – Discovery

When a party receives late discovery responses, the relief that a court often grants is more time, if needed, to meet and respond to the new evidence. Fuji Enterprises v. Amor, 23 FSM R. 130, 139-40 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions; Evidence – Burden of Proof

When a case is presented to the court by way of cross-motions for summary judgment, each party has the burden of producing evidence to support its motion. Even so, when simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them. Fuji Enterprises v. Amor, 23 FSM R. 130, 140 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions; Evidence

When the parties have filed cross-motions for summary judgment, the court must consider each party's evidence regardless under which motion the evidence was offered before ruling on either motion. Fuji Enterprises v. Amor, 23 FSM R. 130, 140 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds

When the plaintiff alleged the lack of an actual in-house audit, or of the relevant audit reports, but documents provided by the defendant are persuasive evidence that the in-house audit did, in fact, occur, and that shows that this material fact (alleged lack of an in-house audit) is genuinely disputed. Fuji Enterprises v. Amor, 23 FSM R. 130, 140 (Pon. 2021).

Civil Procedure – Pleadings – Amendment; Civil Procedure – Summary Judgment – Grounds

A party cannot use a summary judgment motion to effect a *de facto* amendment of its pleadings to assert a new allegation or claim. Therefore a claim that falls outside the scope of the plaintiff's complaint is not properly before the court in a summary judgment motion and must be disregarded. Fuji Enterprises v. Amor, 23 FSM R. 130, 140, 144, 145 (Pon. 2021).

Statutes – Presumptions; Taxation – Gross Revenue Tax

The 54 F.S.M.C. 152(3) presumption can apply not only when a business fails to make and file a required return, but also upon failure to pay any amount due. Fuji Enterprises v. Amor, 23 FSM R. 130, 141 (Pon. 2021).

Statutes – Construction

When a statute sets forth a list in the disjunctive (using the word "or"), the existence of any one of the listed conditions makes the statute applicable. Fuji Enterprises v. Amor, 23 FSM R. 130, 141 (Pon. 2021).

Statutes – Presumptions; Taxation – Gross Revenue Tax

Once a CTA tax audit determines that further tax is due, the 54 F.S.M.C. 152(3) presumption that the tax determination is correct is in effect concerning the additional tax amount due unless and until that additional tax amount is proved incorrect. Fuji Enterprises v. Amor, 23 FSM R. 130, 141 (Pon. 2021).

Statutes – Construction

Because a provision of law must be read so as to be internally consistent and sensible, courts read different subsections of the same statute in a manner that permits them to be consistent with each other rather than to be inconsistent or at cross purposes. Fuji Enterprises v. Amor, 23 FSM R. 130, 141 (Pon. 2021).

Statutes – Presumptions; Taxation – Gross Revenue Tax

As a matter of law, the 54 F.S.M.C. 152(3) presumption of correctness applies to a preliminary notice of tax assessment. Fuji Enterprises v. Amor, 23 FSM R. 130, 141 (Pon. 2021).

Constitutional Law – Due Process

A taxpayer's conversion, unauthorized possession, and illegal collection claims are all subsumed in its due process cause of action when the claims all assert that the taxpayer's property was taken illegally, that is, taken without due process of law. Fuji Enterprises v. Amor, 23 FSM R. 130, 141-42, 145 (Pon. 2021).

Constitutional Law – Due Process

A party's procedural due process protections are not violated merely because that party receives an unfavorable or even a wrong decision. Due process requires that a fair and rational decision-making process be followed. Fuji Enterprises v. Amor, 23 FSM R. 130, 142 (Pon. 2021).

Constitutional Law – Due Process; Taxation – Gross Revenue Tax

Neither due process protections nor the CTA Procedures Manual make a business that filed tax returns of less than $200,000 gross revenue immune from a tax audit. CTA has wide discretion in selecting which tax returns under $200,000 to audit. Fuji Enterprises v. Amor, 23 FSM R. 130, 142 (Pon. 2021).

Constitutional Law – Due Process – Procedural; Taxation – Gross Revenue Tax

Once a business was assessed $6,684.99 in further taxes was due, and the business was given notice of that determination and that it had 30 days to prove that determination wrong, and since the business did not take advantage of this opportunity to be heard and never provided any evidence to prove that the assessment was wrong, the 54 F.S.M.C. 152(3) presumption of the tax's correctness applies, and the business's due process rights were not violated because the business, after notice, just failed to take advantage of its due process opportunity to be heard and to prove that the figures were incorrect. Fuji Enterprises v. Amor, 23 FSM R. 130, 142 (Pon. 2021).

Taxation – Tax Liens

All business gross revenue taxes are a lien upon any property of the person or business obligated to pay those gross revenue taxes and may be collected by levy upon such property in the same manner as the

levy of an execution. Fuji Enterprises v. Amor, 23 FSM R. 130, 143 (Pon. 2021).

Constitutional Law – Due Process – Procedural; Taxation – Tax Liens

Usually, notice and an opportunity to be heard must be given before a government can deprive a person of property, but a government does not need to follow this procedure in the case of taxes, but the government must provide a post-deprivation opportunity to challenge the tax and a clear and certain remedy. The tax lien statute is therefore constitutional and does not violate a business's due process rights. Fuji Enterprises v. Amor, 23 FSM R. 130, 143 (Pon. 2021).

Taxation – Tax Liens

Section 153 does not require a court-issued writ of execution or a court judgment before issuance. If it did, it would say so. Instead, 54 F.S.M.C. 153 permits a levy in the same manner as the levy of an execution. Fuji Enterprises v. Amor, 23 FSM R. 130, 143 n.3 (Pon. 2021).

Constitutional Law – Due Process – Procedural; Taxation – Tax Liens

When a business exercised its post-deprivation due process right to be heard, its due process rights were not violated by the statutory tax lien and the tax levy. Fuji Enterprises v. Amor, 23 FSM R. 130, 143 (Pon. 2021).

Administrative Law – Judicial Review; Constitutional Law – Due Process – Procedural

When a party does not claim that it was denied the opportunity to call witnesses, put on evidence, or be represented by counsel during the administrative hearing but merely contends that the Secretary's decision was wrong, that unfavorable or even an incorrect decision does not violate due process so long as a fair and rational decision-making process was followed. Fuji Enterprises v. Amor, 23 FSM R. 130, 143 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When the plaintiff pled a gross negligence cause of action against only one defendant and all claims against that defendant were dismissed and that dismissal was affirmed on appeal, no gross negligence claim is currently pending before the court, and the plaintiff cannot obtain summary judgment on its gross negligence claim. Fuji Enterprises v. Amor, 23 FSM R. 130, 144 (Pon. 2021).

Civil Procedure – Summary Judgment – Cross-Motions; Civil Procedure – Summary Judgment – Grounds

When a plaintiff's claim was, as a matter of law, decided against the plaintiff as a part of one party's final judgment and was affirmed on appeal, that claim is not a proper subject of either the plaintiff's or the remaining defendant's cross-motion for summary judgment because it has already been decided as a matter of law. Fuji Enterprises v. Amor, 23 FSM R. 130, 145 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds – Particular Cases

When the plaintiff's claim that there was no audit falls outside the scope of its complaint and is therefore not properly before the court in a summary judgment motion, it must be disregarded, and, even drawing all reasonable inferences in the plaintiff's favor, the plaintiff's somewhat implausible assertion that there was no in-house audit is not a genuine dispute of fact because the audit is a fact that the plaintiff cannot dispute since the plaintiff pled the audit's existence in its complaint. Fuji Enterprises v. Amor, 23 FSM R. 130, 145-46 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Taxation – Gross Revenue Tax

When it was the taxpayer's burden to produce evidence to disprove the correctness of the government's audit figures and its tax assessment, and the taxpayer has not done so although it has had many opportunities to do so, there is no genuine dispute about the amount of the additional taxes the taxpayer owes because the taxpayer has neither tried to rebut, nor rebutted, the statutory presumption of the

correctness of the tax assessment. Fuji Enterprises v. Amor, 23 FSM R. 130, 146 (Pon. 2021).

Taxation – Gross Revenue Tax

All businesses required to make and file tax returns must keep and maintain accurate records, and those records may be inspected and audited at any reasonable time by the Secretary for the purpose of administering the business gross revenue taxes. Fuji Enterprises v. Amor, 23 FSM R. 130, 146 (Pon. 2021).

Civil Procedure – Summary Judgment – Grounds

Even when no genuine issue of material fact is present, a movant will not be granted summary judgment unless the movant is also entitled to judgment as a matter of law. Fuji Enterprises v. Amor, 23 FSM R. 130, 147 (Pon. 2021).

Debtor's and Creditor's Rights; Interest and Usury

The general rule is that, in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment will be first applied to the interest due. Fuji Enterprises v. Amor, 23 FSM R. 130, 147 (Pon. 2021).

Debtor's and Creditor's Rights; Interest and Usury; Taxation – Tax Liens

A tax levy on a taxpayer's bank account will first pay off the penalties and interest that had accrued up until then and will then be applied to the tax principal. Fuji Enterprises v. Amor, 23 FSM R. 130, 147 (Pon. 2021).

Interest and Usury; Taxation

Under 54 F.S.M.C. 155(5), interest on the unpaid balance of the tax principal will be collected at the rate of six percent per annum from its due date until the date it is paid. Fuji Enterprises v. Amor, 23 FSM R. 130, 147 (Pon. 2021).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On August 24, 2020, each side filed a motion for summary judgment. The court heard the parties' cross-motions on October 12, 2020. Neither side filed an opposition to the other side's motion. The court therefore, on November 25, 2020, ordered that each side should file and serve an opposition to the other side's summary judgment motion. The defendant filed his on December 14, 2020. The plaintiff sought, and was granted, an enlargement to file its opposition by December 16, 2020, but then did not file one. The court thereafter considered this matter submitted to it for its decision.

For the reasons that follow, the court denies the plaintiff's summary judgment motion and grants the defendant's summary judgment motion.

I. BACKGROUND

The Division of Customs and Tax Administration ("CTA") states that it conducted an in-house audit of Koji Akinaga d/b/a Fuji Enterprises ("Fuji") on April 3, 2010. In his August 3, 2020 affidavit, Fuji's general manager, Kazuhiro Fujita, avers that neither he nor Fuji's management or staff were ever involved with or participated in a CTA tax audit, inspection, or review.

On September 27, 2010, CTA issued to Fuji Enterprises a Notice of Final Tax Assessment for

$6,684.99[1] for business gross revenue taxes for the years 2006, 2007, and 2008. Fuji had already timely filed (and paid) business gross revenue tax returns for those years. CTA's assessment was for additional business gross revenue taxes that, based on the audit, CTA claimed were due. The September 27, 2010 notice stated: 1) that CTA had sent Fuji a preliminary notice of tax assessment on July 13, 2010; 2) that its audit was based on the incomplete records which Fuji had provided; 3) that it had given Fuji 30 days to provide any supporting documents if Fuji disagreed with CTA's preliminary tax assessment; and 4) that Fuji had not responded to CTA's preliminary notice. The September 27, 2010 final notice gave Fuji until October 26, 2010, to either pay or make arrangements to pay the assessment. Fuji did not respond or pay.

On October 25, 2013, CTA issued a Notice of Demand for Payment of Taxes, in the amount of $7,540.95, which included further penalties and interest computed through October 31, 2013. This notice required Fuji to either pay immediately or to arrange for payment within 30 days or CTA would resort to collection by levy as provided for in 54 F.S.M.C. 153. Fuji did not pay. Nor did it otherwise respond to CTA's tax demand.

On November 25, 2013, CTA served a Notice of Levy and Order of Execution on the Bank of the FSM and on the Bank of Guam for money up to $7,540.95 in their possession that was the property of "Fuji Enterprises owned by Mr. Koji Akinaga." On November 28, 2013, the Bank of the FSM remitted $6,676.10, the total amount that was in Fuji's bank account, to the FSM national treasury. Fuji did not have a Bank of Guam account that CTA could levy.

Fuji then asked the Assistant Secretary of Customs and Tax Administration Salvador S. Jacob for an administrative hearing before the Secretary of Finance, Kensley Ikosia. That hearing was held on January 24, 2014. Secretary Ikosia's February 17, 2014 decision upheld CTA's assessment and levy.

On November 12, 2014, Fuji filed suit against Assistant Secretary of Customs and Tax Administration Jacob, Secretary of Finance Ikosia, the FSM national government, and the Bank of the FSM, alleging that the tax assessment, the tax levy, and the bank's $6,676.10 payment to the FSM Treasury were all improper, illegal, and unconstitutional. All defendants moved to dismiss.

On August 7, 2015, the court ruled that Fuji had no claim against the Bank of the FSM for which relief could be granted and dismissed Fuji's claims against the bank. Fuji Enterprises v. Jacob, 20 FSM R. 121, 125-26 (Pon. 2015). That dismissal was later made a Rule 54(b) final judgment. Fuji appealed. The appellate court affirmed. Fuji Enterprises v. Jacob, 21 FSM R. 355, 361-65 (App. 2017).

The defendants other than the bank moved to dismiss Fuji's complaint for Fuji's failure to comply with 54 F.S.M.C. 156 and for the complaint's failure to state a claim on which relief could be granted. The court denied this motion to dismiss because an aggrieved taxpayer may institute an action for judicial review by filing a petition setting forth assignments of all errors the Secretary of Finance allegedly made when determining the assessment. Fuji Enterprises v. Jacob, 20 FSM R. 279, 280-81 (Pon. 2015).

The court further ordered that, unless a party filed a memorandum on why Assistant Secretary of Customs and Tax Administration Jacob, and the FSM national government should remain as defendants, they would be deleted as named parties defendant because the applicable statute, 54 F.S.M.C. 156(1), provided that the Secretary of Finance or his successor in office must be the named defendant in any such proceeding. Fuji Enterprises, 20 FSM R. at 280-81. No party filed a memorandum. Therefore, all the remaining defendants, except the Secretary of Finance, were deemed dismissed.

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[1] This represented $550.79 for tax year 2006, $ 1,762.94 for tax year 2007, and $2,422.28 for tax year 2008, for a total of $4,738.01, plus an additional $1,160.92 in penalties and $786.06 in interest.

The Secretary then answered and counterclaimed for the $864.85 of the assessment that it had not been able to collect by its levy on the banks plus further interest ($162.51 up to December 30, 2015). Fuji answered the counterclaim.

The parties now bring cross-motions for summary judgment.

II. CROSS-MOTION STANDARD

Summary judgment is proper when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g.*, Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 22 (App. 2015); Congress v. Pacific Food & Servs., Inc., 17 FSM R. 542, 545 (App. 2011); Weno v. Stinnett, 9 FSM R. 200, 206 (App. 1999); Iriarte v. Etscheit, 8 FSM R. 231, 236 (App. 1998); Nahnken of Nett v. United States, 7 FSM R. 581, 586 (App. 1996). "Summary judgment is appropriate only if there are no genuine issues of material fact. The rule is no different where there are cross-motions for summary judgment." Lawrence v. City of Philadelphia, 527 F.3d 299, 310 (3d Cir. 2008) (citation omitted).[2] That is, the summary judgment "standard is not changed when the parties bring cross-motions for summary judgment, each nonmovant receiving the benefit of favorable inferences." Chevron U.S.A. Inc. v. Mobil Producing Tex. & N.M., 281 F.3d 1249, 1253 (Fed. Cir. 2002).

Merely because "the parties have filed cross-motions for summary judgment does not mean, of course, that summary judgment for one side or the other is appropriate," Parks v. LaFace Records, 329 F.3d 437, 444 (6th Cir. 2003), because "each [cross-motion] must be independently assessed on its own merit." California v. United States, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

> [E]ven when both parties move for summary judgment, asserting the absence of any genuine issues of material fact, a court need not enter judgment for either party. Rather, each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration.

Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001) (citation omitted). This is because

> [c]ross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. If any such issue exists it must be disposed of by a plenary trial and not on summary judgment.

Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968).

"On cross-motions for summary judgment, each motion is reviewed separately, drawing the facts and the inferences in favor of the non-moving party." Scottsdale Ins. Co. v. United Rentals (N. Am.), Inc., 977

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[2] An FSM court must first look to FSM sources of law rather than begin with a review of other courts' cases, but when it has not previously construed an FSM procedural rule that is identical or similar to a U.S. counterpart, the court may consult U.S. sources for guidance in the rule's application. *See, e.g.*, George v. Albert, 17 FSM R. 25, 31 n.1 (App. 2010); Berman v. College of Micronesia-FSM, 15 FSM R. 582, 589 n.1 (App. 2008). Our summary judgment rule mirrors the U.S. rule, and, although the court has previously entertained cross-motions for summary judgment, it has not explicitly addressed how to approach the situation.

F.3d 69, 72 (1st Cir. 2020). When these "cross-motions are filed simultaneously, or nearly so, the court ordinarily should consider the two motions at the same time, thereby applying the same standards to each motion." Aggregate Indus.-N.E. Region, Inc. v. Teamsters Local Union No. 42, 762 F. Supp. 2d 285, 292 (D. Mass. 2010). But even then "'the court must mull each motion separately, drawing inferences against each movant in turn.'" Sigui v. M+M Commc'ns., Inc., 310 F. Supp. 3d 313, 315 (D.R.I. 2018) (quoting Cochran v. Quest Software, Inc., 328 F.3d 1, 6 (1st Cir. 2003)); *see also* Merchants Ins. Co. of N.H., Inc. v. United States Fid. & Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998); Reich v. John Alden Life Ins. Co., 126 F.3d 1, 6 (1st Cir. 1997).

Thus, when a court is "presented with cross-motions for summary judgment, [it] must view each motion separately, in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor." Fox v. Transam Leasing, Inc., 839 F.3d 1209, 1213 (10th Cir. 2016) (quoting United States v. Supreme Ct. of N.M., 839 F.3d 888, 906-07 (10th Cir. 2016)). This is true even for cross-motions filed simultaneously. Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 184 (D. Me. 2015). Furthermore, the court must keep in mind that "[a] cross-motion for summary judgment does not concede the factual assertions of the opposing motion," CEI Washington Bureau v. Department of Justice, 469 F.3d 126, 129 (D.C. Cir. 2006), and that "separate motions for summary judgment from each party are not an admission that no material facts remain at issue," Massey v. Del Labs., Inc., 118 F.3d 1568, 1573 (Fed. Cir. 1997).

III. FUJI'S SUMMARY JUDGMENT MOTION

A. *Fuji's Contentions*

Fuji contests not only the 2010 determination that Fuji owed an additional $6,684.99, but also the manner and procedure that CTA used to arrive at its demand for the additional 2006, 2007, and 2008 taxes, and that CTA later used to collect those taxes. Fuji contends that there is no evidence of an audit because there are no audit reports, and this creates an issue of material fact precluding summary judgment for the defendant. Fuji then reasons that, if there are no audit reports, there was no audit, and, if there was no audit, then there was no right to any assessment of additional taxes and CTA would not have had a right to a levy.

Fuji further contends that the statutory presumption of correctness for CTA tax assessments applies only to those assessments that CTA makes when the taxpayer has not filed and paid the business gross revenue tax, and not to those assessments made as the result of an audit after the taxpayer, such as Fuji, has filed and paid its gross business revenue taxes. Fuji argues that it did not meet the criteria listed in the July 2002 CTA Procedures Manual for selection for a business tax audit and that, at any rate, Fuji was never formally selected for an audit.

Fuji contends that CTA should not be able to help itself to funds in taxpayers' bank accounts under the guise of tax liens because, in Fuji's view, that deprives taxpayers of their assets and property without due process of law. Fuji also claims it is entitled to summary judgment on a gross negligence cause of action.

B. *Fuji's Requested Relief*

Fuji asks the court to order the FSM to return all of the money it took from Fuji's Bank of the FSM account, plus prejudgment interest, lost profits, and other compensatory damages, and punitive damages. Fuji also urges the court to impose liability on all of the original defendants, including the Bank of the FSM.

The court cannot, and will not, revisit the issue of the Bank of the FSM's liability. The court found the bank not liable, and entered a final judgment on all claims against the bank. Fuji Enterprises, 20 FSM R. at 125-26. Fuji appealed, and the appellate court affirmed that the bank had no liability. Fuji Enterprises, 21 FSM R. at 361-65. The bank is no longer a party to this litigation and is thus no longer represented by

counsel in this action.

Fuji has offered no ground on which to resurrect this claim. Any attempt to do so is either misguided, meritless, or frivolous. The judgment in the bank's favor is final. The trial court is bound by the appellate court's decision. That court's affirmance is controlling law. *See* Setik v. Mendiola, 21 FSM R. 537, 561 (App. 2018).

Also, punitive damages are not an available form of relief. "As a matter of public policy, governments are generally not liable for punitive damages." Herman v. Municipality of Patta, 12 FSM R. 130, 138 (Chk. 2003); *see also* Atesom v. Kukkun, 10 FSM R. 19, 24 (Chk. 2001); Damarlane v. United States, 6 FSM R. 357, 361 (Pon. 1994) (under international law foreign governments are not liable for punitive damages); *see also* 22 AM. JUR. 2D *Damages* § 800 (rev. ed. 1988). The FSM's waiver of sovereign immunity, 6 F.S.M.C. 702, does not include a waiver permitting punitive damages. No punitive damages are possible against the FSM or its officers or agencies.

But, if Fuji prevails and obtains a judgment, Fuji would, of course, be entitled to appropriate compensatory damages.

C. *Merits of Fuji's Motion*

1. *Alleged Lack of Audit Reports or of Actual Audit*

a. *Evidence of Audit*

In addition to Fujita's denial in his affidavit, *supra* page 1, Fuji bases its contention that there was no audit on Assistant Secretary Jacob's discovery response of "none" to Fuji's request for the production of documents No. 6 that asked for copies of "in-house audit reports" for Fuji's 2006, 2007, and 2008 business gross revenue taxes. This was despite Jacob's answer in a deposition that, yes, there was an audit and there were audit reports signed by him as Compliance Branch Manager and by John Uwas as Assistant Secretary for Customs and Tax Administration. Aff. of Salvador S. Jacob at 5-6 (Mar. 17, 2018), Pl.'s Mot. for Summ. J., Ex. B.

Secretary of Finance Eugene Amor attaches, as Exhibit A to his cross-motion for summary judgment, not only the September 27, 2010 Notice of Final Tax Assessment, but also three Business Gross Revenue Tax Examination Changes Reports, one each for Fuji's 2006, 2007, and 2008 business gross revenue taxes. Amor states that the three Business Gross Revenue Tax Examination Changes Reports were not provided in discovery (when they should have been) due to an oversight. These reports would have been responsive to Fuji's request for "in-house audit reports."

A party has a duty to seasonably amend a prior discovery response if the party learns, or becomes aware, that its prior response was incorrect or insufficient when made. FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 575 (Pon. 2011); *see also* FSM Civ. R. 26(e)(2). The attachment of the 2006, 2007, and 2008 Business Gross Revenue Tax Examination Changes Reports to Amor's summary judgment motion was a belated compliance with this duty.

Fuji did not ask for any relief because of this belated response. Fuji has had several opportunities to respond to Amor's attachment and to seek to cure any prejudice that may have been caused by this evidence's late disclosure. Fuji could have raised the issue, or sought relief, by timely opposing Amor's summary judgment motion, or by raising the issue during the October 12, 2020 hearing, or by filing an opposition to Amor's summary judgment motion when the court invited each side to respond to the other side's summary judgment motion. Fuji did not avail itself of any of these opportunities. Fuji, however, did

receive the relief that a court often grants when a party receives late discovery responses – more time, if needed, to meet and respond to the new evidence. *Cf.* FSM v. Wainit, 11 FSM R. 186, 190 (Chk. 2002) (preferred remedy when the government makes a late disclosure of evidence is to offer the defendant a continuance to prepare to meet the additional evidence). Fuji just did not make use of this time.

b. *Application and Effect of Evidence*

"When a case is presented to the court by way of cross-motions for summary judgment, each party has the burden of producing evidence to support its motion." Ghoman v. New Hampshire Ins. Co., 159 F. Supp. 2d 928, 931 (N.D. Tex. 2001). Even so, "when simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." Fair Hous. Council of Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1134 (9th Cir. 2001); *see also* Tulalip Tribes of Washington v. Washington, 783 F.3d 1151, 1156 (9th Cir. 2015); Dinkins v. Schinzel, 362 F. Supp. 3d 916, 922 (D. Nev. 2019); t'Bear v. Forman, 359 F. Supp. 3d 882, 904 (N.D. Cal. 2019); DeBord v. Muller, 446 S.W.2d 299, 301 (Tex. 1969). Therefore, when "the parties have filed cross-motions for summary judgment, the court must consider each party's evidence regardless under which motion the evidence was offered before ruling on either motion." Las Vegas Sands, LLC v. Nehme, 632 F.3d 526, 532 (9th Cir. 2011).

Thus, Amor's supporting documents are all now properly before the court for the court's consideration before ruling on either summary judgment cross-motion. *Cf.* Colon-Millin v. Sears Roebuck de Puerto Rico, 455 F.3d 30, 39-40 (1st Cir. 2006) (new trial not ordered when defense witnesses not disclosed in discovery testified at trial because plaintiff failed to object to their testimony then or to request continuance to cure any prejudice).

These documents are persuasive evidence that the in-house audit did, in fact, occur. Accordingly, the alleged lack of an actual in-house audit, or of the relevant audit reports, cannot be a ground for summary judgment in Fuji's favor because Fuji cannot show that this material fact (alleged lack of an in-house audit) is not genuinely disputed. The court must deny summary judgment on this ground.

c. *Effect of Pleading in Fuji's Complaint*

Furthermore, Fuji, in its complaint, states that Fuji was audited on site in April, 2010. Compl. paras. 11-12 (Nov. 12, 2014). Fuji therefore cannot now, in a cross-motion for summary judgment, claim that it was not. That is because it is improper for a party to use a summary judgment motion to effect a *de facto* amendment of its pleadings to assert a new allegation or claim. Berman v. Pohnpei Legislature, 16 FSM R. 492, 498 (Pon. 2009), *aff'd*, 17 FSM R. 339, 350 (App.), *reh'g denied*, 17 FSM R. 452 (App. 2011). Therefore a claim that falls outside the scope of the plaintiff's complaint is not properly before the court in a summary judgment motion and must be disregarded. *Id.*

Accordingly, the court must also deny Fuji summary judgment on the lack-of-audit ground because its allegation that there was no audit is not properly before the court and must be disregarded.

2. *Statutory Presumptions*

Fuji also seeks summary judgment on its assertion that 54 F.S.M.C. 152(3) statutory presumptions do not apply to audits of taxpayers who have already filed returns and paid taxes. Fuji contends that the statutory presumption applies only to audits of businesses that have not filed any return at all. For this contention, Fuji relies on the first two subsections of 54 F.S.M.C. 152, which read:

> (1) Upon the failure of any person, business, or employer to make and file a return required by this chapter within the time and in the manner and form prescribed, or upon failure to pay any amount due, the Secretary may notify such person, business, or employer of such failure and demand that a return be made and filed and the tax paid as required by this chapter.
>
> (2) If such person, business, or employer upon notice and demand by the Secretary fails or refuses within 30 days after receipt of said notice and demand to make and file a return and pay the tax required by this chapter, the secretary may make a return for such person, business, or employer from any information and records obtainable, and may levy and assess the appropriate amount of tax.

The presumption is in the third subsection. That subsection provides that "[s]uch assessment shall be presumed to be correct unless and until it is proved incorrect by the person, business, or employer disputing the amount of the assessment." 54 F.S.M.C. 152(3). Fuji contends that this presumption cannot apply to this case because Fuji did not fail "to make and file a return." Fuji argues that the presumption only applies when a business has not made and filed a return and the Secretary, under 54 F.S.M.C. 152(2), has instead made a return for the business.

The court cannot agree. Subsection 152(1), reads in the disjunctive. Thus, the 54 F.S.M.C. 152(3) presumption can apply not only when a business fails to make and file a required return, but also "upon failure to pay any amount due." 54 F.S.M.C. 152(1). That is because "[w]hen a statute sets forth a list in the disjunctive (using the word "or"), the existence of any one of the listed conditions makes the statute applicable." FSM v. Siega, 21 FSM R. 291, 298 (Chk. 2017). Thus, once a CTA audit determines that further tax is due, the § 152(3) presumption is in effect concerning the additional tax amount due "unless and until" that additional tax amount "is proved incorrect." 54 F.S.M.C. 152(3).

It would not make sense to construe § 152(3) any other way. Because a provision of law must be read so as to be internally consistent and sensible, courts read different subsections of the same statute in a manner that permits them to be consistent with each other rather than to be inconsistent or at cross purposes. FSM Social Sec. Admin. v. Kingtex (FSM) Inc., 8 FSM R. 129, 131-32 (App. 1997); FSM v. Moroni, 6 FSM R. 575, 579 (App. 1994). It would make no sense for the § 152(3) presumption to apply only when CTA determines tax is due from a business that has not filed a return but not when a business has filed a return, no matter how deficient or inaccurate that return might be. Following Fuji's line of reasoning, the § 152(3) presumption would not apply to a CTA tax assessment when the taxpayer has filed an obviously fraudulent (which neither the court nor Amor considers Fuji's 2006, 2007, and 2008 tax returns to be) or deficient return, or has obviously grossly under reported its gross revenue on its return. That cannot be so.

Accordingly, as a matter of law, the 54 F.S.M.C. 152(3) presumption of correctness applies to CTA's July 13, 2010 preliminary notice of tax assessment on Fuji. Summary judgment for Fuji on this ground is therefore denied.

3. *Due Process*

Fuji also seeks summary judgment that CTA's tax demand and levy on Fuji's account at the Bank of the FSM violated Fuji's due process rights. Fuji contends that its due process rights were violated by being selected for an audit; by being audited; when it was assessed $6,684.99 in further taxes; when CTA seized $6,676.10 from its bank account by levy; and when Secretary Ikosia upheld the audit, the assessment, and the tax levy.

Fuji's conversion, unauthorized possession, and illegal collection claims are all subsumed in Fuji's

due process cause of action. They all assert that Fuji's property was taken illegally, that is, taken without due process of law.

a. *Due Process Protections*

A party's procedural due process protections are not violated merely because that party receives an unfavorable or even a wrong decision. Due process requires that a fair and rational decision-making process be followed. Palsis v. Kosrae, 17 FSM R. 236, 240 (App. 2010) (Constitution requires the government to follow procedures calculated to assure a fair and rational decision-making process); Panuelo v. Amayo, 12 FSM R. 365, 374 (App. 2004) (procedural due process's fundamental concept is that the government is not be permitted to strip citizens of life, liberty, or property in an unfair, arbitrary manner since the Constitution requires the government to follow procedures calculated to assure a fair and rational decision-making process); Pohnpei Cmty. Action Agency v. Christian, 10 FSM R. 623, 635 (Pon. 2002) (due process generally requires some form of fair hearing and rational decision making process when an important interest is at stake).

b. *Audit Selection*

Fuji contends that it is entitled to summary judgment on its claim that its due process rights were violated because it should not have been selected for an audit. Fuji bases this contention on CTA's Procedures Manual, Pl.'s Ex. D at 5, which instructs the CTA Compliance Branch to automatically select for audit any single business or related group with a gross revenue of at least $500,000 annually and a well-balanced selection of businesses with returns in excess of $200,000 annually. Fuji apparently contends that its gross revenue tax returns were below $200,000 annually and therefore it should not have been selected for a tax audit at all, and that it was a due process violation for it to be selected.

The court cannot agree. Neither due process protections nor the CTA Procedures Manual make a business that filed gross revenue tax returns of less than $200,000 gross revenue immune from a tax audit. Furthermore, CTA's Procedures Manual sets forth general criteria ("take into consideration prior examination history or other known facts") to consider when selecting returns with gross annual revenue under $200,000 for audit. CTA Procedures Manual, Pl.'s Ex. D at 6. Under those criteria, CTA has wide discretion in selecting which tax returns under $200,000 to audit. Fuji also does not provide any evidence of, or even allege that, the audit selection was an act of invidious discrimination.

c. *Audit Determination*

Fuji contends that it is entitled to summary judgment on its claim that its due process rights were violated because it was not really audited and because its due process rights were violated when it was assessed $6,684.99 in further taxes.

The court cannot agree here either because, once CTA determined that $6,684.99 in further taxes was due, Fuji was given notice of that determination and that it had 30 days to prove CTA's determination wrong. Fuji did not take advantage of this opportunity to be heard and never provided any evidence to prove that CTA was wrong. Fuji appears to rely on its contention that the 54 F.S.M.C. 152(3) statutory presumption of correctness does not apply and therefore believes that it did not have to respond with evidence showing that CTA's figures were incorrect. But, as already seen, *supra* part III.C.2., the 54 F.S.M.C. 152(3) presumption does apply. Fuji's due process rights were not violated here. Fuji, after notice, just failed to take advantage of its due process opportunity to be heard and to prove that CTA's figures were incorrect.

d. *Tax Liens and Levy*

Fuji asserts that it is entitled to summary judgment on its claim that its due process rights were violated because CTA seized $6,676.10 from its bank account by levy. Fuji also argues that the three years between the September 27, 2010 Notice of Final Tax Assessment and the October 23, 2013 Notice of Demand for Payment of Taxes somehow violated its rights to due process, but the court cannot see how CTA's forbearance in enforcing its final tax assessment deprived Fuji of any opportunity to be heard or to prove that CTA's tax assessment was incorrect.

The applicable statute provides that "[a]ll taxes imposed or authorized under this chapter shall be a lien upon any property of the person or business obligated to pay said [gross revenue] taxes and may be collected by levy upon such property in the same manner as the levy of an execution." 54 F.S.M.C. 153. Usually, notice and an opportunity to be heard must be given before a government can deprive a person of property, but a government does not need to follow this procedure in the case of taxes. Chuuk Chamber of Commerce v. Weno, 8 FSM R. 122, 126 (Chk. 1997). "The government must, however, provide a post-deprivation opportunity to challenge the tax and a 'clear and certain remedy.'" *Id.*; *see also* Harper v. Chuuk State Dep't of Admin. Servs., 19 FSM R. 147, 155 (Chk. 2013) (legislature can grant an administrative agency the power to levy in the manner of a levy of an execution for statutory liens held by a government so long as due process concerns are addressed by such mechanisms as the availability of a prompt post-levy hearing). The tax lien statute is therefore constitutional[3] and did not violate Fuji's due process rights.

Nevertheless, Fuji was given prior notice and an opportunity to be heard, but Fuji did not take advantage of that opportunity. CTA's October 25, 2013 Notice of Demand for Payment of Taxes gave Fuji notice that if Fuji did not pay or make arrangements to pay within 30 days, Fuji's property was subject to levy. Thus, notice of the intended levy was given and Fuji had a further opportunity (30 days) to be heard before its property was levied. Fuji's bank account was emptied by levy 34 days later.[4] Fuji was also given a post-deprivation opportunity to be heard when Fuji asked for and was given an administrative hearing before the Secretary of Finance, Kensley Ikosia on January 24, 2014.

Fuji exercised its post-deprivation due process right to be heard. Fuji's due process rights were thus not violated by the statutory tax lien and the tax levy.

e. *Secretary Ikosia's Ruling*

Fuji also contends that it is entitled to summary judgment because Secretary Ikosia should not have upheld the tax audit, assessment, and levy since the audit, assessment, and levy violated its due process rights. Fuji does not claim that it was denied the opportunity to call witnesses, put on evidence, or be represented by counsel during the administrative hearing. This is merely a contention that Secretary Ikosia's decision was wrong. As already noted, *supra* part III.C.3.a., an unfavorable or even an incorrect decision does not violate due process so long as a fair and rational decision-making process was followed.

Lastly, Fuji has now, by filing this suit, availed itself of its opportunity, under 54 F.S.M.C. 156(1), to

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[3] As the court earlier explained, "Section 153 does not require a court-issued writ of execution or a court judgment before issuance. If it did, it would say so. Instead, 54 F.S.M.C. 153 permits a 'levy . . . in the same manner as the levy of an execution.'" Fuji Enterprises v. Jacob, 20 FSM R. 121, 125 (Pon. 2015), *aff'd*, 21 FSM R. 355, 361-62 (App. 2017).

[4] The Bank of the FSM even gave Fuji three days' notice before the bank complied with the tax levy. *See* Fuji Enterprises, 20 FSM R. at 124.

seek judicial review of Secretary Ikosia's administrative decision.

f. *Due Process Summary*

The court therefore concludes that Fuji has received due process at each stage of the proceeding. Accordingly, Fuji is denied summary judgment on all of its due process claims, however denominated.

4. *Gross Negligence*

Fuji also seeks summary judgment on its gross negligence claim. Fuji asserts that "[d]efendants were more than grossly negligent in their pursuit of invented figures, the Defendants perpetrated a fraud against a taxpayer, Plaintiff Fuji." Pl.'s Mot. for Summ. J. at 14 (Aug. 24, 2020).

In its complaint, Fuji pled a gross negligence cause of action (Count VII) only against the Bank of the FSM. Compl. para. 62 (Nov. 12, 2014). Fuji did not plead a gross negligence claim against any other defendant. All claims against the Bank of the FSM were dismissed with prejudice and that dismissal was affirmed on appeal. Fuji Enterprises v. Jacob, 20 FSM R. 121, 124-26 (Pon. 2015), *aff'd*, 21 FSM R. 355, 362-63 (App. 2017). Thus, no gross negligence claim is currently pending before the court.

Furthermore, as already noted, *supra* part III.C.1.c., it is improper for a party to use a summary judgment motion to effect a *de facto* amendment of its pleadings to assert a new claim, and therefore a claim that falls outside the scope of the plaintiff's complaint is not properly before the court in a summary judgment motion and must be disregarded. Berman v. Pohnpei Legislature, 16 FSM R. 492, 498 (Pon. 2009), *aff'd*, 17 FSM R. 339, 350 (App.), *reh'g denied*, 17 FSM R. 452 (App. 2011). The court must therefore disregard Fuji's attempt to assert a new gross negligence claim against a party other than (the now-dismissed) bank.

Accordingly, Fuji cannot now, in its summary judgment motion, assert a new gross negligence claim against the remaining defendant or reassert its old gross negligence claim against the Bank of the FSM. Summary judgment in Fuji's favor is accordingly denied on any gross negligence claim.

5. *Summary of Ruling on Fuji's Motion*

Fuji's motion that it is entitled to summary judgment because there was no audit is denied since that material fact is genuinely disputed and since the allegation that there was no audit is not properly before the court since Fuji's complaint alleges that there was an audit. Fuji's motion for summary judgment on the ground that the 54 F.S.M.C. 152(3) statutory presumption of correctness of a tax assessment is inapplicable to this case is denied because that presumption does apply to tax assessments derived from a tax audit even when the taxpayer has already filed a business gross revenue tax return.

Fuji's motion for summary judgment on the ground that its due process rights were violated by the tax audit, assessment, and levy is denied because Fuji was afforded all the process it was due even though Fuji did not take advantage of it. And Fuji's motion for summary judgment on a gross negligence claim is denied because Fuji has no such claim pending and cannot now add one.

Fuji's summary judgment motion is therefore denied in its entirety.

IV. AMOR'S SUMMARY JUDGMENT MOTION

A. *Claims and Contentions*

Amor moves for summary judgment on both Fuji's claims and on the counterclaim against Fuji for

the remaining balance of Fuji's assessed tax liability. Amor contends that the facts do not show any liability to Fuji on the FSM's part and further show that Fuji is liable for the remaining tax balance of $864.85, plus prejudgment interest and postjudgment interest as allowed by law. Amor contends that any assessment of additional taxes owed based on a CTA tax audit is, by statute, presumed correct unless and until the taxpayer proves it to be incorrect, and that Fuji has never proved CTA's assessment of additional taxes to be incorrect.

Fuji, in its complaint, asserts causes of action, or "counts," for due process, conversion and unauthorized possession, illegal collection method, lack of judicial power to issue writ, disputed amount of tax owed, and unauthorized withdrawal from bank; gross negligence. The unauthorized withdrawal and gross negligence claims were made only against the Bank of the FSM and are no longer a part of this case since the judgment in the bank's favor is final and affirmed by the appellate division. *See supra* page 3; *also* part III.C.4.

Fuji's lack-of-judicial-power-to-issue-writ claim is an assertion that the FSM cannot issue a levy upon the bank but must first obtain a writ of execution from a court before it can levy on a bank. That claim was, as a matter of law, decided against Fuji as a part of the bank's final judgment and affirmed on appeal. Fuji Enterprises, 21 FSM R. 355, 361 (App. 2017) ("The trial court was justified in finding that the statutory scheme of 54 F.S.M.C. 153, in using the language 'in the same manner as a levy of an execution,' does not mean that a court-issued writ of execution is required prior to a levy."); *see also supra* note 3. It therefore is not a proper subject of either Fuji's or Amor's cross-motion. It has already been decided, as a matter of law, against Fuji.

Fuji's conversion, unauthorized possession, and illegal collection claims are all subsumed in Fuji's due process cause(s) of action because they all assert that Fuji's property was taken illegally, that is, taken without due process of law. *See supra* part III.C.3. Fuji's disputed-amount-of-tax-owed claim, although treated separately, *supra* part III.C.2., also derives from Fuji's due process claims because Fuji alleges that CTA arrived at the disputed amount through a procedure that violated Fuji's due process rights as well as being factually inaccurate.

Since Fuji did not file an opposition to Amor's motion but simultaneously filed its own summary judgment motion, the court will consider Fuji's own summary judgment motion and the evidence provided therein to also be Fuji's opposition to Amor's summary judgment motion. This is proper when there are cross-motions. *See supra* part III.C.1.b.

B. *Material Facts*

There are two facts that Fuji disputes – 1) whether there was an in-house audit of Fuji, and 2) whether 50% was the correct amount to use as a markup figure for the goods Fuji sold. Neither is a genuinely disputed material fact.

1. *Audit of Fuji*

The court cannot consider Fuji's allegation in its cross-motion that there was no in-house audit to be a genuine dispute of material fact. As already noted, *supra* part III.C.1.c., that, since Fuji states in its complaint that Fuji was audited on site in April, 2010, Compl. paras. 11-12 (Nov. 12, 2014), Fuji cannot now, in its cross-motion for summary judgment, claim that it was not. Since it is improper for a party to use a summary judgment motion to effect a *de facto* amendment of its pleadings to assert a new claim, Fuji's claim that there was no audit falls outside the scope of its complaint and is therefore not properly before the court in a summary judgment motion and must be disregarded. Berman, 16 FSM R. at 498, *aff'd*, 17 FSM R. at 350, *reh'g denied*, 17 FSM R. at 452.

Even drawing all reasonable inferences in Fuji's favor, Fuji's somewhat implausible assertion that there was no in-house audit of Fuji is not a genuine dispute of fact because the audit is a fact that Fuji cannot dispute since Fuji pled the audit's existence in its complaint.

2. *Fuji's Markup of Goods*

The other material fact disputed by Fuji is the amount, if any, of additional taxes owed for 2006, 2007, and 2008. This dispute rests solely on whether CTA's markup figure for goods sold is correct. Fuji asserts that it was not, and that therefore no additional taxes were owed.

During the motion hearing, the defense reiterated that, when businesses are audited, the audit personnel presume, in the absence of contrary information, that imported goods are sold, and the taxpayer thus has gross revenue, 50% higher than the taxpayer's cost (including insurance and freight) of the goods. Fuji retorted that the goods in question were motor vehicles and that a more accurate markup for, and thus for gross revenue derived from, motor vehicles is probably 10% over the taxpayer's costs of goods. This disagreement over the proper markup was not new. Fuji noted the 50% markup in its complaint and asserted it was questionable. Compl. para. 12-13 & n.a (Nov. 12, 2014).

That may be an entirely plausible explanation for the difference between Fuji's gross revenue tax return totals and the government's audit-produced figures. But, ever since CTA sent Fuji a preliminary notice of tax assessment, it has been Fuji's burden to produce evidence to disprove the correctness of the government's audit figures and its tax assessment. 54 F.S.M.C. 152(3). Fuji has not done so.

Fuji did not produce any such evidence in response to CTA's July 13, 2010 preliminary notice of tax assessment. Nor did Fuji produce any such evidence in response to CTA's September 27, 2010 final notice. Fuji ignored both. Fuji did not respond to CTA's October 25, 2013 Notice of Demand for Payment of Taxes either or produce any such evidence then. Fuji did not produce any such evidence during the January 24, 2014 administrative hearing.

Nor has Fuji produced any such evidence in support of its current summary judgment motion. Fuji has not met its statutory burden, 54 F.S.M.C. 152(3), to produce this evidence. Fuji therefore cannot genuinely dispute CTA's figures in its assessment of further taxes owed. By law, CTA's figures are correct.

"Under 54 F.S.M.C. 152(3), the Secretary of Finance's assessment of the taxes is presumed correct unless and until it is proven incorrect." Fuji Enterprises v. Jacob, 21 FSM R. 355, 362 (App. 2017) (citing Ting Hong Oceanic Enterprises v. Ehsa, 10 FSM R. 24, 31 (Pon. 2001)). As just decided, *supra* part III.C.2., this statutory presumption, as a matter of law, applies to CTA's July 13, 2010 preliminary notice of tax assessment, and, since no evidence was offered to prove that assessment incorrect, to the September 27, 2010 Notice of Final Tax Assessment.

Fuji's continued failure to produce any evidence to support its contention that its markup was much less than 50% is mystifying. This is because "[a]ll persons, employees, and businesses required to make and file returns under this chapter shall keep and maintain accurate records, and the records may be inspected and audited at any reasonable time by the Secretary for the purpose of administering the provisions of this chapter." 54 F.S.M.C. 151. If Fuji's contention that its markup was much less than 50% is correct, then Fuji should have had the needed business records readily available (because it was required to keep them) to prove that CTA's figures were wrong and its figures correct. Fuji should have been able to quickly produce those records to rebut the statutory presumption of the correctness of CTA's figures. Fuji did not. Fuji has not produced, any such records, even though, as just described, there were ample opportunities for Fuji to do so, and it was Fuji's burden to produce those records.

Since Fuji has neither tried to rebut, nor rebutted, the statutory presumption of the correctness of CTA's tax assessment, there is no genuine dispute about the amount of the additional taxes Fuji owes for tax years 2006, 2007, and 2008 because, as a matter of law, CTA's figures are correct since they have never been proven incorrect.

C. *Entitlement to Judgment*

There are thus no genuine issues of material fact. But even when no genuine issue of material fact is present, a movant will not be granted summary judgment unless the movant is also entitled to judgment as a matter of law. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM R. 574, 579 (Pon. 2002). Since the 54 F.S.M.C. 152(3) statutory presumption of correctness of the Secretary's tax assessments applies and those assessments have not been proven incorrect, Fuji is, as a matter of law, liable for the $864.85 in back taxes that CTA was unable to obtain by levy out of the $7,540.95 that was then due.

That $7,540.95 included penalties and interest. The general rule is that, in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment will be first applied to the interest due. *See* Salomon v. Mendiola, 20 FSM R. 138, 140 (Pon. 2015); *see also* Setik v. Mendiola, 21 FSM R. 537, 557 (App. 2018); George v. Sigrah, 19 FSM R. 210, 219 (App. 2013); Senda v. Creditors of Mid-Pacific Constr. Co., 7 FSM R. 664, 670-71 (App. 1996). Since there was no agreement or statute to the contrary, the November 28, 2013 bank levy paid off all of the penalties and interest that had accrued until then and all but $864.85 of the tax principal.

Under 54 F.S.M.C. 155(5), "there shall be collected . . . interest on the unpaid balance of the tax principal at the rate of six percent per annum from its due date until the date it is paid." Fuji is therefore statutorily liable for 6% interest on the $864.85 tax principal from November 28, 2013, on until date of judgment. And, of course, after the judgment date, interest of 9% is imposed on the judgment. 6 F.S.M.C. 1401.

Secretary of Finance Amor is therefore entitled to summary judgment, as a matter of law, on the counterclaim for $864.85 plus prejudgment interest of $371.06 (as of January 22, 2021), and postjudgment interest.

V. CONCLUSION

Accordingly, after due consideration of the parties' cross-motions for summary judgment, Fuji Enterprises' summary judgment motion is denied in its entirety, and the Secretary of Finance's summary judgment motion is granted. The clerk shall enter judgment in the Secretary of Finance's favor for $864.85, with the statutory 6% prejudgment interest thereon from November 28, 2013, and 9% interest postjudgment.

* * * *