

**IN THE SUPREME COURT OF GUAM**

**EIE GUAM CORPORATION, et al.**  
Plaintiff-Appellee,

**vs.**

**THE LONG TERM CREDIT BANK, OF JAPAN, LTD., et al.,**  
Defendant-Appellant.

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**THE LONG TERM CREDIT BANK, OF JAPAN, LTD., et al.,**  
Counterclaimant-Appellant,

**vs.**

**EIE GUAM CORPORATION, et al.**  
Counterdefendants-Appellees.

Supreme Court Case No. CVA96-017  
Superior Court Case No. Cv1190-95

**OPINION**

**Filed May 21, 1998**

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On Appeal from the Superior Court of Guam  
Argued and Submitted on February 18, 1998  
Hågatña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS, and JOSE I. LEON GUERRERO, Associate Justices.

**SIGUENZA, CJ.:**

***I. Background***

[1] In the 1980's, Long Term Credit Bank of Japan (LTCB), a Japanese corporation, made loans to another Japanese corporation, EIE International (EIEI), in order to finance various construction projects. Consequently, EIE Guam (EIEG) was specifically incorporated to develop and hold the now Guam Hyatt Hotel.

[2] EIEI and EIEG initially invested \$70 - \$150 million to develop the construction project. As security for the loans, LTCB obtained a mortgage on the hotel as well as interests in the hotel's equipment, accounts receivable, inventory, bank accounts, and contract rights. The loan transaction was made and approved in Japan, administered in Japan, and made payable in Japan. In 1992, an additional loan of \$103 million was made directly to EIEG for purposes of completing the hotel. It is undisputed that this loan was also negotiated, approved, and executed in Japan and the amounts denominated in yen; nor is it disputed that performance, as well as the availability of the funds would be in Japan.

[3] On August 2, 1995, a suit arose over the loan agreements. LTCB and four other Japanese banks were named as defendants.<sup>1</sup> EIEG filed the complaint to set aside the mortgages and the other security interests, maintaining that the mortgages were fraudulently executed in favor of LTCB upon instruction of LTCB when it took over EIEI's operation. EIEG also asserted LTCB refused both to complete the financial restructuring it had earlier begun or to extend its loans to EIEG although they were not in default. LTCB answered the complaint and filed counterclaims for foreclosure on the mortgages securing the construction loan used to develop the hotel.

[4] EIEG moved for summary judgment on LTCB's counterclaims asserting LTCB did not have a Guam foreign corporation license, a Guam business license, nor a statement of exemption. These assertions were not disputed.

[5] At hearing, the lower court orally granted the motion for summary judgment and dismissed the counterclaims. A written Decision and Order was later issued supporting the trial court's earlier order. The court then certified the dismissal of the counterclaim as a final judgment which was entered on the docket on November 21, 1996. LTCB timely filed a Notice of Appeal on November 26, 1996.

***II. Analysis***

[6] A review of the grant or denial of a motion for summary judgment is reviewed *de novo*. *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10, ¶7.

[7] Title 11 of the Guam Code Annotated encompasses the Financial and Tax laws of Guam. This Title is divided into four divisions, including Division 3, entitled "Business License Law" and Division 4 entitled "Banks and Banking." The Banks and Banking division includes Chapter 106 on Banks which sets out statutes, located within Article 7, governing the operations of foreign banks on Guam.

[8] Essentially all of Guam's current foreign banking provisions were enacted into law on December 11, 1975 via Guam Pub. L. 13-111:5. These foreign banking laws were added to Article III of the Title XXXI of the Government Code, adopted as an entirely new chapter, and did not expressly amend

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<sup>1</sup> The four other banks were later dismissed from the case.

existing statutes. The Chapter resulted in an area of law not previously addressed and mirrors almost exactly California's foreign banking laws.

[9] LTCB asserts that, as a foreign bank, it need not comply with Guam's business licensing laws because of the language set forth in 11 GCA § 106730. This provision states:

Nothing in this Chapter shall be deemed to prohibit a foreign banking corporation which does not maintain an office in this Territory for the transaction of business from making loans in this Territory secured by mortgages on real property or from accepting assignments of mortgages covering real property situated in this Territory.

11 GCA § 106730 (1994). In order to understand this provision properly, it must be read in context with the other provisions set forth in the Article 7. Essentially, each statute is linked to another by specific reference. The applicable statutes are listed below.

**§ 106722. Right of Foreign Banking Corporation to Engage in Business.** A foreign banking corporation shall not engage in the banking or trust business in this Territory unless it is licensed to do so pursuant to the provisions of §106725 and unless it first complies with all the provisions of this Chapter and then only to the extent expressly permitted in this Chapter or by regulations of the Board. In transacting such business a foreign banking corporation shall comply with all applicable provisions of this Title and of the laws of this Territory.

**11 GCA § 106721 (1994).**

**§ 106722. Requirements to Do Business in Territory.** A foreign banking corporation shall not commence to do business in this Territory until it has met the following requirements:

- (a) It is authorized by its charter to transact the character of business described in § 106727 and has complied with the laws of the country under which it is incorporated.
- (b) It has filed with the Commissioner a certified copy of its charter or articles of incorporation and of its by-laws and a copy of an application for a commercial license pursuant to § 72104 and § 72105 of this Code.
- (c) It has furnished to the Commissioner such proof of the nature and character of its business and its financial condition, stock ownership and managements as he may require.  
....
- (e) It has complied with all applicable requirements of the Title 18 Guam Code Annotated relating to foreign corporations **except matters specifically otherwise provided for in this Title.** (Emphasis added.)  
....
- (i) It has received from the License Board of the Department a commercial license pursuant to § 72102.

**11 GCA § 106722 (1994).**

**§ 106725. Approval of Application; Issuance of License; Transfer; Display.** The Commissioner shall convey to the Board his recommendation as to whether the

application of a foreign banking corporation should be approved. The Board may, in its discretion, direct License Division of the Department to issue such license to such corporation when it is satisfied that the corporation has met all the requirements of this Chapter. The license shall authorize the corporation **to transact the business permitted by § 106727 at the location specified therein**. No such license shall be transferrable or assignable. Each such license shall be conspicuously displayed at all times in the, [sic] place of business specified therein. (Emphasis added.)

#### 11 GCA § 106725 (1994).

**§ 106727. Business Which May be Transacted in Territory.** A foreign banking corporation which is authorized by license under § 106725 may transact in this Territory the business of buying, selling, paying or collecting bills of exchange, or issuing letters of credit, of receiving money for transmission by draft, check, cable or otherwise, and of making loans. It may transact in this Territory the business of accepting deposits only as provided in § 106728.

#### 11 GCA § 106727 (1994).

**§ 106728. Accepting Deposits from Foreign State or Person, Etc.**

. . . .

(b) A foreign banking corporation may transact in this Territory the business of accepting deposits from any foreign state or from any person which resides, is domiciled, and maintains its principal place of business outside the territory [sic]of Guam, if: (1)Such foreign banking corporation has complied with all of the requirements of § 106722; and (2) Such foreign banking corporation has received from the Commissioner his written approval to transact such business in this Territory.

(c) A foreign banking corporation which transacts such business in this Territory shall, with respect to business transacted by it in this Territory, comply with and be subject to the provision of this Title.

#### 11 GCA § 106728 (1994).

**§ 106729. Accepting Domestic Deposits.** (b)A foreign banking corporation may transact in this Territory the business of accepting deposits from any person who is domiciled and maintains its principal place of business within the Territory if: (1) Such foreign banking corporation has complied with all of the requirements of § 106722; and (2) Such deposits may only be accepted from persons who are or were borrowers from a bank accepting the deposit, provided . . . .

#### 11 GCA § 106729 (1994).

[10] The law is clear that a foreign bank can engage in business only if it is properly authorized to do so. 11 GCA § 106721 (1994). A foreign bank is properly authorized to do business on Guam when it holds two licenses: 1) a Banking Business license issued pursuant to 11 GCA § 106725; and a Foreign Corporation License issued pursuant to 11 GCA § 106722(e). *Id.* When these licenses are obtained, a foreign bank may conduct the following specifically enumerated business transactions: buying, selling, paying or collecting bills of exchange, issuing letters of credit, or receiving money for transmission by draft, check, cable or otherwise, and **making loans**. 11 GCA § 106727. If the criteria of 11 GCA §§ 106728 and 106729 are met, a foreign bank can also accept deposits from both foreign and domestic persons. Specifically **not enumerated** in §§106727, 106728 or 106729 is the securing of a loan with a mortgage on real property located in Guam by a foreign bank. The omission of this type of transaction from the activities requiring licensing evidences an intent by our legislature to exempt it from the

licensing statutes. 2A *Sutherland Statutory Construction* § 47.23 (Rev. 5th ed. 1992).

[11] The legislature's enactment of a specific statute distinguishing the transaction at issue is another compelling indication of the intent to exempt a foreign bank that enters into such a transaction from the licensing laws. The language of 11 GCA § 106730 states that "[n]othing in this Chapter shall be deemed to prohibit" a foreign bank from engaging in this type of mortgage transaction. This statute, coupled with the specifically listed business transactions in § 106727, shows that this type of transaction apparently does not require a license.

[12] The state of California, from which Guam adopted its statute, has addressed the same issue now before us. In *Sondeno v. Union Commerce Bank*, 71 Cal. App. 3d 391 (1977), a California appellate court had to decide whether an Ohio bank had charged a usurious interest rate. The issue dealt with the same statutory language limiting a foreign bank from doing business within the state without a license. *Id.* at 394. California law also contained a statute, similar to Guam's, permitting a foreign bank to make a loan secured by real property within the state without a license. The *Sondeno* court read the statute permitting the loan secured by real property as "express permission for the transaction of such business." *Id.* at 395. Further, the requirements to otherwise conduct the other enumerated transactions of a licensed foreign bank were removed by this language. *Id.*

[13] Likewise, in *Skylake State Bank v. Solar Heat and Insulation of Central Utah, Inc.*, 559 N.Y.S.2d 930 (Sup. Ct. 1990), a New York court made the same ruling when confronted with a similar situation. An out of state bank, not licensed in the state, loaned money to the defendants and secured the loan with a mortgage on New York property. *Id.* at 931. The defendants had opposed a summary judgment motion based on the bank's lack of authorization to do business in the state. *Id.* at 931. They asserted that the bank could not bring an action in court pursuant to state law. *Id.* The court held that "[a]n analysis of the regulatory scheme shows that the common-sense result must follow: a lender may enforce its rights in New York collateral." *Id.* The regulatory scheme applied primarily to banks maintaining offices within the state in order to protect consumers. *Id.* The *Skylake* court also addressed New York's general statute that prevented a foreign corporation not authorized to do business from bringing suit in the state courts. *Id.* at 932. This law was, on its face, applicable to banks. *Id.* However, New York had a specific statute expressly permitting a foreign bank which obtained a mortgage secured by real property to enforce its rights. *Id.*

[14] The banking laws addressing the conduct and activities of foreign banks do not require foreign banks, without offices on Guam, to obtain licenses, necessary for broader financial activities, in order to enter loans secured by Guam real property. This transaction is specifically exempted from such licensing requirements under 11 GCA § 106730.

[15] We next address whether a statement of exemption must otherwise be obtained. The Government of Guam, as a policy, requires all businesses to have a business license. 11 GCA § 70130 (1994). If the commercial activity or money-making activity is not required to obtain a business license, the statute then requires a business to obtain a statement of exemption stating no business license is required. 11 GCA § 70130(a). This exemption then can be used in lieu of a business license. *Id.*

[16] If neither a business license nor exemption is obtained, a non-complying business's legal recourse is also limited. 11 GCA § 70130. The relevant provisions of the statute state:

(d) no commercial activity (including operating or leasing of real property) doing business on Guam without a business license may file suit in Guam courts until such time that a business license is obtained. No person engaged in commercial activity without a business license may use the courts to enforce, directly or indirectly, any obligation, lien, or contract incurred during the period of such commercial activity without a business license;

(f) The courts shall liberally construe subsection (b) through (e) of this Section in favor of the landlord or business person and shall ignore technical deficiencies if the courts find there has been substantial compliance with the business license laws, rules, and regulations and if the courts find that the landlord or business person has filed on a timely basis (within thirty (30) days of the due date) gross receipts tax returns fully reporting all accountable revenues from the activity concerned for the periods in question;

11 GCA § 70130.

**[17]** This statute, however, is not applicable to a foreign bank engaging in a transaction listed in 11 GCA § 106730. The purpose of 11 GCA § 70130 is to obtain compliance and collection of gross receipts taxes. 11 GCA § 70130(f) requires a court to “liberally construe subsections (b) through (e) of this Section in favor of . . . the business person and . . . ignore technical deficiencies if the courts find there has been substantial compliance with the business license laws, rules, and regulations and if the courts find that the landlord or business person has filed on a timely basis . . . gross receipts tax returns fully reporting all accountable revenues from the activity concerned for the periods in question . . . .”

**[18]** However, a foreign bank conducting a transaction pursuant to 11 GCA § 106730 is not subject to gross receipt taxes. A review of 11 GCA § 26202(f) indicates that banks must pay gross receipts tax equaling 4% of the net income received from business. This is calculated by the following:

- a. Gross Income of the bank from all sources; less,
- b. Salaries or bonuses paid or other compensation; less,
- c. Rents paid; less,
- d. Interest or discount paid; less,
- e. Ordinary operating expenses such as supplies, utility services, insurance premiums other than for life insurance, provided that any deductible insurance expense shall be allowable only to the extent that such a premium is applicable to the tax period against which it is claimed; less,
- f. Loans or obligation charged off the books of the bank as losses unless charged against reserves then in existence; less,
- g. Losses other than loan losses, such as those occasioned by fire or other casualty, theft, embezzlement, and the like, but only to the extent not covered by insurance proceeds collected; less,
- h. Transfers from earnings to reserve for bad debts or other contingencies provided for; less,
- i. Miscellaneous direct expenses such as legal, advertising, auditing, and the like; less,
- j. Loss on property sold and depreciation on property owned.

11 GCA § 26202(f)(1995).

**[19]** It is apparent the types of banks required to pay gross receipts taxes would be those located on island including foreign banks licensed pursuant to § 106725. A foreign bank so licensed would be required under 11 GCA § 106724 to keep separate accounting records of assets, liabilities, income, expenses, etc. to enable the determination of the gross receipts tax. Moreover, such a bank maintains accounting records locally that permit the audit and verification of calculations of gross tax receipts. *Id.*

**[20]** The statute also requires that the gross tax calculation be based on income from all sources. It is

highly unlikely that Guam would undertake the collection of taxes on all income sources of a foreign bank because of its loan secured by mortgage property. Equally difficult to imagine would be allowing a bank such as LTCB to deduct from income all of its worldwide expenses.

[21] Next, 11 GCA § 70130 does not apply to an entity doing business under 11 GCA § 106730 because the purpose of licensing, pursuant to 11 GCA § 70102, is to ensure “that all necessary and reasonable control and regulation thereof may be practiced by the Government of Guam for the protection of the health, safety and morals of the people of Guam.” However, as addressed in *Skylake*, these public interest concerns are not implicated by lending of a foreign bank which is secured by in state property. *Skylake*, 559 N.Y.S.2d at 932.

[22] In addition, the legislature included specific language in 11 GCA § 106731, not included in 11 GCA § 106730, that exempts the transaction at issue from the business licensing requirements of 11 GCA § 70130. The language of both statutes state, “Nothing in this Chapter shall prohibit . . .” foreign corporations from conducting certain transactions. *See id.* However, 11 GCA § 106731 further states: “subject to compliance with any applicable laws of this Territory pertaining to foreign corporations and any other applicable law, . . .” This language is not present in the mortgage provision of the chapter. Because the legislature enacted these two provisions at the same time, we must assume an intent by the legislature to insulate a mortgage transaction from other laws, including the licensing laws. 2A *Sutherland Statutory Construction* § 47.23 (Rev. 5th ed. 1992).

[23] As stated earlier, a foreign bank wanting to conduct business specified in 11 GCA § 106727 must obtain both a business license and a foreign corporation license. 11 GCA § 106722(e)(stating that the bank must comply with Title 18 requirements). The conditions for a foreign corporation license are set forth in 18 GCA § 7101.

[24] The business license requirement is set forth in 11 GCA § 106722(i). This statute specifically requires that a commercial license be issued pursuant to 11 GCA § 72102. This provision states:

Every person engaging in or carrying on business in Guam of banking or receiving the money of others on deposit shall be required annually to obtain a commercial license; provided, however, that in addition to the requirements of this Subchapter, a license shall not be issued to a foreign banking corporation ***unless its application has first been approved by the Banking Board pursuant to 22 [sic] GCA §106725 [GC §30924] and the license is in the form prescribed by that Section.***

Thus, it is clear from § 72102, coupled with the language of § 106725 (the Banking Board directs the Licensing Division) (listed above), that a license will be issued only by the Banking Board’s authority. The Licensing Division has therefore no discretion in this matter. It must carry out the directives of the Banking Board. Likewise, the Licensing Division has no discretion as to whether to issue an exemption to a foreign bank. That authority also lies with the Banking Board.

[25] Finally, this Court finds that having to get an exemption in order to make a loan secured by Guam real property is simply not reasonable. When a bank gets the two licenses required under 11 GCA § 106722, it may engage in the transactions set forth in § 106727 and, if the bank qualifies, engage in transactions set forth in §§ 106728 and 106729. The business license does not include the transaction set forth in § 106730, the securing of a mortgage loan with Guam real property. Consequently, because it is not included within the scope of the license, then the foreign bank, licensed here on Guam, would still need to get an exemption under § 70130.

### ***III. Conclusion***

[26] Based on the foregoing, we **REVERSE** the judgment of the Superior Court.