

Notice of Hearing on February 24, 1994 by House Committee on Judiciary

and

Testimony of:

Department of Taxation

Office of Information Practices

Gerson Grekin Wynhoff & Thielen

Tax Foundation of Hawaii

Michael A. Shea, Michael J. O'Malley, Lant A. Johnson, Miki Okumura and Jeffrey S. Piper
of Goodsill Anderson Quinn & Stifel

FEB 22 1994

HOUSE OF REPRESENTATIVES
THE SEVENTEENTH LEGISLATURE
REGULAR SESSION OF 1994

COMMITTEE ON JUDICIARY

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RECEIVED
OFFICE OF THE CLERK
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FEB 23 P1:47

NOTICE OF HEARING

DATE: Thursday, February 24, 1994
TIME: 1:30 P.M.
PLACE: Conference Room 802
Leiopapa A Kamehameha Building

A G E N D A

- ✓ HB 2725 RELATING TO FORFEITURE *c: CJ,*
CP-11 Amends provisions relating to forfeiture by
specifying proceedings which the state may
commence in various situations. JUD
- HB 3610 RELATING TO THE DEPARTMENT OF ACCOUNTING AND
GENERAL SERVICES JUD
Allows the department of accounting and
general services to adopt rules as may be
necessary or desirable for the operation and
maintenance of public buildings, including
control of activities conducted in or around
the public buildings.
- ✓ HB 2818 RELATING TO THE UNIFORM SIMULTANEOUS DEATH
ACT *c: Tax, CPUL* JUD
Amends provisions relating to exceptions
provision. Requires survival by 120 hours if
the governing instrument contains language
dealing explicitly with simultaneous deaths
or deaths in a common disaster and that
language is operable under the facts of the
case.
- HB 3073 RELATING TO INTERSPOUSAL TORT IMMUNITY JUD
Amends provision relating to interspousal
tort immunity by requiring that provision
shall be construed to include all suits

c: CJ
Coalition
Tax
OIP
CEO
CMA
RAM
TB
MSK
CSA

commencing on, and subsequent to, April 26, 1993.


- | | | |
|---------------|--|-----|
| HB 3511 | RELATING TO HAWAII RULES OF EVIDENCE | JUD |
| | Provides that, upon request, the proponent of evidence shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial. | |
| ✓ HB 3190 | <i>C: OIP, Tax, CED</i>
RELATING TO THE PUBLIC DISCLOSURE OF WRITTEN OPINIONS BY THE DEPARTMENT OF TAXATION | JUD |
| <i>Tax-11</i> | Establishes that written opinions shall be open to public inspection and copying. | |
| ✓ HB 3302 | <i>C: CED, CMA</i>
RELATING TO OPEN MEETINGS | JUD |
| <i>Att-13</i> | Establishes provision relating to meeting by videoconference. | |
| HB 3167 | RELATING TO THE HAWAII CIVIL RIGHTS COMMISSION | JUD |
| | Allows nonprivileged records to be disclosed as may be requested by a party in a complaint filed with the Hawaii Civil Rights Commission. | |

DECISION MAKING TO FOLLOW

PERSONS WISHING TO TESTIFY ARE REQUESTED TO SUBMIT 40 COPIES OF THEIR TESTIMONY 24 HOURS PRIOR TO THE HEARING TO: (1) THE COMMITTEE'S CHAIR IN ROOM 803, LEIOPAPA A KAMEHAMEHA BUILDING; OR (2) THE HOUSE SGT.-AT-ARMS PERSONNEL ON THE ALAKEA STREET SIDE OF THE CAPITOL CENTER (1177 ALAKEA STREET). TESTIMONY MAY BE FAXED TO THE HOUSE SGT.-AT-ARMS OFFICE AT: 586-6501 (OAHU) OR 1-800-535-3859 (NEIGHBOR ISLANDS).

IT IS ALSO REQUESTED THAT THE COPIES BE ON ONE SIDE OF AN 8-1/2" X 11" SHEET WITH TWO HOLES PUNCHED AT THE TOP. FOR FURTHER INFORMATION, PLEASE CALL THE COMMITTEE CLERK AT 586-6490.

IF YOU REQUIRE SPECIAL ASSISTANCE OR AUXILIARY AIDS AND/OR SERVICES TO PARTICIPATE IN THE PUBLIC HEARING PROCESS OF THE STATE HOUSE (I.E., SIGN LANGUAGE INTERPRETER, WHEELCHAIR ACCESSIBILITY, OR PARKING DESIGNATED FOR THE DISABLED), PLEASE CONTACT THE COMMITTEE CLERK 24 HOURS PRIOR TO THE HEARING SO ARRANGEMENTS CAN BE MADE.


Rep. Terrance W.H. Tom
Chair

JOHN WAIHEE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION

P.O. BOX 259
HONOLULU, HAWAII 96809

RICHARD F. KAHLE, JR.
DIRECTOR OF TAXATION

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GEORGINA M. YUEN
DEPUTY DIRECTOR

February 24, 1994

TESTIMONY ON H.B. NO. 3190
RELATING TO THE PUBLIC DISCLOSURE OF
WRITTEN OPINIONS BY THE DEPARTMENT OF TAXATION

This bill provides that the Department of Taxation shall open to public inspection and copying certain written opinions which have been modified to delete information which might identify the person for which the opinion is made or other persons named in the opinion.

Sections 235-116, 237-34, and 237D-13, Hawaii Revised Statutes (HRS), among others, require that the confidentiality of tax return information be maintained. Written opinions issued by the Department contain information that must be kept confidential, but these opinions also may contain information that is useful to interested members of the public as indicators of the Department's position on tax issues that are not well-settled. In order to make the information in these written opinions accessible to the public, the Department needs the authorization provided by this bill to make the opinions public. At the same time, the public needs the assurance provided by the bill that confidentiality of tax return information will be preserved. Similar legislation exists in Illinois, New York, and in the Internal Revenue Code.

The Department notes that the purpose of this bill is not to make every application of the tax laws available for public review but to limit access to tax determinations written by the Department's Technical Review Office on issues that are evolving or otherwise not clearly well-established. The bill does not open to public inspection routine requests for tax return information or the voluminous correspondence and other communications with taxpayers concerning established principles of law, including approvals of changes in accounting method for net income tax or the grant or denial of registration of nonprofit organizations for exemption from the general excise tax. The Department recognizes that these communications can be viewed as involving the application of tax laws to particular taxpayers' factual circumstances. Nevertheless, the Department maintains that opening this communications to public review would be an overbroad application of the proposed bill. The Department notes that the Internal Revenue Service does not include these communications among those it makes available to the public. Moreover, the Department believes that the burden and expense of compiling and indexing routine determinations and segregating protected or confidential information clearly outweighs any benefit to the public that would result from disclosure of these determinations.

The bill addresses the concern about whether tax return information can be safeguarded by stating that doubts about whether information should be publicly disclosed must be resolved in favor of nondisclosure.

The Department notes that it is a well-established principle that state tax return information, which includes written opinions, is confidential. As far as the Department can determine, Hawaii will be only the third state in the nation to adopt a policy opening written opinions to public review; consequently, the Department recommends that the Legislature adopt a somewhat conservative approach to the opening up written opinions.

The Department believes that the exception in this bill will allow access to information that will be helpful to the public while maintaining appropriate confidentiality. To ensure that the bill adequately protects confidential tax return information while advancing a measure that will assist further compliance with the state tax laws, the Department suggests that the language in the attachment to this testimony be used in the Committee's report.

Recent discussions with members of the private sector have suggested that the distinction between documents which will remain closed and written opinions, which will be available for public review, can be further refined by amending the language of paragraph (3) on page 4, lines 7 through 14 to read as follows:

- "(3) A determination letter, which is a written statement issued by the department that applies an interpretation or principle of tax law clearly established by statute, rule, written opinion, or published court decision to a particular set of facts. A determination letter includes the grant or denial of consent, permission, exemption or registration, or a routine correspondence in response to taxpayer inquiries. A determination letter shall be designated as such and shall indicate the clearly established interpretation or principle applied and its source."

The Department of Taxation is in favor of the enactment of this administration-sponsored bill.


RICHARD F. KAHLE, JR.
Director of Taxation

Attachment

Suggested Committee Report Language

The intent of the Legislature is not to open to public inspection routine requests for tax return information. Nor does the Legislature intend that the Department of Taxation's voluminous correspondence and other communications with taxpayers concerning established principles of law such as, the many letters issued routinely answering taxpayer requests which taxpayers could answer themselves by doing minimal research, approvals of changes in accounting method for net income tax, or the grant or denial of registration of nonprofit organizations for exemption from the general excise tax, be available to the public under this bill. The Legislature recognizes that these kinds of documents involve the application of tax laws to particular taxpayers' factual circumstances; nevertheless, the Legislature has determined that disclosure of these documents or information in these documents would be of little benefit to the public. The Legislature notes that requiring the Department of Taxation to assume the burden and expense of compiling and indexing routine determinations and segregating protected or confidential information only would provide information on well-established principles of law already available to the public. Your Committee notes that the Internal Revenue Service does not open information that will remain closed under this bill.

The Legislature is in agreement with testimony presented by the Department of Taxation that taxpayers could benefit if the law is amended to provide limited access to information in tax determinations written by the Department's Technical Review Office on tax issues that are evolving or otherwise not well-established; thus, this bill allows public access only to information contained in those certain tax determinations written by the Department's Technical Review Office. The Legislature emphasizes that it intends to enact only this narrow exception to the well-established principle that state tax return information, which includes written opinions, is confidential. See, for example, Office of Information Practices Opinion No. 92-10 (1992). The Legislature recognizes that by enacting this bill, Hawaii is one of only a few states that have undertaken to provide tax return information to the public and, therefore, the Legislature is taking a conservative approach in the amendment of the law by this bill. Accordingly, the Legislature also has provided that doubts about whether information should be publicly disclosed should be resolved in favor of nondisclosure.

TESTIMONY OF THE OFFICE OF INFORMATION PRACTICES

ON H.B. NO. 3190

RELATING TO THE PUBLIC DISCLOSURE OF WRITTEN OPINIONS
BY THE DEPARTMENT OF TAXATION

BEFORE THE HOUSE COMMITTEE ON JUDICIARY

DATE: THURSDAY, February 24, 1994
TIME: 1:30 a.m.
PLACE: Conference Room 802
Leiopapa A Kamehameha Building
235 South Beretania Street

PERSON(S) TESTIFYING:

Kathleen A. Callaghan
Director

TESTIMONY OF THE OFFICE OF INFORMATION PRACTICES

ON H.B. NO. 3190

RELATING TO THE DISCLOSURE OF WRITTEN OPINIONS BY THE DEPARTMENT OF TAXATION.

Honorable Chairperson and Committee Members:

The Office of Information Practices ("OIP") supports the passage of this bill. The purpose of this bill is to amend the State's taxation laws to permit the public inspection and copying of written opinions issued by the Department of Taxation ("Department").

The OIP, an agency attached to the Department of the Attorney General for administrative purposes only, was created by the Legislature to administer and implement the State's public records law, the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). The UIPA, applies to all State and county agencies in the executive, legislative, and judicial branches of government. Among other things, the OIP issues advisory opinion letters, upon request by any person, concerning the extent to which government records must be made available for public inspection and copying. The Legislature also directed the OIP to make "recommendations for legislative changes." Haw. Rev. Stat. §92F-42(7) (Supp. 1992).

In OIP Opinion Letter No. 92-10 (August 1, 1992), a copy of which is attached as Exhibit "A," we concluded that opinion letters or determination letters

issued by the Department were protected from public inspection and copying given the statutory prohibition on the disclosure of tax returns and "return information," set forth in the section 235-116, Hawaii Revised Statutes. While the term "return information" is not defined by State law, the OIP relied upon the definition of this term set forth in the Internal Revenue Code for guidance.

Under the Internal Revenue Code, the term "return information" does not include any part of a written determination that is open for public inspection under rules adopted by the Secretary of the Treasury. A copy the IRS' procedures for the disclosure of written determination letters are attached as Exhibit "B." However, when the OIP issued its opinion letter, the State did not have any procedures similar to those set forth in Exhibit "B" thus, the OIP was constrained to conclude that written opinions issued by the Department are confidential.

Despite the fact that the OIP found that written opinions and written determinations of the Department are presently confidential, we stated:

However, the OIP urges the Department and the Legislature to seriously consider the amendment of the State tax laws to permit, in some form, public access to "written determinations" or government records maintained by the Department that are akin to "letter rulings" from the IRS. In our opinion there is a significant public interest in the disclosure of this information.

As noted by one court, "[t]he function of a letter ruling, usually sought by the taxpayer in advance of contemplated transaction, is to advise the taxpayer regarding the tax treatment he can expect from the IRS in the circumstances specified in the ruling." Tax Analysts & Advocates v. Internal Revenue Service, 505 F.2d 350, 352 (D.C. Cir. 1974). The adoption of provisions similar to those set forth in section 6110 of the Internal Revenue

Code would promote the core purpose of the UIPA that the "formation and conduct of public policy--the discussions, deliberations, decisions, and actions of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. §92F-2 (Supp. 1991).

The OIP commends the Department for attempting, through this legislation, to clarify the State tax laws to permit the public inspection and copying of its written opinions, and to establish an appeals procedure to the OIP concerning the segregation of confidential taxpayer information and confidential commercial and financial information. As such, the OIP strongly supports the passage of this legislation.

However, the OIP does not consider this bill a complete solution since as currently drafted, a "written determination," which term is defined as "a written statement issued by the department that applies an interpretation or principle of tax law clearly established by statute, rule, written opinion, or published court decision to a particular set of facts," will remain confidential, and will not be indexed by the Department. Therefore, we suggest that once the Department has had a reasonable period of time to comply with the mandate of this bill, it would be in the public interest for the Department to then develop a legislative proposal making all written determinations publicly available after sanitizing confidential taxpayer information.

Despite the OIP's concerns about "written determinations," we support the passage of this bill as drafted, since it is a definite improvement over the existing law, and would significantly benefit the public.

We will be happy to try to answer any questions.

JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL



KATHLEEN A. CALLAGHAN
DIRECTOR

PH. (808) 586-1400
FAX (808) 586-1412

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
OFFICE OF INFORMATION PRACTICES
426 QUEEN STREET, ROOM 201
HONOLULU, HAWAII 96813-2904

August 1, 1992

Thomas Yamachika, Esquire
Cades, Schutte, Flemming & Wright
P.O. Box 939
Honolulu, Hawaii 96808

Dear Mr. Yamachika:

Re: Department of Taxation Opinion Letters or Written
Determinations

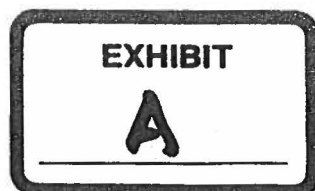
This is in reply to your letter to the Office of
Information Practices ("OIP"), requesting an advisory opinion
concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act
(Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"),
written determinations, or opinions issued to a taxpayer by the
Department of Taxation ("Department") concerning the
applicability of the State franchise tax to loans in which the
borrower is located out of State, must be made available for
public inspection and copying.

BRIEF ANSWER

Under the UIPA, agencies are not required to disclose
"[g]overnment records which, pursuant to state or federal law
. . . are protected from disclosure." Haw. Rev. Stat.
§ 92F-13(4) (Supp. 1991). Section 235-116, Hawaii Revised
Statutes, specifically prohibits the Department from disclosing
tax "return information," and this prohibition has been
incorporated into the State's franchise tax law, chapter 241,
Hawaii Revised Statutes. See Haw. Rev. Stat. § 241-6
(Supp. 1991).



OIP Op. Ltr. No. 92-10

Thomas Yamachika, Esq.
August 1, 1992
Page 2

Using the definition of the term "return information" set forth by section 6103(a) of the Internal Revenue Code for guidance, we conclude that the government records you requested from the Department constitute "return information." While Congress has adopted detailed and elaborate procedures that permit the public inspection of the Internal Revenue Services' ("IRS") written determinations, the State Legislature has not adopted procedures similar to those set forth by section 6110 of the Internal Revenue Code, which carves out an exemption from the prohibition of the disclosure of return information. However, because the OIP believes that there is a significant public interest in these government records, the OIP recommends that the Legislature seriously consider the adoption of provisions similar to those in section 6110 of the Internal Revenue Code that permit the inspection and copying of written determinations and letter rulings issued by the IRS.

Further, we also conclude that even assuming that the Department's written determinations contain information within the scope of section 92F-12(a)(1) and (2), Hawaii Revised Statutes, which requires the availability of certain information "[a]ny provision to the contrary notwithstanding," we do not believe that the Legislature intended this section of the UIPA to require agencies to disclose government records that are protected from disclosure by specific State statutes that prohibit the disclosure of government records, or information contained therein.

Based upon the UIPA's structure, and its legislative history, we believe that in the rare and unusual case that information falling within section 92F-12, Hawaii Revised Statutes, is protected from disclosure by specific State statutes, specific disclosure restrictions adopted by the Legislature prevail over the provisions of section 92F-12, Hawaii Revised Statutes.

Accordingly, we conclude that under the UIPA, the Department is not required to disclose written determinations, or opinions, issued to a taxpayer concerning the applicability of the State franchise tax to loans in which the borrower is located out of State.

FACTS

By letter dated February 19, 1992, citing to the UIPA, your law firm requested the Department to provide it with copies of "[a]ll private letter rulings or other written determinations

Thomas Yamachika, Esq.
August 1, 1992
Page 3

issued by the Department to taxpayers concerning the applicability of the franchise tax (Chapter 241, HRS, or any predecessor statute) to loans in which the borrower is located out of state or in which the security for such loans is used or located out of state."

In its letter, your firm indicated its willingness to accept copies of the written determinations after the Department segregated, or removed, the names and other identifying information about the persons to whom the determinations pertain. Additionally, your firm's UIPA request to the Department asserted that the information requested was public under sections 92F-12(a)(1) and (2), Hawaii Revised Statutes, and made references to case law under the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), supporting your position.

By letter dated February 25, 1992, the Department notified your firm that it was unable to comply with your request for private letter rulings or other written determinations under the UIPA. Specifically, in its letter, the Department stated that it does not issue private letter rulings. Additionally, the Department stated that because the UIPA and FOIA are not the same, interpretations of FOIA are not applicable to the UIPA. As additional support for its position, the Department's letter to your firm stated:

. . . Moreover, the Department does not consider any documents it issues that may be similar to the IRS's private letter rulings to be "final opinions" under section 92F-12(a)(2), HRS, which may be more pertinent to opinions and determinations made by quasi-judicial agencies and boards.

Additionally, in the Department's view, any information the Department provides in response to a request for advice from a taxpayer is based solely upon the facts and circumstances of the taxpayers particular situation. No response can be generalized because each replies to a unique set of facts. In those few cases of general application, the information is usually already available to the public and may be found in the Department's Tax Information Releases and Announcements.

Finally, the Department's individual approach to requests for advice also makes it difficult if not

Thomas Yamachika, Esq.
August 1, 1992
Page 4

impossible to provide the public with an edited copy
of its responses that can serve as useful guides

. . . .

Letter from Richard F. Kahle, Jr., Director of Taxation to
Roger H. Epstein 1-2 (Feb. 25, 1992).

By letter dated February 2, 1992 to the OIP, your firm
requested an advisory opinion concerning whether, under the
UIPA, written determinations issued and maintained by the
Department in response to requests for advice from members of
the public, must be made available for public inspection and
copying.

In a memorandum to the OIP dated June 1, 1992 Deputy
Attorney General Kevin T. Wakayama asserted that opinions or
written advice to taxpayers from the Department constitute "tax
return information" specifically protected from disclosure
under State law. As such, in the opinion of the Attorney
General, under section 92F-13(4), Hawaii Revised Statutes, the
Department is not required by the UIPA to make written opinions
or advice to taxpayers available for public inspection and
copying.

DISCUSSION

I. INTRODUCTION

Under the UIPA, all government records must be made
available for public inspection and copying, unless access is
closed or restricted by law. See Haw. Rev. Stat. § 92F-11(a)
(Supp. 1991). More specifically, the UIPA provides that
"[e]xcept as provided in section 92F-13, each agency upon
request by any person shall make government records available
for inspection and copying." Haw. Rev. Stat. § 92F-11(b)
(Supp. 1991).

II. GOVERNMENT RECORDS PROTECTED FROM DISCLOSURE BY LAW

Under section 92F-13(4), Hawaii Revised Statutes, an
agency is not required by the UIPA to disclose "[g]overnment
records which, pursuant to state or federal law including an
order of any state or federal court, are protected from
disclosure." In OIP Opinion Letter No. 92-6 (June 22, 1992),
we concluded that under this UIPA exception, the authority to
withhold a government record must generally be found in the
express wording of a State statute or federal law.

Thomas Yamachika, Esq.
August 1, 1992
Page 5

Several provisions of the State's tax laws expressly provide for the confidentiality of "tax returns" and tax "return information." See Haw. Rev. Stat. § 235-116 (1985) (income tax)¹; Haw. Rev. Stat. § 237-34 (Supp. 1991) (general excise tax); Haw. Rev. Stat. § 237D-13 (Supp. 1991) (transient accommodations tax).

Because you have requested an advisory opinion concerning written determinations issued by the Department concerning the State's franchise tax law, chapter 241, Hawaii Revised Statutes, we must determine whether any provision in this chapter protects such written determinations from disclosure. Section 241-6, Hawaii Revised Statutes, provides:

§241-6 Chapter 235 applicable. All of the provisions of chapter 235 not inconsistent with this chapter, and which may be appropriately applied to the taxes, persons, circumstances, and situations involved in this chapter, including without prejudice to the generality of the foregoing, sections 235-98, 235-99, and 235-101 to 235-118, shall be applicable to the taxes imposed by this chapter and to the assessment and collection thereof. . . .

Haw. Rev. Stat. § 241-6 (Supp. 1991) (emphases added).

We can find no provision of chapter 241, Hawaii Revised Statutes, that would be inconsistent with section 235-116, Hawaii Revised Statutes, which prohibits the disclosure of tax "returns" and "return information." Thus, in our opinion, these disclosure prohibitions are made applicable to chapter 241, Hawaii Revised Statutes, through section 241-6, Hawaii Revised Statutes.

¹Section 235-116, Hawaii Revised Statutes, provides, in pertinent part:

§235-116 Disclosure of returns unlawful; penalty. All tax returns and return information required to be filed under this chapter shall be confidential, including any copy of any portion of a federal return which may be attached to a state tax return, or any information reflected in the copy of such federal return. . . .

Haw. Rev. Stat. § 235-116 (1985) (emphasis added).

Turning to a consideration of what constitutes a tax "return" or "return information" that is protected from disclosure under section 241-6, Hawaii Revised Statutes, the Attorney General concedes, and we agree that the Department's written determinations do not constitute "tax returns." In a previous advisory opinion, we noted that the term tax "return information" has not been specifically defined by the State Legislature. As a result, in OIP Opinion Letter No. 89-3 (Dec. 3, 1989), we examined the definition of the term "return information" set forth in section 6103(b) of the Internal Revenue Code for guidance.

Our resort to the definition of the term "return information" set forth by the Internal Revenue Code for guidance is appropriate because in 1978, the Legislature amended section 235-116, Hawaii Revised Statutes, to prohibit the disclosure of "return information." Before this amendment, State law merely prohibited the disclosure of "tax returns." Haw. Rev. Stat. § 235-116 (1976). The legislative history of this amendment reflects that the addition of the term "return information" to the disclosure prohibition of section 235-116, Hawaii Revised Statutes, was made to conform Hawaii law to the Internal Revenue Code, and "to eliminate any possibility of problems with [the] Internal Revenue Service on the confidentiality of federal tax return information required by or furnished to the State." H. Stand. Comm. Rep. No. 1110-78, 9th Leg., 1978 Reg. Sess., Haw. H. J. 1905 (1978); see also S. Stand. Comm. Rep. No. 88-78, 9th Leg., 1978 Reg. Sess., Haw. S.J. 829 (1978) ([t]he purpose of this bill is to clarify the law on confidentiality of tax returns to meet federal requirements").

Because the Legislature appears to have intended to extend the same protection to return information as that provided by federal law, we decline to limit the applicability of section 235-116, Hawaii Revised Statutes, to only that return information that is "required to be filed" with the Department, despite the express wording of this statute to this effect. See Haw. Rev. Stat. § 235-116 (1985).

Under section 6103(b) of the Internal Revenue Code, the term "return information" includes but is not limited to:

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies,

over assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of a written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110. . . .

I.R.C. § 6103(b)(2)(A) (1986) (emphases added).

We note that under federal law the term "return information" does not include any portion of a written determination² issued by the Secretary of the Treasury that is open to public inspection under section 6110 of the Internal Revenue Code, entitled "Public Inspection of Written Determinations." However, we must also note that the State Legislature has not adopted the detailed and elaborate procedures (or any procedures) approaching those set forth in this Internal Revenue Code provision.

Among other things, section 6110(f) of the Internal Revenue Code requires the Secretary of the Treasury to adopt regulations establishing administrative remedies to request the additional disclosure of, or to request the IRS to restrain disclosure of, a written determination, and establishes an individual's right to petition the United States Tax Court (anonymously, if appropriate) for a ruling with respect to a written determination. A copy of these procedures are attached as Exhibit "A." But for the exemption created by Congress in this provision of the Internal Revenue Code, "written

²Under the Internal Revenue Code, the term "written determination" means a ruling, determination letter, or technical advice memorandum. I.R.C. § 6110(b)(1).

Thomas Yamachika, Esq.
August 1, 1992
Page 8

determinations" would fall within the federal disclosure prohibition applicable to "return information."

Moreover, while under the Internal Revenue Code the term "return information" does not include information in a form "which cannot be associated with, or otherwise identify directly or indirectly, a particular taxpayer,"³ in OIP Opinion Letter No. 89-3 at p. 9, we observed that the U.S. Supreme Court has adopted a narrow construction of this language. Specifically, the U.S. Supreme Court has held that this provision, commonly known as the "Haskell Amendment," was only intended to allow the continuation of the IRS' practice of releasing "statistical studies and compilations" for research purposes. Thus, the U.S. Supreme Court held that this Internal Revenue Code provision does not exempt from the Code's disclosure prohibitions, material that can be redacted (sanitized) to delete information concerning a taxpayer. See Church of Scientology of California v. IRS, 484 U.S. 9 (1987).

The OIP is constrained to conclude that determinations or opinions issued to a taxpayer by the Department concerning the applicability of the State franchise tax to loans in which the borrower is located out of state are protected from disclosure under section 92F-13(4), Hawaii Revised Statutes. First, written determinations or opinions issued by the Department to a taxpayer concerning the applicability of the State franchise tax to loans in which the borrower is located out of State, or the security for the loan is located out of State, fall within the federal definition of the term "return information" quoted above. Secondly, the Legislature has not, like the Congress, adopted any exemption to this confidentiality provision that permits the public inspection and copying of "written determinations" or other forms of written advice from the Department to taxpayers.

However, the OIP urges the Department and the Legislature to seriously consider the amendment of the State tax laws to permit, in some form, public access to "written determinations" or government records maintained by the Department that are akin to "letter rulings" from the IRS. In our opinion there is a significant public interest in the disclosure of this information.

³See I.R.C. § 6103(b)(2) (1986).

As noted by one court, "[t]he function of a letter ruling, usually sought by the taxpayer in advance of contemplated transaction, is to advise the taxpayer regarding the tax treatment that he can expect from the IRS in the circumstances specified in the ruling." Tax Analysts & Advocates v. Internal Revenue Service, 505 F.2d 350, 352 (D.C. Cir. 1974). The adoption of provisions similar to those set forth in section 6110 of the Internal Revenue Code would promote the core purpose of the UIPA that the "formation and conduct of public policy-the discussions, deliberations, decisions, and actions of government agencies-shall be conducted as openly as possible." Haw. Rev. Stat. § 92F-2 (Supp. 1991).

Our inquiry is not at an end, for we now turn to a consideration of whether, notwithstanding the fact that sections 235-116 and 241-6, Hawaii Revised Statutes, protect "return information" from disclosure, written determinations by the Department concerning the applicability of the State's franchise tax must be made available for public inspection and copying under section 92F-12, Hawaii Revised Statutes.

III. INTERPRETATIONS OF GENERAL APPLICABILITY

Section 92F-12(a), Hawaii Revised Statutes, provides in pertinent part:

§92F-12 Disclosure required. (a) Any provision to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

- (1) Rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency;
- (2) Final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases;

Haw. Rev. Stat. § 92F-12(a)(1) and (2) (Supp. 1991) and Act 185, 1992 Haw. Sess. Laws ____ (emphasis added).

In your letter to the OIP requesting an advisory opinion, you assert that the Department's written determinations or opinions concerning the applicability of the State franchise tax constitute "statements of general policy" or "interpretations of general applicability" adopted by the

Thomas Yamachika, Esq.
August 1, 1992
Page 10

Department that must be made available for public inspection and copying "[a]ny provision to the contrary notwithstanding." In support of this argument, your letter to the OIP referred to case law under the FOIA.

We concur with your observation that court decisions construing the FOIA are relevant in construing section 92F-12(a)(1) and (2), Hawaii Revised Statutes.⁴ For the

⁴The above quoted provisions of subsection (a), of section 92F-12, Hawaii Revised Statutes, were taken from section 2-101 of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioner's on Uniform State Laws. The commentary to section 2-101 of the Model Code provides:

Under this section, the "law of the agency" must be made available to the public. In other words, an agency may not maintain "secret law" relating to its own decisions and policies. This section is similar in general requirement to Sections (a) (1), (2) and (3) of the federal Freedom of Information Act. [citations omitted.] The affirmative disclosure responsibility extends to agency policies, rules, and adjudicative determinations and procedures. In addition, this section mandates disclosure in the form in which the records are used or relied upon by the agency. . . .

Nothing in the section requires an agency to make rules or to formalize its decision-making processes. Nor does it require an agency to reduce its rules or policies to written or other permanent form. If preferred, an administrative procedure act or similar legislation could serve those purposes.

Model Code § 2-101 commentary at 10 (1988) (emphasis added).

We also observe that federal courts have held that IRS written determinations constitute "statements of general policy," or "interpretations which have been adopted by the agency," or "final opinion[s]." See Tax Analysts & Advocates v. Internal Revenue Service, 505 F.2d 350 (1974); Freuhauf Corp. v. Internal Revenue Service, 522 F.2d 284 (1975). Importantly however, both of these cases were decided before Congress passed the Tax Reform Act of 1976, and adopted the elaborate procedures in I.R.C. § 6110 for the disclosure of

Thomas Yamachika, Esq.
August 1, 1992
Page 11

reasons explained below, however, we do not believe that section 92F-12, Hawaii Revised Statutes, requires agencies to disclose government records that are protected from disclosure by specific legislative enactments such as section 235-116, Hawaii Revised Statutes.

In section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records, or information contained therein, that must be made available for public inspection and copying "[a]ny provision to the contrary notwithstanding." While at first reading, one might assume that the phrase "[a]ny provision to the contrary notwithstanding," refers to all of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, the UIPA's legislative history clarifies the intended scope of this phrase. In particular, the UIPA's legislative history indicates that "[a]s to these records, the [UIPA's] exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988) (emphasis added). These UIPA exceptions are set forth by section 92F-13(1) and (3), Hawaii Revised Statutes.

Furthermore, the structure of the UIPA itself reflects that the Legislature intended the provisions of the UIPA to yield to specific State statutes, that either expressly restrict, or that expressly authorize the disclosure of government records. See Haw. Rev. Stat. § 92F-12(b)(2) (Supp. 1991) (requiring the disclosure of government records that pursuant to "a statute of this state" that are authorized to be disclosed); Haw. Rev. Stat. § 92F-13(4) (Supp. 1991) (protecting from disclosure government records that are protected from disclosure by State law); Haw. Rev. Stat. § 92F-22(5) (Supp. 1991) (protecting from disclosure any personal record that is "[r]equired to be withheld from the individual to whom it pertains by statute").

written determinations issued by the the IRS. With respect to these elaborate procedures, "Congress intended that § 6110 provide the exclusive means of public access, ruling out resort to the regular FOIA procedures." Fruehauf Corp. v. Internal Revenue Service, 566 F.2d 574, 577 (6th Cir. 1977) (emphasis added).

Thomas Yamachika, Esq.
August 1, 1992
Page 12

Furthermore, our conclusion is supported by the existence of section 92F-17, Hawaii Revised Statutes, which makes it a criminal offense for any person to "intentionally disclose[] or provide[] a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any person or agency with actual knowledge that disclosure is prohibited." Haw. Rev. Stat. § 92F-17 (Supp. 1991) (emphasis added). Notwithstanding the provisions of section 92F-12, Hawaii Revised Statutes, a person would be subject to criminal prosecution for disclosing a record that is explicitly described by specific confidentiality statutes, with actual knowledge that disclosure is prohibited.

Also, as we noted in OIP Opinion Letter No. 92-6 (June 22, 1992), the UIPA exception set forth in section 92F-13(4), Hawaii Revised Statutes, is similar to one contained in section 3-101 of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State laws, upon which the UIPA was modeled. The commentary to this Model Code provision indicates that it was intended to be "a catch all provision which assimilates . . . any federal law, state statute or rule of evidence that expressly requires the withholding of information from the general public." See Model Code § 2-103 commentary at 18 (1981).

Finally, our conclusion is supported by the general rule of statutory construction that where one statute deals with a subject in general terms, and another in specific terms, the specific law will generally prevail. See State v. Grayson, 70 Haw. 227, 235 (1989); see also 2B N. Singer, Sutherland Statutory Construction § 51.05 (Sands 5th ed. rev. 1992).

Based upon the the above authorities, we conclude that where government records are protected from disclosure by specific State statutes, such as section 235-116, Hawaii Revised Statutes, and where those records contain information described in section 92F-12, Hawaii Revised Statutes, the specific State statute controls the determination of the public's access rights.⁵ Thus, in our opinion, the Legislature

⁵We believe that the presence of a statute protecting the disclosure of information falling within the provisions of section 92F-12, Hawaii Revised Statutes, represents a rare and unusual occurrence, one that is unlikely to be repeated in other statutory or factual settings.

Thomas Yamachika, Esq.
August 1, 1992
Page 13

did not intend section 92F-12, Hawaii Revised Statutes, to require agencies to disclose government records that are protected from required disclosure under section 92F-13(4), Hawaii Revised Statutes.

CONCLUSION

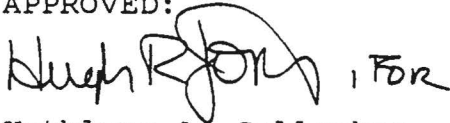
For the reasons set forth above, we conclude that under the UIPA, the Department is not required to disclose written determinations or opinions issued to a taxpayer concerning the applicability of the State franchise tax to loans in which the borrower is located out of State.

Very truly yours,



Hugh R. Jones
Staff Attorney

APPROVED:



Kathleen A. Callaghan
Director

HRJ:sc

c: Honorable Richard F. Kahle, Jr.
Director of Taxation

Kevin T. Wakayama
Deputy Attorney General

A tax attorney was not exempt from the requirement of using his social security number on returns he prepared.

N.E. Powell, DC, 31-1 USTC ¶ 9383, 311 F.Supp 700.

Where a department store licenses a corporation to prepare returns in its stores, and that corporation sublicensees this privilege to a second corporation, the individual employees of the sublicensee, the sublicensee, and the licensee may be considered income tax return preparers. The department store is not a preparer. The individual with primary responsibility for the accuracy of the return must sign the return and show his or her social security number. The name and employer identification number of the original licensee must also be shown on the return as the person who employed or engaged the preparer.

Rev. Rul. 81-246, 1981-2 CB 249.

A firm that furnishes a computerized tax return preparation service to tax practitioners is an income tax return preparer when the program used goes beyond mere mechanical assistance.

Rev. Rul. 85-187, 1985-2 CB 338.

A farmers cooperative credit association that prepares Schedule F of Form 1040 as part of a computerized data processing system provided to members is an income tax return preparer if the Schedule F is a substantial portion of a member's return.

Rev. Rul. 85-188, 1985-2 CB 339.

A person who prepares a computer program and sells it to a taxpayer to use in preparing the taxpayer's income tax return may be an income tax return preparer.

Rev. Rul. 85-189, 1985-2 CB 341.

Software companies and others who prepare computer programs and sell them to taxpayers for

use in preparing income tax returns may be considered return preparers and subject to certain preparer penalties. If the computer program provides substantive tax instructions rather than just mechanical assistance, the individual or company that prepares and sells the software is considered a return preparer.

IR News Rel. IR-86-62, May 5, 1986.

A person in a business other than tax return preparation who fills out or reviews income tax returns for its customers may be an income tax return preparer under section 7701(a)(36) of the Code and subject to potential penalties for failure to comply with Code Sec. 6109 and other provisions applicable to return preparers.

Rev. Rul. 86-35, 1986-1 CB 373.

45 Widows.—Benefit numbers may be used as taxpayer identifying numbers by persons who were drawing social security benefits as widows age 62 or over before January 1, 1963, if they have no social security numbers of their own. The benefit number is the social security number of the deceased husband. All other widows should obtain their own account numbers.

Rev. Proc. 66-29, 1966-1 CB 636.

.90 Prior law.—

Rev. Rul. 63-272, 1963-2 CB 614.

Rev. Rul. 65-130, 1965-1 CB 339.

Rev. Proc. 62-23, 1962-2 CB 487.

Rev. Proc. 63-27, 1963-2 CB 763.

Rev. Proc. 70-22, 1970-2 CB 503.

Rev. Proc. 66-17, 1966-2 CB 1233.

T.I.R. No. 370, December 14, 1966.

[§ 37,980]

PUBLIC INSPECTION OF WRITTEN DETERMINATIONS

Sec. 6110 [1986 Code]. (a) GENERAL RULE.—Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.

(b) DEFINITIONS.—For purposes of this section—

(1) WRITTEN DETERMINATION.—The term "written determination" means a ruling, determination letter, or technical advice memorandum.

(2) BACKGROUND FILE DOCUMENT.—The term "background file document" with respect to a written determination includes the request for that written determination, any written material submitted in support of the request, and any communication (written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination (other than any communication between the Department of Justice and the Internal Revenue Service relating to a pending civil or criminal case or investigation) received before issuance of the written determination.

(3) REFERENCE AND GENERAL WRITTEN DETERMINATIONS.—

(A) REFERENCE WRITTEN DETERMINATION.—The term "reference written determination" means any written determination which has been determined by the Secretary to have significant reference value.

§ 37,965.45 Code § 6110(a)

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EXHIBIT

B

(B) GENERAL WRITTEN DETERMINATION.—The term "general written determination" means any written determination other than a reference written determination.

(c) EXEMPTIONS FROM DISCLOSURE.—Before making any written determination or background file document open or available to public inspection under subsection (a), the Secretary shall delete—

(1) the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1), identified in the written determination or any background file document;

(2) information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and which is in fact properly classified pursuant to such Executive order;

(3) information specifically exempted from disclosure by any statute (other than this title) which is applicable to the Internal Revenue Service;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(6) information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for the regulation or supervision of financial institutions; and

(7) geological and geophysical information and data, including maps, concerning wells.

The Secretary shall determine the appropriate extent of such deletions and, except in the case of intentional or willful disregard of this subsection, shall not be required to make such deletions (nor be liable for failure to make deletions) unless the Secretary has agreed to such deletions or has been ordered by a court (in a proceeding under subsection (f)(3)) to make such deletions.

(d) PROCEDURES WITH REGARD TO THIRD PARTY CONTACTS.—

(1) NOTATIONS.—If, before the issuance of a written determination, the Internal Revenue Service receives any communication (written or otherwise) concerning such written determination, any request for such determination, or any other matter involving such written determination from a person other than an employee of the Internal Revenue Service or the person to whom such written determination pertains (or his authorized representative with regard to such written determination), the Internal Revenue Service shall indicate, on the written determination open to public inspection, the category of the person making such communication and the date of such communication.

(2) EXCEPTION.—Paragraph (1) shall not apply to any communication made by the Chief of Staff of the Joint Committee on Taxation.

(3) DISCLOSURE OF IDENTITY.—In the case of any written determination to which paragraph (1) applies, any person may file a petition in the United States Tax Court or file a complaint in the United States District Court for the District of Columbia for an order requiring that the identity of any person to whom the written determination pertains be disclosed. The court shall order disclosure of such identity if there is evidence in the record from which one could reasonably conclude that an impropriety occurred or undue influence was exercised with respect to such written determination by or on behalf of such person. The court may also direct the Secretary to disclose any portion of any other deletions made in accordance with subsection (c) where such disclosure is in the public interest. If a proceeding is commenced under this paragraph, the person whose identity is subject to being disclosed and the person about whom a notation is made under paragraph (1) shall be notified of the proceeding in accordance with the procedures described in subsection (f)(4)(B) and shall have the right to intervene in the proceeding (anonymously, if appropriate).

(4) PERIOD IN WHICH TO BRING ACTION.—No proceeding shall be commenced under paragraph (3) unless a petition is filed before the expiration of 36 months after the first day that the written determination is open to public inspection.

(e) **BACKGROUND FILE DOCUMENTS.**—Whenever the Secretary makes a written determination open to public inspection under this section, he shall also make available to any person, but only upon the written request of that person, any background file document relating to the written determination.

(f) **RESOLUTION OF DISPUTES RELATING TO DISCLOSURE.**—

(1) **NOTICE OF INTENTION TO DISCLOSE.**—The Secretary shall upon issuance of any written determination, or upon receipt of a request for a background file document, mail a notice of intention to disclose such determination or document to any person to whom the written determination pertains (or a successor in interest, executor, or other person authorized by law to act for or on behalf of such person).

(2) **ADMINISTRATIVE REMEDIES.**—The Secretary shall prescribe regulations establishing administrative remedies with respect to—

(A) requests for additional disclosure of any written determination or any background file document, and

(B) requests to restrain disclosure.

(3) **ACTION TO RESTRAIN DISCLOSURE.**—

(A) **CREATION OF REMEDY.**—Any person—

(i) to whom a written determination pertains (or a successor in interest, executor, or other person authorized by law to act for or on behalf of such person), or who has a direct interest in maintaining the confidentiality of any such written determination or background file document (or portion thereof),

(ii) who disagrees with any failure to make a deletion with respect to that portion of any written determination or any background file document which is to be open or available to public inspection, and

(iii) who has exhausted his administrative remedies as prescribed pursuant to paragraph (2).

may, within 60 days after the mailing by the Secretary of a notice of intention to disclose any written determination or background file document under paragraph (1), together with the proposed deletions, file a petition in the United States Tax Court (anonymously, if appropriate) for a determination with respect to that portion of such written determination or background file document which is to be open to public inspection.

(B) **NOTICE TO CERTAIN PERSONS.**—The Secretary shall notify any person to whom a written determination pertains (unless such person is the petitioner) of the filing of a petition under this paragraph with respect to such written determination or related background file document, and any such person may intervene (anonymously, if appropriate) in any proceeding conducted pursuant to this paragraph. The Secretary shall send such notice by registered or certified mail to the last known address of such person within 15 days after such petition is served on the Secretary. No person who has received such a notice may thereafter file any petition under this paragraph with respect to such written determination or background file document with respect to which such notice was received.

(4) **ACTION TO OBTAIN ADDITIONAL DISCLOSURE.**—

(A) **CREATION OF REMEDY.**—Any person who has exhausted the administrative remedies prescribed pursuant to paragraph (2) with respect to a request for disclosure may file a petition in the United States Tax Court or a complaint in the United States District Court for the District of Columbia for an order requiring that any written determination or background file document (or portion thereof) be made open or available to public inspection. Except where inconsistent with subparagraph (B), the provisions of subparagraphs (C), (D), (E), (F), and (G) of section 552(a)(4) of title 5, United States Code, shall apply to any proceeding under this paragraph. The Court shall examine the matter de novo and without regard to a decision of a court under paragraph (3) with respect to such written determination or background file document, and may examine the entire text of such written determination or background file document in order to determine whether such written determination or background file document or any part thereof shall be open or available to public inspection under this section. The burden of proof with respect to the issue of disclosure of any information shall be on the Secretary and any other person seeking to restrain disclosure.

(B) INTERVENTION.—If a proceeding is commenced under this paragraph with respect to any written determination or background file document, the Secretary shall, within 15 days after notice of the petition filed under subparagraph (A) is served on him, send notice of the commencement of such proceeding to all persons who are identified by name and address in such written determination or background file document. The Secretary shall send such notice by registered or certified mail to the last known address of such person. Any person to whom such determination or background file document pertains may intervene in the proceeding (anonymously, if appropriate). If such notice is sent, the Secretary shall not be required to defend the action and shall not be liable for public disclosure of the written determination or background file document (or any portion thereof) in accordance with the final decision of the court.

— Caution: Code Sec. 6110(f)(5), below, as amended by P.L. 98-620, does not apply to cases pending on November 3, 1984. —

(5) EXPEDITION OF DETERMINATION.—The Tax Court shall make a decision with respect to any petition described in paragraph (3) at the earliest practicable date.

(6) PUBLICITY OF TAX COURT PROCEEDINGS.—Notwithstanding sections 7453 and 7461, the Tax Court may, in order to preserve the anonymity, privacy, or confidentiality of any person under this section, provide by rules adopted under section 7453 that portions of hearings, testimony, evidence, and reports in connection with proceedings under this section may be closed to the public or to inspection by the public.

(g) TIME FOR DISCLOSURE.—

(1) IN GENERAL.—Except as otherwise provided in this section, the text of any written determination or any background file document (as modified under subsection (c)) shall be open or available to public inspection—

(A) no earlier than 75 days, and no later than 90 days, after the notice provided in subsection (f)(1) is mailed, or, if later,

(B) within 30 days after the date on which a court decision under subsection (f)(3) becomes final.

(2) POSTPONEMENT BY ORDER OF COURT.—The court may extend the period referred to in paragraph (1)(B) for such time as the court finds necessary to allow the Secretary to comply with its decision.

(3) POSTPONEMENT OF DISCLOSURE FOR UP TO 90 DAYS.—At the written request of the person by whom or on whose behalf the request for the written determination was made, the period referred to in paragraph (1)(A) shall be extended (for not to exceed an additional 90 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(4) ADDITIONAL 180 DAYS.—If—

(A) the transaction set forth in the written determination is not completed during the period set forth in paragraph (3), and

(B) the person by whom or on whose behalf the request for the written determination was made establishes to the satisfaction of the Secretary that good cause exists for additional delay in opening the written determination to public inspection,

the period referred to in paragraph (3) shall be further extended (for not to exceed an additional 180 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(5) SPECIAL RULES FOR CERTAIN WRITTEN DETERMINATIONS, ETC.—Notwithstanding the provisions of paragraph (1), the Secretary shall not be required to make available to the public—

(A) any technical advice memorandum and any related background file document involving any matter which is the subject of a civil fraud or criminal investigation or jeopardy or termination assessment until after any action relating to such investigation or assessment is completed, or

(B) any general written determination and any related background file document that relates solely to approval of the Secretary of any adoption or change of—

- (i) the funding method or plan year of a plan under section 412.
- (ii) a taxpayer's annual accounting period under section 442.
- (iii) a taxpayer's method of accounting under section 446(e), or
- (iv) a partnership's or partner's taxable year under section 706.

but the Secretary shall make any such written determination and related background file document available upon the written request of any person after the date on which (except for this subparagraph) such determination would be open to public inspection.

(h) DISCLOSURE OF PRIOR WRITTEN DETERMINATIONS AND RELATED BACKGROUND FILE DOCUMENTS.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, a written determination issued pursuant to a request made before November 1, 1976, and any background file document relating to such written determination shall be open or available to public inspection in accordance with this section.

(2) TIME FOR DISCLOSURE.—In the case of any written determination or background file document which is to be made open or available to public inspection under paragraph (1)—

(A) subsection (g) shall not apply, but

(B) such written determination or background file document shall be made open or available to public inspection at the earliest practicable date after funds for that purpose have been appropriated and made available to the Internal Revenue Service.

(3) ORDER OF RELEASE.—Any written determination or background file document described in paragraph (1) shall be open or available to public inspection in the following order starting with the most recent written determination in each category:

(A) reference written determinations issued under this title;

(B) general written determinations issued after July 4, 1967; and

(C) reference written determinations issued under the Internal Revenue Code of 1939 or corresponding provisions of prior law.

General written determinations not described in subparagraph (B) shall be open to public inspection on written request, but not until after the written determinations referred to in subparagraphs (A), (B), and (C) are open to public inspection.

(4) NOTICE THAT PRIOR WRITTEN DETERMINATIONS ARE OPEN TO PUBLIC INSPECTION.—Notwithstanding the provisions of subsections (f)(1) and (f)(3)(A), not less than 90 days before making any portion of a written determination described in this subsection open to public inspection, the Secretary shall issue public notice in the Federal Register that such written determination is to be made open to public inspection. The person who received a written determination may, within 75 days after the date of publication of notice under this paragraph, file a petition in the United States Tax Court (anonymously, if appropriate) for a determination with respect to that portion of such written determination which is to be made open to public inspection. The provisions of subsections (f)(3)(B), (5), and (6) shall apply if such a petition is filed. If no petition is filed, the text of any written determination shall be open to public inspection no earlier than 90 days, and no later than 120 days, after notice is published in the Federal Register.

(5) EXCLUSION.—Subsection (d) shall not apply to any written determination described in paragraph (1).

(i) CIVIL REMEDIES.—

(1) CIVIL ACTION.—Whenever the Secretary—

(A) fails to make deletions required in accordance with subsection (c), or

(B) fails to follow the procedures in subsection (g), the recipient of the written determination or any person identified in the written determination shall have as an exclusive civil remedy an action against the Secretary in the Court of Claims, which shall have jurisdiction to hear any action under this paragraph.

(2) DAMAGES.—In any suit brought under the provisions of paragraph (1)(A) in which the Court determines that an employee of the Internal Revenue Service intentionally or willfully failed to delete in accordance with subsection (c), or in any suit brought

under subparagraph (1)(B) in which ~~The~~ Court determines that an employee intentionally or willfully failed to act in accordance with subsection (g), the United States shall be liable to the person in an amount equal to the sum of—

(A) actual damages sustained by the person but in no case shall a person be entitled to receive less than the sum of \$1,000, and

(B) the costs of the action together with reasonable attorney's fees as determined by the Court.

(j) SPECIAL PROVISIONS.—

(1) FEES.—The Secretary is authorized to assess actual costs—

(A) for duplication of any written determination or background file document made open or available to the public under this section, and

(B) incurred in searching for and making deletions required under subsection (c) from any written determination or background file document which is available to public inspection only upon written request.

The Secretary shall furnish any written determination or background file document without charge or at a reduced charge if he determines that waiver or reduction of the fee is in the public interest because furnishing such determination or background file document can be considered as primarily benefiting the general public.

(2) RECORDS DISPOSAL PROCEDURES.—Nothing in this section shall prevent the Secretary from disposing of any general written determination or background file document described in subsection (b) in accordance with established records disposition procedures, but such disposal shall, except as provided in the following sentence, occur not earlier than 3 years after such written determination is first made open to public inspection. In the case of any general written determination described in subsection (h), the Secretary may dispose of such determination and any related background file document in accordance with such procedures but such disposal shall not occur earlier than 3 years after such written determination is first made open to public inspection if funds are appropriated for such purpose before January 20, 1979, or not earlier than January 20, 1979, if funds are not appropriated before such date. The Secretary shall not dispose of any reference written determinations and related background file documents.

(3) PRECEDENTIAL STATUS.—Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.

(k) SECTION NOT TO APPLY.—This section shall not apply to—

(1) any matter to which section 6104 applies, or

(2) any—

(A) written determination issued pursuant to a request made before November 1, 1976, with respect to the exempt status under section 501(a) of an organization described in section 501(c) or (d), the status of an organization as a private foundation under section 509(a), or the status of an organization as an operating foundation under section 4942(j)(3),

(B) written determination described in subsection (g)(5)(B) issued pursuant to a request made before November 1, 1976,

(C) determination letter not otherwise described in subparagraph (A), (B), or (E) issued pursuant to a request made before November 1, 1976,

(D) background file document relating to any general written determination issued before July 3, 1967, or

(E) letter or other document described in section 6104(a)(1)(B)(iv) issued before September 2, 1974.

(l) EXCLUSIVE REMEDY.—Except as otherwise provided in this title, or with respect to a discovery order made in connection with a judicial proceeding, the Secretary shall not be required by any Court to make any written determination or background file document open or available to public inspection, or to refrain from disclosure of any such documents.

1.01 Added by P.L. 94-55. Amended by P.L. 98-620. For details, see the Code Volumes.

.05 Committee Report on P.L. 94-55 appears at 1976-3 (Vol.2) CB 1004.

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February 23, 1994

Honorable Terrance W.H. Tom, Chairman,
and Committee Members
Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Subject: House Bill No. 3190, Relating to the Public
Disclosure of Written Opinions by the Department of
Taxation

Dear Chairman Tom and Members:

We are Mervyn S. Gerson and Matthew F. Kadish of Gerson Grekin Wynhoff & Thielen, a firm which concentrates in the areas of estates, tax and business law. We are speaking on our own behalf.

We support the passage of this bill for the following reasons:

The federal government has for some time provided for disclosure of its written opinions. The Internal Revenue Service ("IRS") broadly discloses its rulings in Revenue Rulings (which set forth the IRS' litigation position on an issue of tax law), Private Letter Rulings (which are generally applications of well-settled law to the facts of a particular taxpayer), and Technical Advice Memoranda (which are legal memoranda issued from the IRS national office to the district office during the audit of a taxpayer).

The IRS' rulings attempt to balance preserving the confidentiality of the taxpayers with the need of other taxpayers to have guidance on the IRS' position on various areas of tax law. The formalization and publication of the various rulings and legal memoranda require a significant amount of highly trained staff.

Hawaii has lagged behind the federal government presumably for a number of reasons, including the cost of hiring trained staff to formalize the rulings and the difficulty of maintaining taxpayer confidentiality in the smaller state context. Currently, Hawaii does not disclose any of its written opinions.

We believe that H.B. 3190 presents a good, balanced starting point for bringing disclosure to the State of Hawaii. It errs on the side of protecting taxpayer confidentiality, and provides for public disclosure of only written opinions by the

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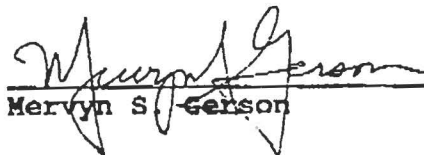
Committee on Judiciary
Testimony on H.B. 3190
February 23, 1994
Page 2

Department of Taxation's Technical Review Office which are on unsettled areas of tax law. The cost of protecting taxpayer confidentiality is that many opinions will not be available to the public, because they deal with the application of settled areas of tax law to the particular facts of a given taxpayer. While we hope that future legislation may make those opinions subject to disclosure, we recognize the need to proceed carefully to protect taxpayer confidentiality, and also the desire to avoid the administrative cost which would be involved in disclosing every opinion of the Department of Taxation.

We commend the Department of Taxation for initiating this move toward public disclosure, and we support the passage of H.B. 3190.

Thank you for the opportunity to testify.

Very truly yours,


Mervyn S. Gerson


Matthew F. Kadish

MFK:m

L E G I S L A T I V E

TAX BILL SERVICE

201 Merchant Street, Suite 901

TAX FOUNDATION
OF HAWAII

Honolulu, Hawaii 96813 Tel 536-4587

SUBJECT: ADMINISTRATION, Public disclosure of written opinions

BILL NUMBER: SB 2972; HB 3190 (Identical)

INTRODUCED BY: SB by Mizuguchi by request; HB by Souki by request

BRIEF SUMMARY: Adds a new section to HRS chapter 231 to provide for the disclosure of written opinions issued by the department of taxation.

Defines a "written opinion" as written communication to the taxpayer that interprets and applies any provision of the tax law with respect to a specific set of facts. Delineates that such opinions may not be used or cited as precedent unless otherwise provided for by department rules. Specifies that such written opinions do not include letters covering the audit of a return or with respect to tax collections, or one of general information or a determination letter.

Specifies that before an opinion is made public, the department must segregate any confidential information such as name, social security number, trade secrets, etc., and must inform the taxpayer to whom the opinion had been submitted that the department intends to make the opinion public indicating the confidential information to be omitted.

Delineates the time period during which the taxpayer may object and appeal to the circuit court or the office of information practices. Requires the department to compile an annual index of opinions issued during the preceding calendar year and specifies charges for copies of the index and opinions. Allows the department to adopt rules under chapter 91 to implement this proposal.

EFFECTIVE DATE: Applies to dates after December 31, 1994

STAFF COMMENTS: This is an administration measure TAX-11 (1994) submitted by the department of taxation. For years, practitioners have sought the release of department written opinions in hopes that those written opinions would help them interpret the state tax laws.

On the other hand, prior administrations believed that the release of such opinions would violate the confidentiality statute which is required by the federal government if the state is to share income tax information with the Internal Revenue Service. The result has been that those taxpayers who obtained written opinions were at an advantage as they were given guidance by the department.

Those who struggled with the same portion of the law were at a disadvantage unless they too went through the lengthy and costly process of securing a written opinion. This proposal would open up those written opinions so that all taxpayers would have the advantage of knowing how the department has decided to interpret and apply the tax laws.

THE HOUSE OF REPRESENTATIVES
SEVENTEENTH STATE LEGISLATURE
HOUSE JUDICIARY COMMITTEE

TESTIMONY OF MICHAEL A. SHEA, MICHAEL J. O'MALLEY, LANT A.
JOHNSON, MIKI OKUMURA AND JEFFREY S. PIPER

H.B. 3190 - RELATING TO THE PUBLIC DISCLOSURE OF
WRITTEN OPINIONS BY THE DEPARTMENT OF
TAXATION

This testimony is submitted on behalf of Michael A. Shea, Michael J. O'Malley, Lant A. Johnson, Miki Okumura and Jeffrey S. Piper. We are attorneys with the tax department of Goodsill Anderson Quinn & Stifel. Although we are active with the Tax Committee of the Chamber of Commerce, the Tax Foundation of Hawaii, the Tax Section of the Hawaii State Bar Association, and the Tax Section of the American Bar Association, this testimony is not submitted on behalf of any organization, but based upon our personal views and experience as tax practitioners who regularly represent individuals and businesses with respect to State tax matters and with concerning disputes between taxpayers and the Department of Taxation.

This bill provides that the Department of Taxation shall make public certain written opinions on State tax matters, after deleting identifying information with respect to the person or persons involved in the opinion.

Several provisions in the Hawaii Revised Statutes require the confidentiality of certain tax information and opinions. However, certain tax opinions that express the views of the Department of Taxation on substantive legal issues are extremely important to tax practitioners and taxpayers in determining how to conduct their affairs and in allowing them to deal fairly and effectively with the Department of Taxation. This bill would make these matters public and would thus protect the rights of taxpayers and assist tax practitioners. Having the rules made known would actually assist the taxpayers in proper compliance, and could, therefore, in the long run ultimately benefit the Department of Taxation.

This bill does strike a balance. It allows for the disclosure of certain substantive opinions, but does not require the disclosure of every piece of administrative paper work. Unduly expanding the disclosure requirements could constitute a nuisance to the Department of Taxation, thereby eroding efficiency, without materially benefiting practitioners and taxpayers. We think that this bill provides a reasonable balance between the desirability of open disclosure of important tax opinions and avoiding an unnecessary deluge of paper work.

We would support this bill in the current form. After a few years of application and the establishment of

Tax Department administrative rules facilitating compliance, disclosures could potentially be expanded or contracted by future legislation. For the moment, however, we believe that this bill strikes a reasonable balance.