

Tax

STAND. COM. REP. NO. 585-94

Honolulu, Hawaii

March 3, 1994

RE: H.B. No. 3190

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Honorable Joseph M. Souki
Speaker, House of Representatives
Seventeenth State Legislature
Regular Session of 1994
State of Hawaii

[TAX-11 (94)]

Sir:

Your Committee on Judiciary, to which was referred H.B. No. 3190 entitled:

"A BILL FOR AN ACT RELATING TO THE PUBLIC DISCLOSURE OF
WRITTEN OPINIONS BY THE DEPARTMENT OF TAXATION,"

begs leave to report as follows:

The purpose of this bill is to open to public inspection written opinions of the Department of Taxation that interpret the tax laws, while at the same time maintaining the confidentiality of tax return information.

Your Committee received testimony in support of the measure from a representative of the Office of Information Practices and from several attorneys in private practice who specialize in tax law. In addition, your Committee also received testimony from a representative of the Department of Taxation (Department) who supports this bill and recommends that minor changes be made.

In adopting this measure, the intent of your Committee is not to open to public inspection routine requests for tax return information. Nor does your Committee intends that the Department'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. Your Committee recognizes that these kinds of documents involve the application of tax laws to particular taxpayers' factual circumstances; nevertheless, your Committee has determined that disclosure of these documents or the information in these documents would be of little benefit to the public.

Your Committee notes that requiring the Department to assume the burden and expense of compiling and indexing routine determinations and segregating protected or confidential information would only 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.

Your Committee is in agreement with testimony presented by the Department 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. Your Committee 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).

Your Committee recognizes that by enacting this bill, Hawaii would become one of only a few states that have undertaken to provide tax return information to the public. Your Committee, therefore, is taking a conservative approach in the amendment of the law by this bill. Accordingly, your Committee believes that doubts about whether information should be publicly disclosed should be resolved in favor of nondisclosure.

Your Committee has amended this bill as follows:

- (1) Amending Section 2 by adding language to subparagraph (b) (3) of Section 231, Hawaii Revised Statutes (HRS), to further define the definition of a "determination letter";
- (2) Amending Section 2 by adding clarifying language in subsection (h) of Section 231, HRS, that in the event of a contested case, the Department shall make the written opinion public only after the final decision in the case;

- (3) Amending Section 2 by adding "pursuant to this section" at the end of subsection (k) of Section 231, HRS; and
- (4) Making technical and nonsubstantive changes to this bill for the purposes of style and clarity.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 3190, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 3190, H.D. 1, and be placed on the calendar for Third Reading.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary,



TERRANCE TOM, Chair

State of Hawaii
House of Representatives
The Seventeenth Legislature

Record of Votes of the Committee on Judiciary

Bill/Resolution No.: HB 3190		Date: 02/24/94		
Committee Referral: JUD		<input type="checkbox"/> The committee is reconsidering its previous decision on this measure.		
The recommendation is to: <input type="checkbox"/> Pass, unamended <input checked="" type="checkbox"/> Pass, with amendments <input type="checkbox"/> Hold <input type="checkbox"/> Recommit				
JUD Members	Ayes	Ayes (WR)	Nays	Excused
1. TOM, Terrance W.H. (C)	X			
2. MENOR, Ron (VC)	X			
3. AMARAL, Annelo C.	X			
4. BUNDA, Robert				X
5. CACHOLA, Romy M.	X			
6. CHUN, Suzanne N.J.	X			
7. HERKES, Robert N.				X
8. HIRONO, Mazie				
9. ISHII-MORIKAMI, Paula	X			
10. OSHIRO, Paul T.	X			
11. PETERS, Henry Haalilio				X
12. TAKAMINE, Dwight Y.				X
13. WHITE, Michael B.	X			
14. THIELEN, Cynthia	X			
TOTAL	9			5
The measure is: <input type="checkbox"/> Passed, unamended <input checked="" type="checkbox"/> Passed, with amendments <input type="checkbox"/> Recommitted				
<input type="checkbox"/> Held If joint referral, _____ did not support recommendation. <div style="text-align: center; font-size: small;">committee acronym(s)</div>				
Vice Chair's or designee's signature: _____				
Distribution: <input checked="" type="checkbox"/> If passed, attach to Committee Report <input type="checkbox"/> Data Entry				

A BILL FOR AN ACT

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

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to open to public
2 inspection written opinions of the department of taxation that
3 interpret the tax laws, while at the same time maintaining the
4 confidentiality of tax return information.

5 The viability of Hawaii's tax system depends upon the
6 voluntary disclosure of information to the taxing authorities.
7 The legislature finds that it is necessary to keep information
8 disclosed by taxpayers confidential in order to maintain
9 voluntary compliance with the tax laws. At the same time, the
10 legislature finds that correct reporting can be enhanced by
11 issuing guidance to taxpayers in areas where the interpretation
12 of the tax laws is unclear. Accordingly, this Act makes
13 available to the public written opinions of the department in
14 areas where the law is unclear.

15 This Act does not open to public inspection the voluminous
16 routine correspondence with taxpayers concerning established
17 principles of law. This Act is an exception to the well-
18 established principle of confidentiality to tax information and
19 thus, it is narrowly tailored to achieve its purpose to provide

1 guidance on the interpretation of tax laws in order to enhance
2 correct reporting, while maintaining the confidentiality of tax
3 return information in order to maintain voluntary compliance with
4 the tax laws. To protect the integrity of the voluntary
5 disclosure system, doubts about whether information should be
6 publicly disclosed shall be resolved in favor of nondisclosure.

7 SECTION 2. Chapter 231, Hawaii Revised Statutes, is amended
8 by adding a new section to be appropriately designated and to
9 read as follows:

10 "§231- Public inspection and copying of written
11 opinions. (a) Written opinions shall be open to public
12 inspection and copying as provided in this section,
13 notwithstanding sections 235-116, 236D-15, 237-34, and 237D-13
14 and any other law restricting disclosure of tax returns or tax
15 return information to the contrary. Except as provided in
16 subsection (f), regarding the disclosure of the text of written
17 opinions, chapters 92F shall not apply to tax returns and tax
18 return information.

19 A written opinion may not be used or cited as precedent
20 unless otherwise provided by department rules.

21 (b) For purposes of this section, the term "written
22 opinion" means a written statement issued by the department to a
23 taxpayer, or to the taxpayer's authorized representative on

1 behalf of the taxpayer, that interprets and applies any provision
2 in title 14 administered by the department to a specific set of
3 facts. A written opinion generally recites the relevant facts,
4 sets forth the applicable provisions of law, and shows the
5 application of the law to the facts. A written opinion shall not
6 include:

- 7 (1) Any written communication from the department to any
8 person in connection with the examination or audit of
9 any person's tax return, or in connection with
10 collection activities relating to any person's
11 delinquent tax liability;
- 12 (2) An information letter, which is a written statement
13 issued by the department that provides general
14 information by calling attention to a well-established
15 interpretation or principle of tax law, whether or not
16 it applies to a specific set of facts. An information
17 letter may be issued when the nature of the request
18 from the taxpayer suggests that the taxpayer is seeking
19 general information, or where the department believes
20 that general information will assist the taxpayer; or
- 21 (3) A determination letter, which is a written statement
22 issued by the department that applies an interpretation
23 or principle of tax law clearly established by statute,

1 rule, written opinion, or published court decision to a
2 particular set of facts. A determination letter
3 includes the grant or denial of consent, permission,
4 exemption or registration, or a routine correspondence
5 in response to taxpayer inquiries. A determination
6 letter shall be designated as such, and shall indicate
7 the clearly established interpretation or principle
8 applied and its source.

9 (c) Before making a written opinion available for public
10 inspection and copying under subsection (a), the department where
11 possible shall segregate from the opinion trade secrets or other
12 confidential, commercial, and financial information, and
13 identifying details such as the name, address, and social
14 security or tax identification number of the person to whom the
15 written opinion pertains and of any other person identified in
16 the written opinion. Segregated text shall not be disclosed
17 under this section.

18 (d) Upon issuance of any written opinion, the department
19 shall mail a notice of intention to disclose the opinion together
20 with a copy of the opinion showing the text the department
21 proposes to segregate to any person to whom the written opinion
22 pertains (or any known successor in interest, personal
23 representative, or other person authorized by law to act for or

1 on behalf of such person).

2 (e) Except as otherwise provided in subsection (h), a
3 written opinion, as segregated under subsection (c), shall be
4 open to public inspection and copying no earlier than seventy-
5 five days, and no later than ninety days, after the department's
6 notice of intention to disclose is mailed. At the written
7 request of a person to whom the written opinion pertains (or a
8 successor in interest, personal representative, or other person
9 authorized by law to act for or on behalf of the person), the
10 preceding period may be extended, but the department shall make
11 the written opinion available for inspection and copying no later
12 than one-hundred-eighty days after the notice to disclose is
13 mailed, including extensions.

14 (f) The department's decision as to what constitutes a
15 written opinion is final. A decision concerning the disclosure
16 of the text of written opinions may be contested, but only in the
17 manner and within the time set forth in this subsection. Any
18 person who meets the requirements of paragraph (1) or (2) and who
19 has exhausted the administrative remedies as prescribed by rules
20 adopted by the department may appeal within sixty days of the
21 date of the department's decision to the office of information
22 practices in accordance with procedures established by the office
23 of information practices under sections 92F-15.5 and 92F-42(1).

1 The office of information practices may examine the written
2 opinion at issue, in camera, to assist in determining whether it,
3 or any part of it, may be withheld. In determining whether
4 information constitutes a trade secret or other confidential,
5 commercial, and financial information, the office of information
6 practices may consider and apply, in addition to any other
7 relevant sources, interpretations of those terms under chapter
8 92F.

9 Only the following persons may contest a decision of the
10 department concerning the disclosure of written opinions:

11 (1) Any person:

12 (A) To whom a written opinion pertains (or a successor
13 in interest, personal representative, or other
14 person authorized by law to act for or on behalf
15 of the person);

16 (B) Who has a material interest in maintaining the
17 confidentiality of any written opinion or portion
18 thereof; and

19 (C) Who disagrees with a decision by the department
20 not to segregate information from any written
21 opinion; or

22 (2) Any person who is aggrieved by the department's denial
23 of a request to inspect and copy any written opinion or
24 portion thereof.

1 Any person aggrieved by a decision of the office of
2 information practices may appeal the decision to the circuit
3 court of the first judicial circuit, or of the judicial circuit
4 in which the request for the written opinion is made or in which
5 a copy of the written opinion is made or in which a copy of the
6 written opinion is maintained by the department. The appeal
7 shall be filed within thirty days after the date of the decision
8 of the office of information practices. The circuit court shall
9 hear the matter de novo. Opinions and ruling of the office of
10 information practices shall be admissible. The circuit court may
11 examine the written opinion at issue, in camera, to assist in
12 determining whether it, or any part of it, may be withheld.

13 Any person advocating nondisclosure or segregation under
14 paragraph (1) shall have the burden of proof and persuasion, but
15 any person under paragraph (2) need only establish the denial of
16 a request and the department shall have the burden of proof and
17 persuasion to justify the denial of the request to inspect and
18 copy.

19 (g) Except for cases the circuit court considers of greater
20 importance, proceedings before the court, as authorized by this
21 section, and appeals therefrom, shall be assigned for hearing and
22 trial or for argument at the earliest practicable date and
23 expedited in every way.

1 (h) Upon appeal to the office of information practices or a
2 court under subsection (f), the written opinion at issue shall
3 not be made available for public inspection and copying pending
4 the final decision in the case. If the final decision in the
5 case determines that the written opinion subject to the appeal
6 shall be open and available to public inspection and copying, or
7 that confidential or identifying information must be segregated,
8 then the department shall make the written opinion available for
9 public inspection and copying not later than thirty days after
10 the decision becomes final. The office of information practices
11 or the court may extend this thirty-day period for such time as
12 the office of information practices or the court finds necessary
13 to allow the department to comply with its decision.

14 (i) The department shall compile yearly an index in such
15 form as the department determines of all written opinions issued
16 during the preceding calendar year. Copies of the index shall be
17 furnished upon the payment of 50 cents a page. Copies of written
18 opinion shall be furnished upon the payment of \$1 a page.

19 (j) Except as provided in this section, written opinions
20 shall remain subject to all laws governing tax returns and tax
21 return information and the department shall not be required by
22 any court to disclose any written opinion except as specifically
23 authorized by title 14.

1 (k) No officer or employee of the department shall be in
2 violation of any law prohibiting the disclosure of tax returns or
3 tax return information, or in violation of any other law
4 restricting the disclosure of information, due to the release of
5 any written opinion pursuant to this section.

6 (l) The department may adopt rules pursuant to chapter 91
7 to implement this section."

8 SECTION 3. New statutory material is underscored.

9 SECTION 4. This Act shall take effect upon its approval and
10 shall apply to written opinions dated after December 31, 1994.