

STANDING COMMITTEE REPORT NO. 1881 ^{Tax}

Honolulu, Hawaii

FEB 18, 1994

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Honorable Norman Mizuguchi
President of the Senate
Seventeenth State Legislature
Regular Session of 1994
State of Hawaii

[TAX-11(94)]

Sir:

RE: S.B. No. 2972

Your Committee on Government Operations, Environmental Protection and Hawaiian Programs, to which was referred S.B. No. 2972 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.

Current laws protect the confidentiality of tax return information, including written Tax Department opinions. However, these opinions may also contain information that would be useful to interested members of the public as indicators of the Department's position on tax issues that are as yet unclear.

This bill authorizes disclosure of such information provided that confidential tax information is not revealed.

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 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 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.


✓ 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 will be one of only a few states 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.

Your Committee has amended this bill by clarifying that a Tax Department determination letter, which is a form of written communication that may not be disclosed, includes the grant or denial of consent, permission, exemption, or registration, or a routine correspondence in response to a taxpayer inquiry. Your Committee has also made some nonsubstantive technical changes for the purposes of clarity and style.

Your Committee on Government Operations, Environmental Protection and Hawaiian Programs is in accord with the intent and purpose of S.B. No. 2972, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 2972, S.D. 1, and be referred to the Committee on Ways and Means.

Respectfully submitted,


ANTHONY K. U. CHANG, Chair



ELOISE YAMASHITA JUNGPALAN,
Vice Chair


CAROL FUKUNAGA, Member


ANDREW LEVIN, Member


MALAMA SOLOMON, Member


JOE TANAKA, Member


RICK REED, Member

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. The

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

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

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

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

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

1 includes the grant or denial of consent, permission,
2 exemption, or registration, or a routine correspondence
3 in response to a taxpayer inquiry. A determination
4 letter shall be designated as such, and shall indicate
5 the clearly established interpretation or principle
6 applied and its source.

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

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

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

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

1 determining whether it, or any part of it, may be withheld. In
2 determining whether information constitutes a trade secret or
3 other confidential, commercial, and financial information, the
4 office of information practices may consider and apply, in
5 addition to any other relevant source, interpretations of those
6 terms under chapter 92F.

7 Only the following persons may contest a decision of the
8 department concerning the disclosure of written opinions:

9 (1) Any person:

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

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

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

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

23 Any person aggrieved by a decision of the office of
24 information practices may appeal the decision to the circuit

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

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

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

22 (h) Upon appeal to the office of information practices or a
23 court under subsection (f), the written opinion at issue shall
24 not be made available for public inspection and copying pending

1 the final decision in the case. If the office of information
2 practices or the court rules that the written opinion subject to
3 the appeal shall be open and available to public inspection and
4 copying, or that confidential or identifying information must be
5 segregated, then the department shall make the written opinion
6 available for public inspection and copying not later than thirty
7 days after the decision becomes final. The office of information
8 practices or the court may extend this thirty-day period for any
9 period of time that the office of information practices or the
10 court finds necessary to allow the department to comply with its
11 decision.

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

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

22 (k) No officer or employee of the department shall be in
23 violation of any law prohibiting the disclosure of tax returns or
24 tax return information, or in violation of any other law

1 restricting the disclosure of information, due to the release of
2 any written opinion.

3 (1) The department may adopt rules pursuant to chapter 91
4 to implement this section."

5 SECTION 3. New statutory material is underscored.

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