

TAX FOUNDATION

O F H A W A I I

126 Queen Street, Suite 304, Honolulu, Hawaii 96813, Telephone 536-4587, www.tfhawaii.org

OFFICERS

Richard Anzai
Chair

Manoj Samaranayake
Vice Chair

Thomas Yamachika
President/Secretary

Justina A. Desuacido
Vice President/Treasurer

Daniel K. Grebence
Asst. Secretary

BOARD OF DIRECTORS

Richard Anzai
Dennis Brown
Helen Chang
Jay Chen
Brent Flygar
Scott W. Hayashi
Ronald I. Heller
Laurie Kawasaki
Ross Kohara
Bennett Liu
Chris Mashiba
Deneen Nakashima
Cyrus Oda
Lon K. Okada
Michael J. O'Malley
Ku'uhaku Park
Manoj Samaranayake
Glenn Shigetomi
Kieran Yap

EXECUTIVE ADVISORY BOARD OF DIRECTORS

Meredith J. Ching
Roger H. Epstein
Richard Henderson
Richard R. Kelley

December 21, 2015

Rules Office
Hawaii Department of Taxation
830 Punchbowl Street, Room 221
Honolulu, HI 96813

Re: **Comments on Proposed Rules Relating to Reconsideration of Assessment**

Ladies and Gentlemen:

The Tax Foundation of Hawaii is providing comments to the proposed amendments to Chapter 18-231, HAR, in response to the notice of public hearing on January 6, 2016.

The Foundation supports the Department of Taxation's efforts in creation of a process for reconsideration of assessment, but we have some concerns with the language as stated in the proposed rules.

Section 18-231-3-1.1(d)(2) and (3) requires "new" documentation, evidence, or other information and an explanation of why this information was not previously presented to the Department. We understand that even in court litigation, the purpose of reconsideration "is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier [adjudication]." *First Ins. Co. of Hawaii, Ltd. v. Lawrence*, 77 Haw. 2, 17, 881 P.2d 489, 504, and is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding. *See Amfac, Inc.*, 74 Haw. 85, 114, 839 P.2d 10, 27 (1992); *Gossinger v. Association of Apartment Owners of the Regency Ala Wai*, 73 Haw. 412, 426, 835 P.2d 627, 634-35 (1992). However, the term "new" may create confusion because it could mean anything between "something the Department did not consider before" to "something that did not exist at the time of final assessment," so we suggest that the first clause of paragraph (2) be changed to: "A list of the documentation, evidence, or other information not previously considered by the department that supports the taxpayer's position under paragraph (1);"

Section 18-231-3-1.1(e) allows the Department to add new requirements "through publication." It's perfectly acceptable if the Department issues publications that interpret the rules or that add examples to illustrate them, but a provision allowing the Department to add additional *substantive* requirements whenever it pleases violates several provisions in chapter 91 including the requirements of gubernatorial approval, public notice, and public hearing. We believe this subsection is illegal and should be deleted.

Proposed section 18-231-3-1.1(f) relates to prepayment of no more than thirty percent prior to granting a reconsideration of assessment. We believe that this provision only makes sense where a normal appeal from the assessment would not be available (the 30-day deadline for appeal from an assessment has passed) and we would suggest that the provision be changed to state that it only applies in that situation.

Section 18-231-3-1.1(g) states that the Department's granting a request for reconsideration does not obligate the Department to reissue the assessment or denial letter, and paragraph (h)(2) states that if the department elects to grant reconsideration of assessment, it will notify the taxpayer that reconsideration does not affect the taxpayer's statutory appeal rights. This will create, at a minimum, confusion as to whether the Board of Review or the Tax Appeal Court has jurisdiction whether or not reconsideration is granted. We recommend that the Department provide that a grant of a request for reconsideration operates to withdraw the assessment or denial letter, without prejudice to the Department's right to reissue the same assessment or denial letter after substantive consideration of the taxpayer's request. Taxpayers should be notified at the time the request for reconsideration is lodged that the *pendency of the request* does not affect the taxpayer's statutory appeal rights, so they can and should docket an appeal at the proper time (although it may be a good idea to sponsor legislation tolling the appeal period, to be consistent with the rule in civil appeals that a timely HRCR Rule 59(e) motion tolls the appeal period).

Section 18-231-3-1.2(c) requires a taxpayer to prepay the tax in full as a condition to participating in the expedited appeals and dispute resolution system in HRS §231-7.5. HRS §231-7.5 contains no prepayment requirement, so we feel that such a condition is contrary to statute and should be removed.

Thank you for considering these comments.

Very truly yours,


Thomas Yamachika
President