SCAP NO. 17-0000367

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

IN THE MATTER OF THE TAX APPEAL OF PRICELINE.COM, INC.
Appellants/Appellees-Cross-Appellants

vs.

DIRECTOR OF TAXATION, STATE OF HAWAI‘I,
Appellee/Appellant-Cross-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
T.A. NO. 13-1-0269 (AND CONSOLIDATED CASES:
13-1-0261 through 13-1-0270; 14-1-0001 through 14-1-0010; 14-1-0243 through 14-1-0251)

APPELLANTS-APPELLEES/CROSS-APPELLANTS' REPLY BRIEF

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APPELLANTS-APPELLEES/CROSS-APPELLANTS' REPLY BRIEF

In their Opening Brief, the OTCs established that the Director's Assessments are erroneous for two reasons: (1) principles of res judicata bar the assessments for the tax years that the parties already litigated to final judgment (2000-2011); and (2) the Director failed to apply the GET apportioning provision for tourism related services and thus improperly assessed GET, penalties and interest on amounts the OTCs passed through to Hawai'i car rental companies. As discussed below, the Director's contrary arguments lack merit.

I. RES JUDICATA BARS THE DIRECTOR'S CURRENT ASSESSMENTS

The principle of res judicata bars multiple actions by the taxing authority involving the same tax for the same tax years. OTC OB at 13-15 (citing cases). In response, the Director ignores the "same tax/same tax year(s)" test for applying res judicata in the context of tax litigation, and instead relies on inapposite authority in an attempt to evade the application of the principle. Simply, the Director cannot assess and litigate the Appellants' GET liability for certain tax years to final judgment, and then further assess the Appellants for *additional GET for the same tax years* (2000-2011).[1] The Tax Court's decision to the contrary should be reversed.

A. Res Judicata Applies Whether Or Not A Tax Return Is Filed

To avoid res judicata, the Director baldly asserts that the doctrine does not apply where the taxpayer failed to file a return and, because the OTCs did not file returns, she "[m]ay [a]ssess the GET at [a]ny [t]ime and [w]ithout [q]ualification." Dir. AB at 5. While the absence of a return is relevant to the applicable statute of limitations, *see* HRS § 237-40(b), there is no support for the proposition that the failure to file subjects a taxpayer to serial assessments for the same tax years at the Director's whim. If it did, it would lead to an absurd result: where a taxpayer did not file, but prevailed in court, the Director could repeatedly continue to re-assess the same tax and relitigate the same issue. The finality of judgments would be a fiction.

The Director also argues that res judicata cannot apply in the absence of a return because the Director is not "required to guess which business activities the non-filing OTCs were conducting in

[1] This appeal relates to the Department's *second* assessment of GET against the OTCs for tax years 2000-2011; still to be litigated is a *third* assessment of GET for the same tax years. *See* OTC OB, Statement of Related Cases. Such seriatim assessments also violate the Director's pledge in the preamble to the Hawaii Taxpayer Bill of Rights that "the tax laws will be administered with fairness, uniformity, courtesy and common sense." Hawaii Taxpayer Bill of Rights, available at: http://files.hawaii.gov/tax/legal/info/16bor.pdf.

Hawai‘i." Dir. AB at 6. But the GET Statute requires no such guesswork where a taxpayer fails to file. Rather, pursuant to HRS § 237-38, the Department is entitled to "proceed as it deems best *to obtain information* on which to base the assessment of the tax."[2] Simply, the Director is authorized to investigate all the potential bases for liability, including by conducting an audit requesting information, and/or issuing summons for records and testimony (*see* HRS § 237-39), *prior to issuing an assessment*. Indeed, the Director initially followed this procedure in a May 2008 audit letter that sought, *inter alia,* information relating to *rental car transactions* in Hawai‘i. R23:40, ¶ 5, 43-49 at 45, but chose to abandon her investigation and instead issue merchant hotel assessments in early 2011 without seeking *any information* from the OTCs.

Finally, the Director implies that this Court should decline to apply res judicata to punish the OTCs for not filing returns. Dir. AB at 6. But Chapter 237 prescribes a specific punishment for non-filers in the form of a "failure to file" penalty, which she assessed against the OTCs here. The Director's suggestion that serial assessment is warranted as an extra-statutory judicial penalty is baseless and should be rejected.

B. The Director's Taxing Power Is Not Limitless And Remains Subject To The Long-Standing Judicial Doctrine Of Res Judicata

The Director offers no authority to support her assertion that res judicata cannot apply to tax cases in Hawai‘i because, under Hawai‘i's Constitution, "the State's [p]ower of [t]axation is [i]nalienable and [s]hall [n]ever be [s]urrendered." Dir. AB at 6. This language, found in a number of States' constitutions, has no relevance here because it is a limit on the legislature's power to permanently surrender its taxing authority. *See*, *e.g.*, *Sheehy v. Pub. Emps. Ret. Div.*, 864 P.2d 762, 766 (Mont. 1993) (interpreting similar provision in Montana Constitution to mean "the state cannot promise any group of taxpayers that it will never tax them").[3] The Court's power to bar repetitive assessments by applying res judicata is not akin to legislative "surrender"; it merely gives finality to choices made by the Director when assessing a taxpayer.

Equally unsupported is the Director's blanket assertion that the State's power of taxation is "not [s]ubject to [e]stoppel [d]efenses." Dir. AB at 6-7. Ignoring the many res judicata cases cited by the OTCs (OTC OB at 13-15), the Director offers only this Court's decision in *Tax Appeal of*

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[2] All emphasis added and citations omitted, unless otherwise indicated.

[3] Notwithstanding the Director's claim that the State's power to tax is "inalienable" and "absolute," clearly there are limits. Even the Director acknowledges, for example, that GET assessments can be barred by statutes of limitation. Dir. AB at 5 (citing HRS § 237-40(a)).

Medical Underwriters of California, 115 Hawai‘i 180, 166 P.3d 353 (2007). Dir. AB at 7. However, *Medical Underwriters* is about equitable estoppel; it did not address res judicata, and the Director offers no support for her assertion that this Court's ruling on equitable estoppel extends to prevent the application of res judicata. The question of whether a taxing authority may bring an action in the first instance (despite its delay and/or the taxpayer's reliance) is very different from whether a taxing authority is free to *relitigate* claims that already were brought, or could have been brought, in a prior action that resulted in a final judgment.

C. Federal Tax Cases Articulate The Appropriate Res Judicata Standard

The Director's criticism of the OTCs' reliance on federal case law, Dir. AB at 13, misses the point. The cited cases demonstrate that res judicata applies in the tax context, and that a taxpayer's total liability for a particular tax in a particular tax year constitutes a single cause of action for res judicata purposes. OTC OB at 9-15. Hawai‘i's appellate courts have not yet addressed the applicability of res judicata in the tax context, and routinely look to federal courts in the absence of Hawai‘i case law, including on issues of res judicata. *See, e.g., Mortg. Elec. Registration Sys., Inc. v. Wise*, 130 Hawai‘i 11, 18, 304 P.3d 1192, 1199 (2013) (citing Wright & Miller, *Fed. Prac. & Proc.,* and federal case law on timing and application of res judicata); *Tradewind Ins. Co. v. Stout,* 85 Hawai‘i 177, 185-86, 938 P.2d 1196, 1204-05 (App. 1997) (same, on applying res judicata between criminal and civil cases). Further, this Court has indicated that the excise tax law and federal income tax law "require construction in relation to each other." *In re 711 Motors, Inc.*, 56 Haw. 644, 650-51, 547 P.2d 1343, 1348 (1976).

Next, the Director argues that federal case law is inapplicable because Hawai‘i imposes a "far more rigorous test" for the application of res judicata, requiring that the claim decided in the first action be "identical" to the one in the second and that the claim in the second action arise out of the same "transaction" as that in the first. Dir. OB at 8-9. For the "identical claim" prong of her new test, the Director cites *Eastern Savings Bank v. Esteban*, 129 Hawai‘i 154, 296 P.3d 1062 (2013), which holds no such thing. To the contrary, this Court held that res judicata applies where "the claim presented in the action in question is identical to the one decided in the original suit, *or to a claim or defense that might have been properly litigated in the first action but was not litigated or decided*." *Id.* at 160, 296 P.3d at 1068; *see also Albano v. Norwest Fin. Hawaii, Inc.*, 244 F.3d 1061, 1063-64 (9th Cir. 2001) (Hawai‘i courts deem claims "identical" for res judicata purposes "if the issues 'could have been raised in the earlier state court actions.'"). And *Kauhane v. Acutron*

Co., 71 Haw. 458, 795 P.2d 276 (1990), the *only* Hawai'i case the Director cites for her "same transaction" test, is a breach of contract case, where this Court applied res judicata to preclude a subsequent claim premised on violations of the same contract. *Id.* at 464, 795 P.2d at 279. The natural extension of the Director's concept of "transaction" is an absurdity—it would mean that each of the OTCs' approximately 8 million merchant hotel and rental car transactions is a *separate cause of action* for purposes of res judicata. Dir. AB at 8-9. Hawai'i law offers no support for the notion that the Director can assess and then litigate GET liability separately—and repeatedly—as to each of a taxpayer's individual transactions.

The federal cases cited by the Director are distinguishable and, to the extent relevant at all, support the OTC's position. For example, *Crowe v. Leeke*, 550 F.2d 184, 187 (4th Cir. 1977), *see* Dir. AB at 8, involved prison mail procedures (not tax litigation). The court held that while res judicata did not apply to bar the current claim, it would "preclude[] plaintiffs from relitigating the constitutionality of defendants' acts occurring before February 27, 1974"—the time period covered by the prior action. *Id.* In so ruling, the court recognized how res judicata has been applied in the context of tax litigation:

> [W]ith regard to tax litigation, the Supreme Court has concluded that each tax year gives rise to a new cause of action. Therefore, 'a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year.' *Commissioner v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948).

Id. Thus, if *Crowe* has any relevance, it *confirms* that res judicata applies to bar subsequent tax proceedings regarding the same claim and the same tax year. Likewise, *Walt Disney Productions v. United States*, 549 F.2d 576, 580 (9th Cir. 1976), Dir. AB at 11, relies on *Sunnen* and *reaffirms* the appropriate standard for tax litigation.

Flora v. United States, 362 U.S. 145 (1960), does not address res judicata at all. The "full payment rule," at issue in *Flora* relates to a District Court's jurisdiction over a suit by a taxpayer for refund of tax payments that did not discharge the entire amount of the assessment; it has no bearing on the res judicata issue here.

Finally, *Hemmings v. Commissioner*, 104 T.C. 221, 234 (1995) (Dir. AB at 11-12), held that, where a taxpayer's refund claim had been litigated in U.S. District Court, but no tax deficiency had been assessed, the government was not barred from pursuing a tax deficiency (analogous to the Notices of Assessment here) for the same tax year in the Tax Court because it was not a "compulsory counterclaim" in the earlier District Court refund action. 104 T.C. at 233-35.

Hemmings concerned different actions brought in different courts with different jurisdiction, and has no applicability here. And, far from setting forth a blanket rule barring application of res judicata against the government, *Hemmings* cites *Sunnen* and makes clear that where, as here, the Tax Court has entered final judgment in proceedings initiated by a Notice of Assessment, the results are binding on *both* the State and the taxpayer. *Id.* at 233-34.

The Director is left trying to argue that *Sunnen,* the seminal United States Supreme Court case applying the "same tax, same tax year" rule, is inapposite because it concerned income tax and "[t]he idea of an annual cause of action makes sense in the context of income tax because of the nature of the taxable transaction at issue." Dir. AB at 12. But the GET, like the income tax, *also* is assessed on an annual basis, as the taxpayer is required to submit annual reconciliation returns pursuant to HRS § 237-33. Regardless, the *Sunnen* Court never stated, or even suggested, that application of res judicata is dependent on the type of tax at issue or whether it is an annual tax. *See Smith v. U.S.,* 242 F.2d 486, 488 (5th Cir. 1957) (citing *Sunnen* and explaining that "transportation of persons" tax was an excise tax assessed and paid monthly, so "each month, then, is the origin of a new liability and of a separate cause of action"). The same res judicata standard has been applied to different types of taxes, and the same finality rule is essential to prevent serial assessments whether a quarterly or annual return is involved. OTC OB at 13-15.

D. <u>The Director Undisputably Knew Of The OTCs' Rental Car Transactions</u>

The Director next attempts to evade the application of res judicata by making the remarkable assertion that the Department was unaware of OTC merchant rental car transactions at the time it issued the prior GET assessments for tax years 2000-2011. Dir. AB at 14-16. That assertion does not withstand scrutiny. The May 2008 letter from the Department to each of the OTCs, alone, conclusively establishes that the Department was aware some OTC transactions included rental cars.[4] This is not surprising because the OTCs maintained public websites on which they have

[4] The fact that the reference to car rentals in the letter was "language provided by Mr. Wolens," the Department's lawyer, Dir. AB at 15, *establishes* the Director's knowledge. *See Medeiros v. Udell*, 34 Haw. 632, 635 (Haw. Terr. 1938) ("Knowledge on the part of an attorney is imputable to his client"); *see also*, *e.g.*, *Carter v. Amgen*, 682 Fed. Appx. 620 (9th Cir. 2017). And, even if it were remotely plausible that Mr. Wolens did not know of the OTCs' Hawai'i rental car operations when he drafted the 2008 letter, Dir. AB at 15, fn. 10, the letter demonstrates that he certainly knew enough to ask, and thus the Director "should have known." Moreover, since at least March 2010, well before the merchant hotel assessments were issued, the Director's attorneys have been

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plainly and obviously offered rental car reservation services. R25:350-53. In any event, the Director had the means to conduct any investigation she deemed necessary, but after abandoning the prior investigation in 2008 did not seek any information from the OTCs before issuing the "final" assessments in early 2011.

Having elected not to pursue additional information upon which to base the assessments despite having ample statutory means available to her to do so, *see* HRS §§ 237-38, 39, the Director's reliance on *Bolte v. AITS, Inc.*, 60 Haw. 58, 587 P.2d 810 (1978), is unavailing. Dir. AB at 14-15. *Bolte* stands for the unremarkable proposition that res judicata will not bar a subsequent action for breach of a separable and divisible contract if the facts regarding the subsequent breach were not known to the plaintiff at the commencement of the action *and* the plaintiff "is not negligent in [her] ignorance or [her] ignorance was caused by the fraud or fault of the defendant." *Id.* at 62-63, 587 P.2d at 814. Here, any claimed "ignorance" on the Director's part was willful and therefore negligent *per se*.

II. HRS § 237-18(F) APPLIES TO THE OTCS' MERCHANT CAR TRANSACTIONS

For the two tax years not barred by res judicata (2012-2013), the OTCs showed that car rentals are "tourism related services" under HRS § 237-18(f) and therefore subject to its apportioning provisions. Specifically, the OTCs showed that the plain language of the statute, the State's own publications, the Department's official guidance, case law, and common sense all support construing the apportioning provision's "catch-all" for "other services rendered directly to the customer or tourist" to cover car rentals, which the Director concedes are part of the tourism industry in Hawai‘i. In response, the Director asks this Court to ignore the plain meaning of the apportioning provision, misapply principles of statutory construction, and disregard its own guidance in *Travelocity.com, L.P., et al. v. Director of Tax.*, 135 Hawai‘i 88, 111, 346 P.3d 157, 180 (2015) that the apportioning provisions of HRS § 237-18, enacted to prevent the pyramiding effect of the GET from negatively affecting tourism, "not be given a constrained interpretation that would frustrate the legislative intent to protect the tourism industry." The Director's arguments should be rejected.

A. Rental Cars Are A Tourism Related Service Under The Plain Language of HRS § 237-18(f)

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representing to other courts that the OTCs facilitate rental car transactions as part of their uniform nationwide business model. R25:240-49 at 248, ¶ 29.

The Director concedes that: (i) each OTC is a "travel agency," and (ii) in car rental transactions, the OTC divides the proceeds with the travel service provider, the car rental company. Dir. AB at 17 n.11. She contends, however, that rental cars are not "tourism related services," defined in the statute as:

> catamaran cruises, canoe rides, dinner cruises, lei greetings, transportation included in a tour package, sightseeing tours not subject to chapter 239, admissions to luaus, dinner shows, extravaganzas, cultural and educational facilities, and *other services rendered directly to the customer or tourist*, but only if the providers of the services other than air transportation are subject to a four per cent tax under this chapter or chapter 239.

HRS § 237-18(f). The Director's attempt to avoid the plain language of the statute, which clearly encompasses car rentals, cannot stand.

To begin, the Director makes a critical concession when she admits, as she must, that rental cars are a substantial part of the tourism industry in Hawai'i, Dir. AB at 28. Because rental cars, like the other listed items in Section 237-18(f), are tourism related services rendered directly to the customer or tourist, this Court need go no further than the plain language of the statute to conclude apportionment applies.

The Director gains no mileage by arguing that rental cars are not expressly listed in Section 237-18(f). *Id.* at 17-18. Numerous tourism related services are not expressly listed in the statute, including jet ski rides and scuba dive excursions.[5] *Id.* at 3, 28. Yet the Director's own prior guidance makes clear that such services are nevertheless covered by the apportioning provision. OTC OB at 28-29. Thus, an express listing is not required for apportioning to apply.

The Director next argues that rental cars are somehow different and, unlike other tourism related services not mentioned in the statute, should be excluded from apportionment because the Legislature would not have "impliedly" encompassed such a significant portion of the tourism industry. But this argument fails on two levels. First, other substantial tourism related services – including helicopter rides to the volcano, jets skis and sunset cruises – are not expressly mentioned yet are subject to apportionment. The Director's implicit "test"—that the more significant the tourism related service the less it is entitled to apportionment—is contrary to the Legislature's intent

[5] The Director can identify *no* tourism related service other than rental cars that supposedly is excluded from apportionment. The Director has never explained, nor can she, why the Legislature would single out this vital part of the tourism industry for disproportionate tax treatment. The answer, of course, is that the Legislature did no such thing.

to *protect* the tourism industry. *Travelocity*, 135 Hawai‘i at 111, 346 P.3d at 180. More fundamentally, the Legislature expressly included "*other tourism related services*" in section 237-18(f). If the Legislature intended to limit the tourism related services entitled to apportionment, it would not have included a broad catch-all provision. Nothing in the plain language of the statute, or its legislative history, supports the Director's interpretation.

Indeed, the legislative history directly contradicts the Director's position. As this Court explained in *Travelocity*, the Legislature *explicitly* intended for the apportioning provisions in § 237-18 to be applied broadly:

> HRS § 237-18 illustrates the legislature's intent to protect certain categories of business transactions from the pyramiding effect of the GET …. Notably, the legislature repeatedly sought to protect tourism-related industries in three separate provisions: tourism-related services in HRS § 237-18(f) . . . .

Travelocity, 135 Hawai‘i at 111, 346 P.3d at 180. As this Court noted, the clear legislative intent was to prevent precisely the type of double taxation the Director now asks this Court to impose. This abusive attempt to pyramid the GET on rental car transactions should be rejected.

B. The Director Misapplies The Rules Of *Ejusdem Generis* and *Noscitur a Sociis*

Because the plain language of Section 237-18(f) supports apportionment for ***all*** tourism related services, this Court need not resort to external rules of statutory construction. However, to the extent the Court looks to *ejusdem generis* and *noscitur a sociis* to interpret the catch-all, it will see that those rules support the OTCs' position, and not the Director's.

Ejusdem generis applies "when the following conditions exist: (1) the statute contains an enumeration by specific words[;] (2) *the members of the enumeration constitute a class*; (3) the class is not exhausted by the enumeration; (4) a general term follows the enumeration[;] and (5) *there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires*." *State v. Tin Yan*, 44 Haw. 370, 377, 355 P.2d 25, 29 (1960). Here, the characteristics that bind the ten tourism related services identified in HRS § 237-18(f) into a discernible class are that they are commonly (albeit not exclusively) (1) used by tourists, (2) arranged by a travel agency or tour packager, and (3) transactions in which the travel agency or tour packager divides the proceeds with the travel service provider. Neither the Director nor the Tax

Court, in multiple attempts, has been able to identify any other "class" that would include all ten identified services.[6]

Ignoring the commonality apparent from the statute, the Director asserts that the ten identified services have in common that "each activity is something that tourists do primarily for enjoyment in Hawai'i," that is "an end in [itself]." Dir. AB at 25. According to the Director, car rentals are not similar because "people do not generally rent cars for enjoyment" but instead rent cars "for a functional or practical purpose, to get from one point to another" so "renting a car is a means to an end." *Id.* The Director's argument is flawed on multiple levels.

First, the Director violates the cardinal rule of *ejusdem generis* and negates its applicability by her acknowledgement that one of the listed items, namely "transportation in a tour package," is not an end in itself and is not something a tourist does primarily for enjoyment but only to get from place to place. *Id.* at 26. Finding a commonality in ***all*** of the items listed is the central requirement for application of the rule; if the list cannot be categorized as a class, the rule has no application. *Richardson v. City & County of Honolulu*, 76 Hawai'i 46, 74-75, 868 P.2d 1193, 1221-22 (1994), J. Klein and C.J. Moon, dissenting. Accordingly, the Director's "fun" argument—which by her own admission does not apply to all ten listed items—fails.

Second, even if "enjoyment" were the commonality defining the class, it would certainly include rental cars. The notion that tourists do not rent cars for enjoyment, and do not drive those cars around the islands as a "fun" activity that is an end in itself, is observably false.[7] The rental cars that clog Hawai'i's roads, filled with tourists stopping at every scenic lookout to ogle the beauty of the Islands, are obviously being used for more than getting from one point to another. Driving the legendary road to Hana is a popular activity more enjoyable for many tourists than a "sightseeing tour[] not subject to chapter 239," one of the identified services in HRS § 237-18(f).

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[6] The Director's first attempt to apply *ejusdem generis* failed miserably—she segregated the ten identified services into four groups, two of which each had a single member. R19:174. When it was pointed out that a commonality was required, she abandoned that attempt and came up with her current theory— that the commonality is that all ten are "fun"—in her Reply Memo. R25:296. The Tax Court found an entirely different purported commonality: "all of these ten items were part and parcel of packages, tour packages." Dkt. 51 at 47:3-4. This also fails, as the Director acknowledges when she points out that "[a] 'stand-alone' luau is included within HRS § 237-18(f) to the same extent as a luau purchased as part of a package." Dir. AB at 29.

[7] There is a conspicuous absence of any *evidence* to support the Director's assertion that driving a rental car is not "fun"—it is simply a "fact" the Director made up.

Moreover, the Director's theory produces the absurd result that everyone renting a car would have to be asked what they planned to do with it in order to determine the appropriate tax base (but presumably Ferraris or convertibles would automatically be entitled to apportionment, as even the Director's counsel appears to concede, Dkt. 51 at 34:9-10).

Finally, any attempt to limit "tourism related services" in such a way that it would exclude rental cars is inappropriate because the Legislature clearly manifested an intent that the catch all provision apply more broadly than the Director's restrictive interpretation. The Legislature sought to protect "tourism related industries" from pyramiding of the GET, finding that "the use of the gross-up in the area of certain tourism related services does not serve the interests of the State in encouraging tourism." *Travelocity*, 135 Hawai'i at 111, 110, 346 P.3d at 180, 179. Interpreting HRS § 237-18(f) to exclude rental cars would frustrate that purpose.[8]

C. Even If The GET Statute Is Ambiguous (It Is Not), It Must Be Construed In Favor Of The OTCs

At a minimum, the OTCs' interpretation is reasonable. Therefore, even if the Director could offer a contrary reasonable interpretation, the resulting ambiguity would have to be resolved in favor of the OTCs. *See, e.g., In re Fasi*, 63 Haw. 624, 629, 634 P.2d 98, 103 (1981) ("if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer").[9] Under either a plain meaning construction or application of the ambiguity rule, the GET Assessments must be vacated.

III. CONCLUSION

For the foregoing reasons, and the reasons stated in the OTCs' Opening Brief, the GET Assessments for tax years 2000 through 2011 are barred by res judicata and should be vacated, and the Assessments for 2012 and 2013 should be vacated and recalculated based on the OTCs's share of the proceeds from merchant rental car transactions "and no more."

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[8] For similar reasons, the Director's application of *noscitur a sociis* to artificially limit the catch-all is without merit. As shown by the OTCs (and conceded by the Director), car rentals are an important part of the tourism industry, OTCs' OB at 19-21; Dir. AB at 28, and are similar in nature to the other tourism services listed, OTCs' OB at 23-24.

[9] The Director's contention that HRS § 237-18(f) is an exemption that must be strictly construed against the OTCs is simply wrong. Dir. AB at 4-5. It is a subsection of HRS § 237-18, which is entitled "Further provisions *as to application of the tax*," and the Department's published guidance unequivocally states that "sections 237-18(a), (b), (c), (f), (g), and (h) are divisions of income, *not exemptions or deductions.*" Dep't of Taxation Announcement No. 2011-27, available at http://files.hawaii.gov/tax/news/announce/annll-27.pdf.

DATED: Honolulu, Hawai‘i, November 13, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date and by the methods of service noted below, a true and correct copy of the foregoing document was served as described on the following:

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