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., *et al*., Appellants.	T. X. 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) APPEAL AND CROSS-APPEAL FROM THE STIPULATED ORDER AND FINAL JUDGMENT DISPOSING OF ALL ISSUES AND CLAIMS OF ALL PARTIES FILED ON APRIL 25, 2017 (AND UNDERLYING ORDERS) TAX APPEAL COURT HONORABLE GARY W.B. CHANG

ANSWERING BRIEF OF DIRECTOR OF TAXATION, STATE OF HAWAI'I, TO APPELLANTS/APPELLEES-CROSS-APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

By this cross-appeal, the online travel companies ("OTCs"[1]) seek to upend the Director's statutory and constitutionally permitted pursuit of taxpayers who have failed to file Hawai'i tax returns or pay Hawai'i taxes. The OTCs also seek to rewrite a century of uniformly applied statutory construction jurisprudence from this Court. Both their points of error should be rejected.

In their first point of error, the OTCs assert that res judicata bars the Director of Taxation, State of Hawai'i ("Director") from assessing merchant *rental car* transactions for 2000 through 2011 because the Director previously litigated the OTCs' GET liability for merchant *hotel* transactions for these same years in the Travelocity case.[2] This res judicata argument is wrong as a matter of Hawai'i law.

First, no Hawai'i court has ever recognized res judicata as a defense against the Director in a tax dispute. Second, this Court has held that estoppel-like defenses (which would include res judicata) do not apply as a matter of law against the Director. Third, the OTCs failed to file tax returns during the years in question. This is a dispositive fact because the GET statute provides that as to non-filers the Department "may proceed as it deems best," and the GET "may be assessed or levied at any time" against non-filers. Fourth, even if res judicata could apply against the Director (it can't), the OTCs' argument fails as a matter of law because there is no evidence that the Department knew of its merchant rental car claims against the OTCs at the time the OTCs filed their appeal of the hotel tax assessments with the Tax Court on March 1, 2011.[3] The undisputed evidence is that the Department first learned of these potential claims around September 2012.

In their second point of error, the OTCs contend that the Tax Court erred by failing to apply the income-reducing provision in HRS §237-18(f) to all the OTCs' rental car transactions because these transactions allegedly fit within the "residual" or "catch-all" provision of HRS §237-18(f). Notwithstanding that HRS §237-18(f) expressly lists ten different "tourism-related services," ("Ten Tourism Services") the list does not include "rental cars." In effect, the OTCs urge that the 1991 Legislature intended to *sub silentio* grant the rental car industry a multi-million dollar tax

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[1] Unless otherwise stated, defined terms shall have the same meaning here as in the Director's Opening Brief.

[2] See Travelocity.com v. Director of Taxation, 135 Haw. 88, 346 P.3d 157 (2015) ("Travelocity").

[3] See R1:178, 547, 932, 1444; R2:256, 614, 976, 1340, 1716 in the record for the Travelocity case, No. SCAP-13-0002896.

break by including rental car transactions via the residual clause that applies to "other services rendered directly to the customer or tourist."

But applying the residual clause to the OTCs' merchant rental car transactions would violate cardinal rules of statutory construction including the *ejusdem generis* and *noscitur a sociis* rules and would be contrary to a century of this Court's decisions. Based upon well-developed Hawai'i case law applying the *ejusdem generis* doctrine to residual clauses, the OTCs must show that their merchant rental car transactions are "similar in nature" or of a "like kind or character" to the Ten Tourism Services for the residual clause to apply. They are not and, therefore, HRS §237-18(f), including the residual clause, does not apply. There is a fundamental distinction between the Ten Tourism Services and renting a car. Each of the Ten Tourism Services are activities that tourists primarily do for pleasure or enjoyment as contrasted with renting a car which is not a tourism activity at all, but rather constitutes a functional means of transporting oneself from place to place.

In addition to the plain language of the statute, other tax statutes, legislative history, administrative rules, and the Department's Tax Information Releases ("TIRs"), strongly support the Director's argument that the 1991 Legislature did not intend to include rental cars as an unenumerated "tourism related service." The same 1991 Legislature that amended HRS §237-18(f) -- by adding six new "tourism related services" plus the residual clause -- also enacted a wholly new tax surcharge on rental cars (codified at HRS Ch. 251). See Appellee-Appellant/Cross-Appellee Opening Brief ("Director OB") at 14-17. It defies common sense to assume that the very same Legislature that added a tax on rental cars in Chapter 251 gave a silent, undisclosed multi-million dollar tax break to the rental car industry via HRS §237-18(f)'s residual clause enacted during the same legislative session. Id.

II. COUNTER-STATEMENT OF THE CASE

A. Factual Background.

The parties agree that the merchant model rental car transactions operate in the same basic manner as the merchant hotel transactions at issue in Travelocity. Appellants/Appellees-Cross-Appellants' Opening Brief ("OTC OB") at 4. The Director, however, disagrees with certain statements contained within the "Factual Background" section of the OTCs' Statement of the Case relating to the Department's historical practices relating to HRS §237-18(f) as applied to rental car transactions. See OTC OB at 7-8.

The OTCs incorrectly state that "the Department historically applied HRS §237-18(f)'s income-apportioning provision to car rental transactions." OTC OB at 7. In fact, the undisputed evidence from the Department's Rule 30(b)(6) witness is that the OTCs' reliance upon the income-reducing provision in HRS §237-18(f) in connection with the assessed rental car transactions is a case of first impression. R25:62, 68, 73. No prior assessments have involved the issue that is now before the Court. R25:62, 68. The Department has issued no policies practices, guidelines, or procedures for determining whether income-apportioning applies to merchant rental car transactions, nor are there any taxpayer letters or audit letters where this issue has previously been addressed. Id. at ¶39, R25:73.

The Department has issued several letters in response to taxpayer requests, in which it has identified several types of services that qualify under the "residual clause" of HRS §237-18(f). These include tourist activities such as scuba diving and seawalker tours and jet ski services. R29:88, 91; R29:94. However, the Department has never extended HRS §237-18(f) to rental car transactions. R25:62 (¶10), 68 (¶25).

The OTCs selectively quote from paragraph 6 of former Director Kurt Kawafuchi's declaration ("Kawafuchi Dec.") R25:95 at 97-98,[4] for the proposition that "the Department's view was that car rentals arranged by a traditional travel agency for customers who were renting cars in Hawai'i qualified for the splitting rule …." OTC OB at 7.[5] The OTCs omitted the following key statement from Mr. Kawafuchi and misleadingly replaced it with an ellipsis: "*however, I do not recall any case or circumstance in which the issue came up*." R25: at 97-98.[6]

His declaration adds no validity to the OTCs' arguments.

[4] The OTCs had noticed Mr. Kawafuchi's deposition. Following a meet and confer between counsel, the OTCs withdrew their notice in favor of a joint telephone interview with Mr. Kawafuchi, which interview served as the basis for his declaration. R25:37, n.8.

[5] Also in paragraph 6 of his declaration, Mr. Kawafuchi acknowledges that his understanding of the GET as applied to rental car transactions lacks foundation. "I don't remember if my understanding was based on a statute, a rule, legislative history, or something I saw or heard. Today, I don't recall any rules, tax information releases or other public pronouncements by the Department addressing this issue." R25:98.

[6] Emphasis is added by the Director unless otherwise noted.

III. LEGAL STANDARDS

A. Appellate Standards of Review.

The standard of review for granting or denying summary judgment is *de novo* under the same standard as applied by the trial court; therefore, "summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Travelocity, 135 Haw. at 96-97, 346 P.3d at 165-66, Haw. R. Civ. P. Rule 56. Moreover, in matters involving appeals from the Tax Appeal Court, "[w]hen the facts are undisputed and the sole question is one of law, the decision of the Tax Appeal Court is reviewed 'under the right/wrong standard.'" Travelocity, 135 Haw. at 97, 346 P.3d at 166.

B. The Assessments Are Presumed Correct.

The Director assessed the OTCs for unpaid GET based on their gross receipts, plus penalties and interest, and these assessments enjoy a presumption of correctness. Travelocity, 135 Haw. at 114, 346 P.3d at 183. It is the OTCs' burden to prove the assessments are not correct. Id. 135 Haw. at 115, 346 P.3d. at 184. Thus, the Director's assessments based on the OTCs' gross receipts are presumed correct, and it is the OTCs' burden to prove that they owe GET only on their retained amounts under the income-reducing provision of HRS §237-18(f).

C. The Income-Reducing Provision of HRS §237-18(f) is to be Strictly Construed Against the OTCs.

The OTCs incorrectly invoke the rule that tax statutes are to be construed strictly against the taxing authority. OTC OB at 12. Here, the opposite rule applies because the OTCs seek to avoid the general rule of the GET's "inherent pervasiveness" that applies to the gross income of a taxpayer. Travelocity, 135 Haw. at 106, 346 P.3d at 175. In Honolulu Star Bulletin, Ltd. v. Burns, 50 Haw. 603, 446 P.2d 171 (1968), the Director assessed the newspaper for its advertising revenues on the full GET rate (then, 1¼%) whereas the newspaper claimed the lower tax rate (¼%) applicable to printers and publishers. The Court agreed with the Director and held that "[u]nder our view that a derogation from the common rate is in the nature of an exemption, we construe the tax strictly against the taxpayer" and concluded that tax was due at the higher GET rate of 1¼%. 50 Haw. at 606, 446 P.2d at 173. When taxpayers such as the OTCs claim the benefit of a tax-reducing provision (whether an exemption, exclusion, rate-reducing provision, or income-splitting

provision), under Hawai‘i tax law, the tax is strictly construed in favor of the taxing authority and against the taxpayer because it is "in the nature of an exemption."

IV. THE TAX COURT CORRECTLY HELD THAT RES JUDICATA DOES NOT APPLY TO THE 2000-2011 RENTAL CAR ASSESSMENTS

A. Because the OTCs Failed to File GET Returns, the GET Statute Provides that the Director May Assess the GET at Any Time and Without Qualification.

The OTCs argue that res judicata applies to tax years 2000 through 2011.[7] But, the OTCs ignore a dispositive fact: *the OTCs admit that they did not file any GET tax returns*[8] (or pay any GET) for their merchant rental car transactions. R19:200-201, 349-50; R29:345. The OTCs' failure to file tax returns dooms their res judicata argument.

Hawai‘i tax law (like federal tax law) treats non-filing taxpayers like the OTCs in a fundamentally different way than taxpayers who file returns. HRS §237-38 provides that "[i]f any person *fails, neglects, or refuses to make a return*, the department of taxation *may proceed as it deems best* to obtain information on which to base the assessment of the tax." HRS §237-38 further provides that any assessments are "presumed to be correct" unless the person assessed clearly proves to the contrary.

HRS §237-40 addresses limitations and provides two different rules for filers versus non-filers. For tax-filers, the statute provides that excise taxes "shall be assessed or levied within three years after the annual return was filed, or within three years of the due date prescribed for the filing of the return, whichever is later." HRS §237-40(a). However, in the case of "*a failure to file the annual return, the tax may be assessed or levied at any time*." HRS §237-40(b).

Thus, the GET statute makes clear that when taxpayers such as the OTCs fail to file GET returns, the Department "may proceed as it deems best" and the GET "may be assessed or levied at any time." That is what the Director did. On December 9, 2013, the then-Director proceeded as he deemed best by issuing GET assessments to the OTCs for their merchant rental car

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[7] The rental car assessments also include years 2012 and 2013. Dir. OB at 3. The OTCs do not contend res judicata applies to these two years because those tax years were not adjudicated in connection with the merchant hotel transactions at issue in Travelocity. See OTC OB at 15.

[8] See R19:200-201, 349-50; R29:345. The OTCs admit they filed no tax returns at all for calendar years 2000 through 2010. Id. For 2011, the OTCs did file GET returns, but the returns (i) "did not reflect any gross income from arranging reservations for car rentals in Hawai`i" (id.), and (ii) were not filed timely, as the 2011 tax returns were not filed by the OTCs until April 2013. R25:115, 117.

transactions for 2000 through 2012. Dir. OB at 3. According to Ronald Randall, the Tax Compliance Administrator for the Department from 1986 until March 2011, because the OTCs failed to file GET returns, the Department knew "very little about the type or extent of the OTCs' business operations in Hawai'i." R25:120-121 at ¶¶ 1 and 8.

Under the OTCs' illogic, however, the Director apparently is required to guess which business activities the non-filing OTCs were conducting in Hawai'i, how they were conducting their undisclosed business (e.g. using "agency" model transactions or "merchant" model transactions), and what amounts of unreported income they were receiving. According to the OTCs, the Director must include in a single assessment the GET due the State from each of the OTCs' *unreported* lines of business or be barred by res judicata.

The application of res judicata urged by the OTCs would pervert public policy by encouraging tax fraud and tax evasion. The tax system is based on self-reporting by taxpayers. As a result of the OTCs flouting their tax reporting and payment obligations and flying under the radar by doing business in Hawai'i for many years without filing GET tax returns or paying GET, they argue they are now free of their tax obligations to Hawai'i. This argument turns the entire taxing system that operates on self-reporting by law-abiding taxpayers into a shell game where non-filing, non-paying taxpayers benefit from their own wrongdoing. The OTCs' "gotcha" rule of res judicata is wrong as a matter of law and policy and defies common sense.

B. The Hawai'i Constitution Provides that the State's Power of Taxation is Inalienable and Shall Never be Surrendered.

Article VII of the Hawai'i Constitution addresses taxation and finance. Section 1 is entitled "Taxing Power Inalienable" and provides: "The power of taxation shall never be surrendered, suspended, or contracted away." Hawai'i Const. Art. VII, Sec. 1. This statement is absolute. Yet, the OTCs effectively argue that the Director "surrendered" her power to pursue rental car assessments against the OTCs because she previously litigated hotel assessments against them. The OTCs' position violates the State's inalienable taxing power enshrined in the Hawai'i Constitution. The OTCs' Opening Brief is notably silent in failing to address the State's inalienable taxing power under the Hawai'i Constitution.

C. This Court Has Held that the State's Taxation Power is a Fundamental Sovereign Right that is not Subject to Estoppel Defenses.

Res judicata is a type of estoppel. See, e.g, United States v. California Bridge & Constr. Co., 245 U.S. 337, 341 (U.S. 1917) (doctrine of res judicata is "estoppel by judgment"); Freytag

v. Commissioner, 110 T.C. 35, 45 (T.C. 1998) ("the doctrine of res judicata operates not as a jurisdictional bar but by way of estoppel.") This Court has recognized that estoppel defenses do not apply as a matter of law to the State's taxing power. See Dir. of Taxation v. Med. Underwriters of Cal., 115 Haw. 180, 194, 166 P.3d 353, 367 (2007).

In Medical Underwriters, the Director assessed GET for a fifteen-year period, from 1985 through 1999, against the taxpayer (MUC). Id. at 183. MUC claimed that, since 1981, it relied upon the Insurance Division's view that it was an insurance company and exempt from the GET. Id. at 193. MUC contended that "the department of taxation had knowledge of MUC's Hawai'i operations because MUC had been filing Hawai'i income tax returns since 1981, yet did not assess MUC until 1999." Id.[9] MUC therefore argued it was "patently unfair" to impose GET upon MUC "after MUC has relied to its detriment upon a determination by another state agency." Id. The Director, on the other hand, asserted that "equitable estoppel cannot be applied to interfere with the government's power (i.e. the power to tax)." Id. This Court agreed with the Director:

> The doctrine of equitable estoppel may not be applied against the government's power to tax. The rationale for the rule precluding the assertion of estoppel against the government in tax cases is to assure that no officer of government has the ability to interfere inadvertently with the government's fundamental sovereign power to tax **. . . .** *[T]here can be no estoppel involved against a sovereign state.* The failure of the tax commission to attempt to collect taxes now sought to be collected from plaintiff for a period of years constitutes no defense to their collection. Id. at 194 (citations omitted).

The Court's stated "rationale" in Medical Underwriters applies equally to the OTCs' res judicata argument. Here, the OTCs' position is that the Director has interfered with or surrendered the State's sovereign power to tax the OTCs' rental car transactions by not pursuing them at the same time as the earlier hotel assessments. Estoppel-based arguments—whether equitable estoppel in Medical Underwriters or res judicata here—cannot limit the State's sovereign power to tax as a matter of law. Just as the OTCs' ignore the State's inalienable taxing powers in Article VII of the Hawai'i Constitution, so too do they ignore this Court's controlling precedents in cases such as Medical Underwriters that estoppel-type defenses do not apply to the State's taxing power.

[9] The taxpayer in Medical Underwriters, unlike the OTCs, had been dutifully filing its tax returns and, therefore, had a better argument for the application of estoppel than do the OTCs. The Supreme Court nonetheless held the taxpayer's estoppel argument failed as a matter of law.

D. No Hawai‘i Court Has Ever Recognized Res Judicata as a Defense to a Tax Assessment by the State of Hawai‘i.

The OTCs assert that "[t]he doctrine of res judicata applies in tax cases" and then cite a handful of federal tax cases. OTC OB at 13. Notably, the OTCs do not cite a single Hawai‘i tax case involving res judicata for a simple reason: *no Hawai‘i court has ever recognized that res judicata is a defense to a tax assessment by the Director*. This Court should decline the OTCs' invitation to create a new defense to the State's inalienable taxing power—a defense that would be contrary to both the Hawai‘i Constitution and this Court's jurisprudence.

E. Even if Hawai‘i Recognized Res Judicata in Tax Cases (It Has Not), Res Judicata Would Still Not Apply to the GET Assessments Under Hawai‘i's "Transactional Test" that Requires "Identical" Claims.

The OTCs cite federal tax cases for a supposed four-part test for application of the res judicata doctrine. See OTC OB at 13. However, the OTCs fail to cite the applicable elements for res judicata under Hawai‘i law. In those cases where res judicata applies, in order to establish a res judicata defense under Hawai‘i law, a party has the burden of establishing (among other elements) that "the claim decided in the original suit is *identical* with the one presented in the action in question." Eastern Sav. Bank, FSB v. Esteban, 129 Haw. 154, 159, 296 P.3d 1062, 1067 (2013). Instead of applying Hawai‘i res judicata law which requires the claims in the two lawsuits to be "identical," the OTCs cite inapplicable federal res judicata law that addresses whether the "same cause of action" is involved in both cases. See OTC OB at 13. Hawai‘i's test requiring "identical claims" for res judicata to apply is a far more rigorous test than merely requiring that two claims have the "same cause of action."

Turning to Hawai‘i res judicata law, the question becomes: what does it mean that the claim in the prior suit be "identical" to the claim in the later suit? Hawai‘i applies the "transactional test," which asks "whether the 'claim' asserted in the second action arises out *of the same transaction, or series of connected transactions*, as the 'claim' asserted in the first action." Kauhane v. Acutron Co., 71 Haw. 458, 464, 795 P.2d 276, 279 (1990). See also Crowe v. Leeke, 550 F.2d 184, 187 (4th Cir. 1977) ("res judicata has very little applicability to a fact situation involving a continuing series of acts, for generally each act gives rise to a new cause of action.")

Here, the OTCs' res judicata argument fails the transactional test because the OTCs produced no evidence that the hotel and rental car transactions arise out of the same transactions. To the contrary, the evidence submitted by the Director is that the *hotel* transactions are different

from the *car rental* transactions. The OTCs' rental car data includes [redacted] transactions with more than [redacted] rental locations in Hawai'i and generating $[redacted] in gross receipts for the OTCs. R25:332 at ¶5. The OTCs' hotel data includes [redacted] transactions involving more than [redacted] hotels and generating $[redacted] in gross receipts for the OTCs. R25:332-33 at ¶6.

In their Opening Brief, the OTCs argue that "with respect to package transactions, the *exact same transactions* are being assessed here as were assessed and litigated to final judgment previously (i.e. transactions in which travelers rented both a hotel and a rental car) …." OTC OB at 15 (emphasis is OTCs). First, there is no evidence to support this statement as shown by the OTCs' failure to include a record citation. Which, if any, of the [redacted] rental car transactions at issue in this appeal were included in the [redacted] hotel transactions at issue in Travelocity? The OTCs have no answer because they failed to present any such summary judgment evidence that any of the assessed transactions, here, involved the "exact same transactions" as the assessed transactions in Travelocity. In addition, the OTCs did not make this legal argument in the summary judgment briefing and, therefore, have waived it. Rule 28(b)(4) of the Hawaii Rules of Appellate Procedure ("Points not presented [to the trial court] will be [generally] disregarded..,"; In the Matter of the Tax Appeal of Hawaiian Land Company, 53 Haw.45, 51, 487 P.2d 1070, 1075-6 (the general rule in Hawai'i is that an appellate court should only reverse a judgment on an issue raised in the trial court).

F. The OTCs Cite Inapplicable Federal Tax Cases, Each of Which is Readily Distinguishable.

At pages 13 through 15 of their Opening Brief, the OTCs cite the tax cases they rely upon for their res judicata argument. Unable to cite any Hawai'i law, the OTCs turn to inapplicable federal income tax and estate tax cases (and one Oregon state court trial decision). As discussed below, these cases are readily distinguishable on numerous grounds.

Case	Did Taxpayer File a Tax Return?	Was RJ Asserted Against the Taxpayer or the Gov't?	Type of Tax Involved	Court's Holding
Russell v. U.S. (9th Cir. 1979)	Yes	Against Taxpayer	Annual Federal Income Tax	Taxpayer litigated Gov't deficiency claim for 1965 and RJ applied to **bar taxpayer** from later asserting refund claim for same tax year
Baptiste v. Comm'r, (11th Cir. 1994)	Yes	Against Taxpayer	Annual Federal Estate Tax	RJ applied to **bar taxpayer** (son) from re-litigating prior estate tax deficiency ruling against father's estate
Comm'r. v. Sunnen (US 1948)	Yes	Collateral estoppel (not RJ) was asserted against IRS	Annual Federal Income Tax	RJ discussion was **dictum**; Court's holding was that collateral estoppel did not bar Gov't deficiency claim
Finley v. U.S. (5th Cir 1980)	Yes	Jurisdictional issue (not RJ)	Annual Federal Estate Tax	RJ discussion was **dictum**; 5th Circuit reversed trial court on jurisdictional grounds
Batchelor-Robjohns v. U.S. (11th Cir. 2015)	Yes	Against IRS	Annual Federal Income Tax	RJ did **not bar Fed Gov't** b/c first and second suit did not involve same claims
Estate of Hunt v. U.S. (5th Cir. 1962)	Yes	Against Taxpayer	Annual Federal Estate Tax	RJ applied to **bar taxpayer** from re-litigation prior tax deficiency ruling
Erickson v. U.S. (Ct. Cl. 1962)	Yes	Against IRS	Annual Federal Income Tax	RJ applied to **bar Fed Gov't** from claiming fraud re: 1942 tax return b/c income tax liability for 1942 had been determined years earlier
U.S. v. Davenport (5th Cir. 2007)	Yes	Against Taxpayer	Annual Federal Estate and Gift Tax	RJ applied to **bar taxpayer** (donee of gift) from re-litigating prior gift tax deficiency ruling against the estate
Present Appeal	No	Taxpayer asserts RJ against Hawai'i	Monthly General Excise Tax	RJ did **not bar Hawai'i** from assessing GET

First, unlike the present case, each of the foregoing cases relied upon by the OTCs involved a taxpayer who filed tax returns. This is a critical distinction under Hawai‘i law, a distinction the OTCs ignore. See HRS §237-38 and HRS §237-40(b) (for non-filing taxpayers, the Director may proceed with assessments as she deems best and the tax may be assessed or levied at any time). The OTCs do not cite a single case where a taxpayer who does not file a tax return nonetheless gets the benefit of a res judicata defense.

Second, tax cases in which res judicata is applied at all are rare. See Walt Disney Productions v. United States, 549 F.2d 576, 580 (9th Cir. 1976). Rarer yet are those cases which res judicata was held to apply against *the government*. In fact, the OTCs cite a single such federal case. See Erickson v. United States, 159 Ct. Cl. 202, 215-216 (Ct. Cl. 1962). But that case is readily distinguishable. Erickson involved a prior proceeding involving tax fraud over a number of years. After the parties settled the case, the IRS realized it had never made a claim for a tax abatement the taxpayer received due to his alleged fraud in one of the years at issue. The Court of Claims held that this claim was barred by res judicata as the IRS was already clearly aware of the details of the claim when the first case commenced, and just failed to bring it. Erickson, 159 Ct. Cl. at 216.

It is an important distinction whether res judicata is sought to be applied against the government versus the taxpayer because different rules apply. That point was made clear by the Tax Court's decision in Hemmings v. Commissioner, 104 T.C. 221, 234 (1995), a case directly on point but which the OTCs fail to cite. The Tax Court held:

> When a taxpayer brings a refund suit in a District Court or the Claims Court, these courts have held that *the taxpayer is precluded* from later pursuing a second refund suit for the same taxable year, even if based on a different item of income or deduction. See Finley v. United States, 612 F.2d 166 (5th Cir. 1980) [additional citations omitted]. *What is sauce for the goose, however, is not necessarily sauce for the gander*.

Hemmings holds that res judicata may preclude the taxpayer-goose but not government-gander. The above quote is noteworthy because it immediately follows and distinguishes the Fifth Circuit's decision in Finley, a primary case the OTCs rely upon in their brief. See OTC OB at 13, 14, 16.

Hemmings presented the same issue as here, a motion for summary judgment by the taxpayer based on a res judicata defense because the government was attempting to collect the same tax for the same tax year upon which a final judgment had previously been rendered. Id. at

222-23. The Tax Court denied the summary judgment motion and held res judicata did not bar the government. Id. at 236. The Hemmings Court noted that "the doctrine of claim preclusion bars litigation of all compulsory claims of the defendant and any permissive counterclaims that are actually litigated" and "[t]he courts that have considered the issue have *uniformly rejected* the contention that the claim of the United States for unassessed additional taxes in a refund action is a compulsory counterclaim." Id. at 234.

As previously noted, the Hawai'i Constitution and this Court's precedents grant rights and immunities to the State in tax matters that are not granted to taxpayers. See Hawai'i Const. Art. VII, §. 1; Med. Underwriters, 115 Haw. at 194, 166 P.3d at 367.

Third, the OTCs misstate the law regarding res judicata as applied to tax cases. The OTCs' key proposition upon which their entire res judicata argument rests is a purported quote from Finley. As a threshold matter, the actual holding in Finley has nothing to do with res judicata. Finley is a jurisdictional case, and its holding was simply that, under I.R.C. § 7422(e), a district court loses jurisdiction when a taxpayer files a petition for redetermination of an estate tax penalty with the Tax Court. 612 F.2d at 168. Yet, the OTCs cite Finley for the proposition that "one's total [ ] tax liability for each taxable year constitutes a *single, unified cause of action,* regardless of the variety of contested issues and points that may bear on the final computation." OTC OB at 16 (emphasis is OTCs). The OTCs cite this as a "quote" from Finley and treat it as a pronouncement of universal tax law on res judicata. It is neither an accurate quote nor a universal rule of tax law. The full quote of that portion of Finley states as follows:

> *In federal tax litigation* one's total *income* tax liability for each taxable year constitutes a single, unified cause of action, regardless of the variety of contested issues and points that may bear on the final computation.

Finley, 612 F.2d at 170. The words omitted by the OTCs (which are italicized in the above quote) are crucial to understanding two things. First, Finley was solely addressing *federal* tax litigation based upon the specific issues before it, not purporting to announce a universal rule of tax law. Second, even within the context of federal tax litigation, Finley limited the scope of the yearly "single, unified cause of action" to "*income tax*" under the applicable IRS Code provision.

The 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. As Sunnen states, income tax is levied on an annual basis on a combined amount of "all income from whatever source derived . . . during the taxable

year." Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948), citing I.R.C. §61(a). Similarly, estate taxes have a one-time cause of action because there is one taxable event – the taxpayer's death. See Guettel v. United States, 95 F.2d 229, 230 (8th Cir. 1938). By contrast, the United States Supreme Court recognized this very distinction between income taxes and excise taxes, stating "[t]he Government suggests – and we agree – that *excise tax deficiencies may be divisible into a tax on each transaction or event*." Flora v. United States, 362 U.S. 145, 175 (1960). Excise taxes turn on the specifics of each transaction to which they apply. See also, Indian Creek Lumber Co. v. Commissioner, T.C. Memo 1982-146, at *44 (T.C. 1982) (sales tax) ("whether or not the taxpayer has made [a taxable] sale … turns upon the particular facts and circumstances of each transaction"). R25:145.

In addition to the federal income and estate tax cases, the OTCs rely upon an Oregon trial court decision. See U.S. Bancorp v. Dep't of Revenue, Tax Court No. 4141 (Or. Mar. 12, 1999). There, the tax court held res judicata barred the Oregon tax department from re-litigating corporate excise taxes for tax years 1984 through 1985, which had previously resulted in a final judgment in favor of the taxpayers. Apart from the dubious precedential value of an Oregon state trial court decision, U.S. Bancorp is distinguishable in several respects. First, unlike the OTCs, there is no suggestion that the Oregon taxpayer had failed to file tax returns. Second, the tax court had expressly found in favor of the taxpayer in a prior proceeding and the department was attempting to re-litigate the same claims. Id. at *1-2. Here, the Director's claims against the OTCs for rental car transactions have not been previously litigated. Third, U.S. Bancorp was similar to the federal income tax cases in focusing on the annual nature of the corporate excise tax liability. The court framed the issue as "[d]oes a taxpayer's income or corporate excise tax liability for a year constitute one claim"? The tax court noted that Oregon income and corporate excise taxes, like federal income taxes, are imposed on an annual basis, which was central to its decision that res judicata applied because it was the same cause of action. Id. at *3-4. By contrast, Hawai'i's GET is not an income, estate, or gift tax and is due and payable *monthly* or, if permitted by the Director, *quarterly*. See HRS §237-30(a) and (b).

In short, the OTCs are trying to pound a square peg in a round hole by trying to force this "annual cause of action" rule – that is based on cases involving federal income taxes that are due and payable *annually* – and have it apply to Hawai'i's unique GET tax regimen in the present case.

G. The OTCs' Res Judicata Defense Fails Because the Undisputed and Uncontroverted Evidence Shows that the Director Had No Knowledge of the OTCs' Merchant Rental Car Transactions in Hawai'i Until After March 2011, the Date the OTCs Filed Their Tax Court Lawsuits Challenging the Merchant Hotel Assessments.

Putting to the side the insuperable legal barriers to the OTCs' res judicata affirmative defense, their argument also collapses due to a failure of proof. Here, the question is what did the Director know and when did she know it? To begin, the relevant date for res judicata purposes is *March 1, 2011*. That is the date that the OTCs instituted the Tax Court proceedings relating to the Director's merchant *hotel* assessments by filing Notices of Appeal. OTC OB at 5, n. 10. The OTCs incorrectly assert that the relevant date for determining the Director's knowledge is *August 15, 2013*, the date the Tax Court entered a final judgment in the Travelocity case on the merchant hotel assessments. However, the relevant date for purposes of the plaintiff's knowledge in connection with a res judicata defense is the date the first tax appeal was filed (March 1, 2011) not the date the first tax appeal resulted in a final judgment (August 15, 2013). See Bolte v. AITS, Inc., "[t]he issue as to when the second breach occurred is crucial to the res judicata inquiry…. [I]f the second breach occurred prior to the filing of the first suit in the district court, then, *dependent on whether plaintiff had knowledge of the second breach* ***before the first suit was filed*** and whether his possible lack of knowledge was due to the negligence of plaintiff or the fault or fraud of the defendant, the second suit may be barred." 60 Haw. 58, 64, 587 P.2d 810, 815 (1978).

Here, the Department's Rule 30(b)(6) witness testified that "[t]he Department first became aware of the GET issues involving car rentals in or around *September 2012* as a result of privileged discussions between the Department and its attorneys." R25:69-72 at ¶¶28, 32 and 35 (C). This evidence was undisputed and uncontroverted. Because September 2012 is obviously well after the March 1, 2011 date that the OTCs initiated their lawsuit against the Director relating to the merchant hotel assessments, res judicata does not apply. In other words, because the Director did not know of her potential claims against the OTCs for unpaid GET for merchant rental car transactions until a year-and-a half *after* litigation was commenced regarding the OTCs' merchant hotel transactions, the Director could not possibly have joined her rental car claims along with her hotel claims as of March 2011. That uncontroverted fact is fatal to the OTCs' res judicata defense.

The OTCs entire res judicata argument was based on the false premise that the August 2013 judgment date for the hotel assessments was the relevant date for res judicata purposes when,

in fact, under Bolte, it is the March 2011 date that the OTCs filed their Tax Court challenges to the hotel assessments that is indisputably the relevant date. R25:239.

Unable to show any proof that the Director had knowledge that (i) the OTCs were conducting merchant rental car transactions prior to September 2012 and (ii) the OTCs were not paying GET on these transactions, the OTCs substitute unsupported speculation for evidence regarding what the Director knew and when she knew it regarding the OTCs' merchant rental car operations.

The OTCs' res judicata argument hinges on establishing that "[t]he Director knew about the OTCs' car rental line of business in 2008," but "*twice* made the strategic decision to issue Final Assessments of GET based on *only* the OTCs' merchant hotel transactions." OTC OB at 2, 15 (emphasis is OTCs). This is mere lawyer-argument, not evidence, and is based on a single passing reference to rental cars in a seven-page May 9, 2008 letter (the "Letter") from Mr. Randall, the Department's Tax Compliance Administrator, to the OTCs requesting documents in connection with an audit of the OTCs' *hotel* transactions, not *rental car* transactions. R23:43-49 at 45.

Moreover, Mr. Randall submitted a declaration in opposition to the OTCs' summary judgment motion that destroys the OTCs' speculation regarding the Department's supposed "knowledge" of the OTCs' rental car business and its alleged "strategic decision" not to pursue assessments for the rental car business. Yet, in their Opening Brief, the OTCs fail even to mention Mr. Randall's declaration, in which he testified:

- The purpose of the Letter was to obtain documents and information relating to the OTCs' hotel room transactions. This is clear from the second paragraph of the Letter, which states, "we request that you provide data to us in electronic format for each transaction, conducted by Expedia, Inc. regarding *transient accommodations* in the State from January 1, 2000 to the present." R25:119-20 at ¶5.
- In describing packages, the Letter includes a parenthetical reference at page 3 – "(i.e. car rental, airline ticket)"…. [T]his parenthetical reference to a "car rental, airline ticket" would have been language provided by Mr. Wolens.[10] It would be incorrect to suggest that this parenthetical reference meant that I knew that the OTCs were engaged in car rental transactions in Hawai'i. R25:120 at ¶6.
- To the extent that the OTCs' Cross-Motion is intended to suggest that, based upon the Letter, I or the Department had knowledge of the OTCs' Hawai'i car rental line of business as of May 9, 2008, that is incorrect. As of the date of the Letter, I had no

[10] Mr. Wolens is retained counsel for the State. He submitted a declaration confirming that he was the principal drafter of the Letter and that he had no knowledge regarding the OTCs' Hawai'i rental car operations at the time of the Letter. R25:123-24 at ¶¶2 and 3.

knowledge that the OTCs were engaged in car rental transactions in Hawai‘i. R25:12 at ¶7.

- [A]s of the date of the Letter, the Department would have known very little about the type or extent of the OTCs' business operations in Hawai‘i because the OTCs had not filed any Hawai‘i tax returns …. R25:120-21 at ¶8.

Mr. Kawafuchi's declaration – which the OTCs put into evidence and which they cite in their Opening Brief – is consistent with Mr. Randall's testimony. Mr. Kawafuchi confirmed that he met with the OTCs [in 2007 and 2008] and discussed the OTCs' hotel transactions, but not rental car transactions. R23:762 at ¶8. While he was Director, from 2003 to June 2010, Mr. Kawafuchi testified that "I do not recall whether car rentals were available in Hawai‘i through OTC websites. Today, I cannot recall what understanding or knowledge anyone else in the Department had regarding car rentals offered by the OTCs." R23:762 at ¶9.

Finally, the OTCs did not produce their Hawai‘i merchant rental car data to the Department or the Department's damages experts, Econ One, until January 2013. R29:160 at ¶4.

There is no genuine issue of material fact that the Director knew of her potential GET claims for merchant rental car transactions prior to September 2012. Given that this date is a year-and-a half after the relevant date for res judicata purposes of March 1, 2011, the OTCs' res judicata defense fails and the Director was entitled to summary judgment on this independent basis.

V. THE INCOME-REDUCING PROVISION IN HRS §237-18(F) FOR "TOURISM-RELATED SERVICES" DOES NOT APPLY TO THE OTCS' MERCHANT RENTAL CAR TRANSACTIONS

A. The OTCs Owe GET on the "Gross Receipts" They Received for their Merchant Rental Car Transactions.

Hawai‘i imposes GET "equal to four per cent of the gross income thereof" upon "every person engaging or continuing within the State in any business, trade [or] activity" not included in other GET provisions. HRS §237-13(9). "Gross income is defined to include "the gross receipts of the taxpayer derived from trade, business, commerce, or sales . . . without any deductions." HRS §237-3 (a). There is an additional surcharge of one-half of one percent for Oahu transactions.

In merchant rental car transactions, the OTCs' gross receipts are the amounts they receive from their customers. These gross receipts are subject to GET. In Travelocity, this Court stated that due to the "inherent pervasiveness" of the GET, the OTCs would owe GET on their gross hotel income *unless* the "income-reducing provision" applicable to hotel transactions, HRS §237-

18(g), applied to limit their GET obligation to their "respective portion of the proceeds," *i.e.* their retained amounts. Travelocity, 135 Haw. at 106, 346 P.3d at 175.

Here, the OTCs likewise owe GET on the gross income from the rental car assessments unless the "income-reducing provision" applicable to "tourism related services," HRS §237-18(f), applies to the OTCs' rental car transactions. Because HRS §237-18(f) does not apply, the OTCs owe GET on their gross receipts.

B. The Income-Reducing Provision in HRS§237-18(f) Does Not Apply to the OTCs' Merchant Rental Car Transactions.

1. Comparison of the "Transient Accommodations" Provision in HRS §237-18(g) to the "Tourism Related Services" Provision in HRS §237-18(f).

In Travelocity, HRS §237-18(g) was the "income-reducing provision" at issue and it expressly applied to "transient accommodations," which were the very transactions the Director assessed in that case.[11] HRS §237-18(g) reads in full:

> (g) Where *transient accommodations* are furnished through arrangements made by a travel agency or tour packager at noncommissioned negotiated contract rates and the gross income is divided between the operator of the transient accommodations on the one hand and the travel agency or tour packager on the other hand, the tax imposed by this chapter shall apply to each such person with respect to such person's respective portions of the proceeds and no more.
>
> As used in this subsection, the words "*transient accommodations*" and "operator" shall be defined in the same manner as they are defined in section 237D-1.

By contrast, the income-reducing provision in HRS §237-18(f) that applies to "tourism related services" nowhere mentions "rental car transactions." HRS §237-18(f) reads in full:

> (f) Where *tourism related services* are furnished through arrangements made by a travel agency or tour packager and the gross income is divided between the provider of the services and the travel agency or tour packager, the tax imposed

[11] In Travelocity, the Director did not dispute the threshold issue that HRS §237-18(g) applied to "transient accommodations." Rather, the Director argued that the OTCs' merchant hotel transactions were not the *type* of transient accommodations covered by HRS §237-18(g) because in these merchant transactions (i) the OTCs did not function as "travel agents," (ii) gross income was not "divided," and (iii) the contracts did not involve "noncommissioned negotiated contract rates. Because the Travelocity Court rejected these three arguments the Director does not rely upon any of them here. Rather, the issue in the present appeal is whether merchant rental car transactions qualify as "tourism related services" under the definition in HRS §237-18(f).

> by this chapter shall apply to each such person with respect to such person's respective portion of the proceeds and no more.
>
> As used in this subsection, "*tourism related services*" means 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 percent tax under this chapter or chapter 239.

The above comparison reveals the fundamental distinction between the income-reducing provision at issue in Travelocity, HRS §237-18(g), and the income-reducing provision at issue here, HRS §237-18(f); namely, subparagraph (g) expressly applied to the assessed "transient accommodations" while subparagraph (f) does not expressly or otherwise apply to the assessed "rental car transactions."[12]

Both sides agree that the starting point for this Court's statutory construction begins with the "plain language" of HRS §237-18(f). See Director OB at 10-11; OTC OB at 12. Based upon the plain language of HRS §237-18(f), rental cars are not listed as one of the Ten Tourism Services. Moreover, there is nothing in the residual clause that plainly encompasses rental cars. The Director relies upon a plain language interpretation of HRS §237-18(f). By contrast, the OTCs urge the opposite of a plain-language interpretation of HRS §237-18(f) in asking this Court to re-write the provision to include an entire and major industry – the rental car industry – that the Legislature has never seen fit to include within the statute.

2. Comparison of the "Tourism Related Services" Definition as Originally Enacted in 1986 and as Amended in 1991.

The "tourism related services" provision at HRS §237-18(f) was enacted in 1986. At that time, the definition of "tourism related services" read in full:

> As used in this subsection, "tourism related services" means catamaran cruises, canoe rides, dinner cruises and sightseeing tours not subject to chapter 239.

[12] The Court in Travelocity addressed only transient accommodations and whether the income-reducing provision of HRS §237-18(g) applied to the OTCs' merchant hotel transactions. Neither rental car transactions nor the income-reducing provision in HRS §237-18(f) applicable to tourism related services were at issue in Travelocity. Yet, without any basis, the OTCs argue that "[t]he Court's ruling in Travelocity … also demonstrates that car rentals are 'tourism related services' within the meaning of § 237-18(f)." This Court said no such thing.

HRS §237-18(f) was amended in 1991. The definition of "tourism related services" was expanded to include six additional examples plus the "residual" category. The amended definition, with the new language in italics, reads in full:

> As used in this subsection, "tourism related services" means 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 percent tax under this chapter or chapter 239.*

Thus, the original 1986 version of HRS §237-18(f) was limited to four specific types of tourism related services: catamaran cruises, canoe rides, dinner cruises and sightseeing tours. The 1991 amendment added six additional types of tourism related services – lei greetings, transportation included in a tour package, and admissions to luaus, dinner shows, extravaganzas, cultural and educational facilities – and a residual provision for "other services rendered directly to the customer or tourist." In their Opening Brief, the OTCs rely upon the residual clause relating to "other services rendered directly to the customer or tourist" to argue that that their merchant rental car transactions fit within the residual clause. The Tax Court correctly held that the residual clause does not apply to the OTCs' merchant rental car transactions.[13]

3. The Rule of *Ejusdem Generis*.

a. The OTCs' Opening Brief Avoids Discussing this Court's Extensive *Ejusdem Generis* Jurisprudence.

Since there is no factual dispute regarding the operation of the OTCs' merchant car rental transactions, this appeal presents a purely legal issue of statutory construction, in particular the rules of *ejusdem generis* and *noscitur a sociis*. Applying these rules of construction to the residual provision in HRS §237-18(f) leads inevitably to the conclusion that none of the OTCs' rental car transactions – whether stand-alone or package transactions – fall within the residual provision, and the OTCs therefore owe GET on their gross receipts.

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[13] As set forth in the Director's Opening Brief, the Tax Court also ruled that the "transportation included in a tour package" language of HRS §237-18(f) applied to the OTCs' "package transactions" involving rental cars and, as a result, held that the OTCs owed GET only on their retained amounts and not their gross income as to package transactions. The Director has appealed this portion of the Tax Court's Judgment and has fully addressed the "transportation included in a tour package" language in her Opening Brief.

As explained by this Court, "[t]he doctrine of *ejusdem generis* states that where general words follow specific words in a statute, those general words are construed to embrace only objects *similar in nature* to those objects enumerated by the preceding specific words." Asato v. Procurement Policy Board, 132 Haw. 333, 352, 322 P.3d 228, 247 (2014). Here, the general words in HRS §237-18(f) – "other services rendered directly to a customer or tourist" – follow the specific itemization of ten enumerated tourism related services ("Ten Tourism Services"). Applying the rule of *ejusdem generis*, the question is whether the OTCs' rental car transactions are "similar in nature" to the Ten Tourism Services. Hawai'i case law makes clear they are not.

There are numerous decisions by this Court involving the analogous situation as present here—a specific list of items in a statute followed by a general, residual provision. The OTCs' Opening Brief is notable for its failure to discuss any of these Hawai'i cases applying the *ejusdem generis* doctrine. The OTCs merely cite several Hawai'i cases for the statement of the *ejusdem generis* doctrine itself (see OTC OB at 24-25), but nowhere do the OTCs analyze a single case involving the *ejusdem generis* doctrine and how the courts actually applied the doctrine based upon the facts and statutory language at issue. The OTCs' failure is understandable given that Hawai'i courts have, invariably, narrowly construed these residual clauses. Unless the item in question was clearly "similar in nature" or of "like kind or character" to the listed items, the residual language was found to be inapplicable.

In Asato, the Hawai'i Procurement Policy Board ("Board") issued an administrative rule that created exceptions from the statutory requirement that there be a minimum of three bids for professional services. The plaintiff challenged the administrative rule as being contrary to the "minimum of three persons" requirement in the statute. The Board countered by relying upon the residual provision in the statute relating to "any other goods or services."

The statute in question in Asato defined eleven specific types of goods or services, followed by a residual description in HRS §103D-102(b)(4)(L) ("Subsection (L)") which reads, "*[a]ny other goods or services* which the policy board determines by rules or the chief procurement officer determines in writing is available from multiple source[s] but for which procurement by competitive means is either not practicable or not advantageous to the State." 132 Haw. at 339, 322 P.3d at 234.

The Court applied the doctrine of *ejusdem generis* in addressing the residual provision in Subsection (L) and stated:

> Subsection (L) is meant to identify particular goods or services exempt from the requirement of the Procurement Code. The general words "*[a]ny other goods or services*" in subsection (L) must, under the doctrine of ejusdem generis, be construed in connection with the list of items (A) through (K) preceding it. Items (A) through (K) enumerate specific types of goods or services, for example, works of art, research and reference materials, out-of-state attorney services, printers, and performances. See HRS § 103D-102(b)(4)(A)-(K). The Board would construe (L) not to exempt types of goods or services, but instead to provide an exemption when a particular factual situation is posited – specifically, where less than three qualified persons are identified under HRS § 103D-304. This would give the general words "[a]ny other goods or services" in HRS § 103D-102(b)(4)(L) a meaning dissimilar to the specific exemptions enumerated at HRS § 103D-102(b)(4)(A)-(K), and therefore would be inconsistent with established principles of statutory construction. Accordingly, the factual situation of less than three qualified persons under the Board's rule HAR § 3-122-66 cannot be rationalized as an unenumerated exception within the scope of HRS § 103D-102(b)(4).

132 Haw. at 352-53, 322 P.3d. at 247-48.

In Brown v. KFC Nat'l Mgmt. Co., 82 Haw. 226, 921 P.2d 146 (1996), an employee sued KFC for being terminated due to racial discrimination and the question was whether the arbitration clause governing his employment claims required him to arbitrate under the Federal Arbitration Act (FAA). The employee relied upon the arbitration exclusion in the FAA which provided that "nothing herein shall apply to contracts of employment of seamen, railroad employees *or any other class of workers engaged in foreign or interstate commerce*." 82 Haw. at 235-36, 921 P.2d at 155-56. This Court found that the claims were subject to arbitration and that the arbitration exclusion did not apply. Applying the rule of *ejusdem generis*, this Court held that the phrase "or any other class of workers engaged in foreign or interstate commerce" was intended "to include only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. The draftsmen had in mind the two groups of transportation workers as to which special arbitration language already existed[,] and they rounded out the exclusionary clause by excluding all other similar classes of workers." 82 Haw. at 236, 921 P.2d at 156.

In Jones v. Hawaiian Elec. Co., 64 Haw. 289, 639 P.2d 1103 (1982), a group of electricity subscribers challenged the legality of a lease-to-purchase agreement with Hawaiian Electric Company (HECO) on the grounds that the agreement was "evidence of indebtedness" that required

prior approval of the Public Utilities Commission (PUC). HRS §269-17 provided in pertinent part that "[a] public utility corporation may, on securing the prior approval of the public utilities commission, and not otherwise, issue stock and stock certificates, bonds, notes, and *other evidence of indebtedness* . . . ." This Court, applying the rule of *ejusdem generis*, held that the lease with purchase option was not "evidence of indebtedness" and approval by the PUC was therefore not required.

> Holding the rule of ejusdem generis applicable to HRS § 269-17, "evidence of indebtedness" is limited to *things of like character* to stocks and stock certificates, bonds and notes. Stocks and stock certificates, bonds and notes are usually issued as a means of raising funds for the purposes specified in HRS § 269-17 and become part of the capital structure of the public utility. The lease agreement is not a means of raising funds for the purchase of the Heeia Kea property and is not a part of the capital structure of HECO. Thus, the lease agreement is not of like character to a stock, bond or note.

64 Haw. at 295, 639 P.2d at 1108-09.

Territory v. Hamakua Mill Co., 23 Haw. 1 (1915) involved a Hawai‘i statute that read: "No person shall manufacture, compound, or otherwise prepare any confections, cakes, bread stuffs *or other food products* intended for sale and for human consumption in any shop or premises without first obtaining . . . a license." The defendant grew sugar cane and sold and manufactured raw sugar, but did not hold a license. The Territory asserted that a license was required because "raw sugar" was included in the words "other food products" while the defendant contended that the rule of *ejusdem generis* applied, and raw sugar was not a food product of a kind like those expressly enumerated. This Court, noting that the rule of *ejusdem generis* is "a potent rule [of construction," agreed with the defendant sugar manufacturer and stated: "The words 'other food products' are doubtless operative to include things similar in kind to 'confections,' 'cakes' and 'bread stuffs,' such for example as pies, candy, and, probably, ice cream. But raw sugar is not of the like kind with any of the things mentioned in the statute." Id. at 6.

HRS §134-51, a criminal statute, has frequently been interpreted using the *ejusdem generis* doctrine. The statute prohibits the carrying of "any dirk, dagger, blackjack, slug shot, bill, metal knuckles, pistol, *or other deadly or dangerous weapon*." This Court has applied the *ejusdem generis* doctrine in deciding a number of cases arising under this statute in determining whether certain items not specifically enumerated fall within the residual clause for "other deadly or dangerous weapons."

In State v. Rackle, 55 Haw. 531, 535, 523 P.2d 299, 302 (1974), the defendant was criminally charged for possessing a flare gun. The Court applied the *ejusdem generis* doctrine to this statute and stated that "the Legislature sought to proscribe the act of carrying those weapons *specifically enumerated* in the statute, as well as other deadly or dangerous weapons *of like kind and character*." (emphasis in original). The Court further held that the phrase "other deadly or dangerous weapon" gives the statute "the necessary flexibility of scope to bring within its ambit instruments closely associated with criminal activity whose sole design and purpose is to inflict bodily injury or death upon another human being." 55 Haw. at 537, 523 P.2d at 303. As a result, the Court found that a flare gun was not designed or intended to be used as a weapon and, therefore, did not constitute an "other deadly or dangerous weapon." Id.

In State v. Muliufi, 64 Haw. 485, 489, 643 P.2d 546, 549 (1982), the Court held that nunchaku sticks were not an "other deadly or dangerous weapon" as their sole purpose was not to inflict death or serious bodily injury, but rather as used in the martial arts, they are socially acceptable and lawful behavior. The Muliufi Court further held that "*rather than acting by judicial fiat* to include nunchaku sticks under HRS §134-51, *we think it more proper for the legislature to provide the additional protections by amending the statute*." 64 Haw. at 489-90, 643 P.2d at 549.

The same reasoning this Court applied in Muliufi applies here. Rather than this Court inserting "rental cars" into HRS §237-18(f) by judicial fiat, it is for the Legislature to add rental cars to HRS §237-18(f) by amending the statute, if it so chooses. As previously noted, the Legislature did extensively amend HRS §237-18(f) in 1991 by adding six specific services to the definition of "tourism related services," but did not see fit to add "rental cars" to the list. Also, as discussed in the Director's Opening Brief, the same 1991 Legislature that amended HRS §237-18(f) by adding six new enumerated "tourism related services" plus the residual clause, also enacted a new tax under Chapter 251 on rental cars and tour vehicles. See Director OB at 14-17. There is nothing to prevent the Legislature from adding "rental cars" to the list of tourism related services in HRS §237-18(f) if that is their intent. Absent that, however, it is not for this Court to read "rental cars" into HRS §237-18(f) by judicial fiat. See Muliufi, 64 Haw. at 489-90, 643 P.2d at 549.

In State v. Giltner, 56 Haw. 374, 375-76, 537 P.2d 14, 15-16 (1975), this Court held that a "diver's knife" was not a deadly or dangerous weapon. It held that the diver's knife was not encompassed by HRS §134-51, notwithstanding that a "dagger," a type of knife, was specifically

listed within the statute.[14] Likewise, this Court held that a cane knife and folding pocket knife were not dangerous or deadly weapons under HRS §134-51.[15]

By contrast, certain items that were similar in nature to the items specifically listed in HRS §134-51 have been found by the Supreme Court to be an "other deadly or dangerous weapon" including a sheathed sword-cane and wooden knuckles with shark's teeth embedded in the striking surface,[16] a shotgun,[17] and a .22 caliber rifle.[18]

Notwithstanding this wealth of case law involving the *ejusdem generis* doctrine, the OTCs steer clear of discussing any of these cases. The reason is clear: this Court's well-developed jurisprudence regarding the *ejusdem generis* doctrine shows that the OTCs' attempt to import "rental cars" into the residual clause of HRS §237-18(f) fails as a matter of law.

b. The "Commonality" Among the Ten Tourism Services is that They Involve Activities that Tourists Primarily do for Enjoyment or Pleasure Whereas Renting Cars is Primarily Done for Functional Purposes of Transportation.

Applying the rule of *ejusdem generis* as interpreted by this Court to the undisputed facts of this case, the OTCs' car rental transactions are not "similar in nature" to, or of the "same kind or character" as, the Ten Tourism Services that are listed in HRS §237-18(f). As such, the residual "other services" language does not extend to the OTCs' rental car transactions. The OTCs urge that the *ejusdem generis* rule "requires one to identify the commonality between the enumerated 'tourism related services' – the tie that binds them together – and then use that commonality to determine the scope and extent of the phrase 'other services rendered directly to a customer or tourist.'" OTC OB at 24. The OTCs' "commonality" test paraphrases this Court's *ejusdem generis*

[14] The Court quoted the dictionary definition of a "dagger" as a "short weapon used for stabbing." It described the diver's knife as consisting of "a hard rubber handle with a blade measuring slightly less than 6-1/2 inches in length, one edge serrated for most of its length and then curving convexly to the point." 56 Haw. at 375, 537 P.2d at 16.

[15] State v. Rodrigues, 56 Haw. 642, 643, 547 P.2d 587, 588 (1976).

[16] State v. Ogata, 58 Haw. 514, 515, 572 P.2d 1222, 1223 (1977) (defendant did not dispute these items were deadly or dangerous weapons).

[17] State v. Jones, 61 Haw. 135, 597 P.2d 210 (1979) (a shotgun was held to be a deadly or dangerous weapon because its primary design and purpose is to inflict injury).

[18] State v. Kawazoye, 63 Haw. 147, 148, 621 P.2d 384, 386 (1981).

test that the unenumerated item be "similar in nature" to, or of the "same kind or character" as, the enumerated items. Asato, 132 Haw. 333, 352, 322 P.3d 228, 2474.

What is "common" to the Ten Tourism Services listed in HRS §237-18(f) – the tie that binds them together – is that *each activity is something that tourists do primarily for enjoyment in Hawai'i*, including: water-based activities (catamaran cruises, canoe rides); dining & entertainment experiences (dinner cruises, dinner shows, extravaganzas); traditional Hawai'ian activities (luaus, lei greetings); "cultural and educational" events; and tour related services (sightseeing tours, and transportation included in a tour package).[19]

By contrast, *people do not generally rent cars for enjoyment*. Rather, people (including, but not limited to tourists) rent cars for a functional or practical purpose, to get from one point to another, not an entertainment purpose. To use the OTCs' words, "the tie that binds" the Ten Tourism Services – enjoyment and entertainment, in short, to have fun in Hawai'i – is not a tie that binds car rentals to the Ten Tourism Services. The OTCs unwittingly make this very point in their Opening Brief in quoting news and tourism articles to the effect that "the best way to get around Maui is by car," "[t]o really experience all that Hawai'i offers, you should consider renting a car," "*we recommend a rental car* for flexibility," and "nearly all visitors … rely on tour buses, taxis, *or rental cars*." OTC OB at 20 (emphasis is OTCs). The OTCs' own words highlight the practical (not entertainment) purpose of renting a car. In so doing, they expose why car rentals do not share a "commonality" with the enumerated Ten Tourism Services.

According to the OTCs themselves, rental cars (like taxis) serve a practical purpose in getting around Hawai'i. But, a rental car is no more a "tourism related service" for purposes of HRS §237-18(f) than a taxi. The "tourism related services" defined in HRS §237-18(f) are an end in themselves, whereas renting a car is a means to an end. A luau is a classic Hawai'i tourism related service. But, if a tourist drives his rental car to the luau, that does not make the rental car a tourism related service. The tourist could have just as easily taken a taxi or public transportation to the luau. It would be absurd to argue that the taxi or bus ride qualifies as a tourism related service and it is equally absurd for the OTCs to argue that a rental car does.

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[19] The Tax Court did not make any findings of fact. Yet, the OTCs quote extensively from the Tax Court's comments at the summary judgment hearing that the commonality among the Ten Tourism Services is that all ten items are included as part of a tour package. Tr. 8/15/16 (Dkt. 51) at 67. But these comments are not relevant to an issue on appeal as there is no dispute that this Court's review of the summary judgment orders is *de novo*. See Director OB at 7; OTC OB at 11-12.

Of the Ten Tourism Services, the only one that is not an end in itself is "transportation included in a tour package." Importantly, HRS §237-18(f) does not cover merely "transportation" but only "transportation *included in a tour package*." TIR 91-8 was issued in conjunction with the 1991 amendment that added "transportation included in a tour package" and the "residual clause" to HRS §237-18(f). It gives an example of what "transportation included in a tour package" means: "tour packager pays a *bus company $30 for transportation*, pays the [pineapple] cannery $5 for a tour, and pays the [Arizona Memorial] Visitor Center $5 for admission." Id. Thus, the transportation provided by the bus company is covered by HRS §237-18(f) because it is part of a "tour package" that contains tourism related services such as a pineapple cannery tour and a visit to the Arizona Memorial. The same cannot be said of the OTCs' rental car transactions. The OTCs submitted no evidence that any of the assessed rental car transactions were part of a "tour package." See Director OB at 18-19.

4. The Rule of Noscitur a Sociis.

Nearly seventy years ago, this Court discussed the *noscitur a sociis* rule of construction, which it stated:

> May be freely translated as "words of a feather flock together," that is, the meaning of a word is to be judged by the company it keeps. This is really a particular rule under the general rule of interpretation that the meaning to be given to a writing is controlled by the context; taken from the context, both words and sentences may be made to mean something very different from what the authors intended.

Advertiser Publishing Co., Ltd. v. Fase, 43 Haw. 154, 161 (1959).

Later, the courts elaborated on the doctrine in stating:

> *Noscitur a sociis* may be explained as a doctrine of statutory construction that requires that the more general and the more specific words of a statute must be construed together in determining the meaning of the statute, and that the general words are restricted to a meaning that should not be inconsistent with, or alien to, the narrower meanings of the more specific words of the statute.

Kaheawa Wind Power, LLC v. County of Maui, 135 Haw. 202,208, 347 P.3d 632, 638 (Haw. App. 2014), quoting In re Pacific Marine & Supply Co., Ltd., 55 Haw. 572, 578, 524 P.2d. 890, 895 (1974).

Applying the *noscitur a sociis* rule of construction to the present case requires that the general words of the residual clause ("other services rendered directly to the customer or tourist") be restricted to the narrower meaning of the enumerated Ten Tourism Services. To paraphrase the

Hawai‘i courts more colloquial way of putting it, a "rental car" transaction is not a "bird of a feather" and does not "flock together" with the Ten Tourism Services. The OTCs' flawed interpretation violates the *noscitur a sociis* rule of construction because the practical act of renting a car to move about the islands is far different than the pleasure-seeking activities represented by the Ten Tourism Services.

Both doctrines, *ejusdem generis* and *noscitur a sociis*, limit a court's ability to impose broad readings on residual provisions in statutes. Instead, these doctrines require that residual provisions be narrowly read, in harmony with the specific words of the statute. In reviewing this Court's decisions applying these two doctrines, it is apparent that the doctrines are very narrowly applied. That is, this Court has been reluctant to read residual clauses broadly to conclude that a significant item the legislature did not specifically list in the statute should nonetheless be interpreted as falling within the statute.

5. In Addition to the Plain Language of HRS §237-18(f), Other Tax Statutes, Legislative History, TIRs, and the Like Unambiguously Show that Rental Cars Were Not Intended to Be Included within HRS §237-18(f).

The Directors' Opening Brief contains an extended discussion regarding the various enactments and amendments of not only HRS §237-18(f), but also related tax legislation, including Hawai‘i's administrative rules, TIRs, and legislative history, which the Director hereby incorporates by reference. See Director OB at 12-18. To summarize, rental cars are not included within the text of HRS §237-18(f). Rental cars are not mentioned in any committee report or legislative history of any kind relating to HRS §237-18(f). Rental cars are not addressed in any TIRs or administrative rules relating to HRS §237-18(f). In short, there is not the slightest hint anywhere to be found that the Legislature, either in its original enactment of HRS §237-18(f) in 1986 or its amendment in 1991, intended to include rental car transactions within the sweep of HRS §237-18(f).

The Legislature's silence cannot be reconciled with the OTCs' attempt to insert rental cars *sub silentio* into HRS §237-18(f). It is not credible – in fact, it is incredible – to argue that the Legislature provided *express* tax breaks in the form of income-reducing provisions for numerous industries in HRS §237-18, ranging from coin-operated devices to insurance agents to hotel operators (see Director OB at 19-20), yet the Legislature chose to provide an *implied* tax break to the large rental car industry that exists throughout this State.

6. The OTCs Eschew Any Meaningful Statutory Analysis in Favor of Random and Irrelevant Arguments.

The OTCs avoid engaging in the type of statutory analysis, including a discussion of the applicable case law, that one would expect in a case that at its core is a statutory interpretation case. Instead, the OTCs spend much time discussing random and irrelevant points.

The OTCs cite a Hawai‘i case for the basic proposition that "*car rental agencies are part of the tourist industry*. Obviously, *visitors coming to* Hawai‘i *rent automobiles*." OTC OB at 21; quoting Bowers v. Alamo Rent-a-Car, Inc., 88 Haw. 274, 282 (1998) (emphasis is OTCs). However, the question is not whether, in a general sense, car rentals are part of the tourism industry. The relevant question under Hawai‘i's well-established rules of statutory construction and the long line of Hawai‘i Supreme Court precedents is whether the OTCs' merchant car rental transactions qualify as a "tourism related service" *for purposes of HRS §237-18(f)*. Similarly, the OTCs quote a definition of "tourism" as "the business or industry of providing information, accommodations, *transportation*, and other services to tourists." OTC OB at 20 (emphasis is OTCs). Again, the question is not whether "transportation" can be considered to be part of the tourism industry; rather, the narrow question is whether by adding the residual clause to the 1991 amendments to HRS §237-18(f) the Legislature intended to include a huge tax break for the multi-million dollar rental car industry *sub silentio*.

In an example of how far afield the OTCs are from the statutory text of HRS §237-18(f), the OTCs insist that "[t]he Department's letter rulings between 2000 and 2003 further confirm that the GET Statute's apportioning provisions apply to the OTCs' merchant car transactions." OTC OB at 29. Yet, none of these letter rulings has anything whatsoever to do with rental cars. The OTCs reference several letter rulings where the Department ruled that scuba diving services and jet ski rentals qualified under the "other services" clause in HRS §237-18(f) as a "tourism related service." OTC OB at 28-29. The Director embraces these letter rulings as being exactly the type of "other services" that the residual clause was intended to capture. Scuba diving and jet ski rentals are classic Hawai‘i vacation activities that tourists do for *enjoyment*. This is the "tie that binds" scuba diving and jet ski rentals to the Ten Tourism Services. And, it is also what distinguishes scuba diving and jet ski rentals from car rentals.

7. The OTCs' Scare-Mongering Regarding the Alleged Impact on Tourism is False and is Based on a Wholesale Misrepresentation of the Director's Position.

Bereft of any statutory basis for arguing that the OTCs' rental car transactions are included within HRS §237-18(f), the OTCs resort to their "sky-is-falling" argument on the alleged impact on Hawai'i tourism if rental car transactions are not included within HRS §237-18(f). See OTC OB at 23 and 26-27 (warning of "devastating consequences to the car rental industry in Hawai'i" and warning that entire industries such as "stand alone helicopter rides, driving excursions, bicycle rentals, sailboats, jet skis, rental cars and the like would be jeopardized.")

First, applying the "commonality" test proposed by the Director, many of these examples include activities that are primarily for pleasure or recreation and would almost certainly qualify as a "tourism related service" such as helicopter rides, sailboat rentals, and jet ski rentals. Second, contrary to the OTCs' false narrative, the Director has never taken the position that a tourism related service must be included as part of a package to be encompassed within HRS §237-18(f). Indeed, of the Ten Tourism Related Services, nine are described as "stand-alone" tourism related services and only one – "transportation included in a tour package" – includes any reference to a "package." As the OTCs correctly note, "the Director specifically concluded that jet ski rentals were a tourism related service subject to apportionment and nowhere suggested that the jet skis had to be part of a package to qualify for apportioning." See OTC Br. at 25, n. 23. Agreed. The OTCs are making the Director's point for her. An activity that qualifies as a tourism related service, whether one of the expressly enumerated items or an activity encompassed within the residual clause such as jet skis, need not be part of a package to be entitled to the income-reducing benefit of HRS §237-18(f). The OTCs, having correctly stated the Director's position regarding the jet ski example at page 25 of their Opening Brief, then completely misstate the Director's position two pages later at page 27 where they falsely attribute to the Director the position that only tourism related services included within a package can be included within HRS §237-18(f). That is not and never has been the Director's position.

The point is this. If the underlying activity qualifies as a tourism related service, it is entitled to the tax benefit provided by HRS §237-18(f), regardless of whether the service is purchased separately or is included as part of a package. A "stand-alone" luau is included within HRS §237-18(f) to the same extent as a luau purchased as part of a package. By contrast, if an activity is not a tourism related service (whether enumerated or not), then it is not included within

HRS §237-18(f), regardless of whether the item is purchased separately or as part of a package.[20] Here, because rental cars do not qualify as a "tourism related service," rental car transactions are not entitled to the tax benefit provided by HRS §237-18(f) and it is irrelevant whether the rental cars are "stand-alone" transactions or part of a package. Rental cars are simply outside the ambit of HRS §237-18(f).

VI. CONCLUSION

The Director requests that this Court affirm the Tax Court's judgment that the OTCs owe GET on their gross receipts for "stand-alone" rental car transactions, including the penalties and interest awarded by the Tax Court on these transactions. The Director requests that the Court reverse the Tax Court's ruling that the OTCs owe GET, penalties, and interest only on their retained amounts for "package" rental car transactions. As to the package rental car transactions, the Director requests that the Court and reverse and render judgment in favor of the Director and ordering that GET, penalties, and interest shall be calculated on the OTCs' gross receipts for package rental car transactions. The Director requests that the case be remanded to the Tax Court as may be necessary for entry of a final judgment in favor of the Director and against the OTCs that liquidates the dollar amounts for unpaid GET, penalties, and interest on penalties consistent with this Court's opinion.

DATED: Honolulu, Hawai'i, October 16, 2017.

[20] As discussed in the Director's Opening Brief, the only exception is that "transportation" such as an airport shuttle that would not qualify for the income-reducing benefit of HRS §237-18(f) if purchased separately does qualify for income reduction if purchased as part of a tour package, based on the express language that applies to "transportation included in a tour package."

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I certify that on October 16, 2017, a copy of the Answering Brief of *Director of Taxation, State of Hawai‘i to Appellants/Appellees-Cross-Appellants' Opening Brief,* was served on the following persons via JEFS at the following email addresses:

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