No. SCAP-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.	Tax Appeal No. 13-1-0269 and Consolidated Cases **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**

TAX FOUNDATION OF HAWAI`I'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

CERTIFICATE OF SERVICE

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TAX FOUNDATION OF HAWAIʻI'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

Pursuant to this Court's Order Granting Motion for Leave to File *Amicus Curiae* Brief filed on November 7, 2017, and Rule 28(g) of the Hawai'i Rules of Appellate Procedure, the Tax Foundation of Hawai'i ("Foundation") submits this brief in support of Appellants, respectfully urging this Court to reverse and remand with instructions to vacate the Department of Taxation's new and additional assessments for any taxable years wherein Appellants' liability for Hawai'i General Excise Tax ("GET") already has been adjudicated.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Foundation is a non-partisan, non-political 501(c)(3) organization whose mission is to educate taxpayers and lawmakers on taxation and public finance. We educate and encourage the efficient and effective use of public funds (our tax dollars) to operate government and deliver public services. To do that, we track changes in tax law and how taxpayer dollars are used. Our work is published and distributed as widely as possible and free of charge. A well-informed public (and this includes lawmakers) that understands the impact of our tax system can more effectively participate in pressing for greater government efficiency and accountability.

Over the years, the Foundation has also functioned as a taxpayer watchdog organization, on many occasions scrutinizing and then calling out the government's legislative proposals to make its own job easier at the expense of taxpayer rights and protections. This case, to the Foundation, presents another example of an assault on taxpayer rights: where the State is saying that it can audit and assess the taxpayer, causing the taxpayer to spend a tremendous amount in resources to reach an adjudicated resolution, and then audit and assess more of the same taxes for the same years, forcing both the taxpayer and the court system through the wringer again without any apparent limit.

STATEMENT OF THE CASE

This brief relies on, and incorporates by reference, the Statement of the Case in Appellants' Opening Brief as it relates to the *res judicata* issue.

ARGUMENT

THE JUDICIAL DOCTRINE OF RES JUDICATA IS APPROPRIATELY APPLIED TO THE GENERAL EXCISE TAX IN THE SAME MANNER AS INCOME TAX, BECAUSE BOTH ARE ASSESSED ANNUALLY.

Res judicata is not statutory; it is a judicially created doctrine. As this Court explained:

> The purpose of the doctrine of res judicata is to prevent a multiplicity of suits and to provide a limit to litigation. It serves to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. The res judicata doctrine thus furthers the interests of litigants, the judicial system and society by bringing an end to litigation where matters have already been tried and decided on the merits. It is a rule of fundamental and substantial justice, of public policy and private peace.
>
> The doctrine therefore permits every litigant to have an opportunity to try his case on the merits; but it also requires that he be limited to one such opportunity. Unsatisfied litigants have a remedy: they can appeal through available channels. But they cannot, even if the first suit may appear to have been decided wrongly, file new suits.

Kauhane v. Acutron Co., 71 Haw. 458, 463–64, 795 P.2d 276, 278–79 (1990) (citations, internal quotation marks, and brackets omitted).

The Supreme Court of the United States has applied this doctrine to litigation with the Government over the federal income tax:

> But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel.
>
> These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus, if a claim of liability or nonliability relating to a particular tax year is litigated, 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 (1948) (citations omitted).

This Court has previously held that the General Excise Tax (GET) Law, which underlies the supplementary assessments this case, and the federal income tax law "deal with sufficiently similar subject matter as to require construction in relation to each other." *In re Island Holidays, Ltd.*, 59 Haw. 307, 312, 582 P.2d 703, 706 (1978); *In re 711 Motors, Inc.*, 56 Haw. 644, 650-51, 547 P.2d 1343, 1348 (1976). As a result, this Court has applied federal income tax definitions and concepts to the GET.

The GET, like the income tax, is assessed on an annual basis. HRS § 237-33 provides that all taxpayers are to file annual reconciliation returns. Periodic returns required by HRS § 237-30 do not have anywhere near the same legal significance. The statute of limitations for the GET, HRS § 237-40, does not even begin to run until the annual return is filed,[1] so taxpayers who file only periodic returns can and do find that their filings several years in the past are open for examination. The GET Protection Act of 2010, Act 155, Session Laws of Hawaii 2010, disallows any "tax benefits," including reduced rates, exemptions, or deductions, unless the taxpayer is registered for the GET and files "the annual general excise tax reconciliation return" for the year in question not more than twelve months after the return is due. HRS § 237-9.3. Finally, shortly after the GET was enacted in the1930's, the Tax Commissioner of the Territory of Hawaii explained that annual returns were to be filed to report the whole of the taxpayer's taxable activities during the year:

> 120. Q. Must the taxpayer file an annual report in addition to the monthly returns?
>
> A. Yes. Annual returns are in addition to the monthly returns.
>
> ….

[1] HRS § 237-40(b) states, "In the case of a false or fraudulent return with intent to evade tax, or of a failure to file the annual return, the tax may be assessed or levied at any time."

122. Q. Suppose a taxpayer engages in more than one taxable business, as for example, selling merchandise at retail and renting rooms in an apartment house. Must he file a separate return for each business?

A. No. Where a person engages in more than one taxable business he must file one return which will cover all taxable activities.

Territory of Hawaii, TAX PRIMER OF THE GROSS INCOME TAX, at 29 (1935).[2]

From these provisions, the GET is assessed on an annual basis, the same as income tax. Taxpayers were instructed from the inception of the GET that the annual return would encompass all taxable activities engaged in by the taxpayer throughout the year. Because this Court in *711 Motors* and *Island Holidays* built a bridge by which federal income tax concepts could cross over and inform the development of the GET, it would be appropriate for this Court to apply *Sunnen* and its progeny to the GET the same as it is applied to the federal income tax.

The rule should not be different even when, as the State suggests, the taxpayer has not filed a return. The Legislature has provided for judicial review of tax liabilities even if the taxpayer does not first file a return. HRS § 40-35, Ch. 232; Tax Information Release 2002-1. The dispositive fact is not whether a piece of paper was filed; the return became irrelevant once both parties litigated the tax liabilities. Even if the taxpayers were demons, ghouls, or devils incarnate, they have judgments. The issue is the respect to be accorded the judgments. *See Bremer v. Weeks*, 104 Haw. 43, 54, 85 P.3d 150, 161 (2004); *Kauhane v. Acutron Co.*, 71 Haw. 458, 463-64, 795 P.2d 276, 278-79 (1980). If the Department can pursue repeated litigation

[2] The Department still instructs taxpayers to combine all taxable activities on one return. See, e.g., Dep't of Taxation, General Instructions for Filing the General Excise/Use Tax Returns 8 (2016) ("Step 5 – Enter the gross income <u>from all your business activities</u> for the filing period in Column a on the appropriate business activity lines." (emphasis added)).

without mercy and without end, woe be to the rest of us, for we do not know who the Department will demonize tomorrow.

CONCLUSION

For the reasons set forth above, the Tax Appeal Court's ruling as to res judicata should be reversed and the matter remanded with instructions to vacate the supplementary assessments in all years for which the tax liabilities were determined by judgment.

The Foundation expresses no view on any other issues raised in this appeal.

DATED: Honolulu, Hawai`i, November 7, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document will be served on counsel of record indicated below through JEFS upon the filing hereof:

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