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Electronically Filed
FIRST CIRCUIT
1CCV-24-0000661
27-NOV-2024
06:39 PM
Dkt. 81 MD

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In re DEPARTMENT OF TAXATION, ADMINSTRATIVE DIRECTIVE NO. 2021-01. TAX FOUNDATION OF HAWAI'I, a Hawai'i nonprofit corporation, Plaintiff, vs. DEPARTMENT OF TAXATION, STATE OF HAWAI'I, Defendant.	CIVIL NO. 1CCV-24-0000661 DEFENDANT DEPARTMENT OF TAXATION, STATE OF HAWAII'S MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT, OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF MOTION; NOTICE OF HEARING; CERTIFICATE OF SERVICE HEARING: Date: December 19, 2024 Time: 2:00 p.m. Judge: The Honorable Karin L. Holma Trial Date: February 3, 2025

DEFENDANT DEPARTMENT OF TAXATION, STATE OF HAWAII'S MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT, OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant DEPARTMENT OF TAXATION, STATE OF HAWAII ("Department"), by and through its attorneys, hereby move this Honorable Court to dismiss the Complaint for Declaratory Judgment filed on May 20, 2024, in the above-entitled matter, for lack of subject matter jurisdiction, or, in the alternative, an order granting summary judgment in favor of the Department and against Plaintiff Tax Foundation of Hawaii.

This Motion is made pursuant to Rules 7, 12, 56, and 57 of the Hawaii Rules of Civil Procedure ("HRCP"), Rule 7 of the Rules of the Circuit Courts, Hawaii Revised Statute ("HRS") § 632-1, the memorandum in support of motion, the records and files herein, and any arguments presented at the hearing on this motion.

DATED: Honolulu, Hawaii, November 27, 2024.

/s/ Janine R. Udui
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STATE OF HAWAII

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In re DEPARTMENT OF TAXATION, ADMINSTRATIVE DIRECTIVE NO. 2021-01. TAX FOUNDATION OF HAWAI'I, a Hawai'i nonprofit corporation, Plaintiff, vs. DEPARTMENT OF TAXATION, STATE OF HAWAI'I, Defendant.	CIVIL NO. 1CCV-24-0000661 MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Tax Foundation of Hawaii, ("Plaintiff") through its Complaint for Declaratory Judgment ("Complaint") seeks to have this Court improperly grant declaratory relief in this case involving a controversy with respect to taxes. Here, Plaintiff challenges an administrative directive issued by the Director of Taxation ("Director") regarding the assessment of certain tax penalties. As the penalty assessed becomes part of the tax, declaratory relief as requested here impermissibly interferes with the Director's ability to assess and collect taxes. Accordingly, this matter falls squarely within § 632-1, Hawaii Revised Statutes' ("HRS") prohibition against this Court's jurisdiction to adjudicate controversies involving taxes. Moreover, because the tax code provides for a specific form of remedy for challenges to tax assessments which involve bringing these matters before the Tax Appeal Court, these remedies must be followed. Therefore, as declaratory relief is not an available remedy for controversies related to taxes and challenges to tax assessments must be brought before the Tax Appeal Court, this matter should be dismissed for lack of subject matter jurisdiction.

In the alternative, the Department of Taxation, State of Hawaii ("Department") moves for an order granting summary judgment in favor of the Department and against the Plaintiff. In

addition to Plaintiff's failure to overcome its showing that this Court can provide declaratory relief, Plaintiff similarly fails to demonstrate it is entitled to relief pursuant to Chapter 91. As discussed below, Plaintiff's assertion that the language of HRS § 91-7 alone permits this Court to ignore the statutory prohibition against declaratory relief as set forth in HRS § 632-1 is without merit. Plaintiff also failed to provide any facts demonstrating (1) that the Administrative Directive challenged is a rule that violates constitutional or statutory provisions; (2) that the Director exceeded his statutory authority; or (3) that that the Department was required to engage in rulemaking pursuant to the Hawaii Administrative Procedures Act. As such, Plaintiff's instant Motion for Summary Judgment ("Plaintiff's MSJ") fails. Finally, Plaintiff's claims are also non-justiciable because Plaintiff lacks standing. Conversely, the Department has demonstrated that based on the admissible facts before the Court, declaratory relief is unwarranted, and the Department is entitled to summary judgment as a matter of law.

II. BACKGROUND

On May 20, 2024, Plaintiff filed a Complaint for Declaratory Judgment alleging among other things, that this Court had jurisdiction over this claim for declaratory relief pursuant to HRS §§ 91-7 and 632-1. See Complaint at 2, ¶ 4 (*Dkt. 1).* In its Complaint, Plaintiff seeks a declaratory judgment that the Director's interpretation of a statutory tax penalty as set forth in Administrative Directive No. 2021-01 ("Administrative Directive") is invalid, and the information contained therein is unlawful. Id. at 6, ¶ 28. Plaintiff further seeks a declaration that certain portions of the Administrative Directive are invalid based on violations of Chapter 91. Id. at 5, ¶ 25.

On June 19, 2024, Plaintiff filed a Motion for Summary Judgment, (*Dkt. 23)*, which the Department opposed on July 2, 2024 (*Dkt. 36).* Plaintiff's June 19, 2024 Motion for Summary Judgment came on for hearing on July 16, 2024, and after a discussion on the record regarding the exhibits to Plaintiff's Motion for Summary Judgment, the Court denied, without prejudice, Plaintiff's June 19, 2024 Motion for Summary Judgment (*Dkt. 45 and 55).* On October 23, 2024, a Stipulation of Facts was filed with the Court (*Dkt. 64)*. On October 28, 2024, Plaintiff's MSJ was filed (*Dkt. 67).*

III. STANDARD OF REVIEW

Review of a motion to dismiss for lack of subject matter jurisdiction is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the Plaintiff. Yamane v. Pohlson, 111 Hawaii 74, 81 (2006). The Court may, however, when considering a motion to dismiss under Rule 12(b)(1) of the Hawaii Rules of Civil Procedure (HRCP), review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." HRCP Rule 12(h)(3). A judgment rendered by a court without subject matter jurisdiction is void. Ocean Resort Villas Vacation Owners Ass'n v. Cnty of Maui, 147 Hawaii 544, 552 (2020).

With respect to motions for summary judgment, pursuant to Rule 56(c), HRCP, summary judgment should be entered "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." "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Critchfield v. Grand Wailea Co., 93 Hawaii 477, 482-3, 6 P.3d 349, 354-5 (2000)(citations omitted). An adverse party may not rest upon the mere allegations or denials of the adverse party's pleading. HRCP Rule 56(e). Rather, the adverse party's response, by affidavits or as otherwise provided by HRCP Rule 56, must set forth specific facts showing that there is a genuine issue for trial. Id. If the adverse party does not so respond, summary judgment, if appropriate shall be entered against the adverse party.

IV. ARGUMENT

A. **PLAINTIFF'S EXHIBITS TO ITS MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ARE INADMISSIBLE. AS SUCH, NO FACTS SUPPORT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**.

Rule 56 of the Hawaii Rules of Civil Procedure ("HRCP") requires that the exhibits attached to a motion for summary judgment be supported by an appropriate affidavit or certification. Rule 56(e), HRCP, states in part, that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

To be admissible in evidence, each exhibit must be authenticated by a competent witness. G.E. Capital Hawaii, Inc. v. Yonenaka, 96 Hawaii 32, 40, 25 P.3d 807, 815 (App.2001). "[A]n affidavit consisting of inadmissible hearsay cannot serve as a basis for awarding or denying summary judgment." Id. at 42, 25 P.3d at 817. Generally, an attorney's declaration alone cannot establish a foundation for the admissibility of an exhibit. See Nakato v.Macharg, 89 Hawaii 79, 88, 969 P. 2d 824, 833 (Ap. 1998). Instead, "[t]o be admissible, documents must be authenticated by and attached to an affidavit that meets the requirement of [Rule 56(e), HRCP] and the affiant must be a person through whom the exhibits could be admitted into evidence." Id. (citations omitted.). Here, the exhibits in support of Plaintiff's MSJ are not properly supported by an appropriate affidavit/declaration. As such, the Department moves to strike the Plaintiff's Counsel's declaration and exhibits as follows:

1. Exhibit 2 (Uniform Information Practices Act Letter) Is Inadmissible.

Exhibit 2 purports to be a copy of the Uniform Information Practices Act ("UIPA") letter the Plaintiff's Counsel submitted to the Department of Taxation. Plaintiff has failed to lay the proper foundation to admit this exhibit into evidence. As noted above, Plaintiff's counsel cannot authenticate a document based on his own declaration and has failed to state with specificity and in great detail why he is competent to authenticate the exhibits. As such, Plaintiff's factual statement alleging it requested Administrative Directives pursuant to a UIPA request must be stricken. See Plaintiff's MSJ, Mem. in Supp. at 1.

2. Exhibits 4, 5, and 6 (Deposition Transcript Pages) Are Inadmissible.

Exhibits 4-6 purport to be pages of a deposition of the Special Assistant to the Director of Taxation. As foundational support for these exhibits, Plaintiff simply states that the exhibits are "true and correct" copies of the transcripts. This declaration by Plaintiff's counsel is insufficient to meet its burden to properly authenticate and provide a foundation for the admissibility of the deposition transcripts. Moreover, the Department objects to the exhibits as inadmissible hearsay. Without the evidentiary foundation to support the authentication of the transcript, Exhibits 4-6 are inadmissible and the facts therein, including Plaintiff's assertion that the Administrative Directive is a policy, cannot be used as factual support for Plaintiff's Motion. See Plaintiff's MSJ, Mem. in Supp. at 1-2.

3. Exhibit 7 (Assessment Notices in 1CTX-20-0000106) Is Inadmissible

Plaintiff's counsel's Declaration ("Declaration") regarding Exhibit 7 provides as follows:

> Exhibit 7 is an excerpt from an assessment notice filed as an exhibit to an existing Hawaii Tax Appeal Court case, No. 1CTX-20-0000106.[1] In my experience, the wording of the negligence penalty assessment in this notice is typical of notices of assessments of the negligence penalty.

Decl. of Thomas Yamachika at 2, ¶ 6. Declarant has not provided additional information with respect to why this exhibit should be admitted. The declaration is devoid of the appropriate evidentiary foundation demonstrating the document is what it purports to be, that it is authentic and relevant to be admitted into evidence, or how the document was created or kept. Simply stating that the document was filed in an existing case before the Tax Appeal Court does not overcome the evidentiary requirements necessary for the consideration of this document in support of Plaintiff's MSJ. Moreover, Declarant's self-serving statement regarding his prior experiences with assessments or the wording of Exhibit 7 is inadmissible hearsay. And "unless counsel wishes to relinquish his or her role as advocate and become a witness in the case, an affidavit of counsel swearing to the truth and accuracy of exhibits does not authenticate exhibits not sworn to or uncertified by the preparer or custodian of those exhibits." Pioneer Mill Co., Ltd. v. Dow, 90 Hawaii 289, 978 P.2d 727 (1999). Declarant has failed to state with specificity and in great detail why he is competent to authenticate the exhibit and therefore, it must be stricken.

For these failings, the Department objects to the Declaration and this Court's consideration of the exhibits above as well as any attendant facts purportedly supported by said exhibits.

B. THIS COURT LACKS SUBJECT MATTER JURISIDICTION TO ISSUE A DECLARATORY JUDGMENT IN THIS CASE.

Plaintiff, in its Complaint, seeks a declaration that Administrative Directive 2021-01 is invalid. However, HRS § 632-1 prohibits such a declaration. Section 632-1, HRS, grants Courts, in cases of actual controversy, the authority to declare the rights of parties. However, HRS § 632-1 expressly prohibits declaratory relief in "any controversy with respect to taxes":

[1] Without admitting this Court may review the declaration and documents referenced in an active case pending before the Tax Appeal Court in Neely v. Department of Taxation, Case No. 1CTX-20-0000106, the Department notes that Plaintiff's Counsel states that the case was filed in the Tax Appeal Court. This supports the Department's position that challenges to assessments fall within the jurisidiction of the Tax Appeal Court.

> (a) In cases of actual controversy,[2] courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for; *provided that declaratory relief may not be obtained . . .in any controversy with respect to taxes* . . ..(Emphasis added).

To determine if a matter is a "controversy with respect to taxes," the relevant inquiry for this Court is whether granting said relief would interfere with the government's ability to assess or collect taxes. See Tax Foundation of Hawaii v. State, 144 Hawaii 175, 187, 439 P.3d 127, 139 (2019).("Declaratory relief may be obtained in tax matters under HRS § 632-1 where such relief does not interfere with the assessment or collection of taxes"); Ocean Resort Villas Vacation Owners Ass'n v. Cnty of Maui, 147 Hawaii 544, 556, 465 P.3d 991, 1003 (2020)("if declaratory relief interferes with the assessment or collection of taxes, it was a 'controversy with respect to taxes for which declaratory relief under HRS § 632-1 is not allowed'"). Indeed, this prohibition against declaratory relief in tax matters exists in HRS § 632-1 like in the federal Declaratory Judgment Act,[3] "to permit the government to assess and collect taxes alleged to be due it without judicial interference." Tax Foundation 144 Hawaii at 187, 465 P.3d at 139 (citations omitted).

1. Plaintiff Fails to Make A Threshold Showing that It is Entitled to Declaratory Relief.

In its Mem. in Supp. of its Motion, Plaintiff fails to demonstrate that it is entitled to relief pursuant to HRS § 632-1. Plaintiff offers no discussion of the standards for obtaining declaratory relief or how it overcomes the express prohibition in HRS § 632-1 against declaratory relief in any controversy involving taxes. Instead, Plaintiff fails to address the controversy related to tax prohibition in HRS § 632-1 altogether and simply frames its allegations as violations of the rulemaking procedures set forth in the Administrative Procedures Act.

The allegations in the Plaintiff's complaint and the relief requested confirm that its purpose is to restrain the assessment and collection of taxes against taxpayers. Indeed, Plaintiff does not deny that its Complaint is intended to restrain the Department's ability to assess and

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[2] Plaintiff has failed to allege any set of facts or allegations in its Complaint demonstrating an actual controversy exists between the Plaintiff and the Department. This Court need not examine the issue of whether an "actual controversy" exists because dismissal is appropriate pursuant to HRS § 632-1 as it is a case involving a controversy related to taxes.

[3] 28 U.S.C. § 2201.

collect taxes. Instead, the actions complained about are actions taken by the Department to calculate penalties in aid of its assessment and collection of taxes. As Plaintiff fails to address how this Court can grant declaratory relief in a controversy related to taxes in violation of HRS § 632-1 [4] this matter must be dismissed. Should this Court determine that the Plaintiff can proceed despite this fatal defect in its motion, the Department will address the remaining arguments in Plaintiff's MSJ.

2. Declaratory Judgment Would Interfere with the Assessment and Collection of Taxes

The Department is authorized to assess additional taxes for a taxpayer's noncompliance with the tax code set forth in HRS Chapter 14. These assessments can include additional taxes in the form of penalties, such as the taxes at issue in the instant action. Section 231-39, HRS, titled "additions to taxes for noncompliance or evasion; interest on underpayments and overpayments" applies to "every tax or revenue law of the State that provides for the filing with the director of taxation a return or statement of the tax or the amount taxable." HRS § 231-39(a). These additions in the form of penalties "shall be added to and become a part of the tax imposed by such tax or revenue law, and collected as such." HRS § 231-39(b). And for the failure to pay tax, HRS § 231-39(b)(2)(A) provides as follows:

> If any part of any underpayment is due to negligence or intentional disregard of rules (but without intent to defraud), there shall be added to the tax an amount up to twenty-five per cent of the underpayment *as determined by the director*. (Emphasis added).

This additional amount is "added to and *become(s) part of the tax imposed* by such tax or revenue law, and collected as such" (emphasis added). HRS § 231-39(b). This means any amount up to twenty-five percent of the underpayment of taxes is part of the tax and applied to the Taxpayer in the form of an assessment. Therefore, any "penalty" imposed for the underpayment of taxes pursuant to HRS § 231-39(b)(2)(A) is an assessed tax against the taxpayer subject to collection by the Department.

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[4] Plaintiff states, without support, that "[i]n a suit for a declaratory judgment such as this one, the plaintiff must either meet the requirements of the Declaratory Judgment Act, HRS § 632-1, or be an 'interested person' within the meaning of the Hawaii Administrative Procedure Act. HRS § 91-7(a)." Plaintiff's MSJ, Mem. in Supp. at 9. As Plaintiff provides no legal support for the assertion that the Plaintiff is not required to meet the requirements of HRS § 632-1 and can proceed simply based on HRS § 91-7, this Court should reject this argument

Plaintiff here, asks the Court to impermissibly prevent the assessment and collection of taxes by the Department. The very intent of Plaintiff's Complaint is to obtain a declaration from this Court that the Department's assessment of additional taxes because of taxpayer's underpayment is invalid. Such declaratory action would not only affect the assessment of taxes but would ultimately obstruct the Department's collection of state taxes. In short, the *controversy* then, growing out of the allegations of the Plaintiff's Complaint could only relate to taxes and a taxpayer's liability for these taxes. And because the ultimate effect of granting the relief Plaintiff seeks here is to restrain the Director's discretion to assess an additional amount for the underpayment of taxes pursuant to HRS § 231-39(b)(2)(A) -- which the legislature has determined to be a tax -- this action is prohibited as a controversy related to taxes. Thus, because Plaintiff's Complaint for declaratory relief seeks to restrain the assessment and collection of taxes, it is related to a controversy with respect to taxes and expressly barred by HRS § 632-1(a). As such, this Court lacks subject matter jurisdiction to hear this case and it must be dismissed.

C. DECLARATORY RELIEF IS UNAVAILABLE BECAUSE THE TAX STATUTE PROVIDES A SPECIFIC FORM OF REMEDY THAT IS REQUIRED TO BE FOLLOWED.

Declaratory relief is prohibited by HRS § 632-1(b) because the tax statutes provide a specific form of remedy in tax cases that shall be followed.

> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. *Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed*; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present. (Emphasis added).

HRS § 632-1(b). For state tax issues, the specific form of remedy for challenges to assessments of taxes are found in the tax code. Disputes regarding the assessment amount as claimed by the Department and the amount claimed by the taxpayer are judicially resolved by the Tax Appeal

Court through the procedures set forth in HRS Chapter 232 and not the Circuit Court. Taxpayers seeking to contest assessments may do one of the following: (1) appeal the assessment to the taxation board of review; (2) appeal the assessment to the Tax Appeal Court directly; or (3) pay the disputed assessment under protest and file an action in Tax Appeal Court pursuant to HRS § 40-35. Appeals to the taxation board of review shall "identif[y] the assessment involved in the appeal and stat[e] the grounds of objection to the assessment." See HRS § 232-15(b). The taxpayer may then appeal the decision of the board of review to the Tax Appeal Court. See HRS § 232-17. Alternatively, a taxpayer may "appeal directly to the tax appeal court without appealing to the state taxation board of review or any equivalent administrative body established by county ordinance," provided the appeal raises all questions of fact and law necessary to the determination of the objections raised in the notice of appeal." See HRS §§ 232-16(a) and (e). Finally, a taxpayer may pay under protest "any disputed portion of moneys representing a claim in favor of the State may be paid under protest…" See HRS § 40-35(a). "Any action to recover payment of taxes under protest shall be commenced in the tax appeal court." See HRS § 40-35(b).

The Tax Appeal Court "shall determine all questions of fact and all questions of law, including constitutional questions involved in the appeal," including "*the amount of valuation or taxes*, as the case may be, in dispute as shown on the one hand by the amount claimed by the taxpayer or county and on the other hand by the amount of the assessment . . ." (Emphasis Added). HRS § 232-13. A challenge to the amount of taxes assessed against a taxpayer for underpayment of tax, including the increase of the taxes owed because of the application of HRS § 231-39(b)(2)(A), is therefore a challenge to the amount of taxes owed. Challenges to a tax or the amount of the assessment increased by the Department is statutorily committed exclusively the jurisdiction of the Tax Appeal Court.[5] See HRS § 232-13.

[5] Plaintiff's concern that a taxpayer would not otherwise be able to identify the basis of the penalty without this Court's intervention is baseless. See Plaintiff's MSJ, Mem. in Supp. at 6. As an initial matter, the factual basis for this assertion, Exhibit 7 to Plaintiff's MSJ, is inadmissible. As such, the Court cannot consider any of the facts purportedly contained in the document or inferences thereto. Moreover, Plaintiff has not demonstrated that taxpayers are unable to receive information from the Department regarding the basis of any assessment. Similarly, there is no showing that taxpayers are precluded from examining audit records, receiving explanations for assessments, receiving clarification or objecting to the assessments, or requesting a meeting with the Department to discuss the assessments. And if a taxpayer disagrees with the Department's position on the basis for the assessment, the taxpayer can exercise its statutory remedy to appeal the assessment of the additional tax to the Board of

In support of this position, this Court need only look to the statutory provisions related to the appeals of state tax assessments:

- Appeals of assessments of income taxes are provided for in HRS § 235-114.

> (a) Any person aggrieved by *any assessment of the tax* or liability imposed by this chapter may appeal from the assessment in the manner and within the time hereinafter set forth. *Appeal may be made either to the taxation board of review or to the tax appeal court* . . . (Emphases added).

- Appeals of assessments of general excise taxes are provided for in HRS § 237-42.

> Any person aggrieved by *any assessment of the tax* for any month or any year may appeal from the assessment in the manner and within the time and in all other respects as provided in the case of income tax appeals by section 234-114. (Emphasis added).

- Appeals of assessments of transient accommodations taxes are provided for in HRS § 237D-11.

> Any person aggrieved by *any assessment of the tax* for any month or any year may appeal from the assessments in the manner and within the time and in all other respects as provided in the case of income tax appeals by section 235-114. (Emphasis added).

- Appeals of assessments of use taxes are provided for in HRS § 238-8. [6]

> If any person having made the return and paid the tax as provided by this chapter feels *aggrieved by the assessment* so made upon the person by the director of taxation, the person may, appeal the assessment in the manner and within the time and in all other respects as provided in section 235-114 . . . (Emphasis added).

Review of Tax Appeal Court. Any lingering confusion regarding the basis of the penalty in the assessment can then be fleshed out during discovery and appropriately adjudicated by the either the Board of Review or Tax Appeal Court. Moreover, decisions from the Tax Appeal Court can then be appealed to the Intermediate Court of Appeals. See § 232-19, HRS. As such, contrary to Plaintiff's assertion, taxpayers have ample avenues to discover the basis of any penalties and challenge, as appropriate the imposition of any penalties imposed pursuant to HRS § 231-39(b)(2)(A) to the Board of Review or Tax Appeal Court.

[6] The statutory authority for appeals of assessments to the Taxation Board of Review or Tax Appeal Court also include appeal of assessments of the following: Fuel Tax (HRS § 243-14.5); Liquor Tax (HRS § 244D-12); Cigarette Tax and Tobacco Tax (HRS § 245-10); and Conveyance Tax (HRS § 247-4.5).

As the tax statutes plainly state, the Tax Appeal Court determines whether the valuation of tax as set forth in the assessment was proper based on the facts of the specific case. Deciding in this action that the Tax Appeal Court cannot consider as part of its determination of the propriety of the assessment impermissibly inserts this court into the jurisdiction of the Tax Appeal Court. Therefore, as a specific form of remedy exists by statute to contest the additional assessment of taxes, declaratory judgment by this Court is prohibited by HRS § 632-1(b).

D. THIS COURT IS PROHIBITED FROM ISSUING A DECLARTORY JUDGMENT PURSUANT TO § 91-7, HRS.

Plaintiff's Complaint relies on HRS § 91-7, to assert this Court may issue a declaratory judgment on the validity of agency rules. Section 91-7(a), HRS, provides that:

> Any interested person may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) by bringing an action against the agency in the circuit court or, if applicable, the environmental court, of the county in which the petitioner resides or has its principal place of business. The action may be maintained whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

However, Plaintiff fails to provide authority that HRS § 91-7, overcomes the statutory prohibition against declaratory judgements related to tax controversies expressly set forth in HRS § 632-1.[7] "When faced with "a plainly irreconcilable' conflict between a general and a specific statute concerning the same subject matter,' this court invariably favors the specific." Kinkaid v. Board of Review of City and County of Honolulu, 106 Hawaii 318, 323,104 P. 3d 905, 910 (2004). It is unmistakable that the plain language of HRS § 632-1 prohibits declaratory judgment in controversies involving taxes. In contrast, HRS § 91-7 provides no authority to contradict this prohibition. It follows that based on the specific language of HRS § 632-1 prohibiting declaratory judgments in tax cases, that this Court is similarly prohibited from issuing a declaratory judgment in tax cases based on HRS § 91-7.

[7] As noted in footnote 4 above, Plaintiff fails to provide legal support for its assertion that is not required to overcome the prohibitions against declaratory relief in tax cases as set forth in HRS § 632-1 and can proceed simply based on HRS § 91-7.

E. THE ADMINISTRATIVE DIRECTIVE IS NOT A RULE AND THE DEPARTMENT IS NOT REQUIRED TO COMPLY WITH THE RULEMAKING SECTIONS OF CHAPTER 91, HRS.

Assuming arguendo, that this Court believes it can proceed despite the showing above, Plaintiff has not made the requisite showing that it is entitled to relief pursuant to Chapter 91, HRS. Pursuant to HRS § 91-7(b), "[t]he court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures." Plaintiff argues that the Administrative Directive exceeds the statutory authority of the agency because it should have been promulgated as a rule. As Plaintiff fails to provide support for its position, its argument fails.

1. The Department's Assessment of Taxes Pursuant to HRS § 231-39(b)(2)(A) is Within Its Statutory Authority.

The Legislature has expressly given the Director of Taxation broad authority with respect to the revenue laws of the State. See HRS § 231-3. To carry out its statutory responsibilities, the Department is authorized to "[m]ake any assessment [required to be made] by law" and "to be responsible for the collection of all taxes imposed under title 14," except for those designated to the counties. HRS §§ 231-3(1) and (2). In furtherance of this duty, the Department has the power to "examine the books and papers of account of any person for the purpose of enabling the department to obtain all information that could in any manner aid the department in discharging its duties under any tax law." HRS § 231-3(6).[8]

For failures to comply with the tax laws of the state, HRS § 231-3(4) requires that the Department "see that penalties are enforced when prescribed by any tax or revenue law of the State (the administration of which is with the scope of the department's duties) for disobedience or evading of its provisions." The penalty section at issue here, HRS § 231-39(b)(2)(A) provides as follows:

> If any part of any underpayment is due to negligence or intentional disregard of rules (but without intent to defraud), there shall be added to the tax an amount up to twenty-five per cent of the underpayment *as determined by the director*.

[8] Indeed, for certain taxes set forth in HRS Chapters 237, 237D, 238, 243, 244D, 245, and 251, the Department may treat the noncompliance with certain record-keeping rules "as evidence of negligence or intent to evade the payment of taxes." See § 18-231-3-14.25, Hawaii Administrative Rules.

(Emphasis added).

And, while the Department has the authority "[t]o adopt such rules as the department *may* deem proper effectually to carry out the purposes for which the department is constituted and to regulate matters of procedure by or before the department," the requirement to adopt rules is discretionary. (Emphasis added). See HRS § 231-3(9).

The Legislature could have mandated that the Department promulgate rules when imposing underpayment penalties as additional taxes pursuant to HRS § 231-39(b)(2)(A) but chose not to. In contrast, the Legislature mandated the Department to promulgate rules relating to the imposition of penalties in HRS § 231-10.6. Section 231-10.6, HRS, expressly requires rules, including temporary rules, be implemented explaining the penalties and fines for the following: "(1) the understatement of taxes; (2) promotion of abusive tax shelters, erroneous claims for refund or credit; (3) or substantial understatement or misstatements of tax." Notably, there is no similar statutory requirement to promulgate a rule or a temporary rule explaining the penalties for the underpayment of taxes in HRS § 231-39(b)(2)(A). Instead, the Legislature left the determination of the imposition of a tax penalty for the failure to pay a tax to the discretion of the Director. See HRS § 231-39(b)(2)(A).

2. The Administrative Directive Is Within the Statutory Authority of the Department.

Plaintiff's argument that the "failure to respond" condition in the Administrative Directive goes far beyond the statute, because the penalty can be imposed for unrelated conduct is fundamentally flawed. Putting aside the argument that Plaintiff completely disregards the application to HRS 231-39(b)(2)(A) to taxpayers who fail to file returns, its assertion that "nothing that happens during the audit can be related to whether or not there is a statutory basis for the negligence penalty" is simply incorrect. See Plaintiff's MSJ, Mem. in. Supp. at 5. Under Plaintiff's reading of the statute, taxpayers could avoid the negligence penalty by simply not responding to the Department's requests for information. The Department would be precluded from considering *any* factors after a return is filed; including the Department's discovery of facts during the audit, that occurred after taxpayer's returns were filed, which demonstrate that taxpayer was indeed negligent in not making a timely payment. Furthermore, Plaintiff is trying to put restrictions on the Director's right to impose the penalty where there are none. There is nothing in the statute that states the Director may not consider how cooperative a taxpayer is during audit in determining the amount of the penalty pursuant to HRS 231-39(b)(2)(A). In

addition, the "failure to respond" condition is not absolute as Taxpayer suggests. Administrative Directive 2021-01 expressly provides that:

> If taxpayer later responds and can show that the non-filed return was not due to negligence or intentional disregard of rules, the penalty may be removed.

See Plaintiff's MSJ, Ex. 1 at 1.

It is clear that Plaintiff conflates two separate occurrences: (1) the underpayment of taxes when the return is filed, and (2) the addition of taxes due to negligence or intentional disregard of rules. For the failure to pay tax HRS § 231-39(b)(2)(A), provides for an additional amount to be added to the taxes owed by the taxpayer:

> If any part of any underpayment is due to negligence or intentional disregard of rules (but without intent to defraud), there shall be added to the tax an amount up to twenty-five per cent of the underpayment as determined by the director.

The Administrative Directive provides guidance that negligence or disregard of rules or regulations could include a failure to respond to the auditor or examiner's request. As such, there are situations where the Department can, and *should*, consider factors that may affect the imposition of additional amounts which range from 0%-25% after the return is filed.

The case cited by the Plaintiff, Masterson v. Commissioner, T.C. Memo. 1981-681, 42 T.C.M. (CCH) 1758 does not support Plaintiff assertion, that the failure of a taxpayer to respond to the Department's inquiries cannot be used as a basis for the penalties imposed by HRS § 231-39(b)(2)(A). The Court in Masterson did not hold that additional taxes could not be imposed for negligence or disregard of rules. Indeed, it held "[w]e hasten to point out that the section 6653(a)[9] addition to tax is imposed by reason of some negligence or intentional act[s] causing a deficiency." Id. at 1761. Instead, the Court found the IRS' specific request for the penalty to be imposed for the "inordinate amount of time it spent on the Petitioner's case" improper. See id.

This is not the same situation currently before this Court. Plaintiff here makes no showing that the underpayment in HRS § 231-39(b)(2)(A) is imposed on taxpayers based on the amount of time the Department spent on a taxpayer's case. Nor has the Plaintiff provided facts that the Department imposes the underpayment in HRS § 231-39(b)(2)(A) for "dilatory tactics."[10]

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[9] Currently I.R.C. § 6662(b)(1), which provides for an underpayment penalty similar to that of HRS § 231-39(b)(2)(A).

[10] Indeed, the "dilatory tactics" alleged in the Masterson case were based on the taxpayer's beliefs regarding their constitutional and procedural rights. Id. n.10. And in Hawaii, "[a]n appeal to the

Finally, Plaintiff's concern that the taxpayer would have the burden of disproving the penalty is unwarranted. See Plaintiff's MSJ, Mem. in Supp at 6. Under HRS § 231-20, tax assessments, including record of delinquency in payment, are prima facie correct:

> In respect of every tax the administration of which is within the scope of the department of taxation's duties and except as otherwise specifically provided in the law imposing the tax, the notices of assessments, records of assessments, and lists or other records of payments and amounts unpaid, prepared by or under the authority of the department, or copies thereof, shall be prima facie proof of the assessment of the property or person assessed, the amount due and unpaid, and the delinquency in payment, and that all requirements of law in relation thereto have been complied with.

Similarly, HRS § 232-13 provides in part, that "the assessment as made by the assessor, or if increased by the board, or equivalent county administrative body, the assessment as so increased, shall be deemed prima facie correct." Because the assessments are presumed valid, *all* taxpayers, not just those subject to the penalty in HRS § 231-39(b)(2)(A), have the burden of "disproving" assessments in tax appeals. Toward that end, the taxpayer "shall have the right to introduce, or the tax appeal court, of its own motion, may require the taking of evidence in relation to the subject pending as in the court's discretion may be deemed proper." See HRS § 232-13. This same presumption that an assessment which includes a tax penalty, exists for challenges to the application of the penalty at the federal level well. See Masterson 42 T.C.M. (CCH) at 1761**Error! Bookmark not defined.** ("respondent's imposition of the addition to tax is presumptively correct, and petitioners bear the burden of proving the assessment wrong."(citations omitted).

3. Plaintiff Makes No Showing Rulemaking Procedures Are Required.

Plaintiff also asserts the Administrative Directive 2021-01 provisions should have been promulgated pursuant to the rulemaking procedures set forth in HRS Chapter 91. In support of this argument, Plaintiff cites to Ainoa v. Unemployment Compensation Appeals Division, 62 Haw. 286, 614 P. 2d 380 (1980). In Aiona, Unemployment Compensation Appeal referees used

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tax appeal court shall bring up for review all questions of fact and all question of law, including constitutional questions, necessary to the determination of the objections raised by the taxpayer or county in the notice of appeal." HRS § 232-16. This supports the Department's assertion that Tax Appeal Court is the proper forum for Plaintiff's Complaint. Notably, the fact that in Masterson, the U.S. Tax Appeal Court exercised jurisdiction over whether the IRS had an appropriate basis to impose a negligence penalty supports the Department's contention that this case belongs in Tax Appeal Court.

certain statements containing the Department of Labor's interpretation of the term "available for work" to decide unemployment insurance benefit claim appeals. In Ainoa, the Court had the necessary facts needed to make an informed decision regarding whether the statements provided to the referees were rules. "The pertinent facts and circumstances for disposition of the appeal [were] undisputed," including the following:

> These statements were prepared, printed and furnished to all referees by the Department. . . . [I]t is undeniable that during appellants' hearing, the referees had access to the statements, which were kept in their notebooks, and relied on them to make their decisions; the referees' decisions in fact recited verbatim the language of the statements. Appellants were never furnished copies of these statements before their hearings.

62 Haw at 288-289, 614 P.2d at 282-383. Here, Plaintiff offers this Court no pertinent facts upon which it can dispose of this matter. Unlike in Ainoa, Plaintiff does not provide any facts proving how the Administrative Directive was prepared or how it was used. The Stipulation of Facts ("Stipulation") in Plaintiff's MSJ, Exhibit 3 simply provides that the Administrative Directive 2021-01 was accessible to employees of the Department and that it is still current. Nothing in the Stipulation discusses how the Administrative Directive was prepared or that it was ever relied upon by any of the employees of the Department. Consequently, this Court has no information upon which it is able to make a complete and fully-informed decision regarding the Administrative Directive.

Most notably however, Plaintiff's reliance on Ainoa is misplaced as it is factually distinguishable from the instant case in one important respect. Ainoa involved a challenge to the denial of unemployment benefits by the Department of Labor and Industrial Relations and not a challenge to the Department's assessment of taxes. See id., at 287, 614 P.2d 382. Therefore, the Ainoa Court could directly address an agency's compliance with statutory rulemaking procedures without consideration of the propriety of declaratory relief in tax cases, as this Court must.

F. TAX FOUNDATION IS NOT AN "INTERESTED PERSON" UNDER HRS § 91-7.

"Any interested person may obtain judicial declaration as to the validity of an agency rule . . . by bringing an action against the agency in the circuit court or, if applicable, the environmental court, of the county in which the petitioner resides or has its principal place of business". HRS § 91-7(a). To be an "interested person" under HRS § 91-7, a person must be "affected" by or "involved" with the validity of an agency rule. Asato v. Procurement Policy

Board, 132 Hawaii 333, 343, 322 P.3d 228, 238 (2014). Without, conceding that Administrative Directive 2021-01 is a rule, Plaintiff does not have standing as an "interested person" pursuant to HRS § 91-7(a).

In Asato, a taxpayer challenged a procurement regulation that waived the number of qualified applicants required for consideration for a government professional service contract where the minimum number of applicants was set by statute. Id. at 337, 322 P.3d at 232. There, Asato could show that he "qualifie[d] as an 'interested person' because, as a taxpayer challenging a specific public bidding procedure, he may be affected by the validity of a regulation that allegedly allowed an illegal expenditure of public funds." Conversely, here, Plaintiff here makes no similar showing it is an "interested person." See id, at 343, 322 P.3d at 238.

Indeed, Plaintiff fails to demonstrate how it "may be affected" by the Administrative Directive and instead, simply states that it is a "governmental financial accountability watchdog" as it was in the Tax Foundation case. See Plaintiff's MSJ, Mem. in Supp. at 10. However, Plaintiff's standing as a "governmental financial accountability watchdog" in the Tax Foundation case by itself does not confer standing on the Plaintiff as an interested person in this case. In Tax Foundation, the Court's finding of a correlation between Plaintiff's status as a government financial accountability watchdog and "the administration and allocation" of the county surcharge after collection is reasonable. See 144 Hawaii at 202-203, 439 P. 3d at 154-155. Here, Plaintiff cannot demonstrate how a "government financial accountability watchdog" is affected by the validity of a regulation that does not concern the expenditure of public funds, but instead relates to the Department's audit of an individual taxpayer in furtherance of its statutory authority to assess and collect taxes owed by the taxpayer. Therefore, Plaintiff here cannot assert standing as an "interested person" pursuant to HRS § 91-7(a).

V. CONCLUSION

Declaratory Judgment is not appropriate in this controversy with respect to taxes. Nor is the Plaintiff an "interested person" who may obtain a judicial declaration pursuant to Chapter 91, HRS. Based on the foregoing, the Department respectfully requests that this Court grant this Motion and enter an order dismissing the case for lack of subject matter jurisdiction, or in the alternative, an order granting summary judgment in favor of the Department and against Plaintiff. The Department also respectfully requests any other relief as the Court deems just and equitable.

DATED: Honolulu, Hawaii, November 27, 2024.

/s/ Janine R. Udui
NATHAN S. C. CHEE
JANINE R. UDUI
Deputy Attorneys General

Attorneys for Defendant
DEPARTMENT OF TAXATION,
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In re DEPARTMENT OF TAXATION, ADMINSTRATIVE DIRECTIVE NO. 2021-01. TAX FOUNDATION OF HAWAI'I, a Hawai'i nonprofit corporation, Plaintiff, vs. DEPARTMENT OF TAXATION, STATE OF HAWAI'I, Defendant.	CIVIL NO. 1CCV-24-0000661 NOTICE OF HEARING

NOTICE OF HEARING

To: THOMAS YAMACHIKA, ESQ.
ALOHA STATE TAX
835 Ikena Circle
Honolulu, HI 96821

Attorney for Plaintiff TAX FOUNDATION OF HAWAII

NOTICE IS HEREBY GIVEN that DEFENDANT DEPARTMENT OF TAXATION, STATE OF HAWAII'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT shall come on for hearing before the Honorable Karin L. Holma, Judge of the First Circuit Court, in her courtroom in the Kaahumanu Hale Building, 777 Punchbowl Street, Honolulu, Hawaii, on December 19, 2024 at 2:00 p.m., or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawaii, November 27, 2024.

/s/ Janine R. Udui
NATHAN S. C. CHEE
JANINE R. UDUI
Deputy Attorneys General

Attorneys for Defendant
DEPARTMENT OF TAXATION,
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In re DEPARTMENT OF TAXATION, ADMINSTRATIVE DIRECTIVE NO. 2021-01. TAX FOUNDATION OF HAWAI'I, a Hawai'i nonprofit corporation, Plaintiff, vs. DEPARTMENT OF TAXATION, STATE OF HAWAI'I, Defendant.	CIVIL NO. 1CCV-24-0000661 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that on November 27, 2024, a copy of the foregoing was duly served on the following party/parties via the Hawaii State Judiciary Electronic Filings and Service System (JEFS) as indicated on the corresponding Notice of Electronic Filing:

THOMAS YAMACHIKA, ESQ.
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Attorney for Plaintiff

DATED: Honolulu, Hawaii, November 27, 2024.

/s/ Janine R. Udui
NATHAN S. C. CHEE
JANINE R. UDUI
Deputy Attorneys General

Attorneys for Defendant
DEPARTMENT OF TAXATION,
STATE OF HAWAII