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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

In re DEPARTMENT OF TAXATION, ADMINISTRATIVE DIRECTIVE NO. 2021-01. TAX FOUNDATION OF HAWAIʻI, a Hawaiʻi nonprofit corporation, Plaintiff, vs. DEPARTMENT OF TAXATION, STATE OF HAWAIʻI, Defendant.	CASE NO. 1CCV-24-0000661 PLAINTIFF'S PRETRIAL STATEMENT and CERTIFICATE OF SERVICE (Other Civil Action) Hon. Karin L. Holma TRIAL: Feb. 3, 2025

PLAINTIFF'S PRETRIAL STATEMENT

Pursuant to Circuit Court Rule 12.1, Plaintiff TAX FOUNDATION OF HAWAIʻI (the Foundation) hereby submits its Pretrial Statement.

I. PARTY

Plaintiff is the TAX FOUNDATION OF HAWAII, a Hawaii nonprofit corporation.

II. SUBSTANCE OF ACTION

Department of Taxation ("Department") issued an Administrative Directive, identified as AD 2021-01, containing directions to its staff as to how to interpret the Negligence Penalty under HRS section 231-39. The Foundation contends that certain policy pronouncements and taxpayer-facing interpretations in the Directive are rules as defined in the Hawaii Administrative Procedure Act and must be invalidated because of (1) failure to follow proper rulemaking procedures and/or (2) the pronouncements are inconsistent with the statute they purport to interpret. In other words, the Foundation seeks a judgment from this Court that some or all of the Administrative Directive contains improper instructions to the Department's staff.

III. ADMITTED FACTS

The parties have filed a Stipulation of Facts (Dkt. #64) and have agreed:

1. The document filed as Exhibit 1 (Dkt.#65) to the Stipulation of Facts is a true and correct copy of Department's AD 2021-01.

2. AD 2021-01 was placed on the Department's internal shared drive and accessible to employees of the Department.

3. AD 2021-01 was not uploaded onto the Department's internet website or otherwise made readily accessible to the public.

4. AD 2021-01 has not been superseded or obsoleted, and currently remains in effect.

IV. DISPUTED FACTS

The Foundation's position is that there are no material facts in dispute.

V. RELIEF PRAYED FOR.

The Foundation is asking this Court to rule that the interpretation of the Negligence Penalty on page 1 of AD 2021-01:

1. Is rulemaking and therefore void for failure to follow proper rulemaking procedure under HRS Chapter 91.

2. Specifically with respect to the Failure to Respond Condition, that such condition is an incorrect interpretation of the Negligence Penalty and is invalid on that basis.

VI. POINTS OF LAW.

Declaratory Judgment: The Foundation is a proper party plaintiff in light of its "historical purpose as a governmental financial accountability watchdog." *Tax Foundation of Hawai'i v. State*, 144 Hawai'i 175, 202-03, 439 P.3d 127, 154-55 (2019).

The Failure to Respond Condition has nothing to do with and cannot legally trigger the Negligence Penalty. HRS § 231-39(b)(2)(A); *Masterson v. Commissioner,* T.C. Memo. 1981-681.

Hawaii Administrative Procedure Act: The Foundation is a proper party plaintiff because it is an interested person under HRS § 91-7(a). *Asato v.*

Procurement Policy Board, 132 Haw. 333, 322 P.3d 228 (2014); *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 174, 623 P.2d 431, 439 (1981).

A nonpublic "cheat sheet" containing direction to staff, which AD 2021-01 is, is a rule within the meaning of HRS § 91-1. *Ainoa v. Unemployment Compensation Appeals Division*, 62 Haw. 286, 614 P.2d 380 (1980). As such, it is invalid for failure to follow necessary rulemaking procedure. *Id.; Hawai'i Prince Hotel Waikiki Corp.,* 89 Haw. 381, 393, 974 P.2d 21 (1999); HRS § 91-7(b).

VII. WITNESSES TO BE CALLED.

1. Custodian of Records, Tax Foundation of Hawaii.

2. Mr. Gary Yamashiroya, Department of Taxation.

VIII. EXHIBITS, SCHEDULES, AND SUMMARIES.

Please see the exhibits to Plaintiff's Motion for Summary Judgment (Dkt. #67).

IX. FURTHER DISCOVERY OR MOTIONS.

No further discovery is anticipated.

Plaintiff's Motion for Summary Judgment filed on October 28, 2024 (Dkt. #67) and the Department's Motion to Dismiss Complaint for Declaratory Judgment, or in the Alternative, Cross-Motion for Summary Judgment filed on November 27, 2024 (Dkt. #81) are scheduled to be heard together on December 19, 2024 at 2:00 p.m.

X. STIPULATIONS AND REQUESTS FOR JUDICIAL NOTICE.

A Stipulation of Facts signed by the parties was filed on October 23, 2024 (Dkt. #64).

XI. AMENDMENTS, DISMISSALS.

No further amendments to pleading are expected.

The Department has moved for dismissal. See motion described in section IX above.

XII. ALTERNATIVE DISPUTE RESOLUTION.

None.

XIII. ESTIMATE OF TRIAL TIME.

One day.

XIV. MISCELLANEOUS.

The Foundation does not believe that there are additional matters that need to be brought before the Court at this time.

DATED: Honolulu, Hawai‘i, December 9, 2024.

/s/ Thomas Yamachika
THOMAS YAMACHIKA
Attorney for Plaintiff
TAX FOUNDATION OF HAWAI‘I

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing document will be served on counsel of record as indicated below upon the filing hereof:

Counsel for Defendant:

ANNE E. LOPEZ, ESQ. Via JEFS
NATHAN S.C. CHEE, ESQ.
JANINE R. UDUI, ESQ.

DATED: Honolulu, Hawaii, December 9, 2024.

/s/ Thomas Yamachika
THOMAS YAMACHIKA
Attorney for Plaintiff
TAX FOUNDATION OF HAWAIʻI