THOMAS YAMACHIKA 3504

TAX FOUNDATION OF HAWAIʻI
126 Queen Street, Suite 304
Honolulu, Hawaiʻi 96813
Telephone: (808) 536-4587
Facsimile: (808) 536-4588
E-mail: tom@tfhawaii.org

Attorney for Plaintiff

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; DECLARATION OF THOMAS YAMACHIKA; EXHIBITS 1-2 and CERTIFICATE OF SERVICE

HEARING DATE AND TIME:
December 19, 2024, 2:00 p.m.

HONORABLE KARIN L. HOLMA

TRIAL: Feb. 3, 2025

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Tax Foundation of Hawai'i (the "Foundation") hereby replies to the opposition of Defendant Department of Taxation ("Department") (Dkt. #79).

I. DISCUSSION

This case is about transparency and accountability.

Ainoa v. Unemployment Compensation Appeals Division, 62 Haw. 286, 614 P.2d 380 (1980), involved statements that the department "prepared, printed and furnished to all referees" and which the referees used to adjudicate cases. The department called them "descriptive words and phrases" that merely recited judicial constructions of key terms in the statutes. The supreme court, after observing that the department's characterization of the statements was erroneous, held that the statements met the Hawaii Administrative Procedure Act (HAPA) definition of rules, were adopted by the department without following HAPA procedures, and were therefore invalid. To follow the department's argument, the court stated, "would be to condone the Department's circumvention of HAPA and to defeat the intent and purposes of HAPA." *Id.* at 295, 614 P.2d at 386 (footnote omitted).

This case presents the same fact pattern. AD 2021-01 is a directive from Department management. It was to be used by its auditors and other staff in determining cases. But, although it contains standards by which the taxpaying public are to be judged, it was not published for general circulation to the public. It is "secret law." As our Office of Information Practices wrote in an opinion involving the Department, "an agency may not maintain 'secret law'

relating to its own decisions and policies." Office of Information Practices, Op. No. 92-10, at 11 n.4 (quoting National Conference of Commissioners on Uniform State Laws, Uniform Information Practices Code § 2-101 commentary at 10 (1988)) (see Exhibit 2).

The Department maintains that the Foundation and this Court cannot hold it accountable for its secret law. It argues that HRS § 632-1 says that no court can do anything about it because declaratory judgments are forbidden "in any controversy with respect to taxes," and that this prohibition also extends to HAPA because the specific declaratory judgment statute trumps the more general HRS § 91-7 within HAPA. Not even the Internal Revenue Service enjoys such immunity. *Cohen v. United States,* 650 F.3d 717 (D.C. Cir. 2011) (en banc), decided that a refund procedure adopted by the Service *was* reviewable under the federal Administrative Procedure Act, and that the reviewing courts could indeed declare the validity or invalidity of that procedure. "The IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA." *Id.* at 723. The Hawaii Supreme Court stated that it was persuaded by the *Cohen* court's interpretation of the federal Declaratory Judgment Act in *Tax Foundation of Hawaii v. State,* 144 Haw. 175, 188, 439 P.3d 127, 140 (2019). A declaration as to the validity of Department procedures, therefore, does not interfere with the assessment or collection of taxes.

As to substance, the Department apparently is arguing that because the Negligence Penalty in HRS § 231-39(b)(2)(A) is "determined by the director" then the director can base the penalty on whatever he or she wishes. That, of

course, ignores the requirement in the statute that the penalty be imposed only when an underpayment is due to negligence or intentional disregard of rules. There must be a causal link between the negligence and the underpayment, or the penalty does not apply. The underpayment, or lack thereof, is determined when the return is filed or is due. Giving a tax auditor documentation late when the audit is performed months or years later has no such causal link to any underpayment.

The Department also argues that the taxpayer's position taken on the return is irrelevant because HRS § 231-39(b)(2)(B) and (C) contain the words "tax required to be shown on a return" while paragraph (A) does not. The argument makes no sense. An understatement is the excess of (1) the amount of tax required to be shown on the return, *i.e.*, the tax legally due, over (2) the amount of tax shown on the return as filed (or zero, if no return is filed). *See, e.g.,* HRS § 231-36.6 (f) (defining "understatement"); HRS § 231-36.7(h) (incorporating HRS § 231-36.6(f) definition); IRC § 6662(d)(2)(A). The amount of tax required to be shown on a return is a necessary element of determining penalties for either negligence or fraud.

II. INCORPORATION BY REFERENCE OF FOUNDATION'S MEMORANDUM IN OPPOSITION TO DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

The Foundation hereby incorporates the argument and evidence in its Memorandum in Opposition To Defendant Department of Taxation, State of Hawaii's Motion to Dismiss Complaint for Declaratory Judgment, Or, in the Alternative, Cross-Motion for Summary Judgment (Dkt. #95).

The Foundation notes that an excerpt of the deposition of Mr. Yamashiroya, the Department's HRCP 30(b)(6) designee, refers to Exhibit 1 of the deposition. For the avoidance of doubt, a copy of said Exhibit 1 is attached hereto as Exhibit 1.

III. CONCLUSION

The Foundation has managed to expose a document from the Department embodying "secret law" that turns out to contain misinformation. To uphold the Legislature's intent behind the actual law, HAPA and the Declaratory Judgment Act allow for secret law to be reviewed and invalidated by the Judiciary. For these reasons the Foundation respectfully urges that its Motion for Summary Judgment be granted and that the Department's Motion to Dismiss or for Summary Judgment be denied.

DATED: Honolulu, Hawaii, December 16, 2024.

/s/ Thomas Yamachika
THOMAS YAMACHIKA
Attorney for Plaintiff
Tax Foundation of Hawai'i

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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 DECLARATION OF THOMAS YAMACHIKA

DECLARATION OF THOMAS YAMACHIKA

THOMAS YAMACHIKA states:

1. I am an attorney licensed to practice in Hawaii. I am the president of and represent the TAX FOUNDATION OF HAWAIʻI. I make this Declaration of my own knowledge.

2. On October 9, 2024, I, on behalf of Plaintiff, took the deposition of Mr. Gary Yamashiroya, who identified himself as Special Assistant to the Director of Taxation.

3. The following exhibits are true and correct copies of the indicated pages of the transcript of the deposition of Mr. Gary Yamashiroya:

Exhibit	Page(s) of Yamashiroya Depo.
1	Exhibit 1

4. The following exhibit is a true and correct copy of a public document downloaded from an official Hawaii Government website:

Exhibit	Downloaded From
2	https://oip.hawaii.gov/wp-content/uploads/1992/08/92-10.pdf

I declare, under penalty of perjury, that the foregoing is true and correct.

DATED: Honolulu, Hawaii, December 16, 2024.

/s/ Thomas Yamachika
THOMAS YAMACHIKA

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document will be served on the following counsel through JEFS on the date hereof.

ANNE E. LOPEZ, Attorney General
NATHAN S.C. CHEE and
JANINE R. UDUI, Deputy Attorneys General
425 Queen Street
Honolulu, Hawaii 96813

Attorneys for
DEPARTMENT OF TAXATION, STATE OF HAWAII

DATED: Honolulu, Hawaii, December 16, 2024.

/s/ Thomas Yamachika
THOMAS YAMACHIKA
Attorney for Plaintiff
Tax Foundation of Hawaiʻi

Exhibit 1

THOMAS YAMACHIKA 3504

TAX FOUNDATION OF HAWAIʻI
126 Queen Street, Suite 304
Honolulu, Hawaiʻi 96813
Telephone: (808) 536-4587
Facsimile: (808) 536-4588
E-mail: tom@tfhawaii.org

Attorney for Plaintiff

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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,

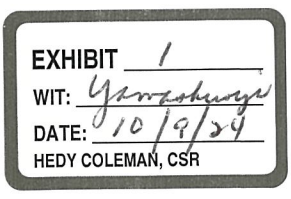
Defendant.

CASE NO. 1CCV-24-0000661
(Other Civil Action)

PLAINTIFF'S SECOND AMENDED NOTICE OF TAKING DEPOSITION UPON ORAL EXAMINATION OF DEFENDANT'S REPRESENTATIVE(S); SCHEDULE A and CERTIFICATE OF SERVICE

Judge: Hon. Karin L. Holma

TRIAL: Feb. 3, 2025



regarding the topics described in the attached "Schedule A." Defendant shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.

Also, pursuant to Rule 30 of the Hawaii Rules of Civil Procedure, the deponent(s) are hereby notified that they may request a review of the completed transcript or recording of the deposition. The deponent must make this request before the completion of the deposition. If such a request is made, after being notified by the court reporter or other officer taking the deposition that the transcript or recording is available, the deponent shall have 30 days to: (1) review the transcript or recording; and (2) if there are changes in form or substance, the deponent shall sign a statement reciting such changes and the reasons for making them.

DATED: Honolulu, Hawaii, September 25, 2024.

/s/ Thomas Yamachika
THOMAS YAMACHIKA
Attorney for Plaintiff

SCHEDULE "A"

LIST OF TOPICS FOR REPRESENTATIVE(S) OF DEPARTMENT OF TAXATION

1. Knowledge of the class of documents known as Administrative Directives, including the purpose(s) for which they are issued; the extent to which the documents are distributed; the process by which serial numbering was assigned to the documents; and where the originals thereof are stored.

2. Knowledge of whether there are other classes of documents that are nonpublic but contain policy pronouncements, including but not limited to Delegations of Authority, Compliance Division Memoranda; including the purpose(s) for which they are issued; the extent to which the documents are distributed; the process by which serial numbering was assigned to the documents; and where the originals thereof are stored.

3. Knowledge of the process by which Administrative Directives were retrieved, reviewed, and then produced to Plaintiff in response to a Uniform Information Practices Act request dated May 18, 2023.

4. Knowledge of whether the guidance on the first page of Administrative Directive 2021-01 ("AD 2021-01") was distributed to, used by, or otherwise implemented in taxpayer examinations or audits.

5. Knowledge of whether any Department staff to which AD 2021-01 was distributed either disagreed with the guidance provided or failed to implement that guidance.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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 (Other Civil Action) CERTIFICATE OF SERVICE Judge: Hon. Karin L. Holma TRIAL: Feb. 3, 2025

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.
Attorney General of Hawaii
NATHAN S.C. CHEE, ESQ.
JANINE R. UDUI, ESQ.

Via JEFS

DATED: Honolulu, Hawaii, September 25, 2024.

/s/ Thomas Yamachika
THOMAS YAMACHIKA
Attorney for Plaintiff

Exhibit 2

Op. Ltr. 92-10 Department of Taxation Written Determinations
The statutes at issue in this opinion letter were amended by Act 115, Session Laws of Hawaii 1994, which permits the Department of Taxation to disclose segregated copies of written opinions, and creates administrative and judicial appeals processes. This may materially affect the conclusion reached in similar future opinions.

August 1, 1992

Thomas Yamachika, Esquire
Cades, Schutte, Flemming & Wright
P.O. Box 939
Honolulu, Hawaii 96808

Dear Mr. Yamachika:

Re:Department of Taxation Opinion Letters or Written Determinations

This is in reply to your letter to the Office of Information Practices ("OIP"), requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), written determinations, or opinions issued to a taxpayer by the Department of Taxation ("Department") concerning the applicability of the State franchise tax to loans in which the borrower is located out of State, must be made available for public inspection and copying.

BRIEF ANSWER

Under the UIPA, agencies are not required to disclose "[g] overnment records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. □ 92F-13(4) (Supp. 1991). Section 235-116, Hawaii Revised Statutes, specifically prohibits the Department from disclosing tax "return information," and this prohibition has been incorporated into the State's franchise tax law, chapter 241, Hawaii Revised Statutes. See Haw. Rev. Stat. □ 241-6 (Supp. 1991).

Using the definition of the term "return information" set forth by section 6103(a) of the Internal Revenue Code for guidance, we conclude that the government records you requested from the Department constitute "return information." While Congress has adopted detailed and elaborate procedures that permit the public inspection of the Internal Revenue Services' ("IRS") written determinations, the State Legislature has not adopted procedures similar to those set forth by section 6110 of the Internal Revenue Code, which carves out an exemption from the prohibition of the disclosure of return information. However, because the OIP believes that there is a significant public interest in these government records, the OIP recommends that the Legislature seriously consider the adoption of provisions similar to those in section 6110 of the Internal Revenue Code that permit the inspection and copying of written determinations and letter rulings issued by the IRS.

Further, we also conclude that even assuming that the Department's written determinations contain information within the scope of section 92F-12(a) (1) and (2), Hawaii Revised Statutes, which requires the availability of certain information "[a] ny provision to the contrary notwithstanding," we do not believe that the Legislature intended this section of the UIPA to require agencies to disclose government records that are protected from disclosure by specific State statutes that prohibit the disclosure of government records, or information contained therein.

Based upon the UIPA's structure, and its legislative history, we believe that in the rare and unusual case that information falling within section 92F-12, Hawaii Revised Statutes, is protected from disclosure by specific State statutes, specific disclosure restrictions adopted by the Legislature prevail over the provisions of section 92F-12, Hawaii Revised Statutes.

Accordingly, we conclude that under the UIPA, the Department is not required to disclose written determinations, or opinions, issued to a taxpayer concerning the applicability of the State franchise tax to loans in which the borrower is located out of State.

FACTS

By letter dated February 19, 1992, citing to the UIPA, your law firm requested the Department to provide it with copies of "[a] ll private letter rulings or other written determinations

issued by the Department to taxpayers concerning the applicability of the franchise tax (Chapter 241, HRS, or any predecessor statute) to loans in which the borrower is located out of state or in which the security for such loans is used or located out of state."

In its letter, your firm indicated its willingness to accept copies of the written determinations after the Department segregated, or removed, the names and other identifying information about the persons to whom the determinations pertain. Additionally, your firm's UIPA request to the Department asserted that the information requested was public under sections 92F-12(a) (1) and (2), Hawaii Revised Statutes, and made references to case law under the federal Freedom of Information Act, 5 U.S.C. □552 (1988) ("FOIA"), supporting your position.

By letter dated February 25, 1992, the Department notified your firm that it was unable to comply with your request for private letter rulings or other written determinations under the UIPA. Specifically, in its letter, the Department stated that it does not issue private letter rulings. Additionally, the Department stated that because the UIPA and FOIA are not the same, interpretations of FOIA are not applicable to the UIPA. As additional support for its position, the Department's letter to your firm stated:

> . . . Moreover, the Department does not consider any documents it issues that may be similar to the IRS's private letter rulings to be "final opinions" under section 92F-12(a) (2), HRS, which may be more pertinent to opinions and determinations made by quasi-judicial agencies and boards.
>
> Additionally, in the Department's view, any information the Department provides in response to a request for advice from a taxpayer is based solely upon the facts and circumstances of the taxpayers particular situation. No response can be generalized because each replies to a unique set of facts. In those few cases of general application, the information is usually already available to the public and may be found in the Department's Tax Information Releases and Announcements.
>
> Finally, the Department's individual approach to requests for advice also makes it difficult if not

> impossible to provide the public with an edited copy of its responses that can serve as useful guides . . . .

Letter from Richard F. Kahle, Jr., Director of Taxation to Roger H. Epstein 1-2 (Feb. 25, 1992).

By letter dated February 2, 1992 to the OIP, your firm requested an advisory opinion concerning whether, under the UIPA, written determinations issued and maintained by the Department in response to requests for advice from members of the public, must be made available for public inspection and copying.

In a memorandum to the OIP dated June 1, 1992 Deputy Attorney General Kevin T. Wakayama asserted that opinions or written advice to taxpayers from the Department constitute "tax return information" specifically protected from disclosure under State law. As such, in the opinion of the Attorney General, under section 92F-13(4), Hawaii Revised Statutes, the Department is not required by the UIPA to make written opinions or advice to taxpayers available for public inspection and copying.

DISCUSSION

I. INTRODUCTION

Under the UIPA, all government records must be made available for public inspection and copying, unless access is closed or restricted by law. See Haw. Rev. Stat. §92F-11(a) (Supp. 1991). More specifically, the UIPA provides that "[e] xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying." Haw. Rev. Stat. §92F-11(b) (Supp. 1991).

II. GOVERNMENT RECORDS PROTECTED FROM DISCLOSURE BY LAW

Under section 92F-13(4), Hawaii Revised Statutes, an agency is not required by the UIPA to disclose "[g] overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." In OIP Opinion Letter No. 92-6 (June 22, 1992), we concluded that under this UIPA exception, the authority to withhold a government record must generally be found in the express wording of a State statute or federal law.

Several provisions of the State's tax laws expressly provide for the confidentiality of "tax returns" and tax "return information." See Haw. Rev. Stat. §235-116 (1985) (income tax)[1]; Haw. Rev. Stat. § 237-34 (Supp. 1991) (general excise tax); Haw Rev. Stat. § 237D-13 (Supp. 1991) (transient accommodations tax).

Because you have requested an advisory opinion concerning written determinations issued by the Department concerning the State's franchise tax law, chapter 241, Hawaii Revised Statutes, we must determine whether any provision in this chapter protects such written determinations from disclosure. Section 241-6, Hawaii Revised Statutes, provides:

> **§241-6 Chapter 235 applicable.** All of the provisions of chapter 235 not inconsistent with this chapter, and which may be appropriately applied to the taxes, persons, circumstances, and situations involved in this chapter, including without prejudice to the generality of the foregoing, sections 235-98, 235-99, and 235-101 to 235-118, shall be applicable to the taxes imposed by this chapter and to the assessment and collection thereof. . . .

Haw. Rev. Stat. § 241-6 (Supp. 1991) (emphases added).

We can find no provision of chapter 241, Hawaii Revised Statutes, that would be inconsistent with section 235-116, Hawaii Revised Statutes, which prohibits the disclosure of tax "returns" and "return information." Thus, in our opinion, these disclosure prohibitions are made applicable to chapter 241, Hawaii Revised Statutes, through section 241-6, Hawaii Revised Statutes.

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[1]Section 235-116, Hawaii Revised Statutes, provides, in pertinent part:

> **§235-116 Disclosure of returns unlawful; penalty.** All tax returns and return information required to be filed under this chapter shall be confidential, including any copy of any portion of a federal return which may be attached to a state tax return, or any information reflected in the copy of such federal return. . . .

Haw. Rev. Stat. § 235-116 (1985) (emphasis added).

Turning to a consideration of what constitutes a tax "return" or "return information" that is protected from disclosure under section 241-6, Hawaii Revised Statutes, the Attorney General concedes, and we agree that the Department's written determinations do not constitute "tax returns." In a previous advisory opinion, we noted that the term tax "return information" has not been specifically defined by the State Legislature. As a result, in OIP Opinion Letter No. 89-3
(Dec. 3. 1989), we examined the definition of the term "return information" set forth in section 6103(b) of the Internal Revenue Code for guidance.

Our resort to the definition of the term "return information" set forth by the Internal Revenue Code for guidance is appropriate because in 1978, the Legislature amended section 235-116, Hawaii Revised Statutes, to prohibit the disclosure of "return information." Before this amendment, State law merely prohibited the disclosure of "tax returns." Haw. Rev. Stat. □235-116 (1976) . The legislative history of this amendment reflects that the addition of the term "return information" to the disclosure prohibition of section 235-116, Hawaii Revised Statutes, was made to conform Hawaii law to the Internal Revenue Code, and "to eliminate any possibility of problems with [the] Internal Revenue Service on the confidentiality of federal tax return information required by or furnished to the State." H. Stand. Comm. Rep. No. 1110-78, 9th Leg., 1978 Reg. Sess., Haw. H. J. 1905 (1978); see also
S. Stand. Comm. Rep. No. 88-78, 9th Leg., 1978 Reg. Sess., Haw. S.J. 829 (1978) ([t] he purpose of this bill is to clarify the law on confidentiality of tax returns to meet federal requirements").

Because the Legislature appears to have intended to extend the same protection to return information as that provided by federal law, we decline to limit the applicability of section 235-116, Hawaii Revised Statutes, to only that return information that is "required to be filed" with the Department, despite the express wording of this statute to this effect. See Haw. Rev. Stat. □235-116 (1985).

Under section 6103(b) of the Internal Revenue Code, the term "return information" includes but is not limited to:

> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies,

> over assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and
>
> (B) any part of a written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110. . . .

I.R.C. □6103(b) (2) (A) (1986) (emphases added).

We note that under federal law the term "return information" does not include any portion of a written determination[2] issued by the Secretary of the Treasury that is open to public inspection under section 6110 of the Internal Revenue Code, entitled "Public Inspection of Written Determinations." However, we must also note that the State Legislature has not adopted the detailed and elaborate procedures (or any procedures) approaching those set forth in this Internal Revenue Code provision.

Among other things, section 6110(f) of the Internal Revenue Code requires the Secretary of the Treasury to adopt regulations establishing administrative remedies to request the additional disclosure of, or to request the IRS to restrain disclosure of, a written determination, and establishes an individual's right to petition the United States Tax Court (anonymously, if appropriate) for a ruling with respect to a written determination. A copy of these procedures are attached as Exhibit "A." But for the exemption created by Congress in this provision of the Internal Revenue Code, "written

[2]Under the Internal Revenue Code, the term "written determination" means a ruling, determination letter, or technical advice memorandum. I.R.C. □6110(b) (1).

determinations" would fall within the federal disclosure prohibition applicable to "return information."

Moreover, while under the Internal Revenue Code the term "return information" does not include information in a form "which cannot be associated with, or otherwise identify directly or indirectly, a particular taxpayer,"[3] in OIP Opinion Letter No. 89-3 at p. 9, we observed that the U.S. Supreme Court has adopted a narrow construction of this language. Specifically, the U.S. Supreme Court has held that this provision, commonly known as the "Haskell Amendment," was only intended to allow the continuation of the IRS' practice of releasing "statistical studies and compilations" for research purposes. Thus, the U.S. Supreme Court held that this Internal Revenue Code provision does not exempt from the Code's disclosure prohibitions, material that can be redacted (sanitized) to delete information concerning a taxpayer. See Church of Scientology of California v. IRS, 484 U.S. 9 (1987).

The OIP is constrained to conclude that determinations or opinions issued to a taxpayer by the Department concerning the applicability of the State franchise tax to loans in which the borrower is located out of state are protected from disclosure under section 92F-13(4), Hawaii Revised Statutes. First, written determinations or opinions issued by the Department to a taxpayer concerning the applicability of the State franchise tax to loans in which the borrower is located out of State, or the security for the loan is located out of State, fall within the federal definition of the term "return information" quoted above. Secondly, the Legislature has not, like the Congress, adopted any exemption to this confidentiality provision that permits the public inspection and copying of "written determinations" or other forms of written advice from the Department to taxpayers.

However, the OIP urges the Department and the Legislature to seriously consider the amendment of the State tax laws to permit, in some form, public access to "written determinations" or government records maintained by the Department that are akin to "letter rulings" from the IRS. In our opinion there is a significant public interest in the disclosure of this information.

---

[3]See I.R.C. □6103(b) (2) (1986).

As noted by one court, "[t] he function of a letter ruling, usually sought by the taxpayer in advance of contemplated transaction, is to advise the taxpayer regarding the tax treatment that he can expect from the IRS in the circumstances specified in the ruling." Tax Analysts & Advocates v. Internal Revenue Service, 505 F.2d 350, 352 (D.C. Cir. 1974) . The adoption of provisions similar to those set forth in section 6110 of the Internal Revenue Code would promote the core purpose of the UIPA that the "formation and conduct of public policy-the discussions, deliberations, decisions, and actions of government agencies-shall be conducted as openly as possible." Haw. Rev. Stat. □92F-2 (Supp. 1991).

Our inquiry is not at an end, for we now turn to a consideration of whether, notwithstanding the fact that sections 235-116 and 241-6, Hawaii Revised Statutes, protect "return information" from disclosure, written determinations by the Department concerning the applicability of the State's franchise tax must be made available for public inspection and copying under section 92F-12, Hawaii Revised Statutes.

III. INTERPRETATIONS OF GENERAL APPLICABILITY

Section 92F-12(a), Hawaii Revised Statutes, provides in pertinent part:

> **□92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:
>
> (1)Rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency;
>
> (2)Final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases; . . . .

Haw. Rev. Stat. □92F-12(a) (1) and (2) (Supp. 1991) and Act 185, 1992 Haw. Sess. Laws (emphasis added).

In your letter to the OIP requesting an advisory opinion, you assert that the Department's written determinations or opinions concerning the applicability of the State franchise tax constitute "statements of general policy" or "interpretations of general applicability" adopted by the Department that must be

made available for public inspection and copying "[a]ny provision to the contrary notwithstanding." In support of this argument, your letter to the OIP referred to case law under the FOIA.

We concur with your observation that court decisions construing the FOIA are relevant in construing section 92F-12(a)(1) and (2), Hawaii Revised Statutes.[4] For the

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[4]The above quoted provisions of subsection (a), of section 92F-12, Hawaii Revised Statutes, were taken from section 2-101 of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioner's on Uniform State Laws. The commentary to section 2-101 of the Model Code provides:

> Under this section, the "law of the agency" must be made available to the public. In other words, an agency may not maintain "secret law" relating to its own decisions and policies. This section is similar in general requirement to Sections (a) (1), (2) and (3) of the federal Freedom of Information Act. [citations omitted.] The affirmative disclosure responsibility extends to agency policies, rules, and adjudicative determinations and procedures. In addition, this section mandates disclosure in the form in which the records are used or relied upon by the agency. . . .
>
> Nothing in the section requires an agency to make rules or to formalize its decision-making processes. Nor does it require an agency to reduce its rules or policies to written or other permanent form. If preferred, an administrative procedure act or similar legislation could serve those purposes.

Model Code □2-101 commentary at 10 (1988) (emphasis added).

We also observe that federal courts have held that IRS written determinations constitute "statements of general policy," or "interpretations which have been adopted by the agency," or "final opinion[s]." See Tax Analysts & Advocates v. Internal Revenue Service, 505 F.2d 350 (1974); Freuhauf Corp. v. Internal Revenue Service, 522 F.2d 284 (1975) . Importantly however, both of these cases were decided before Congress passed the Tax Reform Act of 1976, and adopted the elaborate procedures in I.R.C. □6110 for the disclosure of reasons explained below,

however, we do not believe that section 92F-12, Hawaii Revised Statutes, requires agencies to disclose government records that are protected from disclosure by specific legislative enactments such as section 235-116, Hawaii Revised Statutes.

In section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records, or information contained therein, that must be made available for public inspection and copying "[a]ny provision to the contrary notwithstanding." While at first reading, one might assume that the phrase "[a]ny provision to the contrary notwithstanding," refers to all of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, the UIPA's legislative history clarifies the intended scope of this phrase. In particular, the UIPA's legislative history indicates that "[a]s to these records, the [UIPA's] exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988) (emphasis added). These UIPA exceptions are set forth by section 92F-13(1) and (3), Hawaii Revised Statutes.

Furthermore, the structure of the UIPA itself reflects that the Legislature intended the provisions of the UIPA to yield to specific State statutes, that either expressly restrict, or that expressly authorize the disclosure of government records. See Haw. Rev. Stat. □92F-12(b) (2) (Supp. 1991) (requiring the disclosure of government records that pursuant to "a statute of this state" that are authorized to be disclosed); Haw. Rev. Stat. □92F-13(4) (Supp. 1991) (protecting from disclosure government records that are protected from disclosure by State law); Haw. Rev. Stat. □92F-22(5) (Supp. 1991) (protecting from disclosure any personal record that is "[r] equired to be withheld from the individual to whom it pertains by statute").

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written determinations issued by the the IRS. With respect to these elaborate procedures, "Congress intended that □6110 provide the exclusive means of public access, ruling out resort to the regular FOIA procedures." Fruehauf Corp. v. Internal Revenue Service, 566 F.2d 574, 577 (6th Cir. 1977) (emphasis added).

Furthermore, our conclusion is supported by the existence of section 92F-17, Hawaii Revised Statutes, which makes it a criminal offense for any person to "intentionally disclose[] or provide[] a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any person or agency with actual knowledge that disclosure is prohibited." Haw. Rev. Stat. § 92F-17 (Supp. 1991) (emphasis added). Notwithstanding the provisions of section 92F-12, Hawaii Revised Statutes, a person would be subject to criminal prosecution for disclosing a record that is explicitly described by specific confidentiality statutes, with actual knowledge that disclosure is prohibited.

Also, as we noted in OIP Opinion Letter No. 92-6 (June 22, 1992), the UIPA exception set forth in section 92F-13(4), Hawaii Revised Statutes, is similar to one contained in section 3-101 of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioner's on Uniform State laws, upon which the UIPA was modeled. The commentary to this Model Code provision indicates that it was intended to be "a catch all provision which assimilates . . . any federal law, state statute or rule of evidence that expressly requires the withholding of information from the general public." See Model Code § 2-103 commentary at 18 (1981).

Finally, our conclusion is supported by the general rule of statutory construction that where one statute deals with a subject in general terms, and another in specific terms, the specific law will generally prevail. See State v. Grayson, 70 Haw. 227, 235 (1989); see also 2B N. Singer, Sutherland Statutory Construction § 51.05 (Sands 5th ed. rev. 1992).

Based upon the the above authorities, we conclude that where government records are protected from disclosure by specific State statutes, such as section 235-116, Hawaii Revised Statutes, and where those records contain information described in section 92F-12, Hawaii Revised Statutes, the specific State statute controls the determination of the public's access rights.[5] Thus, in our opinion, the Legislature

[5]We believe that the presence of a statute protecting the disclosure of information falling within the provisions of section 92F-12, Hawaii Revised Statutes, represents a rare and unusual occurrence, one that is unlikely to be repeated in other statutory or factual settings.

did not intend section 92F-12, Hawaii Revised Statutes, to require agencies to disclose government records that are protected from required disclosure under section 92F-13(4), Hawaii Revised Statutes.

CONCLUSION

For the reasons set forth above, we conclude that under the UIPA, the Department is not required to disclose written determinations or opinions issued to a taxpayer concerning the applicability of the State franchise tax to loans in which the borrower is located out of State.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ: sc
c: Honorable Richard F. Kahle, Jr.
Director of Taxation

Kevin T. Wakayama
Deputy Attorney General