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IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAIʻI

In re DEPARTMENT OF TAXATION, ADMINISTRATIVE DIRECTIVE NO. 2021-01. TAX FOUNDATION OF HAWAIʻI, a Hawaiʻi nonprofit corporation, Plaintiff-Appellant, vs. DEPARTMENT OF TAXATION, STATE OF HAWAIʻI, Defendant-Appellee.	CASE NO. 1CCV-24-0000661 FIRST CIRCUIT COURT HONORABLE KARIN L. HOLMA

APPELLANT'S OPENING BRIEF

STATEMENT OF RELATED CASES

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APPELLANT'S OPENING BRIEF

I. NATURE OF THE CASE AND INTRODUCTION

To make the courts "more serviceable to the people," our lawmakers provided for the declaratory judgment remedy "to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other." HRS § 632-6. They also allowed any interested person to "obtain a judicial declaration as to the validity of an agency rule," HRS § 91-7(a), where a "rule" includes "each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy," HRS § 91-1. Here, the Department of Taxation (**Department**) has asserted, and the lower court agreed, that the Department's internal "secret law" is not reviewable under *either* chapter 632 or chapter 91, HRS, because it would be a "controversy with respect to taxes." HRS § 632-1(a).

The Tax Foundation of Hawai'i (**Foundation**) brought this challenge to certain legal interpretations made in the Department's Administrative Directive 2021-01 (**AD 2021-01**), a document captioned "For Internal Use Only" that guides audit and other customer-facing staff in interpreting the tax laws. The Foundation believes that this document contains disinformation and is asking the courts to say so. The Foundation maintains that the document may be reviewed, without needing a victim, because:

- The declaratory judgment statute, HRS § 632-1, explicitly allows for judgments as to written instruments and government regulations; and
- The Hawaii Administrative Procedure Act, HRS § 91-7, clearly allows for "rules" to be validated or invalidated and makes no exception for any state department.

The Foundation, consistent with 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), brings this appeal to challenge the Department's lack of transparency and seek judicial review.

II. STATEMENT OF THE CASE

On May 18, 2023, the Foundation requested under the Uniform Information Practices Act, HRS Chapter 92F, that the Department of Taxation (**Department**) produce its "Administrative Directives." (ROA #68, p. 13.[1]) In response to this request, the Department duly produced eleven documents out of "about 145" Administrative Directives in total.[2] AD 2021-01 was one of the documents produced.[3]

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[1] The page number refers to the page number of the PDF file in the Record on Appeal.
[2] Deposition of Gary Yamashiroya, 26:13-23 (ROA #68, p.23).
[3] See also Department's Answer to Complaint (ROA #17), ¶ 9: "In answer to paragraph 8 of the Complaint, the Department states that on May 4, 2024, the Department emailed a copy of Administrative Directive No. 2021-01 to Tom

(continued...)

In general, Administrative Directives are "policy pronouncements," as the Department's Special Assistant to the Director of Taxation, Gary Yamashiroya,[4] testified:

> Q … So you have some familiarity with the class of documents that are called Administrative Directives?
>
> A Yes.
>
> Q Okay. Can you tell me what they are.
>
> A Administrative Directives are policy pronouncements.
>
> ….
>
> A Administrative Directives generally are for -- it could be a myriad of subjects, including something as simple as how to probably use a facsimile machine, or -- and/or it could be something, in terms of if the director's unavailable, who is responsible -- you know, who's the line of succession if the director's -- so whatever administrative policy or -- that wishes -- that the director wishes to provide to the department for guidance, that's what the Administrative Directive would be for.
>
> Q So it's a policy statement that comes from the director and goes to the department?
>
> MS. UDUI: That misstates the answer.
>
> BY MR. YAMACHIKA
>
> Q Well, Mr. Witness, can you clear it up. Is that what it is or…
>
> A I'm sorry, what's the question?
>
> MR. YAMACHIKA: Can you read it back.
>
> (Record read.)

(...continued)

Yamachika, Tax Foundation of Hawai'i, in response to a Uniform Information Practices Act, chapter 92F, HRS, request."

[4] Yamashiroya Deposition, 12:8-9. (ROA #68, p. 21).

THE WITNESS: All I can respond is it's a directive that's issued by the director for guidance to the department on various subject matter.

Deposition of Gary Yamashiroya, 19:1-7, 20:1-22 (ROA #68, pp. 23-24).

The effect of the directive was, unsurprisingly, that taxpayer-facing Department staff followed it:

Q Okay. So you have "Knowledge of whether the guidance on the first page of Administrative Directive 2101-01... was distributed to, used by, or otherwise implemented in taxpayer examinations or audits." You see that?

A Yes.

Q Okay. Was the guidance on the first page of Administrative Directive 2021-01 distributed to audit staff?

A Yes.

Q Do you have knowledge as to whether this guidance was used by audit staff?

A I think that question is a little too broad, because it depends on each audit. But, generally speaking, we do -- when we issue Administrative Directives, we -- our expectation is that our staff will -- will adhere to it, or follow it.

....

Q Do you have "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"?

MS. UDUI: Compound question.

THE WITNESS: Do I have knowledge of it? Yes.

BY MR. YAMACHIKA

Q And what is that knowledge?

A The answer is no.

Q So, to your knowledge, nobody's disagreed with the guidance provided?

A Correct.

Q And, to your knowledge, nobody's failed to implement that guidance?

A Correct.

Yamashiroya Depo., 49:13-51:9 (ROA #96, pp. 14-16).

AD 2021-01, dated April 27, 2021, states that its purpose "is to assess all applicable penalties under Title 14, Hawaii Revised Statutes (HRS)."[5] The document originates with the Office of the Director of Taxation, and is signed on page 2 by Isaac Choy, the Director at that time. It is marked "For Internal Use Only." The parties have stipulated that the document (1) was placed on the Department's internal shared drive and accessible to its employees; (2) was not uploaded onto the Department's external Internet website or otherwise made readily accessible to the public; and (3) has not been superseded or obsoleted and currently remains in effect. (ROA #64).

AD 2021-01 provides "additional guidance" on the penalty for failure to pay tax due to negligence (the "Negligence Penalty"), as stated in HRS § 231-39(b)(2)(A). The law, quoted in AD 2021-01, states:

> 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.

---

[5] Title 14, HRS, is where the tax chapters are located, as well as certain chapters common to multiple tax types, such as HRS chapter 231, relating to administration of taxes.

AD 2021-01 then states that "[n]egligence or disregard of rules or regulations include, but are not limited to, the following circumstances" and lists five bullet points, the last of which is:

> - A taxpayer fails to respond to auditor/examiner's audit requests, in a timely manner. A failure to respond to a second request within ten business day [*sic*] will be deemed negligent. 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.

This bullet point will be referred to as the **Failure-to-Respond Condition**. The other bullet points will be referred to as the **Four Other Circumstances**.

In this action, the Foundation primarily seeks to have the Failure-to-Respond Condition declared invalid. The Negligence Penalty, quoted above, is imposed if a tax underpayment is caused by negligence or intentional disregard of rules. The penalty equals 25% of the amount of the underpayment — the difference between tax actually owed and tax paid. A taxpayer's failure to produce documents within a time requested by an auditor does not ***result*** in an underpayment.

Thus, in *Masterson v. Commissioner,* T.C. Memo. 1981-681, the U.S. Tax Court rejected an argument from the Internal Revenue Service that a taxpayer's "dilatory tactics," along with an "inordinate amount of time" the Government was required to spend on the taxpayer's case, justified application of the Negligence Penalty under I.R.C. § 6653 (now I.R.C. § 6662(b)(1)). The court stated, "We hasten to point out that the [Negligence Penalty] is imposed by reason of some negligence or intentional act[s] causing a deficiency, not for the

amount of time the Government must spend in ascertaining and achieving final resolution of that deficiency." (Footnote omitted, emphasis in original.) The court voided the Service's assessment of the negligence penalty.

Court review in theory would be available to an actual victim, namely, a taxpayer who has been assessed the Negligence Penalty solely on the ground that the taxpayer produced documents and records late. In practice, however, the Negligence Penalty is assessed without an accompanying statement of reasons, as seen on a sample assessment (ROA #68, pp. 28 ff). It is difficult, if not impossible, for a taxpayer charged the Negligence Penalty to isolate the conduct or omission that motivated the auditor to impose the penalty.

III. STATEMENT OF POINTS OF ERROR

The First Circuit Court erred in granting the State's motion for dismissal on the ground that it lacked jurisdiction. This error was preserved in the memoranda supporting the Foundation's motion for summary judgment and opposing the State's motion for dismissal or for summary judgment (ROA ## 67, 95, 102), and during the oral argument on those motions.

IV. STANDARD OF REVIEW

A. A Dismissal for Lack of Jurisdiction Is Reviewed *De Novo*.

Whether a court possesses subject matter jurisdiction is a question of law reviewable *de novo*. *Fisher v. Grove Farm Co.,* 123 Haw. 82, 94, 230 P.3d 382, 394 (2009); *Kinkaid v. Board of Review,* 106 Haw. 318, 320, 104 P.3d 905, 907 (2004).

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; dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Tax Foundation of Hawaii v. State,* 439 P.3d 127 (2019) (quoting *Casumpang v. ILWU Local 142,* 94 Haw. 330, 337, 13 P.3d 1235, 1242 (2000)); *Fisher,* 123 Haw. at 94, 230 P.3d at 394; *Norris v. Hawaiian Airlines, Inc.,* 74 Haw. 235, 240, 842 P.2d 634, 637 (1992), *aff'd,* 512 U.S. 246 (1994). Further, the trial court is not "restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *Fisher,* 123 Haw. at 94, 230 P.3d at 394; *Norris*, 74 Haw. at 240, 842 P.2d at 637.

The Hawaii appellate courts have consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible. *Lewis v. Kawafuchi,* 108 Haw. 69, 74, 116 P.3d 711, 716 (Ct. App.), *cert. dismissed,* 108 Haw. 160, 118 P.3d 70 (2005). Doubt as to jurisdiction should be resolved in favor of the court having jurisdiction. *Narmore v. Kawafuchi,* 112 Haw. 69, 82, 143 P.2d 1271, 1284 (2006).

V. ARGUMENT

A. Transparency Provisions in the Hawaii Laws Manifest a Distaste for "Secret Law," Which AD 2021-01 Embodies.

HRS § 92F-12, part of the Hawaii Uniform Information Practices Act, requires that any agency, including the Department, disclose its decisions and policies. As the Office of Information Practices explained in the tax context:

> 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. . . . The affirmative disclosure responsibility extends to agency policies, rules, and adjudicative determinations and procedures.

Haw. Off. of Info. Practices, Op. 92-10, at 11 n.4 (quoting Nat'l Conf. of Comm'rs on Unif. State Laws, Model Unif. Info. Practices Code § 2-101 commentary (1988)).

AD 2021-01 is a document captioned "For Internal Use Only" containing interpretations of the tax law that Department employees are expected to follow. It is secret law. The Foundation in this action seeks to bring this pronouncement to light and have the courts either void it as disinformation that may harm the taxpaying public or validate it as good law.

B. Chapter 632, HRS, Allows the Courts to Render Declaratory Judgments on the Validity of Written Instruments, Including AD 2021-01.

1. HRS § 632-1 Explicitly Permits Adjudications of "Written Instruments" or "Regulations," Whether or Not in the Tax Context.

The Department insists that this case is a controversy with respect to taxes, and thus, runs afoul of the proviso in the first sentence of HRS § 632-1(a). The Department reaches that conclusion by ignoring the second sentence in HRS § 632-1(a) that explicitly allows for the challenge presented here. The statute states:

> **§632-1 Jurisdiction; controversies subject to.** (a) In cases of actual controversy, 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 district court, or in any controversy with respect to taxes, or in any case where a divorce or annulment of marriage is sought. **Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations may be so determined,** and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

(Emphasis added.) This case involves the validity of AD 2021-01, an "other instrument of writing" and an "other governmental regulation[]." The interpretation of a written instrument or governmental regulation "may be so determined." Thus, the courts have jurisdiction to proceed.

The Department and the court below glossed over this sentence as if it had no meaning. But the Legislature put it there for a reason, which is why an interpretation of the statute ignoring that sentence cannot be correct. "It is a cardinal rule of statutory construction that the courts are bound, if possible, to give effect to all parts of a statute, and no sentence, clause or word shall be construed as surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute." *In re Ainoa,* 60 Haw. 487, 490, 591 P.2d 607, 609 (1979). The second sentence of HRS § 632-1(a), stating that controversies involving written instruments and governmental regulations "may be so determined," needs to be given effect and should be read as an exception to the provisos in the first sentence.

2. Declaratory Judgments in Tax Controversies Are Permitted When They Do Not Interfere with the

Department's Lawful Duties to Assess and Collect Taxes; This Action Seeks Only to Restrain Unlawful Acts.

The Department argued, and the court below apparently agreed, that this suit must be dismissed because the Foundation is interfering with the Department's duties to assess and collect taxes. The Foundation has no interest in restraining or impeding the lawful functions of the Department. However, it and its constituents have a vested interest in ensuring that these functions ***remain*** lawful and that Hawaii's tax laws are administered without misleading or misinforming staff.

Declaratory relief may be granted in tax matters "where such relief does not interfere with the assessment or collection of taxes." *Tax Foundation,* 144 Haw. at 188, 439 P.3d at 140. The Department, however, has no authority to assess or collect taxes ***unlawfully.*** Its powers are strictly limited to those granted by statute. HRS § 231-3(1), which gives the Department its assessment authority, permits it to "make any assessment **by law** required to be made" (bold type added). Likewise, HRS § 231-3(2), which governs the Department's collection authority, states tht the Department is "responsible for the collection of all taxes imposed **under title 14,** except those which **by law** are to be collected by county treasurers, and for such other duties as are provided **by law**" (bold type added).

Specifically, with respect to penalties, HRS § 231-3(4) requires the Department to "see that penalties are enforced **when prescribed by any tax or revenue law of the State**" (bold type added). Simply put, the Department has no authority to ignore the law and run roughshod over the taxpaying public.

Like any other government agency, the Department has no grounds to object when this Court limits it to its statutorily defined authority.

In the court below, the Department argued that the Foundation's interpretation "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." Its concern is a gross exaggeration. The Department is free to find facts, documents, or other evidence indicating that a taxpayer's ***position taken on its return,*** or ***failure to file a return,*** was negligent. The taxpayer's entries on the return, or the taxpayer's failure to file a return by the due date, cause the tax deficiency and thus can be penalized. The Department has pointed to HAR § 18-231-3-14.25, which states that noncompliance with recordkeeping rules can be used as evidence of negligence or intent to evade the payment of taxes, but this rule is entirely consistent. A taxpayer making up numbers to put on a tax return without support, for example, is negligent with respect to the position taken on that return. If a taxpayer is unable to produce that support during an audit years later, the Department may reasonably infer the absence of support when the return was prepared and filed. The Failure-to-Respond Condition is entirely separate. It is triggered when the taxpayer does not meet the auditor's deadline for producing documentary proof, whether or not that proof ever existed.

The Department urges an unduly broad interpretation of what constitutes interference with lawful assessment and collection of taxes. But the IRS took the same position, and the D.C. Circuit disagreed with it, in a case that the Hawaii Supreme Court followed. *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 (**APA**, 5 U.S.C. § 551 *et seq.*) despite language in the federal Declaratory Judgment Act (**DJA**, 28 U.S.C. § 2201(a)) and the Anti-Injunction Act (**AIA**, I.R.C. § 7421(a)) disallowing relief in any controversy with respect to taxes.[6] "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 principle the case law elucidates is therefore quite simple: The AIA, as its plain text states, bars suits concerning the 'assessment or collection of any tax.' It is no obstacle to other claims seeking to enjoin the IRS, regardless of any attenuated connection to the broader regulatory scheme." *Id.* at 727. And the scope of the exception to declaratory relief is the same as the exception to injunctive relief: "What the AIA accomplishes by denying its application to 'any suit for the purpose of restraining the assessment or collection of any tax' the DJA accomplishes by an exception 'with respect to Federal taxes.' By nature, language is simultaneously robust and precise. Different verbal formulations

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[6] 28 U.S.C. § 2201. The federal statute contains no provision explicitly allowing declaratory judgments as to written instruments and government regulations, as HRS § 632-1(a) does.

can, and sometimes do, mean the same thing." *Id.* at 731. The Hawaii Supreme Court was persuaded by and followed the *Cohen* court's interpretation of the federal Declaratory Judgment Act in interpreting the prohibition on declaratory judgments in tax controversies in HRS § 632-1(a). *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 state taxes just as a declaration as to the validity of an IRS Notice does not interfere with the assessment or collection of federal taxes. Thus, this case does not present the "controversy with respect to taxes" for which HRS § 632-1(a) was designed to bar relief.

3. The Foundation Does Not Have an Alternative Remedy in Tax Appeal Court; Thus, Relief Is Not Barred by HRS § 632-1(b).

The Department argues that even if the Foundation's suit does not interfere with the Department's assessment and collection functions, the Foundation's remedy is nevertheless barred under HRS § 632-1(b) because an alternative remedy is provided by law, namely suit in the Tax Appeal Court.

The jurisdiction of the Tax Appeal Court is limited. That court can only determine "the amount of valuation or taxes, as the case may be, in dispute" as between the taxing agency and the taxpayer assessed. HRS § 232-13. Thus, if there is no dispute about any particular taxpayer's tax liability, which is the case here, then the Foundation cannot bring its claim before the Tax Appeal Court. *Tax Foundation of Hawai'i v. State,* 144 Haw. 175, 186, 439 P.3d 127,

138 (2019). The Department's argument that the Foundation has a statutory alternative remedy is incorrect.

B. HRS § 91-7 Also Explicitly Allows the Courts to Judge the Validity of a Department Rule.

1. The Definition of "Rule" in HRS § 91-1 Includes an Administrative Directive.

Under HRS § 91-1, a "rule" means

> each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

In *Ainoa v. Unemployment Compensation Appeals Division,* 62 Haw. 286, 614 P.2d 380 (1980), the Department of Labor and Industrial Relations (**DLIR**) had given its unemployment claims referees "cheat sheets" containing definitions of "descriptive words and phrases," as DLIR called them, which DLIR referees then used to adjudicate unemployment claims. The Hawaii Supreme Court held that these sheets were "rules" within the meaning of HAPA, *id.* at 292-93, 614 P.2d at 385, and then, after noting that DLIR was supposed to, but didn't, make those sheets public information, hold a public hearing, obtain approval from the Governor or file them with the Lieutenant Governor, declared the rules invalid, *id.* at 293-94, 614 P.2d at 385-86.

Here, the Department in AD 2021-01 gave instructions to its staff relating to the Negligence Penalty. In *Ainoa* the department expected that its referees would follow the guidance, and they did. In AD 2021-01, the

expectation was the same. Could the guidance simply be dismissed as an "intra-agency memorandum," which is excluded from the HRS § 91-1 definition of a "rule"? The court did not treat the cheat sheets as such in *Ainoa,* and AD 2021-01 bears more indicia of formality and finality than a typical memorandum would. AD 2021-01 has the imposing title "Administrative Directive" and is serially numbered by year like other Department published guidance. The Department's witness described ADs as "policy pronouncements." Yamashiroya Depo., at 19:6-7 (ROA #68, at 23). This AD, in particular, affects the rights of the taxpaying public, meaning that it is something that the Administrative Procedures Act was designed to regulate. *Waugh v. University of Hawaii*, 63 Haw. 117, 131, 621 P.2d 957, 968 (1980); *Holdman v. Olim*, 59 Haw. 346, 355, 581 P.2d 1164, 1170 (1978). The directives in AD 2021-01 are rules within the meaning of HAPA and should be reviewable by the Judiciary.

2. There Is No Conflict Between HRS § 632-1 and HRS § 91-7.

The Department argues that although HRS § 91-7 permits this Court to issue "a judicial declaration as to the validity of any agency rule," this authority is revoked because it conflicts with HRS § 632-1's, which prohibits declaratory judgments related to tax controversies. However, as discussed in section 1 above, no such conflict exists because HRS § 632-1 expressly permits judicial declarations relating to written instruments in general and agency rules in particular.

And even if the general declaratory judgment statute prohibited all declarations of rights with respect to taxes (which it does not), it would have to yield to a more specific statute, HRS § 91-7, allowing the courts to declare the validity or invalidity of agency rules in. "The settled law in this State favors a specific statute over a general one when two statutes cover the same subject." *In re Smart,* 54 Haw. 250, 252, 505 P.2d 1179, 1181 (1973); *State v. Coney,* 45 Haw. 650, 662, 372 P.2d 348, 354-55 (1962). Because the Declaratory Judgment Law covers all declaratory judgments, and HAPA covers only declaratory judgments on the validity of agency rules, HAPA is the narrower statute and should prevail in case of conflict.

3. The Department Is Not Exempt from Chapter 91, HRS, Relating to the Requirements of Rulemaking in General and Post-Adoption Judicial Review in HRS § 91-7 in Particular.

"As stated in the 1961 Hawaii House Journal-Standing Committee Reports, Standing Committee Report No. 8, HAPA was adopted to 'provide a uniform administrative procedure for all state and county boards, commissions, departments or offices which would encompass the procedure of rule making and the adjudication of contested cases.'" *Town v. Land Use Commission,* 55 Haw. 538, 545, 524 P.2d 84, 89 (1974). Unless there is a statute providing an exemption to the Department, "as a state agency, [it] must conform to the requirements of HAPA when acting in either a rule making capacity (quasi-legislative), or in the adjudication of a contested case (quasi-judicial)." *Id.*

The Department notes it has discretionary authority in HRS § 231-3(9) and a legislative mandate in HRS § 231-10.6 to promulgate rules explaining penalties and fines for, among other things, the understatement of taxes.[7] The Department argues that this authority somehow gives the Department a get-out-of-chapter-91-free card. Those statutes do no such thing. Agencies large and small issue rules explaining how they are to exercise discretion given to them by the legislature. These rules are subject to Chapter 91 procedures, including HRS § 91-7 judicial review. Moreover, HRS § 231-10.7, which allows the Department to issue temporary rules, contains an explicit exception to chapter 91. This exception strongly implies that chapter 91 applies to the Department outside of the temporary rules context.

C. The Foundation Has Standing to Challenge the Document or Rule at Issue.

1. Nonprofits Have Been Plaintiffs In Important Cases in Hawaii.

The Department has also challenged whether the Foundation is a proper plaintiff in this case and is expected to urge, as an alternative ground for affirmance, that it is not.

In Hawaii, many nonprofit organizations contribute to the public good each day. Some contribute by adding to the jurisprudence of our State. Thus, in *Life of the Land v. Land Use Commission*, 63 Haw. 166, 176-77, 623 P.2d 431, 441 (1981), the nonprofit Life of the Land was held to be an interested

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[7] The Negligence Penalty under HRS § 231-39(b)(2)(A) does indeed fall into this category because it is a penalty for understating taxes without good reason.

person for HRS Chapter 91 purposes even though neither it nor its members were owners or adjoining owners of land reclassified in a boundary review. In *Hawaii Insurers Council v. Lingle,* 120 Haw. 51, 72, 201 P.3d 564, 585 (2008), the Hawaii Insurers Council, a nonprofit trade organization and not an insurer, brought a declaratory action[8] to obtain important clarification from our supreme court on what constitutes a "user fee" versus a "tax." And in *Tax Foundation of Hawai'i v. State,* 144 Haw. 175, 202-03, 439 P.3d 127, 154-55 (2019), our supreme court held that the Foundation had standing to bring a declaratory judgment action to challenge the State's "skimming" of county surcharge funds even though it could not allege that it had suffered an "injury in fact" because of the diversion.

The Foundation, like other nonprofits, is permitted to vindicate the rights of its constituents in declaratory and Chapter 91 actions. It may do so here.

2. The Foundation Otherwise Has Standing Under HRS § 632-1 and As an Interested Person Under HRS § 91-7.

Antagonistic claims exist between the Foundation and the Department as to whether the Negligence Penalty can be applied to post-return conduct as envisioned in the Failure-to-Respond Condition. Under the Foundation's purpose as a governmental financial accountability watchdog, the Foundation has an interest in a right to have the Negligence Penalty applied when, and only when, the statutory conditions for it are satisfied. The Department denies

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[8] The Insurers Council sought declaratory relief among other remedies. 120 Haw. at 56, 201 P.3d at 569.

this right by imposing the Negligence Penalty when its auditors are inconvenienced by taxpayers unable to produce documents within the time frames dictated by said auditors. A judgment of the Judiciary will terminate the controversy. Thus, the Foundation has HRS § 632-1 standing. *Tax Foundation,* 144 Haw. at 202-03, 439 P.3d at 154-55.

Furthermore, the Foundation can be an interested person "in cases in which the rights of the public might otherwise be denied hearing in a judicial forum." A*sato v. Procurement Policy Board,* 132 Haw. 333, 344, 322 P.3d 228, 239 (2014) (quoting *Pele Defense Fund v. Paty,* 73 Haw. 578, 593, 837 P.2d 1247, 1257 (1992). The Department, in an assessment, typically imposes the Negligence Penalty while providing little detail about why it is imposed. *See, e.g.,* ROA #68, pp. 28 ff. It is difficult or impossible in practice to isolate the reasons behind imposition of the Negligence Penalty on any particular taxpayer.

Finally, a declaratory judgment as to the validity of an administrative directive, furthermore, cannot be said to simply vindicate the litigant's own value preferences through the judicial process, which is a good reason to deny standing; rather, the action "will actually serve to uphold the legislature's intent," which is a good reason to recognize standing. *Id.* at 345, 322 P.3d at 240.

VI. CONCLUSION

In enacting government transparency statutes like the Hawaii Declaratory Judgment Act, the Hawaii Administrative Procedures Act, and Hawaii Uniform

Information Practices Act, the legislature sought to achieve greater transparency in government and the demise of "secret law." But transparency by itself achieves little if the public and the judiciary are powerless to do anything about wrongs or injustices exposed. The Department of Taxation wields tremendous power, for, as the Supreme Court stated long ago, "the power to tax involves the power to destroy; [and] the power to destroy may defeat and render useless the power to create." *McCulloch v. Maryland,* 17 U.S. 316, 431 (1819). The public and the courts must not be silenced. The judgment below must be reversed and the cause remanded to allow the Circuit Court to reach the merits.

DATED: Honolulu, Hawai'i, March 28, 2025.

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

STATEMENT OF RELATED CASES

Appellant is not aware of any related cases.

DATED: Honolulu, Hawai‘i, March 28, 2025.

/s/ Thomas Yamachika
THOMAS YAMACHIKA
Attorney for Plaintiff-Appellant
Tax Foundation of Hawai‘i

CERTIFICATE OF SERVICE

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

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DATED: Honolulu, Hawai‘i, March 28, 2025.

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