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**HOUSE COMMITTEE ON FINANCE
TESTIMONY REGARDING SB 2887 SD2
RELATING TO TAXATION**

TESTIFIER: KURT KAWAFUCHI, DIRECTOR OF TAXATION (OR DESIGNEE)

DATE: MARCH 17, 2010

TIME: 4PM

ROOM: 308

This measure, among other things, amends the provisions relating to the withholding tax on real property sold by nonresidents. As amended, this measure allows an exemption from the withholding tax where an affidavit is provided by a transferee in instances when the property is acquired by foreclosure.

The Department of Taxation (Department) provides the following comments.

CLARIFY IN THE FORECLOSURE AFFIDAVIT THAT NO INCOME TAX IS DUE—The Department does not object to exempting transactions where the transferee acquires the real property via foreclosure; provided that there would otherwise be no gain (or tax owed) on the transaction. The Department is acceptable to the affidavit requirement in order to obtain an exemption from paying withholding taxes on foreclosure transactions; provided that the government is given sufficient basis to ensure no income taxes are owed. The Department requests that the following be added:

If the transferee furnishes an affidavit to the department that the transferee acquired the real property pursuant to foreclosure or a deed in lieu of foreclosure and that no income tax is due on the transfer;

CLARIFY PARAGRAPH (3)—The Department is unclear of the purpose of proposed paragraph (3). The Department is concerned that, without further elaboration on this paragraph's intent, that it could impact tax collections.

REVENUE LOSS—After further consideration, it is estimated that this measure will result in a revenue loss of approximately \$3 million annually.

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SUBJECT: INCOME, Real property nonresident withholding

BILL NUMBER: SB 2887, SD-2

INTRODUCED BY: Senate Committee on Ways and Means

BRIEF SUMMARY: Amends HRS section 235-68 to provide that a person shall not be required to withhold any tax on the disposition of Hawaii real property if: (1) the transferee furnishes an affidavit to the department of taxation that the transferee acquired the real property pursuant to foreclosure or a deed in lieu of foreclosure; or (2) the amount realized by the transferor includes real property located in Hawaii whose fair market value is equal to or greater than the fair market value of the real property acquired by the transferee.

Any person held liable for the failure to deduct and withhold on the disposition of real property as required, shall be relieved of that liability to the extent that the department has collected an amount of tax equal to the transferor's tax liability related to the disposition; provided that this shall not relieve any person from liability for any applicable interest or any penalties.

EFFECTIVE DATE: Tax years beginning after December 31, 2009

STAFF COMMENTS: It appears that this measure proposes to clarify the provisions relating to the withholding requirements relating to the disposition of real property by nonresidents to ensure income taxes are paid on the sale of such real property. The measure would exempt from the withholding requirements any property that is sold as a result of a foreclosure since the proceeds would probably accrue to the lender who foreclosed on the property or if the seller holds real property in Hawaii that is of the same or greater value than the property that was sold. The exemption assumes that there are other means than these two cases to ensure payment of any income taxes that would have been due on these types of sales.

The measure also relieves a person who would have been required to withhold on such sales of real property if, in fact, the tax department had collected the tax that would have been due from the seller which in this case the purchaser would have otherwise had to withhold as an amount from the purchase price. This appears to be a reasonable compromise as far as the liability exposure to the purchaser.

Digested 3/16/10



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March 16, 2010

The Honorable Marcus R. Oshiro, Chair
House Committee on Finance
State Capitol, Room 308
Honolulu, Hawaii 96813

RE: S.B. 2887, S.D.2 Relating to Taxation

HEARING: Wednesday, March 17, 2010 at 4:00 p.m.

Aloha Chair Oshiro, Vice Chair Lee and Members of the Committee:

I am Myoung Oh, Government Affairs Director of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, here to testify on behalf of its 8,800 members in Hawai'i. HAR **supports** S.B. 2887, S.D.2, which amends the income tax code regarding the withholding of tax on the disposition of real property by nonresident sellers.

State law requires that the withholding tax will apply to real property transactions in Hawai'i, where the seller is an out-of-state resident. Buyers must withhold a specified percentage of the "amount realized" by the Seller on the sale of the property and forward this amount to the Department of Taxation. The tax withheld is 5% of the sales price, unless a certificate has been processed that allows Escrow to withhold a reduced amount. Transactions are subject to the withholding tax even if the seller will recognize no gain or will incur a loss (unless the Seller requests a waiver by submitting Form N-288B no later than 10 days prior to the transfer).

HAR believes that S.B. 2887, S.D.2, will streamline the process for the transfer of real property by nonresident sellers, allow for the collection of taxes owed and allow for the timely transfer of real property where no taxes are owed and no gain is realized.

Mahalo for the opportunity to testify.



GOODSILL ANDERSON QUINN & STIFEL

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MEMORANDUM

TO: Representative Marcus R. Oshiro
Chair, Committee on Finance
VIA FACSIMILE: 586-6001

FROM: Gary Slovin / Mihoko Ito

DATE: March 16, 2010

RE: **S.B. 2887, SD1 – Relating to Taxation**
Hearing: Wednesday, March 17, 2010 at 4:00 p.m. (Agenda # 3)

Dear Chair Oshiro and Members of the Committee:

I am Mihoko Ito, testifying on behalf of **Wyndham Worldwide** (“**Wyndham**”), a timeshare company with substantial interests in Hawaii including Wyndham Vacation Ownership, with its resort at Waikiki Beach Walk.

Wyndham supports S.B. 2887, SD2 with amendments, which streamlines the process by which non-resident sellers of property pay taxes on the disposition of real property.

This measure eliminates the requirement that a withholding tax and related documentation be submitted to the State where there is no taxable gain on the sale of the transaction. Where no revenue is owed to the State, it makes sense to eliminate this requirement, both to ease the administrative burden on the Department of Taxation and to make the transaction more efficient.

We note that we prefer the language contained in **S.B. 2887, SD1**, which included an exemption for *de minimis* transactions as follows:

(f) No person shall be required to deduct and withhold any amount under subsection (b) [if]:

....

(4) If the amount realized on the disposition of real property that is a time share interest as defined in section 514E-1 does not exceed \$100,000.

March 16, 2010

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This exemption is allowed in other states, and it will further help to streamline the processing of real estate transactions. For these reasons, we respectfully ask the Committee to pass this measure with amendments.

Thank you very much for the opportunity to submit comments.

STARWOOD

VACATION OWNERSHIP

9002 San Marco Court
Orlando, Florida 32819
(407) 418-7271

March 17, 2010

Honorable Marcus R. Oshiro, Chair
House Committee on Finance

Re: **SB 2887 SD2, Relating to Taxation - Support with Amendments**
Hawaii State Capitol, Conference Room 308, 4 PM; Agenda #3

Aloha Chair Oshiro, Vice Chair Lee, and Committee Members:

I'm Robin Suarez, Vice President & Associate General Counsel for Starwood Vacation Ownership. We support SB 2887 SD2, Relating to Taxation, with amendments proposed by ARDA deleting Section 235-68(f)(2) from the bill and replacing it with the following language:

"If the amount realized on the disposition of real property that is a time share interest, as defined in section 514E-1, does not exceed \$100,000 in value."

As it is currently written, all non-resident sellers of real property must either pay the Hawaii Department of Taxation ("DOTAX") five percent of the gross proceeds or file a Form N-288 with DOTAX. The N-288 is to substantiate that the property was sold at a loss. DOTAX must then quickly review and approve the N-288 and return it to the seller prior to closing. If DOTAX cannot do this in a timely manner, the seller must have the five percent withheld and then file a non-resident return, claiming a refund for the full amount of the withholdings.

This bill clarifies that no withholding tax or related paperwork is required for transactions involving a non-resident seller where there is no monetary gain. This clarification would apply to transactions such as property exchanges wherein the timeshare owner upgrades their current timeshare interest or timeshare transactions involving a deed in lieu of foreclosure process. The deed-in-lieu foreclosure process occurs when a timeshare owner who is in default of the terms of their mortgage or assessment payment deeds the property back to the developer or owners association to avoid foreclosure. In either circumstance, there is no taxable gain by the timeshare owner as they are either spending more money on the upgraded interest than their original timeshare was worth or they are simply deeding over their timeshare interest to the developer for no monetary gain.

This change provides important clarification to the withholding provisions and will create significant streamlining by eliminating unnecessary and unproductive paperwork and filings with the State of Hawaii. In addition, New Section (h) is intended to insure that inadvertent failures to file by non-residents will not have their liability (other than interest and penalties) exceed the actual taxable amount owed to the State had the consumer timely filed.

For these reasons, we respectfully request your passage of this bill with amendments.

Sincerely,
Robin Suarez,
Vice President & Associate General Counsel for Starwood Vacation Ownership



American Resort Development Association
c/o PMCI Hawaii 84 N. King Street Honolulu, HI 96817 (808) 536-5688

March 17, 2010

TO: House Finance Committee
Representative Marcus R. Oshiro, Chair
Representative Marilyn B. Lee, Vice Chair

FROM: Ed Thompson
ARDA-Hawaii

DATE: Wednesday, March 17, 2010
Conference Room 308

RE: **SB2887,SD2, Relating to Taxation**

Chair Oshiro and Members of the Committee:

ARDA-Hawaii is the local chapter of the national timeshare trade association. Hawaii's timeshare industry currently accounts for ten percent of the State's lodging inventory with 7,700 timeshare units. Timeshare has had consistent occupancy rates, even during the current tough economic times. This has made our industry a vital partner and a diverse component of the visitor industry in Hawaii.

ARDA-Hawaii supports SB2887, SD2, but recommends that Section 235-68(f) (2) be deleted from the bill and be replaced as follows:

- If the amount realized on the disposition of real property that is a time share interest, as defined in section 514E-1, does not exceed \$100,000.

As currently written, all non-resident sellers of timeshares in resale transactions must either pay the Hawaii Department of Taxation ("DOTAX" or the "Department") five percent of the gross proceeds or file a Form N-288 with DOTAX. The N-288 is to substantiate that the property was sold at a loss. DOTAX must then quickly review and approve the N-288 and return it to the seller prior to closing. If the Department cannot timely do this, the seller will need to have five percent withheld and then file a non-resident return, claiming a refund for the full amount of the withholding.

There are an increasing number of timeshare transactions in Hawaii each year that are either property exchanges wherein the timeshare owner is "upgrading" their current

timeshare interest by buying a more expensive one (upon which taxes will be paid) or that involve the foreclosure process where a timeshare owner who is in default of the terms of their mortgage or assessment payment and wishes to provide the developer or association a deed in lieu of foreclosure. In these cases, there is either no taxable gain by the timeshare owner as they are either spending more money on the upgraded interest than their original timeshare was worth or they are simply deeding over their timeshare interest to the developer for no monetary gain. In such cases, the consumer owes no revenue to the State because there is no taxable gain, so it does not make sense to require the timeshare owner to file an N-288 with the State.

New Section (h) is intended to insure that inadvertent failures to file by non-residents will not have their liability (other than interest and penalties) exceed the actual taxable amount owed to the State had the consumer filed timely.

For these reasons, we believe it would be beneficial for the State as well as the non-resident timeshare owners to have this change in the law.

Thank you for the opportunity to offer testimony in support of this measure.

**HOUSE COMMITTEE ON
FINANCE**

March 17, 2010

Senate Bill 2887, SD 2 Relating to Taxation

Chair Oshiro and members of the House Committee on Finance, I am Rick Tsujimura, representing Marriott Vacation Club International (Marriott).

Marriott opposes Senate Bill 2887, SD 2 Relating to Taxation as written, which provides that in the case of a foreclosure, a deed in lieu of foreclosure, or in a situation wherein real property is acquired in Hawaii that is worth more than the real property in Hawaii for which it is exchanged, no withholding under Chapter 235 is required. The bill also provides relief for transferee from tax liability if the department of taxation has collected from the transferor, an amount equal to or exceeding the tax liability. Senate Bill 2887, SD 1 included a "*de minimus* exemption" as allowed in several other states, notably California. However, the SD 2 deleted said exemption.

We request that the "*de minimus* exemption" be included as the amount of staff time to process disposition requests (Form N-288B) or the withholding certificates (Form N-288A) and subsequent taxpayer refunds (Forms N-288C or N-15) would be lessened and, due to the low probability of a taxable gain, would have a negligible effect on state revenues. Generally most time share sales to second buyers have not had an appreciable gain and in the case of upgrades, no gain.

For these reasons, if the current bill is amended to the SD 1 version, we support your passage of this measure; however, if the "*de minimus* exemption" is not included, we request that your committee hold the measure.

Thank you for the opportunity to present this testimony.