

HB354

TESTIMONY

NEIL ABERCROMBIE
GOVERNOR

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STATE OF HAWAII
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SENATE COMMITTEE ON JUDICIARY AND LABOR

**TESTIMONY OF THE DEPARTMENT OF TAXATION
REGARDING HB 354, HD 1
RELATING TO TAX APPEALS**

TESTIFIER: FREDERICK D. PABLO, DIRECTOR OF TAXATION (OR
DESIGNEE)
COMMITTEE: JDL
DATE: MARCH 21, 2011
TIME: 8:30AM
POSITION: DEFER TO ATTORNEY GENERAL

This measure prohibits discovery and limits the award of costs in controversies involving small claims tax appeals.

The Department of Taxation (Department) defers to the Attorney General on this legislation.

The Department of the Attorney General represents the Department in Tax Appeal Court and therefore is the proper authority to comment on this measure.

DEPARTMENT OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU

REAL PROPERTY ASSESSMENT DIVISION
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GARY T. KUROKAWA
ADMINISTRATOR

March 18, 2011

Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Judiciary and Labor Committee
State Senate
Hawaii State Capitol, Room 407
Honolulu, Hawaii 96813

RE: HB 354, HD1 – RELATING TO TAX APPEALS

The City and County of Honolulu, joined by Maui County, opposes HB354, HD1 and requests your approval of its proposed amendments to HB354, HD1. Below are the reasons for the proposed amendments to HB354, HD1:


Barring pre-trial discovery in tax appeal cases brought under the small claims procedure would prevent both parties from narrowing the issues and obtaining information that could potentially settle the case. Under the small claims procedure in Tax Appeal Court ("TAC"), pretrial discovery is already restricted. Neither party may issue subpoenas or take depositions without obtaining prior written approval from the TAC. Also, the current practice of the TAC is to limit the number of interrogatories the City can pose. The Real Property Assessment Division ("RPAD") of the City proposes, at a minimum, that HRS 232-7, Section (a)(1) of HB354, HD1 be amended to allow pretrial discovery with prior court approval.

We caution that a complete bar of pre-trial discovery, as proposed by HB354, HD1, cannot operate to prevent a site inspection after an appeal has been filed in TAC. Under the Hawaii Constitution, the counties have the exclusive authority over real property tax matters. Thus, the Director of BFS, may examine the records, personal property and real property of any person for purposes of discharging the Director's duties. See ROH Sections 8-1.3(g) and (h). To the extent that there is any conflict between HRS Section 232-5 and ROH Sections 8-1.3(g) and (h), it is the ordinance, and not the statute, that is controlling. State of Hawaii v. City and County of Honolulu, 99 Haw. 508, 520, 57 P.3d 433, 445 (2002) citing Weinberg vs City and County of Honolulu, 82 Hawai'i 317, 922 P.2d 371 (1996).

Subsection (b) is amended to conform HRS Section 232-5 to the amendments made to HRS Sections 232-16 and -17 in 2007, making service on the director of taxation or the real property assessment division (in the case of a real property tax appeal) **jurisdictional**.

Thank you for your time and the opportunity to testify on this important matter.

Respectfully Submitted,


Gary T. Kurokawa, Administrator
Real Property Assessment Division
City and County of Honolulu

A BILL FOR AN ACT

RELATING TO TAX APPEALS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 232-5, Hawaii Revised Statutes, is amended to read as follows:

"§232-5 **Small claims.** (a) The tax appeal court shall establish by rule a small claims procedure that, to the greatest extent practicable, shall be informal[-]; provided that:

(1) No pretrial discovery shall be allowed without the prior written approval of the court; and

(2) Costs and fees awarded to the prevailing party shall be limited to fees paid directly to the court in the course of conducting the tax appeal at issue.

(b) Any protesting taxpayer who would incur a total tax liability, not including penalties and interest, of less than \$1,000, by reason of the protested assessment or payment in

question, may elect to employ the procedure established by this section upon:

- (1) Payment per taxpayer of a non-refundable filing fee set pursuant to rules adopted by the supreme court, which shall not exceed \$25; and
- (2) Filing with the tax appeal court a written statement of the facts in the case, together with a waiver of the right to further appeal.

The tax appeal court shall cause a notice of the appeal and a copy of the statement to be served on the director of taxation and in the case of an appeal from a decision involving a county as a party, the real property assessment division of the county involved."

SECTION 2. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect on July 1, 2011.

INTRODUCED BY: _____

TAXBILLSERVICE

126 Queen Street, Suite 304

TAX FOUNDATION OF HAWAII

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: TAX APPEALS, Small claims tax appeals

BILL NUMBER: HB 354, HD-1

INTRODUCED BY: House Committee on Judiciary

BRIEF SUMMARY: Amends HRS section 232-5 to provide that the tax appeal court: (1) shall not allow pretrial discovery; and (2) shall provide that costs and fees awarded to the prevailing party shall be limited to the fees paid directly to the court in conducting the tax appeal at issue.

EFFECTIVE DATE: January 7, 2009

STAFF COMMENTS: The proposed measure would clarify that pretrial discovery is not allowed in the small claims division of the tax appeal court. While pretrial discovery is permitted in the civil courts, the small claims court is meant to handle claims quickly and cheaply. Legal representation is not permitted in small claims trials, but an attorney may be consulted with prior to trial.

Digested 3/18/11

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March 18, 2011

The Honorable Clayton Hee
Chairman Senate Judiciary and Labor Committee
The Honorable Maile S.L. Shimabukuro
Vice Chair Judiciary and Labor Committee
Hawaii State Capitol
Honolulu, Hawaii

RE: Additional Testimony in Favor of HB354 Relating to Tax Appeals--Small Claims (Parallel to SB34)

Dear Senators Hee and Shimabukuro and Honorable Members of the Senate Judiciary and Labor Committee,

Please accept this letter testimony as well as my original testimony letter dated February 4th, 2011 in favor of HB354, which is attached for your convenience. HB354 is the same measure as SB34 which you have already considered and approved, with an amended effective date to allow further discussion. Your consideration of this testimony is greatly appreciated.

I would like to take this opportunity to respond to testimony opposing this measure submitted by the City and County of Honolulu. This opposition is without merit for the following reasons:

1. Barring Pre-trial Discovery in Small Claims Tax Appeals Will NOT Hamper the Ability of the Government to Settle Cases.

Allowing government lawyers to use the tactic of pre trial discovery in small claims court will coerce capitulation by taxpayers. Citizens will simply give up when faced with having to respond to voluminous discovery demands such written interrogatories, requests for admissions, requests for disclosures of witnesses, demands to produce documents, etc. Permitting discovery will not facilitate fair settlements.

What's more, once the discovery door is opened, citizens will face more obstacles to an expeditious hearing on their appeal than they could ever imagine. For example, there will inevitably be multiple court motions and hearings in Honolulu from government lawyers demanding responses to discovery. There will be motions for monetary sanctions. There will be requests for dismissal of an appeal for alleged failure to comply

(to the lawyers' satisfaction) with discovery rules. Taxpayers won't know which end is up.

2. Discovery is Inappropriate Even With the Requirement of Prior Court Approval.

The opposition is very anxious to keep this unfair strategic advantage against taxpayers. This advantage is maintained even by allowing discovery by "court order" as proposed by the County of Honolulu.

The reason is clear. Government lawyers can and will very easily file boilerplate written motions in court requesting pretrial discovery and setting a court date in Honolulu for a hearing. This alone will force the taxpayer to give up the appeal rather than lose money by taking time off work and traveling to Honolulu--all to deal with a preliminary skirmish over a \$1,000 or less dispute. And as with all other discovery, taxpayers are in no way equipped to respond to demands from skilled litigators which require strict compliance with complex rules and procedures.

It is important to note that no taxpayer will initiate a discovery request in a small claims case because they don't even know what "discovery" is. Only government litigators will seek discovery. There couldn't be a more uneven playing field.

Also, the fact is that there simply are no issues so important or complex in a case involving a \$1,000 or less dispute that would justify allowing the use of discovery. And for the very odd situation the opposition refers to involving multiple cases, it is up to the court to decide if such an appeal is even appropriate for small claims court.

Lastly, contrary to the opposition's contention, this measure does not deal with site inspections. The opposition seems to suggest that the only way an assessor can inspect a property is by pre-trial discovery in a tax appeal. This is not the case. Moreover, it is obvious that any taxpayer who refuses to cooperate with a reasonable request from an assessor to inspect a property will have his case viewed very unfavorably by the court.

3. Three of the Four Amendments Proposed by the City and County of Honolulu are Inappropriate and Should be Rejected.

a. Section (a)(1) has been changed to add new language about the aggregate amount of taxes. This is unnecessary given the existing language in section (b) setting up the small claims jurisdictional limit of "...total tax liability, not including penalties and interest, of less than \$1,000...".

Also, for the reasons mentioned above, the changes to this section completely undercut the purpose of this measure by allowing discovery with a court order. All amendments to this section of the bill should be rejected.

b. Section (a) (2) of the proposed change to the provision limiting the award of costs garbles the language of the bill making it unintelligible and should be rejected.

c. Section (a) (3) is newly added and deals with a taxpayer's right to choose whether to appeal to the tax court directly or to a county administrative body. This issue has nothing to do with this measure which concerns only small claims court pre-trial

discovery and the awarding of costs. Also, this added section acts to limit a taxpayer's appeal rights and should not be dealt with here. Therefore this section is inappropriate and should be rejected.

d. Section (b) (3) amendments (erroneously referred to by Honolulu as (a)(3)) requiring notice of appeal be served on the county real property assessment division is not objectionable and could be adopted.

4. Conclusion.

HB354 should be enacted as introduced except for the change in notice provisions contained in City and County of Honolulu's proposed amendment to section (b) (3).

Respectfully Submitted,


Larry Shapiro

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February 4, 2011

TESTIMONY IN FAVOR OF SB 34 AND HB 353 and 354—"Tax Appeals; Small Claims"

To: The Senate Judiciary and Labor Committee, Senate Ways and Means Committee and the House Judiciary Committee

Dear Honorable Committee Members,

Please accept this letter in support of the above measures. Also attached for your convenience is a research report from the Senate Majority Research Office dated January 12, 2011. Your consideration of this issue is greatly appreciated.

Brief Background

Hawaii has civil small claims courts with streamlined and very informal procedures for resolving small disputes. There is also a small claims division for tax appeals of less than \$1,000, which is part of the Hawaii Tax Court.

The measure would generally make the rules of the small claims division of the Hawaii Tax Court consistent with Hawaii's civil small claims procedures by banning pre-trial discovery and limiting the award of costs.

Why This Legislation is Needed

Appeals to the Tax Court Small Claims Division typically involve a citizen on one side and a government entity on the other. The deck will be stacked against the taxpayer because the government entity, such as a county, is represented by its lawyers.

The problem is that the existing rules allow pre-trial discovery even in these very small cases. Citizens seeking a hearing have been "papered to death" by opposing counsel with voluminous written interrogatories, requests for admissions, demands for written disclosures of witness, and requests for depositions. Compounding the burden from these discovery requests come related motions and mandatory pre-trial appearances in Tax Court in Honolulu, which are especially problematic for neighbor island citizens.

All of this occurs before there is even a hearing on the merits of the small claims case. Taxpayers have no way to deal with matters like these since only lawyers skilled in litigation techniques can understand and respond to them.

In addition, because of an ambiguity in the law, Hawaii Code of Civil Procedure Section 68, which could leave a taxpayer liable for excessive costs, has been abused. This situation involves a settlement offer under Section 68 from a government lawyer, which threatens a taxpayer that if the offer is not accepted, the citizen could be liable for all of the entity's costs incurred if they receive less from the court than the amount offered.

Such a tactic is unheard of in the small claims context and is entirely inappropriate because of its coercive effect in such relatively minor cases. This bill would clarify and limit the award of costs to those actually paid to the court.

Benefits of this Legislation

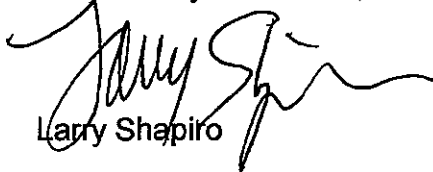
This simple bill would prevent the abuse of the court system, promote justice and fairness, stop the intimidation of innocent taxpayers and "level the playing field". The current rules make it impractical for an aggrieved citizen to exercise the right to a judicial appeal. Most taxpayers faced with discovery demands from lawyers representing their opponent will just give up and abandon their appeal. Moreover, the existing rules are totally inconsistent with the informal nature of a small claims court procedure.

Fiscal Impact

The measure would have no fiscal cost. In fact, there would be significant cost saving to government entities by not wasting valuable resources on inappropriate legal tactics.

All of the things described in this letter happened to me and hopefully your action will prevent it from happening to others.

Respectfully Submitted,



Larry Shapiro



RE: SB 34 AND
HB 353 / 354
TAX APPEALS; SMALL
CLAIMS


The Senate

STATE CAPITOL
HONOLULU, HAWAII 96813

January 12, 2011

MEMORANDUM

TO: Honorable Rosalyn H. Baker
Senator, 5th District

FROM: Rebecca L. Anderson 
Senate Majority Research Office

RE: Pretrial Procedure in Tax Court

Question Presented:

Is potential legislation to limit pretrial discovery procedure and the award of fees in tax appeal cases permissible?

Background:

A constituent related concerns about the procedural burdens and potential liability for excessive costs in an appeal of a real property tax assessment subject to section 232-5, Hawaii Revised Statutes (HRS). Although the amount in dispute in this matter was less than \$1,000, the constituent reports that overly burdensome pre-trial discovery and threat of liability for excessive court costs violate the statutory prescription of a "small claims procedure that, to the greatest extent practicable, shall be informal," §232-5, HRS. The constituent believes that pre-trial discovery creates an unfair situation where it becomes impracticable for an aggrieved citizen to exercise the right of judicial appeal.

Short Answer:

The current tax appeal statutes delegate the responsibility for creating policies and procedures for tax appeals to the judiciary. If the legislature chooses to exert more control over the tax appeal process, the legislature may do so by enacting legislation.

Discussion:

The legislative power of the State is vested in the legislature. HI Const. Art. III, §3. As such, the legislature is empowered to make laws "over all rightful subjects of legislation not inconsistent with" the constitutions of the State of Hawaii or of the United States. *Id.* The law-making power of the legislature extends to the power to statutorily define jurisdiction and procedure for the courts of the state. *Sherman v. Sawyer*, 63 Haw. 55, 57. The judiciary is an independent, co-equal branch of state government, HI Const., Art. VI, §1; §601-5, HRS, with the chief justice as its administrative head. HI Const., Art. VI, §5. The chief justice is empowered by the state constitution to make rules, which shall have the force of law, for the conduct of all courts. HI Const., Art. VI, §6. As co-equal branches of the state, the legislature and the judiciary largely share the authority for determining the conduct of court proceedings. However, as the ultimate law-making authority of the state, the legislature is empowered to statutorily direct the conduct of the courts, including by establishing courts and defining their jurisdiction. HI Const. Art. VI, §1; *Sherman v. Sawyer*, *supra*.

The legislature enacted chapter 232, HRS, to provide an avenue of judicial relief for taxpayers aggrieved by tax assessments. In creating this venue for contesting tax matters, the legislature largely delegated the responsibility for enacting procedural rules to the judiciary, §232-14, HRS, specifying that the procedure should be "a small claims procedure that, to the greatest extent practicable, shall be informal." §232-5, HRS. The small claims procedure referred to is the procedure created by chapter 633, HRS, for the disposition of cases where the amount in controversy does not exceed \$3,500 or where the matter at issue involves a security deposit in a residential landlord-tenant relationship. §633-27, HRS. The statutes creating the small claims court allow for a simplified procedure that is responsive to the needs of unsophisticated individuals such as allowing a clerk of court to assist with preparation of documents, §633-28(a), HRS, allowing for uncompensated representation or assistance by any person, §633-28(b), HRS, limiting some fees to smaller amounts than generally allowed and providing a simple process for waiver of fees for individuals who cannot afford them, §633-29, HRS.

Although the legislature did codify some particulars of the tax appeal process in statute, including requirements for amount in controversy, maximum filing fees, and filing requirements, §§232-5, 232-13, HRS, most procedural aspects of the tax appeals process are determined by the judiciary. For example: cases are assigned by the administrative judge of the first circuit and sessions of the tax appeal court are held at

times and places as determined by the court, §§232-8, 232-10, HRS; evidence is accepted according to the discretion of the court, §232-13, HRS; and procedural rules are adopted and administered by the supreme court, §232-14, HRS. In context of the legislature's grant of rule-making and procedural authority to the judiciary, and the qualifying language "to the greatest extent practicable," the directive that tax appeals adhere to a "small claims procedure" is more descriptive than prescriptive. However, if the legislature chooses to do so, it may, within the exercise of its law-making power, statutorily direct the conduct of the tax appeals court in a more particular manner than it currently does. Specifically, the legislature may enact procedural statutes such as limiting pre-trial discovery or placing a cap on costs that may be awarded in a tax appeal.

Conclusion:

Although the judiciary is a separate and co-equal branch empowered by Hawaii's constitution and statutes currently exist for the judiciary to direct its own internal operations, the legislature may exercise its own constitutional law-making power to provide statutory direction to the tax appeals process.

If you have any questions regarding this matter, please do not hesitate to contact our office at 586-6770.