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STATE OF HAWAII
DEPARTMENT OF TAXATION

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HOUSE COMMITTEE ON JUDICIARY

TESTIMONY OF THE DEPARTMENT OF TAXATION REGARDING HB 354 RELATING TO TAX APPEALS

WRITTEN TESTIMONY ONLY

TESTIFIER: FREDERICK D. PABLO, DIRECTOR OF TAXATION
 (OR DESIGNEE)
COMMITTEE: JUD
DATE: FEBRUARY 22, 2011
TIME: 2:00PM

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.

LARRY J. SHAPIRO, J.D.
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February 4, 2011

Via Fax 808-586-6211 (Representative Keith-Agaran)
Via Fax 808-586-6189 (Representative Rhoads)
6 Pages

The Honorable Gilbert S.C. Keith-Agaran
Chairman House Judiciary Committee
The Honorable Karl Rhoads
Vice Chair House Judiciary Committee
Hawaii State Capitol
Honolulu, Hawaii

RE: H.R. 353 and 354


Dear Representatives Keith-Agaran and Rhoads,

I am writing to seek your help in holding a hearing on pending H.R. 353 and 354, "Tax Appeals; Small Claims". These bills prohibit discovery and limit the award of costs in controversies involving small claims tax appeals. The measures clarify and strengthen the small claims rules to prevent abusive practices. They were introduced by Representative McKelvey based on my personal experience with the issue.

I am concerned that I will not be able to submit testimony if a hearing is held because I will be away and will have only limited internet access from mid- February to the end of March. Therefore I have prepared my testimony in advance and enclosed it with this letter, in the hope that your committee will review this bill. I know this might be an unusual procedure, but I would really appreciate it if there was a way you could make an accommodation for me. I spoke with Susan Wong from Representative Keith-Agaran's office who said this might be possible.

Thank you very much in advance for your consideration. If you have any questions, please do not hesitate to contact me.

Sincerely,


Larry Shapiro
Enc.

cc: Honorable Angus L.K. McKelvey
Via Fax 808-586-6161

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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

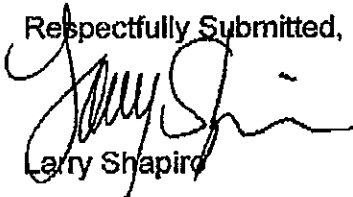
This simple bill would prevent the abuse of the court system, promote justice and fairness, stop the intimidation of innocent taxpayers and "level the playing field". The current rules make it impractical for an aggrieved citizen to exercise the right to a judicial appeal. Most taxpayers faced with discovery 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



The Senate


STATE CAPITOL
HONOLULU, HAWAII 96813

January 12, 2011

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

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.

2011-0322.MEMO.doc

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.