

LATE TESTIMONY

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**HOUSE OF REPRESENTATIVES
THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2011**

**COMMITTEE ON FINANCE
Hearing: March 31, 2011
Testimony on S.B. 1107, SD1,HD1
(Relating to The General Excise Tax)**

Chair Oshiro, Vice-Chair Lee and members of the Committee:

My name is Peter Fritz. I am an attorney specializing in tax matters. This written testimony is submitted to supplement my testimony at the hearing in opposition Part II of S.B. 1107, SD1, HD1.

According to Part II, Section 3 of this bill "the purpose of this part is to clarify the department of taxation's subpoena authority for civil and criminal tax investigations." Part II, Section 3 was added by the Committee on Economic Revitalization & Business by amending the bill to "include the substance of House Bill No. 801, H.D. 2, Regular Session of 2011." Unfortunately, STAND. COM. REP. NO. 1196 did not explain why the substance of H.B. 801 H.D.2 was inserted into the bill nor was any testimony submitted in support of such an action.

The only explanation for the need for clarification was provided in the Department's testimony on H.B. 801, H.D.2. The Department's testimony is as follows:

Specifically, the bill clarifies HRS § 231-7 in the followings ways:

- It clarifies that the Department has the power to subpoena witnesses and require production of records for purposes of conducting civil or criminal inquiries, investigations or hearings.
- It clarifies that the Department may require production of electronic records.
- It clarifies that compliance with a Department-issued subpoena shall not give rise to a civil action for damages on the part of the individual so compelled by the subpoena.

I respectfully submit that the testimony by the Department of Taxation is not sufficient to warrant favorable action by the Committee because the Department has not met its burden of providing enough information as is indicated by my response to each of the points raised by the Department.

First, a version of the statute authorizing the Department of Taxation to subpoena witnesses and require production of documents has been in the statutes for a long time. The Department has not explained why clarifications include additional language such as authorizing subpoenas in investigations and inquiries.. This language expands Department's authority; it does not clarify the statute. The Department needs to provide the Committee with the specific reasons why these additions are necessary.

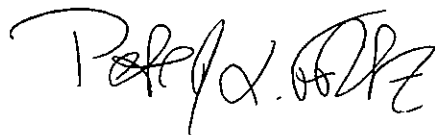
The Department testified that Part II, Section 3, "clarifies that the Department may require production of electronic records." Whether the Department of Taxation may require discovery of electronic records will be determined by a court applying Hawaii Rules on Evidence. My understanding is that discovery of electronic documents is currently permitted and I am aware that there has been discussion of expanding electronic discovery rules. The Department cannot expand the rules solely by statute. The Department has not met its burden of providing sufficient information to the Committee regarding how this law will override the Hawaii Rules on Evidence.

Finally, the Department's last point, that this bill "clarifies that compliance with a Department-issued subpoena shall not give rise to a civil action for damages on the part of the individual so compelled by the subpoena" in not correct. This exculpatory clause is new. It does not clarify any provision that currently exists in HRS § 231-7.

In addition, there may be a problem with the title of this bill. The bill relates to the general excise tax; however, the subpoena powers are not contained in Chapter 237, but are in the administration provisions in Chapter 231. The title may be too narrow to encompass a change to the administrative provisions.

I respectfully submit that the Committee should hold this bill because the Department has not provide sufficient information to justify its request to change the existing subpoena powers found in HRS § 235-7.

Thank you for the opportunity to testify.

A handwritten signature in black ink, appearing to read "Peter L. Fritz". The signature is written in a cursive, somewhat stylized font.