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## LATE TESTIMONY

To: The Honorable Angus McKelvey, Chair  
and Members of the House Committee on Economic Revitalization and Business

Date: Thursday, March 15, 2012

Time: 9:45 A.M.

Place: Conference Room 312, State Capitol

From: Frederick D. Pablo, Director  
Department of Taxation

Re: S.B. 2238 SD1 Relating to Taxation

The Department of Taxation (Department) understands the intent of S.B. 2238 SD1 and provides the following information and comments for the Committee's consideration.

S.B. 2238 SD1 seeks to repeal Act 155, Session Laws of Hawaii 2010, which added two provisions to the Hawaii general excise tax law. The first provision requires taxpayers to obtain a general excise tax license and file an annual tax return or potentially jeopardize general excise tax benefits. The second provision added trust fund liability for taxpayers that willfully failed to pay their general excise tax liability. These provisions were enacted to assist the Department in collecting outstanding general excise taxes owed.

### I. Denial of General Excise Tax Benefits

While the Department understands the concerns raised, subsequent to the enactment of Act 155, the Department issued Tax Information Release (TIR) No. 2010-05, dated July 29, 2010, which provided substantial guidance to taxpayers on the requirements of Act 155. Furthermore, in TIR No. 2010-05, the Department adopted 10 safe harbor provisions to which Act 155 would not apply:

"The following circumstances are deemed to have reasonable cause within the meaning of Act 155 and the Department will not utilize Act 155 to deny a general excise tax benefit in the following situations:

- 1) The provisions of the United States Constitution or laws of the United States prohibit the Department from imposing the tax;
- 2) The person is not "engaging" in "business" within the meaning of HRS § 237-2;
- 3) The amounts involved are not "gross income" or "gross proceeds of sale" as defined in HRS § 237-3(b);
- 4) The person is a Public Service Company and the gross income or gross proceeds are included in the measure of the tax imposed by Chapter 239, HRS;

- 5) Amounts received by persons exempt under HRS § 237-23(a)(3) through (6); provided that such person is exempt from filing federal Form 990, *Return of Organization Exempt from Income Tax*, or Form 990-EZ, *Short Form—Return of Organization Exempt from Income Tax*;
- 6) Amounts received that are exempt under HRS §§ 237-24(1) through (7) (with respect to certain insurance proceeds, gifts, bequests, compensatory tort damages, salaries or wages, and alimony);
- 7) Amounts received that are exempt under HRS § 237-24.8(a) (with respect to certain amounts not taxable for financial institutions);
- 8) Amounts received that are exempt under HRS § 237-29.7 (with respect to certain amounts not taxable for insurance companies);
- 9) Credit unions chartered under Chapter 412, HRS, and exempt from tax as provided in HRS § 412:10-122;
- 10) Any other amounts, persons, or transactions as determined by the Director to be made by subsequent Announcement or Tax Information Release."

If questions continue to be raised, the Department would prefer to provide taxpayers additional guidance through administrative rulings, than to repeal this measure in its entirety.

## II. Trust Fund Liability

Under Act 155, personal trust fund liability for willfully failing to pay general excise taxes was established to assist the collection and compliance functions of the Department. This provision provides the Department with the ability to pursue egregious non-payers, who simply create and dissolve businesses to avoid paying their general excise tax liabilities, and can only be used to address **willful** tax violators. For these reasons, the Department does not believe repeal of this provision is necessary.

Thank you for the opportunity to provide comments.