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To: The Honorable Marcus R. Oshiro, Chair
and Members of the House Committee on Finance

Date: Monday, April 2, 2012
Time: 3:00 p.m.
Place: Conference Room 308, State Capitol

From: Frederick D. Pablo, Director
Department of Taxation

Re: S.B. 2947 S.D. 2 H.D. 1 Relating to the Taxation

The Department of Taxation (Department) understands and appreciates the intent of this measure and offers comments as to the various provisions contained therein.

S.B. 2947 S.D.2 H.D. 1 seeks to establish monetary awards for whistleblowers whose information forms the basis for an action by the Department that results in the collection of additional taxes. It also authorizes the Director of Taxation to appoint an administrative appeals officer, prohibits certain penalties from being added to tax underpayments on which certain other penalties are already imposed, and requires that all advertisements and solicitations for transient accommodations to display the registration identification number or the website address containing the registration identification number. This measure has a defective effective date of July 1, 2112.

Whistleblower Awards: Regarding the whistleblower portion of the bill, the Department supports this measure as well as H.B. 1672, H.D. 1, which is similar in nature. However, the Department recommends that the bill be amended to more closely resemble the federal whistleblower incentives under Internal Revenue Code (IRC) section 7623. While this measure provides authority to the Director to modify the amount of award where the basis of an action is principally derived from sources other than the individual, the Department recommends the provisions of IRC § 7623(a) be added, which specifies that awards will be paid for information that leads to the detection of underpayments of tax or that leads to the detection and bringing to trial and punishment those persons found guilty of committing or conniving to commit tax crimes. In addition, IRC § 7623(a) also specifies that an award is justified only in those situations where an award cannot be provided under other provisions of law.

Administrative Appeals Officer: The Department is in strong support of this provision authorizing the Director to appoint an administrative appeals officer, which will allow the Department to implement Hawaii Revised Statutes (HRS) Section 231-7.5, which was enacted in 2009. Appointment of an appeals officer will enable the Department to greatly reduce the backlog of appeals cases that are currently pending. Not only will the process save time for both the taxpayer and the Department, it will allow the Department to finally resolve the cases and move forward in collecting taxes owed.

Prohibition Against Penalty Stacking: While the Department understands the concerns of the parties, the Department would note that the proposed draft may have the unintended consequence of preventing criminal prosecution in cases of fraud and willful failure to collect and pay over tax. This is because HRS §§ 231-36 and 231-36.4 are not civil penalty sections, but are rather criminal penalties, which are imposed only upon conviction of a crime by a competent court of law. By preventing the imposition of these penalties in cases where civil penalties have already been imposed under HRS §§ 231-36.6 and/or 231-36.8, this bill could prevent criminal prosecutions.

If the Legislature's intent is to only prevent the stacking of civil penalties, and not to prevent criminal prosecution in cases of fraud or willful failure to collect and pay over the tax, the Department recommends that the Committee amend the bill to refer only to HRS §§ 231-36.6 and 231-36.8.

The Department notes that even if the committee amends the bill to provide that the anti-stacking provisions of this measure apply solely to HRS §§ 231-36.6 and 231-36.8, the State would still not be in full conformance with the IRS's civil penalty procedures. Under federal law, willful failure to collect and pay over a tax, or to attempt to evade or defeat such tax, is subject to both civil penalties under IRC § 6672 and to criminal penalties under IRC § 7202.

Under IRC § 6672, the willful failure to collect and pay over tax, or to attempt to evade or defeat such tax, allows the imposition of a penalty of up to 100% of such tax otherwise due. This 100% penalty is intended to and does in fact act as a major deterrent in preventing a taxpayer failing to collect and/or pay over the subject tax or attempting to evade or defeat the tax. This 100% penalty is the primary reason why the IRC contains an anti-stacking provision.

Under Hawaii tax law, however, there is no 100% civil penalty for willful failure to collect and pay over the tax or to attempt to evade or to defeat such tax. Consequently, the anti-stacking protection is much less of an issue.

If this anti-stacking penalty provision is adopted, then the Department suggests that Legislature should also amend the various penalty provisions to authorize the imposition of a 100% penalty in cases of failure to collect and pay over a tax or in attempting to evade or defeat a tax. To do so, the Department recommends that: 1) section 2 of this measure be deleted; and 2) new subsection (e) in section 3 of the bill be replaced with the following language instead:

"(e) This section shall not apply to any portion of an underpayment on which a penalty is imposed under section 231-36.6."

Finally, the Department would note that if a taxpayer desires to contest the imposition of multiple penalties, there are various remedies available to the taxpayer under existing law. For example, under HRS §231-3(12), the Department has the authority to remit penalties and interest in cases not involving fraud or willful violation of law. A taxpayer also has all rights of appeal and judicial review concerning the imposition of any tax or addition to tax, such that the rights of the taxpayer are already adequately protected.

Transient Accommodations Identification Disclosure Requirements: The Department is in support of the requirement that all advertisements and solicitations of transient accommodations disclose the appropriate transient accommodation registration identification number issued by the Department. This requirement will provide an additional enforcement tool for the Department, as well as reduce the amount of staff resources needed to enforce the provisions of Chapter 237D.

Thank you for the opportunity to provide comments.

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Monday, April 02, 2012 1:47 PM
To: FINTestimony
Cc: mahana1012@yahoo.com
Subject: Testimony for SB2947 on 4/2/2012 3:00:00 PM

Testimony for FIN 4/2/2012 3:00:00 PM SB2947

Conference room: 308
Testifier position: Oppose
Testifier will be present: No
Submitted by: Kenneth Green
Organization: Individual
E-mail: mahana1012@yahoo.com
Submitted on: 4/2/2012

Comments:

You might want to check the effective date! We will all be dead.

LATE TESTIMONY