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LATE TESTIMONY

To: The Honorable Gilbert S.C. Keith-Agaran, Chair
and Members of the House Committee on Judiciary

Date: Thursday, March 15, 2012

Time: 2:00 p.m.

Place: Room 325, State Capitol

From: Frederick D. Pablo, Director
Department of Taxation

Re: S.B. No. 2998, S.D. 1, Relating to Tax Penalties

The Department of Taxation (Department) appreciates the intent of this measure, but has some comments and concerns regarding section 2.

S.B. 2998, S.D. 1 prohibits penalties for substantial understatements or misstatements and erroneous claims for refund or credit from being added to tax underpayments on which other penalties have been imposed.

Specifically, if the amendment to section 231-36.4, Hawaii Revised Statutes (HRS) is passed in this form, it may have the effect of preventing prosecution in cases where the Department has assessed a penalty for erroneous claim of refund or credit. The Department defers to the Department of the Attorney General regarding the bills potential to prevent criminal prosecutions

Section 231-36.4, HRS regarding the wilful failure to collect and pay over tax is criminal in nature because a conviction can result in a fine, imprisonment or probation. The Department suggests that section 2 be deleted. If it is the Committee's intent to conform to the Internal Revenue Code (IRC), the Department recommends the Committee adopt a civil penalty statute similar to IRC section 6672 containing a civil accuracy-related anti-stacking provision without amending HRS section 231-36.4.

The IRC has separate criminal and civil penalty sections regarding the willful failure to collect and pay over tax. IRC section 7202 is the criminal section and does not preclude any kind of stacking. IRC section 6672 is the civil penalty section and precludes accuracy-related penalties to be stacked on the 100% penalty assessed under IRC section 6672. Stacking is precluded under IRC section 6672 because of the severity of the penalty at 100%. However, stacking is allowed for penalties assessed for erroneous claims for refunds or credits under IRC section 6676.

Thank you for the opportunity to provide comments.