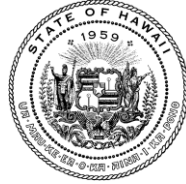


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ISAAC W. CHOY  
DIRECTOR OF TAXATION

To: The Honorable Donovan M. Dela Cruz, Chair;  
The Honorable Gilbert S.C. Keith-Agaran, Vice Chair;  
and Members of the Senate Committee on Ways and Means

From: Isaac W. Choy, Director  
Department of Taxation

Date: February 26, 2021  
Time: 9:30 A.M.  
Place: Via Video Conference, State Capitol

**Re: S.B. 787, S.D. 1, Relating to Taxation**

The Department of Taxation (Department) offers the following comments regarding S.B. 787, S.D. 1, for your consideration.

S.B. 787, S.D. 1, adds a new section in Hawaii Revised Statute (HRS) to requires any revenue estimate provided by the Department to the Legislature or to any executive or administrative office of the State to be accompanied by a description of the methodology used and assumptions made in providing the estimate. The measure also requires that the revenue estimate and description be open to public disclosure, inspection, and copying. The measure is effective upon its approval.

The Department is able provide a description of methodology used and assumptions made in providing the revenue estimate as currently written in S.B. 787, S.D. 1.

Thank you for the opportunity to provide comments on this measure.

# TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: MISCELLANEOUS, Disclosure of Department of Taxation Revenue Estimates

BILL NUMBER: SB 787, SD1

INTRODUCED BY: Senate Committee on Government Operations

EXECUTIVE SUMMARY: Requires that revenue estimates provided by the department of taxation to the legislature or to any executive or administrative office be accompanied by a description of the methodology used and assumptions made in providing the estimate. Requires the estimate and description to be open to public disclosure.

SYNOPSIS: Adds a new section to HRS chapter 231 to require that every revenue estimate provided by the department to the legislature or to any executive or administrative office regarding proposed state legislation shall be accompanied by a description of the methodology used and assumptions made in providing the estimate. The revenue estimate and description shall be open to public disclosure, inspection, and copying, notwithstanding sections 235-116, 237-34, and 237D-13, or any other law restricting disclosure of tax return or tax return information to the contrary.

EFFECTIVE DATE: Upon approval.

STAFF COMMENTS: At present, the availability of estimated revenue impact information on bills wending their way through the legislature is spotty at best. Even when the Department of Taxation testifies on tax bills, some testifiers share revenue impact information with the legislature; others don't; others share information with the legislative committees and leave the public in the dark; and still others share information with the committees and the public only in response to questions asked at a hearing. Having the information would be a great step toward openness and transparency in important legislative decisions.

To make the measure robust, we suggest that the bill needs to clarify when during the process the statement will be available to the public. If this is not done, overzealous people within the government can, and if past practice is followed will, argue that this information needs to be kept from the public's prying eyes. The result, usually, is that the information will be withheld from disclosure until it is no longer useful or relevant. For an example of how this game of cat-and-mouse takes place, we offer the following article, which the Foundation published on Oct. 2, 2017. Although the article involves a slightly different issue, the information there is still relevant.

## **Fritz v. Department of Taxation, and Why You Should Care (Published Oct. 2, 2017)**

Over the past several months, there has been a court fight brewing that could have changed how the Department of Taxation lobbies for legislation.

That's right. Not only special interest groups and activists lobby for legislation. The Department does too. Every year, it introduces and strongly supports "Administration Bills." Many of these propose to make the Department's job easier, but at the expense of taxpayer rights. So it's important for taxpayers to keep tabs on how the Department is pushing these bills.

One example of the above kind of bill was HB 2396 / SB 2925 in last year's legislative session. If a taxpayer files an amended federal income tax return or is adjusted by the IRS, current law allows an extra year for the Department to assess additional tax or for the taxpayer to claim a refund. The bill provided that only the Department, and not the taxpayer, could take advantage of this "bonus time," which is usually needed because tax audits take a while to conclude. The Foundation was concerned that this legislation created a "one-way street," or procedural trap, that could allow the State to retain money to which it was not entitled under law.

Peter Fritz, an attorney who used to work for the Department, tried to get the Department to disclose the letters, texts, and emails sent to legislators in 2009. "Can't do," the Department said. "Work product paid for by taxpayers normally needs to be made public, but policy deliberations can be withheld, and these communications are in that category." Fritz didn't agree, and asked the State Office of Information Practices (OIP) to rule on the matter. OIP ruled in Fritz's favor in 2011, ordering the Department to cough up the documents. The Department complied. But by the time it did so, it was years after the legislative session ended.

In the 2016 legislative session, Fritz tried again. The Department refused to provide documents relating to Administration Bills that it was then sponsoring, again relying upon the "deliberative process privilege" that the OIP had ruled in 2011 to be inapplicable. "Gotta do a case by case determination," the Department said. Fritz filed suit. In January 2017, well after the ending of the 2016 session, the Department "voluntarily disclosed" the documents, although explicitly saying that it "reserved any and all rights to withhold any other documents from disclosure on any and all grounds."

Those documents could have made a difference during session. When SB 2925, described above, was heard by the Senate Ways and Means Committee, then-Chair Jill Tokuda and Majority Leader J. Kalani English were particularly interested in whether the bill was a solution in search of a problem. When they pointedly asked the Department about it at the hearing, the Department representatives professed ignorance. The records later turned over, however, clearly showed that the Department was reacting to a case involving only one taxpayer. The legislation, by the way, ultimately died.

In the lawsuit, Fritz asked the court to take positive steps so that the Department can't again play cat-and-mouse. The State, of course, maintained that once they turned over the documents, the suit can no longer exist because courts are there to decide actual controversies, not purely academic issues. The circuit court judge agreed with the State, and the lawsuit will soon be dismissed.

When the Department of Taxation states a position in a communication to the Legislature, the public is entitled to know what that position is. This is especially important with a complicated subject like taxation, where the public relies heavily on guidance and interpretations put out by

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the Department. (Other legislators do too.) And it is critical to have a fully informed debate when the Department tries to coax legislators to change the law in a way that would make its job easier at the expense of taxpayer rights and protections.

Digested 2/24/2021