

ACT 115

H.B. NO. 3190

A Bill for an Act Relating to the Public Disclosure of Written Opinions by the Department of Taxation.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to open to public inspection written opinions of the department of taxation that interpret the tax laws, while at the same time maintaining the confidentiality of tax return information.

The viability of Hawaii's tax system depends upon the voluntary disclosure of information to the taxing authorities. The legislature finds that it is necessary to keep information disclosed by taxpayers confidential in order to maintain voluntary compliance with the tax laws. At the same time, the legislature finds that correct reporting can be enhanced by issuing guidance to taxpayers in areas

where the interpretation of the tax laws is unclear. Accordingly, this Act makes available to the public written opinions of the department in areas where the law is unclear.

This Act does not open to public inspection the voluminous routine correspondence with taxpayers concerning established principles of law. This Act is an exception to the well-established principle of confidentiality of tax information and thus, it is narrowly tailored to achieve its purpose to provide guidance on the interpretation of tax laws in order to enhance correct reporting, while maintaining the confidentiality of tax return information in order to maintain voluntary compliance with the tax laws. To protect the integrity of the voluntary disclosure system, doubts about whether information should be publicly disclosed shall be resolved in favor of nondisclosure.

SECTION 2. Chapter 231, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§231- Public inspection and copying of written opinions. (a) Written opinions shall be open to public inspection and copying as provided in this section, notwithstanding sections 235-116, 236D-15, 237-34, and 237D-13 and any other law restricting disclosure of tax returns or tax return information to the contrary. Except as provided in subsection (f), regarding the disclosure of the text of written opinions, chapter 92F shall not apply to tax returns and tax return information.

A written opinion may not be used or cited as precedent unless otherwise provided by department rules.

(b) For purposes of this section, the term “written opinion” means a written statement issued by the department to a taxpayer, or to the taxpayer’s authorized representative on behalf of the taxpayer, that interprets and applies any provision in title 14 administered by the department to a specific set of facts. A written opinion generally recites the relevant facts, sets forth the applicable provisions of law, and shows the application of the law to the facts. A written opinion shall not include:

- (1) Any written communication from the department to any person in connection with the examination or audit of any person’s tax return, or in connection with collection activities relating to any person’s delinquent tax liability;
- (2) An information letter, which is a written statement issued by the department that provides general information by calling attention to a well-established interpretation or principle of tax law, whether or not it applies to a specific set of facts. An information letter may be issued when the nature of the request from the taxpayer suggests that the taxpayer is seeking general information, or where the department believes that general information will assist the taxpayer; or
- (3) A determination letter, which is a written statement issued by the department that applies an interpretation or principle of tax law clearly established by statute, rule, written opinion, or published court decision to a particular set of facts. A determination letter includes the grant or denial of consent, permission, exemption or registration, or a routine correspondence in response to taxpayer inquiries. A determination letter shall be designated as such, and

shall indicate the clearly established interpretation or principle applied and its source.

(c) Before making a written opinion available for public inspection and copying under subsection (a), the department where possible shall segregate from the opinion trade secrets or other confidential, commercial, and financial information, and identifying details such as the name, address, and social security or tax identification number of the person to whom the written opinion pertains and of any other person identified in the written opinion. Segregated text shall not be disclosed under this section.

(d) Upon issuance of any written opinion, the department shall mail a notice of intention to disclose the opinion together with a copy of the opinion showing the text the department proposes to segregate to any person to whom the written opinion pertains (or any known successor in interest, personal representative, or other person authorized by law to act for or on behalf of such person).

(e) Except as otherwise provided in subsection (h), a written opinion, as segregated under subsection (c), shall be open to public inspection and copying no earlier than seventy-five days, and no later than ninety days, after the department's notice of intention to disclose is mailed. At the written request of a person to whom the written opinion pertains (or a successor in interest, personal representative, or other person authorized by law to act for or on behalf of the person), the preceding period may be extended, but the department shall make the written opinion available for inspection and copying no later than one-hundred-eighty days after the notice to disclose is mailed, including extensions.

(f) The department's decision as to what constitutes a written opinion is final. A decision concerning the disclosure of the text of written opinions may be contested, but only in the manner and within the time set forth in this subsection. Any person who meets the requirements of paragraph (1) or (2) and who has exhausted the administrative remedies as prescribed by rules adopted by the department may appeal within sixty days of the date of the department's decision to the office of information practices in accordance with procedures established by the office of information practices under sections 92F-15.5 and 92F-42(1). The office of information practices may examine the written opinion at issue, in camera, to assist in determining whether it, or any part of it, may be withheld. In determining whether information constitutes a trade secret or other confidential, commercial, and financial information, the office of information practices may consider and apply, in addition to any other relevant sources, interpretations of those terms under chapter 92F.

Only the following persons may contest a decision of the department concerning the disclosure of written opinions:

- (1) Any person:
 - (A) To whom a written opinion pertains (or a successor in interest, personal representative, or other person authorized by law to act for or on behalf of the person);
 - (B) Who has a material interest in maintaining the confidentiality of any written opinion or portion thereof; and
 - (C) Who disagrees with a decision by the department not to segregate information from any written opinion; or
- (2) Any person who is aggrieved by the department's denial of a request to inspect and copy any written opinion or portion thereof.

Any person aggrieved by a decision of the office of information practices may appeal the decision to the circuit court of the first judicial circuit, or of the

judicial circuit in which the request for the written opinion is made or in which a copy of the written opinion is maintained by the department. The appeal shall be filed within thirty days after the date of the decision of the office of information practices. The circuit court shall hear the matter de novo. Opinions and ruling of the office of information practices shall be admissible. The circuit court may examine the written opinion at issue, in camera, to assist in determining whether it, or any part of it, may be withheld.

Any person advocating nondisclosure or segregation under paragraph (1) shall have the burden of proof and persuasion, but any person under paragraph (2) need only establish the denial of a request and the department shall have the burden of proof and persuasion to justify the denial of the request to inspect and copy.

(g) Except for cases the circuit court considers of greater importance, proceedings before the court, as authorized by this section, and appeals therefrom, shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(h) Upon appeal to the office of information practices or a court under subsection (f), the written opinion at issue shall not be made available for public inspection and copying pending the final decision in the case. If the final decision in the case determines that the written opinion subject to the appeal shall be open and available to public inspection and copying, or that confidential or identifying information must be segregated, then the department shall make the written opinion available for public inspection and copying not later than thirty days after the decision becomes final. The office of information practices or the court may extend this thirty-day period for such time as the office of information practices or the court finds necessary to allow the department to comply with its decision.

(i) The department shall compile yearly an index in such form as the department determines of all written opinions issued during the preceding calendar year. Copies of the index shall be furnished upon the payment of 50 cents a page. Copies of written opinions shall be furnished upon the payment of \$1 a page.

(j) Except as provided in this section, written opinions shall remain subject to all laws governing tax returns and tax return information and the department shall not be required by any court to disclose any written opinion except as specifically authorized by title 14.

(k) No officer or employee of the department shall be in violation of any law prohibiting the disclosure of tax returns or tax return information, or in violation of any other law restricting the disclosure of information, due to the release of any written opinion pursuant to this section.

(l) The department may adopt rules pursuant to chapter 91 to implement this section."

SECTION 3. New statutory material is underscored.¹

SECTION 4. This Act shall take effect upon its approval and shall apply to written opinions dated after December 31, 1994.

(Approved June 8, 1994.)

Note

1. Edited pursuant to HRS §23G-16.5.