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**TESTIMONY OF
GARY S. SUGANUMA, DIRECTOR OF TAXATION**

TESTIMONY ON THE FOLLOWING MEASURE:

H.B. No. 1805, Relating to the Procedure for Payment Under Protest Lawsuits.

BEFORE THE:

House Committee on Judiciary & Hawaiian Affairs

DATE: Tuesday, February 06, 2024

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

Chair Tarnas, Vice-Chair Takayama, and Members of the Committee:

The Department of Taxation ("Department") offers the following comments regarding H.B. 1805 for your consideration.

H.B. 1805 would amend section 40-35, Hawaii Revised Statutes (HRS), to allow for interest earned on payments under protest in the State's litigated claims fund to be paid in nontaxation cases if the claimant prevails, and to establish a procedure for the disposition of moneys and refiling of actions when a payment under protest suit is filed prematurely. If a claimant's suit is determined to have been bought prematurely because an agency has not yet rendered a final decision, the claimant's payment under protest may be retained in the litigated claims fund. If the agency does not render a decision within 180 days after the date of the claimant's payment under protest, or decides in favor of the claimant, the agency will refund the payment with interest. If the agency renders a final decision against the claimant within 180 days, the claimant may, within two years after notice of that decision, refile the action for a refund of their payment. If the agency decides against the claimant and the claimant brings no suit or proceeding within two years of the decision, the money paid under protest will become a government realization. H.B. 1805 is effective upon approval.

As noted, this measure would allow a premature payment under protest made under section 40-35, HRS, to be retained in the State Treasury's "litigated claims fund" and then allow that payment to apply to the refiling of a claimant's section 40-35 lawsuit **within two years** after notice of a final agency decision. It should be noted, however, that section 40-35(b), HRS, currently requires any action to recover payment of taxes under protest to be commenced in the tax appeal court "within the thirty-day period" after payment under protest. The Department is unaware of any valid reason why the time limit to bring an action to recover payment of taxes made under protest should be two years for a premature payment, but thirty-days for a properly made payment. The Department respectfully requests H.B. 1805 be amended to require the refiling of a premature action to recover payment of taxes paid under protest to be brought within the thirty-day period after a final agency decision is made.

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

TAX FOUNDATION OF HAWAII

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SUBJECT: TAX APPEALS, Procedure for Payments Under Protest when Suit Brought Prematurely

BILL NUMBER: HB 1805

INTRODUCED BY: YAMASHITA

EXECUTIVE SUMMARY: Establishes a procedure for the disposition of moneys and refiling of actions when a payment under protest suit is filed prematurely.

SYNOPSIS: Amends section 40-35, HRS, to provide that if a payment under protest suit is brought prematurely and the claimant's suit is dismissed, the claimant's payment may be retained in the litigated claims fund. If the agency then renders a final decision, the claimant has two years to refile the suit. If the agency does not render a final decision within 180 days after the date of the claimant's payment, the payment is to be refunded to the claimant with interest while the litigants await the agency's final decision.

EFFECTIVE DATE: Upon approval.

STAFF COMMENTS: The justification for this bill is that *Grace Business Development Corporation v. Kamikawa*, 92 Haw. 608, 994 P.2d 540 (2000), held that if a taxpayer pays money under protest but then sues for a refund before the defendant agency has formally taken a position on whether the money is due, the appeal is to be dismissed. If the agency later decides that the money is indeed due, it is generally too late for the suit to be refiled (it needs to be filed within 30 days after the payment), potentially allowing the agency to keep the money whether or not the payment to the agency was legal. This bill prevents the Catch-22 situation described.

As an example, suppose a taxpayer is being audited. The auditor sends an email to the taxpayer directing him to pay \$10,000 in additional tax. The taxpayer does so and files suit under HRS section 40-35. The Department responds that the auditor's email was not a final agency determination, and the court dismisses the lawsuit. Assuming that 30 days have passed, under present law it appears that the taxpayer loses the money whether or not the taxpayer would have prevailed on the merits. Under the bill, the taxpayer's money is retained in the litigated claims fund. Assume further that a Notice of Final Assessment is then issued. The taxpayer can refile the lawsuit with no additional payment (except for the court filing fee) within two years after the Notice.

Digested: 2/3/2024