

SUBPOENA (“SUMMONS”) ENFORCEMENT UNDER HAWAII LAW

SUBPOENA AUTHORITY, DIRECTOR OF TAXATION; HAWAII REVISED STATUTES (HRS) SECTION 231-7; SCOPE AND SUBJECTS OF INQUIRY; CONTENTS OF SUBPOENA; RIGHTS OF WITNESSES; PROCEDURES

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[Act 101 of 2011](#) significantly expanded the “summons” authority of the Director of the State of Hawaii Department of Taxation. Hawaii Revised Statutes [Section 231-7](#) was substantially revised and increased in scope, expressly permitting the use of subpoenas in criminal, civil, and collection proceedings. Effective July 1, 2011, the contents and design of the revised HRS 231-7 suggest that the Department of Taxation may begin to use the subpoena power beyond criminal investigations into examination and collection functions.

The Department of Taxation has express statutory powers with respect to the assessment and collection of taxes, and the enforcement of the tax laws. See, HRS [Section 231-3](#). The Department has a criminal investigation division, and the criminal investigators appointed by the Director have the authority and powers of a police officer or deputy sheriff in the performance of their duties. HRS [Section 231-4.3](#).

The State of Hawaii [Department of Taxation](#) routinely uses its subpoena powers in criminal investigations, initially to obtain bank records. Bank records are typically used to determine whether there is potentially unreported or underreported income. After bank statements are analyzed, the subpoena power can be used in a more focused manner to obtain information from others, including the target taxpayer’s accountants and customers, and ultimately, directly from the taxpayer.

Taxpayers that are the focus of a civil or criminal inquiry frequently wonder whether they can resist the Department of Taxation’s efforts to obtain records from third-party record-keepers, such as financial institutions and customers. While not yet the known subject of a court decision, the revised section 231-7 appears to have clarified the permissible scope and conferred expanded powers upon the Department of Taxation with respect to obtaining these records.

Readers are cautioned that this is an overview of selected provisions of HRS Section 231-7 and that there is no substitute for the review of your matter by legal counsel.

SCOPE OF INQUIRY

The Director of the Department of Taxation may conduct broadly described civil and criminal investigations. See, Section 231-7(a). Appropriate subjects of such inquiries and investigations include (a) the assessment of tax; (b) the amount of tax; (c) the collection of any tax; and, (d) the financial resources of any delinquent taxpayer and the collectability of any delinquent tax. See, Section 231-7(a).

Act 101 answered a potentially outstanding question from prior law that the Director could use the subpoena authority of HRS Section 231-7 to gather information for a purely criminal investigation. See, [Conference Committee Report #118](#).

METHODS OF INQUIRY

Civil and criminal subpoenas have different sections. See, Sections 231-7(c) and 237-7(d), respectively. The provisions are similar but differ in important respects, described in part below.

Generally, the Director can issue subpoenas for documents in whatever form, including electronic records, and for testimony under oath from witnesses.

STANDARD FOR ISSUANCE OF SUBPEONA

The Director or Deputy Director of the Department of Taxation “shall give written approval for the issuance of a subpoena only after a review of the appropriateness of the issuance.” See, Section 231-7(c) and 231-7(d).

No standard is provided for the evaluation of the “appropriateness.”

Otherwise, the records sought must be “relevant or material” to the audit or investigation. Section 231-7(c) and 231-7(d).

CONTENTS OF SUBPOENA

HRS Section 231-7 contains specific requirements as to the contents of the subpoena. Among other items, the subpoena must contain a statement of the witness’ rights and the procedure for enforcing or contesting the subpoena.

A “witness” (called a “person” in Section 231-7) may or may not be affiliated with the “taxpayer” that the Department is investigating.

PROCEDURES UPON NON-COMPLIANCE

The Director can apply to the Circuit Court of the Circuit wherein the audit or investigation is being conducted (civil) or the witness resides (criminal) for an order enforcing the summons.

The court then must “cite” the person to appear before the court and produce to the materials and information sought by the subpoena. In civil matters, the person may “promptly” make a motion to quash or modify the subpoena, and the court may modify or quash if compliance “would be unreasonably or oppressive or would violate any privilege the person would be entitled to exercise in a court proceeding.” Otherwise, the court “shall” institute a contempt proceeding and, if the witness refuses to comply with the Order, in civil inquiries, the Court can order up to sixty days of jail time. HRS Section 231-7(c). At the conclusion of the jail time, the process can be re-started by the Director “as if the witness had not previously been called to testify.”

In criminal inquiries, Section 231-7(d) differs in content from the civil provision. Although not yet the subject of any known proceeding, it appears that in criminal inquiries the taxpayer may “promptly” file a motion to quash or modify. Analysis of the rights of, and prospects for, criminal targets to potentially quash a Department of Taxation subpoena issued to a third-party record-keeper is beyond the scope of this brief note.

No contempt procedure is set forth in the criminal section. See, HRS 231-7(d). This omission may have been intentional in light of the legislative history of HD 801, including differences between House and Senate Drafts and remarks contained in Committee Reports. See, [Senate Standing Committee Report #988 \(HB801 HD2 SD1\)](#).

PROTECTIONS FOR WITNESSES

In civil matters, witnesses not related to the taxpayer are allowed witnesses fees, mileage, and travel expenses (for travel between islands) as provided in court proceedings. Section 231-7(c). In criminal matters, witnesses are not

entitled to travel and attendance costs unless the witness and the Department agree that the witness shall travel outside of their district. Section 231-7(d).

In civil and criminal matters, witnesses are entitled to assert any privileges that they would be entitled to assert in court proceedings.

“Financial institutions” are provided with reimbursement at the rate of \$15 per hour for research and \$.50 per page for reproduction. Section 231-7(f). The section does not provide for reimbursement of research and reproduction costs for other witnesses, meaning, witnesses that are not “financial institutions.”

Witnesses may bring a motion to quash the subpoena, so long as it is “promptly made,” and the Court may quash or modify the subpoena if the compliance would be “unreasonable or oppressive” or would violate any privilege. See, 231-7(c). In civil matters, a witness appears to have two opportunities to move to quash, once upon application for enforcement and again during a contempt proceeding.

In criminal matters, as noted above, the circuit court does not have contempt powers pursuant to Section 231-7.

Finally, HRS Section 231-7(g) states:

A person or entity that is compelled to testify or produce documents, information, or other items by a subpoena issued pursuant to an audit, investigation, or hearing pertaining to another person or entity shall not be liable for damages arising from compliance with the subpoena.

At first blush, this provision appears to excuse anyone that complies with a subpoena from any civil liability for compliance. That would be a substantial protection indeed. The key word in this provision might well be “compelled” – something that is typically done by a Court.

CONCLUSION

The State of Hawaii Department of Taxation has powerful investigatory powers to inquire into civil, collection, and criminal matters. The Department can issue subpoenas to obtain relevant and material records and testimony from taxpayers and persons with knowledge thereof. Persons facing an investigation or inquiry, whether as a target or witness, should carefully consider and evaluate their legal rights.

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