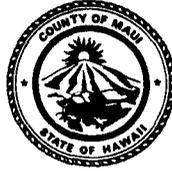


CHARMAINE TAVARES
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February 26, 2008

MEMO T O: Joseph Pontanilla, Chair
Budget and Finance Committee

F R O M: Traci Fujita Villarosa ^{TJV}
First Deputy Corporation Counsel

SUBJECT: Circuit Breaker Tax Credit (BF-58)

The purpose of this memorandum is to provide legal advice requested in your memorandum dated November 14, 2007 regarding the circuit breaker tax credit.

- (1) **May the Council pass an ordinance to re-open the filing period for taxpayers that received the CBTC for FY 2007, but did not file or receive the CBTC for FY 2008?**

At this time it is difficult to fully advise the Committee on this matter in the absence of a specific draft bill. While we reserve final opinion pending completion of such a draft bill, we provide the following general guidance to assist the Committee for purposes of this memorandum.

The Council may pass an ordinance to re-open the filing period for circuit breaker tax credit applications. "The power to determine what shall be subject to taxation and what shall be immune is traditionally within the province of the legislature." 16 Dennis Jensen, J.D. & Gail A. O'Gradney, J.D., The Law of Municipal Corporations § 44.41 (3rd ed. 2003).

As discussed during your October 29, 2007 meeting, the Hawaii Supreme Court has held "that exemptions [benefits/credits] are strictly construed against the taxpayer is a long-standing and uniformly applied rule of construction in this jurisdiction A doubt is fatal to the claim of exemption." In re Amco, 57 Haw. 253 (1976). A treatise on municipal law states:

Tax exemption is a privilege. It is never presumed, and property claimed to be exempt

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from taxation must clearly fall within the boundaries of the provision granting the exemption. The burden of proving an exemption from taxation is upon the party claiming the exemption. 16 Dennis Jensen, J.D. & Gail A. O'Gradney, J.D., The Law of Municipal Corporations § 44.63 (3rd ed. 2003).

The County of Maui Board of Review ("Board") generally denies late-filed appeals, adheres to filing deadlines in the Maui County Code ("MCC"), and construes exemption provisions against taxpayers. The Board generally denies late-filed exemptions, unless there is evidence of fault by the County.¹

If your Committee considers an ordinance to re-open the filing period for circuit breaker tax credit applications, we recommend that the bill limit the duration of any extended application deadline (e.g., only for this year or within 3 months of missing the deadline) and state that no other deadlines in Chapter 3.48, MCC, are affected.

We have no information or estimate as to how many taxpayers would qualify for such a re-opened period or how many would apply if given an opportunity to do so. Therefore, it is difficult to anticipate the consequences of such an ordinance.

¹ This position is shared by the Hawaii County Board of Review as explained by the Hawaii County Office of the Corporation Counsel:

The Board keeps in mind that the government operates in the public interest and everyone has a duty to pay taxes for that purpose. That is why exemptions are strictly construed against the taxpayer. If the Board freely allows late exemptions, the deadline will become meaningless and administration of taxes would be burdened by a steady stream of appeals and adjustments. And if the deadline is softened, all other deadlines become equally vulnerable. This would clearly be detrimental to the public interest.

Letter from Richard D. Wurdeman, Corporation Counsel, to Gary Kiyota, real Property Tax Administrator (Aug. 8, 1996).

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- (2) Would such an ordinance establish precedent for re-opening the filing period for all years in which the "Annual Circuit Tax Breaker Tax Credit Application" was used?

No precedent would be set by passing such an ordinance if such ordinance was narrowly crafted.

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

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xc: Kalbert K. Young, Director
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