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September 8, 2015

The Honorable Samuel M. Slom
Senator, Ninth District
Twenty-Eighth Legislature
State of Hawaii
State Capitol, Room 214
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Senator Slom:

Re: County Surcharge on State Tax

By your letter dated May 14, 2015, you requested a legal opinion regarding the constitutionality and legality of a statute authorizing a ten percent deduction and disbursement to the state general fund from the county surcharge on state general excise tax. This Attorney General opinion responds to your May 14, 2015, letter and addresses some of the concerns raised in the materials you provided with your May 14, 2015, letter.

I. Questions Presented.

- A. Does the deduction violate the Hawaii Constitution?
- B. Does the retention by the State of the difference between the ten percent retained by the State and the actual costs of administering the county surcharge violate the Equal Protection or Due Process Clauses of the United States Constitution?

II. Short Answers.

- A. The deduction of the ten percent of the county surcharge does not violate the Hawaii Constitution.

- B. The retention by the State of the difference between the ten percent retained by the State and the actual costs of administering the county surcharge does not violate either the Equal Protection or the Due Process Clauses of the United States Constitution.

III. Discussion.

A. The Legislature Has the Authority to Retain Ten Percent of the County Surcharge.

The ten percent deduction of the county surcharge for the costs of assessment, collection, and disposition of the county surcharge on state general excise tax into the state general fund is neither unconstitutional nor illegal. Article III, section 1, of the Hawaii Constitution provides that the Legislature's "power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." Furthermore, article VIII, section 3, of the Hawaii Constitution specifically provides "[t]he taxing power shall be reserved to the State." In Act 247, Session Laws of Hawaii 2005 ("Act 247"), codified, in part, as section 248-2.6 of the Hawaii Revised Statutes (HRS), the State of Hawaii Legislature (the "Legislature") enacted a provision that ten percent of the county surcharge on state tax shall be held by the State "to reimburse the costs of assessment, collection, and disposition of the county surcharge incurred by the State. Amounts retained shall be general fund realizations of the State." The right to legislate that these costs be borne by any county implementing the county surcharge is within the Legislature's power as defined by the Hawaii State Constitution. Furthermore, in determining whether an act of the Legislature is constitutional, the Hawaii Supreme Court "[has] consistently held . . . that every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. . . . [T]he infraction should be plain, clear, manifest, and unmistakable." Blair v. Cayetano, 73 Haw. 536, 542, 836 P.2d 1066, 1069 (1992) (quoting Schwab v. Ariyoshi, 58 Haw. 25, 31 564 P.2d 135, 139 (1977)).

B. The State Has Not Delegated Complete Taxing Authority to the Counties.

While Act 247 allows counties to enact a surcharge, it is not a complete delegation of the State's taxing authority. Act 247 allows for an increase in the general excise tax, deemed a county surcharge, if a county passes a specific ordinance by a certain date. Under Act 247, the counties may elect by ordinance to have the State collect the county surcharge and set the rate of the surcharge up to one-half percent (0.5%). The Legislature retains the power to change, by new legislation, all aspects of the county surcharge, including repealing the county surcharge in its entirety.

C. The Term "Shall" in Section 248-2.6(a), HRS, Is Mandatory, Not Directory.

Section 248-2.6(a), HRS, states in part, "[T]he director of finance shall deduct ten per cent of the gross proceeds of a respective county's surcharge on state tax to reimburse the State for the costs of assessment, collection, and disposition of the county surcharge on state tax incurred by the State." (Emphasis added). The use of the term "shall" in this instance means the action is required, or mandatory, and not discretionary, or directory. First, "[i]n determining whether a statute is mandatory or directory, the intent of the legislature must be ascertained." State v. Himuro, 70 Haw. 103, 105, 761 P.2d 1148, 1149 (1988). Here, the Legislature under its broad powers has determined that the "the costs of assessment, collection, and disposition of the county surcharge on state tax incurred by the State" will be ten percent of the county surcharge. The Legislature could have drafted Act 247 so that the State retained only the actual costs of administering the county surcharge but did not do so. Instead, the Legislature fixed the retained amount as a percentage, even though in any given year ten percent of the county surcharge might not equal actual administrative costs. Given the plain meaning of the words used in this section, it is clear that the Legislature intended for the State to retain ten percent of the county surcharge even if the amount retained does not equal the costs incurred to administer the surcharge. Second, we have not found any Hawaii Supreme Court cases involving the disposition of revenue into the general fund where the term "shall" was held to mean "may." The Hawaii Supreme Court has said:

"Shall" is defined as "will have to" or "must."
Webster's Third New Int'l Dictionary 2085 (1961). As
to the meaning of "shall," it is further stated: As

used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. *The word in ordinary usage means "must" and is inconsistent with a concept of discretion. Black's Law Dictionary 1375 (6th ed. 1990) (emphasis added).*

Leslie v. Bd. of Appeals, 109 Haw. 384, 393, 126 P.3d 1071, 1080 (2006). The Hawaii Supreme Court has recognized there are instances where the term "shall" can be discretionary and not mandatory in certain instances involving deadlines or whether individuals met statutory requirements for certain liens or permits.¹ In our opinion, these cases are distinguishable and we do not conclude that these cases are binding precedent. Consistent with the statute's plain language and legislative intent, and absent case law to the contrary, we interpret the term "shall" in section 248-2.6(a), HRS, as amended by section 2 of Act 240, Session Laws of Hawaii 2015, to be mandatory and not directory.

D. There Is No Conflict Among the Provisions of Act 247.

Concerns have been raised that the provision requiring ten percent of the county surcharge be withheld as general fund realizations creates conflicts within the intent of Act 247. The potential conflict occurs if the portion of the ten percent retained by the State that exceeds the actual costs of administering the county surcharge is used to pay for programs that are prohibited under section 46-16.8(c), HRS. Section 46-16.8(e), HRS, as amended by section 2 of Act 240, Session Laws of Hawaii 2015, provides:

¹ See, e.g., Styke v. Sotelo, 122 Haw. 485, 490, 228 P.3d 365, 370 (2010) (statute's fifteen-day time period for holding a show-cause hearing is directory not mandatory). Jack Endo Elec., Inc. v. Lear Siegler, Inc., 59 Haw. 612, 618, 585 P.2d 1265, 1270 (1978) (lien provision calling for the naming and service of notice upon the owner of fee title to the property is directory rather than mandatory). Perry v. Planning Comm'n, 62 Haw. 666, 677, 619 P.2d 95, 103 (1980) (deadline for planning commission to conduct hearing is directory not mandatory).

(e) Each county with a population greater than five hundred thousand that adopts or extends a county surcharge on state tax ordinance pursuant to subsection (a) or (b) shall use the surcharges received from the State for:

- (1) Capital costs of a locally preferred alternative for a mass transit project; and
- (2) Expenses in complying with the Americans with Disabilities Act of 1990 with respect to paragraph (1).

The county surcharge on state tax shall not be used to build or repair public roads or highways, bicycle paths, or support public transportation systems already in existence prior to July 12, 2005.

[Emphases added].

The limitation wording in section 46-16.8(e), HRS, expressly limits how a county with a population of greater than five hundred thousand may spend its allocation of the county surcharge "received from the State." That these limitations only apply to amounts received from the State by a county with a population greater than five hundred thousand is made clear in section 46-16.8(f), HRS:

(f) Each county with a population equal to or less than five hundred thousand that adopts a county surcharge on state tax ordinance pursuant to this section shall use the surcharges received from the State for:

- (1) Operating or capital costs of public transportation within each county for public transportation systems, including public roadways or highways, public buses, trains, ferries, pedestrian paths or sidewalks, or bicycle paths; and
- (2) Expenses in complying with the Americans with Disabilities Act of 1990 with respect to paragraph (1). [Emphases added].

The directives as to how the county surcharge should be expended in subsections (e) and (f) of section 46-16.8, HRS, are expressly limited to "amounts received from the State." Neither provision restricts how funds retained by the State are to be expended. Moreover, subsection (e) prohibits county surcharge funds from being used "to build or repair public roads or highways, bicycle paths, or support public

transportation systems already in existence prior to July 12, 2005," and subsection (f) requires the county surcharge funds to be used "for public transportation systems, including public roadways or highways, public buses, trains, ferries, pedestrian paths or sidewalks, or bicycle paths." Both provisions are clearly intended to apply only to their respective county and not to all the moneys collected as county surcharge. The Hawaii Supreme Court has stated, "[C]ourts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." Keliipuleole v. Wilson, 85 Haw. 217, 221, 941 P.2d 300, 304 (1997).

Giving equal consideration to both subsections (e) and (f) of section 46-16.8, HRS, we believe that no conflict exists.

Concerns were raised regarding another conflict existing between section 248-2.6(a) and (c), HRS, that provide:

(a) If adopted by county ordinance, all county surcharges on state tax collected by the director of taxation shall be paid into the state treasury quarterly, within ten working days after collection, and shall be placed by the director of finance in special accounts. Out of the revenues generated by county surcharges on state tax paid into each respective state treasury special account, the director of finance shall deduct ten per cent of the gross proceeds of a respective county's surcharge on state tax to reimburse the State for the costs of assessment, collection, and disposition of the county surcharge on state tax incurred by the State. Amounts retained shall be general fund realizations of the State.

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(c) For the purpose of this section, the costs of assessment, collection, and disposition of the county surcharges on state tax shall include any and all costs, direct or indirect, that are deemed necessary and proper to effectively administer this section and sections 237-8.6 and 238-2.6. [Emphases added].

The concern was that a possible conflict may exist if the ten percent held back under section 248-2.6(a), HRS, exceeds the costs described in section 248-2.6(c), HRS. We note there is no express requirement that the ten percent deduction in subsection (a) equal the amounts described in subsection (c). Instead, the Legislature used broad language to describe what costs were included:

[T]he costs of assessment, collection, and disposition of the county surcharges on state tax shall include any and all costs, direct or indirect, that are deemed necessary and proper
[Emphasis added.]

Importantly, section 248-2.6(a), HRS, explicitly states "amounts retained shall be general fund realizations of the State." The Legislature classified the entire ten percent of the county surcharge retained by the State as a general fund realization and neither restricted its use nor specified what to do with the funds if the ten percent exceeded the costs specified in section 248-2.6(c), HRS. The Legislature's authority to do this is within the broad powers granted to it in article III, section 1, of the State Constitution that provides the Legislature's "power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States" and article VIII, section 3, of the State Constitution, that reserves the power of taxation to the State. Because the Legislature was within its authority to retain ten percent of the county surcharge, even if the retained amount exceeds the actual costs of administering the surcharge, there is no conflict within Act 247 and no requirement that the State retain less than the ten percent specified in the statute.

E. The Legislature's Retention of Ten Percent of the County Surcharge Does Not Offend the Equal Protection or Due Process Clauses of the United States Constitution and the Hawaii State Constitution.

The State's retention of any funds in excess of what is deemed necessary and proper to administer the surcharge does not violate either the Equal Protection or the Due Process clauses.

1. Equal Protection.

As the result of Act 247 and decisions made by the counties, residents of the City and County of Honolulu ("Honolulu") are subject to the county surcharge while residents of the other counties in the State are not. The imposition of the county surcharge on only Honolulu residents does not violate the Equal Protection clause for the following reasons. The Hawaii Supreme Court stated:

When a denial of equal protection of the laws is alleged, the initial inquiry is whether the legislation is subjected to a "strict scrutiny" or a "rational basis" test. *Baehr v. Lewin*, 74 Haw. 530, 571, 852 P.2d 44, 63, *reconsideration and clarification granted in part*, 74 Haw. 645, 852 P.2d 74 (1993). If either a suspect class or fundamental right is involved, the court applies a strict scrutiny analysis. *Id.* Otherwise, the rational basis standard traditionally applies, that is, whether the statute has a rational relationship to a legitimate government interest.

State v. Nakata, 76 Haw. 360, 379, 878 P.2d 699, 718 (1994).

Here, the imposition of the county surcharge on the residents of Honolulu does not involve either a suspect class or a fundamental right; therefore, the statute should be evaluated on the rational basis standard. Furthermore, the Hawaii Supreme Court has recognized that "judicial review over a statute under the rational basis test is a very limited one. Instead of engaging in a rigorous examination of the objectives behind the legislative enactment, the court will only seek to determine whether any reasonable set of facts can be conceived to uphold the challenged statute." Daoang v. Dep't of Ed., 63 Haw. 501, 504-05, 630 P.2d 629, 631 (1981) (emphasis added). The United States Supreme Court also recognizes the limited review under the rational basis test stating:

[A] legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge if there is any reasonably

conceivable state of facts that could provide a rational basis for the classification."

Heller v. Doe, 509 U.S. 312, 320 (1993) (citations omitted).

The Supreme Court went even further, noting:

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."

Id. (citations omitted and emphasis added). Furthermore,

A statute is presumed constitutional . . . , and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotation marks omitted), whether or not the basis has a foundation in the record.

Id. at 320-21. And finally, the Hawaii Supreme Court also has stated:

[A] party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. . . . [T]he infraction should be plain, clear, manifest, and unmistakable.

Blair v. Cayetano, 73 Haw. 536, 542, 836 P.2d 1066, 1070 (1992) (quoting Schwab v. Ariyoshi, 58 Haw. 25, 31 564 P.2d 135, 139 (1977)). Here, the issue is whether any rational basis supports the classification of two categories of counties - specifically the City and County of Honolulu on the one hand and the other counties on the other - to justify the State's retention of the portion of the ten percent that exceeds the amounts deemed necessary and proper to administer the county surcharge. The Hawaii Supreme Court has stated:

[D]iscrimination in favor of a certain class for tax purposes is not per se arbitrary, and hence unconstitutional, if such discrimination represents a reasonable distinction reflecting state policy and

"if any state of facts reasonably can be conceived that would sustain it."

In re Pac. Marine & Supply Co., 55 Haw. 572, 581, 524 P.2d 890, 897 (1974) (citing and quoting Allied Stores v. Bowers, 358 U.S. 522, 79 S. Ct. 437 (1959)). Here, any number of reasons might be proffered in support of keeping the extra moneys. One basis might be that the rail project may require the State to expend extra funds to prepare state properties or infrastructure. These rail-specific expenses arguably provide a rational basis for treating the City and County of Honolulu as a separate class from the other counties.

2. Due Process.

The retention by the State of the ten percent of the county surcharge, including any revenue beyond what is deemed necessary and proper to administer the county surcharge, is not an unconstitutional "taking" and does not violate due process. The case brought to our attention, Hasegawa v. Maui Pineapple Co., 52 Haw. 327, 475 P.2d 679 (1970), involved a statute requiring employers to pay employees their wages for time missed while they served on a jury or public board or commission. Id. at 328, 475 P.2d 681. The Hawaii Supreme Court held that there was no rational basis for making employers of people serving on juries or public boards or commissions responsible for paying their wages while they served these duties and found the statute offensive of the equal protection clauses of both the state and federal constitutions. Id. at 333, 475 P.2d 683. The Court reasoned that, because juries and public boards and commissions serve the entire state and not just the employers, there was no rational basis for making them pay the entire burden. Id. The Court held the statute in question violated due process because money was taken from employers without just compensation. Id. at 334, 475 P.2d 684. In doing so, the Court observed the following regarding the statute in question: "Nor can this taking of private property be justified under the State's power of taxation. HRS § 388-32 is not a general tax measure." Id.

The Hawaii Supreme Court has defined the term "tax" as follows:

Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government, and for all public needs.

Taxes are generally defined as burdens or charges imposed by legislative authority on persons or property to raise money for public purposes, or, more briefly, an imposition for the supply of the public treasury.

The word taxes is very comprehensive, and properly includes, as indicated in the foregoing definition, all burdens, charges and impositions by virtue of the taxing power with the object of raising money for public purposes.

Hawaii Insurers Council v. Lingle, 120 Haw. 51, 59-60, 201 P.3d 564, 572-73 (2008).

In this instance the Legislature has, in conjunction with the adoption of a city ordinance, imposed a tax of one-half percent on every transaction that would be subject to the general excise and use tax. Because payment of the county surcharge applies to every transaction subject to the general excise and use tax and is not in exchange for any service, it is not a service or regulatory fee. See id. at 60, 201 P.3d at 573. Likewise, the broad nature of the county surcharge precludes it from being a special assessment as the term usually refers to a one-time fee for a specific purpose. The imposition statutes of the county surcharge are contained in chapters 237 and 238, HRS; both chapters are in title 14 of the HRS that is titled "Taxation." The Hawaii Supreme Court has described the general excise tax as follows:

In form, it is a tax imposed upon entrepreneurs for the privilege of doing business; in effect, it is more. It has been characterized as "an amalgam of consumption, business and income taxation," for the ultimate burden is often shifted forward to consumers. . . . The tax applies at all levels of economic activity from production or manufacturing to retailing, albeit at different rates, and to virtually all goods and services.

Wasson-Bendon Partners v. Kamikawa, 93 Haw. 267, 273, 999 P.2d 865, 871 (2000) (emphasis added). The general excise tax and, therefore, the county surcharge are clearly general taxes and

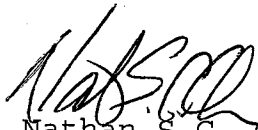
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as such both are justifiable under the State's power of taxation and are not an unconstitutional taking.

IV. CONCLUSION.


The ten percent of the county surcharge retained by the State pursuant to section 248-2.6(a), HRS, - including amounts, if any, that exceed the actual amount to reimburse the State for the costs of assessment, collection, and disposition of the county surcharge on state tax incurred by the State - are proper general fund realizations. Furthermore, the State's retention of these amounts is consistent with a plain reading of the statute, consistent with legislative intent, and does not offend the equal protection and due process clauses of the state or federal constitutions.

Sincerely,



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APPROVED:



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