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FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED  
2012 DEC 11 AM 9:32

L. PARALES  
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB,

Plaintiff,

v.

STATE OF HAWAI'I DEPARTMENT OF  
TAXATION,

Defendant.

) Civil No.

**12-1-3119 12.ECN**

) (DECLARATORY JUDGMENT)

) COMPLAINT FOR DECLARATORY  
) JUDGMENT ON VALIDITY OF RULES  
) AND INJUNCTIVE RELIEF; SUMMONS

COMPLAINT FOR DECLARATORY JUDGMENT  
ON VALIDITY OF RULES AND INJUNCTIVE RELIEF

I. INTRODUCTION

By this Complaint, plaintiff Sierra Club seeks a judicial declaration that the new temporary administrative rules ("Temporary Rules") regarding the Renewable Energy Technologies Income Tax Credit ("RETITC") that defendant State of Hawai'i Department of Taxation ("DoTax") issued on November 9, 2012 are invalid. Plaintiff seeks an order enjoining

I do hereby certify that this is a full, true and correct copy of the original as filed in this office.

L. Paraless  
Clerk, Circuit Court, First Circuit

DoTax from implementing or enforcing the Temporary Rules and reinstating DoTax's prior interpretation of the RETITC.

Plaintiff complains of defendant as follows:

## II. JURISDICTION AND VENUE

1. The Court has subject matter jurisdiction over the claims for relief in this action pursuant to Hawai'i Revised Statutes ("HRS") §§ 91-7, 603-21.5 and 661-1.

2. Venue is properly laid in this judicial circuit pursuant to HRS § 91-7(a) because Plaintiff resides in this judicial circuit.

## III. PARTIES

### Plaintiff

3. Plaintiff Sierra Club is a national non-profit organization registered to do business in Hawai'i and has over 5,500 members who reside in Hawai'i.

4. The Sierra Club is one of the lead advocates on environmental matters in Hawai'i, with a particular focus on advancing clean energy, energy independence, climate security and greenhouse gas reductions. The Sierra Club in Hawai'i has a demonstrated track record of reducing the impacts of global climate change by encouraging the development of clean renewable energy, reducing the use of fossil fuels, and ensuring our fragile native habitat is protected from harm. Over the past few years, the Sierra Club has been involved in a multitude of clean energy initiatives, including successful advocacy for passage of legislation mandating the installation of solar water heaters and establishing an aggressive renewable portfolio standard. To help wean Hawai'i off dirty fossil fuels, the Sierra Club has repeatedly advocated for passage of legislation expanding the amount and availability of the RETITC.

5. The Sierra Club's efforts to promote clean, renewable energy have included a focus on increasing the availability of financing for Hawai'i residents to install photovoltaic ("PV") systems to generate electricity from the sun. To that end, the Sierra Club recently intervened in a docket before the Hawai'i Public Utilities Commission ("PUC") investigating the implementation of an on-bill financing program for residential electric utility customers in the state. The intent of on-bill financing is to allow electric utility customers who are renters or who lack financial resources to acquire renewable energy systems through an assessment on their monthly electric bill. In granting the Sierra Club's motion to intervene in the docket, the PUC concluded that the Sierra Club has "specific interest that differs from the general public with regard to the development of on-bill financing of renewable energy."

6. Sierra Club members are on the forefront of efforts to use renewable energy resources in the State of Hawai'i, including the installation of PV systems. A substantial limiting factor in the ability of Sierra Club members to install PV systems is the availability of adequate financial resources to pay for such systems. The RETITC is key to many Sierra Club members achieving their goal to produce clean, renewable energy through installation of PV systems, and, at the same time, to benefit financially as they reduce their electricity bills for dirty, fossil-fuel generated energy.

7. To help Hawai'i achieve a clean energy future, the Sierra Club has actively promoted commercial, utility-scale renewable energy projects. To this end, the Sierra Club was a principle advocate for Hawai'i's current renewable portfolio standards, HRS § 269-92, which require that set percentages of Hawai'i's energy come from renewable energy, creating the impetus for large, utility-scale renewable energy projects. The Sierra Club has also pursued a

national campaign advocating for utility-scale, clean energy solutions to come online so as to replace dirty, fossil fuel burning plants that significantly contribute to climate disruption.

8. By restricting the availability and amount of the RETITC, DoTax's recently promulgated Temporary Rules impair both the organizational interests of the Sierra Club and the interests of its members. DoTax's draconian restriction of the RETITC will make it impossible for many Sierra Club members to pursue plans to install PV systems. Moreover, by curtailing the installation of residential and commercial PV projects, the Temporary Rules harm the Sierra Club's organizational interests in advancing clean energy, energy independence, climate security and greenhouse gas reductions.

9. Defendant's issuance and implementation of the Temporary Rules has adversely affected and continues to adversely affect the environmental, economic and public policy interests of the Sierra Club and its members. Unless the relief requested herein is granted, plaintiff will continue to be irreparably injured by defendant's issuance and implementation of the Temporary Rules, as detailed below. Plaintiff brings this action on behalf of itself and its adversely affected members.

Defendant

10. Defendant State of Hawai'i Department of Taxation is an "agency" within the meaning of HRS chapter 91. DoTax is authorized to "adopt rules necessary to effectuate the purposes of [HRS § 235-12.5] pursuant to chapter 91." HRS § 235-12.5(e). Moreover, DoTax may adopt temporary rules, which may remain in effect no longer than eighteen months, regarding "matters which the department is authorized to regulate." *Id.* § 235-10.7(a).

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#### IV. BACKGROUND

A. For More Than Three Decades, The Hawai'i Legislature Has Sought To Promote Renewable Energy Through Tax Credits.

11. HRS § 235-12.5 currently provides a tax credit “for every eligible renewable energy technology system that is installed and placed in service in the State by a taxpayer during the taxable year.” *Id.* § 235-12.5(a).

12. The statute defines “renewable energy technology system” as “a new system that captures and converts a renewable source of energy, such as solar or wind energy, into: (1) A usable source of thermal or mechanical energy; (2) Electricity; or (3) Fuel.” *Id.* § 235-12.5(c). It further defines “solar or wind energy system” as “any identifiable facility, equipment, apparatus, or the like that converts solar or wind energy to useful thermal or electrical energy for heating, cooling, or reducing the use of other types of energy that are dependent upon fossil fuel for their generation.” *Id.*

13. HRS § 235-12.5 establishes the RETITC for “each solar energy system” as “thirty-five per cent of the actual cost or the cap amount determined in subsection (b), whichever is less.” *Id.* § 235-12.5(a)(1). In the case of photovoltaic systems, the cap amounts generally are \$5,000 per system for single-family residential property, \$350 per unit per system for multi-family residential property, and \$500,000 per system for commercial property. *Id.* § 235-12.5(b)(2).

14. The RETITC has a long history. In 1976, the Hawai'i State Legislature enacted Act 189, which established a state income tax credit for individual and corporate taxpayers who install devices that “make[] use of solar energy for heating, cooling, or reducing the use of other types of energy dependent upon fossil fuel for its generation.”

15. In the decades since 1976, the Legislature repeatedly reaffirmed its commitment to wean Hawai'i off fossil fuels, passing numerous laws to provide tax credits to encourage private investment in renewable energy systems, including photovoltaic systems.

16. In 2006, the Legislature enacted Act 240, which noted that:

Hawaii's dependence on petroleum for about ninety per cent of its energy needs is more than any other state in the nation. This makes the State extremely vulnerable to any oil embargo, supply disruption, international market dysfunction, and many other factors beyond the control of the State. Furthermore, the continued consumption of conventional petroleum fuel negatively impacts the environment. At the same time, Hawaii has among the most abundant renewable energy resources in the world, in the form of solar, geothermal, wind, biomass, and ocean energy assets.

The Legislature further found that "that increased ... use of renewable energy resources would increase Hawaii's energy self-sufficiency, achieving broad societal benefits, including increased energy security, resistance to increases in oil prices, environmental sustainability, economic development, and job creation."

17. To promote the use of renewable energy, the Legislature in Act 240 increased the RETITC, including substantially increasing HRS § 235-12.5's maximum allowable credit for photovoltaic energy systems to the current levels.

B. Prior To Issuing The Temporary Rules, DoTax Interpreted The RETITC Consistently.

18. On or about September 17, 2007, DoTax issued Tax Information Release ("TIR") 2007-02 to clarify issues related to the RETITC. Among other things, TIR 2007-02 addresses "what constitutes a system for purposes of this credit." DoTax noted that:

This question is important because a credit may be claimed for every eligible renewable energy technology system that is installed and placed in service by a taxpayer during the taxable year. The credit allowable for each system, however, is subject to a cap; and, therefore, the question of whether the installation of renewable energy technology constitutes the installation of one or more systems will directly affect the amount of credit available to a taxpayer.

19. TIR 2007-02 states that:

The key to answering the question of whether any installation of renewable energy technology constitutes the installation of one or more systems, therefore, depends upon identifying the facility, equipment, apparatus or the like that is converting insolation or wind energy into useful thermal or electrical energy for heating, cooling, or reducing the use of other types of energy that are dependent upon fossil fuel for their generation. A system will only exist when all the components necessary for the conversion of insolation or wind energy into useful thermal or electrical energy are present.

20. TIR 2007-02 presents two scenarios to illustrate its interpretation of how to count the number of “systems” for purposes of calculating how many credits are available. In the first, the taxpayer installs and places into service three photovoltaic panels/arrays, one inverter, and associated attachment and connection equipment sufficient to make one connection to the project site’s electrical system. In such a case, DoTax stated that “[t]he taxpayer has installed one system, not three.”

21. In the second scenario, the taxpayer installs and places into service three photovoltaic panels/arrays, three inverters, and associated attachment and connection equipment sufficient to make three separate, independent connections to the project site’s electrical system. DoTax stated that, “[i]f the taxpayer installs each array to a separate inverter, which is connected to the project site’s electrical system separately and independently of the other inverter-array combinations, the taxpayer has installed three systems.”

22. Following the issuance of TIR 2007-02, the Legislature passed three laws amending the RETITC, Act 204 in 2008 and Acts 154 and 155 in 2009. None of those laws materially changed HRS § 235-12.5’s definition of a “solar energy system.” Nor did any of these subsequent laws evince any legislative intent to cut back on the availability or amount of tax credits for the installation of photovoltaic systems. On the contrary, in 2009, the Legislature passed Act 154 to make the RETITC refundable because the Legislature was concerned that

many investors could not otherwise take advantage of the credit, and, “[w]ithout access to this tax credit, solar projects in Hawaii are not financially viable.”

23. In 2010, DoTax issued two TIRs – TIR 2010-02 and 2010-03 – to provide further guidance regarding the term “system” for purposes of the RETITC. TIR 2010-02 and 2010-03 both reiterated that, “[f]or purposes of determining the number of systems associated with any property, the proper test under TIR 2007-02 is the number of independent connections to the project site’s electrical system.”

24. DoTax applied this test in TIR 2010-02, explaining that, if a “[t]axpayer installs and places into service ten photovoltaic panels” and there are “two independent connections to the project site’s electrical system,” then “[t]he taxpayer has installed two systems.”

C. After Failing To Convince The Legislature To Amend The RETITC To Reduce Its Availability, DoTax Issues The Temporary Rules In An Attempt To Accomplish The Same Purpose.

25. During the Legislature’s 2012 session, DoTax lobbied for amendments to HRS § 235-12.5 to reduce the availability of the RETITC. The 2012 Legislature did not enact DoTax’s proposed amendments to HRS § 235-12.5, or any others.

26. Plaintiff is informed and believes, and on the basis thereof alleges, that, having failed to convince the Legislature to amend the RETITC to reduce its availability for photovoltaic systems, DoTax drafted the Temporary Rules to accomplish the same purpose.

27. On or about November 9, 2012, DoTax adopted temporary rules relating to the RETITC, Hawai‘i Administrative Rules (“HAR”) § 18-235-12.5-01T through § 18-235-12.5-06T. The Temporary Rules took effect on November 16, 2012. They apply to photovoltaic systems that are installed and placed in service on or after January 1, 2013. HAR § 18-235-12.5-06T.



28. Rather than calculate the number of photovoltaic systems eligible for the RETITC based on the number of independent connections to the project site's electrical system, as DoTax had done in the past, the new Temporary Rules generally calculate the number of systems based on "total output capacity." The Temporary Rules define "total output capacity" as "the combined individual output capacities (maximum power) of all identifiable facilities, equipment, apparatus or the like that make up the renewable energy technology system installed and placed in service during a taxable year measured in kilowatts." *Id.* § 18-235-12.5-01T(11). For photovoltaic systems, total output capacity is generally "the output capacity (maximum power) of each cell, module or panel at Standard Test Conditions in kilowatts multiplied by the number of cells, modules or panels installed and placed into service during a taxable year." *Id.*

29. The Temporary Rules provide that, in order to claim the RETITC for more than one photovoltaic system installed and placed in service on a single property, each system must meet the applicable total output capacity: at least five (5) kilowatts per system for single-family residential property, at least 0.360 kilowatts per unit per system for multi-family residential property, and at least one thousand (1,000) kilowatts per system for commercial property. *Id.* § 18-235-12.5-03T(a).

30. The Temporary Rules further provide that the RETITC may be claimed for systems that fail to meet the applicable "total output capacity" requirement where: (1) "[o]nly one solar energy system, for the purposes of the credit, has been installed and placed in service during a taxable year on a single property" or (2) "[m]ore than one solar energy system, for the purposes of the credit, has been installed and placed in service during a taxable year on a single property and one of the systems fails to meet the applicable total output capacity requirement." *Id.* § 18-235-12.5-03T(b).

31. The Temporary Rules contravene the Legislature's purpose in enacting and amending HRS § 235-12.5: to increase investment in and installation of residential and commercial renewable energy projects, including photovoltaic projects.

32. Application of the Temporary Rules' method for calculating the number of photovoltaic systems eligible for the RETITC will result in substantially lower tax credits available to residential and commercial photovoltaic projects, as compared with the level of tax credit available under DoTax's prior, longstanding interpretation of what constitutes a "system."

33. By lowering the available credit, the Temporary Rules will have the effect of increasing the cost to residential and commercial consumers of photovoltaic installations, which will result in fewer photovoltaic projects being put into service. Moreover, by dramatically changing its longstanding interpretation of what constitutes a "system" for purposes of claiming the RETITC, DoTax's issuance of the Temporary Rules has created regulatory uncertainty that further discourages investment in residential and commercial photovoltaic installations, which will result in fewer photovoltaic projects being put into service.

34. Plaintiff is informed and believes, and on the basis thereof alleges, that, when it issued the Temporary Rules, DoTax was aware that the rules would result in substantially lower tax credits available to residential and commercial photovoltaic projects, as compared with the level of tax credit available under DoTax's prior, longstanding interpretation of what constitutes a "system."

35. Plaintiff is further informed and believes, and on the basis thereof alleges, that, when it issued the Temporary Rules, DoTax was aware the rules would have the effect of increasing the cost to residential and commercial consumers of photovoltaic installations, resulting in fewer photovoltaic projects being put into service.

36. Plaintiff is further informed and believes, and on the basis thereof alleges, that, when it issued the Temporary Rules, DoTax was aware the rules would create regulatory uncertainty that would discourage investment in residential and commercial photovoltaic installations, resulting in fewer photovoltaic projects being put into service.

CLAIM FOR RELIEF  
(Issuance of Invalid Agency Rules)

37. Plaintiff realleges and incorporates by reference each and every allegation set forth in paragraphs 1-36 of this Complaint.

38. The Temporary Rules are invalid because they violate HRS § 235-12.5.

39. The Temporary Rules are invalid because they exceed DoTax's statutory authority.

PRAAYER FOR RELIEF

WHEREFORE, Plaintiff Sierra Club respectfully requests that the Court:

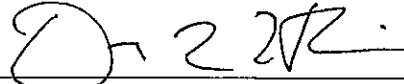
1. Enter a declaratory judgment that the Temporary Rules are invalid because they violate HRS § 235-12.5;
  2. Enter a declaratory judgment that the Temporary Rules are invalid because they exceed Defendant DoTax's statutory authority;
  3. Enter appropriate injunctive relief to prohibit Defendant DoTax from implementing or enforcing the Temporary Rules;
  4. Enter appropriate injunctive relief to reinstate DoTax's prior interpretation of the RETITC, as set forth in TIR 2007-02, 2010-02 and 2010-03;
  5. Award Plaintiff the cost of this litigation, including reasonable attorneys' fees;
- and

6. Provide such other relief as may be just and proper.

DATED: Honolulu, Hawai'i, December 11, 2012.

Respectfully submitted,  
EARTHJUSTICE  
223 South King Street, Suite 400  
Honolulu, Hawai'i 96813

By:



\_\_\_\_\_  
David L. Henkin  
Attorneys for Plaintiff Sierra Club

<b>STATE OF HAWAI'I CIRCUIT COURT OF THE FIRST CIRCUIT</b>	<b>SUMMONS TO ANSWER CIVIL COMPLAINT</b>	CASE NUMBER
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<b>PLAINTIFF,</b> SIERRA CLUB	<b>VS.</b>	<b>DEFENDANT.</b> STATE OF HAWAI'I DEPARTMENT OF TAXATION
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<b>PLAINTIFF'S ADDRESS (NAME, ADDRESS, TEL. NO.)</b> DAVID L. HENKIN #6876 EARTHJUSTICE 223 South King Street, Suite 400 Honolulu, Hawai'i 96813 (808) 599-2436	
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**TO THE ABOVE-NAMED DEFENDANT(S)**


You are hereby summoned and required to file with the court and serve upon DAVID L. HENKIN, plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

**THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.**

**A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.**

DATE ISSUED  <b>DEC 11 2012</b>	CLERK  L. PARALES <div data-bbox="836 1570 982 1722" style="text-align: center;">  </div>	
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I do hereby certify that this is full, true, and correct copy of the original on file in this office	Circuit Court Clerk	
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 In accordance with the Americans with Disabilities Act and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the First Circuit Court Administration Office at PHONE NO. 539-4333, FAX 539-4322, or TTY 539-4853, at least ten (10) working days prior to your hearing or appointment date.