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SENATE COMMITTEE ON ECONOMIC DEVELOPMENT & TAXATION

TESTIMONY REGARDING HB 2137 HD 2 SD 1 RELATING TO HEALTH

TESTIFIER: KURT KAWAFUCHI, DIRECTOR OF TAXATION (OR DESIGNEE)

DATE: MARCH 18, 2008

TIME: 1:15PM

ROOM: 224

This bill provides a tax credit up to an unspecified amount for the costs associated with the donation of an organ.

The House Committee on Health amended the bill by providing the Department with the authority to issue credits on a first-to-file basis.

The House Committee on Finance amended the measure requiring maximum adjusted gross incomes in order to claim the credit, as well as unspecifying the credit amounts.

The House of Representatives passed this measure on third reading.

The Senate Committee on Health amended the measure by providing a lost wage stipend in lieu of lost wages and by precluding any cost from qualifying for the credit if the credit was reimbursed with insurance proceeds. The Committee on Health also precluded any cost from qualifying to the extent a deduction or other credit was claimed.

The Department of Taxation **provides comments** on this legislation.

I. TECHNICAL COMMENTS

Live Organs Only—The Department recognizes that the intent of the measure is to provide a tax credit for live donors only. The Department points out for the Committee that deceased organ donors have tax liabilities after death as well. Though a deceased person's credit calculation would be unworkable under the current bill (*i.e.*, likely no travel, lodging or wage loss to claim); the Department suggests that the Committee clarify the measure by inserting language that the credit is for live donors only.

(b) To qualify for the tax credit, the taxpayer shall be a full-time resident of the State with an adjustable gross income of less than \$50,000, or less than \$100,000 in the case of a joint return, who has donated one or more of the taxpayer's human organs, not in contemplation of death, for the purpose of an organ transplant during the taxable year; provided that this section shall not apply to organs sold for monetary or other consideration.

Lost Wages Provision—The Department supports the intent of eliminating the "lost wages" category of losses that qualify for the credit in exchange for a flat dollar amount. However, the Department believes that the current language may be unworkable and confusing. Because the language provides that the taxpayer can claim a stipend of \$100 per day "or less," it is unclear whether the person must claim the actual amount of wage loss if less or the \$100. The provision could be clarified by the following amendments:

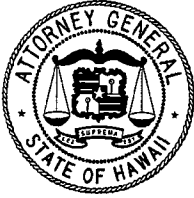
(c) A taxpayer may claim the tax credit only once per lifetime for the following unreimbursed related expenses incurred by the taxpayer:

- (1) Travel expenses;
- (2) Lodging expenses; and
- (3) A lost wages stipend of one hundred dollars ~~[or less]~~ per day, or actual lost wages, whichever is less ~~[provided that the lost wages are actual and not reimbursable or due to leave without pay]~~.

The Department believes that the foregoing amendments will be simpler for taxpayers to understand. The Department does not object to a flat amount that constitutes lost wages if the legislative intent is to provide some degree of relief for such losses. By having a flat amount, the Department's prior concerns relating to fraud or abuse are mitigated.

II. REVENUE ESTIMATE.

This bill is estimated to result in an indeterminate revenue loss due to unspecified limits. However, assuming the previous \$1,000 cap per individual, it is estimated that there will be a revenue loss of approximately \$15,000 per year. There have been on average 17 living donors per year. Taking into consideration that the number of living donors is increasing in Hawaii, and taking into account the AGI limitations of the credit, it is estimated that approximately 15 people will qualify for the credit each year.



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:

H.B. NO. 2137, H.D. 2, S.D. 1, RELATING TO HEALTH.

BEFORE THE:

SENATE COMMITTEE ON ECONOMIC DEVELOPMENT AND TAXATION

DATE: Tuesday, March 18, 2008 **TIME:** 1:15 PM

LOCATION: State Capitol, Room 224

Deliver to: State Capitol, Room 216, 1 Copy

TESTIFIER(S): Mark J. Bennett, Attorney General
or Mary Bahng Yokota, Deputy Attorney General

Chair Fukunaga and Members of the Committee:

The Department of the Attorney General provides these comments to bring to your attention that this bill may be subject to constitutional challenge.

This bill provides "full-time residents of the State" with an income tax credit for expenses related to organ donation.

This bill is facially discriminatory in that it restricts the tax credit to Hawaii residents. A court may conclude that the credit is unconstitutional because the bill does not expressly articulate a legitimate government interest served by the legislation sufficient to withstand constitutional challenge based on the Equal Protection and/or Privileges and Immunities Clauses of the United States Constitution.

The Equal Protection Clause prohibits discrimination against a nonresident based solely on residency. See, e.g., Williams v. Vermont, 472 U.S. 14 (1985) (use tax credit for sales taxes paid on cars purchased in other states invalidated because it was only available to Vermont residents). The Hawaii Supreme Court has recognized that the Equal Protection Clause applies where a tax operates unequally on persons or property of the same class. In re Swann, 7 Haw. App. 390, 776 P.2d 395 (1989).

Similarly, under the Privileges and Immunities Clause, a state may not impose higher taxes on a nonresident individual than it imposes on its own citizens. However, a discriminatory tax could be sustained if legitimate reasons for the tax exist and the discrimination bears a substantial relation to those reasons. Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287 (1998) (alimony deduction for residents only struck down as violating Privileges and Immunities Clause).

The wording in the bill that creates this potential constitutional problem is the "full-time resident of the State" requirement on page 1, lines 12 through 13, and the definition of the term "full-time resident of the State" on page 3, lines 20 through 22.

The residency requirement arguably violates the Equal Protection and Privileges and Immunities Clauses because it expressly favors residents over nonresidents, as noted above. To insulate the bill from a possible constitutional challenge, we recommend either of two possible remedies: (1) that the bill be amended to provide that the credit is available to taxpayers subject to chapter 235, Hawaii Revised Statutes -- deleting the "full-time resident of the State" requirement (on page 1, lines 12 through 13) and the definition for the term (on page 3, lines 20 through 22) should remedy this possible constitutional problem; or (2) that a legitimate government purpose substantially related to that purpose is articulated within the preamble of the bill.

We are aware that prior tax refunds or credits may have had residency requirements but have not been subject to constitutional challenge yet. However, this does not preclude the possibility of such a challenge in the future.



March 17, 2008

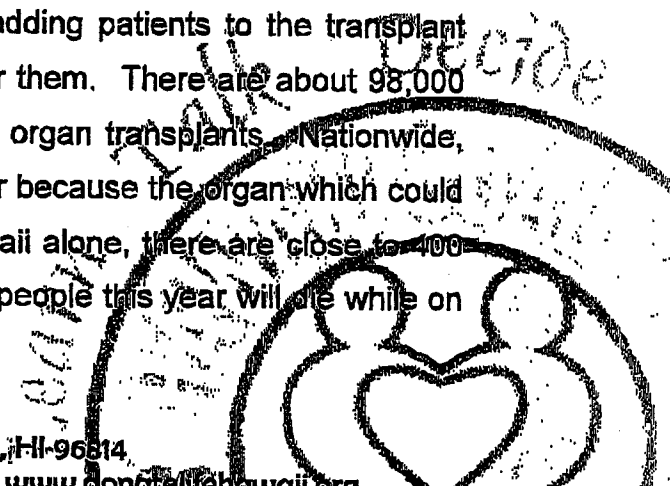
Senator Carol Fukunaga, Chair
 Senator Will Espero, Vice Chair
 Committee on Economic Development and Taxation
 Hawaii State Capitol
 Conference Room 224
 Honolulu, HI 96813

RE: H.B. No. 2137. SD1 – Relating to Health (Tax Credit; Organ Donation)

Dear Chairman Fukunaga, Vice Chair Espero and members of the Senate Committee on Economic Development and Taxation:

I am Glen Hayashida, CEO, National Kidney Foundation of Hawaii (NKFH) and member of the Hawaii Coalition on Donation. It is my privilege to support HB 2137. SD1. This bill is designed to help reduce a financial barrier for people who are considering giving a second chance at life to someone by becoming a living organ donor. This legislation would create a state income tax credit for living donors who incur expenses because of travel, lodging and lost wages associated with organ donation. For this purpose, living donor is defined as anyone who donates a kidney, bone marrow, or part of a liver, lung, intestine, or pancreas.

It is well known that we have a serious shortage of organs for transplantation in the United States, including Hawaii. We are adding patients to the transplant waiting lists faster than organs can be found for them. There are about 98,000 people in America on the waiting list to receive organ transplants. Nationwide, over 5,000 of these individuals will die each year because the organ which could have saved their life was not available. In Hawaii alone, there are close to 400 people on the waiting list today; as many as 16 people this year will die while on the transplant waitlist.

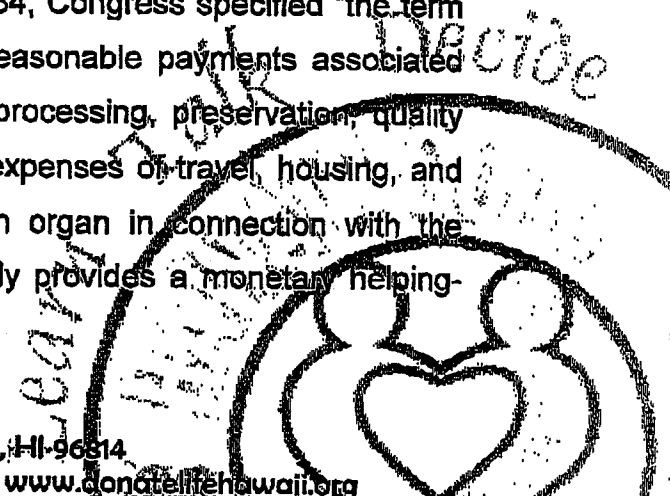




Since 2002, in Hawaii we have had a total of 104 living donors. This is an average of 17 living donors per year. Nationwide, the number of living organ donors exceeds the number of donations received from deceased individuals. While, this only happened once in Hawaii, in 2005, the percentage of living donors has increased significantly. This trend is predicted to continue, making the need for legislation providing partial relief of the costs of donating making more important than ever.

There is additional value to be had from living donations. The quality of transplant is often better when the organ comes from a living donor. Many times there are fewer infections, fewer complications, longer working-life of the organ, and generally better outcomes.

HB 2137.SD1 is modeled after similar laws (more commonly known as "Cody's Law") in Arkansas, Georgia, Iowa, Minnesota, New Mexico, New York, North Dakota, Oklahoma, Utah, and Wisconsin (where it originated). In Idaho, a version of the law was adopted in 2006 that allows a \$5,000 tax credit. Overall, Cody's Law provides financial assistance to living organ donors through a tax deduction or a tax credit to cover travel, lodging expenses and lost wages, it also completely conforms to federal law. This bill reiterates the fact that in section 301 of the National Organ Transplant Act of 1984, Congress specified "the term 'valuable consideration' does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ." HB 2137.SD1 uniquely provides a monetary helping-hand to those who choose to donate organs.





HB 2137.SD1 is a unique bill in several ways. It is the first of its kind to provide for reimbursement of expenses for organ donation in a way that conforms completely with federal law. This bill creates a state income tax credit for living donors. This is a way to facilitate the gift of those who bravely and generously choose to become living organ donors. It fully is within the limits of federal law which prohibit a person from acquiring, receiving, or otherwise transferring an organ for valuable consideration for use in human transplantation.

This bill is designed to help save lives. This bill is relevant; there is a genuine and increasing need for living organ donations. Most importantly, this legislation can save lives by lending a helping hand to those who selflessly choose to give the gift of life.

Thank you for your consideration



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SUBJECT: INCOME, Credit for organ donation

BILL NUMBER: HB 2137, SD-1

INTRODUCED BY: Senate Committee on Health

BRIEF SUMMARY: Adds a new section to HRS chapter 235 to establish a refundable tax credit for the expenses incurred relating to the donation of organs. The credit shall be available to individual taxpayers with adjusted gross income of less than \$50,000 or \$100,000 in the case of those filing a joint return. The credit shall not exceed \$_____ per taxpayer per year and \$_____ for all taxpayers per year for unreimbursed travel expenses, lodging expenses, and a lost wages stipend of \$100 or less per day provided that the lost wages are actual and not reimbursable or due to leave without pay. The taxpayer shall be entitled to one credit in a lifetime. Requires the donor to be a full-time resident of the state and have donated one or more organs to another human being, and shall not apply to organs sold for monetary or other consideration.

Defines “human organ” as all or part of a liver, pancreas, kidney, intestine, lung or bone marrow.

The director of taxation may adopt rules pursuant to HRS chapter 91, prepare the necessary forms to claim the credit, may require proof of the claim, and allocate the credit on a first-come, first-served basis.

If any other tax credit or deduction under Title 14, including a deduction under IRS sections 162 or 213, is taken than no credit shall be allowed under this section for the same costs.

The credit shall sunset on December 31, 2012 and be repealed on June 30, 2014.

EFFECTIVE DATE: July 1, 2020; applicable to tax years beginning after December 31, 2007

STAFF COMMENTS: This measure allows taxpayers to claim a credit for expenses incurred as a result of donating a human organ to another person.

It should be remembered that this measure would grant preferential tax treatment to a select group of taxpayers and it does so without the taxpayer’s need for tax relief. Generally, preferential tax treatments are designed to alleviate an undue burden on those who are unable to carry that burden, largely the poor and low income. An example is the general excise tax food credit for purchases made by the poor. If this measure is enacted, it would merely result in a subsidy by the state to encourage taxpayers to donate their organs without regard to a taxpayer’s need for tax relief.

In a sense this proposal is insulting in that it attempts to reward a person for having made a donation of a human organ in order to save a life, a humanitarian act that has been reduced to an income tax credit. It should be remembered that the word “donation” has its genesis in the Latin word “*donare*” which means to give or give freely without contingency and, as such, donations of human organs should be given

without consideration for compensation.

If the intent is to cover some of the costs associated with the donation of a human organ, then just appropriate the money to a department that can then judge what are appropriate costs to reimburse the donor. Why complicate the tax forms and instructions for a handful of taxpayers?

That said, there are some major flaws in this proposal. For example, the bill does not define "lost wages." For a salaried employee, that might not be such a difficult calculation, but when it comes to hourly workers, does that calculation take into hourly differentials like overtime or those who are paid more for shift work? What about those employees who are commissioned or perhaps receive bonuses for work output and performance? The term "full-time resident" is inconsistent with the definition of "resident" and "non-resident" as provided for in HRS 235-1. Under that definition a person is considered a resident for tax purposes if Hawaii is his/her domicile, that is Hawaii is the place which the person has singled out as home base. One can only have one domicile. So what is meant by full-time resident is unclear as one can reside in Hawaii but not declare Hawaii as his/her domicile. In this latter case, that person would not be considered a resident for state tax purposes. As a result, a nonresident who happens to reside in Hawaii "full-time" could claim this credit even though that person may have no Hawaii sourced income as the credit is refundable.

There is a limitation on adjusted gross income for single filers of \$50,000 or \$100,000 for joint filers, but no provisions made with respect to married taxpayers filing separate returns. Finally, the proposal does not specify how the credit is to be calculated. Is it, in fact, a 100% reimbursement of the costs listed in the bill or is it a fraction thereof? As noted above, if it is a complete reimbursement of expenditures incurred for the donation of a human organ, then why involve the tax department which has no expertise in this area to make a determination of reasonable costs. This is truly an inappropriate use of the state tax system.

Digested 3/17/08



1149 Bethel Street, Suite 801 • Honolulu, HI 96813

March 18, 2008

**Before
Honorable Carol Fukunaga, Chair
Honorable Will Espero Vice-Chair
Senate Committee on Economic Development & Taxation**

Public Hearing – 1:15PM Tuesday, March 18, 2008 - Conference Room 224

RE: Testimony in strong support of HB 2137, HD2, SD1 - Relating to Health
Provides a tax credit for expenses related to an organ donation

**The Honorable Carol Fukunaga, Chair; Honorable Will Esepro, Vice-Chair
and members of the committee:**

My name is Tony L. Sagayadoro, Program Coordinator of the Minority Organ Tissue Transplant Education Program (MOTTEP) and member of the Hawaii Coalition on Donation, a 2000 Kidney Transplant Recipient and I appreciate the opportunity to testify in support of HB 2137, HD2, SD1 which provide and allow a one time tax credit for expenses related to organ donation..

We fully support the passage of the intention of HB 2137, HD2, SD1 for the following reasons:

- recognize the financial burden, and offers an amount of relief to an individuals who gives so much of themselves by giving the *Gift of Life*
- remove one barrier for a potential living donor to consider
- encourage more people to serve as living donors
- helps increase the supply of the critically needed organs and bone marrow
- saves the lives of critically ill patients who needs organ transplant
- Other states have already passed similar legislation to address the critical shortage of organs for transplantation: Arkansas, signed into law, March, 2005; Georgia, signed into law, April, 2004; Idaho, signed into law, July, 2006; Iowa, signed into law, May, 2005; Minnesota, signed into law, July, 2005; New Mexico, signed into law, April 2005; North Dakota, signed into law, March, 2005; Utah, signed into law, March, 2005; other states like Oklahoma, Wisconsin; and other states who have pending legislation.

We urge that you give HB 2137, HD2, SD1 your favorable consideration.

Thank you.

Sincerely,

Tony L. Sagayadoro