
A BILL FOR AN ACT

RELATING TO TAXATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The largest source of state revenues is from
2 the payment of various taxes by residents and nonresidents.
3 During these tough economic times it is especially important for
4 the State to protect and improve upon the collection of its
5 various taxes in order to provide widespread financial support
6 to social programs, infrastructure projects, and public
7 education. One area of tax collections that the State can
8 improve upon is the withholding tax requirement under the Hawaii
9 Real Property Tax Act.

10 According to sales data acquired from the Honolulu Board of
11 Realtors, it is estimated that the sales revenue generated from
12 the transfer of single family homes, apartments, and
13 condominiums across the State in 2008 was over \$9,800,000,000.
14 If two per cent of those sellers were nonresidents that were
15 subject to the Hawaii Real Property Tax Act withholding
16 requirements, then the State would have received over \$9,800,000
17 in Hawaii Real Property Tax Act withholdings. If it is further

1 assumed that ten per cent of the sales transactions that
2 involved those nonresident sellers failed to comply with the
3 Hawaii Real Property Tax Act withholding requirements in section
4 235-68, Hawaii Revised Statutes, then under that assumption the
5 State had a shortfall in Hawaii Real Property Tax Act
6 withholding tax revenues of over \$980,000 for 2008. The
7 legislature further finds that this analysis is based upon the
8 2008 calendar year, which experienced nearly a thirty per cent
9 decline in the sales of single family homes, apartments, and
10 condominiums from the prior year, according to the Honolulu
11 Board of Realtors. Thus, a potential shortfall of Hawaii Real
12 Property Tax Act withholding tax revenues by the State in any
13 given year could easily exceed \$1,300,000, this amount becomes
14 far greater if there is a larger number of nonresident sellers
15 of real property in Hawaii or a larger percentage of those
16 nonresident seller transactions that do not comply with the
17 Hawaii Real Property Tax Act withholding requirements.

18 The purpose of this Act is to strengthen the Hawaii Real
19 Property Tax Act withholding requirements by requiring a tax
20 clearance certificate to be furnished to the bureau of
21 conveyances as a condition to any recording of the transfer in
22 title of the real property. This Act will help to ensure that

1 all Hawaii Real Property Tax Act withholding tax revenues are
2 captured by the State and will also improve on capturing
3 additional income tax revenues from the sale of real property in
4 Hawaii by nonresidents who may otherwise not file a State
5 individual income tax return.

6 SECTION 2. Section 235-68, Hawaii Revised Statutes, is
7 amended to read as follows:

8 **"§235-68 Withholding of tax on the disposition of real**
9 **property by nonresident persons.** (a) As used in this section:

10 "Nonresident person" means every person other than a
11 resident person.

12 "Property" or "real property" has the meaning as the same
13 term is defined in section 231-1.

14 "Resident person" means any:

15 (1) Individual included in the definition of resident in
16 section 235-1;

17 (2) Corporation incorporated or granted a certificate of
18 authority under chapter 414, 414D, or 415A;

19 (3) Partnership formed or registered under chapter 425 or
20 425E;

21 (4) Foreign partnership qualified to transact business
22 pursuant to chapter 425 or 425E;

1 (5) Limited liability company formed under chapter 428 or
2 any foreign limited liability company registered under
3 chapter 428; provided that if a single member limited
4 liability company has not elected to be taxed as a
5 corporation, the single member limited liability
6 company shall be disregarded for purposes of this
7 section and this section shall be applied as if the
8 sole member is the transferor;

9 (6) Limited liability partnership formed under chapter
10 425;

11 (7) Foreign limited liability partnership qualified to
12 transact business under chapter 425;

13 (8) Trust included in the definition of resident trust in
14 section 235-1; or

15 (9) Estate included in the definition of resident estate
16 in section 235-1.

17 "Transferee" means any person, the State and the counties
18 and their respective subdivisions, agencies, authorities, and
19 boards, acquiring real property [~~which~~] that is located in
20 Hawaii.

21 "Transferor" means any person disposing real property that
22 is located in Hawaii.

1 (b) Unless otherwise provided in this section, every
2 transferee shall deduct and withhold a tax equal to five per
3 cent of the amount realized on the disposition of Hawaii real
4 property. Every person required to withhold a tax under this
5 section is made liable for the tax and is relieved of liability
6 for or upon the claim or demand of any other person for the
7 amount of any payments to the department made in accordance with
8 this section.

9 (c) Every transferee required by this section to withhold
10 tax under subsection (b) shall make a return of the amount
11 withheld to the department of taxation not more than twenty days
12 following the transfer date.

13 (d) No person shall be required to deduct and withhold any
14 amount under subsection (b), if the transferor furnishes to the
15 transferee an affidavit by the transferor stating the
16 transferor's taxpayer identification number and:

- 17 (1) The transferor is a resident person; or
18 (2) That by reason of a nonrecognition provision of the
19 Internal Revenue Code as operative under this chapter
20 or the provisions of any United States treaty, the
21 transferor is not required to recognize any gain or
22 loss with respect to the transfer;

- 1 (3) A brief description of the transfer; and
- 2 (4) A brief summary of the law and facts supporting the
- 3 claim that recognition of gain or loss is not required
- 4 with respect to the transfer.

5 This subsection shall not apply if the transferee has actual
6 knowledge that the affidavit referred to in this subsection is
7 false.

8 (e) An application for a withholding certificate may be
9 submitted by the transferor to the department setting forth:

10 (1) The name, address, and taxpayer identification number,
11 if any, of the parties to the transaction and the
12 location and general description of the real property
13 to be transferred; and

14 (2) A calculation and written justification showing that
15 the transferor will not realize any gain with respect
16 to the transfer; or

17 (3) A calculation and written justification showing that
18 there will be insufficient proceeds to pay the
19 withholding required under subsection (b) after
20 payment of all costs, including selling expenses and
21 the amount of any mortgage or lien secured by the
22 property.

1 Upon receipt of the application, the department shall
2 determine whether the transferor has realized or will realize
3 any gain with respect to the transfer, or whether there will be
4 insufficient proceeds to pay the withholding. If the department
5 is satisfied that no gain will be realized or that there will be
6 insufficient proceeds to pay the withholding, it shall issue a
7 withholding certificate stating the amount to be withheld, if
8 any.

9 The submission of an application for a withholding
10 certificate to the department does not relieve the transferee of
11 its obligation to withhold or to make a return of the tax under
12 subsections (b) and (c).

13 (f) No person shall be required to deduct and withhold any
14 amount under subsection (b) if one or more individual
15 transferors furnishes to the transferee an affidavit by the
16 transferor stating the transferor's taxpayer identification
17 number, that for the year preceding the date of the transfer the
18 property has been used by the transferor as a principal
19 residence, and that the amount realized for the property does
20 not exceed \$300,000.

21 (g) The department may enter into written agreements with
22 persons who engage in more than one real property transaction in

1 a calendar year or other persons to whom meeting the withholding
2 requirements of this section are not practicable. The written
3 agreements may allow the use of a withholding method other than
4 that prescribed by this section or may waive the withholding
5 requirement under this section.

6 (h) Every nonresident person that is a transferor under
7 this section shall submit to the bureau of conveyances a
8 certified tax clearance certificate issued from the department
9 stating that the transferor properly made a return of the amount
10 withheld to the department not more than twenty days following
11 the transfer date. Submission of the tax clearance certificate
12 shall be made a condition to recording of any transfer of title
13 of real property located in Hawaii by a nonresident person that
14 is a transferor under this section.

15 The director of taxation shall prepare forms as may be
16 necessary to satisfy the requirements of this subsection. The
17 director may also require the nonresident person that is a
18 transferor under this section to furnish information to
19 ascertain the person's compliance with the requirements of this
20 subsection and may adopt rules necessary to effectuate the
21 purposes of this subsection pursuant to chapter 91."

1 SECTION 3. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 4. This Act shall take effect on January 1, 2010.

Report Title:

HARPTA Withholding Tax; Tax Clearance Certificate

Description:

Requires a seller of real property located in Hawaii to furnish to the bureau of conveyances a tax clearance certificate issued from the department of taxation that certifies that the HARPTA withholding requirements were satisfied as a condition to recording a change in title on the real property. (SD1)