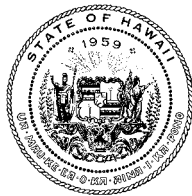


SB 2748

EDT

LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LT. GOVERNOR



KURT KAWAFUCHI
DIRECTOR OF TAXATION

STANLEY SHIRAKI
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809

PHONE NO: (808) 587-1510
FAX NO: (808) 587-1560

**SENATE COMMITTEE ON ECONOMIC DEVELOPMENT & TECHNOLOGY
TESTIMONY REGARDING SB 2748
RELATING TO GENERAL EXCISE TAX**

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

DATE: FEBRUARY 10, 2010

TIME: 1:30PM

ROOM: 016

This measure modifies the general excise tax law by disallowing a general excise tax benefit (*i.e.*, reduced rate, deduction, splitting, etc.) unless the taxpayer first registers to do business in Hawaii; files a timely return; and claims the benefit expressly on the proper returns. This measure also shores up general excise tax collections by creating "trust fund liability" for those that collect taxable receipts.

The Department of Taxation (Department) **strongly supports** this measure.

GENERAL FUND PROTECTION IS IMPORTANT—This legislative session, when the economy is sliding and state revenues are declining, it is important that the general excise tax collection tools be strengthened.

Of all sources of state revenues, the general excise tax accounts for over 50 % of state realizations.

DISALLOWING TAX BENEFITS FOR FAILURE TO PROPERLY CLAIM IS APPROPRIATE—The general excise tax contains dozens of favorable benefits, including exemptions, reduced rates, and income splitting. A majority of these benefits allow businesses that are otherwise very profitable to avoid paying the general excise tax altogether. Because some businesses pay no tax, they often do not register to do business in Hawaii or file tax returns. Furthermore, out-of-state businesses that claim exemption from the general excise tax also fail to register, file, or otherwise expressly declare the exemption. This lack of data on businesses operating in Hawaii greatly undermines the Department of Taxation's ability to gather information on what businesses are claiming which tax benefits. Requiring businesses to be "on the radar" of the Department of Taxation will greatly assist in tax administration by providing valuable information that the government may use in compliance efforts.

Disallowing any general excise tax benefits unless basic information is filed is rational and justifiable, especially when tax benefits are a matter of legislative grace. In a time when tax incentives are reviewed with scrutiny by policymakers and administrators, it is important to ensure businesses do not avoid government tax benefit oversight by assuming that filing is unnecessary when no tax is due as a result of tax benefits. Even when no tax is due, officials should have all necessary data and information about persons conducting business in Hawaii in order to test the effectiveness of the tax system, and accurately account for those that enjoy exemptions from it.

CREATING TRUST FUND LIABILITY IS IMPORTANT TO ENSURE THE GOVERNMENT IS PAID FOR INCREASES IN PRICE TO RECOVER THE TAX— Additionally, though the general excise tax is a tax on businesses, Hawaii businesses are allowed by law to pass on their general excise tax costs to customers as a cost recovery. However, as the economy has declined, more businesses have failed to pay their general excise tax, even though the tax is still visibly passed on to Hawaii consumers under the guise that it would be paid to the government. Businesses that do not timely remit the tax recovery amount are known to use these funds to pay operating expenses, and some disreputable businesses pocket these funds with no intent on paying their taxes. In short, the practice of increasing consumer costs under the pretext of tax recovery now becomes a consumer protection matter, and businesses should be liable for paying those tax recovery amounts owed to the government. Especially since more businesses are keeping these tax recovery amounts to cover costs during this economic downturn, the government inevitably becomes the last creditor to be paid.

REVENUE GAIN—This measure will result in a revenue gain to the general fund of:

FY11: \$15 million
FY12: \$30 million
FY13: \$30 million
FY14: \$30 million
FY15: \$30 million



CERTIFIED PUBLIC ACCOUNTANTS

SENATE COMMITTEE ON ECONOMIC DEVELOPMENT AND TECHNOLOGY

Senator Carol Fukunaga, Chair

Senator Rosalyn H. Baker, Vice Chair

Subject: Senate Bill No. 2748
Hearing: February 10, 2010, 1:30 p.m.
Testimony in OPPOSITION

My name is Kent K. Tsukamoto, and I am a certified public accountant and the managing partner of Accuity LLP, a Hawaii based full service accounting firm. We OPPOSE this measure and strongly urge you not to pass it out of committee. There are significant flaws with this bill, including the following:

Section 2: Loss of All Deductions, Exemptions, and Credits: As drafted, this section is overly broad. It will cause massive administrative problems incident to requiring hundreds of thousands of Hawaii residents who do not currently file GET returns to file under the threat of being taxed at 4% / 4.5% on income that the Department's own current GET return instructions and rules say does not need to be reported at all:

- All wage earners would have to file under pain of being subject to GET on their wages. HRS §237-24(6) now provides an exemption for this.
- Recipients of gifts and inheritances would be taxable on their receipts. HRS §237-24(4). This exclusion is not limited to nonprofit associations. Should the GET apply if a husband gave his wife a present for her birthday?
- All recipients of dividends and distributions, including partners in a partnership that has paid GET, would be exposed. HRS §237-3(b); TIR 97-5.
- All employee benefit plans would have to file under pain of being subject to GET on investment income. HRS §237-24.5(5).
- All persons making casual sales would also have to file. HRS §237-1; HAR §18-237-1.

- All condominium associations or co-operative housing corporations receiving only maintenance fees would have to file. HRS §§237-24.3(3), 237-24(16).

These unintended consequences represent a Pandora's box of potentially enormous proportions.

Section 3: GET As a Trust Fund Tax: This section seems to be based on IRC §6700, which applies when employers fail to pay withheld payroll taxes over to the government. There, the employee has had taxes taken out of a paycheck and the government is obligated to give credit for those taxes to the employee whether or not the employer pays the taxes over. The GET, on the other hand, is a tax on the privilege of doing business in Hawaii and it is imposed on the taxpayer doing business, by design.

One of the reasons why the GET is imposed upon the seller, rather than the buyer as in states that impose sales taxes, is so that the tax can be imposed when the buyer is the Federal Government. If trust fund liability or similar features are added to the GET, the State will risk the Federal Government arguing that the GET is really imposed on the purchaser, so that federal purchases will be immune from tax because of the Federal Government's sovereign immunity. This conclusion will be made by the federal courts, irrespective of what state law or the state courts may say. Diamond National Corp. v. Board of Equalization, 425 U.S. 268 (1976) ("The judgment is reversed. We are not bound by the California court's contrary conclusion and hold that the incidence of the state and local sales taxes falls upon the national bank as purchaser and not upon the vendors."); United States v. Board of Equalization, 650 F.2d 1127 (9th Cir. 1981) ("In determining who the legislature intends will pay the tax, the entire state taxation scheme and the context in which it operates as well as the express words of the taxing statute must be considered." The court then held that because a facially neutral statute created an economic incentive for the seller to pass the tax on, the legal incidence of the tax fell upon the buyer; thus, the Federal Government, as buyer, could invoke its immunity.), affirmed, 450 U.S. 901 (1982). This creates a massive risk that the State cannot afford to take in these troubled economic times.

Thank you for this opportunity to offer comments on the measure and we urge you, please do not pass this flawed bill.



LATE

February 9, 2010

Chair Carol Fukunaga
Senate Committee on Economic Development and Technology
Hawaii State Senate
State Capitol, Room 016
Honolulu, HI 96813

RE: SB 2748, Relating to General Excise Tax

Dear Chair Fukunaga, Vice-Chair Baker and members of the Senate EDT Committee:

The Hawai'i Alliance of Nonprofit Organizations is a statewide, sector-wide professional association of nonprofits. HANO member nonprofits provide essential services to every community in the state. Our mission is to unite and strengthen the nonprofit sector as a collective force to improve the quality of life in Hawai'i.

We understand the intent of SB 2748 which proposes that businesses comply with administrative filings in order to realize tax benefits. HANO would like to make several points about nonprofit organizations as they relate to this bill.

Administrative filing requirements proposed by SB 2748 are not necessary for nonprofit organizations and would be considered duplicative because there already is available data on them in the State of Hawaii. The State Department of Commerce and Consumer Affairs, Department of Taxation, Attorney General and the IRS all impose annual reporting and filing requirements on nonprofits. If a nonprofit does not file its 990 tax return with the IRS for three consecutive years, its 501(c) (3) nonprofit status is revoked. Simply put, there are requirements and incentives already in place that require a nonprofit to "show up on the radar," so to speak.

Also, imposition of personal liability on volunteer officers of nonprofit boards for organizations that do not pay their general excise tax obligation will make it difficult to get qualified volunteers to serve on nonprofit boards. It is already challenging for nonprofits to recruit good board volunteers. HANO asks that this provision be removed from the bill language.

Thank you for the opportunity to make constructive comments on SB 2748. We ask you to consider our recommended changes related to the particular issues of Hawaii's nonprofit sector.

Mahalo,
Lisa Maruyama
President and CEO

LATE

TESTIMONY BEFORE THE SENATE COMMITTEE ON EDT
Wednesday, February 10, 2010 at 1:30 p.m.
State Capitol, Conference Room 016
Senate Bill 2748

Chair Fukunaga, Vice Chair Baker, and Members of the EDT Committee:

Thank you for the opportunity to testify. My name is Philmund Lee. I am an attorney in private, a member of the tax section of the bar, and a veteran legislative staffer. I oppose Senate Bill 2748 for the following reasons:

1. As a legislative staffer, I have worked 20 hours per day, seven days per. When I worked for Rep. Terry Nui Yoshinaga, our office was famous for hard work and sound policy. I believe we hold the historically record for the number of bill introductions and the number of bills passed. With the help of a small army of attorneys and experts we passed the landmark Hawaii Endangered Species Act in one year. Considering, we worked all our waking hours for the state from December to May, there was virtually no time to wash our clothes not to say prepare and filed our tax returns. We did not know how much we made because we had over a years worth of paychecks at the accounting office that we did not have the time to pick or deposit.
2. The Senate bill 2748 would severely penalize taxpayers who do not have the time or inadvertently fail to file general excise tax (“GET”) returns, even if those taxpayers would not otherwise owe any tax. It would therefore create an unnecessary technical requirement, violation of which could result in massive tax liability for innocent taxpayers. The taxpayers most likely to unintentionally violate this technical requirement are small businesses, individuals, and non-profit organizations—those who are least likely to have access to sophisticated tax advice, and least able to bear the burden of such severe penalties. This result is contrary to fair tax administration. The bill would not pass constitutional scrutiny, as it would have a disparate effect against racial minorities, and immigrants of various national origins.
3. The bill would create needless administrative complexity both for taxpayers and for the government. It would force even taxpayers who have no GET liability, such as ordinary wage-earners, to obtain a GET license and file periodic GET returns. It may also result in inadvertent attempts to tax income that is beyond the State’s power and authority to tax. This could lead to unnecessary and expensive tax audits and litigation, which would be a waste of both taxpayer and government resources.
4. The bill would also impose personal trust fund liability on taxpayers, which is inappropriate for GET. Personal trust fund liability is generally imposed on items such as withholding of employee payroll taxes, which are the liability the employee. Unlike payroll tax withholding, however, businesses do not hold the GET in trust for any other party. Rather, GET is a tax liability of the business itself. The imposition of personal liability for GET is inappropriate in these circumstances.
5. Worst of all, it does not comply with federal tax laws and would force taxpayers pay more to tax professions for diverging state and federal tax policy.

LATE

TESTIMONY BEFORE THE SENATE ECONOMIC DEVELOPMENT AND
TECHNOLOGY COMMITTEE

Re: Senate Bill 2748

Wednesday, February 10, 2010 at 1:30 p.m.
State Capitol, Conference Room 016

Chair Fukunaga, Vice Chair Baker, and Members of the Senate Economic and Development Committee:

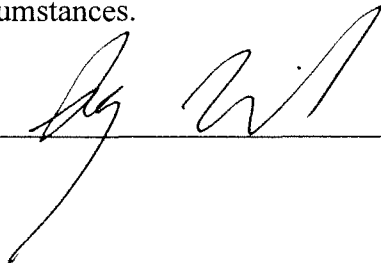
Thank for the opportunity to testify. My name is Ryan Wilson. I am a tax attorney in private practice in Hawaii. I oppose Senate Bill 2748 for the following reasons:

1. The bill would severely penalize taxpayers who inadvertently fail to file general excise tax ("GET") returns, even if those taxpayers would not otherwise owe any tax. It would therefore create an unnecessary technical requirement, violation of which could result in massive tax liability for innocent taxpayers. The taxpayers most likely to unintentionally violate this technical requirement are small businesses, individuals, and non-profit organizations—those who are least likely to have access to sophisticated tax advice, and least able to bear the burden of such severe penalties. This result is contrary to fair tax administration.

2. The bill would create needless administrative complexity both for taxpayers and for the government. It would force even taxpayers who have no GET liability, such as ordinary wage-earners, to obtain a GET license and file periodic GET returns. It may also result in inadvertent attempts to tax income that is beyond the State's power and authority to tax. This could lead to unnecessary and expensive tax audits and litigation, which would be a waste of both taxpayer and government resources.

3. The bill would also impose personal trust fund liability on taxpayers, which is inappropriate for GET. Personal trust fund liability is generally imposed on items such as withholding of employee payroll taxes, which are the liability the employee. Unlike payroll tax withholding, however, businesses do not hold the GET in trust for any other party. Rather, GET is a tax liability of the business itself. The imposition of personal liability for GET is inappropriate in these circumstances.

Respectfully submitted: _____



Ronald I. Heller
700 Bishop Street, Suite 1500
Honolulu, Hawaii 96813

LATE

phone 808 523 6000 fax 808 523 6001
rheller@torkildson.com

**TESTIMONY BEFORE THE SENATE COMMITTEE
ON ECONOMIC DEVELOPMENT & TECHNOLOGY**

Re: Senate Bill 2748

**Wednesday, February 10, 2010 at 1:30 pm
State Capitol, Conference Room 016**

Chair Fukunaga, Vice-Chair Baker, and Members of the Committee:

Thank you for the opportunity to testify. My name is Ronald Heller. I am a practicing attorney, and also licensed as a Certified Public Accountant. I oppose Senate Bill 2748.

First, from a legal viewpoint, the concept of a “trust fund” is fundamentally incompatible with the theory that the GE tax is a “privilege” tax based on the privilege of doing business in Hawaii. For example, in a sale of goods, the actual tax liability is imposed on the seller, not the buyer. The seller is the one engaging in business, and the tax applies to that privilege. The seller may pass on the tax by adding it to the price, but legally the buyer does not owe tax to the State; the tax liability is imposed on the seller. That theory is the constitutional basis for many of the decisions upholding the GE tax in various circumstances. If we are going to toss away the legal theory on which the GE tax has been repeatedly upheld, we should be prepared to re-examine decades of previously-settled law.

In some states, the state sales tax is actually imposed on the buyer, and the seller is basically a collecting agent, responsible for collecting the tax and remitting it to the state. In those states, a trust fund concept may make sense. However, from a constitutional viewpoint, a tax **imposed on** the seller and a tax **collected by** the seller and held in trust are two very different things. If we are going to change from one to the other, virtually every court decision involving the application of the GE tax to interstate business will be wide open for a whole new challenge.

Also, the trust fund concept is inconsistent with “grossing up” the tax. For example, consider the seller who charges \$100 for a product, and then adds \$4 for the tax, charging a total of \$104. The seller is considered to have gross income of \$104 (because the amount added for tax is included) and the tax due is \$4.16. That is why most sellers actually add on 4.1666% rather than 4.0% (or they add 4.712% on Oahu). However, if the tax collected is a trust fund, then conceptually **it is not the seller’s income** and should not be part of the tax base. Thus the seller would only owe tax on \$100, not on \$104. The tax due would be \$4.00 and not \$4.16. The State can’t have it both ways – the tax collected from the buyer is either a trust fund or it’s not. If it’s a trust fund, then it can’t be part of the tax base.

I also disagree with the other part of this bill.

The bill would disallow any general excise tax exemption, exclusion, rate reduction or other tax benefit unless the taxpayer files a Hawaii GE tax return specifically identifying and claiming the tax benefit and including whatever forms, schedules or information the Department of Taxation may choose to require. While there is an exception in cases where federal law prohibits such a requirement, there are at least two categories of taxpayers that are likely to fall into a trap if this bill passes.

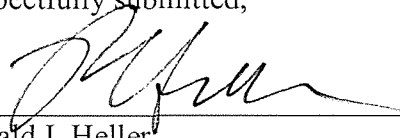
The first category is non-profit organizations, where most or all of their gross receipts are exempt from the GE tax. Often, these entities have volunteers serving as officers and directors. Often, the volunteers are not tax experts, and forms may not be filed in exactly the technically correct manner. This is not due to deliberate non-compliance, but simply due to the complexity of the tax law. Under this bill, a charitable organization that qualified for a tax exemption could lose the exemption through technical errors in filing.

The second category consists of taxpayers based outside Hawaii, or based here but doing business across state lines. Given the extremely complicated nature of the law dealing with multi-state businesses, again it is easy for taxpayers who are sincerely trying to comply with the

law to make a mistake. Again, under this bill, a company that substantively qualifies for a tax exemption or exclusion could lose the tax benefit due to a technical filing mistake.

Overall, I think that passing this bill would create a number of serious problems. If we are going to consider a change as drastic as this – and I don't think we should – it ought to be given far more study first.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Heller', written over a horizontal line.

Ronald I. Heller

LATE

**TESTIMONY BEFORE THE SENATE COMMITTEE
ON ECONOMIC DEVELOPMENT AND TECHNOLOGY**

Re: Senate Bill 2748

**Wednesday, February 10, 2010 at 1:30 p.m.
State Capitol**

Chair Fukunaga, Vice-Chair Baker, and Members of the Committee:

My name is Chris Mashiba. I am a tax partner at the law firm Cades Schutte LLP. **I OPPOSE Senate Bill 2748 for the following reasons:**

1. The complete denial of deductions, exemptions, and exclusions for not filing a timely GET return is an excessive penalty. This practice is not adopted by the federal tax laws except in the very limited situation involving foreign taxpayers. It may be appropriate for foreign taxpayers because of their inadequate tax information reporting and difficulty for the IRS to obtain information. SB 2748 imposes this severe penalty on every person in Hawaii who has any type of income, including employees with wages or tax exempt entities, which are both GET exempt by HRS statute and are not otherwise currently required to file GET returns. Therefore, SB 2748 is overbroad and makes bad tax policy.

2. The GET is not a trust fund tax. The federal tax laws will not impose personal liability on owners or managers of a business except for a very limited situation where the business collects and holds in trust employee payroll tax. The payroll tax is the liability of the employee and not the business. On the other hand, Hawaii businesses do not hold the GET in trust for anyone. The GET is the tax liability of the Hawaii business. Therefore, imposing personal liability for GET payment is highly improper.

Respectfully submitted: *Chris S. Mashiba*

L E G I S L A T I V E

TAXBILLSERVICE

126 Queen Street, Suite 304

TAX FOUNDATION OF HAWAII

Honolulu, Hawaii 96813 Tel. 536-4567

SUBJECT: INCOME, General excise tax benefits**LATE****BILL NUMBER:** SB 2748; HB 2595 (Identical)**INTRODUCED BY:** SB by Hanabusa by request; HB by Say by request

BRIEF SUMMARY: Adds a new section to HRS chapter 237 to provide that a person shall not be entitled to any general excise tax benefit unless the person claiming the general excise tax benefit shall: (1) be licensed to engage and conduct business as required; (2) file a tax return as provided under this chapter or HRS chapter 231 no later than twelve months from the due date prescribed for the return; and (3) make a claim for the general excise tax benefit on the forms prescribed by the director of taxation. The director of taxation may require the taxpayer to furnish information to ascertain the validity of any general excise tax benefit and may adopt rules necessary to effectuate the purposes of this section.

Defines "general excise tax benefit" as any exemption, exclusion of amount, reduction from the measure of tax imposed, deduction, credit, lower rate, segregation or division of amounts amongst multiple taxpayers involved in the same transaction, or income split allowed under this chapter.

Adds a new section to HRS chapter 237 to provide that there shall be personal liability for the taxes imposed under this chapter for the following amounts of gross income or gross proceeds: (1) any amount collected as a recovery of the taxpayer's liability under the GET, where the amount is passed on as the tax owed by the taxpayer for the transaction and is separately stated or accounted for in a receipt, contract, invoice, billing, or other evidence of the business activity; or (2) an amount equal to an imputed tax liability on a transaction where a taxpayer does not separately state or account for the amount as a tax recovery. The amount of the imputed tax liability is the result of multiplying the gross income or gross proceeds received in the transaction by the tax rate. The amounts in paragraphs (1) and (2) shall be held in trust for the state and for the payment to the tax collector as required.

The personal liability applies to any officer, member, manager, or other person having control or supervision of gross proceeds or gross income collected and held in trust, or who is charged with the responsibility for the filing of returns or the payment of gross income or gross proceeds collected and held in trust. Such person shall be personally liable for any unpaid taxes and interest and penalties on those taxes, if such officer or other person wilfully fails to pay or to cause to be paid any taxes due from the taxpayer. Stipulates that "wilfully fails to pay or to cause to be paid" shall be construed in accordance with judicial interpretations given to similar provisions of Title 26 of the United States Code; consistent with, the term "wilfully" shall mean a voluntary, intentional violation of a known legal duty.

EFFECTIVE DATE: July 1, 2010; applicable to gross income received on or after its effective date

STAFF COMMENTS: This is an administration measure submitted by the department of taxation TAX-07(10). This measure underscores the importance of the requiring businesses to register to do business in Hawaii in order to "enjoy" the benefits of the general excise tax. While the measure extols the virtue of being registered as it provides valuable information that may be used for compliance efforts by the

SB 2748; HB 2595 - Identical

department of taxation, it is questionable whether the adoption of this measure will ensure the proper payment of taxes. This measure is aimed, do doubt, at those entities which enjoy exemptions or unique treatment under the general excise tax laws. With everyone from nonprofit organizations which enjoy exemptions from the tax on related activities to for profit entities which are allowed to treat their gross income as provided for by law. In this latter case, these could include travel related entities where the gross income is divided between commissioned sales and the provider of travel related activities other wise known as gross-up to hotel operators who are contracted to manage a hotel on behalf of a hotel property owner where the amounts disbursed as compensation and employee benefits are not subject to tax by the hotel operator as they are viewed as pass-through expenditures.

If the intent of this measure is to catch so-called abusers and scofflaws who enjoy these special provisions, this measure is overkill, creating an administrative and compliance nightmare, enticing businesses who do not have the funds, due to an ailing economy, to pay their fair share of the general excise tax. In this case, this proposal violates one of the principles of a good tax policy, that a tax should be easy to administer and with which to comply insuring that the cost of administration and compliance does not exceed the amount of the tax collected.

While the justification sheet of the measure estimates that the adoption of this measure will result in a revenue gain of \$15 million in fiscal 2011 and increasing to \$45 million in fiscal 2015, such estimates appear to be overly optimistic

Digested 2/9/10



LATE

H S C P AHawaii Society of
Certified Public Accountants

**TESTIMONY BEFORE THE SENATE COMMITTEE
ON ECONOMIC DEVELOPMENT AND TECHNOLOGY**

Re: Senate Bill 2748

**Wednesday, February 10, 2010 at 1:30 pm
State Capitol, Conference Room 016**

Chair Fukunaga, Vice-Chair Baker, and Members of the Committee:

Thank you for the opportunity to testify. My name is David Carr. I am a licensed Certified Public Accountant in Hawaii and I am the Chair of the Tax Committee of the Hawaii Society of Certified Public Accountants. I am testifying on behalf of that committee. **We oppose Senate Bill 2748.**

SB 2748 attempts to change the Hawaii General Excise Tax (GET) to a "trust fund" tax. A "trust fund" tax is one in which one party receives payment of taxes that are a liability of the second party and remits that second party's taxes to the taxing authority. Unpaid payroll trust fund taxes, at the federal level, can result in personal liability for those individuals responsible for the operation of the business or non-profit organization.

The GET is, under Hawaii statutes, a tax on the seller and is not a tax on the buyer. It is not a "trust fund" tax. The seller's GET liability does not depend upon whether the GET is visibly passed on to the buyer or not. Even if the seller does visibly pass on an amount labeled as GET to the buyer, the amount passed on seldom matches exactly the amount of GET liability incurred by the seller, because any amount passed on is, by statute, limited to a rate that is slightly less than the actual rate of GET required to be paid by the seller.

The bill would also disallow any general excise tax exemption, exclusion, rate reduction or other tax benefit unless the taxpayer files a GET return, within 12 months of the original due date, specifically identifying and claiming the tax benefit and including whatever forms, schedules or information the Department of Taxation may choose to require.

This would result in:

- An effective one-year statute of limitations on claiming any lawful GET exclusion, exemption, deduction or credit;
- Technical traps for taxpayers, including Hawaii businesses doing business outside Hawaii, out of state tax businesses doing business in Hawaii, and volunteer boards of directors of non-profit organizations who may not be fully aware of the issues and complexity of the GET.

Our committee opposes SB 2748 both on statutory and fairness grounds.

Respectfully submitted,

David M. Carr, Chair
Tax Committee of the Hawaii Society of Certified Public Accountants

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Honolulu, Hawaii 96806

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LATE

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E-MAIL: PLFLEGIS@FRITZHQ.COM

**THE SENATE
THE TWENTY-FIFTH LEGISLATURE
REGULAR SESSION OF 2010**

**COMMITTEE ON ECONOMIC DEVELOPMENT AND TECHNOLOGY
Hearing February 10, 2010
Testimony on S.B. 2748
(Relating to General Excise Tax)**

Chair Fukunaga, Vice-Chair Baker and members of the Committee:

My name is Peter Fritz. I am an attorney specializing in tax matters. This written testimony is submitted to supplement my testimony at the hearing in opposition to S.B. 2748.

This Section 2 of this bill denies any tax benefits under the General Excise Tax (“GET”) to any person who failed to properly obtain a GET or file a tax return. Any income received by a person would be taxable notwithstanding the fact that the person was qualified for an exemption under the GET law.

In addition, this bill would create a trust fund liability for any amounts deemed to be owed because the person did not obtain a GET license or file a GET tax return within 12 months the time limits in this bill of the due date of the return.

- This bill would create a trap for the unwary. A business that filed all 12 periodic GET tax returns, but failed to file the final reconciliation return would not be entitled to claim the benefit of an exemption or credit for GET returned for an item returned by a customer or an exemption that it is entitled to under law.
 - This bill will deny tax benefits to small nonprofits, volunteer sports teams, PTAs and other similar organizations who fail to dot the I’s or cross the T’s with no intent to avoid paying taxes.
 - My daughter’s hula halau holds a show before the Merrie Monarch each year. Proceeds from the show are exempt from the GET because they are related to the exempt activity of the hula halau. If the hula halau filed all 12 monthly periodic returns, but inadvertently failed to file a reconciliation return, the halau would be taxable on the all of its gross receipts and have trust fund liability for any taxes it could not pay.
- This bill would discourage people coming forward to get GET licenses or who failed to file GET tax return if more than 12 months from the due date of the return. Considering

the potential liability, who would come forward and subject themselves to denial of GET tax benefits? It will only drive persons further underground or close an existing operation and open a new one in an attempt to avoid these onerous provisions.

- Imposition of trust fund liability is inappropriate because there is no settler trustee relationship. When an employer withholds money from an employee's compensation for the express intention of paying it over to the State to pay the employee's income tax, a fiduciary relationship is created because the employer is expected to pay this money over to the State to on behalf of the employee. When the business visibly passes the tax onto the customer, it is the business that is considered the payer of the tax. According to the Department of Taxation General Excise Tax Memorandum No. 4.

“Whether there is a visible pass on or not, the Department of Taxation will look to the seller for the tax upon the seller's total gross receipts. Any amount added as the tax and collected by the taxpayer must be considered as part of the price received, and will be a part of the gross receipts of the taxpayer and must be reported as taxable income.”

Because the Department of Taxation considers any additional amount part of the seller's gross receipts for calculation of the tax owed by the seller, and not tax paid by the consumer, no fiduciary relationship is created and trust fund liability is unwarranted.

- Imposing trust fund liability could cause hardship for the volunteer soccer coach who holds a fund raiser and fails innocently fails to comply with GET law. The soccer coach would have trust fund liability for gross receipts, which but for this bill could be exempt from the GET. This trust fund liability is not dischargeable in bankruptcy and will follow the coach to the grave.

Thank you for the opportunity to testify.

A handwritten signature in black ink, appearing to read "Robert A. O'Leary". The signature is written in a cursive, somewhat stylized font.