

SB 2887

JAN 27 2010

S.B. NO. 2887

A BILL FOR AN ACT

RELATING TO TAXATION.

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

1 SECTION 1. Section 235-68, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§235-68 Withholding of tax on the disposition of real
4 property by nonresident persons. (a) As used in this section:

5 "Nonresident person" means every person other than a
6 resident person.

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

9 "Resident person" means any:

10 (1) Individual included in the definition of resident in
11 section 235-1;

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

14 (3) Partnership formed or registered under chapter 425 or
15 425E;

16 (4) Foreign partnership qualified to transact business
17 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 is located in Hawaii.

20 "Transferor" means any person disposing real property that
21 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~~] :

15 (1) If one or more individual transferors furnishes to the
16 transferee an affidavit by the transferor stating the
17 transferor's taxpayer identification number, that for
18 the year preceding the date of the transfer the
19 property has been used by the transferor as a
20 principal residence, and that the amount realized for
21 the property does not exceed \$300,000 [-];



1 (2) If the transferee acquires the real property pursuant
2 to foreclosure or a deed in lieu of foreclosure; or

3 (3) If the amount realized by the transferor includes real
4 property located in Hawaii the fair market value of
5 which is equal to or greater than the fair market
6 value of the real property acquired by the transferee.

7 (g) The department may enter into written agreements with
8 persons who engage in more than one real property transaction in
9 a calendar year or other persons to whom meeting the withholding
10 requirements of this section are not practicable. The written
11 agreements may allow the use of a withholding method other than
12 that prescribed by this section or may waive the withholding
13 requirement under this section.

14 (h) Any person held liable for the tax under subsection
15 (b) due to a failure to deduct and withhold on the disposition
16 of real property as required, shall be relieved of that
17 liability to the extent that the department has collected an
18 amount of tax equal to the transferor's tax liability related to
19 the disposition. This subsection shall not relieve any person
20 from liability for interest or any penalties otherwise
21 applicable in respect of any failure to deduct and withhold."



S.B. NO. 2887

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

3 SECTION 3. This Act shall take effect upon approval and
4 shall apply to taxable years beginning after December 31, 2009.

5

INTRODUCED BY:

Anna Mercedes Ki



Report Title:

Taxation; Disposition of Real Property; Withholding

Description:

Amends income tax code regarding the withholding of tax on the disposition of real property by nonresident persons.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



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 COMMERCE & CONSUMER PROTECTION
TESTIMONY REGARDING SB 2887
RELATING TO TAXATION**

*****WRITTEN TESTIMONY ONLY*****

**TESTIFIER: KURT KAWAFUCHI, DIRECTOR OF TAXATION (OR DESIGNEE)
DATE: FEBRUARY 5, 2010
TIME: 9AM
ROOM: 229**

This measure, among other things, amends the provisions relating to the withholding tax on real property sold by nonresidents.

The Department of Taxation (Department) provides the following comments.

REQUIRE AN AFFIDAVIT IF THE TRANSACTION IS GOING TO BE EXEMPT—

The Department does not object to exempting transactions where the transferee acquires the real property via deed in lieu of foreclosure; provided that there would otherwise be no gain on the transaction. As is required under current exemptions, an affidavit to that affect should be required:

(2) If the transferee furnishes an affidavit to the department that the transferee acquired the real property pursuant to foreclosure or a deed in lieu of foreclosure and no income tax is due on the transfer; or

CLARIFY PARAGRAPH (3)—The Department is unclear of the purpose of proposed paragraph (3). The Department is concerned that, without further elaboration on this paragraph's intent, that it could impact tax collections.



American Resort Development Association
c/o PMCI Hawaii 84 N. King Street Honolulu, HI 96817 (808) 536-5688

February 5, 2010

TO: Senate Commerce and Consumer Protection Committee
Senator Rosalyn Baker, Chair
Senator David Y. Ige, Vice Chair

FROM: Ed Thompson
ARDA-Hawaii

DATE: Friday, February 5, 2010
Conference Room 229
9:00 a.m.

RE: **SB2887, Relating to Taxation**

Chair Baker and Members of the Committee:

ARDA-Hawaii is the local chapter of the national timeshare trade association. Hawaii's timeshare industry currently accounts for ten percent of the State's lodging inventory with 7,700 timeshare units. Timeshare has had consistent occupancy rates, even during the current tough economic times. This has made our industry a vital partner and a diverse component of the visitor industry in Hawaii.

The purpose of this provision of HARPTA is to ensure that the State has the ability to collect taxes on transfers of real estate owned by non-residents and creates a process whereby a buyer and seller must notify the State of the transaction. The proposed changes in paragraphs (f) (2) and (f) (3) are intended to balance the needs of the State with the likely impact from a transaction from which no tax is owed, as in the case of a sale at a loss or by virtue of a creditor acquiring the property due to a failure of a borrower from paying on a mortgage.

As currently written, all non-resident sellers of timeshares in resale transactions must either pay the Hawaii Department of Taxation ("DOTAX" or the "Department") five percent of the gross proceeds or file a Form N-288 with DOTAX. The N-288 is to substantiate that the property was sold at a loss. DOTAX must then quickly review and approve the N-288 and return it to the seller prior to closing. If the Department cannot timely do this, the seller will need to have five percent withheld and then file a non-resident return, claiming a refund for the full amount of the withholdings.

There are an increasing number of timeshare transactions in Hawaii each year that are either property exchanges wherein the timeshare owner is "upgrading" their current timeshare interest by buying a more expensive one (upon which taxes will be paid) or that involve the foreclosure process where a timeshare owner who is in default of the terms of their mortgage or assessment payment and wishes to provide the developer or association a deed in lieu of foreclosure. In these cases, there is either no taxable gain by the timeshare owner as they are either spending more money on the upgraded interest than their original timeshare was worth or they are simply deeding over their timeshare interest to the developer for no monetary gain. In such cases, no revenue is owed to the State because there is no taxable gain by the consumer so it does not make sense to require the timeshare owner to file an N-288 with the state.

New Section (h) is intended to insure that inadvertent failures to file by non-residents will not have their liability (other than interest and penalties) exceed the actual taxable amount owed to the State had the consumer filed timely.

For these reasons, we believe it would be beneficial for the State as well as the non-resident timeshare owners to have this change in the law.

Thank you very much for the opportunity to offer testimony in support of this measure.

TIMESHARE WITH ALOHA

baker5 - Leo

From: Tina Desuacido [tina500@juno.com]
Sent: Thursday, February 04, 2010 2:54 PM
To: CPN Testimony
Subject: Tax Foundation Testimony
Attachments: s2887-10.pdf

TRANSMISSION OF TESTIMONY

Date: Thursday, February 4, 2010

To: Senate Committee on Commerce & Consumer Protection

From: Tax Foundation of Hawaii

TOTAL PAGES - 1

For: Senator Rosalyn Baker, Chair

Testifier: Lowell L. Kalapa, President - Tax Foundation of Hawaii

(Mr. Kalapa will not appear in person at the hearing.)

Date of Hearing: February 5, 2010

Time of Hearing: 9:00 am

SB 2887 - Relating to Taxation (1 page)

Number of Copies - 1

Thank you.

TAXBILLSERVICE

126 Queen Street, Suite 304

TAX FOUNDATION OF HAWAII

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: INCOME, Real property nonresident withholding

BILL NUMBER: SB 2887

INTRODUCED BY: Kim

BRIEF SUMMARY: Amends HRS section 235-68 to provide that a person shall not required to withhold any tax on the disposition of Hawaii real property if: (1) the transferee acquires the real property pursuant to foreclosure or a deed in lieu of foreclosure; or (2) the amount realized by the transferor includes real property located in Hawaii whose fair market value is equal to or greater than the fair market value of the real property acquired by the transferee.

Any person held liable for the failure to deduct and withhold on the disposition of real property as required, shall be relieved of that liability to the extent that the department has collected an amount of tax equal to the transferor's tax liability related to the disposition; provided that this shall not relieve any person from liability for any applicable interest or any penalties.

EFFECTIVE DATE: Tax years beginning after December 31, 2009

STAFF COMMENTS: It appears that this measure proposes to clarify the provisions relating to the withholding requirements relating to the disposition of real property by nonresidents to ensure income taxes are paid on the sale of such real property. The measure would exempt from the withholding requirements any property that is sold as a result of foreclosure since the proceeds would probably accrue to the lender who foreclosed on the property or if the seller holds real property in Hawaii that is of the same or greater value than the property that was sold. The exemption assumes that there are other means than these two cases to ensure payment of any income taxes that would have been due on these types of sales.

The measure also relieves a person who would otherwise had been required to withhold on such sales of real property if, in fact, the tax department had collected the tax that would have been due from the seller which in this case the purchaser would otherwise would have had to withhold an amount from the purchase price. This appears to be a reasonable compromise as far as the liability exposure to the purchaser.

Digested 2/4/10

**SENATE COMMITTEE ON
COMMERCE AND CONSUMER PROTECTION**

February 5, 2010

Senate Bill 2887 Relating to Taxation

Chair Baker and members of the Senate Committee on Commerce and Consumer Protection, I am Rick Tsujimura, representing Marriott Vacation Club International, Inc. (Marriott).

Marriott supports Senate Bill 2887 Relating to Taxation, which provides that in the case of a foreclosure, a deed in lieu of foreclosure, or in a situation wherein real property is acquired in Hawaii that is worth more than the real property in Hawaii for which it is exchanged, no withholding under Chapter 235 is required. The bill also provides relief from tax liability if the department of taxation has collected an amount equal to or exceeding the tax liability. Although Marriott supports Senate Bill 2887, we prefer the text of the companion measure House Bill 2362, because it includes a “*de minimus* exemption” as allowed in several other states, notably California. The language reads as an additional exemption to section 235-68(f) as follows:

- (4) If the amount realized on the disposition of real property that is a time share interest, as defined in section 514E-1, does not exceed \$100,000.

We request that this additional language be included as the amount of staff time to process disposition requests (Form N-288B) or the withholding certificates (Form N-288A) and subsequent taxpayer refunds (Forms N-288C or N-15) or would be lessened and due to the low probability of a taxable gain, would have a negligible if not negative effect on state revenues. Generally most time share sales to second buyers have not had an appreciable gain and in the case of upgrades, no gains.

For these reasons we request your passage of this measure to allow us to continue dialogue on this measure and would ask your consideration of the *de minimus* exemption. Thank you for the opportunity to present this testimony.