

**SB 1355**

# TAXBILLSERVICE

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**SUBJECT:** MISCELLANEOUS, Streamlined sales and use tax

**BILL NUMBER:** SB 1355; HB 1265 (Identical)

**INTRODUCED BY:** SB by Chun Oakland, Baker, Fukunaga, Ige, Kidani, Tokuda and 3 Democrats; HB by Mizuno

**BRIEF SUMMARY:** Adds a new chapter to the law to set out sections of HRS chapter 237 which establish transactions subject to the 0.5% general excise tax rate.

Adds a new chapter to the law to set out sections of HRS chapter 238 which establish transactions subject to the 0.5% use tax rate.

Adds a new chapter to the law to set out sections of HRS chapter 237 which establish transactions subject to the 0.15% general excise tax rate. The measure delineates provisions governing commissioned sellers of insurance to replace references to agents, general agents, subagents, or solicitors with the term "insurance producers."

Adds several new sections to HRS chapter 237 to establish sourcing rules to determine when a product or service is taxed, including telecommunication services. The measure delineates provisions defining "direct mail" and how the sourcing of direct mail transactions will be ascertained.

Adds a new section to HRS chapter 237 to allow a seller to take a deduction from taxable sales for bad debts.

Adds several sections to HRS chapter 255D to establish provisions relating to the determination of the proper general excise or use tax rates between different tax jurisdictions, rounding on tax computations, amnesty for registered sellers who pay, collect, or remit general excise or use taxes in accordance with the terms of the streamlined sales and use tax agreement, tax rate changes by a county, certified service provider, confidentiality of records, liability for uncollected tax and rate changes, and customer refund procedures.

Amends HRS sections 237-8.6 and 238.2.6 to prohibit a county to conduct an independent audit of sellers registered under the streamlined sales and use tax agreement.

Amends HRS section 237-24.3 to redefine the term "prosthetic device."

Establishes a committee to oversee the department of taxation's implementation, administration, and compliance of the streamlined sales and use tax agreement. The committee shall be administratively attached to the department of taxation. Requires the committee to hold meetings to carry out this act and serve as the state's official delegation to the streamlined sales and use tax governing board when establishing the state's criteria for compliance.

Permits the department of taxation to seek technical assistance with legal professionals that have a background and practice in taxation. Allows the department of taxation to secure services in an expeditious manner as soon as possible. The legislative reference bureau shall assist the department of taxation or contractor in drafting any legislation.

This act shall take effect when the state becomes a party to the streamlined sales and use tax agreement; provided that: (1) the amendments made to HRS section 237-9 by this act shall not be repealed when that section is reenacted on June 30, 2014, pursuant to section 13(3) of Act 134, SLH 2009; (2) the amendments made to HRS section 237-24 by this act shall not be repealed when that section is reenacted on December 31, 2013, pursuant to section 4, Act 70, SLH 2009; and (3) the amendments made to HRS section 237-24.3 by this act shall not be repealed when that section is reenacted on December 31, 2014, pursuant to section 4, Act 239, SLH 2007, as amended by section 5, Act 196, SLH 2009, as amended by section 1 of Act 91, SLH 2010.

**EFFECTIVE DATE:** Upon approval as noted in the measure

**STAFF COMMENTS:** The Streamlined Sales Tax Project's Model Agreement and Act is a project undertaken with other states that is intended to simplify sales and use tax administration as it relates to multiple sales and use tax rates, definitions, and taxing jurisdictions.

Goals of the project include the establishment of a single sales tax rate, uniform definitions of sales and use tax terms, requiring states to administer any sales and use taxes, and a central electronic registration system to allow a seller to register to collect and remit sales and use taxes for all states.

At the national level, there appears to be a number of difficulties in the negotiations and unanimous agreement is far from reality. Before jumping on the band wagon, lawmakers should exercise care as it should be remembered that Hawaii does not have a sales tax as found in other states. To the contrary, the general excise tax, while viewed as a sales tax, is a far cry from the retail sales tax structure found on the mainland.

The 2005 legislature had approved a measure to direct the department of taxation to identify issues that need to be resolved to effectuate the orderly enactment and operation of a streamlined sales and use tax based on the Streamlined Sales Tax Project's Model Agreement and Act. The act also repealed the streamlined sales and use tax advisory committee council which was to consult with the department of taxation on the implementation of the streamlined sales and use tax agreement in Hawaii. When this measure was sent to the governor, the governor vetoed it due to the repeal of the advisory council, unrealistic deadlines in the measure, and concerns of allowing a third party to access confidential tax return information. A special session of the legislature overrode the governor's veto and the measure passed as Act 3 of the Special Session of 2005.

Basically the measure attempts to turn Hawaii's gross receipts tax imposed for the privilege of doing business in Hawaii into a retail sales tax structure with respect to where the tax is imposed. Much of the bill is devoted to separating the wholesale imposition of the tax from the retail and then reworking where the tax is applied otherwise known as "sourcing." The general excise tax, as we know it today, would be radically changed to accommodate the format adopted by the Streamline Sales Tax Project (SSTP).

What is not evident in the measure is that by participating in the consortium known as the SSTP, Hawaii businesses will be required to collect the sales taxes of other states when purchases are made by residents of that state. The cost of collecting, accounting, and remitting those taxes will add even more overhead costs to operating a business in Hawaii. So why is there such enthusiasm on the part of the legislature to participate in the SSTP? Lawmakers have been promised hundreds of millions of dollars that could be had if the state would just participate in the project. The suggestion came to the 2001-2003 Tax Review Commission on the recommendation of their consultant who was already an advocate of the project.

Of course, no thought was given to how this would affect Hawaii businesses and what additional costs there would be. Given the fact that Hawaii businesses will now have to operate in a different mode insofar as the general excise/SSTP sales tax, will lawmakers compensate businesses for undertaking the collection of other state's retail sales taxes? Indeed, the law being proposed in this measure is a hybrid of the current general excise tax law and a retail sales tax. It retains the two-tiered wholesale/retail system and keeps the tax imposed on services as well as on business-to-business transactions. So the measure attempts to have the best of both worlds - to force other states to collect our general excise tax while retaining the pyramiding features of the general excise tax. This is a major change in the state's largest source of general fund revenues. Care should be taken in making this transition as it could alter not only the past interpretation of the general excise tax, but it may also have a major impact on the revenue producing capacity of the tax.

One of the key issues still under discussion amongst the members who have already signed on is "where" does the sale occur. For a number of the larger states like California, Illinois, and Texas which have much at stake since they are states that manufacture goods shipped to other states, the sourcing rules they adopted use "origin" based rules, that is the tax that is imposed at the place from which the goods are shipped and not where the purchaser takes possession. The proposed bill here is ambiguous, at best, as in some cases being origin based as long as the purchaser takes possession of the goods at the place of the business but provides, on the other hand, for the taxation at the address to which the goods are delivered. It is this destination rule that causes the most problems for businesses as they must now deal with a plethora of rates depending on the number of states from which they receive orders for their goods.

While some states may elect destination, there is no doubt that the larger states will elect origin sourcing as they are probably net exporters of goods. That being the case, Hawaii residents will probably end up paying the Illinois or California sales tax on their purchases from out-of-state vendors and in the long run, the purported windfall will turn into a disaster for Hawaii. Under current law, the use tax would otherwise have been due on those sales and while it has been difficult to enforce and collect on individual sales, more of an effort should be placed on the collection of the use tax where Hawaii already has jurisdiction.

Again, a main area of concern is whether the states can afford the streamlined system itself. Given the promises that have been made and not delivered upon such as the software that is supposed to facilitate the collection and remittance of the various states' sales taxes, to the promise to pay the cost of funding the administrative structure of the governing board, it appears that all of these are promises with no intent to make it happen. As such, it is premature for Hawaii to jump on the throttling locomotive engine that appears to be headed for a brick wall. This proposal needs more discussion in the interim and further clarification as well as a discussion with taxpayers who must carry out the duty of the actual

collection.

Curiously, this is what the 2005-2007 Tax Review Commission recommended, that until the member states of the SSTP agreement come to a definitive conclusion, it is premature for Hawaii to jump on board. With this latest development, it appears that Hawaii will be a net loser as its residents will end up paying other state's sales taxes.

While the proposed measure attempts to conform Hawaii's general excise and use tax laws to the streamlined sales and use tax agreement, due to its complexity and technical aspects, it is questionable whether members of the legislature are qualified to determine whether this measure will be sufficient to comply with the Streamlined Sales and Use Tax Agreement.

In 2006 a bill that would adopt the streamline sales tax agreement was introduced and nearly passed the legislature but for a small glitch in the closing moments of the session. This, despite the fact that the State Auditor had a consultant assess the revenue potential of participating in the project. Instead of the hundreds of millions of dollars the promoters of the project had promised, the consultant estimated that Hawaii would benefit at the very least by about \$10 million and at the most \$50 million.

At the same time, when the department of taxation was asked what it estimated it would cost the department to implement the project for Hawaii, the price tag was set at \$15 million. Thus, it came as no surprise that when the Tax Review Commission looked at the issue, the decision was a no brainer, Hawaii would stand to gain about \$10 million in revenue, but it would cost the state \$15 million to implement. And that doesn't include the cost to businesses in Hawaii that would be required to collect the sales taxes of other states.

So the Commission's advice to the legislature and administration was to wait. In its recommendation it was noted that "the largest states (by economic size) have failed to sign on to the project, jeopardizing the chances of becoming an effective vehicle for collecting the Use Tax. Until the Project shows greater promise of producing results, it is premature for Hawaii to incur the expense to join it."

In 1992, in *Quill Corp. v. North Dakota*, the U.S. Supreme Court reaffirmed that the power of states to impose taxes on interstate commerce is limited by their geographic border. Although some academics resent this "physical presence rule," it remains the law of the land and is essential to prevent revenue officials from wreaking havoc on national markets by reaching beyond their borders for tax revenues. Since no working alternative to the physical presence rule has been developed, abandoning it would result in states harming themselves by harming the whole.

The SSTP was formed in reaction to *Quill*, though not necessarily to create an alternative to the physical presence rule. The SSTP is a working group of revenue officials and experts with the stated purpose of bringing simplicity and uniformity to sales taxes in the United States. (The governance structure raises some questions of democratic accountability and whether SSTP receives or seeks genuine public input.) Member states must adopt reforms to align their tax code with the SSTP. The hope is that simple and uniform sales tax statutes will allow the collection of interstate sales taxes without placing burdens on interstate commerce.

Simplicity and uniformity are both important goals, but the SSTP has, at best, mixed success in achieving them. There are nearly 8,000 sales taxing jurisdictions in the United States, each with their

own bases and rates, and the enormous complexity involved in tracking borders and changes is a huge stumbling block to state efforts to impose taxes on online sales.

While the SSTP has made some progress on uniformity (they have succeeded, for instance, in a single accepted definition of “candy”- something everyone defined differently before), the SSTP appears to be giving up the effort on simplicity. At their New Orleans meeting in July 2008, for instance, the SSTP panel was asked if any effort was being made to reduce the number of sales taxing jurisdictions, and/or to align them with 5-digit zip codes. “No and no,” were the short, but honest answers.

Rather than requiring that states simplify before reaching out beyond their borders to tax out-of-state companies, the SSTP seems content to let states continue the status quo. One panelist noted that far from requiring substantial reforms, “States still get to do 99.9% of what they want to do” under the SSTP agreement. This demonstrates either disingenuousness or how little the SSTP recognizes that many existing sales taxes are in need of substantial reform.

The SSTP already abandoned the notion of taxing like transactions alike when they adopted “destination sourcing” for online sales, but permitted states to adopt “origin sourcing” for intrastate sales. This, in effect, requires Internet companies to collect sales taxes based on where their customer is located, but allows brick-and-mortar stores to collect sales taxes based on where the store is located. In this way the SSTP prevents a level playing field between Internet businesses and brick-and-mortar businesses.

Coupled with the SSTP’s non-worry about reducing the number of jurisdictions (they spoke optimistically of providing maps of sales tax jurisdictions, having rejected even aligning jurisdictions with 9-digit zip codes), full implementation of the SSTP, at this time, without serious reforms, could result in a serious and inequitable burden on e-commerce.

Another recent example involves clothing taxes. The SSTP requires that all states have a uniform definition of clothing, and tax all of it (or none of it) at the same rate. Minnesota did so, but then imposed a “separate” fur tax on fur sales. Rather than recognizing this as an end-run around tax uniformity, the SSTP upheld Minnesota’s action.

The SSTP is attempting to persuade Congress to permit SSTP member states to begin collecting sales taxes on online purchases, premised on the belief that the SSTP’s simplification and uniformity mission has been accomplished. **The SSTP has not accomplished its mission.** The SSTP should look again at serious simplification efforts before declaring themselves a success and seeking to expand state taxing power.

States should be willing to adopt uniform definitions worked out by the SSTP so as to reduce transaction costs between state statutes. However, the ability of any state to collect sales tax on online transactions is wholly dependent on the willingness of other states to simplify their laws and adopt uniform definitions as well. It is also dependent on the creation of a working alternative to the physical presence standard that provides certainty and prevents multiple taxation. Neither the wholesale adoption nationwide of uniform sales tax statutes, nor the development of a working alternative that provides the certainty needed for long-term investment, are likely in the foreseeable future.

For these reasons, lawmakers and other states should understand that SSTP membership does not lead to a sudden influx of free tax money. In any event, this money will come from Hawaii residents and should be looked at as a tax increase notwithstanding the existing liability under the use tax laws. The SSTP's goals are good ones, but their success is mixed at best, and whatever effect it has will not be seen in the short-term.

A few years ago, a similar measure was vetoed by the governor. In her veto message, she stated that the "bill is objectionable because it would abdicate the authority of the state to establish, administer, and change its general excise tax structure; grants amnesty to certain taxpayers, absolving them of the requirement to pay taxes due the state, and treats out-of-state vendors more favorably than in-state vendors." She further stated that in order to comply with the Streamline Sales and Use Tax Model Agreement and Act (SSUTA), the state and each county would have to establish a single tax rate and once the state participates in the SSUTA, the state must certify to a national governing board that the state's law complies with the SSUTA and may relinquish control over the state's ability to determine its own tax revenue collections. The governor also had concerns about the provision of the SSUTA requiring the state to pay out-of-state vendors for collecting Hawaii taxes since the taxes the state would be receiving would be reduced by the collection fee paid to the out-of-state vendor, thereby giving out-of-state vendors an unfair advantage since local businesses are not compensated for collecting and paying required taxes.

The long and short of this measure is that it is nothing more than a tax increase that will probably end up benefitting other states if the majority of states adopt "origin" based sourcing and continuing a tradition of passing the cost to administer and complying with the proposal on to businesses in Hawaii, adding yet another nail in the coffin for businesses in Hawaii. It is certainly a reflection of the lack of understanding of Hawaii's unique general excise tax and how generous it is in producing revenues for the state.

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February 22, 2011

**The Honorable David Y. Ige, Chair**  
Senate Committee on Ways and Means  
State Capitol, Room 211  
Honolulu, Hawaii 96813

**RE: S.B. 1355, Relating To Taxation**

**DECISION MAKING: Thursday, February 24, 2011 at 9:00 a.m.**

Aloha Chair Ige, Vice Chair Kidani and Members of the Committee:

I am Craig Hirai, a member of the Subcommittee on Taxation and Finance, submitting comments on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members in Hawai'i. HAR **supports** S.B. 1355, Relating to Taxation, which adopts amendments to Hawaii tax laws to implement the Streamlined Sales and Use Tax Agreement.

The Report of the 2001-2003 Tax Review Commission states that Hawaii would potentially achieve not only the benefit of better definitions, uniformity, and certainty, but also increase tax compliance by interstate vendors (primarily mail order and e-commerce merchants) who agree to pay state taxes under the Streamlined Sales Tax Project. The Report goes on to state that because of Hawaii's uniquely broad based General Excise and Use Tax system, by joining the Streamlined Sales Tax Project, Hawaii may be able to better maintain the viability of its broad revenue base.

The Report of the 2005-2007 Tax Review Commission, however, states that while the Commission believes that the goal of coordinating the collection of taxes on interstate sales, such as via the internet, is desirable, and that Hawaii should remain involved in discussions on the Streamlined Sales Tax Project, the Commission did not think that Hawaii should make a formal commitment yet.

HAR believes that the procedures set forth in Section 32 of S.B. 1355 should help alleviate some of the concerns of the 2005-2007 Tax Review Commission, and that S.B. 1355 should eventually level the playing field for local merchants who must deal with the high cost of doing business in Hawaii and still compete with mail order and e-commerce merchants from outside of the State.

Mahalo for the opportunity to submit comments.

