
A BILL FOR AN ACT

RELATING TO TAXATION.

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

1 SECTION 1. Section 238-6, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§238-6 Collection of tax by seller; penalty.** (a) For
4 purposes of the taxes due under sections 238-2 and 238-2.3,
5 every seller [~~having~~]:

6 (1) Having in the State, regularly or intermittently, any
7 property, tangible or intangible, any place of
8 business, or any representation as hereinabove
9 defined, (and irrespective of the seller's having or
10 not having qualified to do business in the State); or

11 (2) Who is otherwise engaged in business in the State as
12 defined in subsection (h);

13 shall, if the seller under paragraph (1) makes sales of
14 property, services, or contracting for use in the State (whether
15 or not the sales are made in the State), or if the seller under
16 paragraph (2) makes sales of tangible personal property for use

17 in the State as described in section 238-2, collect from the
18 purchaser the taxes imposed by sections 238-2 and 238-2.3, on



1 the use of the property, services, or contracting, as
2 applicable, so sold by the seller, if the seller is not subject
3 to the use tax under this chapter on the importation of the
4 property into the State. The collection shall be made within
5 twenty days after the accrual of the tax or within [~~such other~~]
6 a period [~~as shall be~~] fixed by the director of taxation upon
7 the application of the seller, and the seller shall give to the
8 purchaser a receipt therefor in the manner and form prescribed
9 by the director; provided that this subsection shall not apply
10 to vehicles registered under section 286-50.

11 (b) The director, in the director's discretion, upon
12 application therefor and under terms and conditions prescribed
13 by the director, may relieve any seller of the duty of
14 collecting and paying over the tax imposed by subsection (a)
15 above, if the director is satisfied that the tax can be
16 effectively collected by other means. Exemption from the duty
17 of collecting the tax may be canceled at any time when the
18 director finds that the tax cannot be effectively collected by
19 other means. The director likewise may terminate the duty and
20 authority of any seller to collect and pay over the tax imposed
21 by subsection (a) above if the director finds, [~~as to such~~



1 ~~seller,~~] on a case-by-case basis, that the tax cannot be
2 effectively collected by [~~such~~] other means.

3 (c) The director, in the director's discretion, upon
4 application therefor and under terms and conditions prescribed
5 by the director, may authorize the collection of the tax imposed
6 by this chapter by a seller not otherwise required to collect
7 the tax. The seller, when so authorized, shall have the duty of
8 collecting and paying over the tax in the same manner and
9 subject to the same requirements as set out in subsection (a).
10 The authority may be canceled at any time when, in the judgment
11 of the director, the tax can more effectively be collected by
12 other means.

13 (d) In case any seller required or authorized to collect
14 the tax under this chapter fails to collect the same, or having
15 collected the tax fails to pay over the same as provided by this
16 chapter, the seller shall nevertheless be personally liable to
17 the State for the amount of the tax, but it shall be a defense
18 to [~~such~~] this tax liability that the indebtedness for the price
19 is a worthless account actually charged off for income tax
20 purposes, if and to the extent that the collections of the price
21 do not equal the tax.



1 (e) Every seller required or authorized to collect the tax
2 shall make returns and payments of the tax at the same time and
3 in the same manner as is provided with respect to taxpayer by
4 section 238-5. All provisions of this chapter with respect to
5 returns, reports, records, payments, penalties, and interest,
6 appeals, investigations, and audits, assessments, tax
7 collections procedure, criminal offenses, and the general
8 administrative powers and duties of the director, shall apply to
9 [~~such~~] these sellers the same as to taxpayers.

10 (f) The tax collected pursuant to this section shall be
11 held in trust for the State and for payment to the proper
12 collecting officer in the manner and at the time required by
13 this chapter. Any person collecting [~~such~~] the tax who
14 appropriates or converts the same to the person's own use or to
15 any use other than the payment of the tax as herein provided,
16 and who fails to pay over the amount of tax so collected at the
17 time required by this chapter, shall be deemed guilty of an
18 embezzlement of property of the State and shall be fined more
19 than five times the amount of money so embezzled or imprisoned
20 at hard labor not more than ten years, and any failure by the
21 person so collecting the tax to pay the same over within the



1 time provided by this chapter, after demand therefor, shall be
2 taken and held to be prima facie evidence of the embezzlement.

3 (g) This section shall not apply to a seller engaged in
4 business in the State as defined in paragraph (2) of that
5 definition if the seller can demonstrate that the person in the
6 State with whom the seller has an agreement did not engage in
7 referrals in the State on behalf of the seller that would
8 satisfy the requirements of the commerce clause of the United
9 States Constitution.

10 (h) For the purposes of this section:

11 "Commonly controlled group" means:

12 (1) A parent corporation and any one or more corporations
13 or chains of corporations, connected through stock
14 ownership or constructive ownership with the parent,
15 if:

16 (A) The parent owns stock possessing more than fifty
17 per cent of the voting power of at least one
18 corporation; and

19 (B) If applicable, stock cumulatively representing
20 more than fifty per cent of the voting power of
21 each of the corporations, except the parent, is
22 owned by the parent, one or more corporations



1 described in subparagraph (A), or one or more
2 other corporations that satisfy the conditions of
3 this subparagraph;

4 (2) Any two or more corporations, if stock representing
5 more than fifty per cent of the voting power of the
6 corporations is owned, or constructively owned, by the
7 same person;

8 (3) Any two or more corporations that constitute stapled
9 entities, meaning:

10 (A) Any group of two or more corporations if more
11 than fifty per cent of the ownership or
12 beneficial ownership of the stock possessing
13 voting power in each corporation consists of
14 stapled interests; or

15 (B) Two or more interests if, by reason of form of
16 ownership restrictions on transfer or other terms
17 or conditions, in connection with the transfer of
18 one of the interests the other interest or
19 interests are also transferred or required to be
20 transferred; or

21 (4) Any two or more corporations, all of whose stock
22 representing more than fifty per cent of the voting



1 power of the corporations is cumulatively owned by, or
2 for the benefit of, members of the same family.

3 Members of the same family are limited to an
4 individual; the individual's spouse, parents, brothers
5 or sisters, grandparents, children, and grandchildren;
6 and their respective spouses.

7 "Engaged in business in the State" means a seller,
8 including an entity affiliated with a seller within the meaning
9 of Section 1504 of the Internal Revenue Code, that has
10 substantial nexus with the State for purposes of the commerce
11 clause of the United States Constitution and upon whom federal
12 law permits the State to impose the taxes under this chapter,
13 and includes:

- 14 (1) Any seller that is a member of a commonly controlled
15 group that includes another member that, pursuant to
16 an agreement with or in cooperation with the seller,
17 performs services in the State in connection with
18 tangible personal property to be sold by the seller,
19 including the design and development of tangible
20 personal property sold by the seller, or the
21 solicitation of sales of tangible personal property on
22 behalf of the seller; and



1 (2) Any seller entering into an agreement or agreements
2 under which a person or persons in the State, for a
3 commission or other consideration, directly or
4 indirectly refer potential purchasers of tangible
5 personal property to the seller, whether by an
6 internet-based link or an internet web site, or
7 otherwise, provided that:

8 (A) The total cumulative sales price from all of the
9 seller's sales, within the preceding twelve
10 months, of tangible personal property to
11 purchasers in the State that are referred
12 pursuant to all of those agreements with a person
13 or persons in the State, is in excess of \$10,000;
14 and

15 (B) The seller, within the preceding twelve months,
16 has total cumulative sales of tangible personal
17 property to purchasers in the State in excess of
18 \$1,000,000;

19 provided further that an agreement under which a
20 seller purchases advertisements from a person or
21 persons in the State, to be delivered on television,
22 radio, in print, on the internet, or by any other



1 medium, is not an agreement for the purposes of this
2 paragraph unless the advertisement revenue paid to the
3 person or persons in the State consists of commissions
4 or other consideration that is based upon sales of
5 tangible personal property; and provided further that
6 an agreement under which a seller engages a person in
7 the State to place an advertisement on an internet web
8 site operated by that person, or operated by another
9 person in the State, is not an agreement for the
10 purposes of this paragraph unless the person entering
11 the agreement with the seller also directly or
12 indirectly solicits potential customers in the State
13 through use of flyers, newsletters, telephone calls,
14 electronic mail, blogs, microblogs, social networking
15 sites, or other means of direct or indirect
16 solicitation specifically targeted at potential
17 customers in the State."

18 SECTION 2. Prior to the convening of the regular session
19 of 2013, the director of taxation shall certify in writing to
20 the governor and the legislature whether federal law has been
21 enacted by December 31, 2012, authorizing the states to require



1 a seller to collect taxes on sales of goods to in-state
2 purchasers without regard to the location of the seller.

3 SECTION 3. If any provision of this Act, or the
4 application thereof to any person or circumstance is held
5 invalid, the invalidity does not affect other provisions or
6 applications of the Act, which can be given effect without the
7 invalid provision or application, and to this end the provisions
8 of this Act are severable.

9 SECTION 4. Statutory material to be repealed is bracketed
10 and stricken. New statutory material is underscored.

11 SECTION 5. This Act shall take effect upon its approval;
12 provided that section 1 of this Act shall take effect on July 1,
13 2013, if the State does not, by June 30, 2013, enact a law in
14 accordance with any federal law authorizing the states to
15 require a seller to collect taxes on sales of goods to in-state
16 purchasers without regard to the location of the seller.

17

INTRODUCED BY: *Asam w Choy*

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H.B. NO. 1694

Report Title:

Use Tax; Tangible Personal Property; Internet Sales; Out-of-State Sellers; Affiliates

Description:

Unless preempted by federal law, requires the collection of use taxes by sellers of tangible personal property who enter into agreements under which a person in the State refers potential purchasers to the seller, including by an internet link or web site, or performs related services in the State on behalf of the seller.

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