
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[+];

11 or

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

14 shall, if the seller under paragraph (1) makes sales of
15 property, services, or contracting for use in the State [+],
16 whether or not the sales are made in the State[+], or if the
17 seller under paragraph (2) makes sales of tangible personal
18 property for use in the State as described in section 238-2,



1 collect from the purchaser the taxes imposed by sections 238-2
2 and 238-2.3, on the use of the property, services, or
3 contracting, as applicable, so sold by the seller, if the seller
4 is not subject to the use tax under this chapter on the
5 importation of the property into the State. The collection
6 shall be made within twenty days after the accrual of the tax or
7 within [~~such other~~] a period [~~as shall be~~] fixed by the director
8 of taxation upon the application of the seller[~~, and the~~]. The
9 seller shall give to the purchaser a receipt therefor in the
10 manner and form prescribed by the director; provided that this
11 subsection shall not apply to vehicles registered under section
12 286-50.

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



1 by subsection (a) above if the director finds, [~~as to such~~
2 ~~seller,~~] on a case-by-case basis, that the tax cannot be
3 effectively collected by [~~such~~] other means.

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

14 (d) In case any seller required or authorized to collect
15 the tax under this chapter fails to collect [~~the same,~~] it or,
16 having collected the tax, fails to pay it over [~~the same~~] as
17 provided by this chapter, the seller shall nevertheless be
18 personally liable to the State for the amount of the tax, but it
19 shall be a defense to [~~such~~] this tax liability that the
20 indebtedness for the price is a worthless account actually
21 charged off for income tax purposes, if and to the extent that
22 the collections of the price 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]~~ it to the person's own use
15 or to any use other than the payment of the tax as herein
16 provided, and who fails to pay over the amount of tax so
17 collected at the time required by this chapter, shall be deemed
18 guilty of an embezzlement of property of the State and shall be
19 fined more than five times the amount of money ~~[so]~~ embezzled or
20 imprisoned at hard labor not more than ten years, and any
21 failure by the person ~~[so]~~ collecting the tax to pay ~~[the same]~~
22 collected taxes over within the time provided by this chapter~~[.]~~



1 after demand [~~therefor,~~] shall be taken and held to be prima
2 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 corporation if:

16 (A) The parent corporation owns stock possessing more
17 than fifty per cent of the voting power of at
18 least one 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
22 corporation, is owned by the parent corporation,



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

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

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

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

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



1 (4) Any two or more corporations, all of whose stock
2 representing more than fifty per cent of the voting
3 power of the corporations is cumulatively owned by, or
4 for the benefit of, members of the same family
5 consisting of an individual, the individual's spouse,
6 parents, siblings, grandparents, children, and
7 grandchildren; and their respective spouses.

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

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



1 solicitation of sales of tangible personal property on
2 behalf of the seller; and

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

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

17 (B) The seller, within the preceding twelve months,
18 has total cumulative sales of tangible personal
19 property to purchasers in the State in excess of
20 \$1,000,000;

21 provided further that an agreement under which a
22 seller purchases advertisements from a person or



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

20 SECTION 2. Prior to the convening of the 2013 regular
21 session, the director of taxation shall certify in writing to
22 the governor and the legislature whether any federal law has



1 been enacted by December 31, 2012, authorizing the states to
2 require a seller to collect taxes on sales of goods to in-state
3 purchasers without regard to the location of the seller.

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

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

12 SECTION 5. This Act shall take effect on July 1, 2112;
13 provided that section 1 of this Act shall take effect on July 1,
14 2112, if the State does not, by June 30, 2013, enact a law in
15 accordance with any federal law authorizing the states to
16 require a seller to collect taxes on sales of goods to in-state
17 purchasers without regard to the location of the seller.



Report Title:

Use Tax; 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. Effective July 1, 2112. (HB1694 HD1)

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