
A BILL FOR AN ACT

RELATING TO TAXATION.

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

1 SECTION 1. Section 231-36.4, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "~~+~~§231-36.4~~+~~ Wilful failure to collect and pay over
4 tax. (a) Any person required to collect, account for, and pay
5 over any tax imposed by title 14, who wilfully fails to collect
6 or truthfully account for and pay over such tax shall be guilty
7 of a class C felony, in addition to other penalties provided by
8 law and, upon conviction, shall be subject to one or any
9 combination of the following:

- 10 (1) A fine of not more than \$100,000;
11 (2) Imprisonment of not more than five years; or
12 (3) Probation;
13 provided that a corporation shall be fined not more than
14 \$500,000.

15 (b) This section shall not apply to any portion of an
16 underpayment on which a penalty is imposed under section 231-36,
17 231-36.6, or 231-36.8."



1 SECTION 2. Section 231-36.6, Hawaii Revised Statutes, is
2 amended to read as follows:

3 " ~~§231-36.6~~ **Substantial understatements or**
4 **misstatements of amounts; penalty.** (a) There shall be added to
5 the tax an amount equal to twenty per cent of the portion of any
6 underpayment that is attributable to any substantial
7 understatement of any tax in a taxable year. The penalty under
8 this section shall be in addition to any other penalty
9 assessable by law.

10 (b) Except as provided under subsection (c), there is a
11 substantial understatement of tax for any taxable year if the
12 amount of the understatement for the taxable year exceeds the
13 greater of:

14 (1) Ten per cent of the tax required to be shown on the
15 return for the taxable year; or

16 (2) \$1,500.

17 (c) In the case of a corporation other than a corporation
18 taxable under subchapter S of the Internal Revenue Code, there
19 is a substantial understatement of tax for any taxable year if
20 the amount of the understatement for the taxable year exceeds
21 the greater of:



1 (1) Ten per cent of the tax required to be shown on the
2 return for the taxable year; or

3 (2) \$30,000.

4 (d) The amount of any understatement shall be reduced by
5 that portion of the understatement that is attributable to:

6 (1) The tax treatment of any item by the taxpayer if there
7 is or was substantial authority for such treatment; or

8 (2) Any item if the relevant facts affecting the item's
9 tax treatment are adequately disclosed in the return
10 or in a statement attached to the return and there is
11 a reasonable basis, as defined under section 231-36.8,
12 for the tax treatment by the taxpayer.

13 The reduction in this subsection shall not apply to any item
14 attributable to a tax shelter as described in section 231-36.7.

15 (e) This section shall be construed in accordance with
16 regulations and judicial interpretations given to section 6662
17 of the Internal Revenue Code.

18 (f) For purposes of this section, "understatement" means
19 the excess of:

20 (1) The amount of tax required to be shown on the return
21 for the taxable year; over



1 (2) The amount of tax imposed that is shown on the return,
2 reduced by any rebate as that term is defined by
3 section 6211(b)(2) of the Internal Revenue Code.

4 (g) This section shall not apply to any portion of an
5 underpayment on which a penalty is imposed under section 231-36,
6 231-36.4, or 231-36.8."

7 SECTION 3. Section 231-36.8, Hawaii Revised Statutes, is
8 amended to read as follows:

9 " ~~§231-36.8~~ **Erroneous claim for refund or credit.**

10 (a) If a claim for refund or credit with respect to tax is made
11 for an excessive amount, the person making the claim shall be
12 liable for a penalty in an amount equal to twenty per cent of
13 the excessive amount; provided that there shall be no penalty
14 assessed where the penalty calculation under this section
15 results in an amount of less than \$400.

16 (b) It shall be a defense to the penalty under this
17 section that the claim for refund or credit had a reasonable
18 basis. A person claiming the reasonable basis defense shall
19 have the burden of proof to demonstrate the reasonableness of
20 the claim.



1 (c) This section shall be construed in accordance with
2 regulations and judicial interpretations given to section 6676
3 of the Internal Revenue Code.

4 (d) For purposes of this section:

5 "Excessive amount" means the amount by which the amount of
6 the claim for refund or credit for any taxable year exceeds the
7 amount of the claim allowable for such taxable year.

8 "Reasonable basis" means a standard of care used in tax
9 reporting that is significantly higher than not frivolous or not
10 patently improper. A reasonable basis position will be more
11 than arguable and based on at least one or more authorities of
12 either state or federal tax administration. A position is
13 considered to have a reasonable basis if a reasonable and well-
14 informed analysis by a person knowledgeable in tax law would
15 lead that person to conclude that the position has approximately
16 a one-in-four, or greater, likelihood of being sustained on the
17 merits. A reasonable basis includes innocent mistakes where the
18 excessive amount is the result of inadvertence, mathematical
19 error, or where otherwise defined as innocent by the director
20 pursuant to a formal pronouncement issued without regard to
21 chapter 91.



1 (e) This section shall not apply to any portion of an
2 underpayment on which a penalty is imposed under section 231-36,
3 231-36.4, or 231-36.6."

4 SECTION 4. Section 238-6, Hawaii Revised Statutes, is
5 amended to read as follows:

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

9 (1) Having in the State, regularly or intermittently, any
10 property, tangible or intangible, any place of
11 business, or any representation as hereinabove
12 defined, [~~and~~] irrespective of the seller's having or
13 not having qualified to do business in the State[~~+~~];
14 or

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

17 shall, if the seller subject to paragraph (1) makes sales of
18 property, services, or contracting for use in the State[~~+~~],
19 whether or not the sales are made in the State[~~+~~], or if the
20 seller subject to paragraph (2) makes sales of tangible personal
21 property for use in the State as described in section 238-2,
22 collect from the purchaser the taxes imposed by sections 238-2



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

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

13 (d) In case any seller required or authorized to collect
14 the tax under this chapter fails to collect [~~the same,~~] it or,
15 having collected the tax, fails to pay it over [~~the same~~] as
16 provided by this chapter, the seller shall nevertheless be
17 personally liable to the State for the amount of the tax, but it
18 shall be a defense to [~~such~~] this tax liability that the
19 indebtedness for the price is a worthless account actually
20 charged off for income tax purposes, if and to the extent that
21 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 [~~se~~] embezzled or
20 imprisoned at hard labor not more than ten years, and any
21 failure by the person [~~se~~] collecting the tax to pay [~~the same~~]
22 collected taxes over within the time provided by this chapter[7]



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 (3) of that
5 definition established under subsection (h) if the seller can
6 demonstrate that:

7 (1) The person in the State with whom the seller has an
8 agreement did not engage in referrals in the State on
9 behalf of the seller that would satisfy the
10 requirements of the commerce clause of the United
11 States Constitution; or

12 (2) The person in the State with whom the seller has an
13 agreement did not engage in any activity within the
14 State that was significantly associated with the
15 seller's ability to establish or maintain the seller's
16 market in the State during the preceding twelve
17 months. For the purpose of this paragraph, the seller
18 may demonstrate this by submitting sworn written
19 statements from all persons in the State with whom the
20 seller has an agreement stating that the person did
21 not engage in any solicitation in the State on behalf
22 of the seller during the preceding twelve-month



1 period; provided that these statements were provided
2 and obtained in good faith.

3 (h) For the purposes of this section:

4 "Commonly controlled group" means:

5 (1) A parent corporation and any one or more corporations
6 or chains of corporations, connected through stock
7 ownership or constructive ownership with the parent
8 corporation if:

9 (A) The parent corporation owns stock possessing more
10 than fifty per cent of the voting power of at
11 least one corporation; and

12 (B) If applicable, stock cumulatively representing
13 more than fifty per cent of the voting power of
14 each of the corporations, except the parent
15 corporation, is owned by the parent corporation,
16 one or more corporations described in
17 subparagraph (A), or one or more other
18 corporations that satisfy the conditions of this
19 subparagraph;

20 (2) Any two or more corporations, if stock representing
21 more than fifty per cent of the voting power of the



1 corporations is owned, or constructively owned, by the
2 same person;

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

5 (A) Any group of two or more corporations if more
6 than fifty per cent of the ownership or
7 beneficial ownership of the stock possessing
8 voting power in each corporation consists of
9 stapled interests; or

10 (B) Two or more interests if, by reason of form of
11 ownership restrictions on transfer or other terms
12 or conditions, in connection with the transfer of
13 one of the interests the other interest or
14 interests are also transferred or required to be
15 transferred; or

16 (4) Any two or more corporations, all of whose stock
17 representing more than fifty per cent of the voting
18 power of the corporations is cumulatively owned by, or
19 for the benefit of, members of the same family
20 consisting of an individual, the individual's spouse,
21 parents, siblings, grandparents, children, and
22 grandchildren; and their respective spouses.



1 "Engaged in business in the State" is presumed to include a
2 seller, including an entity affiliated with a seller within the
3 meaning of section 1504 of the Internal Revenue Code, that has a
4 substantial nexus with the State for purposes of the commerce
5 clause of the United States Constitution and upon whom federal
6 law permits the State to impose the taxes under this chapter,
7 and includes:

8 (1) Any seller that is a member of a commonly controlled
9 group that includes an entity that has a substantial
10 nexus with the State and:

11 (A) Sells a similar line of products as the seller
12 and does so under the same or similar business
13 name; or

14 (B) Uses trademarks, service marks, or trade names in
15 the State that are the same or substantially
16 similar to those used by the seller;

17 (2) Any seller entering into an agreement or agreements
18 under which any person, other than a common carrier
19 acting in its capacity, that has substantial nexus in
20 this State and that:



- 1 (A) Delivers, installs, assembles, or performs
- 2 maintenance services for the seller's customers
- 3 within this State; or
- 4 (B) Facilitates the seller's delivery of property to
- 5 customers in the State by allowing the seller's
- 6 customers to pick up property sold by the seller
- 7 at an office, distribution facility, warehouse,
- 8 storage place, store front, or similar place of
- 9 buisness maintained by the in-state person;
- 10 (3) Any seller that is a member of a commonly controlled
- 11 group that includes another member that, pursuant to
- 12 an agreement with or in cooperation with the seller,
- 13 performs services in the State in connection with
- 14 tangible personal property to be sold by the seller,
- 15 including the design and development of tangible
- 16 personal property sold by the seller, or the
- 17 solicitation of sales of tangible personal property on
- 18 behalf of the seller; and
- 19 (4) Any seller entering into an agreement or agreements
- 20 under which a person or persons in the State, for a
- 21 commission or other consideration, directly or
- 22 indirectly refer potential purchasers of tangible



1 personal property to the seller, whether by an
2 internet-based link or an internet web site, or
3 otherwise; provided that:

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

11 (B) The seller, within the preceding twelve months,
12 has total cumulative sales of tangible personal
13 property to purchasers in the State in excess of
14 \$20,000;

15 provided further that an agreement under which a
16 seller purchases advertisements from a person or
17 persons in the State, to be delivered on television,
18 radio, in print, on the Internet, or by any other
19 medium, is not an agreement for the purposes of this
20 paragraph unless the advertisement revenue paid to the
21 person or persons in the State consists of commissions
22 or other consideration that is based upon sales of



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

14 SECTION 5. Prior to the convening of the 2013 regular
15 session, the director of taxation shall certify in writing to
16 the governor and the legislature whether any federal law has
17 been enacted by December 31, 2012, authorizing the states to
18 require a seller to collect taxes on sales of goods to in-state
19 purchasers without regard to the location of the seller.

20 SECTION 6. If any provision of this Act, or the
21 application thereof to any person or circumstance is held
22 invalid, the invalidity does not affect other provisions or



1 applications of the Act, which can be given effect without the
2 invalid provision or application, and to this end the provisions
3 of this Act are severable.

4 SECTION 7. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 8. This Act shall take effect on July 1, 2112;
7 provided that sections 1 through 3 of this Act shall apply to
8 taxable years beginning after December 31, 2011; provided
9 further that section 4 of this Act shall take effect on July 1,
10 2112, if the State does not, by June 30, 2013, enact a law in
11 accordance with any federal law authorizing the states to
12 require a seller to collect taxes on sales of goods to in-state
13 purchasers without regard to the location of the seller.



Report Title:

Use Tax; Internet Sales; Out-of-State Sellers; Affiliates; Tax Penalties

Description:

Prohibits penalties for substantial understatements or misstatements and for erroneous claims for refund or credit from being added to tax underpayments on which certain other penalties are already imposed. 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. (SB2226 HD1)

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