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LATE TESTIMONY

HOUSE COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS

TESTIMONY OF THE DEPARTMENT OF TAXATION REGARDING HB 1183 RELATING TO THE GENERAL EXCISE TAX

WRITTEN TESTIMONY ONLY

TESTIFIER: FREDERICK D. PABLO, INTERIM DIRECTOR OF
TAXATION (OR DESIGNEE)
COMMITTEE: ERB
DATE: FEBRUARY 15, 2011
TIME: 8:00AM
POSITION: SUPPORT CONCEPT; CONCERNS

This measure clarifies the nexus standard for taxing out-of-state businesses on their business activity in Hawaii.

The Department of Taxation (Department) supports the concept of this measure to expand nexus to economic nexus. However the Department is concerned that the bill would allow businesses which already have nexus to stop paying tax and instead file an informational return. The Department would then have to pursue the consumers for the use tax, which would be more difficult. Therefore the bill could cause a revenue loss.

From: Tina Desuacido [tina500@juno.com]
Sent: Monday, February 14, 2011 2:56 PM
To: ERBtestimony
Subject: LATE TESTIMONY - Tax Foundation Testimony
Attachments: h1183-11.pdf; h1187-11.pdf

TRANSMISSION OF TESTIMONY

DATE: Monday, February 14, 2011

TO: House Committee on Economic Revitalization & Business

FROM: Tax Foundation of Hawaii

Total Pages 4

FOR: Rep. Angus McKelvey, Chair

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

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

Date of Hearing - Tuesday, February 15, 2011

Position: Comments

Time of Hearing - 8:00 am

✓ **HB 1183 - Relating to the General Excise Tax (2 pages)**
HB 1187 - Relating to the Liquor Tax (2 pages)

Number of copies - 4

Thank you.

TAXBILLSERVICE LATE TESTIMONY

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TAX FOUNDATION OF HAWAII

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SUBJECT: ADMINISTRATION, GENERAL EXCISE, Taxation of out-of-state businesses

BILL NUMBER: HB 1183

INTRODUCED BY: Choy

BRIEF SUMMARY: Adds a new section to HRS chapter 231 to provide that a person or entity conducting business in this state that has its commercial domicile in another state, shall be presumed to be systematically and regularly engaging in business in this state and taxable under Title 14 if during a year: (1) the person or entity engages in or solicits business with persons within this state; and (2) the person or entity earns income, gross proceeds, gross rental, or gross rental proceeds attributable to sources in this state.

If a person or entity is assessed and currently remits tax on a monthly basis under Title 14 and becomes taxable in this state by reason of this section, the person or entity may petition the director of taxation to allow the assessment and remitting of tax on a basis other than monthly for good cause. For purposes of this section, good cause includes compliance with the United States Constitution and the state constitution.

Adds a new section to HRS chapter 237 to require any person or entity conducting business in this state that: (1) has its commercial domicile in another state; (2) is presumed to be systematically and regularly engaging in business in this state under section 231- ; and (3) does not collect the tax imposed by this chapter for sales of tangible personal property to residents of this state, to file an annual statement with the department of taxation.

The annual statement shall be filed on forms provided or approved by the department of taxation on or before the fourth month following the close of the taxable year and include: (1) names of residents of this state to whom the out-of-state business sold tangible personal property during the taxable year; (2) dates of each sale; (3) zip code of the shipping address of each sale; and (4) dollar amount of each sale. Stipulates that except for the dollar amount required under paragraph (4), no information describing the tangible personal property sold shall be provided in the annual statement. Any person or entity that files an annual report pursuant to this section shall be relieved of any duty to collect the tax imposed by this chapter for sales of tangible personal property to residents of this state for the taxable year for which the annual statement is filed.

Amends HRS section 237-2 to provide that the definition of "engaging" in business shall include the sale of tangible personal property by a person soliciting business through an independent contractor or other representative if the person enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an Internet website or otherwise, to the person. This presumption may be rebutted by proof that the resident with whom the person has an agreement did not engage in any solicitation in the state on behalf of the person that would satisfy the nexus requirement of the United States

Constitution during the taxable year in question.

EFFECTIVE DATE: Tax years beginning after December 31, 2010

STAFF COMMENTS: The proposed measure would establish nexus in this state for companies located out of state if the business: (1) engages in or solicits business; and (2) earns income, gross proceeds, gross rental, or gross rental proceeds from sources in the state. Once nexus has been established, then it appears that these businesses would be subject to the general excise tax.

The proposed measure would also require an out-of-state business conducting business in the state that does not collect the general excise tax, to file an annual statement with the department of taxation with the names of residents of this state who were sold tangible personal property, date of the sale, zip code and dollar amount of the sale. The filing of this annual statement would relieve the business of the duty to collect any general excise tax on such purchases. It would appear that if the amendment to HRS chapter 231, as noted above, is adopted this provision would be unnecessary since the chapter 231 amendment would establish nexus for these out-of-state businesses who would then be subject to the general excise tax and whose transactions conducted in this state would presumably be taxed under the general excise tax.

This measure also proposes that the definition of engaging in business shall include the sale of tangible personal property by a person who solicits business through an independent contractor or other representative, if the person enters into an agreement with a resident of this state who refers potential customers, whether by a link on an Internet website or otherwise, for which the resident receives a commission or other consideration. If this provision is adopted, it would appear that the out-of-state business would be considered to be "engaging" in business in this state and would then become subject to the general excise tax.

While these provisions proposed in this measure would attempt to impose the general excise tax on out-of-state businesses who sell tangible personal property to residents of the state, it is questionable why services are not included.

While this approach to collecting the general excise tax on out-of-state purchases deserves serious consideration as an alternative to the proposed "streamlined sales tax" project which places the onus of burden on the manufacturer to collect the tax from the consumer, it is a work in progress and serious consideration should be given to refining the provisions of this proposal. For example, if the amendment to HRS chapter 231 is sufficient to establish nexus and, therefore, subject the out-of-state vendor to the general excise tax, then the second amendment requiring the filing of information may not be necessary. Conversely, if the requirement for filing sales information is deemed adequate in capturing the information on these sales, then the amendment to HRS chapter 231 may not be necessary.

Digested 2/14/11

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 14, 2011 5:13 PM
To: ERBtestimony
Cc: hotlicksguitars@hotmail.com
Subject: Testimony for HB1183 on 2/15/2011 8:00:00 AM

Testimony for ERB 2/15/2011 8:00:00 AM HB1183

Conference room: 312
Testifier position: support
Testifier will be present: No
Submitted by: Dennis Yamamoto
Organization: Hot Licks Guitars, Inc.
Address:
Phone:
E-mail: hotlicksguitars@hotmail.com
Submitted on: 2/14/2011

Comments:

As a small business owner, we have been subject to market forces that provoke us to match the discount prices given on the internet. However, never a day goes by when a potential customer requests that they be denied having to pay the 4.712% GE. If we choose to collect the tax from the customer, we risk the loss of the sale.