

TAXBILLSERVICE

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SUBJECT: USE, Taxation of out-of-state businesses

BILL NUMBER: HB 1694

INTRODUCED BY: Choy

BRIEF SUMMARY: Adds a new section paragraph (g) to HRS section 238-6 to provide that the use tax shall not be collected by a seller engaged in business in the state if the seller can demonstrate that the person in the state with whom the seller has an agreement did not engage in referrals in the state on behalf of the seller that would satisfy the requirements of the commerce clause of the U.S. Constitution.

Defines "engaged in business in the state" to mean a seller, including an entity affiliated with a seller within the meaning of Section 1504 of the Internal Revenue Code (IRC), that has substantial nexus in the state for purposes of the commerce clause of the U.S. Constitution which would permit the state to impose the use tax, and includes: (1) any seller that is a member of a commonly controlled group that includes another member that, pursuant to an agreement in cooperation with the seller, performs services in the state in connection with tangible personal property to be sold by the seller, including the design and development of tangible personal property sold by the seller or the solicitation of sales of tangible personal property on behalf of the seller; and (2) any seller who enters into an agreement under which a person in the state, for a commission or other consideration, refers potential purchasers of tangible personal property to the seller by an internet-based link or internet web site, provided that: (a) the total cumulative sales from all of the seller's sales, within the preceding twelve months, of tangible personal property to purchasers in the state that are referred pursuant to all of those agreements with a person in the state, are in excess of \$10,000; and (b) the seller, within the preceding twelve months, has total cumulative sales of tangible personal property to purchasers in the state in excess of \$1,000,000.

An agreement under which a seller purchases advertisements from a person in the state, to be delivered on television, radio, in print, or on the internet, shall not be considered an agreement for the purposes of this paragraph unless the advertisement revenue paid to the person in the state consists of commissions or other consideration that is based upon sales of tangible personal property. An agreement where a seller engages a person in the state to place an advertisement on an internet web site operated by that person, or operated by another person in the state, is not an agreement for the purposes of this paragraph unless the person entering the agreement with the seller also directly or indirectly solicits potential customers in the state through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in the state.

Requires the director of taxation, prior to the convening of the 2013 regular session, to certify in writing to the governor and the legislature whether federal law has been enacted by December 31, 2012 authorizing the states to require a seller to collect taxes on sales of goods to in-state purchasers without regard to the location of the seller.

Defines “commonly controlled group” for purposes of the measure.

This Act shall take effect on July 1, 2013 if the state does not, by June 30, 2013, enact a law in accordance with any federal law authorizing the states to require a seller to collect taxes on sales of goods to in-state purchasers without regard to the location of the seller.

EFFECTIVE DATE: Upon approval

STAFF COMMENTS: This measure provides that the definition of engaging in business shall include the sale of tangible personal property by an out-of-state seller that is a member of a commonly controlled group that includes another member that, pursuant to an agreement in cooperation with the seller, performs services in the state in connection with tangible personal property to be sold by the seller, including the design and development of tangible personal property sold by the seller, or the solicitation of sales of tangible personal property on behalf of the seller; and any seller who enters into an agreement with a person in the state, who refers potential purchasers of tangible personal property to the seller, by an internet-based link or internet web site, and receives a commission or other consideration, provided that: (a) the total cumulative sales from all of the seller’s sales, within the preceding twelve months, of tangible personal property to purchasers in the state that are referred pursuant to all of those agreements with a person in the state, are in excess of \$10,000; and (b) the seller, within the preceding twelve months, has total cumulative sales of tangible personal property to purchasers in the state in excess of \$1,000,000. While the measure provides that if these conditions are satisfied, and it appears that the out-of-state seller would be considered to be “engaging” in business in this state, it is questionable whether the seller would be subject to the general excise tax or use tax. If the intent of this measure is to subject the sales of the seller to the general excise tax, then these provision should be inserted into HRS chapter 237 rather than HRS chapter 238.

While the provisions proposed in this measure would attempt to tax out-of-state sellers 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 or use tax on out-of-state purchases deserves serious consideration as an alternative to the proposed “streamlined sales tax” project that places the onus of burden on the seller 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. However, it is far superior to the approach of the “streamlined sales tax” in that it continues to maintain the structure and philosophy of the general excise tax rather than attempting to change Hawaii’s tax into a “sales tax.”

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January 31, 2012

The Honorable Angus McKelvey, Chair
House Committee on Economic Revitalization & Business
State Capitol, Room 312
Honolulu, Hawaii 96813

RE: H.B. 1694, Relating To Taxation

HEARING: Tuesday, January 31, 2012 at 8:30 a.m.

Aloha Chair McKelvey, Vice Chair Choy and Members of the Committee:

I am Craig Hirai, a member of the Subcommittee on Taxation and Finance, here to testify 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 the intent of H.B. 1694, Relating to Taxation**, which 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, unless preempted by federal law.

Currently, many states and municipalities are encountering unprecedented budget deficits. In order to meet their obligations many public agencies must either cut jobs and services or raise revenue from increasing sales taxes, property taxes or other business fees. Proposed federal legislation may give the states the power to collect revenue they are owed and help offset current budget shortfalls – all without costing the federal government a dime.

Every day, brick-and-mortar retailers of all sizes collect and remit sales taxes, putting them at a significant competitive disadvantage to online and catalogue retailers who continue to reap the benefits from an antiquated and biased system. Proposed federal legislation may provide a fairer and more transparent market for community based retailers and it will help keep our downtowns vibrant by protecting much needed local jobs, promoting community investment and maintaining access to essential goods and services in our neighborhoods.

HAR therefore supports the intent of H.B. 1694 to the extent that it may become consistent with any proposed federal legislation.

Mahalo for the opportunity to submit testimony.



Representative Angus McKelvey, Chair
Representative Isaac Choy, Vice Chair
Committee on Economic Revitalization and Business
State Capitol, Honolulu, Hawaii 96813



HEARING Tuesday, January 31, 2012
8:30 am
Conference Room 312

RE: **HB 1694, Relating to Taxation**

Chair McKelvey, Vice Chair Choy, and Members of the Committee:

Retail Merchants of Hawaii (RMH) is a not-for-profit trade organization representing about 200 members and over 2,000 storefronts, and is committed to supporting the retail industry and business in general in Hawaii.

RMH supports HB1694, which, 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.

We are in an era of omnichannel retailing, with brick and mortar retailers leveraging innovative digital technologies to improve the consumer experience. But unlike our omnichannel counterparts, brick and mortar retailers must comply with 7,600 different state and local sales tax systems.

As electronic commerce continues its dramatic increase, traditional brick and mortar retailers, which are required by law to collect taxes for government, are experiencing continued erosion of their sales base to remote sellers, which, under most circumstances, are not subject to tax mandates. HB1694 will level the playing field. The unfair disadvantage our Hawaii retailers are experiencing results in unrealized sales, lower tax revenue to the state and minimized revenue and resources to expand their operations and create jobs.

Twelve states enacted e-fairness and/or consumer use laws since 2008: New York, Rhode Island, North Carolina, Colorado, Oklahoma, Illinois, South Dakota, Arkansas, Connecticut, Vermont, California and Texas. Ten other states have legislation pending in 2012: Arizona, Florida, Georgia, Michigan, Minnesota, Missouri, New Jersey, Virginia, Utah and Hawaii.

The reality is that the State of Hawaii has considerable liabilities and unfunded mandates that cannot be satisfied without additional revenue or cutting essential services. It is more than reasonable to collect a tax that's already due before instituting new taxes on everyone. Tax revenue generated from online sales can be used to pay down deficits and get Hawaii back on track toward fiscal solvency.

Retailers nationally are encouraged that current initiatives in Congress, Main Street Fairness Act, Marketplace Fairness Act and Marketplace Equity Act hold greater promise to ameliorate this unfair situation, but there is no certainty that this legislation will be enacted soon.

We urge this Committee to pass HB1694. Thank you for your consideration and for the opportunity to comment on this measure.

Carol Pregill, President

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TO: Representative Angus L.K. McKelvey
Chair, Committee on Economic Revitalization & Business

Via Email:
ERBtestimony@Capitol.hawaii.govmailto:EDTtestimony@capitol.hawaii.gov

FROM: Mihoko E. Ito
DATE: January 30, 2012
RE: **H.B. 1694 – Relating to Taxation**
Hearing: Tuesday, January 31, 2012 at 8:30 a.m.
Room 312

Dear Chair McKelvey and Members of the Committee on Economic Revitalization & Business:

I am Mihoko Ito, an attorney with Goodsill Anderson Quinn & Stifel, submitting comments on behalf of Walgreen Co. (“Walgreens”). Walgreens operates more than 8,200 locations in all 50 states, the District of Columbia and Puerto Rico. In Hawai`i, Walgreens now has 11 stores on the islands of Oahu, Maui and Hawai`i.

Walgreens **supports** H.B. 1694, which 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.

Walgreens supports this measure because it seeks to level the playing field so that local “brick-and-mortar” stores operate under the same rules and online sellers. Walgreens believes that all retailers can conduct their business in a fair, competitive environment. With the changes in the marketplace, e-commerce has become a critical marketplace for both retailers to sell and consumers to buy products 24 hours a day, regardless of geography. However, tax collection laws, including those in Hawaii, have not changed to address the marketplace changes. Accordingly, Walgreens supports this measure to the extent that it seeks to enable the collection of use taxes from internet retail sellers.

Thank you very much for the opportunity to testify.

