

JAN 24 2013

A BILL FOR AN ACT

RELATING TO TAXATION.

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

1 SECTION 1. Section 237-1, Hawaii Revised Statutes, is
2 amended by amending the definition of "representative" to read
3 as follows:
4 ""Representative" means any salesperson, commission agent,
5 manufacturer's representative, broker or other person who is
6 authorized or employed by an unlicensed seller to ~~[assist such~~
7 ~~seller in]~~ conduct activities in this State that are
8 significantly associated with the seller's ability to establish
9 or maintain a market in this State for the seller's sales,
10 including selling property for use in the State, [by] procuring
11 orders for [such] sales, and making collections or deliveries
12 ~~[or otherwise, and who carries on such activities in the State],~~
13 it being immaterial whether such activities are regular or
14 intermittent ~~[, but the term "representative" does not include a~~
15 ~~manufacturer's representative whose functions are wholly~~
16 ~~promotional and to act as liaison between an unlicensed seller~~
17 ~~and a seller or sellers, and which do not include the procuring,~~
18 ~~soliciting or accepting of orders for property or the making of~~



1 ~~deliveries of property, or the collecting of payment for~~
2 ~~deliveries of property, or the keeping of books of account~~
3 ~~concerning property orders, deliveries or collections~~
4 ~~transpiring between an unlicensed seller and a seller or~~
5 ~~sellers]. Any unlicensed seller who in person carries on any~~
6 such activity in the State shall also be classed as a
7 representative."

8 SECTION 2. Section 237-13, Hawaii Revised Statutes, is
9 amended as follows:

10 "§237-13 **Imposition of tax.** There is hereby levied and
11 shall be assessed and collected annually privilege taxes against
12 persons on account of their business and other activities in the
13 State measured by the application of rates against values of
14 products, gross proceeds of sales, or gross income, whichever is
15 specified, as follows:

16 (1) Tax on manufacturers.

17 (A) Upon every person engaging or continuing within
18 the State in the business of manufacturing,
19 including compounding, canning, preserving,
20 packing, printing, publishing, milling,
21 processing, refining, or preparing for sale,
22 profit, or commercial use, either directly or



1 through the activity of others, in whole or in
2 part, any article or articles, substance or
3 substances, commodity or commodities, the amount
4 of the tax to be equal to the value of the
5 articles, substances, or commodities,
6 manufactured, compounded, canned, preserved,
7 packed, printed, milled, processed, refined, or
8 prepared for sale, as shown by the gross proceeds
9 derived from the sale thereof by the manufacturer
10 or person compounding, preparing, or printing
11 them, multiplied by one-half of one per cent.

12 (B) The measure of the tax on manufacturers is the
13 value of the entire product for sale, regardless
14 of the place of sale or the fact that deliveries
15 may be made to points outside the State.

16 (C) If any person liable for the tax on manufacturers
17 ships or transports the person's product, or any
18 part thereof, out of the State, whether in a
19 finished or unfinished condition, or sells the
20 same for delivery to points outside the State
21 (for example, consigned to a mainland purchaser
22 via common carrier f.o.b. Honolulu), the value of



1 the products in the condition or form in which
2 they exist immediately before entering interstate
3 or foreign commerce, determined as hereinafter
4 provided, shall be the basis for the assessment
5 of the tax imposed by this paragraph. This tax
6 shall be due and payable as of the date of entry
7 of the products into interstate or foreign
8 commerce, whether the products are then sold or
9 not. The department shall determine the basis
10 for assessment, as provided by this paragraph, as
11 follows:

12 (i) If the products at the time of their entry
13 into interstate or foreign commerce already
14 have been sold, the gross proceeds of sale,
15 less the transportation expenses, if any,
16 incurred in realizing the gross proceeds for
17 transportation from the time of entry of the
18 products into interstate or foreign
19 commerce, including insurance and storage in
20 transit, shall be the measure of the value
21 of the products;



1 (ii) If the products have not been sold at the
2 time of their entry into interstate or
3 foreign commerce, and in cases governed by
4 clause (i) in which the products are sold
5 under circumstances such that the gross
6 proceeds of sale are not indicative of the
7 true value of the products, the value of the
8 products constituting the basis for
9 assessment shall correspond as nearly as
10 possible to the gross proceeds of sales for
11 delivery outside the State, adjusted as
12 provided in clause (i), or if sufficient
13 data are not available, sales in the State,
14 of similar products of like quality and
15 character and in similar quantities, made by
16 the taxpayer (unless not indicative of the
17 true value) or by others. Sales outside the
18 State, adjusted as provided in clause (i),
19 may be considered when they constitute the
20 best available data. The department shall
21 prescribe uniform and equitable rules for
22 ascertaining the values;



1 (iii) At the election of the taxpayer and with the
2 approval of the department, the taxpayer may
3 make the taxpayer's returns under clause (i)
4 even though the products have not been sold
5 at the time of their entry into interstate
6 or foreign commerce; and

7 (iv) In all cases in which products leave the
8 State in an unfinished condition, the basis
9 for assessment shall be adjusted so as to
10 deduct the portion of the value as is
11 attributable to the finishing of the goods
12 outside the State.

13 (2) Tax on business of selling tangible personal property;
14 producing.

15 (A) Upon every person engaging or continuing within
16 this State in the business of selling any
17 tangible personal property whatsoever (not
18 including, however, bonds or other evidence of
19 indebtedness, or stocks), there is likewise
20 hereby levied, and shall be assessed and
21 collected, a tax equivalent to four per cent of
22 the gross proceeds of sales of the business;



1 provided that insofar as the sale of tangible
2 personal property is a wholesale sale under
3 section ~~[+]237-4(a)(8)[+]~~, the sale shall be
4 subject to section 237-13.3. Upon every person
5 engaging or continuing within this State in the
6 business of a producer, the tax shall be equal to
7 one-half of one per cent of the gross proceeds of
8 sales of the business, or the value of the
9 products, for sale, if sold for delivery outside
10 the State or shipped or transported out of the
11 State, and the value of the products shall be
12 determined in the same manner as the value of
13 manufactured products covered in the cases under
14 paragraph ~~[(1)(C)-]~~ (1)(J).

15 (B) Gross proceeds of sales of tangible property in
16 interstate and foreign commerce shall constitute
17 a part of the measure of the tax imposed on
18 persons in the business of selling tangible
19 personal property, to the extent, under the
20 conditions, and in accordance with the provisions
21 of the Constitution of the United States and the
22 Acts of the Congress of the United States which



1 may be now in force or may be hereafter adopted,
2 and whenever there occurs in the State an
3 activity to which, under the Constitution and
4 Acts of Congress, there may be attributed gross
5 proceeds of sales, the gross proceeds shall be so
6 attributed.

7 (C) For purposes of this section, a seller is
8 "engaging or continuing within this State in
9 business" within the meaning of subparagraph
10 (2) (A) if the seller, regularly or
11 intermittently, owns any property, maintains any
12 place of business, or uses any representative in
13 the State, irrespective of whether the person has
14 qualified to do business in the State.

15 (D) For purposes of this section, a seller shall be
16 presumed to be "engaging or continuing within
17 this State in business" within the meaning of
18 subparagraph (A) if an affiliated person has
19 substantial nexus in the state or if any person,
20 other than a person acting in its capacity as a
21 common carrier, that has substantial nexus in
22 this State:



- 1 (i) Sells a similar line of products as the
2 seller and does so under the same or a
3 similar business name;
- 4 (ii) Maintains an office, distribution facility,
5 warehouse, storage place, or similar place
6 of business in the State to facilitate the
7 delivery of property or services sold by the
8 seller to the seller's customers;
- 9 (iii) Uses trademarks, service marks, or trade
10 names in the State that are the same or
11 substantially similar to those used by the
12 seller;
- 13 (iv) Delivers, installs, assembles, or performs
14 maintenance services for the seller's
15 customers within the State;
- 16 (v) Facilitates the seller's delivery of
17 property to customers in the State by
18 allowing the seller's customers to pick up
19 property sold by the seller at an office,
20 distribution facility, warehouse, storage
21 place, or similar place of business
22 maintained by the person in the State; or



1 (vi) Conducts any other activities in the State
2 that are significantly associated with the
3 seller's ability to establish and maintain a
4 market in the State for the seller's sales.

5 (E) The presumption that a seller is "engaging or
6 continuing in business within this State" within
7 the meaning of subparagraph (D) of this section
8 may be rebutted by demonstrating that the
9 activities of the person or affiliated person in
10 the State are not significantly associated with
11 the seller's ability to establish or maintain a
12 market in this State for the seller's sales.

13 (F) For purposes of this section, a seller shall be
14 presumed to be "engaging or continuing in
15 business within this State" if the seller enters
16 into an agreement with one or more residents of
17 this State under which the resident, for a
18 commission or other consideration, directly or
19 indirectly refers potential customers, whether by
20 a link on an internet website, by telemarketing,
21 by an in-person oral presentation, or otherwise,
22 to the seller, if the cumulative gross receipts



1 from sales by the seller to customers in the
2 State who are referred to the seller by all
3 residents with this type of an agreement with the
4 seller is in excess of \$10,000 during the
5 preceding twelve months.

6 (G) The presumption that a seller is "engaging or
7 continuing in business within this State" within
8 the meaning of subparagraph (F) may be rebutted
9 by submitting proof that the residents with whom
10 the seller has an agreement did not engage in any
11 activity within the State that was significantly
12 associated with the seller's ability to establish
13 or maintain the seller's market in this State
14 during the preceding twelve months. Such proof
15 may consist of sworn written statements from all
16 of the residents with whom the seller has an
17 agreement stating that they did not engage in any
18 solicitation in this State on behalf of the
19 seller during the preceding year; provided that
20 such statements were provided and obtained in
21 good faith. Subparagraph (F) shall take effect
22 ninety days after the effective date of this Act



1 and shall apply to sales made, uses occurring,
2 and services rendered on or after the effective
3 date of this Act in accordance with the
4 applicable transition provisions and without
5 regard to the date the seller and the resident
6 entered into the agreement described in
7 subparagraph (F); provided that the term "the
8 preceding twelve months" as used in subparagraph
9 (F) may include the twelve months commencing
10 prior to the effective date of this Act.

11 (H) If any person sells or leases tangible personal
12 property or services to the State, a state
13 department, a state agency, or an agent thereof,
14 that person and any affiliated person, as a
15 prerequisite for any such sale or lease, shall
16 register with the department of taxation as a
17 seller required to collect tax and comply with
18 all legal requirements imposed on such sellers,
19 including the requirement to collect and remit
20 the tax imposed by this chapter.

21 (I) For purposes of this section, the term
22 "affiliated person" means any person that is a



1 member of the same "controlled group of
2 corporations" as defined in section 1563(a) of
3 the Internal Revenue Code as the seller or any
4 other entity that, notwithstanding its form of
5 organization, bears the same ownership
6 relationship to the seller as a corporation that
7 is a member of the same "controlled group of
8 corporations" as defined in section 1563(a) of
9 the Internal Revenue Code.

10 [~~(C)~~] (J) No manufacturer or producer, engaged in such
11 business in the State and selling the
12 manufacturer's or producer's products for
13 delivery outside of the State (for example,
14 consigned to a mainland purchaser via common
15 carrier f.o.b. Honolulu), shall be required to
16 pay the tax imposed in this chapter for the
17 privilege of so selling the products, and the
18 value or gross proceeds of sales of the products
19 shall be included only in determining the measure
20 of the tax imposed upon the manufacturer or
21 producer.



1 [~~(D)~~] (K) When a manufacturer or producer, engaged in
2 such business in the State, also is engaged in
3 selling the manufacturer's or producer's products
4 in the State at wholesale, retail, or in any
5 other manner, the tax for the privilege of
6 engaging in the business of selling the products
7 in the State shall apply to the manufacturer or
8 producer as well as the tax for the privilege of
9 manufacturing or producing in the State, and the
10 manufacturer or producer shall make the returns
11 of the gross proceeds of the wholesale, retail,
12 or other sales required for the privilege of
13 selling in the State, as well as making the
14 returns of the value or gross proceeds of sales
15 of the products required for the privilege of
16 manufacturing or producing in the State. The
17 manufacturer or producer shall pay the tax
18 imposed in this chapter for the privilege of
19 selling its products in the State, and the value
20 or gross proceeds of sales of the products, thus
21 subjected to tax, may be deducted insofar as
22 duplicated as to the same products by the measure



1 of the tax upon the manufacturer or producer for
2 the privilege of manufacturing or producing in
3 the State; provided that no producer of
4 agricultural products who sells the products to a
5 purchaser who will process the products outside
6 the State shall be required to pay the tax
7 imposed in this chapter for the privilege of
8 producing or selling those products.

9 [~~E~~] (L) A taxpayer selling to a federal cost-plus
10 contractor may make the election provided for by
11 paragraph (3)(C), and in that case the tax shall
12 be computed pursuant to the election,
13 notwithstanding this paragraph or paragraph (1)
14 to the contrary.

15 [~~F~~] (M) The department, by rule, may require that a
16 seller take from the purchaser of tangible
17 personal property a certificate, in a form
18 prescribed by the department, certifying that the
19 sale is a sale at wholesale; provided that:

20 (i) Any purchaser who furnishes a certificate
21 shall be obligated to pay to the seller,
22 upon demand, the amount of the additional



1 tax that is imposed upon the seller whenever
2 the sale in fact is not at wholesale; and
3 (ii) The absence of a certificate in itself shall
4 give rise to the presumption that the sale
5 is not at wholesale unless the sales of the
6 business are exclusively at wholesale.

7 (3) Tax upon contractors.

8 (A) Upon every person engaging or continuing within
9 the State in the business of contracting, the tax
10 shall be equal to four per cent of the gross
11 income of the business.

12 (B) In computing the tax levied under this paragraph,
13 there shall be deducted from the gross income of
14 the taxpayer so much thereof as has been included
15 in the measure of the tax levied under
16 subparagraph (A), on:

17 (i) Another taxpayer who is a contractor, as
18 defined in section 237-6;

19 (ii) A specialty contractor, duly licensed by the
20 department of commerce and consumer affairs
21 pursuant to section 444-9, in respect of the
22 specialty contractor's business; or



1 (iii) A specialty contractor who is not licensed
2 by the department of commerce and consumer
3 affairs pursuant to section 444-9, but who
4 performs contracting activities on federal
5 military installations and nowhere else in
6 this State;

7 provided that any person claiming a deduction
8 under this paragraph shall be required to show in
9 the person's return the name and general excise
10 number of the person paying the tax on the amount
11 deducted by the person.

12 (C) In computing the tax levied under this paragraph
13 against any federal cost-plus contractor, there
14 shall be excluded from the gross income of the
15 contractor so much thereof as fulfills the
16 following requirements:

17 (i) The gross income exempted shall constitute
18 reimbursement of costs incurred for
19 materials, plant, or equipment purchased
20 from a taxpayer licensed under this chapter,
21 not exceeding the gross proceeds of sale of



1 the taxpayer on account of the transaction;
2 and

3 (ii) The taxpayer making the sale shall have
4 certified to the department that the
5 taxpayer is taxable with respect to the
6 gross proceeds of the sale, and that the
7 taxpayer elects to have the tax on gross
8 income computed the same as upon a sale to
9 the state government.

10 (D) A person who, as a business or as a part of a
11 business in which the person is engaged, erects,
12 constructs, or improves any building or
13 structure, of any kind or description, or makes,
14 constructs, or improves any road, street,
15 sidewalk, sewer, or water system, or other
16 improvements on land held by the person (whether
17 held as a leasehold, fee simple, or otherwise),
18 upon the sale or other disposition of the land or
19 improvements, even if the work was not done
20 pursuant to a contract, shall be liable to the
21 same tax as if engaged in the business of
22 contracting, unless the person shows that at the



1 time the person was engaged in making the
2 improvements the person intended, and for the
3 period of at least one year after completion of
4 the building, structure, or other improvements
5 the person continued to intend to hold and not
6 sell or otherwise dispose of the land or
7 improvements. The tax in respect of the
8 improvements shall be measured by the amount of
9 the proceeds of the sale or other disposition
10 that is attributable to the erection,
11 construction, or improvement of such building or
12 structure, or the making, constructing, or
13 improving of the road, street, sidewalk, sewer,
14 or water system, or other improvements. The
15 measure of tax in respect of the improvements
16 shall not exceed the amount which would have been
17 taxable had the work been performed by another,
18 subject as in other cases to the deductions
19 allowed by subparagraph (B). Upon the election
20 of the taxpayer, this paragraph may be applied
21 notwithstanding that the improvements were not
22 made by the taxpayer, or were not made as a



1 business or as a part of a business, or were made
2 with the intention of holding the same. However,
3 this paragraph shall not apply in respect of any
4 proceeds that constitute or are in the nature of
5 rent; all such gross income shall be taxable
6 under paragraph (9); provided that insofar as the
7 business of renting or leasing real property
8 under a lease is taxed under section 237-16.5,
9 the tax shall be levied by section 237-16.5.

10 (4) Tax upon theaters, amusements, radio broadcasting
11 stations, etc.

12 (A) Upon every person engaging or continuing within
13 the State in the business of operating a theater,
14 opera house, moving picture show, vaudeville,
15 amusement park, dance hall, skating rink, radio
16 broadcasting station, or any other place at which
17 amusements are offered to the public, the tax
18 shall be equal to four per cent of the gross
19 income of the business [~~and in the case of a~~
20 ~~sale of an amusement at wholesale under section~~
21 ~~237-4(a)(13), the tax shall be subject to section~~
22 ~~237-13.3~~].



1 (B) The department may require that the person
2 rendering an amusement at wholesale take from the
3 licensed seller a certificate, in a form
4 prescribed by the department, certifying that the
5 sale is a sale at wholesale; provided that:

6 (i) Any licensed seller who furnishes a
7 certificate shall be obligated to pay to the
8 person rendering the amusement, upon demand,
9 the amount of additional tax that is imposed
10 upon the seller whenever the sale is not at
11 wholesale; and

12 (ii) The absence of a certificate in itself shall
13 give rise to the presumption that the sale
14 is not at wholesale unless the person
15 rendering the sale is exclusively rendering
16 the amusement at wholesale.

17 (5) Tax upon sales representatives, etc. Upon every
18 person classified as a representative or purchasing
19 agent under section 237-1, engaging or continuing
20 within the State in the business of performing
21 services for another, other than as an employee, there
22 is likewise hereby levied and shall be assessed and



1 collected a tax equal to four per cent of the
2 commissions and other compensation attributable to the
3 services so rendered by the person.

4 (6) Tax on service business.

5 (A) Upon every person engaging or continuing within
6 the State in any service business or calling
7 including professional services not otherwise
8 specifically taxed under this chapter, there is
9 likewise hereby levied and shall be assessed and
10 collected a tax equal to four per cent of the
11 gross income of the business, and in the case of
12 a wholesaler under section 237-4(a)(10), the tax
13 shall be equal to one-half of one per cent of the
14 gross income of the business. [~~Notwithstanding~~
15 ~~the foregoing, a wholesaler under section~~
16 ~~237-4(a)(10) shall be subject to section~~
17 ~~237-13.3-]~~

18 (B) The department may require that the person
19 rendering a service at wholesale take from the
20 licensed seller a certificate, in a form
21 prescribed by the department, certifying that the
22 sale is a sale at wholesale; provided that:



- 1 (i) Any licensed seller who furnishes a
2 certificate shall be obligated to pay to the
3 person rendering the service, upon demand,
4 the amount of additional tax that is imposed
5 upon the seller whenever the sale is not at
6 wholesale; and
- 7 (ii) The absence of a certificate in itself shall
8 give rise to the presumption that the sale
9 is not at wholesale unless the person
10 rendering the sale is exclusively rendering
11 services at wholesale.
- 12 (C) Where any person is engaged in the business of
13 selling interstate or foreign common carrier
14 telecommunication services within and without the
15 State, other than as a home service provider, the
16 tax shall be imposed on that portion of gross
17 income received by a person from service which is
18 originated or terminated in this State and is
19 charged to a telephone number, customer, or
20 account in this State notwithstanding any other
21 state law (except for the exemption under section
22 237-23(a)(1)) to the contrary. If, under the



1 Constitution and laws of the United States, the
2 entire gross income as determined under this
3 paragraph of a business selling interstate or
4 foreign common carrier telecommunication services
5 cannot be included in the measure of the tax, the
6 gross income shall be apportioned as provided in
7 section 237-21; provided that the apportionment
8 factor and formula shall be the same for all
9 persons providing those services in the State.

10 (D) Where any person is engaged in the business of a
11 home service provider, the tax shall be imposed
12 on the gross income received or derived from
13 providing interstate or foreign mobile
14 telecommunications services to a customer with a
15 place of primary use in this State when such
16 services originate in one state and terminate in
17 another state, territory, or foreign country;
18 provided that all charges for mobile
19 telecommunications services which are billed by
20 or for the home service provider are deemed to be
21 provided by the home service provider at the
22 customer's place of primary use, regardless of



1 where the mobile telecommunications originate,
2 terminate, or pass through; provided further that
3 the income from charges specifically derived from
4 interstate or foreign mobile telecommunications
5 services, as determined by books and records that
6 are kept in the regular course of business by the
7 home service provider in accordance with section
8 239-24, shall be apportioned under any
9 apportionment factor or formula adopted under
10 subparagraph (C). Gross income shall not
11 include:

12 (i) Gross receipts from mobile
13 telecommunications services provided to a
14 customer with a place of primary use outside
15 this State;

16 (ii) Gross receipts from mobile
17 telecommunications services that are subject
18 to the tax imposed by chapter 239;

19 (iii) Gross receipts from mobile
20 telecommunications services taxed under
21 section 237-13.8; and



1 (iv) Gross receipts of a home service provider
2 acting as a serving carrier providing mobile
3 telecommunications services to another home
4 service provider's customer.

5 For the purposes of this paragraph, "charges for
6 mobile telecommunications services", "customer",
7 "home service provider", "mobile
8 telecommunications services", "place of primary
9 use", and "serving carrier" have the same meaning
10 as in section 239-22.

11 (7) Tax on insurance producers. Upon every person engaged
12 as a licensed producer pursuant to chapter 431, there
13 is hereby levied and shall be assessed and collected a
14 tax equal to 0.15 per cent of the commissions due to
15 that activity.

16 (8) Tax on receipts of sugar benefit payments. Upon the
17 amounts received from the United States government by
18 any producer of sugar (or the producer's legal
19 representative or heirs), as defined under and by
20 virtue of the Sugar Act of 1948, as amended, or other
21 Acts of the Congress of the United States relating
22 thereto, there is hereby levied a tax of one-half of



1 one per cent of the gross amount received; provided
2 that the tax levied hereunder on any amount so
3 received and actually disbursed to another by a
4 producer in the form of a benefit payment shall be
5 paid by the person or persons to whom the amount is
6 actually disbursed, and the producer actually making a
7 benefit payment to another shall be entitled to claim
8 on the producer's return a deduction from the gross
9 amount taxable hereunder in the sum of the amount so
10 disbursed. The amounts taxed under this paragraph
11 shall not be taxable under any other paragraph,
12 subsection, or section of this chapter.

13 (9) Tax on other business. Upon every person engaging or
14 continuing within the State in any business, trade,
15 activity, occupation, or calling not included in the
16 preceding paragraphs or any other provisions of this
17 chapter, there is likewise hereby levied and shall be
18 assessed and collected, a tax equal to four per cent
19 of the gross income thereof. In addition, the rate
20 prescribed by this paragraph shall apply to a business
21 taxable under one or more of the preceding paragraphs
22 or other provisions of this chapter, as to any gross



1 income thereof not taxed thereunder as gross income or
2 gross proceeds of sales or by taxing an equivalent
3 value of products, unless specifically exempted."

4 SECTION 3. Section 237-25, Hawaii Revised Statutes, is
5 amended by amending subsection (b) to read as follows:

6 "(b) Nothing in this section shall be deemed to exempt any
7 sales to or by a federal cost-plus contractor, as defined in
8 chapter 237, or the gross proceeds thereof; with respect to all
9 such activities and transactions, taxes shall be levied,
10 returned, computed, and assessed the same as if this section had
11 not been enacted, and in the case of an election made under
12 sections [~~237-13(2)(F)~~] 237-13(2)(M) and 237-13(3)(C)(ii), the
13 tax shall be computed the same as upon a sale to the state
14 government."

15 SECTION 4. Section 238-1, Hawaii Revised Statutes, is
16 amended by amending the definition of "representation" to read
17 as follows:

18 ""Representation" refers to any or all of the following:

19 (1) A seller being present in the State; and

20 (2) A seller having in the State a salesperson, commission
21 agent, manufacturer's representative, broker, or other
22 person who is authorized or employed by the seller to



1 ~~[assist]~~ conduct activities in this State that are
2 significantly associated with the seller's ability to
3 establish or maintain a market in this State for the
4 seller's sales, including assisting the seller in
5 selling property, services, or contracting for use or
6 consumption in the State, ~~[by]~~ procuring orders for
7 the sales, and making collections or deliveries ~~[, or~~
8 ~~otherwise; and~~

9 ~~(3) A seller having in the State a person upon whom~~
10 ~~process directed to the seller from the courts of the~~
11 ~~State may be served, including the director of~~
12 ~~commerce and consumer affairs and the deputy director~~
13 ~~in the cases provided in section 414-64]."~~

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

16 "**§238-6 Collection of tax by seller; penalty.** (a) For
17 purposes of the taxes due under sections 238-2 and 238-2.3,
18 every seller ~~[having in the State, regularly]~~:

- 19 (1) Regularly or intermittently, owning any property,
20 ~~[tangible or intangible,]~~ maintaining any place of
21 business, or using any representation as hereinabove
22 defined~~[,]~~ in the State (and irrespective of the



1 seller's having or not having qualified to do business
2 in the State); or
3 (2) Who is otherwise engaged in business in the State as
4 defined in subsection (g);
5 shall, if the seller is described under paragraph (1) and makes
6 sales of property, services, or contracting for use in the State
7 (whether or not the sales are made in the State), or if the
8 seller is described under paragraph (2) and makes sales of
9 tangible personal property for use in the State as described in
10 section 238-2, collect from the purchaser the taxes imposed by
11 sections 238-2 and 238-2.3, on the use of the property,
12 services, or contracting, as applicable, so sold by the seller,
13 if the seller is not subject to the use tax under this chapter
14 on the importation of the property into the State. The
15 collection shall be made within twenty days after the accrual of
16 the tax or within such other period as shall be fixed by the
17 director of taxation upon the application of the seller, and the
18 seller shall give to the purchaser a receipt therefor in the
19 manner and form prescribed by the director; provided that this
20 subsection shall not apply to vehicles registered under section
21 286-50.



1 (b) The director, in the director's discretion, upon
2 application therefor and under terms and conditions prescribed
3 by the director, may relieve any seller of the duty of
4 collecting and paying over the tax imposed by subsection (a)
5 above, if the director is satisfied that the tax can be
6 effectively collected by other means. Exemption from the duty
7 of collecting the tax may be canceled at any time when the
8 director finds that the tax cannot be effectively collected by
9 other means. The director likewise may terminate the duty and
10 authority of any seller to collect and pay over the tax imposed
11 by subsection (a) above if the director finds, as to such
12 seller, that the tax cannot be effectively collected by such
13 means.

14 (c) The director, in the director's discretion, upon
15 application therefor and under terms and conditions prescribed
16 by the director, may authorize the collection of the tax imposed
17 by this chapter by a seller not otherwise required to collect
18 the tax. The seller, when so authorized, shall have the duty of
19 collecting and paying over the tax in the same manner and
20 subject to the same requirements as set out in subsection (a).
21 The authority may be canceled at any time when, in the judgment



1 of the director, the tax can more effectively be collected by
2 other means.

3 (d) In case any seller required or authorized to collect
4 the tax under this chapter fails to collect the same, or having
5 collected the tax fails to pay over the same as provided by this
6 chapter, the seller shall nevertheless be personally liable to
7 the State for the amount of the tax, but it shall be a defense
8 to such liability that the indebtedness for the price is a
9 worthless account actually charged off for income tax purposes,
10 if and to the extent that the collections of the price do not
11 equal the tax.

12 (e) Every seller required or authorized to collect the tax
13 shall make returns and payments of the tax at the same time and
14 in the same manner as is provided with respect to taxpayer by
15 section 238-5. All provisions of this chapter with respect to
16 returns, reports, records, payments, penalties, and interest,
17 appeals, investigations, and audits, assessments, tax
18 collections procedure, criminal offenses, and the general
19 administrative powers and duties of the director, shall apply to
20 such sellers the same as to taxpayers.

21 (f) The tax collected pursuant to this section shall be
22 held in trust for the State and for payment to the proper



1 collecting officer in the manner and at the time required by
2 this chapter. Any person collecting such tax who appropriates
3 or converts the same to the person's own use or to any use other
4 than the payment of the tax as herein provided, and who fails to
5 pay over the amount of tax so collected at the time required by
6 this chapter, shall be deemed guilty of an embezzlement of
7 property of the State and shall be fined more than five times
8 the amount of money so embezzled or imprisoned at hard labor not
9 more than ten years, and any failure by the person so collecting
10 the tax to pay the same over within the time provided by this
11 chapter, after demand therefor, shall be taken and held to be
12 prima facie evidence of the embezzlement.

13 (g) For purposes of this section, a seller shall be
14 presumed to be "engaged in business in the State" if:

15 (1) Any person, other than a person acting in its capacity
16 as a common carrier, that has substantial nexus in
17 this State:

18 (A) Sells a similar line of products as the seller
19 and does so under the same or a similar business
20 name;

21 (B) Maintains an office, distribution facility,
22 warehouse, storage place, or similar place of



- 1 business in the State to facilitate the delivery
2 of property or services sold by the seller to the
3 seller's customers;
- 4 (C) Uses trademarks, service marks, or trade names in
5 the State that are the same or substantially
6 similar to those used by the seller;
- 7 (D) Delivers, installs, assembles, or performs
8 maintenance services for the seller's customers
9 within the State;
- 10 (E) Facilitates the seller's delivery of property to
11 customers in the State by allowing the seller's
12 customers to pick up property sold by the seller
13 at an office, distribution facility, warehouse,
14 storage place, or similar place of business
15 maintained by the person in the State; or
- 16 (F) Conducts any other activities in the State that
17 are significantly associated with the seller's
18 ability to establish and maintain a market in the
19 State for the seller's sales; or
- 20 (2) An affiliated person has substantial nexus in the
21 State.



1 (h) The presumption that a seller is "engaged in business
2 in the State" within the meaning of subsection (g) may be
3 rebutted by demonstrating that the activities of the person or
4 affiliated person in the State are not significantly associated
5 with the seller's ability to establish or maintain a market in
6 this State for the seller's sales.

7 (i) For purposes of this section, "engaged in business in
8 the State" is also presumed to include every seller that has
9 entered into an agreement with one or more residents of this
10 State under which the resident, for a commission or other
11 consideration, directly or indirectly refers potential
12 customers, whether by a link on an internet website, by
13 telemarketing, by an in-person oral presentation, or otherwise,
14 to the seller, if the cumulative gross receipts from sales by
15 the seller to customers in the State who are referred to the
16 seller by all residents with this type of an agreement with the
17 seller is in excess of \$10,000 during the preceding twelve
18 months.

19 (j) The presumption that a seller is "engaged in business
20 in the State" within the meaning of subsection (i) may be
21 rebutted by submitting proof that the residents with whom the
22 seller has an agreement did not engage in any activity within



1 the State that was significantly associated with the seller's
2 ability to establish or maintain the seller's market in this
3 State during the preceding twelve months. Such proof may
4 consist of sworn written statements from all of the residents
5 with whom the seller has an agreement stating that they did not
6 engage in any solicitation in this State of behalf of the seller
7 during the preceding year; provided that such statements were
8 provided and obtained in good faith. Subsection (i) shall take
9 effect ninety days after the effective date of this Act and
10 shall apply to sales made, uses occurring, and services rendered
11 on or after the effective date of this Act in accordance with
12 the applicable transition provisions and without regard to the
13 date the seller and the resident entered into the agreement
14 described in subsection (i); provided that the term "the
15 preceding twelve months" as used in subsection (i) may include
16 the twelve months commencing prior to the effective date of this
17 Act.

18 (k) If any person sells or leases tangible personal
19 property or services to the State, a state department, a state
20 agency, or an agent thereof, that person and any affiliated
21 person, as a prerequisite for any such sale or lease, shall
22 register with the department of taxation as a seller required to



1 collect tax and comply with all legal requirements imposed on
2 such sellers, including the requirement to collect and remit the
3 tax imposed by this chapter.

4 (1) For purposes of this section, "affiliated person"
5 means any person that is a member of the same "controlled group
6 of corporations" as defined in section 1563(a) of the Internal
7 Revenue Code as the seller or any other entity that,
8 notwithstanding its form of organization, bears the same
9 ownership relationship to the seller as a corporation that is a
10 member of the same "controlled group of corporations" as defined
11 in section 1563(a) of the Internal Revenue Code."

12 SECTION 6. If any provision of this Act, or the
13 application thereof to any person or circumstance, is held
14 invalid, the invalidity does not affect other provisions or
15 applications of the Act that can be given effect without the
16 invalid provision or application, and to this end the provisions
17 of this Act are severable.

18 SECTION 7. Statutory material to be repealed is bracketed
19 and stricken. New statutory material is underscored.

20 SECTION 8. This Act shall take effect on July 1, 2013.

21

INTRODUCED BY: *Michelle Stedani*

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Report Title:

General Excise Tax; Use Tax

Description:

Expands application of the general excise tax to business activities in the State that are significantly associated with a seller's ability to establish or maintain a market in the State. Creates a presumption under the general excise tax law for sellers of tangible personal property where the seller's activities in the State demonstrate a significant business nexus with the State. Creates a presumption under the use tax law that a seller is engaged in business in the State if the seller's activities in the State demonstrate a significant business nexus with the State.

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