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To: The Honorable Sylvia Luke, Chair
and Members of the House Committee on Finance

Date: March 1, 2016
Time: 3:00 P.M.
Place: Conference Room 308, State Capitol

From: Maria E. Zielinski, Director
Department of Taxation

Re: H.B. 2458, H.D. 1, Relating to the General Excise Tax.

The Department of Taxation (Department) appreciates the intent of H.B. 2458, H.D. 1, and offers the following comments for your consideration.

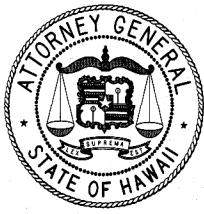
H.B. 2458, H.D. 1 applies the General Excise Tax (GET) to the products of Hawaiian loko i'a at the wholesale rate of one-half of one percent. The measure has a defective effective date of December 24, 2088.

The Department notes that it does not have the expertise to differentiate the products produced by Hawaiian loko i'a from other similar products that may be produced and sold by other aquaculture systems. The Department suggests adding a provision that requires another government agency to certify taxpayers that qualify as loko i'a which are intended to benefit from the provisions of this measure.

Additionally, the measure as currently written would apply not only to sales by a Hawaiian loko i'a itself, but also to retail sales of these products by other taxpayers, such as a supermarket. The Department suggests that the measure be limited to sales or other business activity of a Hawaiian loko i'a.

The Department also notes that the tax benefit proposed in H.B. 2458, H.D. 1 may be impermissible under the Commerce Clause of the United States Constitution, which generally does not allow differential tax treatment for in-state and out-of-state products. The Department defers to the Department of the Attorney General regarding the constitutionality of this provision.

Thank you for the opportunity to provide comments.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

H.B. No. 2458, H.D. 1, RELATING TO THE GENERAL EXCISE TAX.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Tuesday, March 1, 2016 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Nathan S.C. Chin, Deputy Attorney General

Chair Luke and Members of the Committee:

The Department of the Attorney General provides the following comments and respectfully recommends that this bill be held.

The purpose of this bill is to establish a general excise tax at the wholesale rate of one-half of one per cent for the gross proceeds or income from all products produced by Hawaiian loko i'a (Hawaiian fishponds). Hawaiian loko i'a are defined in section 183B-1, Hawaii Revised Statutes (HRS).

This bill contains wording that may be challenged as being unconstitutional under the Commerce Clause of the United States Constitution. Article I, section 8, clause 3, of the United States Constitution provides that the Commerce Clause grants Congress power to “regulate Commerce . . . among the several States.” “It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. New Energy Co. of In. v. Limbach, 486 U.S. 269, 273-74 (1988). “Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.” C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 392 (1994), *citing* Maine v. Taylor, 477 U.S. 131 (1986). The United States Supreme Court stated in a case arising from a Hawai'i tax law that the cardinal rule of Commerce Clause jurisprudence is that “[n]o State, consistent with the Commerce Clause, may ‘impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.’” Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 268 (1984), *citing* Boston Stock

Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977). In Bacchus, the United States Supreme Court struck down a Hawai'i law that provided an exemption from the liquor tax for liquor produced in the State.

In this bill, a beneficial tax rate will be provided "to all of the gross proceeds or income arising from the sale of all products produced by Hawaiian loko i'a." page 2, lines 1-2. Section 183B-1, HRS, defines Hawaiian fishponds as follows:

"Hawaiian fishponds" means the unique, traditional system and methodology of aquaculture practiced by the aboriginal people of Hawaii, and found nowhere else in the world. Generally referred to as "loko i'a", the system mastered by ancient Hawaiians includes but is not limited to loko kuapa, loko umeiki, and loko pu'uone. Loko i'a are natural or artificial enclosures; loko kuapa are enclosures built upon a reef, loko umeiki are a type of permanent fish-trap structure, and loko pu'uone are enclosed by sand. The term does not include any fishpond designed in a manner or constructed for purposes other than those associated with traditional loko i'a management and culture.

This bill is distinguishable from Bacchus in that it provides a reduced tax rate instead of a tax exemption. However, we believe that this bill may still be subject to a legal challenge under the Commerce Clause because it has "both the purpose and effect of discriminating in favor of local products." Bacchus, 468 U.S. 263, 273. It is "not the formal language of the tax statute but rather its practical effect." Comptroller of Treasury of Md., 135 S. Ct. 1787, 1795 (2015), *citing Complete Auto*, 430 U.S. 274, 279 (1977).

The proposed legislation, when read in conjunction with the restrictive definition of a Hawaiian fishpond, may provide a distinct advantage to products produced within the State. For the foregoing reasons the Department of the Attorney General recommends that this bill be held.



HB2458 HD1
RELATING TO THE GENERAL EXCISE TAX
House Committee on Finance

March 1, 2016

3:00 p.m.

Room 308

The Office of Hawaiian Affairs (OHA) **SUPPORTS** HB2458 HD1, which seeks to promote the financial sustainability of loko i‘a operations, and thereby facilitate the rejuvenation of our cultural heritage, provide economic opportunities for fishpond practitioners and others, and increase the food self-sufficiency of our islands.

Traditional fishponds, or loko i‘a, were and continue to be important cultural resources to Native Hawaiians, and may have the potential to once again contribute to the economic security and food self-sufficiency of the state. Demonstrating advanced engineering and aquaculture technologies found nowhere else in the Pacific, loko i‘a once provided a substantial and sustainable source of protein for our islands’ inhabitants, and dozens of loko i‘a continued to be profitably operated well into the twentieth century. While the vast majority of loko i‘a have fallen into disrepair, those that have been restored today once again serve as a source of sustenance for communities, and further provide a wide range of educational opportunities for Native Hawaiians and others seeking to bring our once-forgotten fishponds back to life. Notably, the broader rejuvenation of loko i‘a throughout our islands may have the potential to bolster our local economy, through the production of high-value seafood products and the associated creation of jobs; moreover, the widespread reestablishment of our traditional aquaculture infrastructure may enhance our food self-sufficiency and reduce our over-reliance on imported goods.

By applying a favorable wholesale general excise tax rate to Hawaiian fishpond products, this bill will promote the financial sustainability of loko i‘a operations in Hawai‘i. This, along with other government and community initiatives to encourage loko i‘a restoration and cultivation, may in turn facilitate the broader rejuvenation of our loko i‘a infrastructure, and thereby realize the social, economic, and self-sufficiency benefits of reinvesting in our cultural heritage.

Accordingly, OHA urges the Committee to **PASS** HB2458 HD1.

Mahalo nui for the opportunity to testify on this measure.

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

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SUBJECT: GENERAL EXCISE, Wholesale Rate for Products from Hawaiian Fishponds

BILL NUMBER: HB 2458, HD-1

INTRODUCED BY: House Committee on Ocean, Marine Resources, & Hawaiian Affairs

EXECUTIVE SUMMARY: Establishes a special 0.5% rate for products produced by Hawaiian loko i'a (fishponds). Approval of the exemption would have the potential of opening the barn door to all other businesses who want relief from our retail rate GET.

BRIEF SUMMARY: Adds a new section to HRS chapter 237 providing that the wholesale rate (presently 0.5%) shall apply to gross income from the sale of all products produced by Hawaiian fishponds.

EFFECTIVE DATE: December 24, 2088.

STAFF COMMENTS: Under the Hawaii GET law as it now exists, agricultural or aquacultural products are indeed eligible for the wholesale tax rate, but of course retail sales of such products are still taxable at the retail rate.

As proposed, it would grant a special preference to a select group of taxpayers at the expense of others who are not eligible for the exemption. The general excise tax is a tax that permits someone to operate a business in the state. Thus, businesses providing similar, if not identical, services should be treated equally as the tax is on the business and not on the customer. In this case, this proposal would grant the wholesale rate to the fishpond owner or operator whether or not the products sold were in fact sold at wholesale. This would discriminate against fishers or other food producers who do not qualify for the proposed exemption.

It should be remembered that businesses that qualify for the tax preferences proposed in this measure would utilize services funded by current taxpayers while being tax-exempt. The question that should be asked is why businesses other than those granted the limited exemption proposed by this measure should foot the bill to run state government. Thus, the limited tax preference granted under this measure would merely shift the burden of paying for public services to those not so favored.

Further, what can be the policy justification for giving a special rate to this type of business while others pay full freight to make up the difference? If this bill is approved, lawmakers should brace themselves for a deluge of requests by other businesses, large and small, who for whatever reason think they merit special treatment under the GET law.

Digested 2/27/2016