

**"CHAPTER 239**  
**PUBLIC SERVICE COMPANY TAX LAW**

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## Law Journals and Reviews

Hawaii's General Excise Tax Law: A Comprehensive Review of the Decisions. II HBJ No. 13, at pg. 1.

### "PART I. GENERAL PROVISIONS

#### Note

Sections 239-1 to 239-13 designated as Part I by L 2002, c 209, §5.

**§239-1 Tax levy, in general.** There shall be levied and assessed upon each public service company a tax in the manner provided by this chapter. [L 1932 2d, c 43, §1; am L 1933, c 183, §2; RL 1935, §2140; RL 1945, §5671; RL 1955, §126-1; am L Sp 1957, c 1, §9(a); am L 1963, c 147, §2(b); HRS §239-1]

#### Case Notes

Cited: 34 H. 324.

" **§239-2 Definitions.** As used in this chapter unless otherwise required by the context:

"Carrier" means a person who engages in transportation, and does not include a person such as freight forwarder or tour packager who provides transportation by contracting with others, except to the extent that such person oneself engages in transportation.

"Contract carrier" means a person other than a public utility or taxicab which, under contracts or agreements, engages in the transportation of persons or property for compensation, by land, water, or air.

"Gross income" means the gross income from public service company business as follows:

- (1) Gross income from the production, conveyance, transmission, delivery, or furnishing of light, power, heat, cold, water, gas, or oil;
- (2) Gross income from the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages other than mobile telecommunications services, or the furnishing of facilities for the transmission of intelligence by electricity, by land or water or air:
  - (A) Originating and terminating within this State;
  - (B) By means of vessels or aircraft having their home port in the State and operating between ports or

- airports in the State, with respect to the transportation so effected; or
- (C) By means of plant or equipment located in the State, between points in the State;
- (3) Gross income from the transportation of freight by motor carriers (other than as stated in paragraph (2)), or the conveyance or transmission of messages or intelligence through wires or cables located or partly located in the State (other than as stated in paragraph (2) or (5));
- (4) Gross income from the operation of a private sewer company or private sewer facility; or
- (5) With respect to a home service provider of mobile telecommunications services, "gross income" includes charges billed for mobile telecommunications services provided by a home service provider to a customer with a place of primary use in this State when the mobile telecommunications services originate and terminate within the same state; provided that all such charges for mobile telecommunications services that are billed by or for the home service provider are deemed to be provided by the home service provider at the customer's place of primary use, regardless of where the mobile telecommunications services originate, terminate, or pass through. "Gross income" shall not include:
- (A) Any charges for or receipts from mobile telecommunications services provided to customers of the home service provider whose place of primary use is outside this State;
- (B) Any receipts of a home service provider acting as a serving carrier providing mobile telecommunications services to another home service provider's customer; and
- (C) Any receipts specifically from interstate or foreign mobile telecommunications services taxable under section 237-13(6)(D), as determined by the home service provider's books and records kept in the ordinary course of business.

For the purposes of this paragraph, "customer", "home service provider", "mobile telecommunications services", "place of primary use", and "serving carrier" have the same meaning as in section 239-22.

The words "gross income" and "gross income from public service company business" shall not be construed to include dividends (as defined by section 235-1) paid by one member of an affiliated public service company group to another member of the

same group; or gross income from the sale or transfer of materials or supplies, interest on loans, or the provision of engineering, construction, maintenance, or managerial services by one member of an affiliated public service company group to another member of the same group. "Affiliated public service company group" means an affiliated group of domestic corporations within the meaning of chapter 235, all of the members of which are public service companies. "Member of an affiliated public service company group" means a corporation (including the parent corporation) that is included within an affiliated public service company group.

Where the transportation of passengers or property is furnished through arrangements between motor carriers, and the gross income is divided between the motor carriers, any tax imposed by this chapter shall apply to each motor carrier with respect to each motor carrier's respective portion of the proceeds.

Where tourism related services are furnished through arrangements made by a travel agency or tour packager and the gross income is divided between the provider of the services on the one hand and the travel agency or tour packager on the other hand, any tax imposed by this chapter shall apply to each person with respect to each person's respective portion of the proceeds.

Accounts found to be worthless and actually charged off for income tax purposes, at corresponding periods, may be deducted from gross income as specified under this chapter so far as the accounts reflect taxable sales, but shall be added to gross income when and if subsequently collected.

As used in this paragraph, "tourism related services" means motor carriers of passengers regulated by the public utilities commission.

"Home port" means the place where vessels or aircraft have their tax situs or principal tax situs.

"Motor carrier" means a common carrier or contract carrier transporting persons or property for compensation on the public highways, other than a public utility or taxicab.

The "net operating income" of a public utility subject to the tax rate imposed by section 239-5(a) is the operating revenues less the operating expenses and tax accruals, including in the computation of such revenues and expenses, debits and credits arising from equipment rents and joint facility rents. In the event that, but for this sentence, deductions could not be had for expenses of services because such services were rendered by the same person or persons constituting the public utility or could not be had for income taxes, because such taxes were levied against the person or persons constituting the

public utility in the person's or their individual capacity and not as a separate entity, there nevertheless shall be allowed as deductions in computing the net operating income (A) a reasonable allowance for the value of personal services actually rendered, and (B) such proportion of the actual amount of income taxes, federal and state, as fairly represents the portion of the income so taxed which was derived from the public utility business.

"Partner" means the same as in the Internal Revenue Code.

"Partnership" means the same as in the Internal Revenue Code.

"Ports", "airports", or "points in the State" shall be deemed to be such if they are loading, unloading, transshipment, assembly, transfer, or relay points.

"Public highways" has the meaning defined by section 264-1 including both state and county highways, but operation upon rails shall not be deemed transportation on the public highways.

"Public service company" means a public utility, motor carrier, or contract carrier.

"Public utility" has the meaning given that term in section 269-1. [L 1932 2d, c 43, §2; RL 1935, §2141; RL 1945, §5672; am L 1945, c 78, §1; RL 1955, §126-2; am L Sp 1957, c 1, §9(b); am L 1963, c 147, §2(c); HRS §239-2; am L 1977, c 26, §1; gen ch 1985; am L 1986, c 308, §1; gen ch 1993; am L 1997, c 178, §§7, 11; am L 1998, c 125, §1; am L 2002, c 209, §4; am L 2005, c 146, §2; am L 2008, c 16, §8]

### Case Notes

"Gross income", "net operating income", defined. 34 H. 269, aff'd 105 F.2d 286.

The portion of tariff rates reflecting value of equipment owned by taxpayer's customer is not income earned by taxpayer. 57 H. 477, 559 P.2d 283.

"Gross income" from conveyance or transmission of telephone messages or furnishing of facilities for transmission of intelligence by electricity construed. 61 H. 572, 608 P.2d 383.

" **§239-3 REPEALED.** L 2001, c 64, §6.

" **§239-4 Returns.** Each public service company, on or before the twentieth day of the fourth month following the close of the taxable year, shall file with the office of the department of taxation for the district within which the principal office of the public service company is maintained a return in such form as the department may prescribe, showing its taxable gross

income for the preceding taxable year. In case any public service company engages in lines of business other than its public service company business, the receipts therefrom shall not be subject to tax under this chapter, but the same tax liabilities shall attach to the public service company on account of the other lines of business as would exist if no public service company business were engaged in. In the case of a public utility subject to the rate of tax imposed by section 239-5(a) or (b), if the public utility engages in lines of business other than its public utility business the real property used in connection with the other lines of business shall be taxed, in accordance with the applicable county tax ordinance, the same as if no public utility business were done. In the case of a public utility remitting payments to a county of a portion of the revenues generated from the tax imposed by section 239-5(a), the public utility shall also file with the director of finance of the county to which such payment is paid, a statement showing all gross income from the public utility business upon which the tax is calculated and the allocation of that gross income among the counties. [L 1932 2d, c 43, §3; RL 1935, §2142; RL 1945, §5673; RL 1955, §126-4; am L 1957, c 34, §22; am L Sp 1959 2d, c 1, §16; am L 1963, c 147, §2(d); am L 1967, c 37, §1; HRS §239-4; am L 1991, c 25, §1; am L 2001, c 64, §2]

#### Case Notes

Cited: 34 H. 269, 270.

" **§239-4.5 Segregation of gross income, etc., on records and in returns of telecommunications businesses.** (a)

Notwithstanding section 239-4, any person engaged in the business of selling interstate or foreign common carrier telecommunications services taxable under section 237-13(6)(C), or any public utility defined in section 269-1 having gross income from the conveyance or transmission of telephone or telegraph messages, or from the furnishing of facilities for the transmission of intelligence by electricity, may reasonably segregate in the person's returns, based on its books and records that are kept in the normal course of business:

- (1) The parts of its gross income, gross proceeds of sales, and value of products subject to taxation under this chapter from the parts subject to taxation under chapter 237; and
- (2) The parts of its gross income, gross proceeds of sales, and value of products subject to taxation under

one provision of this chapter from the parts subject to taxation under any other provision of this chapter.

(b) The segregation shall be deemed valid so long as the method of segregation does not conflict with rules subsequently adopted by the department pursuant to this section. [L 2002, c 236, §2; am L 2008, c 16, §9]

" **§239-5 Public utilities, generally.** (a) There shall be levied and assessed upon each public utility, except airlines, motor carriers, common carriers by water, and contract carriers taxed by section 239-6, a tax of such rate per cent of its gross income each year from its public utility business as shall be determined in the manner hereinafter provided. The tax imposed by this section is in lieu of all taxes other than those below set out, and is a means of taxing the personal property of the public utility, tangible and intangible, including going concern value. In addition to the tax imposed by this chapter there also are imposed income taxes, the specific taxes imposed by chapter 249, the fees prescribed by chapter 269, any tax specifically imposed by the terms of the public utility's franchise or under chapter 240, the use or consumption tax imposed by chapter 238, and employment taxes.

The rate of the tax upon the gross income of the public utility shall be four per cent; provided that if:

- (1) A county provides by ordinance for a real property tax exemption for real property used by a public utility in its public utility business and owned by the public utility (or leased to it by a lease under which the public utility is required to pay the taxes upon the property), and
- (2) The county has not denied the exemption to the public utility, but excluding a denial based upon a dispute as to the ownership, lease, or use of a specific parcel of real property,

then there shall be levied and assessed a tax in excess of the four per cent rate determined in the manner hereinafter provided upon the gross income allocable to such county. The revenues generated from the tax in excess of the four per cent rate hereinbefore established shall be paid by the public utility directly to such county based upon the proportion of gross income from its public utility business attributable to such county, based upon the allocation made in the public utility's filings with the State of Hawaii; provided that if the gross income from the public utility business attributable to such county is not so allocated in the public utility's State filings, then the gross income from the public utility business

shall be equitably allocated to each county. The relative number of access lines in each county shall be deemed an acceptable basis of equitable allocation for telecommunication companies.

The rate of the tax in excess of the four per cent rate hereinbefore established upon the gross income from the public utility business shall be determined as follows:

If the ratio of the net income of the company to its gross income is fifteen per cent or less, the rate of tax in excess of the four per cent rate on gross income shall be 1.885 per cent; for all companies having net income in excess of fifteen per cent of the gross, the rate of the tax on gross income shall increase continuously in proportion to the increase in ratio of net income to gross, at such rate that for each increase of one per cent in the ratio of net income to gross, there shall be an increase of .2675 per cent in the rate of the tax.

The following formula may be used to determine the rate, in which formula the term "R" is the ratio of net income to gross income, and "X" is the required rate of the tax on gross income for the utility in question:

$$X = (26.75R - 2.1275)\%$$

provided that in no case governed by the formula shall "X" be less than 1.885 per cent or more than 4.2 per cent.

However, if the gross income is apportioned under section 239-8(b) or (c), there shall be no adjustment of the rate of tax on the amount of gross income so apportioned to the State on account of the ratio of the net income to the gross income being in excess of fifteen per cent, and it shall be assumed in such case that the ratio is fifteen per cent or less.

(b) Notwithstanding subsection (a), the rate of the tax upon the portion of the gross income of a carrier of passengers by land which consists in passenger fares for transportation between points on a scheduled route, shall be 5.35 per cent. However, if the carrier has other public utility gross income the fares nevertheless shall be included in applying subsection (a) in determining the rate of tax upon the other public utility gross income.

(c) Notwithstanding subsection (a), the rate of tax upon the portion of the gross income of:

- (1) A public utility that consists of the receipts from the sale of its products or services to another public utility that resells such products or services shall be one-half of one per cent; or
- (2) A public utility engaged in the business of selling telecommunication services to a person defined in section 237-13(6)(C) who resells such products or services, shall be one-half of one per cent;



provided that the resale of the products, services, or telecommunication services is subject to taxation under this section or subject to taxation at the highest rate under section 237-13(6); and provided further that whenever the public utility has other public utility gross income, the gross income from the sale of its products or services to another public utility or a person subject to section 237-13(6)(C) shall be included in applying subsection (a) in determining the rate of tax upon the other public utility gross income. The department shall have the authority to implement the tax rate changes in paragraph (2) by prescribing tax forms and instructions that require tax reporting and payment by deduction, allocation, or any other method to determine tax liability with due regard to the tax rate changes. [L 1932 2d, c 43, §4; RL 1935, §2143; RL 1945, §5674; RL 1955, §126-5; am L Sp 1957, c 1, §9(c) to (f); am L 1963, c 147, §2(e); am L 1965, c 201, §§30, 31; HRS §239-5; am L 1968, c 59, §2; am L 1974, c 135, §1; am L 1990, c 34, §13; am L 2000, c 198, §14; am L 2001, c 64, §3; am L 2008, c 16, §10; am L 2015, c 22, §6; am L 2016, c 52, §2]

#### **Note**

L 2001, c 64, §7 provides:

"SECTION 7. Transition period. Commencing with the July 2001, installment of the remaining quarterly or monthly installments of the tax upon gross income which has been levied and assessed for the calendar year 2001 under section 239-5(a), Hawaii Revised Statutes, that portion of each such installment that is described in section 3 [amending §239-5(a)] of this Act as the tax in excess of the rate of four per cent that is paid to a county if the county provides for a real property tax exemption for real property used by a public utility in its public utility business, shall be paid to the respective county director of finance as provided in section 3 [amending §239-5(a)] of this Act. Provided that for the period July 2001 to December 2001, if a public utility is not required to pay to a particular county director of finance tax in excess of the rate of four per cent, as provided in section 3 [amending §239-5(a)] of this Act, the public utility shall not be liable to the State or respective county for such portion of the installments of the tax imposed in excess of the rate of four per cent under section 239-5(a), Hawaii Revised Statutes, for the period July 2001 to December 2001."

#### **Case Notes**

"Net income" defined. 34 H. 269, aff'd 105 F.2d 286; 34 H. 324.

The portion of tariff rates reflecting value of equipment owned by taxpayer's customer is not income earned by taxpayer. 57 H. 477, 559 P.2d 283.

" **[\$239-5.5] Surcharge amounts exempt.** Amounts received in the form of a monthly surcharge by a utility acting on behalf of an affected utility under section 269-16.3 shall not be gross income for the acting utility for purposes of this chapter. Any amounts retained by the acting utility for collection or other costs shall not be included in this exemption. [L 1993, c 337, §2]

" **[\$239-5.6] Cable surcharge amounts exempt.** Amounts received in the form of a cable surcharge by an electric utility company acting on behalf of a certified cable company under section 269-134 shall not be deemed gross income of that electric utility company for purposes of this chapter; provided that any amounts retained by that electric utility company for collection or other costs shall not be included in this exemption. [L 2012, c 165, §3]

" **§239-6 Airlines, certain carriers.** (a) There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business.

(b) There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business.

(c) The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

(d) Notwithstanding subsections (a), (b), and (c), the rate of tax upon the portion of the gross income of a motor carrier which consists of the receipts from the sale of its products or services to a contractor shall be one-half of one

per cent; provided that there is a resale of the products or services and the resale by the contractor is subject to taxation at the highest rate under section 237-13; the gross income of the motor carrier is not divided as provided in the definition of "gross income" in section 239-2 for the tax imposed under this chapter or chapter 237; and the gross income of the motor carrier from the sale of its products or services to the contractor is not subject to a deduction under chapter 237 by the contractor; and in the case of services provided by the motor carrier, the benefit of the service passes to the customer of the contractor as an identifiable element of the contracting or service provided by the contractor and does not constitute overhead as defined in section 237-1.

For purposes of this subsection, "contractor" has the same meaning as defined in section 237-6.

(e) Notwithstanding subsections (a) through (d), beginning on October 1, 2001, the tax under this chapter shall not apply to airlines, motor carriers, common carriers by water, and contract carriers other than motor carriers; provided that the gross income received on or after October 1, 2001, by these carriers shall be subject to the tax imposed under chapter 237. For the taxable year in which October 1, 2001 occurs, the tax imposed and due under this chapter for the affected carriers shall be abated in an amount equal to:

- (1) The tax imposed on the first day of the taxpayer's taxable year in which October 1, 2001 occurs;
- (2) Divided by the number of months in the taxpayer's affected taxable year; and
- (3) Multiplied by the number of months in the taxpayer's taxable year remaining after September 30, 2001. [L 1963, c 147, §2(f); am L 1965, c 155, §18; Supp, §126-5.1; HRS §239-6; am L 1968, c 59, §3; am L 1970, c 180, §22; am L 2000, c 198, §15; am L Sp 2001 3d, c 9, §4; am L 2003, c 135, §8; am L 2015, c 22, §7]

### **Case Notes**

Federal law preempts gross receipts tax on air transportation or carriage of persons in air commerce. 464 U.S. 7.

Commissions retained by airline's travel agents are includible in airline's gross income for purposes of imposing tax. 56 H. 626, 547 P.2d 586.

Section does not burden commerce unduly, and is not preempted by federal law. 65 H. 1, 647 P.2d 263.

Federal Aviation Act did not preempt State's power, under this section, to tax gross receipts attributable to the ground transportation portion of air packages that common carrier

transported interisland and/or between Hawaii and the mainland.  
88 H. 336, 966 P.2d 648.

" **[\$239-6.5] Tax credit for lifeline telephone service subsidy.** A telephone public utility subject to this chapter that has been authorized to establish lifeline telephone service rates by the public utilities commission shall be allowed a tax credit, equal to the lifeline telephone service costs incurred by the utility, to be applied against the utility's tax imposed by this chapter. The amount of this credit shall be determined and certified annually by the public utilities commission. The tax liability for a telephone public utility claiming the credit shall be calculated in the manner prescribed in section 239-5; provided that the amount of tax due from the utility shall be net of the lifeline service credit. [L 1986, c 116, §2]

" **§239-7 Assessments; payments; chapter 235 applicable.** (a) The tax imposed by this chapter shall be assessed against each public service company in the manner provided by this chapter, and shall be paid to the department of taxation at the times and in the manner (in installments or otherwise) provided by this section, except as provided in section 239-5(a), where there is levied and assessed a tax in excess of four per cent upon gross income, the revenues generated from the tax in excess of the four per cent rate shall be paid to the respective county director of finance at the times and in the manner (in installments or otherwise) provided by this section.

(b) The total amount of the tax imposed by this chapter shall be paid on or before the twentieth day of the fourth month following the close of the taxable year. The public service company may elect to pay the tax in four equal installments, in which case the first installment shall be paid on or before the twentieth day of the fourth month following the close of the taxable year, the second installment shall be paid on or before the twentieth day of the sixth month following the close of the taxable year, the third installment shall be paid on or before the twentieth day of the ninth month following the close of the taxable year, and the fourth installment shall be paid on or before the twentieth day of the twelfth month following the close of the taxable year. Notwithstanding the preceding, if the total tax liability under this chapter for the taxable year exceeds \$100,000, the taxes so levied shall be payable in twelve equal installments, in which case the first installment shall be paid on or before the tenth day of the first month following the close of the taxable year, and the remaining installments shall be paid on or before the tenth day of each calendar month after

such date. If any installment is not paid on or before the date fixed for its payment, the department or the county director of finance as to payments due the county under section 239-5(a), at the election of the department or the county director, may cause the balance of the tax unpaid to become payable upon not less than ten days' notice and demand, and this amount shall be paid upon the date so fixed in the notice and demand from the department or the county director of finance as to payments due to the county.

(c) The department shall prescribe the forms in which returns shall be made so as to reflect clearly the liability of each public service company subject to this tax, and may provide in the forms for such additional information as it may deem necessary. All provisions of the laws, not inapplicable and not inconsistent with this chapter, relating to returns for income tax purposes, the assessment (including additional assessments), collection, and payment (in installments or otherwise) of income taxes and the powers and duties of the department and the state director of finance in connection therewith, and relating to appeals from or other adjustments of such assessments, limitation periods for assessments, enforcement of attendance of witnesses, and the production of evidence, examination of witnesses and records, the effect of assessments, tax books, and lists and other official tax records as evidence, delinquent dates and penalties, and the rights and liabilities (civil and criminal) of taxpayers and other persons in connection with any matters dealt with by chapter 235, are made applicable (1) to the taxes and the assessment, payment, and collection thereof, provided by this chapter, and (2) to the department and the state director of finance in connection with the taxes and the assessment, payment, or enforcement of payment and collection thereof, and (3) to taxpayers and other persons affected by this chapter, as the case may be. The provisions of chapter 235 regarding the limitation period for assessment and refunds shall run from the filing of the return for the taxable year, or the due date prescribed for the filing of the return, whichever is later. With respect to payments due to a county of the revenues generated from the tax in excess of the four per cent rate imposed under section 239-5(a), a county director of finance shall be afforded such rights and procedures of the department in the enforcement of payment and collection of the taxes assessed and levied under this chapter. [L 1932 2d, c 43, §5; RL 1935, §2144; RL 1945, §5675; RL 1955, §126-6; am L 1959, c 277, §16; am L Sp 1959 2d, c 1, §§14, 16; am L 1963, c 114, §1 and c 147, §2(g); HRS §239-7; am L 1991, c 25, §2; am L 1992, c 38, §2; am L 2001, c 64, §4]

## Case Notes

Claim for refund starts to run from due date of any quarterly payment. 68 H. 391, 716 P.2d 1138.

" **§239-8 Allocation and apportionment.** (a) The gross income included in the measure of the tax as defined in subparagraphs (B) and (C) of the definition of "gross income" in section 239-2, shall be determined by an allocation and separate accounting so far as practicable.

(b) If under subparagraph (B) of the definition of "gross income" in section 239-2, an apportionment of gross income is necessary, there shall be apportioned to the State and included in the measure of the tax that proportion of the total gross income, so requiring apportionment, which the direct cost of the transportation, conveyance, or transmission designated in subparagraph (B) of the definition of "gross income" in section 239-2, bears to the total direct cost of the transportation, conveyance, or transmission the gross income from which requires apportionment.

(c) If under subparagraph (C) of the definition of "gross income" in section 239-2, an apportionment of gross income is necessary, there shall be apportioned to the State and included in the measure of the tax that proportion of the total gross income, so requiring apportionment, which the total direct cost of the transportation, conveyance, or transmission within the State bears to the total direct cost of the transportation, conveyance, or transmission the gross income from which requires apportionment. [L 1963, c 147, §2(i); Supp, §126-7.1; HRS §239-8; am L 1997, c 178, §8]

" **§239-9 Time of application of tax and other provisions.**

(a) In general. The tax imposed by this chapter applies to every public service company:

- (1) Which is in business at the commencement of a calendar year, as of January 1 of that year;
- (2) Which begins business after the commencement of a calendar year, as of the commencement of business.

(b) Third year of doing business; earlier years, how governed. If the company is in business at the commencement of the calendar year, and was in business during the whole of the preceding year and prior thereto, the tax shall be returned and paid as provided in sections 239-4 and 239-7.

However, if subsection (a)(2) applies, or if the company though in business at the commencement of the calendar year was not in business during the preceding year, or was in business during the preceding year or a part thereof but not prior

thereto, the tax shall be returned and paid as provided in subsections (c) and (d).

(c) First year of doing business. The measure of the tax for the year in which the company begins business is an estimate of the gross income of the public service company for that year or for the part of that year in which it is in business.

The tax thereon for the year in which the company begins business shall be at the following rate:

- (1) If subsection (a)(2) applies, at the rate of four per cent, or
- (2) If subsection (a)(1) applies but the company though in business at the commencement of the calendar year was not in business during any part of the preceding year, the tax shall be at the rate provided by sections 239-5 and 239-6, except that there shall be no adjustment of the rate of tax on account of the ratio of the net income to the gross income being in excess of fifteen per cent and it shall be assumed for purposes of this subsection and subsection (e) that the ratio is fifteen per cent or less.

The estimate shall be made and the tax returned on or before the twentieth day of the third month after the month in which the company begins business and shall be subject to adjustment by the filing of an amended return as provided in subsection (e). Payment of the tax shall accompany the return unless time for payment is extended by the director of taxation. The extension may be granted by the director in order to provide for payment of the tax in installments during the remainder of the taxable year.

(d) Second year of doing business. The measure of the tax for the year following the year in which the company began business is an estimate of the average gross income for a taxable year, subject to adjustment by the filing of an amended return as provided in subsection (e). The estimate shall be made and the tax returned and paid at the times provided for other companies which are in business at the commencement of the calendar year. The tax thereon shall be at the rate provided by sections 239-5 and 239-6, except that there shall be no adjustment of the rate of tax on account of the ratio of the net income to the gross income being in excess of fifteen per cent and it shall be assumed for purposes of this subsection and subsection (e) that the ratio is fifteen per cent or less.

(e) Adjustment of estimates. An amended return shall be filed after the close of the applicable taxable year for each year for which an estimated tax return was filed under subsection (c) or (d).

If the year for which the estimate is made is the year in which the company commenced doing business and subsection (c) applies, any variance between the estimate and the actual gross income for that year shall be adjusted and a credit or refund made, or payment of additional tax due, depending upon whether the estimate was in excess of, or less than, the actual gross income of the company for that year.

If the year for which the estimate is made is the year following the year in which the company commenced doing business and subsection (d) applies, the average monthly gross income during the period from and after the commencement of business to the close of the year for which the estimate was made shall be determined and multiplied by twelve. Any variance between the estimate and the amount so computed shall be adjusted and a credit or refund made, or payment of additional tax due, depending upon whether the estimate was in excess of, or less than, the amount computed.

The amended return shall be made and filed and any additional tax due paid on or before the twentieth day of the fourth month following the close of the taxable year in which the company commenced business.

The adjustment of the tax imposed under this chapter and the making of an amended return as provided under this section shall apply only to the first and second taxable years of doing business.

(f) Acquisition of business of another company. Whenever any public service company subject for any year to the tax imposed by this chapter, shall have acquired by purchase or otherwise during the preceding year the business or any part thereof of another public service company liable to tax under this chapter for the preceding year but not liable for the year following the sale or disposition, and the acquiring company continues the operation of the business so acquired, the gross income to be reported by the acquiring company for the purpose of determining the amount of its tax under this chapter for the year following the year in which the business was so acquired shall include, in addition to the gross income of the acquiring company during the year ending December 31 or fiscal year preceding, whichever is applicable, the gross income of the business or part thereof so acquired for the portion of the preceding year as the business was not operated by the acquiring company.

This subsection shall not apply to any company whose tax for the year involved is measured under subsection (c) by an estimate of gross income for the year subject to adjustment after the close of the year.



If the first paragraph of this subsection applies but the tax of the acquiring company for the year is governed by subsection (d) and adjusted under subsection (e), then in determining the average monthly gross income for that purpose there shall be included, in addition to the gross income of the acquiring company for the period involved in the determination of the average, the gross income of the business or part thereof acquired by the company for the portion of that period in which the business was not operated by the acquiring company.

(g) Consolidation or merger. Whenever there is a consolidation or merger of public service companies, liability to the tax imposed by this chapter shall attach to the company thus formed and the gross income which shall be used for measuring the tax of the company thus formed shall include the gross income of the companies which were consolidated or merged. [L 1963, c 147, §2(j); am L 1965, c 155, §19; Supp, §126-7.5; HRS §239-9; am L 1991, c 25, §3]

" **§239-10 Disposition of revenues.** All taxes collected under this chapter shall be state realizations; provided that where a tax in excess of the four per cent rate upon gross income is levied and assessed under section 239-5(a), such tax revenues to be paid to the county shall be realizations of such county. [L 1932 2d, c 43, §6; RL 1935, §2145; RL 1945, §5676; RL 1955, §126-8; HRS §239-10; am L 2001, c 64, §5]

" **§239-11 Exemption of certain contract carriers.** (a) There shall be exempted and excluded from the measure of the tax imposed by this chapter the gross income from any contract carrier by water which is engaged primarily in the business of transporting persons between harbors or wharves of the various counties for interisland cruises within the State; provided that such exemption shall be applicable for the period July 1, 1981, to June 30, 1996.

(b) Any contract carrier and related partners, if any, claiming an exemption under subsection (a) shall submit an annual financial report, prepared by an independent certified public accountant, to the department of taxation and to the department of business, economic development, and tourism on or before the fifteenth day of the fifth month following the close of each taxable year for which the exemption is being claimed; provided that in addition to reports in 1992, 1993, 1994, and 1995, an annual financial report shall be due on or before March 1, 1996. The annual financial report, prepared in a form approved by the director of taxation, shall include but not be limited to:

(1) A balance sheet of assets and liabilities;

- (2) A statement of income and expenses;
- (3) Supplementary information to financial statements;
- (4) A summary of financial condition; and
- (5) An apportionment of income and expenses of the contract carrier and related partners, if any, within and without the State.

Within thirty days of the receipt of the financial report from the contract carrier and related partners, if any, the director of taxation shall submit relevant financial data to the legislature. Failure to comply with this subsection by the contract carrier or related partners, if any, as determined by the director of taxation, shall constitute a waiver of the right to claim the exemption. [L 1981, c 240, §1; am L 1985, c 30, §1; am L 1987, c 20, §1; am L 1991, c 228, §1]

" **[§239-12] Call centers; exemption; engaging in business; definitions.** (a) This chapter shall not apply to amounts received from a person operating a call center by a person engaged in business as a telecommunications common carrier for interstate or foreign telecommunications services, including toll-free telecommunications, telecommunications capabilities for electronic mail, voice and data telecommunications, computerized telephone support, facsimile, wide area telecommunications services, or computer to computer communication.

(b) The department, by rule, may provide that the person providing the telecommunications service may take from the person operating a call center a certificate, in a form that the department shall prescribe, certifying that the amounts received for telecommunications services are for operating a call center. If the certificate is required by rule of the department, the absence of the certificate in itself shall give rise to the presumption that the amounts received from the sale of telecommunications services are not for operating a call center.

(c) As used in this section:

"Call center" means a physical or electronic operation that focuses on providing customer service and support for computer hardware and software companies, manufacturing companies, software service organizations, and telecommunications support services, within an organization in which a managed group of individuals spend most of their time engaging in business by telephone, usually working in a computer-automated environment; provided that the operation shall not include telemarketing or sales.

"Customer service and support" means product support, technical assistance, sales support, phone or computer-based

configuration assistance, software upgrade help lines, and traditional help desk services.

(d) This section shall not apply to income received after June 30, 2010. [L 2000, c 195, §3]

#### **Note**

L 2000, c 195, §5(3) provides in part that this section:

"... shall apply to the entire gross income received by a public service company for the fiscal year preceding July 1, 2001; provided that in the case of a public service company operating on a calendar year, this Act shall apply to the entire gross income received for the calendar year in which July 1, 2001, occurs and for fiscal years thereafter."

" **§239-13 REPEALED.** L 2007, c 9, §28.

### **"[PART II.] SOURCING OF MOBILE TELECOMMUNICATIONS SERVICES INCOME**

#### **Note**

L 2002, c 209, §6 provides:

"SECTION 6. Notwithstanding any provisions of this Act to the contrary, nothing in this Act shall affect or shall be construed to affect the taxation of prepaid telephone calling service under section 237-13.8, Hawaii Revised Statutes."

This part, with respect to tax liabilities, applies only to charges on or revenues from customer bills issued after August 1, 2002. L 2002, c 209, §9.

**[\$239-21] Application.** Sections 239-21 to 239-25 shall apply to home service providers as defined in section 239-22. [L 2002, c 209, pt of §2]

" **[\$239-22] Definitions.** As used in sections 239-21 to 239-25:

"Charges for mobile telecommunications services" means any charge for, or associated with, the provision of commercial mobile radio service, as defined in title 47 Code of Federal Regulations section 20.3 as in effect on June 1, 1999, or any charge for, or associated with, a service provided as an adjunct to a commercial mobile radio service, that is billed to the customer by or for the customer's home service provider regardless of whether individual transmissions originate or

terminate within the licensed service area of the home service provider.

"Customer" means:

- (1) The person or entity that contracts with the home service provider for mobile telecommunications services; or
- (2) If the end user of mobile telecommunications services is not the contracting party, "customer" means the end user of the mobile telecommunications service; provided that this paragraph shall apply only for the purpose of determining the place of primary use. Without implication for the general definition of "customer", the term does not include:
  - (A) A reseller of mobile telecommunications service; or
  - (B) A serving carrier under an arrangement to serve the customer outside the home service provider's licensed service area.

"Home service provider" means the facilities-based carrier or reseller with which the customer contracts for the provision of mobile telecommunications services.

"Licensed service area" means the geographic area in which the home service provider is authorized by law or contract to provide commercial mobile radio service to the customer.

"Mobile telecommunications service" means commercial mobile radio service, as defined in title 47 Code of Federal Regulations section 20.3 as in effect on June 1, 1999.

"Place of primary use" means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be:

- (1) The residential street address or the primary business street address of the customer; and
- (2) Within the licensed service area of the home service provider.

"Prepaid telephone calling service" means the right to purchase exclusively telecommunications services that must be paid for in advance, that enables the origination of calls using an access number, authorization code, or both, whether manually or electronically dialed, if the remaining amount of units of service that have been prepaid is known by the provider of the prepaid service on a continuous basis.

"Reseller":

- (1) Means a provider who purchases telecommunications services from another telecommunications service provider and then resells, uses as a component part of, or integrates the purchased services into a mobile telecommunications service; and

- (2) Does not include a serving carrier with which a home service provider arranges for the services to its customers outside the home service provider's licensed service area.

"Serving carrier" means a facilities-based carrier providing mobile telecommunications service to a customer outside a home service provider's or reseller's licensed service area.

"Taxing jurisdiction" means any of the several states, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee. [L 2002, c 209, pt of §2]

" **[\$239-23] Mobile telecommunications definitions.** The definitions relating to mobile telecommunications services set forth under section 239-22 shall apply to give effect to the federal Mobile Telecommunications Sourcing Act, title 4 United States Code sections 116 to 126, and shall have no impact on the interpretation of the laws of this State except as expressly set forth in this chapter. [L 2002, c 209, pt of §2]

" **[\$239-24] Effect of customer's failure to provide its place of primary use; effect of aggregation or segregation of charges.** (a) Nothing in this chapter modifies, impairs, supersedes, or authorizes the modification, impairment, or supersession of any law allowing a taxing jurisdiction to collect a tax, charge, or fee from a customer that has failed to provide its place of primary use.

(b) If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to the tax, charge, or fee from its books and records that are kept in the regular course of business.

(c) If a taxing jurisdiction does not subject charges for mobile telecommunications services to taxation, a customer may not rely upon the nontaxability of charges for mobile telecommunications services unless the customer's home service provider separately states the charges for nontaxable mobile

telecommunications services from taxable charges or the home service provider elects, after receiving a written request from the customer in the form required by the provider, to provide verifiable data based upon the home service provider's books and records that are kept in the regular course of business that reasonably identifies the nontaxable charges.

(d) A home service provider shall be responsible for obtaining and maintaining the customer's place of primary use. Subject to a determination by the department that the customer's place of primary use does not reflect the correct taxing jurisdiction, and if the home service provider's reliance on information provided by its customer is in good faith, a home service provider may rely on the applicable residential or business street address supplied by the customer and the home service provider shall not be held liable for any additional taxes, charges, or fees that are passed on to the customer as a separate itemized charge; provided that a home service provider may treat the address used by the home service provider for tax purposes under a service contract or agreement in effect on July 28, 2002, as the customer's place of primary use for the remaining term of the contract or agreement, excluding any renewal of the contract or agreement. [L 2002, c 209, pt of §2]

" **[\$239-25] Nonseverability.** If a court of competent jurisdiction enters a final judgment on the merits that:

- (1) Is based on federal law;
- (2) Is no longer subject to appeal; and
- (3) Substantially limits or impairs the essential elements of sections 239-21 to 239-24,

then sections 239-21 to 239-24 are invalid and have no legal effect as of the date of entry of the judgment. [L 2002, c 209, pt of §2]