

[CHAPTER 346E]
NURSING FACILITY TAX

Section

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Note

Effect and application. L 1993, c 315, §8; L 1994, c 230, §§2, 4; L 1995, c 176, §2.

Chapter heading amended by L 1994, c 230, §1.

" **§346E-1 Definitions.** As used in this chapter, unless the context otherwise requires:

"Department" means the department of human services.

"Director" means the director of human services.

"Nursing facility" means a nursing facility licensed under sections 321-9 and 321-11 and any intermediate care facility for individuals with intellectual disabilities licensed under sections 321-9 and 321-11.

"Nursing facility income" means the total compensation received for furnishing nursing facility services, including all receipts from "ancillary services" (as defined in 42 Code of Federal Regulations 413.53(b)) to the provision of nursing facility services, and receipts from items supplied in connection with these services. "Nursing facility income" shall not include the following: compensation received from services covered by title XVIII of the federal Social Security Act (including copayments and deductibles received from beneficiaries of the medicare program); income from an affiliated entity that operates as a prepaid health maintenance organization; settlements from third party payors for services delivered or items supplied prior to the effective date of this Act (such as settlements of cost reports or decisions on rate reconsideration requests); income from services provided by separately licensed units (such as distinct part intermediate care facilities for individuals with intellectual disabilities); income from the provision of adult day health and adult day care programs; income from the provision of home health agency services; income from the provision of "nursing homes without walls" programs; income from the provision of inpatient hospital services; income from grants, bequests, donations, endowments, or investments; or amounts of taxes imposed by chapter 237 or this chapter and passed on, collected, and received from the consumer as part of nursing facility income.

"Operator" means any person operating a nursing facility, whether as owner or proprietor, or as lessee, sublessee, mortgagee in possession, licensee, or otherwise, or engaging or continuing in any service business that involves the actual furnishing of nursing facility services. [L 1993, c 315, pt of §1; am L 1994, c 230, pt of §1; am L 2011, c 220, §11]

" **§346E-2 Imposition of tax and rates.** (a) There is levied and shall be assessed and collected during each quarter a tax in the amount of six per cent of all nursing facility income.

(b) Each nursing facility operator shall pay to the State the tax imposed by this section as provided by this chapter.

(c) The tax imposed by this section shall not apply to an individual facility determined by the department to be financially distressed, pursuant to the rulemaking authority authorized by this chapter; provided that this exemption does not cause the tax to fail to qualify as permissible under section 1903(w) of the federal Social Security Act.

(d) Each operator of a nursing facility shall identify separately the tax imposed by this section in all invoices or statements to persons whose payments result in nursing facility income. Notwithstanding the foregoing, the amount that a beneficiary of the medicaid program is required to contribute toward his or her care shall not be changed as a result of the tax imposed by this section.

(e) The taxes imposed by this section shall terminate at the end of the month following the time at which the taxes no longer qualify as permissible under section 1903(w) of the federal Social Security Act; but not before July 1, 1997. [L 1993, c 315, pt of §1; am L 1994, c 230, pt of §1; am L 1995, c 176, §1]

" **[§346E-3] Return and payments; penalties.** (a) On or before the fifteenth day of February, May, August, and November, or for fiscal year taxpayers on or before the forty-fifth day after the close of the fiscal quarter, every operator taxable under this chapter during the preceding calendar or fiscal quarter shall file a sworn return with the director in such form as the director shall prescribe, together with a remittance for the amount of the tax in the form of cash, bank draft, cashier's check, money order, or certificate of deposit. In lieu of the remittance, the operator may request withholding from payments made to the operator by the department under section 346E-4. Sections 237-30 and 237-32 shall apply to returns and penalties made under this chapter to the same extent as if the sections were set forth specifically in this section.

(b) Notwithstanding subsection (a), the director, for good cause, may permit an operator to file the operator's return required under this section and make payments thereon, on a semiannual basis during the calendar or fiscal year, the return and payment to be made on or before the last day of the calendar month after the close of each six-month period, to wit: for calendar year operators, on July 31 and January 31 or, for fiscal year operators, on or before the last day of the seventh

month following the beginning of the fiscal year and on or before the last day of the month following the close of the fiscal year; provided that the director is satisfied that the grant of the permit will not unduly jeopardize the collection of the taxes due thereon and the operator's total tax liability for the calendar or fiscal year under this chapter will not exceed \$1,000.

The director, for good cause, may permit an operator to make quarterly payments based on the operator's estimated quarterly or semiannual liability; provided that the operator files a reconciliation return at the end of each quarter or at the end of each six-month period during the calendar or fiscal year, as provided in this section.

(c) If an operator filing the operator's return on a semiannual basis, as provided in this section, becomes delinquent in either the filing of the operator's return or the payment of the taxes due thereon, or if the liability of an operator, who possesses a permit to file the operator's return and make payments on a semiannual basis, exceeds \$1,000 in taxes during the calendar or fiscal taxable year, or if the director determines that any such semiannual filing of a return would unduly jeopardize the proper administration of this chapter, including the assessment or collection of the taxes, the director, at any time, may revoke an operator's permit, in which case the operator then shall be required to file the operator's return and make payments thereon as provided in subsection (a).

(d) Section 232-2 shall apply to the annual return, but not to a quarterly or semiannual return. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1]

" **[\$346E-4] Withholding.** As an option to making payments under section 346E-3, the department and the operator in writing may agree that the department will withhold all or part of the amount of taxes owing for a quarter from medicaid payments owed by the department to the operator. All reports by the department to the federal government or to the operator, of medicaid payments made to the operator by the department shall include any amount withheld to satisfy the tax obligation imposed by this chapter. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1]

" **[\$346E-5] Annual return.** On or before the twentieth day of the fourth month following the close of the calendar or fiscal taxable year, every operator who has become liable for the payment of the taxes under this chapter during the preceding tax year shall file a return summarizing that operator's liability under this chapter for the year, in such form as the

director prescribes. The operator shall transmit to the Honolulu office of the department with the return, a remittance covering the residue of the tax chargeable to the operator, if any. The return shall be signed by the operator, if made by an individual, or by the president, vice-president, secretary, or treasurer of a corporation, if made on behalf of a corporation. If made on behalf of a partnership, firm, society, unincorporated association, group, hui, joint venture, joint stock company, corporation, trust estate, decedent's estate, trust, or other entity, any individual delegated by the entity shall sign the return on behalf of the operator. If for any reason it is not practicable for the individual operator to sign the return, it may be done by any duly authorized agent. The department, for good cause shown, may extend the time for making the return on the application of any operator and grant such reasonable additional time within which to make the return as the department may deem advisable.

Section 232-2 shall apply to the annual return, but not to a quarterly or semiannual return. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1]

" **§346E-6 Assessment of tax upon failure to make return; limitation period; exceptions; extension by agreement.** (a) If any operator fails to make a return as required by this chapter, the director shall make an estimate of the tax liability of the operator from any information the director obtains, and according to the estimate so made, assess the taxes, interest, and penalty due the State from the operator; give notice of the assessment to the operator; and make demand upon the operator for payment. The assessment shall be presumed to be correct until and unless, upon an appeal duly taken as provided in section 346E-8, the contrary shall be clearly proved by the operator assessed. The burden of proof upon the appeal shall be upon the operator assessed to disprove the correctness of assessment.

(b) After a return is filed under this chapter the director shall cause the return to be examined, and may make such further audits or investigations as the director considers necessary. If the director determines that there is a deficiency with respect to the payment of any tax due under this chapter, the director shall assess the taxes and interest due the State, give notice of the assessment to the persons liable, and make demand upon the persons for payment.

(c) Except as otherwise provided by this section, the amount of taxes imposed by this chapter shall be assessed or levied within three years after the annual return was filed, or within three years of the due date prescribed for the filing of

the return, whichever is later. No proceeding in court without assessment for the collection of any such taxes shall be begun after the expiration of the period. Where the assessment of the tax imposed by this chapter has been made within the period of limitation applicable thereto, the tax may be collected by levy or by a proceeding in court under chapter 231; provided that the levy is made or the proceeding was begun within fifteen years after the assessment of the tax. For any tax that has been assessed prior to July 1, 2009, the levy or proceeding shall be barred after June 30, 2024.

Notwithstanding any other provision to the contrary in this section, the limitation on collection after assessment in this section shall be suspended for the period:

- (1) The taxpayer agrees to suspend the period;
- (2) The assets of the taxpayer are in control or custody of a court in any proceeding before any court of the United States or any state, and for six months thereafter;
- (3) An offer in compromise under section 231-3(10) is pending; and
- (4) During which the taxpayer is outside the State if the period of absence is for a continuous period of at least six months; provided that if at the time of the taxpayer's return to the State the period of limitations on collection after assessment would expire before the expiration of six months from the date of the taxpayer's return, the period shall not expire before the expiration of the six months.

(d) In the case of a false or fraudulent return with intent to evade tax, or a failure to file the annual return, the tax may be assessed or levied at any time; provided that the burden of proof with respect to the issues of falsity or fraud and intent to evade tax shall be upon the State.

(e) Where, before the expiration of the period prescribed in subsection (c) for assessments or in section 346E-7 for credits and refunds, both the department and the operator have consented in writing to the assessment or levy of the tax after the date fixed by subsection (c) or the credit or refund of the tax after the date fixed by section 346E-7, the tax may be assessed or levied, or the overpayment, if any, may be credited or refunded at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1; am L 2009, c 166, §13]

" **[\$346E-7] Overpayment; refunds.** Upon application by an operator, if the director determines that any tax, interest, or penalty has been paid more than once, or has been erroneously or illegally collected or computed, the tax, interest, or penalty shall be credited by the director on any taxes then due from the operator under this chapter. The director shall refund the balance to the operator or the operator's successors, administrators, executors, or assigns in accordance with section 231-23. As to all tax payments for which a refund or credit is not authorized under this section (including, without prejudice to the generality of the foregoing, cases of unconstitutionality), the remedies provided by appeal or under section 40-35 are exclusive. No credit or refund shall be allowed for any tax imposed by this chapter, unless a claim for the credit or refund is filed as follows:

- (1) If an annual return is timely filed, or is filed within three years after the date prescribed for filing the annual return, then the credit or refund shall be claimed within three years after the date the annual return was filed or the date prescribed for filing the annual return, whichever is later; and
- (2) If an annual return is not filed, or is filed more than three years after the date prescribed for filing the annual return, a claim for credit or refund shall be filed within:
 - (A) Three years after the payment of the tax; or
 - (B) Three years after the date prescribed for the filing of the annual return, whichever is later.

The preceding limitation shall not apply to a credit or refund pursuant to an appeal, provided for in section 346E-8. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1]

" **§346E-8 Appeals.** Any operator aggrieved by any assessment of the tax imposed by this chapter for any quarter or any year, may appeal from the assessment in the manner and within the time and in all other respects, as provided in the case of income tax appeals by section 235-114. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1; am L 2004, c 123, §11]

" **[\$346E-9] Records to be kept; examination; penalties.** (a) Every operator shall keep, in the English language, within the State, and preserve for a period of three years, suitable records relating to nursing facility income taxed under this chapter, and such other books, records of account, and invoices as may be required by the department. All such books, records, and invoices shall be open for examination at any time by the department or the department of taxation, or the authorized

representative thereof. For the purposes of determining the amount of taxes due under this chapter, every operator shall keep its books and records of account on the accrual basis.

(b) Any operator violating this section shall be guilty of a misdemeanor; and any officer, director, president, secretary, or treasurer of a corporation who permits, aids, or abets the corporation to violate this section shall likewise be guilty of a misdemeanor. The penalty for this misdemeanor shall be that prescribed by section 231-34 for individuals, corporations, or officers of corporations, as the case may be, for violation of that section. [L 1993, c 315, pt of §1; am L 1994, c 230, pt of §1]

" **[§346E-10] Disclosure of returns unlawful; destruction of returns.** (a) All tax returns and return information required to be filed under this chapter, and the report of any investigation of the return or of the subject matter of the return, shall be confidential. It shall be unlawful for any person or any officer or employee of the State to intentionally make known information imparted by any tax return or return information filed pursuant to this chapter, or any report of any investigation of the return or of the subject matter of the return, or to wilfully permit any such return, return information, or report so made, or any copy thereof, to be seen or examined by any person; provided that for tax purposes only the operator, the operator's authorized agent, or persons with a material interest in the return, return information, or report may examine the same. Unless otherwise provided by law, persons with a material interest in the return, return information, or report shall include:

- (1) Trustees;
- (2) Partners;
- (3) Persons named in a board resolution or a one per cent shareholder in the case of a corporate return;
- (4) The person authorized to act for a corporation in dissolution;
- (5) A shareholder of an S corporation;
- (6) The personal representative, trustee, heir, or beneficiary of an estate or trust in the case of the estate's or decedent's return;
- (7) The committee, trustee, or guardian of any person in paragraphs (1) to (6) who is incompetent;
- (8) The trustee in bankruptcy or receiver, and the attorney-in-fact of any person in paragraphs (1) to (7);
- (9) Persons duly authorized by the State in connection with their official duties; and

(10) Any duly accredited tax official of the United States or any state or territory.

Any violation of this subsection shall be a misdemeanor. Nothing in this subsection shall prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items of the reports or returns.

(b) The department may destroy the quarterly or semiannual returns filed pursuant to section 346E-3, or any of them, upon the expiration of three years after the end of the calendar or fiscal year in which the taxes so returned accrued. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1]

" **[\$346E-11] Collection by suit; injunction.** The department may collect taxes due and unpaid under this chapter, together with all accrued penalties, by action in assumpsit or other appropriate proceedings in the district or circuit court of the judicial circuit in which the taxes arose, regardless of the amount. After delinquency has continued for sixty days, the department may proceed in the circuit court of the judicial circuit in which the nursing facility income is taxed to obtain an injunction restraining the further furnishing of nursing facility services until full payment is made of all taxes, penalties, and interest due under this chapter. [L 1993, c 315, pt of §1; am L 1994, c 230, pt of §1]

" **[\$346E-12] Application of taxes.** The taxes imposed by this chapter shall be in addition to any other taxes imposed by any other laws of the State; provided that if it is held by any court of competent jurisdiction that the taxes imposed by this chapter may not legally be imposed in addition to any other tax or taxes imposed by any other law or laws with respect to the same property and the use thereof, then this chapter shall be deemed not to apply to the property and the use thereof under the specific circumstances, but the other laws shall be given full effect with respect to the property and use. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1]

" **[\$346E-13] Administration and enforcement; rules.** (a) The director shall administer and enforce this chapter. With respect to:

- (1) The examinations of books and records, and operators and other persons;
- (2) Procedures and powers upon failure or refusal by an operator to make a return or proper return; and
- (3) The general administration of this chapter;

the director shall have all rights, powers, and duties conferred by chapters 231 and 237 with respect to powers and duties or with respect to taxes imposed under chapter 237. Without restriction upon these rights and powers, section 237-8 and sections 237-36 to 237-41 are made applicable to and with respect to taxes, operators, department officers, and other persons, and the matters and things affected or covered by this chapter, insofar as these sections are not inconsistent with this chapter, in the same manner, as nearly as may be, as in similar cases covered by chapter 237.

(b) The director may adopt rules under chapter 91 to carry out this chapter.

(c) The department may contract with the department of taxation for assistance in implementing and administering this chapter. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1]

" **[§346E-14] Taxes; allowable reimbursement costs.** All taxes paid pursuant to this chapter shall be deemed allowable and reimbursable costs for federal medicaid reimbursement purposes. The department shall make appropriate adjustments to the methods and standards for reimbursing nursing facilities under section 346-14 by a medicaid state plan amendment which shall become effective on federal approval. In the case of any program involving federal medicaid participation, the adjustment shall take effect no earlier than the effective date of any federally-approved medicaid state plan amendment containing any such adjustment. [L 1993, c 315, pt of §1; am L 1994, c 230, pt of §1]

" **§346E-15 REPEALED.** L 2002, c 178, §13.

" **[§346E-16] Evasion of tax, etc.; penalties.** It shall be unlawful:

- (1) For any operator to:
 - (A) Refuse to make the return required in section 346E-5;
 - (B) Make any false or fraudulent return or false statement in any return, with intent to defraud the State or to evade the payment of any tax imposed by this chapter; and
 - (C) For any reason to aid or abet another in any attempt to evade the payment of any tax imposed by this chapter; or
- (2) For the president, vice-president, secretary, or treasurer of any corporation to make or permit to be made for any corporation or association any false return, or any false statement in any return required

by this chapter, with the intent to evade the payment of any tax imposed by this chapter.

Any person violating this section or section 231-34 in relation to the tax imposed by this chapter, shall be punished as provided in section 231-34. Any corporation for which a false return, or return containing a false statement is made, shall be fined in the amount provided in section 231-34. [L 1993, c 315, pt of §1; ree L 1994, c 230, pt of §1]