

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: GENERAL EXCISE, Sellers Without Physical Presence; Economic Nexus

BILL NUMBER: SB 2514

INTRODUCED BY: DELA CRUZ by request

LATE

EXECUTIVE SUMMARY: States that the seller with more than \$5000 in sales or 200 transactions into the state shall comply with the GET law as if it had a presence in the state.

SYNOPSIS: Adds a new section to chapter 231, HRS, providing that notwithstanding any other provision of law, any person selling tangible personal property, products transferred electronically, or services for delivery into the State or any of its counties, who does not have a physical presence in the State, shall be subject to title 14, shall remit the general excise tax, and shall follow all applicable procedures and requirements of law as if the person had a physical presence in the State; provided that the person either has sales exceeding \$5000, or 200 or more transactions, in the previous calendar year or the current calendar year:

EFFECTIVE DATE: Applies to taxable years beginning after December 31, 2017.

STAFF COMMENTS: The United States Constitution has been interpreted as providing two limits on the states' powers to tax. These limits come from at least two places: first, the Due Process Clause, requiring a person to have "minimum contacts" with a state before that state is allowed to exercise police powers, including the power to tax, against that person; and second, the Commerce Clause, where the Supreme Court held in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), that if the Congress does not otherwise define the threshold for taxability, state tax may not be imposed upon a person unless there is "substantial nexus" with that person. Substantial nexus is more than minimum contacts, and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), appears to stand for the proposition that some physical presence is needed to establish substantial nexus.

In Hawaii, section 237-22(a) HRS, states that there shall be excepted or deducted from the values, gross proceeds of sales, or gross income so much thereof as, under the Constitution and laws of the United States, the state is prohibited from taxing, but only so long as and only to the extent that the state is so prohibited. *In re Grayco Land Escrow, Ltd.*, 57 Haw. 436, 559 P.2d 264, *cert. denied*, 433 U.S. 910 (1977), established that Hawaii already extends its general excise and use taxes to reach the limit of the Constitution ("Thus, in plain and unmistakable language, the statute evidences the intention of the legislature to tax every form of business, subject to the taxing jurisdiction, not specifically exempted from its provisions.").

This bill is, of course, trying to solve the problem, faced by all states that have enacted sales and use taxes, about collecting sales and use taxes on remote sellers. A seller with no physical presence in a customer's state might see no obligation to collect and remit tax in the customer's state. The customer would be liable for use tax, but tax departments throughout the country have

met with little success in motivating such customers, especially those with small purchases, to pay use tax.

Nothing the legislature enacts will change the U.S. Constitution, and the bill may face constitutional challenge if enacted. Even so, the Multistate Tax Commission has recommended, and many states have enacted, “factor presence nexus” standards saying that nexus should be found when a taxpayer has a significant dollar amount of sales activity in the state, and these standards have motivated some of the larger remote sellers to agree to collect and remit sales and use taxes on that activity.

This bill adopts thresholds that are significantly more severe than those in other states, who in most cases have adopted thresholds for sales in the \$100,000 to \$250,000 range.

Digested 2/11/2018



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**TESTIMONY OF TINA YAMAKI
PRESIDENT
RETAIL MERCHANTS OF HAWAII
February 13, 2018**

Re: SB 2514 Relating to Taxation

Good afternoon Chair Dela Cruz and members of the Senate Committee on Ways and Means. I am Tina Yamaki, President of the Retail Merchants of Hawaii and I appreciate this opportunity to testify.

The Retail Merchants of Hawaii (RMH) is a statewide not-for-profit trade organization committed to supporting the retail industry and business in general in Hawaii. The retail industry is one of the largest employers in the state, employing 25% of the labor force.

The Retail Merchants of Hawaii strongly supports SB 2514 Relating to Taxation. Our local brick and mortar stores are the economic backbones of our communities that provide employment and tax revenue to fund vital services throughout the State. Many of our retailers statewide are already operating on a thin margin, especially mom and pop stores. This measure would provide e-fairness by leveling the playing field for businesses in our community.

Currently under the existing state law, consumers are required to pay the General Excise Tax on the goods they purchase in the brick and mortar stores physically located in the state of Hawaii. However, if local consumers shop on line, sellers are not required to collect a tax in the same way our local businesses do. This puts our local retailers at a disadvantage as this effectively makes products purchased at brick-and-mortar stores more expensive than products purchased online.

Although news last year that Amazon will begin charging tax on Hawaii purchases was a step in the right direction, they are only a 1% tax and NOT the 4% on neighbor islands and 4.5% for Oahu customers that our local brick and mortar stores have to charge. Furthermore, third party sellers on Amazon do not charge the tax. There are so many more online retailers like QVC, Wayfair, Overstock, Ebay, Vista Print, Etsy and Shoe Dazzle to name a few that are also not collecting taxes. Because of this, Hawaii is missing out on millions of dollars on uncollected use tax from remote sales. And every year online sales has been increasing substantially.

We urge you to support SB 2514

Again mahalo for this opportunity to testify.

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Before the House Committee on
Ways and Means

February 13, 2018 at 10:15 a.m. Conference Room 211

Testimony of Ronald I. Heller

In Opposition to Senate Bill 2514
Relating to Taxation

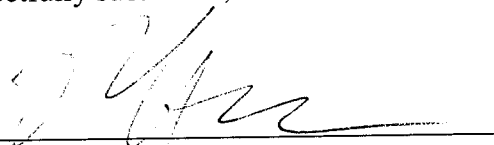
Chair Dela Cruz, Vice-Chair Keith-Agaran, and Members of the Committee:

I am **opposed to Senate Bill 2514**. As drafted, the bill is arguably unconstitutional – it certainly raises serious constitutional questions.

Moreover, the proposed threshold level for taxation is far too low. Five thousand dollars of sales would mean GE Tax of two hundred dollars at 4.0% (or \$225 at 4.5%). It is clearly NOT cost-effective for the Department of Taxation to pursue an out-of-state seller to collect \$200 or \$225. Thus, **the practical result would be a law that is not enforced**. Having laws on the books that are not enforced is bad policy and sets a bad example.

I suggest waiting for the U.S. Supreme Court to clarify the applicable law. At that point, if the Legislature chooses to act, we should adopt a law that is both constitutionally enforceable, and enforceable as a practical matter.

Respectfully submitted,



Ronald I. Heller