



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-NINTH LEGISLATURE, 2018**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2685, RELATING TO THE GENERAL EXCISE TAX.

**BEFORE THE:**

SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

**DATE:** Wednesday, January 31, 2018

**TIME:** 1:30 p.m.

**LOCATION:** State Capitol, Room 224

**TESTIFIER(S):** Russell A. Suzuki, First Deputy Attorney General, or  
Nathan S.C. Chee, Deputy Attorney General

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Chair Gabbard and Members of the Committee:

The Department of the Attorney General has the following comments on this bill, which proposes to provide a general excise tax exemption for qualified small farmers that grow produce in the State for human consumption.

S.B. No. 2685 contains wording that could be subject to challenge as violative of 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, 108 S. Ct. 1803, 1807-08, 100 L. Ed. 2d 302 (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, 114 S. Ct. 1677, 1683, 128 L. Ed. 2d 399 (1994), *citing* Maine v. Taylor, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986).

In Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 268 (1984), the United States Supreme Court struck down a Hawaii law that provided an exemption from the liquor tax for liquor produced in the State. In doing so, the Supreme Court explained 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, 468 U.S. at 268, *citing Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 329 (1977).

In this bill, an exemption from the general excise tax will be granted to a farmer who grows produce in the state if certain conditions are met regarding the size and type of land being farmed. See, S.B. No. 2685, pg. 2, lines 1-10. This exemption provides a distinct advantage to local farmers as out-of-state farmers growing the same produce would still be subject to tax. This exemption may be subject to challenge under the Commerce Clause.

The Department of the Attorney General recommends that S.B. No. 2685 be held or amended to avoid constitutional challenges. The definition of “qualified small farmer” could be amended to read “cultivates land in order to grow produce for human consumption” on pg. 2, lines 2-3.

DAVID Y. IGE  
GOVERNOR

SHAN S. TSUTSUI  
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA  
DIRECTOR

DAMIEN A. ELEFANTE  
DEPUTY DIRECTOR

**STATE OF HAWAII  
DEPARTMENT OF TAXATION**

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To: The Honorable Mike Gabbard, Chair  
and Members of the Senate Committee on Agriculture & Environment

Date: January 31, 2018

Time: 1:30 P.M.

Place: Conference Room 224, State Capitol

From: Linda Chu Takayama, Director  
Department of Taxation

Re: S.B. 2685, Relating to the General Excise Tax.

The Department of Taxation (Department) appreciates the intent of S.B. 2685 and offers the following comments for your consideration.

S.B. 2685 exempts from the general excise tax (GET) the “gross proceeds received by a qualified small farmer of the sale of produce that is intended for human consumption within the State.” The measure defines “qualified small farmer” as “a person or entity that cultivates the land in the State in order to grow produce for human consumption,” but restricts the definition only to produce that is grown on a parcel of land that is within a certain size and that has been fallow for at least five years immediately prior to the year for which the exemption is first claimed. The maximum size of the parcel has not yet been inserted into the bill.

The measure explicitly states that this exemption will not apply to sales of produce intended for human consumption outside the State of Hawaii. The measure would apply to income or proceeds received after December 31, 2017, and would be repealed on January 1, 2022.

The Department notes that this exemption may create a Constitutional issue as the definition of “qualified small farmer” necessitates the cultivation of land and growth of produce must occur in the State. The Department ultimately defers to the Department of the Attorney General on the constitutionality of this provision.

Finally, if the Committee wishes to advance this measure, the Department requests that the measure apply to gross income or gross proceeds received after December 31, 2018 and before January 1, 2023. This will allow the Department to make the necessary updates and changes to forms and instructions while maintaining the credit’s 5-year period of applicability.

Thank you for the opportunity to provide comments.

DAVID Y. IGE  
Governor

SHAN S. TSUTSUI  
Lt. Governor



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**DEPARTMENT OF AGRICULTURE**  
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**SCOTT E. ENRIGHT**  
Chairperson, Board of Agriculture

**PHYLLIS SHIMABUKURO-GEISER**  
Deputy to the Chairperson

**TESTIMONY OF SCOTT E. ENRIGHT  
CHAIRPERSON, BOARD OF AGRICULTURE**

**BEFORE THE SENATE COMMITTEE ON AGRICULTURE & ENVIRONMENT**

**JANUARY 31, 2018  
1:30 P.M.  
CONFERENCE ROOM 224**

**SENATE BILL NO. 2685  
RELATING TO THE GENERAL EXCISE TAX**

Chairperson Gabbard and Members of the Committee:

Thank you for the opportunity to testify on Senate Bill No. 2685 which seeks to exempt the gross proceeds of any qualified small farmer who grows produce in the State from the general excise tax for five years. To qualify, the produce grown must be intended for human consumption within the State, the parcel on which the produce is not larger than an acreage to be determined, and the parcel has been fallow for no less than five consecutive years immediately prior to the year for which an exemption is first claimed. This last qualification appears to mean that the crop production land is “new” and not existing or recently cultivated. The Department of Agriculture supports the intent of this measure, defers to the Department of Taxation, and offers comments.

The bill does not extend the exemption from the general excise tax to other agricultural uses and activities that are described in Section 205-4.5(a)(1 to 3), including crops for bioenergy, flowers, foliage, forage, and timber; game and fish propagation, raising of livestock, including poultry, bees, fish, or other animal or aquatic life. Some portion of these crops are also consumed locally.



We recommend the following amendment should the measure move forward in its current form:

(Page 2, lines 6 to 10)

- “(1) Is no larger than \_\_\_\_ acres; ~~and~~
- (2) Has been fallow for a period of not less than five consecutive years immediately prior to the year for which an exemption is first claimed under this section; and
- (3) Is classified and zoned as agricultural land by the land use commission and the county.”

Thank you for the opportunity to submit our testimony.

# TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

**SUBJECT:** GENERAL EXCISE, Exempt Qualified Small Farmers

**BILL NUMBER:** SB 2685

**INTRODUCED BY:** ENGLISH, BAKER, KEITH-AGARAN, RUDERMAN, Galuteria

**EXECUTIVE SUMMARY:** This measure seems to be an attempt to assist small farmers by providing a five-year general excise tax exclusion, but it is much more narrow and may be special interest legislation.

**SYNOPSIS:** Adds a new section to chapter 237, HRS, exempting the gross proceeds of a qualified small farmer of produce intended for human consumption within the State.

Defines “produce” as any fresh fruit or vegetable grown in the soil or hydroponically, regardless of whether organic, that is sold in the same general condition as when it was harvested.

Defines a “qualified small farmer” as a person or entity that cultivates land in the State to grow produce for human consumption; provided that the produce is grown on a parcel of land that: (1) is no larger than \_\_\_ acres; and (2) has been fallow for a period of not less than five consecutive years immediately prior to the year for which an exemption is first claimed under this section.

**EFFECTIVE DATE:** Upon approval, applies to gross income received after December 31, 2017, and before January 1, 2022 (which is actually four years). The act is repealed on January 1, 2022.

**STAFF COMMENTS:** Although the bill on its face appears to give a tax break to small farmers, the exemption is much narrower and more targeted because of the requirement that the land have been fallow for five years immediately prior to the exemption being claimed. Any farmer, no matter how small, who is now farming his or her own land is not eligible for this incentive because of this definition. This may be special interest legislation.

The bill language states that the exemption shall not apply to sales of produce intended for human consumption outside the State. That language might not be necessary because such produce may already be eligible for the export sales exemption under HRS section 237-29.5.

The bill language benefits only those farmers who are growing fruits and vegetables. If the intent is to benefit farmers raising livestock, bees, or poultry, the language would need to be changed, perhaps by referencing the existing definition of “producer” in HRS section 237-5.

Digested 1/26/2018



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January 31, 2018

HEARING BEFORE THE  
SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

**TESTIMONY ON SB 2685**  
RELATING TO GENERAL EXCISE TAX

Room 224  
1:30 pm

Aloha Chair Gabbard, Vice Chair Riviere, and Members of the Committee:

I am Randy Cabral, President of the Hawaii Farm Bureau (HFB). Organized since 1948, the HFB is comprised of 1,900 farm family members statewide, and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic and educational interests of our diverse agricultural community.

**The Hawaii Farm Bureau supports the intent of SB 2685**, which exempts the gross proceeds of any qualified small farmer from the general excise tax.

HFB supports any initiative that support Hawaii's small farmers and encourages new farming businesses.

We request some clarification on the definition of "Qualified small farmer". The maximum acreage is left blank and we are unsure why there's a requirement that the eligible land must be fallowed for no less than 5 consecutive years before the exemption can be claimed.

HFB would like to see this concept more broadly applied to include other locally produced agricultural food products.

Thank you for this opportunity to provide our opinion on this important matter.

**SB-2685**

Submitted on: 1/29/2018 1:26:47 PM

Testimony for AEN on 1/31/2018 1:30:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Dale Sandlin	Hawaii Cattlemens Council	Support	No

Comments: