



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

ON THE FOLLOWING MEASURE:

S.B. NO. 2871, RELATING TO TAXATION.

LATE

BEFORE THE:

SENATE COMMITTEES ON
ECONOMIC DEVELOPMENT, TOURISM, AND TECHNOLOGY AND ON
COMMERCE, CONSUMER PROTECTION, AND HEALTH

DATE: Wednesday, February 7, 2018 **TIME:** 1:15 p.m.

LOCATION: State Capitol, Room 414

TESTIFIER(S): Russell A. Suzuki, First Deputy Attorney General, or
Mary Bahng Yokota, Deputy Attorney General

Chairs Wakai and Baker and Members of the Committees:

The Department of the Attorney General provides the following comments.

It appears that the intent of this bill is to require those who may not have physical presence (remote sellers, referrers, and marketplace facilitators) to elect to collect and remit general excise tax for sales into the State or comply with information reporting to encourage the payment of use tax by the purchaser. (This is not clear as the use of the terms "sales tax," "general excise tax," and "use tax" appears to be inconsistent in the bill.)

General excise tax is a privilege tax against persons on account of their "business" and other activities in the State. Hawaii Revised Statutes (HRS) § 237-13. This bill broadens the definition of business to include all activities engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, without regard to physical presence in the State and expressly provides that remote sellers, marketplace facilitators, and referrers are engaged in "business" if their gross receipts exceed certain amounts. Page 25, line 3, through page 26, line 4.

The imposition of taxes on the privilege of doing business when there is no physical presence may be challenged under the Commerce Clause of the United States. Article I, section 8, clause 3, of the United States Constitution grants Congress power to "regulate Commerce . . . among the several States." "It has long been

accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. New Energy Co. of In. v. Limbach, 486 U.S. 269, 273-74 (1988). A state tax will survive a Commerce Clause challenge if the tax “is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.” Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). In the context of sales and use tax, the United States Supreme Court in Quill Corp. v. North Dakota, 504 U.S. 298 (1992), appeared to affirm the need for some type of physical presence, as originally established in National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967), in order to meet the substantial nexus requirement.

It may be important to note that it appears that the United States Supreme Court may be reevaluating the physical presence requirement under Quill in State v. Wayfair Inc., 901 N.W.2d 754 (S.D. 2017), cert. granted, 2018 WL 386568 (U.S. Jan. 12, 2018) (No. 17-494), later this year.

Thank you for the opportunity to provide comments.



**TESTIMONY OF TINA YAMAKI
PRESIDENT
RETAIL MERCHANTS OF HAWAII
February 7, 2018**

SB 2871 Relating to Taxation

Good afternoon Chair Wakai and Chair Baker and members of the Senate Committee on Economic Development, Tourism and Technology and the Senate Committee on Commerce, Consumer Protection & Health. 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 is committed to support 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 2871 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 2871.

Again mahalo for this opportunity to testify.

LATE

SB-2871

Submitted on: 2/7/2018 11:59:42 AM

Testimony for ETT on 2/7/2018 1:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
viraphanh sananikone	hanalei company	Comments	Yes

Comments:

Will make comments in person testimony, as some language might be problematic for small business owners and may not address closing the loop hole that allows online marketplaces like Amazon.com to avoid paying sales tax on half of the orders.