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To: The Honorable Donovan M. Dela Cruz, Chair  
and Members of the Senate Committee on Ways and Means

Date: Friday, February 23, 2018  
Time: 10:00 A.M.  
Place: Conference Room 211, State Capitol

From: Linda Chu Takayama, Director  
Department of Taxation

Re: S.B. 3088, S.D. 1, Relating to Taxation

The Department of Taxation (Department) offers the following comments on S.B. 3088, S.D. 1, for the Committee's consideration.

S.B. 3088, S.D. 1, extends the deadline for a county to adopt an ordinance to establish a general excise tax surcharge (CS) from March 31, 2018 to June 30, 2018. The bill is effective upon approval. To date, only Honolulu and Kauai Counties have adopted a CS. Thus, this measure would provide Hawaii and Maui Counties with the extension.

The Department notes that current law requires that the county ordinance be adopted prior to March 31, 2018 with imposition and collection of the CS to begin January 1, 2019. The Department appreciates the Senate Committee on Transportation and Energy adopting its suggestion that the deadline to adopt an ordinance be extended to June 30, 2018 instead of September 30, 2018. This will provide the Department a minimum of six months to prepare.

Thank you for the opportunity to provide comments.

# TAX FOUNDATION OF HAWAII

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SUBJECT: MISCELLANEOUS, Extends Period for Counties to Opt-In on GET Surcharge

BILL NUMBER: SB 3088, SD-1

INTRODUCED BY: Senate Committee on Transportation & Energy

EXECUTIVE SUMMARY: Extends the period by three months that a county may adopt a surcharge on state tax, under certain conditions, from March 31, 2018, to June 30, 2018. Allows Neighbor Island counties additional flexibility in using surcharge money, and requires that at most 2% of the money be used on roads. Both the additional flexibility and the restriction may be constitutionally problematic.

SYNOPSIS: Amends section 46-16.8(c), HRS, to give all counties the option to adopt a general excise and use tax surcharge for an additional three months, to June 30, 2018.

In addition, for counties with population of 500,000 or less, no less than 60% of the surcharges received are to be used for transportation purposes. Prohibits more than 2% of the surcharge money from being used on any roadway used by the general public.

Makes conforming amendments in sections 237-8.6 and 238-2.6, HRS.

EFFECTIVE DATE: Upon approval.

STAFF COMMENTS: This measure concerns the 0.5% surcharge on the general excise tax that is currently imposed in the City and County of Honolulu, sometimes known as the “rail surcharge.” As originally enacted in 2006, the rail surcharge was scheduled to sunset on December 31, 2022. The surcharge authority was extended to December 31, 2027, by Act 240, Session Laws of Hawaii 2015, and the City & County of Honolulu extended the surcharge by Ordinance 16-1. To date, Kauai County is the only other county that has adopted a surcharge ordinance, and collections of the Kauai surcharge will begin in January 2019. Kauai Ord. No. 1021 (Dec. 11, 2017).

How can counties raise money to balance their budgets?

One source of funding that is available to any county is the real property tax. Article VIII, section 3 of the Hawaii Constitution exclusively and directly gives power to the counties to impose real property tax. *State ex rel. Anzai v. City and County of Honolulu*, 99 Hawai‘i 508, 57 P.3d 433 (2002), established that for at least the past twenty years, any county is “free to exercise its exclusive authority to increase, diminish, enact, or repeal any exemptions involving real property taxes without interference by the legislature.” *Id.*, 57 P.3d at 446. The real property tax is imposed by county ordinance, it is imposed on those under the jurisdiction of the county and not of the state, and the money raised belongs to the county imposing it.

Another source of funding is state tax; specifically, state tax that is shared with the counties. Article VIII, section 3 of the Hawaii Constitution provides:

The taxing power shall be reserved to the State, except so much thereof as may be delegated by the legislature to the political subdivisions, and except that all functions, powers and duties relating to the taxation of real property shall be exercised exclusively by the counties, with the exception of the county of Kalawao. The legislature shall have the power to apportion state revenues among the several political subdivisions.

Where the funds raised are by state statute imposing a state tax, the money raised is the State's money. The Hawaii Constitution, in the language quoted above, explicitly empowers the Legislature to apportion that money to one or more political subdivisions however the Legislature sees fit. Money can be raised for general revenue purposes, as is the case with most taxes including the Transient Accommodations Tax. That money can also be directed to special funds used for specific purposes, as is the case with the fuel tax that feeds the Highway Fund. Sometimes the tax money raised is directed to a multitude of uses, as with the TAT and the Conveyance Tax. It has been held that such funds can be disbursed to one or more counties through grants in aid, and that the State can enact conditions upon the power to disburse or give discretion to the Executive Branch to withhold disbursement. *Fasi v. Burns*, 56 Hawai'i 615, 618-19, 546 P.2d 1122, 1125 (1976).

The county surcharge on the GET, which is the subject of this bill, is imposed by county ordinance and not state law, although state statute delegates the power to tax. So far Oahu and Kauai have adopted ordinances imposing the surcharge, and Hawaii County is in the process of holding public meetings on the topic to gauge support for doing the same.

This version of the bill provides additional flexibility to Neighbor Island counties to use a portion of the surcharge money for purposes unrelated to transportation. This may discriminate against Honolulu County, which is to use the surcharge money exclusively for transportation. Discrimination against a particular county may be problematic because of the requirement in Article VIII, section 1 of the Hawaii Constitution that the counties have and exercise such powers as shall be conferred under general law. "In its broadest sense, the term 'general laws,' as used in Article VII, Section 1, of the State constitution, denotes laws which apply uniformly throughout all political subdivisions of the State. But a law may apply to less than all of the political subdivisions and still be a general law, if it applies uniformly to a class of political subdivisions, which, considering the purpose of the legislation, are distinguished by sufficiently significant characteristics to make them a class by themselves." *Bulgo v. County of Maui*, 50 Haw. 51, 430 P.2d 321 (1967).

In addition, the bill restricts use of the surcharge money collected. The surcharge is not a state tax, but it is levied by county ordinance using taxing power delegated to the counties by the state. Thus, the money is county money upon collection, and there is some doubt as to whether the state may restrict its use in the hands of the county under *State ex rel. Anzai v. City and County of Honolulu*, 99 Hawai'i 508, 57 P.3d 433 (2002), discussed above.



## HAWAII REGIONAL COUNCIL OF CARPENTERS

February 21, 2018

### COMMITTEE ON WAYS AND MEANS

Senator Donovan M. Dela Cruz, Chair

Senator Gilbert S.C. Keith-Agaran, Vice Chair

Dear Chair Dela Cruz, Vice Chair Keith-Agaran and members of the committee,

The Hawaii Regional Carpenters **supports SB 3088, SD1**. We understand that there is a desire by the Hawaii County Council and Mayor Harry Kim to have more time to hear from the community regarding the possible .05% county surcharge on the general excise tax.

Our organization testified in strong support for the surcharge at the public hearing held in Kona on February 20<sup>th</sup>. We understand that the following day the council deferred action on the surcharge to allow for more time to consider how these new tax revenues will be spent on the island's transportation needs.

We respectfully ask that the committee pass this bill to give the counties more time to consider the implications that this surcharge will have on their respective transportation futures.

Thank you for allowing us to testify in support.

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