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**STATE OF HAWAII
DEPARTMENT OF TAXATION**

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

Date: Friday, March 1, 2019
Time: 10:15 A.M.
Place: Conference Room 211, State Capitol

From: Linda Chu Takayama, Director
Department of Taxation

Re: S.B. 162, Proposed S.D. 2, Relating to Transportation

The Department of Taxation (Department) supports S.B. 162, Proposed S.D. 2, and offers the following comments for the Committee's consideration.

S.B. 162, Proposed S.D. 2, amends Chapter 251, Hawaii Revised Statutes (HRS) to provide that the additional \$2 per day surcharge on rental motor vehicles enacted by Act 215, Session Laws of Hawaii 2018 (Act 215), applies to rentals by all lessors rather than only rentals by lessors without a valid Hawaii driver's license.

Act 215, SLH 2018, imposed an additional \$2 per day surcharge on rental motor vehicles rented by lessees without a valid Hawaii driver's license. Act 215, SLH 2018, also provides that all income from the surcharge shall be deposited into the subaccount of the State Highway Fund for the county in which the rental took place.

The Department notes that it has consulted with the Department of the Attorney General regarding Act 215 and believes that the provision imposing a \$2 surcharge on rentals by lessees without a valid Hawaii driver's license violates the dormant Commerce Clause of the United States Constitution. In general, the Dormant Commerce Clause prohibits state discrimination against interstate commerce. Often, such discrimination takes the form of taxes or surcharges targeted at nonresidents of the imposing state. The Department believes the additional \$2 surcharge does this and thus violates the Dormant Commerce Clause.

S.B. 162, Proposed S.D. 2, would remedy the violation by expanding the application of the \$2 per day surcharge to apply it to all rentals regardless of whether the lessor has a valid Hawaii driver's license. The Proposed S.D. 2 would not change the allocation of the additional \$2 surcharge to the county where the rental took place.

Thank you for the opportunity to provide testimony in support of this measure.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

ON THE FOLLOWING MEASURE:

S.B. NO. 162, S.D. 2, RELATING TO TAXATION.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Friday, March 1, 2019

TIME: 10:15 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): Clare E. Connors, Attorney General, or
Gary S. Sukanuma, Deputy Attorney General

Chair Dela Cruz and Members of the Committee:

The Department of the Attorney General supports this bill as necessary to correct a legal issue with the present law.

S.B. No. 162, Proposed S.D. 2, amends Chapter 251, Hawaii Revised Statutes (HRS) by repealing the additional \$2 per day surcharge on rental motor vehicles for rentals to individuals without a valid Hawaii driver's license enacted by Act 215, Session Laws of Hawaii (SLH) 2018. Currently, nonresidents pay a surcharge of \$5 per day, while residents pay \$3 per day. The proposed measure makes the daily rental motor vehicle surcharge \$5 for all renters regardless of residency.

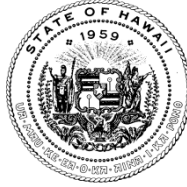
We believe the current law imposing a higher rental motor vehicle surcharge on nonresidents violates the Dormant Commerce Clause of the United States Constitution. The Commerce Clause generally prohibits state discrimination against interstate commerce. Although the Commerce Clause has most often been applied to measures that discriminate against out-of-state businesses, the Commerce Clause has also been applied to invalidate state laws that discriminate in favor of local consumers over out-of-state consumers. *Opinion of Justices to the House of Representatives*, 428 Mass. 1201, 1206, 702 N.E.2d 8, 13 (1998). In *Opinion of the Justices*, the court determined a proposed measure to be unconstitutional where it proposed to reduce the surcharge on vehicular rental transaction contracts in the city of Boston from \$10 down to \$3, but only for residents of the city of Boston. The court determined that vehicle rentals in Boston

were part of interstate commerce even where the rental vehicles were used locally only within the city and were not driven across state lines. *Id.* at 1205.

Here, the current law is facially discriminatory, as it imposes a higher daily surcharge on persons without a valid Hawaii driver's license. Indeed, the law requires nonresidents to pay \$2 more per day than local residents on motor vehicle rentals in the State. A facially discriminatory law will survive a dormant Commerce Clause challenge only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 1351 (1992).

The proposed measure proposing an equal surcharge on all renters regardless of residency shows that a nondiscriminatory alternative for raising additional funds for capital highway improvements exists. This sort of nondiscriminatory surcharge was recently upheld in *Saban Rent-A-Car LLC v. Arizona Dep't of Revenue*, 2019 WL 905192 (Ariz. Feb. 25, 2019). The case involved a law that imposed a surcharge on the gross proceeds of car-rental businesses for rentals in Maricopa County to fund the construction of sports facilities in that county. In determining that the law was not discriminatory, the Arizona Supreme Court noted that "the surcharge applies equally to resident and non-resident car rental agencies operating in Maricopa County and is calculated and imposed without regard to their customers' residencies." *Id.* at *3. "[I]t is imposed uniformly on all car rental agencies, and ultimately on their customers, regardless of the agencies' or customers' residency status." *Id.* at *4. Even though the surcharge arguably targeted the non-resident visitors who purportedly rented most of the vehicles to pay the lion's share of the surcharges, the court determined, "[t]he fact that visitors as a group pay most of the surcharge collected by car rental agencies is not 'discriminatory.'" *Id.* at *3.

The Department of the Attorney General supports this bill as necessary to correct the constitutional issue noted above with respect to the current law.



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

March 1, 2019
10:15 a.m.
State Capitol, Room 211

S.B. 162, S.D. 2
RELATING TO TAXATION.

Senate Committee on Ways and Means

The Department of Transportation (DOT) **supports** this bill and requests amending §248-9 State highway fund, §251-2 Rental motor vehicle and tour vehicle surcharge tax, §251-5 Remittances, and adding §251-__ Highway road capacity special fund; establishment.

Specifically, this amendment:

- (1) Increases the rental motor vehicle surcharge tax for **all** lessees by \$2 for each day, or portion of a day;
- (2) Requires that the revenues from the increase in motor vehicle surcharge tax be expended for state highway road capacity projects in the county in which the rental motor vehicle was operated under the rental or lease agreement; and
- (3) Establishes the highway road capacity special fund.

Please refer to the attached bill language.

Thank you for the opportunity to provide testimony.

Section 248-9, Hawaii Revised Statutes, is amended to read as follows:

"§248-9 State highway fund. (a) Moneys in the state highway fund may be expended for the following purposes:

- (1) To pay the costs of operation, maintenance, and repair of the state highway system, including without limitation, the cost of equipment and general administrative overhead;
- (2) To pay the costs of acquisition (including real property and interests therein), planning, designing, construction, and reconstruction of the state highway system and bikeways, including, without limitation, the cost of equipment and general administrative overhead;
- (3) To reimburse the general fund for interest on and principal of general obligation bonds issued to finance highway projects where the bonds are designated to be reimbursable out of the state highway fund; and
- (4) To pay the costs of construction, maintenance, and repair of county roads; provided that none of the funds expended on a county road or program shall be federal funds when such expenditure would cause a violation of federal law or a federal grant agreement.

(b) At any time, the director of transportation may transfer from the state highway fund all or any portion of available moneys determined by the director of transportation to exceed one hundred thirty-five per cent of the requirements for the ensuing twelve months for the state highway fund as permitted by and in accordance with section 37-53. For purposes of the determination, the director of transportation shall take into consideration:

- (1) The amount of federal funds and bond funds on deposit in, and budgeted to be expended from, the state highway fund during the period;
- (2) Amounts on deposit in the state highway fund that are encumbered or otherwise obligated;

- (3) Budgeted amounts payable from the state highway fund during the period;
- (4) Revenues anticipated to be received by and expenditures to be made from the state highway fund during the period based on existing agreements and other information for the ensuing twelve months; and
- (5) Any other factors as the director of transportation shall deem appropriate.

~~[(c) The department of transportation shall establish county subaccounts within the state highway fund. Notwithstanding subsections (a) and (b), funds in each county subaccount shall be expended for state highway road capacity projects in the respective county.~~

~~For purposes of this subsection, "state highway road capacity project" means construction:~~

- ~~(1) Of a new road;~~
- ~~(2) To widen or add additional lanes to an existing road; or~~
- ~~(3) That increases the number of vehicles that may be driven on an island and alleviates the level of traffic congestion on existing roads of that island, and any planning, design, or right-of-way acquisition related to the construction.]"~~

Section 251-2, Hawaii Revised Statutes, is amended to read as follows:

"§251-2 Rental motor vehicle and tour vehicle surcharge

tax. (a) There is levied and shall be assessed and collected each month a rental motor vehicle surcharge tax of \$3 a day, or any portion of a day that a rental motor vehicle is rented or leased. ~~[+]~~ (b) Provided that lessees ~~[without a valid Hawaii driver's license]~~ shall be assessed an additional \$2 a day, or any portion of a day that a rental motor vehicle is rented or leased. The rental motor vehicle surcharge tax shall be levied upon the lessor; provided that the tax shall not be levied on the lessor if:

- (1) The lessor is renting the vehicle to replace a vehicle of the lessee that is being repaired; and
- (2) A record of the repair order for the vehicle is retained either by the lessor for two years for verification purposes or by a motor vehicle repair dealer for two years as provided in section 437B-16.

In addition to the requirements imposed by section 251-4, a lessor shall disclose, to the department, the portion of the remittance attributed to the county in which the motor vehicle was operated under rental or lease.

Of the remittances collected pursuant to this subsection, \$2 per day or portion of a day from each lessee [~~without a valid Hawaii driver's license~~] shall be deposited into the state treasury to the credit of the respective county subaccount of the [~~state highway fund established pursuant to section 248-99C~~] highway road capacity special fund, established pursuant to section 251-, that corresponds to the county in which the rental motor vehicle was driven under rental or lease.

(b) There is levied and shall be assessed and collected each month a tour vehicle surcharge tax of:

- (1) \$66 for each tour vehicle used or partially used during the month that falls into the over twenty-five passenger seat category; and
- (2) \$16 for each tour vehicle used or partially used during the month that falls into the eight to twenty-five passenger seat category.

The tour vehicle surcharge tax shall be levied upon the tour vehicle operator."

Section 251-5, Hawaii Revised Statutes, is amended to read as follows:

"§251-5 Remittances. All remittances of surcharge taxes imposed under this chapter shall be made by cash, bank draft, cashier's check, money order, or certificate of deposit to the office of the taxation district to which the return was transmitted. The department shall deposit the moneys into the state treasury to the credit of the state highway fund; provided that user

fee revenues that are levied, assessed, and collected pursuant to section 251-2[(a)]b from lessees [~~without a valid Hawaii drivers license~~] shall be deposited in accordance with section ~~248-9(e)~~ 251- ."

§251- Highway road capacity special fund; establishment. (a) There is established in the state treasury the highway road capacity special fund.
(b) The department of transportation shall establish county subaccounts within the highway road capacity special fund. Funds in each county subaccount shall be expended for highway road capacity projects in the respective county.

For purposes of this subsection, "state highway road capacity project" means construction:

- (1) Of a new road;
- (2) To widen or add additional lanes to an existing road; or
- (3) That increases the number of vehicles that may be driven on an island and alleviates the level of traffic congestion on existing roads of that island,

and any planning, design, or right-of-way acquisition, including, without limitation, the general administrative overhead related to the construction."

SECTION X. This Act shall take effect upon approval.

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: RENTAL MOTOR VEHICLE AND TOUR VEHICLE SURCHARGE, Rate Hike, Repeal Exemption for Hawaii Drivers' License Holders

BILL NUMBER: SB 162, Proposed SD-2

INTRODUCED BY: Senate Committee on Ways and Means

EXECUTIVE SUMMARY: Establishes a rental motor vehicle surcharge of \$5 per day for those who rent motor vehicles with or without a valid Hawaii driver's license. The entire surcharge tax is to be deposited into the state highway fund but is to be used in the county in which the moneys are generated.

SYNOPSIS: Amends section 251-2, HRS, to increase the rental motor vehicle surcharge tax to \$5 for each day, or portion of a day, that a rental motor vehicle is rented; and repeals the exemption from paying an additional fee from the rental motor vehicle surcharge tax for operators who possess a valid Hawaii driver's license.

Further provides that \$5 per day or portion of a day from each lessee shall be deposited into the state treasury to the credit of the respective county subaccount of the state highway fund that corresponds to the county in which the rental motor vehicle was driven under rental or lease.

EFFECTIVE DATE: July 1, 2019.

STAFF COMMENTS: The proposed measure would add another tax increase and would perpetuate the earmarking of rental motor vehicle and tour vehicle surcharge tax revenues. Yes, our highways and bridges need work, and the fuel tax that now feeds the highway fund has proven to be less stable as more and more consumers start using alternative fuel vehicles, electric vehicles, and hybrids. But does that justify burdening the visitor industry with yet another tax and without going through the normal appropriation and budgeting process that also considers sweltering primary schools, underfunded state pensions, or the unique costs of intercollegiate athletics?

Rather than the continual earmarking of revenues, a direct appropriation of general funds would be preferable. Earmarking revenues from any tax type for a particular purpose decreases transparency and accountability.

Next, it should be remembered that revenues diverted for a special purpose, in this case to fund highways and bridges, will not be counted against the state's spending ceiling or debt limit and will obscure the state's true financial condition.

As a technical matter, we note that the chapter 251 tax is imposed on lessors, not lessees, so we suggest the following change to section 2 of the bill:

~~[Of the]~~ The remittances collected pursuant to this subsection~~[, \$2 per day or portion of a day from each lessee without a valid Hawaii driver's license]~~ shall be deposited into the state treasury to the credit of the respective county subaccount of the state highway fund, established pursuant to section 248-9(c), that corresponds to the county in which the rental motor vehicle was driven under rental or lease.

Digested 2/28/2019



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Senator Donovan Dela Cruz, Chair
Senator Gilbert Keith-Agaran, Vice Chair
Senate Committee on Ways and Means

Friday, March 1, 2019; 10:15 AM
Hawaii State Capitol; Conference Room 211

RE: SB 162 PROPOSED SD2 – Relating to Taxation – Comments

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

Avis Budget appreciates this opportunity to provide comments on SB 162 proposed SD2, which increases the rental motor vehicle surcharge tax and repeals the exemption from paying the additional fee of the rental motor vehicle surcharge tax for operators who possess a valid Hawaii driver's license.

Last session, we expressed concerns with HB 2601 CD2 (Act 215), which established the additional surcharge of \$2.00 per day for out-of-state customers, because we believed the additional surcharge violated the Dormant Commerce Clause, Equal Protection Clause and the Privileges and Immunities Clause of the United States Constitution.

SB 162 Proposed SD2 addresses these legal concerns because it repeals the additional surcharge for out-of-state customers; however, Avis Budget submits these comments to request that the Committee address practical issues resulting from the collection and remittance of the additional surcharge since Act 215 took effect on January 1, 2019.

Since Act 215 took effect on January 1, 2019, Avis Budget has been collecting the additional \$2 per day surcharge from out-of-state customers and has been remitting these funds to the State Department of Taxation. Avis Budget respectfully requests that this bill provide a safe harbor and immunity from liability for companies such as Avis Budget that complied with Act 215 and collected the surcharge despite the legal issues raised, and also require the State Department of Taxation to issue guidance on the collection of the surcharge from January 1, 2019 through the effective date of this legislation.

Thank you for the opportunity to provide comments on this legislation.



SanHi

GOVERNMENT STRATEGIES
A LIMITED LIABILITY LAW PARTNERSHIP

DATE: February 28, 2019

TO: Senator Donovan Dela Cruz
Chair, Committee on Ways and Means
Submitted Via Capitol Website

FROM: Mihoko Ito

RE: **S.B. 162, S.D. 1, proposed S.D.2 – Relating to Taxation**
Hearing Date: Friday, March 1, 2019 at 10:15 a.m.
Conference Room: 211

Dear Chair Dela Cruz and Members of the Committee on Ways and Means:

We submit this testimony on behalf of Enterprise Holdings, which includes Enterprise Rent-A-Car, Alamo Rent-A-Car, National Car Rental, Enterprise CarShare and Enterprise Commute (Van Pool).

Enterprise **submits comments** regarding S.B. 162, Relating to Taxation, Proposed S.D.2, which increases the rental motor vehicle surcharge tax and repeals the exemption from paying the additional fee of the rental motor vehicle surcharge tax for operators who possess a valid Hawaii driver's license.

S.B. 162 seeks to amend Act 215, Session Laws of Hawaii 2018, which increased the rental motor vehicle surcharge tax for lessees without a valid Hawaii driver's license by an additional \$2 each day, to be expended for road capacity projects in the county in which the rental motor vehicle was rented.

Enterprise has concerns that Act 215 on its face discriminates against out-of-state visitors to Hawaii and, for that reason, violates the Dormant Commerce Clause (see *Bacchus Imports, Ltd v. Dias*, 468 U.S. 263 (1984)), Equal Protection Clause, Privileges and Immunities Clause of the United States Constitution. By imposing the fee only on renters without a valid Hawaii driver's license, the existing law appears likely to be found unconstitutional if challenged in court.

We appreciate the State's need for revenue and are supportive of the effort to make the change proposed in S.B. 162, S.D.1, proposed S.D.2 because it resolves the legal issues with the existing law, even though it is not our preference to raise the rental motor vehicle surcharge to \$5 on all renters.

As of January 1, 2019, Enterprise and other rental car companies have been collecting and remitting the extra \$2 fee per rental per day to the State. Should this

bill become law, we would note that additional guidance from the State on whether the existing law will be enforced until this bill is adopted may be necessary.

Thank you for the opportunity to submit testimony regarding this .measure.