

DAVID Y. IGE
GOVERNOR

JOSH GREEN M.D.
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA
DIRECTOR

DAMIEN A. ELEFANTE
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF TAXATION**

830 PUNCHBOWL STREET, ROOM 221

HONOLULU, HAWAII 96813

<http://tax.hawaii.gov/>

Phone: (808) 587-1540 / Fax: (808) 587-1560

Email: Tax.Directors.Office@hawaii.gov

To: The Honorable Karl Rhoads, Chair
and Members of the Senate Committee on Judiciary

Date: Thursday, February 7, 2019
Time: 9:00 A.M.
Place: Conference Room 016, State Capitol

From: Linda Chu Takayama, Director
Department of Taxation

Re: S.B. 495, Relating to Taxation

The Department of Taxation (Department) offers the following comments on S.B. 495 for the Committee's consideration.

S.B. 495 creates an economic nexus standard for Hawaii income tax. The bill states that a person that lacks physical presence in Hawaii is presumed to be engaged in business in the State if the person engages in 200 or more transactions with persons in the State and has \$100,000 or more in gross income from sources in the State in the current or previous calendar year. The bill is effective upon approval and applies to taxable years beginning after December 31, 2018.

First, the Department notes that this bill will clarify the circumstances under which a person will be subject to Hawaii income tax and that the proposed standard is similar to the standard created for purposes of the general excise tax (GET) by Act 41, Session Laws of Hawaii (SLH) 2018. However, the standard in S.B. 495 requires that a person have 200 or more transactions and have \$100,000 or more in gross income in the State. Act 41, SLH 2018, requires 200 or more transactions or \$100,000 or more in gross income in the State.

The Department recommends that the proposed standard be kept as close as possible to the standard created by Act 41, SLH 2018. Therefore, the Department suggests that the bill be amended to presume a person is engaging in business in the State if the person has 200 or more transactions or \$100,000 or more in gross income in the State.

Second, the Department notes that Public Law 86-272 prohibits a state from imposing income tax on a taxpayer if the only activity within the state is solicitation of sales and the orders are shipped from outside of the state. Stated in another way, the solicitation of sales alone is not sufficient to allow the imposition of income tax. Thus, the Department suggests deleting the words "or solicits" from paragraph (1) of the measure.

Third, the Department notes that while it is important to construct the standards for income tax and general excise tax as similarly as possible, the income tax is more complicated than the general excise tax and therefore the standards cannot be identical. The Department therefore recommends amending the gross income threshold in the bill to refer to the numerator of the sales factor for taxpayers that do business within and without the State. Subsection (2) of the nexus standard should be revised to read as follows:

(2) The sum of the value of the person's gross income attributable to sources in this State equals or exceeds \$100,000 or for a person that does business within and without the State the numerator of the person's sales factor for this State equals or exceeds \$100,000.

A taxpayer's sales factor is a ratio, the numerator of which is the taxpayer's total sales in the State and the denominator of which is their sales in all states. There is also abundant law and administrative rules defining the sales factor. Therefore, the numerator of the sales factor is an appropriate and well-defined measure of the person's gross income in the State.

Finally, the Department notes that it will be able to administer the changes in this bill with the current effective date.

Thank you for the opportunity to provide comments.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Thirtieth Legislature, State of Hawaii
The Senate
Committee on Judiciary

Testimony by
Hawaii Government Employees Association

February 7, 2019

S.B. 495 – RELATING TO TAXATION

The Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO supports the purpose and intent of S.B. 495 which creates a nexus standard for taxing out-of-state businesses on their business income in Hawaii.

In the past two decades, our economy has quickly evolved from purchases made exclusively at brick-and-mortar physical storefronts to now include increasing amounts of internet purchases via online merchants and third-party vendors. As the popularity of e-commerce continues to exponentially grow, fairness dictates that internet-based transactions should be treated in the same manner as other retail transactions. Retail transactions that are taxable by brick and mortar retailers should also be taxable when sold through the internet.

Hawaii has already lost millions of dollars in uncollected internet-based sales, and the losses will likely increase as internet commerce continues to grow. Creating a nexus standard to tax those who regularly and systematically engage in business in Hawaii is necessary and appropriate.

Thank you for the opportunity to testify in support of S.B. 495.

Respectfully submitted,

Randy Perreira
Executive Director

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: INCOME , Nexus Presumptions

BILL NUMBER: SB 495

INTRODUCED BY: DELA CRUZ

EXECUTIVE SUMMARY: States that a seller with more than \$100,000 in in-state sales or 200 transactions into the state shall be deemed to be doing business in the state for purposes of the income tax law. Creates a nexus presumption for income tax like the presumption for general excise tax adopted last year.

SYNOPSIS: Adds a new section to chapter 235, HRS, providing that a person is presumed to be systematically and regularly engaging in business in the State, whether or not the person has a physical presence in the State, if in the current or preceding calendar year: (1) the person engages in or solicits two hundred or more business transactions with persons within the State; and (2) the sum of the value of the person's gross income attributable to sources in this State equals or exceeds \$100,000.

EFFECTIVE DATE: Taxable years beginning after December 31, 2018.

STAFF COMMENTS: Apparently, this bill was intended to be the counterpart for income tax to the nexus standard for general excise tax enacted last year as Act 41, SLH 2018. However, the standard used is not the same. The nexus presumption under Act 41 is triggered if a potential taxpayer completes 200 transactions, for example, but under this bill the presumption can be triggered if a taxpayer solicits 200 transactions, even though the number of completed transactions is far fewer. We recommend using the same language as Act 41 to be consistent with that law and with *South Dakota v. Wayfair, Inc.*, 585 U.S. ___ (2018), the Supreme Court case on which Act 41 relies.

Digested 2/3/2019