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To: The Honorable Donovan M. Dela Cruz, Chair;  
The Honorable Gilbert S.C. Keith-Agaran, Vice Chair;  
and Members of the Senate Committee on Ways & Means

The Honorable Karl Rhoads, Chair  
The Honorable Jarrett Keohokalole, Vice Chair;  
and Members of the Senate Committee on Judiciary

From: Rona M. Suzuki, Director  
Department of Taxation

Re: **S.B. 2922, S.D. 1, Relating to Transient Accommodations Tax**

Date: Wednesday, February 26, 2020

Time: 1:10 P.M.

Place: Conference Room 211, State Capitol

The Department of Taxation (Department) **strongly supports** S.B. 2922, S.D. 1, an Administration measure. S.B. 2922, S.D. 1, makes various amendments to the transient accommodations tax (TAT), contained in chapter 237D, Hawaii Revised Statutes (HRS). Specifically, S.B. 2922, S.D. 1, makes the following amendments:

1. Repeals the misdemeanor for failing to obtain a TAT registration identification number and replaces the misdemeanor with a monetary fine.

The criminal penalty for failure to register for a TAT license is not consistent with the monetary fines for similar violations under the general excise tax (GET) law. S.B. 2922, S.D. 1, repeals this penalty and replaces it with fines under the fine structure already existing in chapter 237D, HRS, for other violations for consistency.

2. Applies personal liability for certain controlling officers under section 237-41.5, HRS, to TAT;

Section 237D-16, HRS, applies the administrative provisions of GET to TAT, but needs to be updated to include the personal liability provision enacted by the Legislature in 2010. S.B. 2922, S.D. 1, amends section 237D-16, HRS, to explicitly include the GET personal liability provision.

3. Replaces the specific term "operator or plan manager" with "person" or "taxpayer" to ensure that there are no technical defenses or loopholes to any TAT provisions.

These amendments are necessary because of the imposition of TAT on transient accommodations brokers, travel agents, and tour packers enacted by Act 211, Session Laws of Hawaii 2018. Prior to this new imposition, TAT was only imposed on operators and

timeshare plan managers.

4. Broadens the definition of “operator” to clarify that it includes any person who engages in any activity that results in the collection of receipts that are defined as gross rental proceeds under the TAT law.

The Department has received numerous inquiries from taxpayers who believe that they are not subject to tax because they are not the “operator” in a transaction. The Hawaii Supreme Court in *Travelocity.com, L.P. v. Director of Taxation*, 135 Hawaii 88 (2015), said that there can only be one operator in a transaction. S.B. 2922, S.D. 1, makes clear that gross rental proceeds received by anyone is subject to TAT; and

5. Repeals references to filing of returns and remittance of payments to specific taxation districts.

The Department no longer requires taxpayer to file and pay in their home district. Other than taxpayers who are required to filed and/or pay electronically, taxpayers may file and pay taxes at any of the Department’s district offices regardless of where they reside or operate their business.

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

# TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

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SUBJECT: TRANSIENT ACCOMODATIONS, Replace Criminal Penalty with Fine and Add Personal Liability

BILL NUMBER: SB 2922, SD-1

INTRODUCED BY: Senate Committee on Energy, Economic Development, and Tourism

EXECUTIVE SUMMARY: Amends chapter 237D, Hawaii Revised Statutes, to repeal the misdemeanor for failing to register under chapter 237D and replacing it with a fine structure and to make various technical amendments. Makes the taxpayer personally liable for unpaid tax.

SYNOPSIS: Amends section 237D-4, HRS, to remove the misdemeanor criminal penalty for engaging in the business of furnishing transient accommodations or as a plan manager without being registered. Rather, the noncompliant person shall be subject to the citation process and monetary fines provided in this section.

Amends section 237D-16, HRS, to make section 237-41.5, HRS, relating to personal liability for unpaid tax, applicable to TAT.

Makes various technical and conforming amendments.

EFFECTIVE DATE: Upon approval.

STAFF COMMENTS: This is the Administration measure TAX-03 (20) sponsored by the department of taxation.

Most of the bill makes simple technical changes to the TAT law. It also gets rid of a misdemeanor penalty and substitutes civil fines instead.

But the blockbuster buried in the bill is that it establishes *personal liability* for unpaid TAT by incorporating one of the provisions from the General Excise Tax Protection Act of 2010, namely HRS section 237-41.5.

Section 237-41.5 provides that if the taxpayer is an entity, and it has unpaid taxes, then the Department can go after the personal assets of any responsible person within the entity, as long as that person “willfully fails to pay or cause to be paid” the tax. That would include any decision to pay any creditor of the company before the tax liability.

Historically, trust fund liability arises when the taxpayer receives and holds someone else’s money that is supposed to be paid to the government, and then doesn’t pay it. This happens, for example, in wage withholding taxes. This also occurs in sales tax states where the tax is the liability of the purchaser and the seller has the obligation to collect and remit the purchaser’s tax. If this money is collected and not turned over to the government, it’s akin to stealing and the government does seem to be justified in using unusual means such as responsible party liability

in order to collect it. With Hawaii GET and TAT, however, the tax is another expense of the business. The business is liable for the tax and needs to pay it. It does not come into possession of someone else's money because, there is no withholding of GET and TAT (at least not in the transient accommodations context) and unlike in the sales tax states, "passing on" of tax liability is purely a matter of contract. Department of Taxation, General Excise Tax Memo. No. 4. Thus the "trust fund" theory on which personal liability is based does not appear to apply to the TAT.

The TAT has been in existence since 1986. Act 340, SLH 1986. The General Excise Tax Protection Act was passed in 2010. Act 155, SLH 2010. Here we are 34 years after the TAT's inception and a decade after the GET provision took effect. Why is the Department pushing for trust fund provisions only now?

Digested 2/24/2020