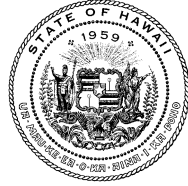


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To: The Honorable Sylvia Luke, Chair;
The Honorable Ty J.K. Cullen, Vice Chair;
and Members of the House Committee on Finance

From: Isaac W. Choy, Director
Department of Taxation

Date: March 2, 2021
Time: 11:00 A.M.
Place: Via Video Conference, State Capitol

Re: H.B. 1043, H.D. 2, Relating to Transient Accommodations Tax

The Department of Taxation (Department) strongly supports H.B. 1043, H.D. 2, an Administration measure. H.B. 1043, H.D. 2, proposes various amendments to the transient accommodations tax (TAT). The measure replaces the misdemeanor for failing to obtain a TAT registration with a monetary fine. It also adds personal liability for TAT to be consistent with personal liability for general excise tax (GET). H.B. 1043, H.D. 2, also expands the definition of “operator” and expands the imposition of TAT to “persons” to ensure there are no loopholes in the TAT. Lastly, the bill proposes several nonsubstantive cleanup amendments. The Department provides the following comments for your consideration. The bill has a defective effective date of July 1, 2050.

First, the Department notes that the misdemeanor criminal penalty for failure to obtain a TAT license is inconsistent with the fine structure already in place in chapter 237D, Hawaii Revised Statutes (HRS), for other violations. H.B. 1043, H.D. 2, proposes replacing the misdemeanor with the monetary fines already applied to other violations of TAT and GET. This amendment is necessary because it creates parity between the taxes.

Second, the Department notes that section 237D-16, HRS, applies certain GET administrative provisions to TAT, but does not apply the personal liability provision enacted by the Legislature in 2010. It is clear from section 237D-16(a), HRS, that the Legislature intended the GET enforcement provisions to apply to TAT, as that section states that the Director of Taxation, in administering TAT, has all of the rights and powers of chapter 237, HRS. H.B. 1043, H.D. 2, proposes updating the enforcement provisions of TAT to conform with those of GET.

Furthermore, the Department notes that it has made attempts to address this issue before, notably by proposing trust fund liability through H.B. 2343 and S.B. 2893 in 2014. H.B. 1043, H.D. 2, merely extends the limited personal liability that already exists for GET to TAT. This limited personal liability is a useful administrative tool to ensure compliance with the TAT law. There is no distinction between GET and TAT justifying limited personal liability for one tax type but not for the other.

Third, the Department has received numerous inquiries from taxpayers claiming they are not subject to TAT because they are not the “operator” in a transaction, as defined. These inquiries are due to use of the term “operator or plan manager” as the operative imposition language of the TAT and that term’s narrow definition. H.B. 1043, H.D. 2, proposes replacing “operator or plan manager” with “person” or “taxpayer” to ensure there are no technical defenses or loopholes to TAT imposition. Relatedly, H.B. 1043, H.D. 2, also proposes expanding the definition of “operator” to include any person who generates income or receipts defined as gross rental proceeds under the TAT law.

However, upon further consideration, the Department believes that this issue may be more clearly addressed by making the following amendments to this measure. The Department respectfully requests that the amendment to the definition of “operator” be deleted from this measure and section 237D-2(b), HRS, be amended to read as follows:

(b) Every transient accommodations broker, travel agency, and tour packager who arranges transient accommodations at noncommissioned negotiated contract rates and every operator or other taxpayer who receives gross rental proceeds shall pay to the State the tax imposed by subsection (a), as provided in this chapter.

Finally, the Department notes that it no longer requires taxpayers to file and pay in their home district. Other than taxpayers who are required to file 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. As such, H.B. 1043, H.D. 2, proposes repealing the references to filing of returns and remittance of payments to specific taxation districts.

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

TAX FOUNDATION OF HAWAII

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SUBJECT: TRANSIENT ACCOMMODATIONS, Add Personal Liability

BILL NUMBER: HB 1043, HD2

INTRODUCED BY: House Committee on Labor & 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.

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: 7/1/2050.

STAFF COMMENTS: This is an administration measure sponsored by the Department of Taxation and identified as TAX-03 (21).

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?

If the Committee is inclined to pass the bill and include the above provisions, we suggest making the imposition of personal liability explicit so it can be easily found by those reading the law, such as by restoring section 237D-16, HRS, to its unamended form and then adding:

237D-__ Certain amounts held in trust; liability of key individuals. There is hereby imposed personal liability of key individuals of any entity liable for the tax imposed by this chapter in the same manner as provided for the general excise tax in section 237-41.5.

Digested 2/27/2021