

DAVID Y. IGE  
GOVERNOR

JOSH GREEN M.D.  
LT. GOVERNOR



ISAAC W. CHOY  
DIRECTOR OF TAXATION

STATE OF HAWAII  
**DEPARTMENT OF TAXATION**  
P.O. BOX 259  
HONOLULU, HAWAII 96809  
PHONE NO: (808) 587-1540  
FAX NO: (808) 587-1560

To: The Honorable Henry J.C. Aquino, Chair;  
The Honorable Greggor Ilagan, Vice Chair;  
and Members of the House Committee on Transportatio

From: Isaac W. Choy, Director  
Department of Taxation

Date: February 10, 2021  
Time: 10:00 AM.  
Place: Via Video Conference, State Capitol

**Re: H.B. 408, Relating to Transportation**

The Department of Taxation (Department) has concerns regarding H.B. 408 and provides the following comments for your consideration.

H.B. 408 is intended to ensure the collection of general excise tax in instances in which the transportation of passengers is furnished by common carriers by the use of aircraft when the collection of the tax is not prohibited by federal law. The measure limits imposition of the tax to flights that occur within the airspace of a single island of the State. H.B. 408 is effective on July 1, 2021.

The Department believes that it has correctly interpreted the federal Anti-Head Tax Act to preempt the imposition of tax as proposed by this measure. However, the Department ultimately defers to the Department of the Attorney General on the legality of this measure.

Thank you for the opportunity to provide comments.



**WRITTEN TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTY- FIRST LEGISLATURE, 2021**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 408, RELATING TO TRANSPORTATION.

**BEFORE THE:**

HOUSE COMMITTEE ON TRANSPORTATION

**DATE:** Wednesday, February 10, 2021 **TIME:** 10:00 a.m.

**LOCATION:** State Capitol, Via Videoconference

**TESTIFIER(S):** **WRITTEN TESTIMONY ONLY.**

(For more information, contact Kristen M.R. Sakamoto,  
Deputy Attorney General, at 808-586-1470)

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Chair Aquino and Members of the Committee:

The Department of the Attorney General has concerns regarding this bill and provides the following comments.

This bill imposes general excise tax on the transportation of passengers "by a common carrier by the use of aircraft . . . provided that the transportation furnished begins and ends within the airspace of a single island of the State." (H.B. No. 408, page 7, lines 10-16.) The bill concludes that when transportation begins and ends within the airspace of a single island, that transportation does not constitute "air commerce" or "air transportation" as defined by 49 U.S.C. § 40102. (*Id.*)

This bill may be subject to a preemption challenge under the federal Anti-Head Tax Act (AHTA), 49 U.S.C. § 40116(b), which provides that a state "may not levy or collect a tax, fee, head charge, or other charge on—(1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation."

The term "air commerce" is defined as "foreign air commerce, interstate air commerce, the transportation of mail by aircraft, the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce." 49 U.S.C. § 40102(a)(3) (emphasis added). In *Hill v. National Transportation Safety Board*, 886 F.2d 1275, 1280 (10th Cir.

1989), the United States Court of Appeals for the Tenth Circuit held that "air commerce" is not restricted to interstate flights that occur in controlled or navigable airspace. The petitioner in *Hill* argued that flights that "occurred outside of either 'navigable' airspace or airspace controlled by the [Federal Aviation Administration (FAA)]" did not fall under the definition of "air commerce" because those flights "could not have affected safety within" interstate airspace. *Id.* at 1279. The Court disagreed, holding that the term "air commerce" is "clearly not restricted to interstate flights occurring in controlled or navigable airspace." *Id.* at 1280. The Court explained that even flights that were purely intrastate had the "potential" of endangering the safety of interstate or foreign air commerce. *Id.*; see also *Gorman v. Nat'l Transp. Safety Bd.*, 558 F.3d 580, 591 (D.C. Cir. 2009) (holding "wholly intrastate" flights between Long Beach, California, and San Diego, California, involve "air commerce" because operation of an aircraft could pose a danger to interstate or foreign air commerce).

Based on the foregoing, the United States Department of Transportation (USDOT), the agency charged with enforcing the AHTA, opined that the AHTA preempts a state tax on hot air balloon rides because hot air balloons may endanger the safety of interstate air commerce. Question on Taxation of Hot Air Balloon Flights, U.S. Dep't of Transp. Office of Gen. Counsel Op. (June 29, 2010), available at <https://www.transportation.gov/sites/dot.dev/files/docs/Assistant%20General%20Counsel%20Letter%20re%20Whether%20MD%20Gross%20Receipts%20Tax%20Violates%20Anti%20Head%20Tax%20Act%201.29.2010.pdf>. The USDOT explained: "[a]n aircraft operator need not . . . operate in interstate air transportation . . . in order to be regulated under the FAA's 'air commerce' jurisdiction." *Id.*; see also *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 824 (Mo. 2014) (holding state tax on hot air balloon rides preempted by AHTA because hot air balloons have the potential of endangering safety in interstate air commerce).

This bill, which imposes tax on the transportation of passengers by aircraft, may be subject to a preemption challenge under the AHTA because even if the transportation begins and ends within the airspace of a single island, operation of the aircraft may nevertheless endanger safety in foreign or interstate air commerce.

We therefore respectfully request that the Committee hold this bill. Thank you for the opportunity to provide comments.

# TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: GENERAL EXCISE, Taxation of One-Island Air Transportation

BILL NUMBER: HB 408

INTRODUCED BY: BRANCO, BELATTI, JOHANSON, KITAGAWA, MARTEN, MIZUNO, MORIKAWA, TARNAS

EXECUTIVE SUMMARY: Ensures the collection of the state general excise tax in instances in which the transportation of passengers is furnished by common carriers by the use of aircraft when the collection of the tax is not prohibited by federal law. Limits imposition of tax to flights that occur within the airspace of a single island of the State.

SYNOPSIS: Amends section 237-18. HRS, to provide: “Where the transportation of passengers is furnished by a common carrier by the use of aircraft, any tax imposed by this chapter shall apply; provided that the transportation furnished begins and ends within the airspace of a single island of the State and is therefore not considered: (1) Air commerce; or (2) Air transportation, as defined by title 49 United States Code section 40102.”

Makes other technical amendments to the section.

EFFECTIVE DATE: 7/1/2021

STAFF COMMENTS: The stated purpose of this bill is to ensure the collection of the state general excise tax in instances in which the transportation of passengers is furnished by common carriers by the use of aircraft when the collection of the tax is not prohibited by federal law. The bill sponsors recognize that flights between islands and between this State and another jurisdiction are air commerce the taxation of which is prohibited by the Anti-Head Tax Act, 49 U.S.C. section 40116. Thus, the bill seeks to impose tax when the air transportation begins and ends within the airspace of a single island of the State.

The definitions of air transportation and air commerce, however, are not simple.

49 U.S.C. section 40102(a)(3) defines air commerce as foreign air commerce, interstate air commerce, the transportation of mail by aircraft, the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce. Thus, an air tour that takes off from or lands at an airport under federal control would fall within the definition because it uses a federal airway and may endanger safety in foreign or interstate air commerce.

After reviewing the federal law in place at the time, the Department concluded in Tax Information Release 89-10 that the “transportation of persons by helicopter aircraft, including the hiring of a helicopter for aerial sightseeing tours or charters originating and terminating at the same point in the State” could not be taxed.

Re: SB 339  
Page 2

It is, therefore, questionable whether the proposed legislation would appreciably increase revenues.

Digested 2/6/2021

**HB-408**

Submitted on: 2/7/2021 5:50:32 PM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Eileen Hilton	Windward Coalition	Support	No

Comments:

The Windward Coalition strongly supports HB408

**HB-408**

Submitted on: 2/8/2021 8:08:12 PM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Michelle Matson	O'ahu Tour Helicopter Safety and Noise Inter-Action Group	Support	No

Comments:

Aloha Transportation Committee Chair Aquino and Committee Members:

The O'ahu Tour Helicopter Safety and Noise Inter-Action Group, established in July, 2019 and comprised of O'ahu community leaders and concerned constituents island wide, fully supports House Bill 408 introduced by Representative Branco together with Representatives Belatti, Johanson, Kitagawa, Marten, Mizuno, Morikawa and Tarnas.

House Bill 408 provides for the long-overdue General Excise taxation of local, island-centric commercial and tour helicopter businesses just the same as any other local business.

Local tour helicopter businesses have been grossing millions of dollars annually while unresponsively ignoring their well-documented safety and noise impacts inflicted on each island's communities on the ground.

It is past time that they pay their fair share of General Excise taxes after not doing so at all, as they continue to fly wherever and however they choose without abatement or General Excise taxation to date.

Michelle S. Matson

O'ahu Tour Helicopter Safety and Noise Inter-Action Group



**HB-408**

Submitted on: 2/6/2021 1:14:20 PM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mark Gordon	Individual	Support	No

Comments:

Please Support HB 408

This Bill will allow the State to obtain GET from helicopter tour operators which operate on one Island. This Bill clearly does not conflict with the U.S. Supreme Court Ruling for travel interisland.

The GET from these helicopter tours and similar is long past due to the State. It is especially needed with a billion dollar shortfall in the State revenues.

Please SUPPORT HB 408 and pass onto the Legislature.

Thanks

Mark Gordon

Waikoloa HI.

**HB-408**

Submitted on: 2/6/2021 8:09:54 PM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Cory Harden	Individual	Support	No

Comments:

Aloha legislators,

Thank you to Dave Tarnas and others for sponsoring this bill. Helicopter tour companies need to pay their fair share--we're having a budget crisis.

mahalo,

Cory Harden

**Bruce Lum**  
**99-546 Iwaiwa Street**  
**Aiea, Hawaii 96701**

January 07, 2021

THE HOUSE THIRTY-FIRST LEGISLATURE - REGULAR SESSION OF 2021  
COMMITTEE ON TRANSPORTATION  
Senator Henry Aquino, Chair  
Senator Greggor Ilagan, Vice Chair

Re. Support for H.B. No. 408

Aloha kākou Aquino, Vice Chair Ilagan and committee members,

I am in strong support of H.B. No. 408 described as follows:

Transportation; taxation

Ensures the collection of the state general excise tax in instances in which the transportation of passengers is furnished by common carriers by the use of aircraft when the collection of the tax is not prohibited by federal law. Limits imposition of tax to flights that occur within the airspace of a single island of the State.

The tour helicopter industry exacts a heavy noise and safety toll on our state's residential communities, scenic points of interest, park lands, coastal sea scapes and mountain vistas. I welcome every measure by government to ensure that commercial enterprises share the burden of costs that their enterprises and industry exacts upon our state and counties to provide support for facilities, protections, safety infrastructure, emergency services, industry specific government frameworks and interfaces for coordination and quality support operations.

This measure will correct a far too long free-ride as it were that the tour helicopter industry has profited from and I hope the industry will accept the fact that it is the good corporate citizen thing to do to set right what has been unfair at the expense of public disruption and sacrifice.

I have lived in my Aiea home for over 58 years. For the first 45 years the aircraft flying directly over my house amounted to a handful of military helicopters and occasional emergency aircraft. I bought my home in an area that I new I had to live with the impacts from commercial air traffic from the Honolulu International Airport, and Hickham AFB, Pearl Harbor, Tripler Army Hospital, Camp HM Smith, Wheeler AAF and Schofield Barracks. The trade-off was that the price range for living in my area was affordable compared to the quieter (at the time) areas around Honolulu's core. However, I never imagined the current situation and the significant noise impacts and crashes by the

current tour helicopter industry.

Over the last 13 years, the commercial aircraft and helicopter count has steadily increased to a pre-COVID19 high of 20/hr from 6:45a to 7:45p every day. That means 260 total aircraft fly over my house daily, and from just one of 3 daily tour flight paths passing over or near my home. My estimate of an average number of tour aircraft over my house is 300 to 320 per day, every day.

The primary issues I have with tour aircraft are:

1. bone jarring noise
2. safety

The biggest contributor of noise invasion comes from low altitude flying, helicopter hovering and looping over-head. My primary safety concern is the constant, frequent and persistent tour aircraft presence over Pearl Harbor and the residential and business areas from Aiea to Pearl City.

Before I retired in 2008, I did not experience the small aircraft nuisance near my home during daytime hours of the work week, and I put up with the frequent and indifferent military helicopter traffic that flew low and loud during all hours of the early morning and night.

I retired in 2008 assuming that I would live out my life relaxing, and enjoying the peace and quiet of my home and I could listen to my favorite music, tv programs, talking with my wife and playing my guitar. I also looked forward to simply enjoying the view, the sun, surf, ocean, beach and the sounds of people laughing and enjoying each other's easy conversations when visiting my favorite beach park every day.

The shocker now is that whether at home or at the beach park, my expectation of "quiet relaxation" has become impossible, because of the ever present, intrusive noise from tour helicopters.

All day and night my home, is bombarded by low flying tour helicopters that fly and hover below the minimum 800 foot altitude that they are supposed to be at. Here are the ways it is destroying my retirement bliss:

1. Conversations with my wife often get drowned out by the helicopter din and we got very irritable with each other for not hearing what was said or waiting until the din died down. Now it always seems that when we have some interesting or an important thing to talk about, we are drowned out by tour helicopters. As seniors, with a typical level of hearing loss, it is annoying and quite disruptive for us when we can not hear ourselves or one another over the helicopter noise.
2. OurTV controller's pause and rewind buttons are truly being worn out, because of over use, as we try to compensate for not being able to uninterruptedly hear our favorite TV news or TV programs through out the day and night. This noise intrusion has serious impact on lost time due to the stop-and-start routine we have been forced to endure when listening to our TV, radio or talking on the

phone. We can not rewind the radio or our phone conversations to salvage what we missed hearing when being drowned out by tour helicopter noise.

Mahalo for hearing this measure and strongly encourage this committee to pass HB 408 out of this committee.

Advocating for the quiet skies and the safety of Hawaii's neighborhoods, respectfully and appreciatively,

A handwritten signature in black ink, reading "Bruce D. Lum". The signature is written in a cursive, flowing style with a long horizontal flourish extending to the right.

Bruce Lum

**HB-408**

Submitted on: 2/8/2021 9:15:51 AM

Testimony for TRN on 2/10/2021 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Dan Brown	Individual	Support	No

Comments:

**Testimony in support of Hawaii State - House Bill 408 for 2021 Legislature Session**

*I am Dan Brown – I live in Kailua on Oahu and I fully support HB 408 to require General Excise Tax (GET) to be collected in instances where air passengers such as those flying in tour helicopters within the state of Hawaii to be collected. Collection of GET on what is clearly a leisure/vacation/tour related operation will ensure the industry pays its fair share of taxes on monies they collect while doing business in the state of Hawaii. During these trying times it is imperative that GET be collected to ensure fair business practices across the tourism industry and general business community as a whole. It is time to roll back tax breaks on industries that impact our community. I strongly support HB 408. Respectfully submitted by Dan Brown, Kailua Hawaii (member of Oahu Tour Helicopter Safety and Noise Inter-Action Group).*

**HB-408**

Submitted on: 2/8/2021 9:56:51 AM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Jeanne Herbert	Individual	Support	No

Comments:

Aloha,

I support HB408 regarding collection of excise taxes on same island helicopter tours. It is appropriate for Helicopter tour companies and their passengers to contribute, via excise taxes, to the impact these tours have on our islands with Co2 emissions (many factors more than automobiles), noise pollution, and safety issues.

Mahalo,

Jeanne Herbert

**HB-408**

Submitted on: 2/8/2021 12:00:57 PM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Scott Smart	Individual	Oppose	No

Comments:

OPPOSE HB 408.

Section one of the bill correctly finds that the Hawaii GET is pre-empted as regards air commerce. However, I believe it is in error as regards the definition of air commerce, by claiming that air commerce excludes "intraisland travel". If an air common carrier is transporting passengers in the federal airways (as the contemplated operations surely must), then it is air commerce, regardless if the commerce involves one island, several islands, or no island at all (i.e, mainland).



**HB-408**

Submitted on: 2/8/2021 2:41:10 PM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Daryl Soares	Individual	Support	No

Comments:

Tour Helicopters are in the sightseeing business and operate exclusively in Hawaii. They do not provide transportation as a form of business to transport people from one point to another, and should NOT be classified with transportation aircraft! Tour Helicopters are in the for-profit business of sightseeing and should pay their fair share of GT TAX, just as any other TOUR business which operates exclusively in Hawaii. Recreational Tour Helicopters take-off and land at the same locations with the same customers. Hawaii resources are stretched thin to pay for RAIL, HOMELESSNESS, INFRASTRUCTURE, SALARIES and we are giving Tour Helicopter Companies a free pass. WHY?

**HB-408**

Submitted on: 2/8/2021 2:42:23 PM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Debra Laeha	Individual	Support	No

Comments:

Mahalo for allowing me to provide testimony in support of HB408.

How it is possible that FOR-PROFIT commercial tour helicopter companies are exempt from paying the general excise taxes required for all other businesses in the State? It is long past due for us to scrutinize what the helicopter industry has been able to get away with over all these years. The tax loophole these companies are exploiting needs to be closed so they are forced to pay their fair share of GET taxes.

Mahalo,

Deb Laeha

**HB-408**

Submitted on: 2/8/2021 7:04:47 PM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Sharlene Chun Lum	Individual	Support	No

Comments:

Please pass this bill which allows the State to impose the general excise tax on aircraft tours that travel solely within a single island. This taxation is legal, long overdue and will add more needed revenue to the state.

**HB-408**

Submitted on: 2/8/2021 9:53:02 PM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
sam hickman	Individual	Support	No

Comments:

Why don't you please stop Magnum Helicopters from ruining our lives in Mililani? Please. The real estate agents should also divulge when a house is in the direct flight path of Magnum Tour helicopters. We bought one and have suffered for years. The company fly's low over Mililani Elementary/ High School towards Walmart and towards the airport all day long, about 30 times a day so about 8,900 times a year over the residents houses causing an abundance of noise pollution. Magnum helicopters makes good money but they have ruined Mililani for those in their flight path. The FAA won't do anything, tourist oriented companies can do what they want. Meanwhile, we are paying almost a million dollars for a house with noise pollution and not being told about this, would you like to pay a million dollars and not be told? Are you going to stop Magnum Helicopters? Are you going to tell anyone?

**HB-408**

Submitted on: 2/9/2021 9:50:09 AM

Testimony for TRN on 2/10/2021 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Linda Pexa	Individual	Support	No

Comments:

I fully support the taxing of tour helicopter operators in Hawaii. It seems unreasonable that they should be exempt from taxation when they cause so much noise pollution and disruption to people in Hawaii.