

ACT 230

S.B. NO. 576

A Bill for an Act Relating to Taxation.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Act 315, Session Laws of Hawaii 1993, is amended by amending sections 1 and 2 to read as follows:

“SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
[HOSPITAL AND] NURSING FACILITY TAX**

§ -1 **Definitions.** As used in this chapter, unless the context otherwise requires:

"Department" means the department of human services.

"Director" means the director of human services.

["Hospital" means a hospital licensed under sections 321-9 and 321-11, including state and state/county hospitals.

"Hospital income" means the total compensation received for furnishing inpatient or outpatient hospital services, including all receipts from "ancillary services" (as defined in 42 C.F.R. 413.53(b)) to the provision of inpatient and outpatient services, and receipts from items supplied in connection with these services. Hospital income also includes compensation for patients who are on a waiting list to be transferred to a nursing facility or in acute care "swing beds". "Hospital income" shall not include the following: compensation received for services covered by Title XVIII of the federal Social Security Act (including coinsurance and deductibles received from beneficiaries of the Medicare program and Medicare health maintenance organization or risk sharing contracts); income from an affiliated entity that operates as a prepaid health maintenance organization; settlements from third party payors for services delivered or items supplied prior to the effective date of this Act (such as settlements of cost reports or decision on rate reconsideration requests); income from services provided by separately licensed units (such as distinct part nursing facilities within hospitals); income from grants, bequests, donations, endowments, or investments; income from "nonexempt hospital activities" as defined in section 237-23(b) (such as income from leased property or from parking lots); or amounts of taxes imposed by chapter 237 or this chapter and passed on, collected, and received from the consumer as part of hospital income.]

"Nursing facility" means a nursing facility licensed under sections 321-9 and 321-11 and any intermediate care facility for the mentally retarded person licensed under sections 321-9 and 321-11.

"Nursing facility income" means the total compensation received for furnishing nursing facility services, including all receipts from "ancillary services" (as defined in 42 C.F.R. 413.53(b)) to the provision of nursing facility services, and receipts from items supplied in connection with these services. "Nursing facility income" shall not include the following: compensation received from services covered by Title XVIII of the federal Social Security Act (including copayments and deductibles received from beneficiaries of the Medicare program); income from an affiliated entity that operates as a prepaid health maintenance organization; settlements from third party payors for services delivered or items supplied prior to the effective date of this Act (such as settlements of cost reports or decisions on rate reconsideration requests); income from services provided by separately licensed units (such as distinct part intermediate care facilities for the mentally retarded); income from the provision of adult day health and adult day care programs; income from the provision of home health agency services; income from the provision of "nursing homes without walls" programs; income from the provision of inpatient hospital services; income from grants, bequests, donations, endowments, or investments; or amounts of taxes imposed by chapter 237 or this chapter and passed on, collected, and received from the consumer as part of nursing facility income.

"Operator" means any person operating a nursing facility [or hospital], whether as owner or proprietor, or as lessee, sublessee, mortgagee in possession, licensee, or otherwise, or engaging or continuing in any service business that involves the actual furnishing of nursing facility [or hospital] services.

§ -2 Imposition of tax and rates. (a) There is levied and shall be

assessed and collected during each quarter a tax in the amount of six per cent of all nursing facility income.

[(b)] (b) There is levied and shall be assessed and collected during each quarter a tax in the amount of four per cent of all hospital income, except for income subject to taxes imposed by chapter 237.

(c) [(b)] Each nursing facility [and hospital] operator shall pay to the State the tax imposed by this section as provided by this chapter.

[(d)] (c) The tax imposed by this section shall not apply to an individual facility determined by the department to be financially distressed, pursuant to the rulemaking authority authorized by this chapter; provided that this exemption does not cause the tax to fail to qualify as permissible under section 1903(w) of the federal Social Security Act.

[(e)] (d) Each operator of a nursing facility shall identify separately the tax imposed by this section in all invoices or statements to persons whose payments result in nursing facility income. Notwithstanding the foregoing, the amount that a beneficiary of the Medicaid program is required to contribute toward his or her care shall not be changed as a result of the tax imposed by this section.

[(f)] (e) The taxes imposed by this section shall terminate at the end of the month following the time at which the taxes no longer qualify as permissible under section 1903(w) of the federal Social Security Act.

§ -3 **Return and payments; penalties.** (a) On or before the fifteenth day of February, May, August, and November, or for fiscal year taxpayers on or before the forty-fifth day after the close of the fiscal quarter, every operator taxable under this chapter during the preceding calendar or fiscal quarter shall file a sworn return with the director in such form as the director shall prescribe, together with a remittance for the amount of the tax in the form of cash, bank draft, cashier's check, money order, or certificate of deposit. In lieu of the remittance, the operator may request withholding from payments made to the operator by the department under section -4. Sections 237-30 and 237-32 shall apply to returns and penalties made under this chapter to the same extent as if the sections were set forth specifically in this section.

(b) Notwithstanding subsection (a), the director, for good cause, may permit an operator to file the operator's return required under this section and make payments thereon, on a semiannual basis during the calendar or fiscal year, the return and payment to be made on or before the last day of the calendar month after the close of each six-month period, to wit: for calendar year operators, on July 31 and January 31 or, for fiscal year operators, on or before the last day of the seventh month following the beginning of the fiscal year and on or before the last day of the month following the close of the fiscal year; provided that the director is satisfied that the grant of the permit will not unduly jeopardize the collection of the taxes due thereon and the operator's total tax liability for the calendar or fiscal year under this chapter will not exceed \$1,000.

The director, for good cause, may permit an operator to make quarterly payments based on the operator's estimated quarterly or semiannual liability; provided that the operator files a reconciliation return at the end of each quarter or at the end of each six-month period during the calendar or fiscal year, as provided in this section.

(c) If an operator filing the operator's return on a semiannual basis, as provided in this section, becomes delinquent in either the filing of the operator's return or the payment of the taxes due thereon, or if the liability of an operator, who possesses a permit to file the operator's return and make payments on a

semiannual basis, exceeds \$1,000 in taxes during the calendar or fiscal taxable year, or if the director determines that any such semiannual filing of a return would unduly jeopardize the proper administration of this chapter, including the assessment or collection of the taxes, the director, at any time, may revoke an operator's permit, in which case the operator then shall be required to file the operator's return and make payments thereon as provided in subsection (a).

(d) Section 232-2 shall apply to the annual return, but not to a quarterly or semiannual return.

§ **-4 Withholding.** As an option to making payments under section -3, the department and the operator in writing may agree that the department will withhold all or part of the amount of taxes owing for a quarter from Medicaid payments owed by the department to the operator. All reports by the department to the federal government or to the operator, of Medicaid payments made to the operator by the department shall include any amount withheld to satisfy the tax obligation imposed by this chapter.

§ **-5 Annual return.** On or before the twentieth day of the fourth month following the close of the calendar or fiscal taxable year, every operator who has become liable for the payment of the taxes under this chapter during the preceding tax year shall file a return summarizing that operator's liability under this chapter for the year, in such form as the director prescribes. The operator shall transmit to the Honolulu office of the department with the return, a remittance covering the residue of the tax chargeable to the operator, if any. The return shall be signed by the operator, if made by an individual, or by the president, vice-president, secretary, or treasurer of a corporation, if made on behalf of a corporation. If made on behalf of a partnership, firm, society, unincorporated association, group, hui, joint venture, joint stock company, corporation, trust estate, decedent's estate, trust, or other entity, any individual delegated by the entity shall sign the return on behalf of the operator. If for any reason it is not practicable for the individual operator to sign the return, it may be done by any duly authorized agent. The department, for good cause shown, may extend the time for making the return on the application of any operator and grant such reasonable additional time within which to make the return as the department may deem advisable.

Section 232-2 shall apply to the annual return, but not to a quarterly or semiannual return.

§ **-6 Assessment of tax upon failure to make return; limitation period; exceptions; extension by agreement.** (a) If any operator fails to make a return as required by this chapter, the director shall make an estimate of the tax liability of the operator from any information the director obtains, and according to the estimate so made, assess the taxes, interest, and penalty due the State from the operator; give notice of the assessment to the operator; and make demand upon the operator for payment. The assessment shall be presumed to be correct until and unless, upon an appeal duly taken as provided in section -8, the contrary shall be clearly proved by the operator assessed. The burden of proof upon the appeal shall be upon the operator assessed to disprove the correctness of assessment.

(b) After a return is filed under this chapter the director shall cause the return to be examined, and may make such further audits or investigations as the director considers necessary. If the director determines that there is a deficiency with respect to the payment of any tax due under this chapter, the director shall

assess the taxes and interest due the State, give notice of the assessment to the persons liable, and make demand upon the persons for payment.

(c) Except as otherwise provided by this section, the amount of taxes imposed by this chapter shall be assessed or levied within three years after the annual return was filed, or within three years of the due date prescribed for the filing of the return, whichever is later. No proceeding in court without assessment for the collection of any such taxes shall be begun after the expiration of the period.

(d) In the case of a false or fraudulent return with intent to evade tax, or a failure to file the annual return, the tax may be assessed or levied at any time.

(e) Where, before the expiration of the period prescribed in subsection (c) for assessments or in section -7 for credits and refunds, both the department and the operator have consented in writing to the assessment or levy of the tax after the date fixed by subsection (c) or the credit or refund of the tax after the date fixed by section -7, the tax may be assessed or levied, or the overpayment, if any, may be credited or refunded at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

§ -7 **Overpayment; refunds.** Upon application by an operator, if the director determines that any tax, interest, or penalty has been paid more than once, or has been erroneously or illegally collected or computed, the tax, interest, or penalty shall be credited by the director on any taxes then due from the operator under this chapter. The director shall refund the balance to the operator or the operator's successors, administrators, executors, or assigns in accordance with section 231-23. As to all tax payments for which a refund or credit is not authorized under this section (including, without prejudice to the generality of the foregoing, cases of unconstitutionality), the remedies provided by appeal or under section 40-35 are exclusive. No credit or refund shall be allowed for any tax imposed by this chapter, unless a claim for the credit or refund is filed as follows:

- (1) If an annual return is timely filed, or is filed within three years after the date prescribed for filing the annual return, then the credit or refund shall be claimed within three years after the date the annual return was filed or the date prescribed for filing the annual return, whichever is later; and
- (2) If an annual return is not filed, or is filed more than three years after the date prescribed for filing the annual return, a claim for credit or refund shall be filed within:
 - (A) Three years after the payment of the tax; or
 - (B) Three years after the date prescribed for the filing of the annual return, whichever is later.

The preceding limitation shall not apply to a credit or refund pursuant to an appeal, provided for in section -8.

§ -8 **Appeals.** Any operator aggrieved by any assessment of the tax imposed by this chapter for any quarter or any year, may appeal from the assessment in the manner and within the time and in all other respects, as provided in the case of income tax appeals by section 235-114; provided the tax so assessed shall have been paid.

§ -9 **Records to be kept; examination; penalties.** (a) Every operator

shall keep, in the English language, within the State, and preserve for a period of three years, suitable records relating to nursing facility [or hospital] income taxed under this chapter, and such other books, records of account, and invoices as may be required by the department. All such books, records, and invoices shall be open for examination at any time by the department or the department of taxation, or the authorized representative thereof. For the purposes of determining the amount of taxes due under this chapter, every operator shall keep its books and records of account on the accrual basis [with the exception of hospitals in the state community hospital system].

(b) Any operator violating this section shall be guilty of a misdemeanor; and any officer, director, president, secretary, or treasurer of a corporation who permits, aids, or abets the corporation to violate this section shall likewise be guilty of a misdemeanor. The penalty for this misdemeanor shall be that prescribed by section 231-34 for individuals, corporations, or officers of corporations, as the case may be, for violation of that section.

§ -10 Disclosure of returns unlawful; destruction of returns. (a) All tax returns and return information required to be filed under this chapter, and the report of any investigation of the return or of the subject matter of the return, shall be confidential. It shall be unlawful for any person or any officer or employee of the State to intentionally make known information imparted by any tax return or return information filed pursuant to this chapter, or any report of any investigation of the return or of the subject matter of the return, or to wilfully permit any such return, return information, or report so made, or any copy thereof, to be seen or examined by any person; provided that for tax purposes only the operator, the operator's authorized agent, or persons with a material interest in the return, return information, or report may examine the same. Unless otherwise provided by law, persons with a material interest in the return, return information, or report shall include:

- (1) Trustees;
- (2) Partners;
- (3) Persons named in a board resolution or a one per cent shareholder in the case of a corporate return;
- (4) The person authorized to act for a corporation in dissolution;
- (5) A shareholder of an S corporation;
- (6) The personal representative, trustee, heir, or beneficiary of an estate or trust in the case of the estate's or decedent's return;
- (7) The committee, trustee, or guardian of any person in paragraphs (1) to (6) who is incompetent;
- (8) The trustee in bankruptcy or receiver, and the attorney-in-fact of any person in paragraphs (1) to (7);
- (9) Persons duly authorized by the State in connection with their official duties; and
- (10) Any duly accredited tax official of the United States or any state or territory.

Any violation of this subsection shall be a misdemeanor. Nothing in this subsection shall prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items of the reports or returns.

(b) The department may destroy the quarterly or semiannual returns filed pursuant to section -3, or any of them, upon the expiration of three years after the end of the calendar or fiscal year in which the taxes so returned accrued.

§ **-11 Collection by suit; injunction.** The department may collect taxes due and unpaid under this chapter, together with all accrued penalties, by action in assumpsit or other appropriate proceedings in the district or circuit court of the judicial circuit in which the taxes arose, regardless of the amount. After delinquency has continued for sixty days, the department may proceed in the circuit court of the judicial circuit in which the nursing facility [or hospital] income is taxed to obtain an injunction restraining the further furnishing of nursing facility [or hospital] services until full payment is made of all taxes, penalties, and interest due under this chapter.

§ **-12 Application of taxes.** The taxes imposed by this chapter shall be in addition to any other taxes imposed by any other laws of the State; provided that if it is held by any court of competent jurisdiction that the taxes imposed by this chapter may not legally be imposed in addition to any other tax or taxes imposed by any other law or laws with respect to the same property and the use thereof, then this chapter shall be deemed not to apply to the property and the use thereof under the specific circumstances, but the other laws shall be given full effect with respect to the property and use.

§ **-13 Administration and enforcement; rules.** (a) The director shall administer and enforce this chapter. With respect to:

- (1) The examinations of books and records, and operators and other persons;
- (2) Procedures and powers upon failure or refusal by an operator to make a return or proper return; and
- (3) The general administration of this chapter;

the director shall have all rights, powers, and duties conferred by chapters 231 and 237 with respect to powers and duties or with respect to taxes imposed under chapter 237. Without restriction upon these rights and powers, section 237-8 and sections 237-36 to 237-41 are made applicable to and with respect to taxes, operators, department officers, and other persons, and the matters and things affected or covered by this chapter, insofar as these sections are not inconsistent with this chapter, in the same manner, as nearly as may be, as in similar cases covered by chapter 237.

(b) The director may adopt rules under chapter 91 to carry out this chapter.

(c) The department may contract with the department of taxation for assistance in implementing and administering this chapter.

§ **-14 Taxes; allowable reimbursement costs.** All taxes paid pursuant to this chapter shall be deemed allowable and reimbursable costs for federal Medicaid reimbursement purposes. The department shall make appropriate adjustments to the methods and standards for reimbursing nursing facilities [or hospitals] under section 346-14 by a Medicaid state plan amendment which shall become effective on federal approval. In the case of any program involving federal Medicaid participation, the adjustment shall take effect no earlier than the effective date of any federally-approved Medicaid state plan amendment containing any such adjustment.

§ **-15 Health care revolving fund.** The department shall collect the tax and pay all tax revenues into the state general fund for deposit into the health

care revolving fund which is hereby created in the state treasury. Amounts deposited in the health care revolving fund, and any interest earned on these amounts, shall be used only for section 346-14 Medicaid purposes. Any federal Medicaid matching funds to expenditures made from funds deposited in the health care revolving fund shall not become part of the health care revolving fund. The funds in the health care revolving fund shall be expended by the department.

§ **-16 Evasion of tax, etc.; penalties.** It shall be unlawful:

- (1) For any operator to:
 - (A) Refuse to make the return required in section -5;
 - (B) Make any false or fraudulent return or false statement in any return, with intent to defraud the State or to evade the payment of any tax imposed by this chapter; and
 - (C) For any reason to aid or abet another in any attempt to evade the payment of any tax imposed by this chapter; or
- (2) For the president, vice-president, secretary, or treasurer of any corporation to make or permit to be made for any corporation or association any false return, or any false statement in any return required by this chapter, with the intent to evade the payment of any tax imposed by this chapter.

Any person violating this section or section 231-34 in relation to the tax imposed by this chapter, shall be punished as provided in section 231-34. Any corporation for which a false return, or return containing a false statement is made, shall be fined in the amount provided in section 231-34.

SECTION 2. Section 237-24.7, Hawaii Revised Statutes, is amended to read as follows:

“§237-24.7 Additional amounts not taxable. In addition to the amounts not taxable under section 237-24, this chapter shall not apply to:

- (1) Amounts received by the operator of a hotel from the owner of the hotel in amounts equal to and which are disbursed by the operator for employee wages, salaries, payroll taxes, insurance premiums, and benefits, including retirement, vacation, sick pay, and health benefits. As used in this paragraph:

“Employee” means employees directly engaged in the day to day operation of the hotel and employed by the operator.

“Hotel” means an operation licensed under section 445-92.

“Owner” means the fee owner or lessee under a recorded lease of a hotel.

“Operator” means any person who, pursuant to a written contract with the owner of a hotel, operates or manages the hotel for the owner;

- (2) Amounts received by the operator of a county transportation system operated under an operating contract with a political subdivision, where the political subdivision is the owner of the county transportation system. As used in this paragraph:

“County transportation system” means a mass transit system of motorized buses providing regularly scheduled transportation within a county.

“Operating contract” or “contract” means a contract to operate and manage a political subdivision’s county transportation system, which provides that:

- (A) The political subdivision shall exercise substantial control over all aspects of the operator’s operation;
- (B) The political subdivision controls the development of transit policy, service planning, routes, and fares; and
- (C) The operator develops in advance a draft budget in the same format as prescribed for agencies of the political subdivision. The budget must be subject to the same constraints and controls regarding the lawful expenditure of public funds as any public sector agency, and deviations from the budget must be subject to approval by the appropriate political subdivision officials involved in the budgetary process.

“Operator” means any person who, pursuant to an operating contract with a political subdivision, operates or manages a county transportation system.

“Owner” means a political subdivision that owns or is the lessee of all the properties and facilities of the county transportation system (including buses, real estate, parking garages, fuel pumps, maintenance equipment, office supplies, etc.), and that owns all revenues derived therefrom;

- (3) Surcharge taxes on rental motor vehicles imposed by chapter 251 and passed on and collected by persons holding certificates of registration under that chapter;
- (4) Amounts received by the operator of orchard properties from the owner of the orchard property in amounts equal to and which are disbursed by the operator for employee wages, salaries, payroll taxes, insurance premiums, and benefits, including retirement, vacation, sick pay, and health benefits. As used in this paragraph:

“Employee” means an employee directly engaged in the day to day operations of the orchard properties and employed by the operator.

“Orchard property” means any real property that is used to raise trees with a production life cycle of fifteen years or more producing fruits or nuts having a normal period of development from the initial planting to the first commercially saleable harvest of not less than three years.

“Owner” means a fee owner or lessee under a recorded lease of orchard property.

“Operator” means a producer who, pursuant to a written contract with the owner of the orchard property, operates or manages the orchard property for the owner where the property contains an area sufficient to make the undertaking economically feasible; and

- (5) Taxes on nursing facility [or hospital] income imposed by chapter _____ and passed on and collected by operators of nursing facilities [or hospitals].¹”

SECTION 2. Act 315, Session Laws of Hawaii 1993, is amended by amending section 8 to read as follows:

“SECTION 8. This Act, upon its approval, shall:

- (1) Take effect on July 1, 1993, or the effective date of reimbursement changes referred to in section -14 of section 1 of this Act, whichever is later; and
- (2) Apply to [hospital and] nursing facility income arising from activities occurring on and after the effective date of this Act and before July 1, 1995”

SECTION 3. Statutory material to be repealed is bracketed. New statutory material is underlined.

SECTION 4. This Act shall take effect on the last day of the month before the department of human service’s implementation of the Hawaii Health QUEST program; provided that all taxes shall be levied, assessed, and collected under Act 315, Session Laws of Hawaii 1993, through the last day of the month preceding the implementation of the QUEST program.

(Approved June 22, 1994.)

Note

1. Paragraph missing.