

ACT 156

S.B. NO. 2259

A Bill for an Act Relating to Taxation.

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

PART I.

SECTION 1. The legislature finds that the visitor industry brings almost seven million visitors into the State every year. It accounts for almost twenty-five per cent of the gross state product and provides over thirty per cent of all civilian jobs. In light of the State's dependence on tourism, it is extremely important that the development, marketing, and research of this industry be coordinated in a manner consistent with the needs of the State.

As part of its revitalization plan for the State, the economic revitalization task force recommended that funds for tourism come from a dedicated source. The task force proposed that such a funding source be established by raising the transient accommodations tax (TAT) and earmarking part of the total revenue from the TAT to create a special fund for tourism. The task force further recommended that an executive board be established to oversee this special fund. Tourism-related data collection and basic research would be conducted by the department of business, economic development, and tourism.

The purpose of this Part is to implement recommendations of the economic revitalization task force, convened by the governor, the president of the senate, and the speaker of the house of representatives related to tourism and economic development, and to increase the transient accommodations tax and amend the distribution of transient accommodations tax revenues.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
HAWAII TOURISM AUTHORITY
PART I. GENERAL PROVISIONS**

§ -1 Definitions. As used in this chapter:

“Agency” means any agency, department, authority, board, commission, the University of Hawaii, or any other unit of the State or its political subdivisions.

“Authority” means the Hawaii tourism authority established in section

-2.

“Board” means the board of directors of the Hawaii tourism authority established in section -2, and any successor thereto.

“Public agency” means any office, department, board, commission, bureau, division, public corporation agency, or instrumentality of the federal, state, or county government.

§ -2 Hawaii tourism authority; establishment; board; staff. (a) There is established the Hawaii tourism authority, which shall be a body corporate and a public instrumentality of the State, for the purpose of implementing this chapter. The authority shall be placed within the department of business, economic development, and tourism for administrative purposes only.

(b) The authority shall be headed by a board of directors which consists of ten public, voting members, one public, nonvoting member, one ex officio voting member, and one ex officio nonvoting member; provided that:

- (1) Ten public, voting members shall be appointed by the governor as provided in section 26-34, except as otherwise provided by law;
- (2) The ten public, voting members shall be composed of one representative each from the city and county of Honolulu and the counties of Hawaii, Kauai, and Maui; the remaining public members shall be appointed at-large;
- (3) Of the ten public, voting members, two shall be appointed by the governor from a list of three names nominated by the president of the senate, and two shall be appointed by the governor from a list of three names nominated by the speaker of the house of representatives;
- (4) At least six of the ten public, voting members shall have knowledge, experience, and expertise in the area of visitor industry management, marketing and promotion;
- (5) The governor shall make appointments to ensure the fulfillment of all requirements;
- (6) The director of business, economic development, and tourism, or a designated representative, shall be an ex officio voting member;
- (7) The director of transportation or a designated representative, shall be an ex officio nonvoting member; and
- (8) The governor shall appoint a public, nonvoting member.

(c) The public members shall be appointed by the governor for terms of four years, except that the terms of the members first appointed shall be for two and four years, respectively, as designated by the governor at the time of appointment. Each public member shall hold office until the member’s successor is appointed and qualified. Section 26-34 shall be applicable insofar as it relates to the number of terms and consecutive number of years a member may serve on the board.

(d) The board shall elect a chairperson from among the voting members. The director of business, economic development, and tourism shall not be chairperson of the board.

(e) Six voting members shall constitute a quorum, whose affirmative vote shall be necessary for all actions by the authority. The members shall serve without

compensation, but shall be reimbursed for expenses, including traveling expenses, necessary for the performance of their duties.

(f) The board shall appoint an executive director, exempt from chapters 76 and 77, who shall oversee the authority staff, and shall be compensated at a salary level set by the governor.

(g) The authority may employ persons not subject to chapters 76, 77, and 78 to perform and execute the functions of the authority.

§ **-3 Powers.** Except as otherwise limited by this chapter, the board may:

- (1) Sue and be sued;
- (2) Have a seal and alter the same at pleasure;
- (3) Make and execute contracts and all other instruments necessary or convenient for the exercise of its powers and functions under this chapter, provided that the authority may enter into contracts and agreements for a period of up to five years;
- (4) Make and alter bylaws for its organization and internal management;
- (5) Adopt rules in accordance with chapter 91 with respect to its projects, operations, properties, and facilities;
- (6) Through its executive director represent the authority in communications with the governor and with the legislature;
- (7) Through its executive director appoint officers, agents, and employees, prescribe their duties and qualifications, and fix their salaries, without regard to chapters 76, 77, and 78;
- (8) Through its executive director purchase supplies, equipment, or furniture;
- (9) Through its executive director allocate the space or spaces which are to be occupied by the authority and appropriate staff;
- (10) Engage the services of qualified persons to implement the State's tourism marketing plan or portions thereof as determined by the board;
- (11) Engage the services of consultants on a contractual basis for rendering professional and technical assistance and advice;
- (12) Procure insurance against any loss in connection with its property and other assets and operations in such amounts from such insurers as it deems desirable;
- (13) Contract for, and accept gifts or grants in any form from any public agency or any other source;
- (14) Create a vision and develop a long range plan for tourism in Hawaii, including product development, infrastructure, and diversification issues;
- (15) Develop, coordinate, and implement state policies and directions for tourism and related activities taking into account the economic, social, and physical impacts of tourism on the State;
- (16) Develop and implement the state tourism strategic marketing plan, which shall be updated every three years, to promote and market the State as a desirable visitor destination;
- (17) Have a permanent, strong focus on marketing and promotion;
- (18) Conduct market development-related research as necessary;
- (19) Coordinate all agencies and advise the private sector in the development of tourism-related activities and resources;
- (20) Work to eliminate or reduce barriers to travel in order to provide a positive and competitive business environment, including coordinating with the department of transportation on issues affecting airlines and air route development;
- (21) Market and promote sports-related activities and events;

- (22) Coordinate the development of new products with the public and private sectors, including the development of sports, culture, health, education, business, and eco-tourism;
- (23) Establish a public information and educational program to inform the public of tourism and tourism-related problems;
- (24) Encourage the development of tourism educational, training, and career counseling programs;
- (25) Establish a program to monitor, investigate, and respond to complaints about problems resulting directly or indirectly from the tourism industry and taking appropriate action as necessary; and
- (26) Do any and all things necessary to carry out its purposes and exercise the powers given and granted in this chapter.

§ **-4 Meetings of the board.** (a) The meetings of the board shall be open to the public as provided in section 92-3, except that when it is necessary for the board to receive information that is proprietary to a particular enterprise or the disclosure of which might be harmful to the business interests of the enterprise, the board may enter into an executive meeting that is closed to the public.

(b) The board shall be subject to the procedural requirements of section 92-4, and this authorization shall be in addition to the exceptions listed in section 92-5, to enable the authority board to respect the proprietary requirements of enterprises with which it has business dealings.

§ **-5 Exemption of Hawaii tourism authority from administrative supervision of boards and commissions.** Notwithstanding any law to the contrary, the authority shall be exempt from section 26-35 with the exception of section 26-35(2), (3), (7) and (8).

§ **-6 Tourism marketing plan; measures of effectiveness.** (a) The authority shall be responsible for developing a strategic tourism marketing plan which shall be updated every three years, that includes the following:

- (1) Identification and evaluation of current and future tourism needs for the different regions of the State;
- (2) Goals and objectives in accordance with identified needs;
- (3) Statewide promotional efforts and programs;
- (4) Targeted markets;
- (5) Efforts to enter into brand marketing projects that make effective use of cooperative advertising programs;
- (6) Measures of effectiveness for the authority's promotional programs; and
- (7) Coordination of marketing plans of all destination marketing organizations receiving state funding prior to finalization of the authority's marketing plan.

(b) In accordance with subsection (a), the authority shall be responsible for developing measures of effectiveness to assess the overall benefits and effectiveness of the marketing plan and include documentation of the directly attributable benefits of the plan to the following:

- (1) Hawaii's tourism industry;
- (2) Employment in Hawaii;
- (3) State taxes; and
- (4) The State's lesser known and underutilized destinations.

§ **-7 Tourism-related activities.** (a) The authority may enter into contracts and agreements that include the following:

- (1) Tourism promotion, marketing, and development;
- (2) Market development-related research;
- (3) Product development and diversification issues;
- (4) Promotion, development, and coordination of sports-related activities and events;
- (5) Reduction of barriers to travel;
- (6) Tourism public information and educational programs;
- (7) Programs to monitor and investigate complaints about the problems resulting from the tourism industry in the State; and
- (8) Any and all other activities necessary to carry out the intent of this chapter;

provided that for the purposes of continuity, the Hawaii Visitors and Convention Bureau shall be the designated agency to conduct the marketing and promotion of the State until the end of fiscal year 1998-1999 or until a date specified by the board.

(b) The authority staff shall be responsible for monitoring and facilitating any and all functions developed in accordance with subsection (a).

PART II. TOURISM SPECIAL FUND; EXEMPTIONS; REPORTS

§ -11 **Tourism special fund.** (a) There is established in the state treasury the tourism special fund, into which shall be deposited:

- (1) A portion of the revenues from any transient accommodations tax, as provided by section 237D-6.5; and
- (2) Appropriations by the legislature to the tourism special fund; and
- (3) Gifts, grants, and other funds accepted by the authority.

(b) Moneys in the tourism special fund may be placed in interest-bearing accounts or otherwise invested by the authority until such time as the moneys may be needed. All interest accruing from the investment of these moneys shall be credited to the tourism special fund.

(c) Moneys in the tourism special fund shall be used by the authority for the purposes of this chapter, provided that not more than three per cent of this amount shall be used for administrative expenses; provided further that of this amount the sum of \$15,000 shall be made available for a protocol fund to be expended at the discretion of the executive director; provided further that moneys in the tourism special fund shall be used for the salaries and expenses of the office of tourism established in section 201-92.

§ -12 **Exemption of authority from taxation and Hawaii public procurement code.** (a) All revenues and receipts derived by the authority from any project or a project agreement or other agreement pertaining thereto shall be exempt from all state taxation. Any right, title, and interest of the authority in any project shall also be exempt from all state taxation. Except as otherwise provided by law, the interest of a qualified person or other user of a project or a project agreement or other agreements related to a project shall not be exempt from taxation to a greater extent than it would be if the costs of the project were directly financed by the qualified person or user.

(b) The authority shall not be subject to chapter 103D and any and all other requirements of law for competitive bidding for project agreements, construction contracts, lease and sublease agreements, or other contracts unless a project agreement with respect to a project otherwise shall require.

§ -13 **Assistance by state and county agencies.** Any state or county agency may render services upon request of the authority.

§ -14 **Declaration of public function, purpose, and necessity.** The powers and functions granted to and exercised by the Hawaii tourism authority under this chapter are declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity.

§ -15 **Court proceedings; preferences; venue.** Any action or proceeding to which the authority, the State, or the county may be a party, in which any question arises as to the validity of this chapter, shall be preferred over all other civil cases, except election cases, in any court of this State and shall be heard and determined in preference to all other civil cases pending therein except election cases, irrespective of position on the calendar. The same preference shall be granted upon application of counsel to the authority in any action or proceeding questioning the validity of this chapter in which the authority may be allowed to intervene. In addition to the preference provided in this section, any action or proceeding to which the authority, the State, or the county may be party, in which any question arises as to the validity of this chapter or any portion of this chapter, or any action of the authority may be filed in the supreme court of the State, which court is hereby vested with original jurisdiction over the action. Notwithstanding any provision of law to the contrary, declaratory relief from the supreme court may be obtained for any action.

§ -16 **Annual report.** The authority shall submit a complete and detailed report of its activities, expenditures, and results to the governor and the legislature at least twenty days prior to the convening of each regular session of the legislature.”

SECTION 3. Chapter 201, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§201- **Hawaii tourism authority.** For the period beginning January 1, 1999, and for each year thereafter, the office of tourism shall provide assistance to the Hawaii tourism authority established in section -2.”

SECTION 4. Section 36-27, Hawaii Revised Statutes, is amended to read as follows:

“§36-27 **Transfers from special funds for central service expenses.** Except as provided in this section, and notwithstanding any other law to the contrary, from time to time the director of finance, for the purpose of defraying the prorated estimate of central service expenses of government in relation to all special funds, except the:

- (1) Special summer school and intersession fund under section 302A-1310;
- (2) School cafeteria special funds of the community colleges and the department of education;
- (3) Special funds of the student housing, summer session, college of continuing education and community service, campus center, Kau‘iokahaloa Iki faculty housing development, and bookstores of the University of Hawaii;
- (4) State educational facilities improvement special fund;
- (5) Convention center capital special fund under section 206X-10.5 and the convention center operations special fund under section 206X-10.6;
- (6) Special funds established by section 206E-6;
- (7) Housing loan program revenue bond special fund;
- (8) Housing project bond special fund;
- (9) Aloha Tower fund created by section 206J-17;
- (10) Domestic violence prevention special fund under section 321-1.3;

- (11) Spouse and child abuse special account under section 346-7.5;
- (12) Spouse and child abuse special account under section 601-3.6;
- (13) Funds of the employees' retirement system created by section 88-109;
- (14) Unemployment compensation fund established under section 383-121;
- (15) Hawaii hurricane relief fund established under chapter 431P;
- (16) The University of Hawaii tuition and fees special fund; [and]
- (17) Division of community hospitals' special funds; and
- (18) Tourism special fund established under section -8;

shall deduct five per cent of all receipts of all other special funds, which deduction shall be transferred to the general fund of the State and become general realizations of the State. All officers of the State and other persons having power to allocate or disburse any special funds shall cooperate with the director in effecting these transfers. To determine the proper revenue base upon which the central service assessment is to be calculated, the director shall adopt rules pursuant to chapter 91 for the purpose of suspending or limiting the application of the central service assessment of any fund. No later than twenty days prior to the convening of each regular session of the legislature, the director shall report all central service assessments made during the preceding fiscal year."

SECTION 5. Section 36-30, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

- “(a) Each special fund, except the:
- (1) Transportation use special fund established by section 261D-1;
 - (2) Special summer school and intersession fund under section 302A-1310;
 - (3) School cafeteria special funds of the community colleges, and the department of education;
 - (4) Special funds of the student housing, summer session, college of continuing education and community service, campus center, Kau‘iokahaloa Iki faculty housing development and bookstores of the University of Hawaii;
 - (5) State educational facilities improvement special fund;
 - (6) Special funds established by section 206E-6;
 - (7) Aloha Tower fund created by section 206J-17;
 - (8) Domestic violence prevention special fund under section 321-1.3;
 - (9) Spouse and child abuse special account under section 346-7.5;
 - (10) Spouse and child abuse special account under section 601-3.6;
 - (11) Funds of the employees' retirement system created by section [89-109;] 88-109;
 - (12) Unemployment compensation fund established under section 383-121;
 - (13) Hawaii hurricane relief fund established under chapter 431P;
 - (14) Convention center capital special fund established under section 206X-10.5 and the convention center operations special fund established under section 206X-10.6;
 - (15) The University of Hawaii tuition and fees special fund; [and]
 - (16) Division of community hospitals' special funds; and
 - (17) Tourism special fund established under section -8;

shall be responsible for its pro rata share of the administrative expenses incurred by the department responsible for the operations supported by the special fund concerned.”

SECTION 6. Section 201-3, Hawaii Revised Statutes, is amended to read as follows:

“§201-3 Specific research and promotional functions of the department.

Without prejudice to its general functions and duties the department of business, economic development, and tourism shall have specific functions in the following areas:

- (1) Agricultural development. The department shall:
 - (A) Conduct surveys and feasibility studies to determine the need for and value of additional research in the production of agricultural commodities, and the processing and marketing of agricultural food products;
 - (B) Promote an informational program directed to the consuming public both in Hawaii and in the mainland United States relative to the qualities of agricultural commodities produced in Hawaii and in the maximum utilization of same, including processed agricultural food products; and
 - (C) Make grants to and contracts with appropriate agencies, firms, or individuals for surveys, studies, research, and promotion.

With respect to agricultural development, the department's activities shall be consistent with the policies, programs, and activities of the board of agriculture and the agribusiness development corporation;

- (2) Industrial development. The department shall determine through technical and economic surveys the profit potential of new or expanded industrial undertakings; develop through research projects and other means new and improved industrial products and processes; promote studies and surveys to determine consumer preference as to design and quality and to determine the best methods of packaging, transporting, and marketing the State's industrial products; disseminate information to assist the present industries of the State, to attract new industries to the State, and to encourage capital investment in present and new industries in the State; assist associations of producers and distributors of industrial products to introduce such products to consumers; and make such grants or contracts as may be necessary or advisable to accomplish the foregoing;
- (3) Land development. The department shall encourage the most productive use of all land in the State in accordance with a general plan developed by the department; encourage the improvement of land tenure practices on leased private lands; promote an informational program directed to landowners, producers of agricultural and industrial commodities, and the general public regarding the most efficient and most productive use of the lands in the State; and make such grants or contracts as may be necessary or advisable to accomplish the foregoing;
- (4) Credit development. The department shall conduct a continuing study of agricultural and industrial credit needs; encourage the development of additional private and public credit sources for agricultural and industrial enterprises; promote an informational program to acquaint financial institutions with agricultural and industrial credit needs and the potential for agricultural and industrial expansion, and inform producers of agricultural and industrial products as to the manner in which to qualify for loans; and make such grants or contracts as may be necessary or advisable to accomplish the foregoing; [and]

- (5) Promotion. The department shall disseminate information developed for or by the department pertaining to economic development to assist present industry in the State, attract new industry and investments to the State, and assist new and emerging industry with good growth potential or prospects in jobs, exports, and new products. The industrial and economic promotional activities of the department may include the use of literature, advertising, demonstrations, displays, market testing, lectures, travel, motion picture and slide films, and such other promotional and publicity devices as may be appropriate[.]; and
- (6) Tourism research and statistics. The department shall maintain a program of research and statistics for the purpose of:
 - (A) Measuring and analyzing tourism trends;
 - (B) Providing information and research to assist in the development and implementation of state tourism policy;
 - (C) Encouraging and arranging for the conduct of tourism research and information development through voluntary means or through contractual services with qualified agencies, firms, or persons; and
 - (D) Providing tourism information to policy makers, the public, and the visitor industry. This includes:
 - (i) Collecting and publishing visitor-related data including visitor arrivals, visitor characteristics and expenditures;
 - (ii) Collecting and publishing hotel-related statistics including the number of units available, occupancy rates, and room rates;
 - (iii) Collecting and publishing airline-related data including seat capacity and number of flights;
 - (iv) Collecting information and conducting analyses of the economic, social, and physical impacts of tourism on the State;
 - (v) Conducting periodic studies of the impact of ongoing marketing programs of the Hawaii tourism authority on Hawaii's tourism industry, employment in Hawaii, state taxes, and the State's lesser known and underutilized destinations; and
 - (vi) Cooperate with the Hawaii tourism authority and provide it with the above information in a timely manner.

The department shall be the central agency to coordinate film permit activities in the State.”

SECTION 7. Section 201-13.8 Hawaii Revised Statutes, is amended to read as follows:

“**[[§201-13.8]] Data or information collection.** (a) The director, in consultation with all affected governmental agencies, shall assess the need for statistics and other information as to the number, characteristics, needs, and movement of people into, out of, or within Hawaii, including residents, migrants, and visitors, and such other information as the director may deem necessary, for the purposes of sound economic research and analysis. The director shall be responsible for collecting, analyzing, and disseminating such information to governmental agencies on a timely basis, and is authorized to use any appropriate method to collect the information, including but not limited to conducting an entry and exit census or survey of all individuals entering, leaving, or living within the State, and obtaining data or information acquired by other agencies, both public and private. All governmental agencies shall cooperate with and assist the director to implement this

section. The director may adopt necessary rules pursuant to chapter 91, to administer this section.

(b) To the extent that it is identifiable to an individual, information obtained by the department or its agents through surveys, questionnaires, or other information gathering efforts shall be held confidential and not disclosed or opened to public inspection, except that such information may be shared with other government agencies as provided in section 92F-19.

(c) Public disclosure of information gathered by the department could place businesses at a competitive disadvantage. Consequently, where disclosure would result in the impairment of the department's ability to obtain such information and the frustration of a legitimate government function, the department may withhold from public disclosure competitively sensitive information including:

- (1) Completed survey and questionnaire forms;
- (2) Coding sheets; and
- (3) Database records of such information.

(d) The director may adopt necessary rules pursuant to chapter 91, to administer this section.^{1''}

SECTION 8. Act 96, Session Laws of Hawaii 1988, as amended by Act 159, Session Laws of Hawaii 1992, as amended by Act 241, Session Laws of Hawaii 1993, and as amended by Act 75, Session Laws of Hawaii 1994, is amended to read:

“SECTION 3. This Act shall automatically expire on June 30, [1998.] 1999.

In the event any judicial or quasi-judicial proceeding is commenced regarding the validity of this Act or any section of this Act, or any action of the authority, the running of the period shall be suspended until a final nonappealable determination is made in the judicial or quasi-judicial proceeding.”

SECTION 9. There is appropriated out of the tourism special fund the sum of \$500,000 or so much thereof as may be necessary for fiscal year 1998-1999 for the conduct of the research specified in section 6 by the department of business, economic development, and tourism.

SECTION 10. The sum appropriated shall be expended by the department of business, economic development, and tourism for the purposes of this Act.

SECTION 11. Section 235-17, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) There shall be allowed to each taxpayer subject to the taxes imposed by this chapter, an income tax credit which shall be deductible from the taxpayer's net income tax liability, if any, imposed by this chapter for the taxable year in which the credit is properly claimed. The amount of the credit shall be up to [six per cent] 7.25 per cent effective January 1, 1999, of the costs incurred in the State in the production of motion picture or television films for actual expenditures for transient accommodations. The director of taxation shall specify by rule a schedule of allowable tax credits based on the principle that greater tax credits shall be allowed for greater benefits to the state economy.

In the case of a partnership, S corporation, estate, or trust, the tax credit allowable is for production costs incurred by the entity for the taxable year. The cost upon which the tax credit is computed shall be determined at the entity level.”

SECTION 12. (a) The auditor shall audit and monitor the progress made by the convention center authority in resolving various outstanding issues and problems

so as to assure the legislature that these issues have been addressed on or before the termination date of the authority. By February 28, 1999, the auditor shall submit a management audit report to the legislature on the effectiveness of the steps taken by the convention center authority to resolve traffic, noise, and other outstanding claims against the authority. The management audit may include financial audit issues that the auditor deems appropriate. An interim report on the progress being made by the convention center authority on the above issues shall be submitted by September 30, 1998.

(b) The department of business, economic development, and tourism may assume present visitor-research related contracts between the Hawaii visitors and convention bureau and individuals, agencies, or firms exempt from chapter 103D, Hawaii Revised Statutes.

SECTION 13. This Part shall take effect upon its approval, provided that sections 2 to 7 and 10 shall take effect on July 1, 1998; provided further that section 8 shall take effect on June 29, 1998; provided further that section 9 shall take effect on January 1, 1999; and provided further that section 11 shall apply to taxable years beginning after December 31, 1998.

PART II.

SECTION 14. The legislature finds that the purchase of a resort time share vacation unit is essentially a vacation purchase. In essence, the purchasers are sold a week or more in Hawaii either in perpetuity or for a fixed number of years, thereby saving money on vacations. The average Hawaii resort time share vacation purchaser purchases 1.6 weeks in Hawaii. The purchasers are transients in Hawaii, whether Hawaii residents or out-of-state residents, as the purchasers are occupying a transient accommodation. As legal commentator Mark E. Henze noted in The Law and Business of Time-Share Resorts: "The purchaser is essentially purchasing tomorrow's vacation at today's prices and dollars. The contract price is paid or financed all at once and there is no worry about skyrocketing hotel rentals or inflation."

The legislature finds that hotels are converted to nonownership time shares, where the time share developer retains the proprietary or fee interest in the project, and the time share owners retain a right to occupy the premises for a certain time period. On the other hand, the time share owner may own a fee interest limited to a certain time period. In either instance, a time share is merely interval ownership. Time share ownership is essentially a periodic vacation rental rather than conventional real estate ownership.

The legislature finds that resort time share vacation plans, which sell occupancy by temporal division, are similarly situated to hotels which rent occupancy for a limited time period rather than to condominiums which sell ownership interests in fee. Resort time share vacation purchasers may use exchange privileges between time share plans, which are similar to hotel upgrades.

The legislature finds that the constant turn over of transient individuals owning a resort time share vacation unit burdens state and county facilities in a manner similar to transient individuals occupying hotels. Resort time share vacation owners travel to and from airports, similar to transient individuals occupying hotels, thereby adding to the transportation burden on the State and the counties. Resort time share vacation owners use the roads for sightseeing in a manner similar to other hotel visitors. Resort time share vacation owners also add to the burden on police and fire protective services in the same manner as transient individuals occupying hotels.

The legislature finds that resort time share vacation owners are not similarly situated to condominium apartment owners. Resort time share vacation units are sold and marketed as hotel or vacation investments. Indeed, the State's time share law, section 514E-4, Hawaii Revised Statutes, explicitly recognizes that time share plans and units are "transient vacation rentals". When occupying their units, resort time share vacation owners are neither residents nor domiciliaries, but transient visitors similar to hotel visitors. Unlike resort time share vacation owners, the overwhelming majority of condominium apartment owners are residents of the State of Hawaii, occupying condominium apartments as their primary residence or domicile.

The legislature finds that despite the similar burdens imposed on state and county resources, resort time share vacation owners are not similarly taxed as other transients. Hotel visitors currently pay the transient accommodations tax that goes to assist counties to offset the burden these visitors place on county roads and services and to the State for tourism purposes. Unlike hotel visitors, transient resort time share vacation owners do not contribute their fair share of taxes. The transient accommodations tax is specifically imposed for the costs that transients impose on the State and the counties and to support tourism in Hawaii. The legislature finds that resort time share vacation owners are similar to transient occupants of hotels for tax purposes.

The legislature finds that the taxation of resort time share activities does not unduly burden interstate commerce. In fact, the United States Supreme Court has found that interstate commerce can be burdened under appropriate circumstances. The legislature finds that those circumstances exist. The taxation of resort time share activity in this Part has nexus because it will apply to resort time share activity which occurs wholly in Hawaii. The taxation of this activity is fairly apportioned because it only taxes time share activity which occurs wholly in Hawaii. The taxation of this activity does not discriminate because time share occupants are taxed regardless of whether the occupants are residents or nonresidents. Finally, the taxation of this activity is fairly related to the services provided by state and county governments in Hawaii.

The legislature finds that the transient accommodations tax should be imposed on the fair market rental value of the resort time share vacation unit occupied by the unit occupant. The legislature finds that the determination of the fair market rental value of a unit is fraught with difficulty. Comparing resort time share vacation units with similar hotel units does not appear advisable or feasible. Comparing similar resort time share vacation units, one rented and one occupied, may not be feasible since the rented unit may not be rented at fair market rental value. Instead, the rental may be determined to be sufficient if the rental charged covers the costs incurred by the owner in paying for the maintenance and other fees and costs involved with the unit. The legislature finds that maintenance fees attributable to the resort time share vacation unit may be used as a proxy for fair market rental value. Maintenance fees reflect the current and reasonably foreseeable costs, and therefore, to a great extent the fair market rental value of a resort time share vacation unit is reflected by maintenance, operations, insurance, repair, administration, taxes, and other costs and fees associated with resort time share vacation units.

The legislature finds that resort time share vacation unit owners are a subcategory of transient occupants.

The legislature also finds that the moneys from the taxation of transient occupancy will be used to offset the burdens transients and visitors place on the State and the counties. In addition, the moneys will be used to further promote Hawaii and tourism in Hawaii making Hawaii a more appealing destination. This will result in even more transients and visitors burdening the State and counties which must be paid for by those transient and visitors.

The purpose of this Part is to increase the transient accommodations tax, to amend the distribution of transient accommodations, and to tax the transient occupancy of resort time share vacation units under the transient accommodations tax in a manner similar to transients taxed on their hotel rental.

SECTION 15. Section 237D-1, Hawaii Revised Statutes, is amended by adding eight new definitions to read as follows:

“‘Department’ means the department of taxation.

‘Fair market rental value’ means an amount equal to one-half the gross daily maintenance fees that are paid by the owner, are attributable to the time share unit, and include maintenance costs, operational costs, insurance, repair costs, administrative costs, taxes, other than transient accommodations taxes, and other costs including payments required for reserves or sinking funds. The taxpayer shall use gross daily maintenance fees, unless the taxpayer proves or the director determines that the gross daily maintenance fees do not fairly represent fair market rental value taking into account comparable transient accommodation rentals or other appraisal methods.

‘Occupant’ means an owner of a resort time share vacation plan or other person occupying the resort time share vacation unit.

‘Owner’ means any person who owns a resort time share vacation interest; provided that to the extent and for those purposes provided in an agreement of sale, the vendee under the agreement of sale shall be considered the owner of the resort time share vacation interest.

‘Plan manager’ means a person who undertakes the duties, responsibilities, and obligations of managing a resort time share vacation plan or is required to act for a resort time share vacation plan under this chapter.

‘Resort time share vacation interest’ means any interest in a resort time share vacation unit or plan which entitles the owner thereof to the use, occupancy, or possession of a resort time share vacation unit on a periodically recurring basis.

‘Resort time share vacation plan’ means any plan or program subject to chapter 514E in which the use, occupancy, or possession of one or more resort time share vacation units circulates among various persons for less than a sixty-day period in any year, for any occupant. The term resort time share vacation plan includes both resort time share vacation ownership plans and resort time share vacation use plans, as follows:

- (1) ‘Resort time share vacation ownership plan’ means any arrangement whether by tenancy in common, sale, deed, or by other means, whereby the purchaser receives an ownership interest and the right to use the property for a specific or discernible period by temporal division.
- (2) ‘Resort time share vacation use plan’ means any arrangement, excluding normal hotel operations, whether by membership agreement, lease, rental agreement, license, use agreement, security, or other means, whereby the purchaser receives a right to use accommodations or facilities, or both, in a resort time share vacation unit for a specific or discernible period by temporal division, but does not receive an ownership interest.

‘Resort time share vacation unit’ means the actual and promised accommodations, and related facilities, which are the subject of a resort time share vacation plan.”

SECTION 16. Section 237D-2, Hawaii Revised Statutes, is amended to read as follows:

“§237D-2 Imposition and rates. (a) There is levied and shall be assessed and collected each month a tax of [five];

- (1) Five per cent for the period beginning on January 1, 1987, to June 30, 1994[, and a tax of six];
- (2) Six per cent for the period beginning July 1, 1994, [and thereafter,] to December 31, 1998; and
- (3) 7.25 per cent for the period beginning on January 1, 1999, and thereafter;

on the gross rental or gross rental proceeds derived from furnishing transient accommodations.

(b) Every operator shall pay to the State the tax imposed by [this section] subsection (a) as provided in this chapter.

(c) There is levied and shall be assessed and collected each month on the occupant of a resort time share vacation unit, a transient accommodations tax of 7.25 per cent on the fair market rental value.

(d) Every plan manager shall be liable for and pay to the State the transient accommodations tax imposed by subsection (c) as provided in this chapter. Every resort time share vacation plan shall be represented by a plan manager who shall be subject to this chapter.”

SECTION 17. Section 237D-4, Hawaii Revised Statutes, is amended to read as follows:

“§237D-4 Certificate of registration. (a) Each operator or plan manager as a condition precedent to engaging or continuing in the business of furnishing transient accommodations or in business as a resort time share vacation plan shall register with the director the name and address of each place of business within the State subject to this chapter. The operator or plan manager shall make a one-time payment as follows:

- (1) \$5 for each registration for transient accommodations consisting of one to five units; [and]
- (2) \$15 for each registration for transient accommodations consisting of six or more units; and
- (3) \$15 for each resort time share vacation plan within the State;

upon receipt of which the director shall issue a certificate of registration in such form as the director determines, attesting that the registration has been made. The registration shall not be transferable and shall be valid only for the operator or plan manager in whose name it is issued and for the transaction of business at the place designated therein.

The registration, or in lieu thereof a notice stating where the registration may be inspected and examined, shall at all times be conspicuously displayed at the place for which it is issued. Acquisition of additional transient accommodation units after payment of the one-time fee shall not result in additional fees. [Any person registering or holding a certificate of registration under this chapter before January 1, 1990, shall pay a one-time registration fee according to the schedule in this subsection on or before January 31, 1990, as a condition precedent to engaging or continuing in business.

(b) The registration provided for by this section shall be effective until canceled in writing. Any application for the reissuance of a previously canceled registration identification number [after December 31, 1989,] shall be regarded as a new registration application and shall be subject to the payment of the one-time registration fee [in subsection (a)]. The director may revoke or cancel any license issued under this chapter for cause as provided by rule under chapter 91.

[(c)] (b) If the license fee is paid, the department shall not refuse to issue a registration or revoke or cancel a registration for the exercise of a privilege protected by the First Amendment of the Constitution of the United States, or for the carrying on of interstate or foreign commerce, or for any privilege the exercise of which, under the Constitution and laws of the United States, cannot be restrained on account of nonpayment of taxes, nor shall section 237D-14 be invoked to restrain the exercise of such a privilege, or the carrying on of such commerce.

[(d)] (c) Any person who may lawfully be required by the State, and who is required by this chapter, to register as a condition precedent to engaging or continuing in the business of furnishing transient accommodations or as a plan manager subject to taxation under this chapter, who engages or continues in the business without registering in conformity with this chapter, shall be guilty of a misdemeanor. Any director, president, secretary, or treasurer of a corporation who permits, aids, or abets such corporation to engage or continue in business without registering in conformity with this chapter, shall likewise be guilty of a misdemeanor. The penalty for the misdemeanors 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."

SECTION 18. Section 237D-6, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) On or before the last day of each calendar month, every operator taxable, or plan manager liable under this chapter during the preceding calendar month 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 required by section 237D-6.5. 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."

SECTION 19. Section 237D-6.5, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) For the fiscal year beginning July 1, 1994, and for each fiscal year thereafter, until December 31, 1998, revenues collected under this chapter shall be distributed as follows:

- (1) One-sixth of the revenues collected under this chapter shall be deposited into the convention center capital special fund established under section 206X-10.5;
- (2) Of the remaining revenues, five per cent shall be retained by the State; and
- (3) Of the remainder, Kauai county shall receive 14.5 per cent; Hawaii county shall receive 18.6 per cent; city and county of Honolulu shall receive 44.1 per cent; and Maui county shall receive 22.8 per cent.

Beginning on January 1, 1999, revenues collected under this chapter shall be distributed as follows:

- (1) 17.3 per cent of the revenues collected under this chapter shall be deposited into the convention center capital special fund established under section 206X-10.5;
- (2) 37.9 per cent of the revenues collected under this chapter shall be deposited into the tourism special fund established under section
-11;
- (3) 44.8 per cent of the revenues collected under this chapter shall be transferred as follows: Kauai county shall receive 14.5 per cent; Hawaii

county shall receive 18.6 per cent, city and county of Honolulu shall receive 44.1 per cent, and Maui county shall receive 22.8 per cent.

All transient accommodations taxes shall be paid into the state treasury each month within ten days after collection, and shall be kept by the state director of finance in special accounts for distribution as provided in this subsection.”

SECTION 20. Section 237D-7, Hawaii Revised Statutes, is amended to read as follows:

“§237D-7 Annual return. On or before the twentieth day of the fourth month following the close of the taxable year, every person who has become liable for the payment of the taxes under this chapter during the preceding tax year shall file a return summarizing that person’s liability under this chapter for the year, in such form as the director prescribes. The operator or plan manager shall transmit with the return a remittance covering the residue of the tax chargeable to the operator[,] or plan manager, if any, to the office of the appropriate state district tax assessor designated in section 237D-8. The return shall be signed by the taxpayer, 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 adventure, joint stock company, corporation, trust estate, decedent’s estate, trust, or other entity, any individual delegated by the entity shall sign the same on behalf of the taxpayer. If for any reason it is not practicable for the individual taxpayer 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 taxpayer and grant such reasonable additional time within which to make the return as the department may deem advisable.

Section 232-2 applies to the annual return, but not to a monthly return.”

SECTION 21. Section 237D-7.5, Hawaii Revised Statutes, is amended by amending the title and subsection (a) to read as follows:

“[[§237D-7.5]] Federal assessments; adjustments of gross rental [or], gross rental proceeds[;], or fair market rental value; report to the department. (a) Any person required to report to the department by section 235-101(b), also shall report to the department any change, correction, adjustment, or recomputation of gross rental [or], gross rental proceeds, or fair market rental value subject to the tax imposed by this chapter. This report shall be made in the form of a return amending the person’s gross rental [or], gross rental proceeds, or fair market rental value as previously reported on a return filed with the department for the taxable year. If no return has been filed with the department for the taxable year, a return shall be filed and shall take into account any change, correction, adjustment, or recomputation of gross rental [or], gross rental proceeds[.], or fair market rental value.”

SECTION 22. Section 237D-8, Hawaii Revised Statutes, is amended to read as follows:

“§237D-8 Filing of returns. All monthly, quarterly, semiannual, and annual returns shall be transmitted to the office of the taxation district in which the [transient accommodation upon which the tax is imposed is situated] taxes arose or to the office of the first taxation district in Honolulu.”

SECTION 23. Section 237D-8.6, Hawaii Revised Statutes, is amended to read as follows:

“**[§237D-8.6] Reconciliation; form requirement.** (a) On or before the twentieth day of the fourth month following the close of the taxable year, every person who has become liable for the payment of taxes under this chapter during the preceding taxable year and who has furnished transient accommodations which were exempt, for any portion of the taxable year, from the tax imposed under this chapter, shall file a reconciliation for transient accommodations as prescribed by the director indicating the amount of gross income that was subject to such tax and the amount that was subject to the general excise tax imposed under chapter 237.

(b) On or before the twentieth day of the fourth month following the close of the taxable year, every plan manager who has become liable for the payment of taxes under this chapter during the preceding taxable year shall file a reconciliation indicating the period of time that the owner of a resort time share vacation unit was subject to the general excise tax or the tax under section 237D-2(a)."

SECTION 24. Section 237D-9, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) If any operator or plan manager fails to make a return as required by this chapter, the director shall make an estimate of the tax liability of the operator or plan manager 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[, or plan manager], give notice of the assessment to the operator[, or plan manager], and make demand upon the operator or plan manager for payment. The assessment shall be presumed to be correct until and unless, upon an appeal duly taken as provided in section 237D-11, the contrary shall be clearly proved by the person assessed, and the burden of proof upon such appeal shall be upon the person assessed to disprove the correctness of assessment.”

SECTION 25. Section 237D-10, Hawaii Revised Statutes, is amended to read as follows:

“**§237D-10 Overpayment; refunds.** Upon application by an operator[, or plan manager], 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 or plan manager under this chapter. The director shall refund the balance to the operator or plan manager or the operator’s or plan manager’s successors, administrators, executors, or assigns in accordance with section 231-23. No credit or refund shall be allowed for any tax imposed by this chapter, unless a claim for such 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.
- (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.

Paragraphs (1) and (2) are mutually exclusive. The preceding limitation shall not apply to a credit or refund pursuant to an appeal, provided for in section 237D-11.

As to all tax payments for which a refund or credit is not authorized by this section (including, without prejudice to the generality of the foregoing, cases of unconstitutionality), the remedies provided by appeal or by section 40-35 are exclusive.”

SECTION 26. Section 237D-12, Hawaii Revised Statutes, is amended to read as follows:

“§237D-12 Records to be kept; examination. Every operator and plan manager shall keep in the English language within the State, and preserve for a period of three years, suitable records of gross rental [or], gross rental proceeds, or fair market rental value relating to [transient accommodations] the business taxed under this chapter, and such other books, records of account, and invoices as may be required by the department [of taxation], and all such books, records, and invoices shall be open for examination at any time by the department or the Multistate Tax Commission pursuant to chapter 255, or the authorized representative thereof.”

SECTION 27. Section 237D-14, Hawaii Revised Statutes, is amended to read as follows:

“§237D-14 Collection by suit; injunction. The department [of taxation] may collect taxes due and unpaid under this chapter, together with all accrued penalties, by action in assumpsit or other appropriate proceedings in the circuit court of the judicial circuit in which the taxes arose. After delinquency shall have continued for sixty days, or if any person lawfully required so to do under this chapter shall fail to apply for and secure a certificate as provided by this chapter for a period of sixty days after the first date when the person was required under this chapter to secure the certificate, the department may proceed in the circuit court of the judicial circuit in which the transient accommodations or in which occupants of resort time share vacation units are taxed, to obtain an injunction restraining the further furnishing of transient accommodations or the operation of the resort time share vacation plan until full payment shall have been made of all taxes and penalties and interest due under this chapter, or until such certificate is secured, or both, as the circumstances of the case may require.”

SECTION 28. Section 237D-15, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) In order to determine if the tax under this chapter is to be levied, assessed, and collected upon transient accommodations the following presumptions shall control.

- (1) If a person lets a transient accommodation for less than one hundred eighty consecutive days, it shall be presumed that the accommodation furnished is for a transient purpose.
- (2) If a person lets a transient accommodation for one hundred eighty days or more, there is no presumption one way or another as to the purpose for which the accommodation is furnished.

The operator shall have the burden of proving to the department whether an accommodation is not being furnished for a transient purpose. If the department is satisfied that an accommodation is not furnished for a transient purpose, then the department shall not levy any tax under this chapter. The department shall adopt rules to implement this section.”

SECTION 29. Section 514E-3, Hawaii Revised Statutes, is amended to read as follows:

“§514E-3 Taxation. (a) The plan manager, if any, shall collect and pay real property and transient accommodations taxes due on the time share units or occupants under the plan manager’s authority as the agent of the owners of the individual units or temporal divisions thereof. The liability of the individual owners of the units, or temporal division thereof, for real property taxes, shall be primary to all parties except the plan manager. The right to contest or appeal any real property or transient accommodations tax assessment shall apply to the plan manager and any person having an interest in a time share unit.

(b) The acquisition agent and sales agent shall maintain records pertaining to the general excise tax of any independent contractors employed by them, their addresses and commissions paid during each calendar year. The plan manager shall maintain records of the general excise [tax] and transient accommodations taxes due and owing with respect to any occupants or time share units under the plan manager’s management. The records for any year shall be retained for at least two years and be available for inspection by the director or the director of taxation.”

SECTION 30. This Part, upon its approval, shall take effect on January 1, 1999.

PART III.

SECTION 31. Statutory material to be repealed is bracketed. New statutory material is underscored.²

SECTION 32. This Act, subject to the effective dates in Parts I and II of this Act, shall take effect upon its approval.

(Approved July 9, 1998.)

Notes

1. So in original.
2. Edited pursuant to HRS §23G-16.5.