

JAN 26 2009

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# A BILL FOR AN ACT

RELATING TO TAXATION.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The largest source of state revenues is from  
2 the payment of various taxes by residents and nonresidents.  
3 During these tough economic times it is especially important for  
4 the State to protect and improve upon the collection of its  
5 various taxes in order to provide widespread financial support  
6 to social programs, infrastructure projects, and public  
7 education. One area of tax collections that the State can  
8 improve upon is the withholding tax requirement under the Hawaii  
9 Real Property Tax Act.

10           According to sales data acquired from the Honolulu Board of  
11 Realtors, it is estimated that the sales revenue generated from  
12 the transfer of single family homes, apartments, and  
13 condominiums across the State in 2008 was over \$9,800,000,000.  
14 If two per cent of those sellers were nonresidents that were  
15 subject to the Hawaii Real Property Tax Act withholding  
16 requirements, then the State would have received over \$9,800,000  
17 in Hawaii Real Property Tax Act withholdings. If it is further



1 assumed that ten per cent of the sales transactions that  
2 involved those nonresident sellers failed to comply with the  
3 Hawaii Real Property Tax Act withholding requirements in section  
4 235-68, Hawaii Revised Statutes, then under that assumption the  
5 State had a shortfall in Hawaii Real Property Tax Act  
6 withholding tax revenues of over \$980,000 for 2008. The  
7 legislature further finds that this analysis is based upon the  
8 2008 calendar year, which experienced nearly a thirty per cent  
9 decline in the sales of single family homes, apartments, and  
10 condominiums from the prior year, according to the Honolulu  
11 Board of Realtors. Thus, a potential shortfall of Hawaii Real  
12 Property Tax Act withholding tax revenues by the State in any  
13 given year could easily exceed \$1,300,000, this amount becomes  
14 far greater if there is a larger number of nonresident sellers  
15 of real property in Hawaii or a larger percentage of those  
16 nonresident seller transactions who do not comply with the  
17 Hawaii Real Property Tax Act withholding requirements.

18 The purpose of this Act is to strengthen the Hawaii Real  
19 Property Tax Act withholding requirements by requiring a tax  
20 clearance certificate to be furnished to the bureau of  
21 conveyances as a condition to any recording of the transfer in  
22 title of the real property. This Act will help to ensure that



1 all Hawaii Real Property Tax Act withholding tax revenues are  
2 captured by the State and will also improve on capturing  
3 additional income tax revenues from the sale of real property in  
4 Hawaii by nonresidents who may otherwise not file a State  
5 individual income tax return.

6 SECTION 2. Section 235-68, Hawaii Revised Statutes, is  
7 amended to read as follows:

8 **"§235-68 Withholding of tax on the disposition of real**  
9 **property by nonresident persons.** (a) As used in this section:

10 "Nonresident person" means every person other than a  
11 resident person.

12 "Property" or "real property" has the meaning as the same  
13 term is defined in section 231-1.

14 "Resident person" means any:

15 (1) Individual included in the definition of resident in  
16 section 235-1;

17 (2) Corporation incorporated or granted a certificate of  
18 authority under chapter 414, 414D, or 415A;

19 (3) Partnership formed or registered under chapter 425 or  
20 425E;

21 (4) Foreign partnership qualified to transact business  
22 pursuant to chapter 425 or 425E;



1 (5) Limited liability company formed under chapter 428 or  
2 any foreign limited liability company registered under  
3 chapter 428; provided that if a single member limited  
4 liability company has not elected to be taxed as a  
5 corporation, the single member limited liability  
6 company shall be disregarded for purposes of this  
7 section and this section shall be applied as if the  
8 sole member is the transferor;

9 (6) Limited liability partnership formed under chapter  
10 425;

11 (7) Foreign limited liability partnership qualified to  
12 transact business under chapter 425;

13 (8) Trust included in the definition of resident trust in  
14 section 235-1; or

15 (9) Estate included in the definition of resident estate  
16 in section 235-1.

17 "Transferee" means any person, the State and the counties  
18 and their respective subdivisions, agencies, authorities, and  
19 boards, acquiring real property which is located in Hawaii.

20 "Transferor" means any person disposing real property that  
21 is located in Hawaii.



1           (b) Unless otherwise provided in this section, every  
2 transferee shall deduct and withhold a tax equal to five per  
3 cent of the amount realized on the disposition of Hawaii real  
4 property. Every person required to withhold a tax under this  
5 section is made liable for the tax and is relieved of liability  
6 for or upon the claim or demand of any other person for the  
7 amount of any payments to the department made in accordance with  
8 this section.

9           (c) Every transferee required by this section to withhold  
10 tax under subsection (b) shall make a return of the amount  
11 withheld to the department of taxation not more than twenty days  
12 following the transfer date.

13           (d) No person shall be required to deduct and withhold any  
14 amount under subsection (b), if the transferor furnishes to the  
15 transferee an affidavit by the transferor stating the  
16 transferor's taxpayer identification number and:

- 17           (1) The transferor is a resident person; or  
18           (2) That by reason of a nonrecognition provision of the  
19 Internal Revenue Code as operative under this chapter  
20 or the provisions of any United States treaty, the  
21 transferor is not required to recognize any gain or  
22 loss with respect to the transfer;



- 1           (3) A brief description of the transfer; and
- 2           (4) A brief summary of the law and facts supporting the
- 3                 claim that recognition of gain or loss is not required
- 4                 with respect to the transfer.

5 This subsection shall not apply if the transferee has actual  
6 knowledge that the affidavit referred to in this subsection is  
7 false.

8           (e) An application for a withholding certificate may be  
9 submitted by the transferor to the department setting forth:

- 10           (1) The name, address, and taxpayer identification number,
- 11                 if any, of the parties to the transaction and the
- 12                 location and general description of the real property
- 13                 to be transferred; and
- 14           (2) A calculation and written justification showing that
- 15                 the transferor will not realize any gain with respect
- 16                 to the transfer; or
- 17           (3) A calculation and written justification showing that
- 18                 there will be insufficient proceeds to pay the
- 19                 withholding required under subsection (b) after
- 20                 payment of all costs, including selling expenses and
- 21                 the amount of any mortgage or lien secured by the
- 22                 property.



1           Upon receipt of the application, the department shall  
2 determine whether the transferor has realized or will realize  
3 any gain with respect to the transfer, or whether there will be  
4 insufficient proceeds to pay the withholding. If the department  
5 is satisfied that no gain will be realized or that there will be  
6 insufficient proceeds to pay the withholding, it shall issue a  
7 withholding certificate stating the amount to be withheld, if  
8 any.

9           The submission of an application for a withholding  
10 certificate to the department does not relieve the transferee of  
11 its obligation to withhold or to make a return of the tax under  
12 subsections (b) and (c).

13           (f) No person shall be required to deduct and withhold any  
14 amount under subsection (b) if one or more individual  
15 transferors furnishes to the transferee an affidavit by the  
16 transferor stating the transferor's taxpayer identification  
17 number, that for the year preceding the date of the transfer the  
18 property has been used by the transferor as a principal  
19 residence, and that the amount realized for the property does  
20 not exceed \$300,000.

21           (g) The department may enter into written agreements with  
22 persons who engage in more than one real property transaction in



1 a calendar year or other persons to whom meeting the withholding  
2 requirements of this section are not practicable. The written  
3 agreements may allow the use of a withholding method other than  
4 that prescribed by this section or may waive the withholding  
5 requirement under this section.

6 (h) Every nonresident person that is a transferee under  
7 this section shall submit to the bureau of conveyances a  
8 certified tax clearance certificate issued from the department  
9 stating that the transferee properly made a return of the amount  
10 withheld to the department not more than twenty days following  
11 the transfer date. Submission of the tax clearance certificate  
12 shall be made a condition to recording of any transfer of title  
13 of real property located in Hawaii by a nonresident person that  
14 is a transferee under this section.

15 The director of taxation shall prepare forms as may be  
16 necessary to satisfy the requirements of this subsection. The  
17 director may also require the nonresident person that is a  
18 transferee under this section to furnish information to  
19 ascertain their compliance with the requirements of this  
20 subsection and may adopt rules necessary to effectuate the  
21 purposes of this subsection pursuant to chapter 91."

22 SECTION 3. New statutory material is underscored.



# S.B. NO. 1106

1 SECTION 4. This Act shall take effect on January 1, 2010.

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INTRODUCED BY: Russell Kohb

*[Handwritten signatures and scribbles]*  
A series of handwritten marks, including a signature that appears to be "John" and another that appears to be "Norman Sakom", followed by several horizontal lines and a vertical line crossing them.

*[Handwritten signature]*  
A large, stylized handwritten signature that appears to be "B.C.C. J.L.".

**Report Title:**

HARPTA Withholding Tax; Tax Clearance Certificate

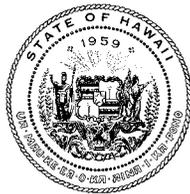
**Description:**

Requires a buyer of real property located in Hawaii to furnish to the bureau of conveyances a tax clearance certificate issued from the department of taxation that certifies that the HARPTA withholding requirements were satisfied as a condition to recording a change in title on the real property.



LINDA LINGLE  
GOVERNOR

JAMES R. AIONA, JR.  
LT. GOVERNOR



KURT KAWAFUCHI  
DIRECTOR OF TAXATION

SANDRA L. YAHIRO  
DEPUTY DIRECTOR

STATE OF HAWAII  
DEPARTMENT OF TAXATION  
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PHONE NO: (808) 587-1510  
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**SENATE COMMITTEE ON COMMERCE & CONSUMER PROTECTION  
TESTIMONY REGARDING SB 1106  
RELATING TO TAXATION**

**TESTIFIER: KURT KAWAFUCHI, DIRECTOR OF TAXATION (OR DESIGNEE)**

**DATE: FEBRUARY 11, 2009**

**TIME: 8:30AM**

**ROOM: 229**

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This measure requires a buyer of real property located in Hawaii to obtain a tax clearance from the Department of Taxation (Department) confirming that the taxpayer's Hawaii income tax withholding on real property (HARPTA) obligations have been satisfied.

The Department **supports the intent** of this legislation and **offers comments**.

**STRONG SUPPORT FOR ENSURING NONRESIDENTS PAY THEIR FAIR SHARE OF TAX**—That Department strongly supports legislation that ensures all taxpayers, including nonresidents with Hawaii tax obligations, pay their fair share of taxes. With nonresidents specifically, tax compliance can be poor because of unfamiliarity with laws and obligations. In order to ensure nonresidents are aware of their income tax obligations from selling Hawaii property, Hawaii's HARPTA law requires a withholding tax on the buyer where the seller is a nonresident. This withholding tax is patterned after federal law and is an effective way of ensuring that nonresidents are compliant.

**SUPPORT FOR THE CONCEPT OF TAX CLEARANCES**—Though very resource intensive, the Department supports the concept of tax clearances because they serve as a condition precedent to obtaining whatever action the taxpayer desires, i.e., business permits or the recording of a deed in the case of this bill.

**AMEND TO REQUIRE A TAX CLEARANCE OF SELLER**—The Department notices that this measure appears to preclude the recording of a deed for bureau of conveyances purposes by requiring the buyer to ensure HARPTA obligations are carried out. The Department suggests that the bill be modified to require the seller obtain a tax clearance prior to recording. Though HARPTA operates as a buyer's obligation, the tax clearance envisioned by this measure would operate better as a means of ensuring tax compliance if the seller were also required to obtain a tax clearance for its Hawaii tax obligations. The reason why the seller tax clearance would be more

fruitful is because most nonresident sellers have rental property in Hawaii, which would have yielded taxable income and transient accommodations taxes, as well as general excise taxes in Hawaii. The simple act of renting property in Hawaii subjects a person to three taxes at a minimum. Rather than a simple clearance for ensuring withholding requirements by the buyer, this measure could have a far greater impact if it were to require a seller to obtain a clearance from the Department ensuring that all income, TAT, and GET were paid.

The Department does not object to also having a buyer provide a tax clearance that the HARPTA withholding was obtained.

The Department supports having the tax clearances as a condition to recording a deed to ensure that nonresidents are compliant with their taxes.

**TAX CLEARANCE REQUIREMENT SHOULD BE CLARIFIED**—Currently, there are other tax clearances required by law. However, the clearance requirement is not clear and is interpreted as "all taxes." Because all taxes must be cleared, obtaining a tax clearance is overly burdensome on the Department's resources. Clearance could be obtain much quicker and easier for both taxpayers and the Department if the clearances were only for income tax, TAT, and GET. These are the main taxes, rather than tobacco tax, rental motor vehicle tax, etc., which must be cleared under current practice.

**RESOURCES**—Tax clearances are also very resource intensive for the reasons stated above. The Department would be greatly burdened by this legislation without additional resources and an amendment clarifying that the tax clearance is a limited clearance of the relevant taxes.

**REVENUE IMPACT**—As currently written, any revenue gain will be less than the \$1.3 million annual shortfall in withholding tax revenues estimated by this bill. The gain will be offset by the increased costs incurred by the department of taxation which does not charge for tax clearance certificates.

February 10, 2009

**The Honorable Rosalyn H. Baker, Chair**  
Senate Committee on Commerce and Consumer Protection  
State Capitol, Room 229  
Honolulu, Hawaii 96813

**RE: S.B. 1106 Relating to Taxation**

**HEARING DATE:** Thursday, February 12, 2009 at 8:30 am

Aloha Chair Baker and members of the Committee on Commerce and Consumer Protection.

I am Craig Hirai, a member of the Subcommittee on Taxation and Finance of the Government Affairs Committee of the Hawai'i Association of REALTORS® ("HAR"), here to testify on behalf of the HAR and its 9,600 members in Hawai'i. **S.B. 1106, Relating to Taxation**, requires a nonresident buyer of real property located in Hawaii to furnish to the Bureau of Conveyances a tax clearance certificate issued from the Department of Taxation that certifies that the HARPTA withholding requirements were satisfied as a condition to recording a change in title on the acquired real property.

HAR **strongly opposes** S.B. 1106 unless the following logistical problem can be resolved by the title and escrow companies, the Bureau of Conveyances, and the Department of Taxation (DoTax).

Proposed HRS §235-68(h) states in part that:

. . . Every nonresident person that is a transferee under this section shall submit to the bureau of conveyances a certified tax clearance certificate issued from the department stating that the transferee properly made a return of the amount withheld to the department not more than twenty days following the transfer date. Submission of the tax clearance certificate shall be made a condition to recording of any transfer of title of real property located in Hawaii by a nonresident person that is a transferee under this section.

The HARPTA withholding payment is generally 5% of the purchase price. Typically, a buyer will not want to pay this amount unless the transaction has closed and the buyer has received insurable title. Under the proposed measure, this presents a problem because the payment of the HARPTA withholding to DoTax, receipt of the tax clearance from DoTax, and the recording of the transfer of title at the Bureau of Conveyances will generally need to take place simultaneously. If this logistical problem can be solved, HAR would not oppose this bill.



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HAR looks forward to working with our state lawmakers in building better communities by supporting quality growth, seeking sustainable economies and housing opportunities, embracing the cultural and environmental qualities we cherish, and protecting the rights of property owners.

Mahalo for the opportunity to testify.



# Title Guaranty of Hawaii, Inc.

236 QUEEN STREET, HONOLULU, HI 96813 • P.O. BOX 3084, HONOLULU, HI 96802

LEGAL DEPARTMENT Phone (808) 533-5942 Fax (808) 521-0287 email: [hirano@tghawaii.com](mailto:hirano@tghawaii.com)

February 11, 2009

Via Email: [CPNTestimony@Capitol.hawaii.gov](mailto:CPNTestimony@Capitol.hawaii.gov)

The Honorable Roslyn H. Baker, Chair  
The Honorable David Y. Ige, Vice Chair  
Members of The Senate Committee On Commerce  
And Consumer Protection  
415 South Beretania Street, Room 229  
Honolulu, Hawaii 96813

Re: Senate Bill 1106 Relating to Taxation  
Hearing Date: Thursday, February 12, 2009  
Hearing Time: 8:30 a.m.

Dear Senators Baker and Ige, and Members of the Senate Committee on Commerce And Consumer Protection:

I am writing on behalf of Title Guaranty of Hawaii, Inc. and Title Guaranty Escrow Services, Inc. We respectfully oppose the adoption of Senate Bill 1106 Relating to Taxation. While we support the philosophy of making sure that valid taxes are collected, the mechanism suggested by this Bill is not workable.

The first clause of the proposed new statutory language requires a non-resident transferee to submit a tax clearance certificate "stating that the transferee properly made a return of the amount withheld [ . . . ] not more than twenty days following the transfer date." A non-resident transferee, however, is not always required to withhold tax pursuant to Section 235-68, Hawaii Revised Statutes (HARPTA). That withholding only applies when the **transferor (seller)** is a non-resident and otherwise does not qualify for an exemption from the withholding requirement. If the non-resident transferee is acquiring Hawaii property from a resident, HARPTA does not apply. Requiring the non-resident **transferee** to submit a tax clearance certificate therefore does not further the intention of the Bill.

In addition, the Bill requires the tax clearance certificate to be submitted to the bureau of conveyances, and that its submission "shall be made a condition to recording of any transfer of title of real property located in Hawaii by a nonresident person that is a transferee under this section." The bureau of conveyances, however, is not well-situated to maintain an index of all of the tax clearance certificates. The non-resident transferee may not decide to sell his or her interest in land for years or even decades after having submitted their tax clearance certificate. That non-resident may become a resident during that period and HARPTA may not even apply. Moreover, when that subsequent sale

occurs there is no mechanism for the bureau to verify that the non-resident transferee complied with this Bill at the time that the transferee acquired his or her interest in the land.

While we are sure the Bill is well-intentioned, its passage will create confusion, delay and additional expense for the bureau of conveyances and for persons buying and selling real property in this State without appreciably aiding the collection of the tax imposed by HARPTA. We respectfully urge the Committee to decline to pass this Bill.

Thank you very much for your consideration and attention to this matter.

Sincerely,



Lorrin Hirano  
Legal Counsel