
A BILL FOR AN ACT

RELATING TO TAXATION.

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

1 SECTION 1. Section 238-6, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "**§238-6 Collection of tax by seller; penalty.** (a) For
4 purposes of the taxes due under sections 238-2 and 238-2.3,
5 every seller ~~having~~:

6 (1) Having in the State, regularly or intermittently, any
7 property, tangible or intangible, any place of
8 business, or any representation as hereinabove
9 defined, [~~and~~] irrespective of the seller's having or
10 not having qualified to do business in the State[+];

11 or

12 (2) Who is otherwise engaged in business in the State as
13 defined in subsection (h);

14 shall, if the seller under paragraph (1) makes sales of
15 property, services, or contracting for use in the State[+],
16 whether or not the sales are made in the State[+], or if the
17 seller under paragraph (2) makes sales of tangible personal
18 property for use in the State as described in section 238-2,

1 collect from the purchaser the taxes imposed by sections 238-2
2 and 238-2.3, on the use of the property, services, or
3 contracting, as applicable, so sold by the seller, if the seller
4 is not subject to the use tax under this chapter on the
5 importation of the property into the State. The collection
6 shall be made within twenty days after the accrual of the tax or
7 within [~~such other~~] a period [~~as shall be~~] fixed by the director
8 of taxation upon the application of the seller[~~, and the~~]. The
9 seller shall give to the purchaser a receipt therefor in the
10 manner and form prescribed by the director; provided that this
11 subsection shall not apply to vehicles registered under section
12 286-50.

13 (b) The director, in the director's discretion, upon
14 application [~~therefor~~] and under terms and conditions prescribed
15 by the director, may relieve any seller of the duty of
16 collecting and paying over the tax imposed by subsection (a)
17 [~~above~~], if the director is satisfied that the tax can be
18 effectively collected by other means. Exemption from the duty
19 of collecting the tax may be canceled at any time [~~when~~] if the
20 director finds that the tax cannot be effectively collected by
21 other means. The director likewise may terminate the duty and
22 authority of any seller to collect and pay over the tax imposed

1 by subsection (a) [~~above~~] if the director finds, [~~as to such~~
2 ~~seller,~~] on a case-by-case basis, that the tax cannot be
3 effectively collected by [~~such~~] other means.

4 (c) The director, in the director's discretion, upon
5 application [~~therefor~~] and under terms and conditions prescribed
6 by the director, may authorize the collection of the tax imposed
7 by this chapter by a seller not otherwise required to collect
8 the tax. The seller, when so authorized, shall have the duty of
9 collecting and paying over the tax in the same manner and
10 subject to the same requirements as set out in subsection (a).
11 The authority may be canceled at any time [~~when,~~] if, in the
12 judgment of the director, the tax can more effectively be
13 collected by other means.

14 (d) In case any seller required or authorized to collect
15 the tax under this chapter fails to collect [~~the same,~~] it or,
16 having collected the tax, fails to pay it over [~~the same~~] as
17 provided by this chapter, the seller shall nevertheless be
18 personally liable to the State for the amount of the tax, but it
19 shall be a defense to [~~such~~] this tax liability that the
20 indebtedness for the price is a worthless account actually
21 charged off for income tax purposes, if and to the extent that
22 the collections of the price do not equal the tax.

1 (e) Every seller required or authorized to collect the tax
2 shall make returns and payments of the tax at the same time and
3 in the same manner as is provided with respect to taxpayer by
4 section 238-5. All provisions of this chapter with respect to
5 returns, reports, records, payments, penalties, and interest,
6 appeals, investigations, and audits, assessments, tax
7 collections procedure, criminal offenses, and the general
8 administrative powers and duties of the director, shall apply to
9 [~~such~~] these sellers the same as to taxpayers.

10 (f) The tax collected pursuant to this section shall be
11 held in trust for the State and for payment to the proper
12 collecting officer in the manner and at the time required by
13 this chapter. Any person collecting [~~such~~] the tax who
14 appropriates or converts [~~the same~~] it to the person's own use
15 or to any use other than the payment of the tax as herein
16 provided, and who fails to pay over the amount of tax so
17 collected at the time required by this chapter, shall be deemed
18 guilty of an embezzlement of property of the State and shall be
19 fined more than five times the amount of money [~~so~~] embezzled or
20 imprisoned at hard labor not more than ten years, and any
21 failure by the person [~~so~~] collecting the tax to pay [~~the same~~]
22 collected taxes over within the time provided by this chapter[7]

1 after demand [~~therefor,~~] shall be taken and held to be prima
2 facie evidence of the embezzlement.

3 (g) This section shall not apply to a seller engaged in
4 business in the State as defined in paragraph (3) of that
5 definition established under subsection (h) if the seller can
6 demonstrate that:

- 7 (1) The person in the State with whom the seller has an
8 agreement did not engage in referrals in the State on
9 behalf of the seller that would satisfy the
10 requirements of the commerce clause of the United
11 States Constitution; or
- 12 (2) The person in the State with whom the seller has an
13 agreement did not engage in any activity within the
14 State that was significantly associated with the
15 seller's ability to establish or maintain the seller's
16 market in the State during the preceding twelve
17 months. For the purpose of this paragraph, the seller
18 may demonstrate this by submitting sworn written
19 statements from all persons in the State with whom the
20 seller has an agreement stating that the person did
21 not engage in any solicitation in the State on behalf
22 of the seller during the preceding twelve-month

1 period; provided that these statements were provided
2 and obtained in good faith.

3 (h) For the purposes of this section:

4 "Commonly controlled group" means:

5 (1) A parent corporation and any one or more corporations
6 or chains of corporations, connected through stock
7 ownership or constructive ownership with the parent
8 corporation if:

9 (A) The parent corporation owns stock possessing more
10 than fifty per cent of the voting power of at
11 least one corporation; and

12 (B) If applicable, stock cumulatively representing
13 more than fifty per cent of the voting power of
14 each of the corporations, except the parent
15 corporation, is owned by the parent corporation,
16 one or more corporations described in
17 subparagraph (A), or one or more other
18 corporations that satisfy the conditions of this
19 subparagraph;

20 (2) Any two or more corporations, if stock representing
21 more than fifty per cent of the voting power of the

1 corporations is owned, or constructively owned, by the
2 same person;

3 (3) Any two or more corporations that constitute stapled
4 entities, meaning:

5 (A) Any group of two or more corporations if more
6 than fifty per cent of the ownership or
7 beneficial ownership of the stock possessing
8 voting power in each corporation consists of
9 stapled interests; or

10 (B) Two or more interests if, by reason of form of
11 ownership restrictions on transfer or other terms
12 or conditions, in connection with the transfer of
13 one of the interests the other interest or
14 interests are also transferred or required to be
15 transferred; or

16 (4) Any two or more corporations, all of whose stock
17 representing more than fifty per cent of the voting
18 power of the corporations is cumulatively owned by, or
19 for the benefit of, members of the same family
20 consisting of an individual, the individual's spouse,
21 parents, siblings, grandparents, children, and
22 grandchildren; and their respective spouses.

1 "Engaged in business in the State" is presumed to include a
2 seller, including an entity affiliated with a seller within the
3 meaning of section 1504 of the Internal Revenue Code, that has a
4 substantial nexus with the State for purposes of the commerce
5 clause of the United States Constitution and upon whom federal
6 law permits the State to impose the taxes under this chapter,
7 and includes:

8 (1) Any seller that is a member of a commonly controlled
9 group that includes an entity that has a substantial
10 nexus with the State and:

11 (A) Sells a similar line of products as the seller
12 and does so under the same or similar business
13 name; or

14 (B) Uses trademarks, service marks, or trade names in
15 the State that are the same or substantially
16 similar to those used by the seller;

17 (2) Any seller entering into an agreement or agreements
18 under which any person, other than a common carrier
19 acting in its capacity, that has substantial nexus in
20 this state and that:

1 (A) Delivers, installs, assembles, or performs
2 maintenance services for the seller's customers
3 within this state; or

4 (B) Facilitates the seller's delivery of property to
5 customers in the state by allowing the seller's
6 customers to pick up property sold by the seller
7 at an office, distribution facility, warehouse,
8 storage place, store front, or similar place of
9 buisness maintained by the in-state person;

10 (3) Any seller that is a member of a commonly controlled
11 group that includes another member that, pursuant to
12 an agreement with or in cooperation with the seller,
13 performs services in the State in connection with
14 tangible personal property to be sold by the seller,
15 including the design and development of tangible
16 personal property sold by the seller, or the
17 solicitation of sales of tangible personal property on
18 behalf of the seller; and

19 (4) Any seller entering into an agreement or agreements
20 under which a person or persons in the State, for a
21 commission or other consideration, directly or
22 indirectly refer potential purchasers of tangible

1 personal property to the seller, whether by an
2 internet-based link or an internet web site, or
3 otherwise; provided that:

4 (A) The total cumulative sales price from all of the
5 seller's sales, within the preceding twelve
6 months, of tangible personal property to
7 purchasers in the State that are referred
8 pursuant to all of those agreements with a person
9 or persons in the State, is in excess of \$10,000;
10 and

11 (B) The seller, within the preceding twelve months,
12 has total cumulative sales of tangible personal
13 property to purchasers in the State in excess of
14 \$20,000;

15 provided further that an agreement under which a
16 seller purchases advertisements from a person or
17 persons in the State, to be delivered on television,
18 radio, in print, on the Internet, or by any other
19 medium, is not an agreement for the purposes of this
20 paragraph unless the advertisement revenue paid to the
21 person or persons in the State consists of commissions
22 or other consideration that is based upon sales of

1 tangible personal property; and provided further that
2 an agreement under which a seller engages a person in
3 the State to place an advertisement on an internet web
4 site operated by that person, or operated by another
5 person in the State, is not an agreement for the
6 purposes of this paragraph unless the person entering
7 the agreement with the seller also directly or
8 indirectly solicits potential customers in the State
9 through use of flyers, newsletters, telephone calls,
10 electronic mail, blogs, microblogs, social networking
11 sites, or other means of direct or indirect
12 solicitation specifically targeted at potential
13 customers in the State."

14 SECTION 2. Prior to the convening of the 2013 regular
15 session, the director of taxation shall certify in writing to
16 the governor and the legislature whether any federal law has
17 been enacted by December 31, 2012, authorizing the states to
18 require a seller to collect taxes on sales of goods to in-state
19 purchasers without regard to the location of the seller.

20 SECTION 3. If any provision of this Act, or the
21 application thereof to any person or circumstance is held
22 invalid, the invalidity does not affect other provisions or

1 applications of the Act, which can be given effect without the
2 invalid provision or application, and to this end the provisions
3 of this Act are severable.

4 SECTION 4. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 5. This Act shall take effect on July 1, 2012;
7 provided that section 1 of this Act shall take effect on July 1,
8 2112, if the State does not, by June 30, 2013, enact a law in
9 accordance with any federal law authorizing the states to
10 require a seller to collect taxes on sales of goods to in-state
11 purchasers without regard to the location of the seller.

Report Title:

Use Tax; Internet Sales; Out-of-State Sellers; Affiliates

Description:

Unless preempted by federal law, requires the collection of use taxes by sellers of tangible personal property who enter into agreements under which a person in the State refers potential purchasers to the seller, including by an internet link or web site, or performs related services in the State on behalf of the seller. Effective July 1, 2012.

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