

JAN 26 2022

A BILL FOR AN ACT

RELATING TO TAXATION.

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

1 SECTION 1. The legislature finds that since 1964, when the
2 department of the attorney general issued Attorney General
3 Opinion No. 64-52 (November 5, 1964), operators and their
4 vendors have been treated as exempt from the general excise and
5 other taxes on income from their activities in a foreign-trade
6 zone. The exemption has been affirmed by opinions issued by the
7 department of the attorney general and guidance issued by the
8 department of taxation and department of business, economic
9 development, and tourism. The department of taxation's own
10 publications have treated the foreign-trade zone as beyond the
11 taxing power of the State. For fifty-seven years, taxpayers
12 doing business in the foreign-trade zone relied upon these legal
13 authorities to treat their foreign-trade zone income as exempt
14 from the general excise tax and other taxes.

15 The legislature also finds that in 2021, without advance
16 warning or notice, the department of taxation and department of
17 the attorney general took action to reverse their long-standing



1 position on foreign-trade zone taxation. First, in
2 January 2021, tax forms were changed so that taxpayers could no
3 longer claim the foreign-trade zone exemption for certain
4 activities, such as services, contracting, and other sales
5 within the foreign-trade zone that were exempted pursuant to
6 Attorney General Opinion No. 64-52. At the time, the department
7 of taxation had no legal authority to remove the foreign-trade
8 zone exemption as an available exemption for those activities.
9 Taxpayers were caught by surprise and left without guidance by
10 this unilateral action by the department of taxation.

11 The legislature further finds that it was not until nine
12 months later that the department of the attorney general,
13 through its issuance of Attorney General Opinion No. 2021-01
14 (September 22, 2021), reversed Attorney General Opinion
15 No. 64-52. One week later, the department of taxation made
16 public through Tax Information Release No. 2021-07
17 (September 29, 2021) its position that foreign-trade zone income
18 would be subject to taxation by the State. Furthermore, the
19 department of taxation informed taxpayers doing business in the
20 foreign-trade zone who had previously claimed the foreign-trade



1 zone exemption that they would be subject to audit and should
2 amend their tax returns retroactively going back three years.

3 The legislature finds that the foregoing actions by the
4 department of the attorney general and the department of
5 taxation:

6 (1) Resulted in hundreds of businesses being adversely
7 impacted with the threat of additional taxes,
8 penalties, and interest, without warning or time to
9 plan;

10 (2) Exhibited poor judgment in failing to consult with
11 these businesses to determine the probable impact of
12 the change in the tax rules on foreign-trade zone
13 taxation; and

14 (3) Used questionable legal analysis in reversing Attorney
15 General Opinion No. 64-52.

16 Accordingly, the purpose of this Act is to restore the
17 foreign-trade zone exemption first established under
18 Attorney General Opinion No. 64-52 by codifying the exemption as
19 part of the foreign-trade zones law.

20 SECTION 2. Section 212-8, Hawaii Revised Statutes, is
21 amended to read as follows:



1 "§212-8 Exemption from taxes. (a) Notwithstanding any
2 law to the contrary, sales of all products [~~which~~] that are
3 categorized as privileged foreign merchandise, nonprivileged
4 foreign merchandise, domestic merchandise, or zone-restricted
5 merchandise[~~7~~] and [~~which~~] that are admitted into a foreign-
6 trade zone, as more specifically set forth in the Act of
7 Congress[~~7~~] and any rules and regulations promulgated
8 thereunder, made directly to any common carrier in interstate or
9 foreign commerce, or both, whether ocean-going or air, for
10 consumption out-of-state by the crew or passengers on the
11 shipper's vessels or airplanes, or for use out-of-state by the
12 vessels or airplanes, shall be exempt from those taxes imposed
13 under chapters 237, 238, 243, 244D, and 245.

14 (b) Notwithstanding any law to the contrary, the following
15 shall be exempt from those taxes imposed under chapters 237,
16 238, 243, 244D, and 245:

17 (1) The value or purchase price, as applicable, of any
18 tangible personal property, intangible personal
19 property, services, or contracting imported into a
20 foreign-trade zone; and



1 (2) The gross income from the sale of tangible personal
2 property, from services and contracting rendered, and
3 from the sale of intangible personal property within a
4 foreign-trade zone."

5 SECTION 3. Any tax paid by a taxpayer after September 29,
6 2021, not consistent with section 212-8, Hawaii Revised
7 Statutes, as amended by section 2 of this Act, upon demand of
8 the taxpayer, shall be refunded to the taxpayer with interest
9 under applicable law; provided that the taxpayer shall be
10 entitled to a refund regardless of whether the taxes were paid
11 as a result of:

12 (1) Tax liabilities incurred by the taxpayer during the
13 current taxable year; or

14 (2) Amendments made to the taxpayer's returns for prior
15 taxable years.

16 SECTION 4. This Act shall be liberally construed in favor
17 of the taxpayer.

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

20 SECTION 6. This Act shall take effect upon its approval
21 and shall apply to all taxable years for which the statute of



1 limitations on assessment remains open, including but not
2 limited to sections 231-40.5, 237-40, 238-7, 243-14, 244D-8, and
3 245-7, Hawaii Revised Statutes.

4

INTRODUCED BY:





S.B. NO. 3193

Report Title:

Foreign-Trade Zones; Taxation; Exemption

Description:

Retroactively restores the foreign-trade zones exemption from taxation under the general excise tax law, use tax law, fuel tax law, liquor tax law, and cigarette tax and tobacco tax law.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

