

ACT 70

S.B. NO. 44

A Bill for an Act Relating to Taxation.

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

SECTION 1. Chapter 237, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§237- Exemption for contracting or services exported out of State.

(a) There shall be exempted from, and excluded from the measure of, taxes imposed by this chapter, all of the value or gross income derived from contracting (as defined under section 237-6) or services performed by a person engaged in a service business or calling in the State for a customer located outside the State where:

- (1) The contracting or services are for resale, consumption, or use outside the State; and
- (2) The value or gross income derived from the contracting or services performed would otherwise be subject to the tax imposed under this chapter on contracting or services at the highest rate.

For the purposes of this subsection, the seller or person rendering the contracting or services exported and resold, consumed, or used outside the State shall take from the customer, a certificate or an equivalent, in a form the department prescribes, certifying that the contracting or service purchased is to be otherwise resold, consumed, or used outside the State. Any customer who furnishes this certificate or an equivalent shall be obligated to pay the seller or person rendering the contracting or services, upon demand, if the contracting or service purchased is not resold or

otherwise consumed or used outside the State, the amount of the additional tax which by reason thereof is imposed upon the seller or person rendering the contracting or service.

(b) There shall be exempted from, and excluded from the measure of, taxes imposed by this chapter, all of the value or gross income derived from contracting (as defined in section 237-6) or services performed by a person engaged in a service business or calling in the State for a purchaser who resells all of the contracting or services for resale, consumption, or use outside the State pursuant to subsection (a). For the purposes of this subsection, the seller or person rendering the contracting or services for a purchaser who resells the contracting or services for resale, consumption, or use outside the State shall take from the purchaser, a certificate or an equivalent, in a form that the department prescribes, certifying that the contracting or services purchased is to be resold to a customer of the purchaser who has complied with subsection (a). Any purchaser who furnishes this certificate or an equivalent shall be obligated to pay the seller or person rendering the contracting or services, upon demand, if the contracting or services purchased is not resold in its entirety to a customer of the purchaser who has complied with subsection (a), the amount of the additional tax which by reason thereof is imposed upon the seller or the person rendering the contracting or service.

(c) For purposes of this section, "service business or calling" includes all activities engaged in for other persons for a consideration that involve the rendering of a service as distinguished from the sale of tangible personal property or the production and sale of tangible personal property. "Service business or calling" includes professional services, but does not include service rendered by an employee to the employee's employer."

SECTION 2. Chapter 238, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§238- Imposition of tax on imported services; exemptions. (a)¹ There is hereby levied an excise tax on the value of services that are performed by an unlicensed seller at a point outside the State and imported or purchased for use in this State. The rates of the tax hereby imposed and the exemptions from the tax are as follows:

- (1) If the importer or purchaser is licensed under chapter 237 and is:
 - (A) Engaged in a service business or calling in which the imported or purchased services become identifiable elements, excluding overhead, of the services rendered, and the gross income of the importer or purchaser is subject to the tax imposed under chapter 237 on services at the rate of one-half of one per cent; or
 - (B) A manufacturer importing or purchasing services that become identifiable elements, excluding overhead, of a finished or saleable product (including the container or package in which the product is contained) and the finished or saleable product is to be sold in a manner that results in a further tax on the activity of the manufacturer as a wholesaler, and not a retailer;

there shall be no tax imposed on the value of the imported or purchased services; provided that if the manufacturer is also engaged in business as a retailer as classified under chapter 237, paragraph (2) shall apply to the manufacturer, but the director of taxation shall refund to the manufacturer, in the manner provided under section 231-23(c), that amount of tax that the manufacturer, to the satisfaction of the director, shall establish to have been paid by the manufacturer to the director with

respect to services that have been used by the manufacturer for the purposes stated in this paragraph.

- (2) If the importer or purchaser is a person licensed under chapter 237 and is:
 - (A) Engaged in a service business or calling in which the imported or purchased services become identifiable elements, excluding overhead, of the services rendered, and the gross income from those services when sold by the importer or purchaser is subject to the tax imposed under chapter 237 at the highest rate; or
 - (B) A manufacturer importing or purchasing services that become identifiable elements, excluding overhead, of the finished or saleable manufactured product (including the container or package in which the product is contained) and the finished or saleable product is to be sold in a manner that results in a further tax under chapter 237 on the activity of the manufacturer as a retailer; or
 - (C) A contractor importing or purchasing services that become identifiable elements, excluding overhead, of the finished work or project required, under the contract, and where the gross proceeds derived by the contractor are subject to the tax under section 237-13(3) or 237-16 as a contractor;

the tax shall be one-half of one per cent of the value of the imported or purchased services.
- (3) In all other cases, the importer or purchaser is subject to the tax at the rate of four per cent on the value of the imported or purchased services."

SECTION 3. Section 237-21, Hawaii Revised Statutes, is amended to read as follows:

"§237-21 Apportionment. If any person, other than persons liable to the tax on manufacturers as provided by section 237-13(1), is engaged in business both within and without the State or in selling goods for delivery outside the State, and if under the Constitution or laws of the United States or section 237-29.5 [or 237-29.6] the entire gross income of such person cannot be included in the measure of this tax, there shall be apportioned to the State and included in the measure of the tax that portion of the gross income which is derived from activities within the State, to the extent that the apportionment is required by the Constitution or laws of the United States or section 237-29.5 [or 237-29.6]. In the case of a tax upon the production of property in the State the apportionment shall be determined as in the case of the tax on manufacturers. In other cases, if and to the extent that the apportionment cannot be accurately made by separate accounting methods, there shall be apportioned to the State and included in the measure of this tax that proportion of the total gross income, so requiring apportionment, which the cost of doing business within the State, applicable to the gross income, bears to the cost of doing business both within and without the State, applicable to the gross income."

SECTION 4. Section 238-1, Hawaii Revised Statutes, is amended as follows:

1. By adding three new definitions to be appropriately inserted and to read as follows:

““Foreign customer” means a nonresident person who:

- (1) Is not subject to chapter 237;
- (2) Has not been physically present in the State for more than thirty days in the six months prior to entering into a written exported contracting or

services agreement with a person licensed under chapter 237 engaged in contracting (as defined in section 237-6) or a service business or calling; and

- (3) Is the sole recipient of the exported contracting or services provided through a person in Hawaii engaged in contracting or a service business or calling and licensed under chapter 237.

“Overhead” means continuous or general costs occurring in the normal course of a business, including but not limited to costs for labor, rent, taxes, royalties, interest, discounts paid, insurance, lighting, heating, cooling, accounting, legal fees, equipment and facilities, telephone systems, depreciation, and amortization.

“Service business or calling” includes all activities engaged in for other persons for a consideration that involve the rendering of a service as distinguished from the sale of tangible personal property or the production and sale of tangible property. “Service business or calling” includes professional services, but does not include services rendered by an employee to the employee’s employer.”

2. By amending the definitions of “price”, “purchase” and “sale”, “purchaser”, “representation”, “seller”, and “use” to read:

“Price” means the total amount for which tangible personal property [is] or services are purchased, valued in money, whether paid in money or otherwise, and wheresoever paid[.]; provided that cash discounts allowed and taken on sales shall not be included.

“Purchase” and “sale” [mean and refer to] means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means, wheresoever consummated, of tangible personal property or services for a consideration.

“Purchaser” means any person purchasing property or services and “importer” means any person importing property[.] or services; provided that the terms “purchaser” and “importer” shall not include the State, its political subdivisions, or wholly owned agencies or instrumentalities of the State or a political subdivision; or the United States, its wholly owned agencies or instrumentalities, or any person immune from the tax imposed by this chapter under the Constitution and laws of the United States but the terms shall include national banks.

“Representation” refers to any or all of the following:

- (1) A seller being present in the State;
- (2) A seller having in the State a salesperson, commission agent, manufacturer’s representative, broker, or other person who is authorized or employed by the seller to assist the seller in selling property or services for use or consumption in the State, by procuring orders for the sales, making collections or deliveries, or otherwise; and
- (3) A seller having in the State a person upon whom process directed to the seller from the courts of the State may be served, including the director of commerce and consumer affairs and the deputy director in the cases provided in section 415-14.

“Seller” means any person engaged in the business of selling tangible personal property[.] or services, wheresoever engaged, but does not include the United States or its wholly owned agencies or instrumentalities other than national banks, the State or a political subdivision thereof, or wholly owned agencies or instrumentalities of the State or a political subdivision.

“Use” (and any nounal, verbal, [adjective,] adjectival, adverbial, and other equivalent form of the term) herein used interchangeably means any use, whether the use is of such nature as to cause the property or services to be appreciably consumed or not, or the keeping of the property or services for such use or for sale, and shall include the exercise of any right or power over tangible or intangible personal

property incident to the ownership of that property, but the term “use” shall not include:

- (1) Temporary use of property, not of a perishable or quickly consumable nature, where the property is imported into the State for temporary use (not sale) therein by the person importing the same and is not intended to be, and is not, kept permanently in the State (as for example without limiting the generality of the foregoing language:
 - (A) [in] In the case of a contractor importing permanent equipment for the performance of a construction contract, with intent to remove, and who does remove, the equipment out of the State upon completing the contract;
 - (B) [in] In the case of moving picture films imported for use in theaters in the State with intent or under contract to transport the same out of the State after completion of such use; and
 - (C) [in] In the case of a transient visitor importing an automobile or other belongings into the State to be used by the transient visitor while therein but which are to be used and are removed upon the transient visitor's departure from the State);
- (2) Use by the taxpayer of property acquired by the taxpayer solely by way of gift;
- (3) Use which is limited to the receipt of articles and the return thereof, to the person from whom acquired, immediately or within a reasonable time either after temporary trial or without trial;
- (4) Use of goods imported into the State by the owner of a vessel or vessels engaged in interstate or foreign commerce and held for and used only as ship stores for the vessels;
- (5) The use or keeping for use of household goods, personal effects, and private automobiles imported into the State for nonbusiness use by a person who:
 - (A) [acquired] Acquired them in another state, territory, district, or country[.];
 - (B) [at] At the time of the acquisition was a bona fide resident of another state, territory, district, or country[.];
 - (C) [acquired] Acquired the property for use outside the State[.]; and
 - (D) [made] Made actual and substantial use thereof outside this State; provided that as to an article acquired less than three months prior to the time of its importation into the State it shall be presumed, until and unless clearly proved to the contrary, that it was acquired for use in the State and that its use outside the State was not actual and substantial;
- (6) The leasing or renting of any aircraft or the keeping of any aircraft solely for leasing or renting to lessees or renters using the aircraft for commercial transportation of passengers and goods;
- (7) The use of oceangoing vehicles for passenger or passenger and goods transportation from one point to another within the State as a public utility as defined in chapter 269; [and]
- (8) The use of material, parts, or tools imported or purchased by a person licensed under chapter 237 which are used for aircraft service and maintenance, or the construction of an aircraft service and maintenance facility as those terms are defined in section 237-24.9[.]; and
- (9) The use of services imported for resale to a foreign customer located outside the State to the extent the services are resold, consumed, or used by that foreign customer outside the State pursuant to section 237-
 - (a).

With regard to purchases made and distributed under the authority of chapter 421, a cooperative association shall be deemed the user thereof.”

SECTION 5. Section 238-3, Hawaii Revised Statutes, is amended as follows:

1. By amending subsections (a), (b), (c), and (d) to read as follows:

“(a) The tax imposed by this chapter shall not apply to any property[,] or services, or to any use of the property[,] or services, which cannot legally be so taxed under the Constitution or laws of the United States, but only so long as, and only to the extent to which the State is without power to impose the tax.

Any provision of law to the contrary notwithstanding, exemptions or exclusions from tax under this chapter allowed on or before April 1, 1978, under the provisions of the Constitution of the United States or an act of the Congress of the United States to persons or common carriers engaged in interstate or foreign commerce, or both, whether ocean-going or air, shall continue undiminished and be available thereafter.

(b) The tax imposed by this chapter shall not apply to any use of property or services the transfer of which property or services to, or the acquisition of which by, the person so using the same, has actually been or actually is taxed under chapter 237.

(c) The tax imposed by this chapter shall be paid only once upon or in respect of the same property[,] or services; provided that nothing in this chapter contained shall be construed to exempt any property or services or the use thereof from taxation under any other law of the State.

(d) The tax imposed by this chapter shall be in addition to any other taxes imposed by any other laws of the State, except as otherwise specifically provided herein; provided that if it be finally held by any court of competent jurisdiction, that the tax imposed by this chapter may not legally be imposed in addition to any other tax or taxes imposed by any other law or laws with respect to the same property or services or the use thereof, then this chapter shall be deemed not to apply to the property or services and the use thereof under such specific circumstances, but such other laws shall be given full effect with respect to the property or services and use.”

2. By amending subsections (i) and (j) to read as follows:

“(i) Each taxpayer liable for the tax imposed by this chapter on tangible personal property or services shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by the taxpayer with respect to the same transaction and property or services to another state and any subdivision thereof, but such credit shall not exceed the amount of the use tax imposed under this chapter on account of the transaction and property[,] or services. The director of taxation may require the taxpayer to produce the necessary receipts or vouchers indicating the payment of the sales or use tax to another state or subdivision as a condition for the allowance of the credit.

(j) The tax imposed by this chapter shall not apply to any use of property or services exempted by section 237-26 or section 237-29.”

SECTION 6. Section 238-5, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) On or before the last day of each calendar month, any person who has become liable for the payment of a tax under this chapter during the preceding calendar month in respect of any property or services or the use thereof, shall file a return with the assessor of the taxation district in which the property was held or the services were received when the tax first became payable, or with the director of taxation at Honolulu, setting forth a description of the property or services and the character and quantity thereof in sufficient detail to identify the same or otherwise in such reasonable detail as the director by rule shall require, and the purchase price or

value thereof as the case may be. The return shall be accompanied by a remittance in full of the tax, computed at the rate specified in section 238-2 or 238-___ upon the price or value so returned. Any tax remaining unpaid after the last day following the end of the calendar month during which the tax first became payable shall become delinquent; provided that a receipt from a seller required or authorized to collect the tax, given to a taxpayer in accordance with section 238-6, shall be sufficient to relieve the taxpayer from further liability for the tax to which the receipt may refer, or for the return thereof.”

SECTION 7. Section 238-6, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) For purposes of the taxes due under sections 238-2(3) [and], 238-2.5, and 238-___, every seller having in the State, regularly or intermittently, any property, tangible or intangible, any place of business, or any representation as hereinabove defined, (and irrespective of the seller’s having or not having qualified to do business in the State) shall, if the seller makes sales of property or services for use in the State (whether or not the sales are made in the State), collect from the purchaser the taxes imposed by sections 238-2(3) [and], 238-2.5, and 238-___, on the use of the property or services so sold by the seller. The collection shall be made within twenty days after the accrual of the tax or within such other period as shall be fixed by the director of taxation upon the application of the seller, and the seller shall give to the purchaser a receipt therefor in the manner and form prescribed by the director; provided that this subsection shall not apply to vehicles registered under section 286-50.”

SECTION 8. Section 238-9, Hawaii Revised Statutes, is amended to read as follows:

“**§238-9 Records.** Every person who is engaged in any business in the State and who is required under this chapter to make returns, shall keep in the English language in the State and preserve for a period of three years, books of account or other records in sufficient detail to enable the director of taxation, as far as reasonably practicable, to determine whether or not any taxes imposed by this chapter are payable in respect of the property or services concerned, and if so payable, the amount thereof.”

SECTION 9. Section 237-29.6, Hawaii Revised Statutes, is repealed.

SECTION 10. Statutory material to be repealed is bracketed. New statutory material is underscored.²

SECTION 11. This Act shall take effect on January 1, 2000; provided that sections 1 and 9 of this Act shall apply to gross income and gross proceeds received after December 31, 1999, and sections 2, 4, 5, 6, 7, and 8 of this Act shall apply to all taxes accruing after December 31, 1999.

(Approved June 10, 1999.)

Notes

1. No subsection (b).
2. Edited pursuant to HRS §23G-16.5.