

ACT 114

S.B. NO. 2994

A Bill for an Act Relating to the Use Tax.

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

SECTION 1. The purpose of this Act is to clarify current use tax laws in light of *Baker & Taylor, Inc. v. Kawafuchi*, S.C. 23376 (Jan. 14, 2004) and administrative rule 18-237-13-02.01 by:

- (1) Clarifying when a seller is subject to the 0.5 per cent use tax;
- (2) Restoring the imposition of taxes on goods purchased both within and outside the State; and
- (3) Clarifying that the use tax applies to sellers who acquire goods from outside the State and import the product for sale or resale in the State.

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

1. By amending the definition of “import” to read:

““Import” (or any nounal, verbal, adverbial, adjective, or other equivalent of the term) includes:

- (1) The importation into the State of tangible property, services, or contracting owned, purchased from an unlicensed seller, or however acquired, from any other part of the United States or its possessions or from any foreign country, whether in interstate or foreign commerce, or both[.]; and

- (2) The sale and delivery of tangible personal property owned, purchased from an unlicensed seller, or however acquired, by a seller who is or should be licensed under the general excise tax law from an out-of-state location to an in-state purchaser, regardless of the free on board point or the place where title to the property transfers to the purchaser.”

2. By amending the definition of “purchaser” and “importer” to read:

““Purchaser” means any person purchasing property, services, or contracting and “importer” means any person importing property, services, or contracting[;], regardless if at the time of importation, the property, services, or contracting is owned by the importer, purchased from an unlicensed seller, or however acquired; 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.”

3. By amending the definition of “use” to read:

““Use” (and any nounal, verbal, 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, services, or contracting 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, and shall include control over tangible or intangible property by a seller who is licensed or who should be licensed under chapter 237, who directs the importation of the property into the state for sale and delivery to a purchaser in the State, liability and free on board (FOB) to the contrary notwithstanding, regardless of where title passes, 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. For example, without limiting the generality of the foregoing language:
 - (A) 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 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 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 them in another state, territory, district, or country;
 - (B) At the time of the acquisition was a bona fide resident of another state, territory, district, or country;
 - (C) Acquired the property for use outside the State; and
 - (D) 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 or the acquisition or importation of any such aircraft or aircraft engines by any lessee or renter engaged in interstate air transportation. For purposes of this paragraph, "leasing" includes all forms of lease, regardless of whether the lease is an operating lease or financing lease. The definition of "interstate air transportation" is the same as in 49 U.S.C. 40102;
- (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;
- (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;
- (9) The use of services or contracting imported for resale where the contracting or services are for resale, consumption, or use outside the State pursuant to section 237-29.53(a);
- (10) The use of contracting imported or purchased by a contractor as defined in section 237-6 who is:
- (A) Licensed under chapter 237;
 - (B) Engaged in business as a contractor; and
 - (C) Subject to the tax imposed under section 238-2.3; and
- (11) The use of property, services, or contracting imported by foreign diplomats and consular officials who are holding cards issued or authorized by the United States Department of State granting them an exemption from state taxes.

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

SECTION 3. Section 238-2, Hawaii Revised Statutes, is amended to read as follows:

“§238-2 Imposition of tax[;] on tangible personal property; exemptions.

There is hereby levied an excise tax on the use in this State of tangible personal property which is imported[; -or] by a taxpayer in this State whether owned, purchased from an unlicensed seller, or however acquired for use in this State. The tax imposed by this chapter shall accrue when the property is acquired by the importer or purchaser and becomes subject to the taxing jurisdiction of the State. The rates of the tax hereby imposed and the exemptions thereof are as follows:

- (1) If the importer or purchaser is licensed under chapter 237 and is:

- (A) A wholesaler or jobber importing or purchasing for purposes of sale or resale; or
- (B) A manufacturer importing or purchasing material or commodities which are to be incorporated by the manufacturer into a finished or saleable product (including the container or package in which the product is contained) wherein it will remain in such form as to be perceptible to the senses, and which finished or saleable product is to be sold in such manner as to result in a further tax on the activity of the manufacturer as the manufacturer or as a wholesaler, and not as a retailer,

there shall be no tax; provided that if the wholesaler, jobber, or manufacturer is also engaged in business as a retailer (so classed under chapter 237), paragraph (2) shall apply to the wholesaler, jobber, or manufacturer, but the director of taxation shall refund to the wholesaler, jobber, or manufacturer, in the manner provided under section 231-23(c) such amount of tax as the wholesaler, jobber, or manufacturer shall, to the satisfaction of the director, establish to have been paid by the wholesaler, jobber, or manufacturer to the director with respect to property which has been used by the wholesaler, jobber, or manufacturer for the purposes stated in this paragraph;

- (2) If the importer or purchaser is licensed under chapter 237 and is:
 - (A) A retailer or other person importing or purchasing for purposes of sale or resale, not exempted by paragraph (1);
 - (B) A manufacturer importing or purchasing material or commodities which are to be incorporated by the manufacturer into a finished or saleable product (including the container or package in which the product is contained) wherein it will remain in such form as to be perceptible to the senses, and which finished or saleable product is to be sold at retail in this State, in such manner as to result in a further tax on the activity of the manufacturer in selling such products at retail;
 - (C) A contractor importing or purchasing material or commodities which are to be incorporated by the contractor into the finished work or project required by the contract and which will remain in such finished work or project in such form as to be perceptible to the senses;
 - (D) A person engaged in a service business or calling as defined in section 237-7, or a person furnishing transient accommodations subject to the tax imposed by section 237D-2, in which the import or purchase of tangible personal property would have qualified as a sale at wholesale as defined in section 237-4(a)(8) had the seller of the property been subject to the tax in chapter 237; or
 - (E) A publisher of magazines or similar printed materials containing advertisements, when the publisher is under contract with the advertisers to distribute a minimum number of magazines or similar printed materials to the public or defined segment of the public, whether or not there is a charge to the persons who actually receive the magazines or similar printed materials,

the tax shall be one-half of one per cent of the purchase price of the property, if the purchase and sale are consummated in Hawaii; or, if there is no purchase price applicable thereto, or if the purchase or sale is consummated outside of Hawaii, then one-half of one per cent of the value of such property; and

(3) In all other cases, four per cent of the value of the property.

For purposes of this section, tangible personal property is property that is imported by the taxpayer for use in this State, notwithstanding the fact that title to the property, or the risk of loss to the property, passes to the purchaser of the property at a location outside this State.”

SECTION 4. Section 238-2.3, Hawaii Revised Statutes, is amended by amending the title to read as follows:

“§238-2.3 Imposition of tax on imported services[;] or contracting; exemptions.”

SECTION 5. 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)~~] 238-2 and 238-2.3, 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, services, or contracting 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)~~] 238-2 and 238-2.3, on the use of the property, services, or contracting so sold by the seller[-], if the seller is not subject to the use tax under this chapter on the importation of the property into the State. 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 6. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 7. This Act, upon its approval, shall take effect retroactive to taxable years beginning after December 31, 1998.

(Approved June 10, 2004.)