

ACT 3

H.B. NO. 1224

A Bill for an Act Relating to Taxation.

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

SECTION 1. The legislature finds that the National Conference of State Legislatures estimates that, in 2003, Hawaii lost approximately \$112,000,000 to \$117,000,000 in state and local revenues due to the State's inability to capture tax revenues from electronic commerce transactions. The National Conference of State Legislatures estimates that, by 2008, Hawaii will lose between \$157,000,000 and

\$245,500,000 if nothing is done by that time. Hawaii stands to be one of the top ten states in terms of tax revenues lost in electronic commerce transactions.

The legislature also finds that, with regard to the loss in revenues due to the State's inability to tax electronic commerce, Hawaii's situation is not unique. Other states are currently dealing with this very same problem. To this end, the Streamlined Sales Tax Project (Project) is an effort created by state governments, with input from local governments and the private sector, to simplify and modernize the collection and administration of the sales and use taxes. The Project's proposals include tax law simplifications, more efficient administrative procedures, and implementing emerging technologies to substantially reduce the burden of tax collection. The Project's proposals are focused on improving sales and use tax administration systems for both local businesses and remote sellers of all types of commerce. Forty-two states and the District of Columbia are involved in the Project. Nationally, forty-five states and the District of Columbia impose a sales and use tax.

The Project was organized in March 2000, and is conducting its work through a steering committee with co-chairs and a number of work groups. Project participants are generally state revenue department administrators, as well as representatives of state legislatures and local governments. Businesses, including national retailers, trade associations, manufacturers, direct marketers, telecommunications companies, leasing companies, technology companies, printers, accounting firms, and others, have actively participated in the Project by offering expertise and input, reviewing proposals, suggesting language, and testifying at public hearings.

The goal of the Streamlined Sales Tax Project is to provide the states with a streamlined sales tax system that includes the following key features:

- (1) Uniform definitions within tax laws. Legislatures still choose what is taxable or exempt in their state. However, participating states will agree to use the common definitions for key items in the tax base and will not deviate from these definitions. As states move from their current definitions to the Project's definitions, a certain amount of impact on state revenues is inevitable. However, it is the intent of the Project to provide states with the ability to closely mirror their existing tax bases through common definitions;
- (2) Rate simplification. States will be allowed one state rate and a second state rate in limited circumstances (food and drugs). Each local jurisdiction will be allowed one local rate. A state or local government may not choose to tax telecommunications services, for example, at one rate and all other items of tangible personal property or taxable services at another rate. State and local governments will accept responsibility for notice of rate and boundary changes at restricted times. States will provide an on-line rate/jurisdiction database to simplify rate determinations;
- (3) State level tax administration of all state and local sales and use taxes. Businesses will no longer file tax returns with each local government within which it conducts business in a state. Each state will provide a central point of administration for all state and local sales and use taxes and the distribution of the local taxes to the local governments. A state and its local governments will use common tax bases;
- (4) Uniform sourcing rules. States will have uniform and simple rules for how they will source transactions to state and local governments. The uniform rules will be destination/delivery based and uniform for tangible personal property, digital property, and services. Special sourcing rules will be developed for unique industries;
- (5) Simplified exemption administration for use- and entity-based exemptions. Sellers are relieved of the "good faith" requirements that exist in current law and will not be liable for uncollected tax. Purchasers will be

- responsible for paying the tax, interest, and penalties for claiming incorrect exemptions. States will have a uniform exemption certificate in paper and electronic form;
- (6) Uniform audit procedures. Sellers who participate in one of the certified Streamlined Sales Tax System technology models will either not be audited or will have limited scope audits, depending on the technology model used. The states may conduct joint audits of large multi-state businesses; and
 - (7) State funding of the system. Participating states will apportion costs of a third-party online sales tax collections software system among themselves. It is intended that each state's allocation of costs of the new software system will be paid out of the higher level of tax revenues collected under the Streamlined Sales Tax System Project.

The legislature further finds that the states are also participating in a joint business-government study of the costs of collection on sellers. The Project proposes that states change their sales and use tax laws to conform with the simplifications as proposed by the Project. Thus, the simplifications would apply to all sellers. Sellers who do not have a physical presence or "nexus" are not required to collect sales and use taxes unless Congress chooses to require collection from all sellers for all types of commerce. Sellers without a physical presence can volunteer to collect under the proposed simplifications. Registration by sellers to voluntarily collect sales and use taxes will not infer that the business must pay business activity taxes, such as the corporate franchise or income tax.

The legislature further finds that the Streamlined Sales Tax Project envisions two components to the legislation necessary to accomplish the Project's goals. First, states would adopt enabling legislation referred to as the Uniform Sales and Use Tax Administration Act ("Act"). The Act allows the State to enter into an agreement with one or more states to simplify and modernize sales and use tax administration in order to reduce the burden of tax compliance for all sellers and all types of commerce.

According to the Project, states would amend or modify their sales and use tax laws to achieve the simplifications and uniformity required by the participating states working together. The Project refers to this legislation as the Streamlined Sales and Use Tax Agreement ("Agreement"). Some states will require only minor changes to current law to implement the requirements of the Agreement. Other states with more complicated sales tax laws may require significant changes to current law to be in accord with the Agreement.

In Hawaii, the legislature finds that few amendments are needed to the State's existing general excise and use tax laws to comply with the requirements of the Agreement and Act. The legislature further finds that, with the amendments contained in this Act, Hawaii will have conformed in most respects to the seven key features described above. The legislature intends that passage of this Act meets the threshold requirements for Hawaii to petition for a certificate of compliance and membership under the Agreement.

A certificate of compliance would document each state's compliance with the provisions of the Agreement and cite applicable statutes, rules or regulations, or other authorities supporting such compliance. Public notice and comment will be provided before a state becomes part of the interstate Agreement. A state is in compliance with the Agreement if the effect of the state's laws, rules or regulations, and policies is substantially compliant with each of the requirements of the Agreement. If a state is found to be out of compliance with the Agreement, it will not be accepted into the interstate Agreement or will be sanctioned or expelled by the other participating states. In a voluntary system, sellers who are voluntarily collecting sales taxes for participating states may decide to no longer collect for the expelled state. Also, that state may not have a vote on changes in the Agreement.

Under the Agreement, a governing board will be comprised of representatives of each member state of the Agreement. Each member state is entitled to one vote on the governing board. The governing board is responsible for interpretations of the Agreement, amendments to the Agreement, and issue resolution. A State and Local Government Advisory Council and a Business and Taxpayer Advisory Council from the private sector will advise the governing board.

On November 12, 2002, thirty states and the District of Columbia approved the interstate Agreement provisions. As of April 2004, twenty states have moved forward and enacted all or part of the conforming legislation. It is anticipated that states that enacted the conforming legislation and are found to be in compliance with the Agreement will continue as the governing states of the interstate Agreement of the future.

SECTION 2. Chapter 231, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§231- Streamlined sales and use tax agreement compliance. (a) A seller that registers to pay or collect and remit sales or use tax in accordance with the terms of the streamlined sales and use tax agreement may select one of the following methods of remittance or other method allowed by law to remit the taxes collected, as follows:

- (1) A model 1 seller, who shall be a seller who selects a certified service provider as an agent to perform all the seller's sales or use tax functions, other than the seller's obligation to remit tax on its own purchases;
- (2) A model 2 seller, who shall be a seller who selects a certified automated system to use which calculates the amount of tax due on a transaction; or
- (3) A model 3 seller, who shall be a seller who uses its own proprietary automated sales tax system that has been certified as a certified automated system.

(b) A certified service provider in model 1 shall be allowed a monetary allowance in accordance with the terms of the contract that the states participating in the streamlined sales and use tax agreement execute with the provider. The director shall prescribe the allowance in accordance with the terms of the contract, which shall be funded entirely from money collected in model 1.

A monetary allowance to a certified service provider may be based on one or more of the following incentives:

- (1) A base rate that applies to taxable transactions processed by the provider; and
- (2) For a period not to exceed twenty-four months following a voluntary seller's registration through the streamlined sales and use tax agreement's central registration process, a percentage of tax revenue generated for a member state by the voluntary seller for each member state for which the seller does not have a requirement to register to collect the tax.

(c) A model 2 seller shall be allowed a monetary allowance that the director shall prescribe in accordance with the terms agreed to by the member states of the streamlined sales and use tax agreement. The member states initially anticipate that they will provide a monetary allowance to sellers under model 2 based on the following:

- (1) Each seller shall receive a base rate for a period not to exceed twenty-four months following the commencement of participation by the seller; and
- (2) For a period not to exceed twenty-four months following a voluntary seller's registration through the streamlined sales and use tax agree-

ment's central registration process, a percentage of tax revenue generated for a member state by the voluntary seller for each member state for which the seller does not have a requirement to register to collect the tax.

(d) A model 3 seller and all other sellers that are not under model 1 or model 2 shall be allowed a monetary allowance that the director shall prescribe in accordance with the terms agreed to by the member states of the streamlined sales and use tax agreement. The member states initially anticipate that they will provide a monetary allowance to sellers under model 3 and to all other sellers that are not under models 1 or 2 based on the following:

- (1) For a period not to exceed twenty-four months following a voluntary seller's registration through the streamlined sales and use tax agreement's central registration process; and
- (2) A percentage of tax revenue generated for a member state by the voluntary seller for each member state for which the seller does not have a requirement to register to collect the tax.

(e) Pursuant to the streamlined sales and use tax agreement, the director is authorized to accept certified automated systems and certified service providers to aid in the administration of the collection of the tax imposed under chapter 237 and chapter 238.

(f) No person required to collect any tax imposed by chapter 237 or 238, or any tax authorized to be collected under the streamlined sales and use tax agreement shall be held liable for having charged and collected the incorrect amount of sales or use tax by reason of reliance on erroneous data provided by the director with respect to tax rates, boundaries, or taxing jurisdiction assignments.

(g) In connection with a purchaser's request from a seller of over-collected sales or use taxes, a seller shall be presumed to have a reasonable business practice, if in the collection of the sales or use taxes, the seller:

- (1) Uses either a provider or a system, including a proprietary system, that is certified by the State; and
- (2) Has remitted to the State all taxes collected less any deductions, credits, or collection allowances.

(h) For the purposes of this section, "streamlined sales and use tax agreement" means the agreement authorized under chapter 255D."

SECTION 3. Section 255D-3, Hawaii Revised Statutes, is amended to read as follows:

~~“[E]§255D-3[H] Authority to participate in multistate negotiations. [(a)] For the purposes of reviewing or amending the agreement embodying the simplification requirements in section 255D-6, the State may enter into multistate discussions. For purposes of these discussions, the State shall be represented by the department. [The department shall regularly consult with an advisory council regarding these discussions.~~

~~(b) The department shall regularly consult with the advisory council and use its best efforts to consult with the advisory council before any multistate discussions in which it is anticipated that amendments may be proposed to the agreement embodying the simplification requirements in section 255D-6.~~

~~(c) The advisory council shall consist of not more than five members who shall be appointed by the governor under section 26-34. The members shall serve without compensation but shall be reimbursed for actual expenses, including travel expenses, that are necessary for the performance of their duties.]”~~

SECTION 4. Section 255D-4, Hawaii Revised Statutes, is amended to read as follows:

“§255D-4 Authority to enter agreement. The department with the concurrence of the legislature may enter into the streamlined sales and use tax agreement with one or more states to simplify and modernize sales and use tax administration to substantially reduce the burden of tax compliance for all sellers and for all types of commerce. In furtherance of the agreement, the department may act jointly with other states that are members of the agreement to establish standards for certification of a certified service provider and certified automated system and establish performance standards for multistate sellers. The department may take other actions reasonably required to implement this section. Other actions authorized by this section include but are not limited to the adoption of rules not subject to chapter 91, with other member states, of goods and services in furtherance of the cooperative agreement. The department, or the department’s designee, may represent this State before the other states that are signatories to the agreement.”

SECTION 5. (a) No later than August 1, 2005, the department of taxation, together with three designees selected by the president of the senate and three designees selected by the speaker of the house of representatives shall:

- (1) Identify issues that need to be resolved to effectuate the orderly enactment and operation of a streamlined sales and use tax that is based on the Streamlined Sales Tax Project’s model Agreement and Act, including issues of conformance with the State’s existing general excise tax law and other laws as may be required; and
- (2) Conduct informational briefings for the legislature on the department’s efforts to comply with the purposes of this Act.

(b) No later than twenty days prior to the convening of the 2006 regular session, the department of taxation shall submit proposed legislation to the legislature for its enactment prior to January 1, 2007, that provides for:

- (1) Any further amendments requested by the Streamlined Sales Tax Project to address issues such as sourcing and rounding and to enhance the operation of a streamlined sales and use tax in accordance with the Streamlined Sales Tax Project’s model Agreement and Act; and
- (2) Any additional conforming amendments to the State’s existing general excise tax law and other laws as may be required.

SECTION 6. For the purposes of complying with the requirements to apply for certification under the Streamlined Sales and Use Tax Agreement, the legislature declares that chapters 237 and 238, Hawaii Revised Statutes, substantially comply with the requirements set forth under the Streamlined Sales and Use Tax Agreement.

SECTION 7. There is appropriated out of the general revenues of the State of Hawaii the sum of \$50,000 or so much thereof as may be necessary for fiscal year 2005-2006 for technical assistance and briefings to enable the legislature to carry out its responsibilities in section 5 of this Act.

Technical assistance may include analysis of the fiscal and legal impacts of proposed conformance with the existing general excise tax law and other laws and any other issues that might result from the implementation of a streamlined and sales and use tax. Funds may also be expended for preparation of proposed legislation above and beyond that which could be undertaken by state employees due to the specialized nature of this project. Funds may be further expended in briefings of legislators and any other parties deemed appropriate by the designees of the

president of the senate and the speaker of the house of representatives and in any other support activities for this project.

The sum appropriated shall be expended by the office of the auditor for the purposes of this Act. The office of the auditor, given the deadline imposed by section 5 of this Act, shall secure the services necessary to support the project in as expeditious a manner as possible and without regard to chapter 103D, Hawaii Revised Statutes.

SECTION 8. Notwithstanding the provisions of any law making it unlawful for any person, officer, or employee of the State to make known information imparted by any tax return or permit any tax return to be seen or examined by any person, it shall be lawful to permit a private contractor contracted under section 7 of this Act to inspect any tax return of any taxpayer, or to furnish to the private contractor an abstract of the return or supply the private contractor with information concerning any item contained in the return or disclosed by the report of any investigation of the return or of the subject matter of the return only for the purposes of conforming the State's general excise and use taxes to be operative with the Streamlined Sales Tax Project's model Agreement and Act.

SECTION 9. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 10. This Act shall take effect upon its approval; provided that section 7 shall take effect on July 1, 2005.

(Vetoed by Governor and veto overridden by Legislature on July 12, 2005.)

Note

1. Edited pursuant to HRS §23G-16.5.