



GOV. MSG. NO. 786

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

July 1, 2009

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fifth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

I am transmitting herewith HB1405 HD2 SD2 CD1, without my approval, and with the statement of objections relating to the measure.

HB1405 HD2 SD2 CD1

A BILL FOR AN ACT
RELATING TO THE GENERAL EXCISE TAX.

Sincerely,

LINDA LINGLE

EXECUTIVE CHAMBERS

HONOLULU

July 1, 2009

STATEMENT OF OBJECTIONS TO HOUSE BILL NO. 1405

Honorable Members
Twenty-Fifth Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, House Bill No. 1405, entitled "A Bill for an Act Relating to the General Excise Tax."

The purpose of this bill is to establish the nexus standard when the State can tax out-of-state businesses that do not have a physical presence in Hawaii. Specifically, this bill requires out-of-state companies to pay the general excise tax if their Hawaii revenue is at least \$10,000 per year and they solicit business through Hawaii representatives who receive commission for referring customers, whether through the internet or in person. This bill also requires out-of-state businesses to pay taxes under Title 14 of the Hawaii Revised Statutes, such as income tax and transient accommodations tax, if their Hawaii revenue is at least \$100,000 per year or they transacted with at least 20 Hawaii residents per year.

This bill is objectionable because its content violates Article III, Section 14 of the Hawaii State Constitution, which provides that "each law shall embrace but one subject, which shall be expressed in its title." Since the title of this measure is "A Bill for an Act Relating to the General Excise Tax," it is questionable whether Part II of this bill, which applies to all taxes under Title 14, such as income tax, conveyance tax, cigarette tax, transient accommodations tax, and

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franchise taxes, is included in the subject of the title.

Second, this bill places the nexus language in the general tax administration chapter (Hawaii Revised Statutes Chapter 231). It is likely this placement will present constitutional challenges present in the United States Supreme Court cases of Quill v. North Dakota and Complete Auto Transit, Inc. v. Brady.

Because the imposition of the nexus standard in New York last year has led to a challenge by Amazon.com regarding the constitutionality of requiring out-of-state businesses with no physical presence to collect state sales and use taxes, it would be premature to enact legislation on this issue until the New York case is resolved.

Finally, given the State's current economic situation, this bill is harmful to small Hawaii businesses making customer referrals to out-of-state businesses and those in Hawaii developing an on-line media industry. Website developers use affiliate advertisements to cover the costs of operating and developing their sites. As a result of New York's law, Overstock.com canceled its New York affiliates program last year in order to avoid collecting sales tax. Companies such as Audible.com and Zappos.com have already notified their Hawaii affiliates that they will cancel their programs as a result of the Legislature's passage of this bill and will no longer pay commission for referrals made. This will handicap Hawaii entrepreneurs and place them at a competitive disadvantage to Mainland and international companies.

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For the foregoing reasons, I am returning House Bill
No. 1405 without my approval.

Respectfully,

A handwritten signature in black ink, appearing to read "Linda Lingle", written in a cursive style.

LINDA LINGLE
Governor of Hawaii

VETO

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2009
STATE OF HAWAII

H.B. NO. 1405
H.D. 2
S.D. 2
C.D. 1

A BILL FOR AN ACT

RELATING TO THE GENERAL EXCISE TAX.

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

1 PART I.

2 SECTION 1. Section 237-2, Hawaii Revised Statutes, is
3 amended to read as follows:

4 "§237-2 "Business", "engaging" in business, defined.

5 "Business" as used in this chapter, includes all activities
6 (personal, professional, or corporate), engaged in or caused to
7 be engaged in with the object of gain or economic benefit either
8 direct or indirect, but does not include casual sales.

9 The term "engaging" as used in this chapter with reference
10 to engaging or continuing in business also includes [the]:

11 (1) The exercise of corporate or franchise powers[-]; or

12 (2) (A) The sale of tangible personal property by a
13 person soliciting business through an independent
14 contractor or other representative if the person
15 enters into an agreement with a resident of this
16 state under which the resident, for a commission
17 or other consideration, directly or indirectly



1 refers potential customers, whether by a link on
2 an internet website or otherwise, to the person,
3 and if the cumulative gross receipts from sales
4 by the person to customers in the state who are
5 referred to the person by such a resident, is at
6 least \$10,000 in the twelve-month period ending
7 on the last day of the most recent calendar
8 quarter before the calendar quarter in which the
9 sale is made.

10 (B) This presumption may be rebutted by proof that
11 the resident with whom the person has an
12 agreement did not engage in any solicitation in
13 the state on behalf of the person that would
14 satisfy the nexus requirement of the United
15 States Constitution during twelve-month period in
16 question. Nothing in this section shall be
17 construed to narrow the scope of the terms
18 "person," "purchasing agent," or "representative"
19 as defined in section 237-1."

20 SECTION 2. The department of taxation shall adopt rules,
21 in accordance with chapter 91, Hawaii Revised Statutes,



1 implementing and providing guidance to taxpayers concerning
2 section 237-2, Hawaii Revised Statutes, as amended by this Act.

3 PART II.

4 SECTION 3. Chapter 231, Hawaii Revised Statutes, is
5 amended by adding a new section to be appropriately designated
6 and to read as follows:

7 "§231- Businesses domiciled out-of-state; nexus
8 presumptions. (a) Notwithstanding any law to the contrary, a
9 person or entity conducting business in this State that has its
10 commercial domicile in another state is presumed to be
11 systematically and regularly engaging in business in this State
12 and taxable under title 14 if, during any year:

13 (1) The person or entity engages in or solicits business
14 with twenty or more persons within this State; or
15 (2) The sum of the value of the person or entity's income,
16 gross proceeds, gross rental, or gross rental proceeds
17 attributable to sources in this State equals or
18 exceeds \$100,000.

19 (b) Notwithstanding any requirement under title 14 that a
20 person or entity assess and remit tax on a monthly basis, if a
21 person is taxable in this State by reason of this section, the



1 person or entity may petition the director of taxation to allow
2 the assessment and remitting of tax on a basis other than
3 monthly for good cause. For purposes of this section, good
4 cause includes compliance with the Constitution of the United
5 States and compliance with the Constitution of the State of
6 Hawaii."

7 PART III.

8 SECTION 4. If any provision of this Act, or the
9 application thereof to any person or circumstance is held
10 invalid, the invalidity does not affect other provisions or
11 applications of the Act, which can be given effect without the
12 invalid provision or application, and to this end the provisions
13 of this Act are severable.

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

16 SECTION 6. This Act shall take effect on July 1, 2009.

