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# A BILL FOR AN ACT

RELATING TO TAXATION.

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

1 PART I

2 SECTION 1. Section 231-36.4, Hawaii Revised Statutes, is  
3 amended to read as follows:

4 " ~~[+]§231-36.4[+]~~ **Wilful failure to collect and pay over**  
5 **tax.** (a) Any person required to collect, account for, and pay  
6 over any tax imposed by title 14, who wilfully fails to collect  
7 or truthfully account for and pay over such tax shall be guilty  
8 of a class C felony, in addition to other penalties provided by  
9 law and, upon conviction, shall be subject to one or any  
10 combination of the following:

- 11 (1) A fine of not more than \$100,000;  
12 (2) Imprisonment of not more than five years; or  
13 (3) Probation;

14 provided that a corporation shall be fined not more than  
15 \$500,000.

16 (b) This section shall not apply to any portion of an  
17 underpayment on which a penalty is imposed under section 231-36,  
18 231-36.6, or 231-36.8."



1 SECTION 2. Section 231-36.8, Hawaii Revised Statutes, is  
2 amended to read as follows:

3 "[~~§~~231-36.8] **Erroneous claim for refund or credit.**

4 (a) If a claim for refund or credit with respect to tax is made  
5 for an excessive amount, the person making the claim shall be  
6 liable for a penalty in an amount equal to twenty per cent of  
7 the excessive amount; provided that there shall be no penalty  
8 assessed where the penalty calculation under this section  
9 results in an amount of less than \$400.

10 (b) It shall be a defense to the penalty under this  
11 section that the claim for refund or credit had a reasonable  
12 basis. A person claiming the reasonable basis defense shall  
13 have the burden of proof to demonstrate the reasonableness of  
14 the claim.

15 (c) This section shall be construed in accordance with  
16 regulations and judicial interpretations given to section 6676  
17 of the Internal Revenue Code.

18 (d) For purposes of this section:

19 "Excessive amount" means the amount by which the amount of  
20 the claim for refund or credit for any taxable year exceeds the  
21 amount of the claim allowable for such taxable year.



1 "Reasonable basis" means a standard of care used in tax  
 2 reporting that is significantly higher than not frivolous or not  
 3 patently improper. A reasonable basis position will be more  
 4 than arguable and based on at least one or more authorities of  
 5 either state or federal tax administration. A position is  
 6 considered to have a reasonable basis if a reasonable and well-  
 7 informed analysis by a person knowledgeable in tax law would  
 8 lead that person to conclude that the position has approximately  
 9 a one-in-four, or greater, likelihood of being sustained on the  
 10 merits. A reasonable basis includes innocent mistakes where the  
 11 excessive amount is the result of inadvertence, mathematical  
 12 error, or where otherwise defined as innocent by the director  
 13 pursuant to a formal pronouncement issued without regard to  
 14 chapter 91.

15 (e) This section shall not apply to any portion of an  
 16 underpayment on which a penalty is imposed under section 231-  
 17 36.6."

PART II

18 SECTION 3. Section 238-6, Hawaii Revised Statutes, is  
 19 amended to read as follows:  
 20



1           "§238-6   **Collection of tax by seller; penalty.**   (a)   For  
2 purposes of the taxes due under sections 238-2 and 238-2.3,  
3 every seller [~~having~~]:

4           (1)   Having in the State, regularly or intermittently, any  
5           property, tangible or intangible, any place of  
6           business, or any representation as hereinabove  
7           defined, [~~and~~] irrespective of the seller's having or  
8           not having qualified to do business in the State[~~+~~];

9           or

10          (2)   Who is otherwise engaged in business in the State as  
11          defined in subsection (h);

12 shall, if the seller subject to paragraph (1) makes sales of  
13 property, services, or contracting for use in the State[~~+~~],  
14 whether or not the sales are made in the State[~~+~~], or if the  
15 seller subject to paragraph (2) makes sales of tangible personal  
16 property for use in the State as described in section 238-2,  
17 collect from the purchaser the taxes imposed by sections 238-2  
18 and 238-2.3, on the use of the property, services, or  
19 contracting, as applicable, so sold by the seller, if the seller  
20 is not subject to the use tax under this chapter on the  
21 importation of the property into the State. The collection  
22 shall be made within twenty days after the accrual of the tax or



1 within [~~such other~~] a period [~~as shall be~~] fixed by the director  
2 of taxation upon the application of the seller[~~, and the~~]. The  
3 seller shall give to the purchaser a receipt therefor in the  
4 manner and form prescribed by the director; provided that this  
5 subsection shall not apply to vehicles registered under section  
6 286-50.

7 (b) The director, in the director's discretion, upon  
8 application [~~therefor~~] and under terms and conditions prescribed  
9 by the director, may relieve any seller of the duty of  
10 collecting and paying over the tax imposed by subsection (a)  
11 [~~above~~], if the director is satisfied that the tax can be  
12 effectively collected by other means. Exemption from the duty  
13 of collecting the tax may be canceled at any time [~~when~~] if the  
14 director finds that the tax cannot be effectively collected by  
15 other means. The director likewise may terminate the duty and  
16 authority of any seller to collect and pay over the tax imposed  
17 by subsection (a) [~~above~~] if the director finds, [~~as to such~~  
18 ~~seller~~], on a case-by-case basis, that the tax cannot be  
19 effectively collected by [~~such~~] other means.

20 (c) The director, in the director's discretion, upon  
21 application [~~therefor~~] and under terms and conditions prescribed  
22 by the director, may authorize the collection of the tax imposed



1 by this chapter by a seller not otherwise required to collect  
2 the tax. The seller, when so authorized, shall have the duty of  
3 collecting and paying over the tax in the same manner and  
4 subject to the same requirements as set out in subsection (a).  
5 The authority may be canceled at any time [~~when,~~] if, in the  
6 judgment of the director, the tax can more effectively be  
7 collected by other means.

8 (d) In case any seller required or authorized to collect  
9 the tax under this chapter fails to collect [~~the same,~~] it or,  
10 having collected the tax, fails to pay it over [~~the same~~] as  
11 provided by this chapter, the seller shall nevertheless be  
12 personally liable to the State for the amount of the tax, but it  
13 shall be a defense to [~~such~~] this tax liability that the  
14 indebtedness for the price is a worthless account actually  
15 charged off for income tax purposes, if and to the extent that  
16 the collections of the price do not equal the tax.

17 (e) Every seller required or authorized to collect the tax  
18 shall make returns and payments of the tax at the same time and  
19 in the same manner as is provided with respect to taxpayer by  
20 section 238-5. All provisions of this chapter with respect to  
21 returns, reports, records, payments, penalties, and interest,  
22 appeals, investigations, and audits, assessments, tax



1 collections procedure, criminal offenses, and the general  
2 administrative powers and duties of the director, shall apply to  
3 ~~[such]~~ these sellers the same as to taxpayers.

4 (f) The tax collected pursuant to this section shall be  
5 held in trust for the State and for payment to the proper  
6 collecting officer in the manner and at the time required by  
7 this chapter. Any person collecting ~~[such]~~ the tax who  
8 appropriates or converts ~~[the same]~~ it to the person's own use  
9 or to any use other than the payment of the tax as herein  
10 provided, and who fails to pay over the amount of tax so  
11 collected at the time required by this chapter, shall be deemed  
12 guilty of an embezzlement of property of the State and shall be  
13 fined more than five times the amount of money ~~[so]~~ embezzled or  
14 imprisoned ~~[at hard labor]~~ for not more than ten years, and any  
15 failure by the person ~~[so]~~ collecting the tax to pay ~~[the same]~~  
16 collected taxes over within the time provided by this chapter~~[7]~~  
17 after demand ~~[therefor,]~~ shall be taken and held to be prima  
18 facie evidence of the embezzlement.

19 (g) This section shall not apply to a seller engaged in  
20 business in the State as defined in paragraph (4) of that  
21 definition established under subsection (h), if the seller can  
22 demonstrate that:



1       (1) The person in the State with whom the seller has an  
2       agreement did not engage in referrals in the State on  
3       behalf of the seller that would satisfy the  
4       requirements of the commerce clause of the United  
5       States Constitution; or

6       (2) The person in the State with whom the seller has an  
7       agreement did not engage in any activity within the  
8       State that was significantly associated with the  
9       seller's ability to establish or maintain the seller's  
10      market in the State during the preceding twelve  
11      months. For the purpose of this paragraph, the seller  
12      may demonstrate this by submitting sworn written  
13      statements from all persons in the State with whom the  
14      seller has an agreement stating that the person did  
15      not engage in any solicitation in the State on behalf  
16      of the seller during the preceding twelve-month  
17      period; provided that these statements were provided  
18      and obtained in good faith.

19      (h) For the purposes of this section:

20      "Commonly controlled group" means:

21      (1) A parent corporation and any one or more corporations  
22      or chains of corporations, connected through stock





1 ownership or constructive ownership with the parent  
2 corporation if:

3 (A) The parent corporation owns stock possessing more  
4 than fifty per cent of the voting power of at  
5 least one corporation; and

6 (B) If applicable, stock cumulatively representing  
7 more than fifty per cent of the voting power of  
8 each of the corporations, except the parent  
9 corporation, is owned by the parent corporation,  
10 one or more corporations described in  
11 subparagraph (A), or one or more other  
12 corporations that satisfy the conditions of this  
13 subparagraph;

14 (2) Any two or more corporations, if stock representing  
15 more than fifty per cent of the voting power of the  
16 corporations is owned, or constructively owned, by the  
17 same person;

18 (3) Any two or more corporations that constitute stapled  
19 entities, meaning:

20 (A) Any group of two or more corporations if more  
21 than fifty per cent of the ownership or  
22 beneficial ownership of the stock possessing



1 voting power in each corporation consists of  
2 stapled interests; or  
3 (B) Two or more interests if, by reason of form of  
4 ownership restrictions on transfer or other terms  
5 or conditions, in connection with the transfer of  
6 one of the interests the other interest or  
7 interests are also transferred or required to be  
8 transferred; or

9 (4) Any two or more corporations, all of whose stock  
10 representing more than fifty per cent of the voting  
11 power of the corporations is cumulatively owned by, or  
12 for the benefit of, members of the same family. For  
13 the purposes of this paragraph, "members of the same  
14 family" includes the spouse, parents, siblings,  
15 grandparents, children, and grandchildren of an  
16 individual, as well as their respective spouses.

17 "Engaged in business in the State" is presumed to include a  
18 seller, including an entity affiliated with a seller within the  
19 meaning of section 1504 of the Internal Revenue Code, that has a  
20 substantial nexus with the State for purposes of the commerce  
21 clause of the United States Constitution and upon whom federal



1 law permits the State to impose the taxes under this chapter,  
2 and includes:

3 (1) Any seller that is a member of a commonly controlled  
4 group that includes an entity that has a substantial  
5 nexus with the State and:

6 (A) Sells a similar line of products as the seller  
7 and does so under the same or similar business  
8 name; or

9 (B) Uses trademarks, service marks, or trade names in  
10 the State that are the same or substantially  
11 similar to those used by the seller;

12 (2) Any seller entering into an agreement or agreements  
13 under which any person, other than a common carrier  
14 acting in its capacity, that has substantial nexus in  
15 this State and that:

16 (A) Delivers, installs, assembles, or performs  
17 maintenance services for the seller's customers  
18 within this State; or

19 (B) Facilitates the seller's delivery of property to  
20 customers in the State by allowing the seller's  
21 customers to pick up property sold by the seller  
22 at an office, distribution facility, warehouse,



1                   storage place, store front, or similar place of  
2                   buisness maintained by the in-state person;

3       (3) Any seller that is a member of a commonly controlled  
4       group that includes another member that, pursuant to  
5       an agreement with or in cooperation with the seller,  
6       performs services in the State in connection with  
7       tangible personal property to be sold by the seller,  
8       including the design and development of tangible  
9       personal property sold by the seller, or the  
10       solicitation of sales of tangible personal property on  
11       behalf of the seller; and

12       (4) Any seller entering into an agreement or agreements  
13       under which a person or persons in the State, for a  
14       commission or other consideration, directly or  
15       indirectly refer potential purchasers of tangible  
16       personal property to the seller, whether by an  
17       internet-based link or an internet web site, or  
18       otherwise; provided that:

19       (A) The total cumulative sales price from all of the  
20       seller's sales, within the preceding twelve  
21       months, of tangible personal property to  
22       purchasers in the State that are referred



1                   pursuant to all of those agreements with a person  
2                   or persons in the State, is in excess of \$10,000;

3                   and

4                   (B) The seller, within the preceding twelve months,  
5                   has total cumulative sales of tangible personal  
6                   property to purchasers in the State in excess of  
7                   \$20,000;

8                   provided further that an agreement under which a  
9                   seller purchases advertisements from a person or  
10                  persons in the State, to be delivered on television,  
11                  radio, in print, on the Internet, or by any other  
12                  medium, is not an agreement for the purposes of this  
13                  paragraph unless the advertisement revenue paid to the  
14                  person or persons in the State consists of commissions  
15                  or other consideration that is based upon sales of  
16                  tangible personal property; and provided further that  
17                  an agreement under which a seller engages a person in  
18                  the State to place an advertisement on an internet web  
19                  site operated by that person, or operated by another  
20                  person in the State, is not an agreement for the  
21                  purposes of this paragraph unless the person entering  
22                  the agreement with the seller also directly or



1 indirectly solicits potential customers in the State  
 2 through use of flyers, newsletters, telephone calls,  
 3 electronic mail, blogs, microblogs, social networking  
 4 sites, or other means of direct or indirect  
 5 solicitation specifically targeted at potential  
 6 customers in the State."

7 PART III

8 SECTION 4. Prior to the convening of the 2013 regular  
 9 session, the director of taxation shall certify in writing to  
 10 the governor and the legislature whether any federal law has  
 11 been enacted by December 31, 2012, authorizing the states to  
 12 require a seller to collect taxes on sales of goods to in-state  
 13 purchasers without regard to the location of the seller.

14 SECTION 5. If any provision of this Act, or the  
 15 application thereof to any person or circumstance is held  
 16 invalid, the invalidity does not affect other provisions or  
 17 applications of the Act, which can be given effect without the  
 18 invalid provision or application, and to this end the provisions  
 19 of this Act are severable.

20 SECTION 6. This Act does not affect rights and duties that  
 21 matured, penalties that were incurred, and proceedings that were  
 22 begun before its effective date.



1 SECTION 7. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3 SECTION 8. This Act shall take effect on July 1, 2112;  
4 provided that part I of this Act shall apply to taxable years  
5 beginning after December 31, 2011; provided further that part II  
6 of this Act shall take effect on July 1, 2112, if the State does  
7 not, by June 30, 2013, enact a law in accordance with any  
8 federal law authorizing the states to require a seller to  
9 collect taxes on sales of goods to in-state purchasers without  
10 regard to the location of the seller.



**Report Title:**

Use Tax; Internet Sales; Out-of-State Sellers; Affiliates; Tax Penalties

**Description:**

Prohibits penalties for erroneous claims for refund or credit from being added to tax underpayments on which certain other penalties are already imposed. Unless preempted by federal law, requires the collection of use taxes by sellers of tangible personal property who enter into agreements under which a person in the State refers potential purchasers to the seller, including by an internet link or web site, or performs related services in the State on behalf of the seller. Effective July 1, 2012. (SB2226 HD2)

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