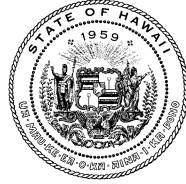


DAVID Y. IGE
GOVERNOR

SHAN TSUTSUI
LT. GOVERNOR



MARIA E. ZIELINSKI
DIRECTOR OF TAXATION

STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1540
FAX NO: (808) 587-1560

To: The Honorable Karl Rhoads, Chair
and Members of the House Committee on Judiciary

Date: Friday, February 6, 2015
Time: 2:00 P.M.
Place: Conference Room 325, State Capitol

From: Maria E. Zielinski, Director
Department of Taxation

Re: H.B. 968, Relating to Liability for Amounts Passed on as Tax

The Department of Taxation (Department) strongly supports H.B. 968, an Administration measure, and provides the following information and comments for your consideration.

H.B. 968 creates a conclusive presumption that a taxpayer is liable for any amounts passed on as a tax under title 14 of the Hawaii Revised Statutes (HRS), where said amount is separately stated in a receipt, contract, invoice, or bill. The bill also provides that the amount of liability is reduced by any amount the taxpayer returns to the source from which it was collected.

The Department has found that taxpayers often visibly pass on title 14 taxes, such as the general excise tax (GET) and the transient accommodations tax, but do not remit these amounts to the State. These taxpayers often claim that they either do not owe the State any tax for the transaction or that they owe a lesser amount than what was collected.

Hawaii tax law is silent on the issue of passing on taxes such as the transient accommodations tax and GET. The restriction on the amount of tax passed on is based in consumer protection law. For example, where the amount visibly passed on is represented as general excise tax, the business cannot pass on an amount which exceeds the actual general excise tax due on the gross income from that transaction. To do so would be a misrepresentation of the facts and a violation of consumer protection laws administered by the Department of Commerce and Consumer Affairs' Office of Consumer Protection.

It is important to note that adoption of this measure will not provide a windfall for the State, as H.B. 968 does not impose any liability above the amount the taxpayer actually passed

on and collected, and expressly excludes from liability amounts the taxpayer collected but then returned to third parties.

H.B. 968 will assist the Department administratively with assessments and collections and will expedite the resolution of tax disputes. Taxpayers will not be able to take the contradictory position that they do not owe tax under title 14, HRS, even though they passed on and collected the tax from a third party. In addition, the public will benefit from this bill, as they will have greater certainty that any amount paid for a purported tax will be remitted to the State and not retained by the taxpayer.

In summary, H.B. 968 would amend the law to require taxpayers to remit the amounts visibly passed on and actually collected as Hawaii taxes. Taxpayers would not be required to remit any amounts returned to customers.

Thank you for the opportunity to provide testimony in support of this measure.

TAXBILLSERVICE

126 Queen Street, Suite 304

TAX FOUNDATION OF HAWAII

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: ADMINISTRATION, Liability for amounts passed on as tax

BILL NUMBER: SB 1137; HB 968 (Identical)

INTRODUCED BY: SB by Kim by request; HB Souki by request

EXECUTIVE SUMMARY: The department of taxation has consistently, since 1957, taken a hands-off position regarding amounts passed on to consumers as tax, saying it is a consumer protection issue rather than a tax issue. This bill creates a conclusive presumption that the taxpayer is liable to the state for any such amounts collected as a recovery of the taxpayer's liability.

BRIEF SUMMARY: Adds a new section to HRS chapter 231 to provide that if an amount is passed on as tax owed by the taxpayer for the transaction and is separately stated in a receipt, contract, invoice, billing, or other evidence of the business activity, that taxpayer is conclusively liable for any amounts collected as a recovery of that taxpayer's liability. States that the taxpayer is also so liable for any amounts added as penalties and interest under HRS section 231-39. The taxpayer's liability shall be reduced by any amount collected as a recovery of the taxpayer's liability.

EFFECTIVE DATE: Upon approval

STAFF COMMENTS: This is an administration measure submitted by the department of taxation TAX-08 (15). It appears that the department is bothered by some taxpayers who visibly pass on a tax, such as the general excise tax or transient accommodations tax, and then fail to remit those monies to the department. As justification for the measure, the department states: "The public will benefit from this new provision because there will be certainty that any amount paid as tax will be remitted to the State and not retained by the taxpayer," and "The Department will have an easier time with assessment and collection in cases where any title 14 tax is passed on."

This measure, as proposed, has the potential to cause many more problems than it is intended to solve, and cannot be justified.

Consistently, since 1957, the department has always maintained in General Excise Tax Memorandum No. 4, that the "pass on" of tax is purely a matter of contract between the buyer and the seller. Current tax laws really don't care what is represented to the buyer by the seller, only that any amount paid between them becomes income to the seller and is then subject to tax as provided by law. This bill appears to make the taxing law irrelevant: if the seller states that a certain amount is tax and the buyer pays it, then the department is entitled to assess and collect that amount regardless of any other law. What if the seller made a mistake and applied either an incorrect rate or forgot to take advantage of an exemption that is allowed by law? Under current law, the seller is entitled to pay the department no more than the correct amount of tax, and then the seller must make peace with the buyer or suffer

consequences under the consumer protection law. (See discussion in Tax Facts 96-1.) Under this bill, the correct amount of tax is irrelevant. Assuming that the taxpayer can't prove that the difference has been refunded to the proper customer, the department just keeps the money. It's a "heads I win, tails you lose" situation.

Digested 2/4/15

On King Lau

10700 Alexander Falls Ave

Bakersfield, CA 93312

Regarding HB968

Aloha Committee,

I oppose HB968 due to the fact it takes away our right to a defense. This is very troubling and there should be no law that makes defending yourself harder!

Please vote to oppose. Thank you.

Neal Halstead
C312, 2531 S Kihei Road
Kihei, HI
96753
nealhalstead@yahoo.ca

Dear Members of the Judiciary Committee:

In respect of HB 968

I am writing to **OPPOSE** this bill.

I have absolutely no disagreement that as a vacation rental owner, I owe and am fully responsible for remitting all GET and TAT that I have billed a guest for and have collected.

I have absolutely no disagreement that anyone who does not remit all GET and TAT billed and collected should be penalized in accordance with the relevant sections of the Tax acts of Hawaii.

However, the term “conclusive presumption” takes away any right to defend oneself. The taxpayers’ right to defend himself is explicit in all tax codes in the United States of America.

I would ask to the members of the Committee to determine why one group of taxpayers should be singled out for such onerous treatment. I would also ask the members of the Committee to determine if such language is constitutional in this context.

Kindest regards,

Neal Halstead

Submitted By	Organization	Testifier Position	Present at Hearing
Marsha Vaughn	Individual	Oppose	No

Comments: My understanding is that "conclusive presumption" means the taxpayer has no defense and is deemed guilty. There leaves no room for error and no room for extenuating circumstances. I agree with the RBOAA position which supports full compliance with all tax laws and suggests penalties for non compliance be consistent with existing tax law. We do not understand why conclusive presumption would be applied to vacation rental owners and no other taxpayer. For these reasons, I oppose this bill and consider it to be unreasonable and unduly harsh. Mahalo for the opportunity to present testimony.

Joe Slabe
C312, 2531 S Kihei Road
Kihei, HI
96753
joeslabe@hotmail.com

Aloha,

I am writing to oppose HB 968.

My partner and I are vacation rental owners who comply fully with State and Federal law, and we take our responsibilities to collect and remit all GET and TAT very seriously.

Furthermore, I fully support and actively encourage the government to investigate and penalize any vacation rental owners who do not collect and remit tax under the current tax laws of Hawaii.

This bill, however, is deeply flawed due to the inclusion of the term “conclusive presumption.” This language is unprecedented in tax law and may even be unconstitutional, since it denies the accused the right to a defense.

The Rule for Hawaii, Rule #2 (A) says:

(A) Conclusive presumption. The trier of fact is compelled by law to accept an assumption of fact as conclusive, regardless of the strength of the opposing evidence;

This language takes away the right to a defense by excluding evidence out of hand and begs the question as to why one group of taxpayers should be singled out for such draconian treatment.

Furthermore, US Court of Appeal precedent suggests that all conclusive presumptions are unconstitutional and the bill clearly violates the Hawaii Bill of Rights in its denial of due process.

Mahalo for your time and for your service to the people of Hawaii,

Joe Slabe

Submitted By	Organization	Testifier Position	Present at Hearing
Elen Stoops	Individual	Oppose	No

Comments: Dear Legislators, I OPPOSE this measure as it removes a citizen's rights to due process. Mahalo for considering my comments.

Submitted By	Organization	Testifier Position	Present at Hearing
Adam Leamy	Individual	Oppose	No

Comments: Dear Members of the Committee: Thank you for the opportunity to provide testimony on HB968. While I support the need for taxes, the benefits provided through their collection, and the legitimacy of authorities in enforcing tax laws, HB968 eliminates a citizen's right to due process. For this significant reason, I oppose this measure.
Sincerely, Adam

Submitted By	Organization	Testifier Position	Present at Hearing
Chris Yarish	Individual	Oppose	No

Comments: I would like to begin by saying that I fully support the state's right to collect General Excise and Transient Accommodations taxes, as well as the relevant authorities rights to enforce existing tax laws. I do, however, OPPOSE HB968 as it eliminates a law-abiding, and tax paying citizen's right to due process. Mahalo, Chris Yarish

Submitted By	Organization	Testifier Position	Present at Hearing
Cara Birkholz	Individual	Oppose	No

Comments: I agree that taxes collected must be remitted to the government and that the government has the right to enforce that. However, this bill seems to eliminate the individual taxpayer's right to due process in case of a dispute or error.

Submitted By	Organization	Testifier Position	Present at Hearing
Ada Eschen	Individual	Oppose	No

Comments: I support taxes and the authorities right to enforce tax laws, however I OPPOSE this measure to amend Hawaii Tax Law as it removes taxpayers rights to due process.

I believe we should pay taxes. However, I oppose this HB968 because it seems to eliminate the individual taxpayer's right to due process in case of a dispute or error.

Submitted By	Organization	Testifier Position	Present at Hearing
Matthew Hubner	Individual	Oppose	No

Comments: Honorable Chair and Committee Members, Thank you for the opportunity to provide testimony on HB968. I support taxes and the right of States to enforce the collection of taxes. However, as I understand this language as proposed in this bill, it assumes a conclusive presumption that strips taxpayers of their right to due process as outlined in the Fifth and Fourteenth Amendments of the Unites States Constitution. Because of this language, I must respectfully Oppose this bill in its current form. Mahalo. Matt Hubner

Full compliance with all GE and TAT taxing laws is the responsibility of every individual and entity who collects such taxes. There are current laws that already exist to that effect.

The proposed law is for a "conclusive presumption" that is not rebuttable (with the exception of a refund to the customer). The proposed law says the "conclusive presumption" pertains to all amounts passed on and accounted for in receipt, contract, invoice, billing or other evidence.

As taxpayers we submit collected taxes and transmit with a TA-1 that is signed under penalty of perjury. The effect of that document is that we are declaring under penalty of perjury that we are transmitting to the state what is owed. It is unclear why a receipt, which is a supporting document to a tax filing, would have the weight of a conclusive presumption.

I respectfully request you consider the already existing laws. All other taxpayers have a right of rebuttal.