

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION
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FREDERICK D. PABLO
DIRECTOR OF TAXATION

RANDOLF L. M. BALDEMOR
DEPUTY DIRECTOR

May 30, 2012

LETTER RULING 2012-09

[Redacted text]
[Redacted text]
[Redacted text]
[Redacted text]

Dear [Redacted text]:

QUESTION PRESENTED

Your letter dated October 10, 2011 inquired whether [Redacted text] ("Taxpayer"), whose business is described below, is subject to the General Excise Tax ("GET") for gross proceeds from sales of food to airlines for consumption by the airlines' customers outside the territorial boundaries of the State, or whether those proceeds are exempt from the general excise tax under either 1) Section 237-24.3 of the Hawaii Revised Statutes; or 2) Section 237-29.5 of the Hawaii Revised Statutes.

SHORT ANSWER

Taxpayer's sales prior to the effective date of Act 105, Session Laws of Hawaii 2011 were exempt from the General Excise Tax under HRS § 237-24.3(2)(C) and HRS § 237-29.5(a)(2), as they were sales of agricultural, meat, or fish products to a common carrier engaged in interstate commerce for consumption out of state on the customer's airplanes. However, Act 105 suspends the exemption under HRS §§ 237-24.3(2)(C) and 237-29.5(a)(2) for the period from July 1, 2011 to June 30, 2013. Gross proceeds from Taxpayer's sales of its food products to airlines during this period are not exempt and are subject to GET at a rate of 4%.

FACTS

You represent the following:

Taxpayer is in the business of preparing and selling food items to airlines, to be served in-flight to the airlines' customers. Other services provided by Taxpayer, such as packaging of the food items and delivery of the packaged food items to their customers, are incidental to the sale of the food. Taxpayer's sales are retail sales. Taxpayer transfers ownership of the food items to the airlines while within the State of Hawaii, however all the food items prepared by Taxpayer are served to the airlines' customers outside the State, while planes are in-flight but after the planes have left the territorial boundaries of the State (i.e., while planes are more than 3

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miles offshore of any island).

LAW AND ANALYSIS

Taxpayer requested the Department analyze whether its gross receipts from the sales of food items to airlines for consumption out-of-state are exempt from GET under both HRS § 237-24.3 and HRS § 237-29.5. Based on the representations made by Taxpayer, those gross receipts are exempt from GET under both HRS § 237-24.3(2)(C) and 237-29.5(a)(2). However, because that exemption is temporarily suspended under Act 105, those gross receipts which are received during the period from July 1, 2011 until June 30, 2013 are subject to GET at a rate of 4%.

1) Exemption under Section 237-24.3

Taxpayer prepares food, which is sold to airlines, which in turn provide the food to their customers for consumption on airplanes flying outside the state. Taxpayer delivers the food to the airlines within the state, and therefore taxpayer's sales to airlines are subject to the general excise tax. However, HRS § 237-24.3(2)(C) exempts income received from sales of "agricultural, meat, or fish products. . . to any person or common carrier in interstate or foreign commerce, or both. . . for consumption out-of-state on the shipper's vessels or airplanes" from General Excise Tax.

Based on Taxpayer's representations, Taxpayer's gross receipts from sales of food products to airlines are exempt under this provision. First, the products described by taxpayer as the subject of these sales fall within the plain meaning of "agricultural, meat, or fish products."¹ Second, the airlines, which transport passengers between Hawaii and destinations outside the State, are clearly common carriers engaged in interstate or foreign commerce. Third, the food items are consumed by the airlines' passengers out-of-state on the airlines' vessels.

"Consumption" in the context of HRS § 237-24.3(2)(C) means actual consumption of the products as food by passengers.² The Department has historically considered the point three miles offshore of each island to be outside the boundaries of the State for general excise tax

¹ It was previously the Department's policy, as detailed in Tax Information Release 15-68, that to qualify for this exemption to the General Excise Tax, the agricultural, meat, or fish products sold to the airlines must have been sold in their "natural state." Tax Information Release 15-68 was declared obsolete in the Department of Taxation Announcement dated November 22, 1995, and is without legal effect. There is no requirement in HRS § 237-24.3(2)(C) for agricultural, meat, or fish products to be sold in their "natural state," and as such the Department relies only on the plain meaning of "agricultural, meat, or fish products," which would appear, based on your representations, to include the food products sold by Taxpayer.

² The Department notes that "consumption" in this provision is distinguished from the definition of consumption generally used for tax purposes. In this provision, "consumption" means actual consumption (i.e. eating, or the mastication and digestion of foodstuffs) versus consumption in the context of determining, for example, who is the final customer in a chain of sales at wholesale terminating in a sale at retail.

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purposes,³ and in this case the three-mile boundary should also apply. Provided that the agricultural, meat, or fish products sold by Taxpayer are consumed as food while farther than three miles from shore, proceeds from the sales of those products are exempt from the General Excise Tax under HRS § 237-24.3(2)(C).

However, the exemption described in HRS § 237-24.3(2)(C) was among many that were temporarily suspended by Act 105, for a period from July 1, 2011 until June 30, 2013. Gross proceeds received by Taxpayer prior to July 1, 2011 were exempt under the above analysis, but gross proceeds received subsequent to July 1, 2011 and before June 30, 2013 are subject to the General Excise Tax at a rate of 4%.

2) Exemption under Section 237-29.5

Taxpayer also requests a ruling as to whether proceeds from the sales of their products would be exempt from the General Excise Tax under HRS § 237-29.5. Section 237-29.5 exempts from General Excise Tax proceeds from the sale of tangible personal property:

- (1) Shipped . . . to a point outside the State where the property is otherwise resold or otherwise consumed or used outside the State; or
- (2) The sale of which is exempt under section 237-24.3(2).

Taxpayer's gross proceeds from sales of food products to airlines are not exempt under paragraph (1). When Taxpayer sells its products to airlines, it is not shipping its products out of the State, but rather selling its products at retail to the airline inside the State. As detailed in Tax Information Release (TIR) No. 98-5, for the purposes of the exemption detailed in HRS §237-29.5(a)(1), the product sold is consumed where the purchaser takes possession of the property. The sale is consummated at the "place of delivery" of the product sold. The "place of delivery" is defined as "the state or place where the purchaser or its agent accepts a delivery of tangible personal property." See also Hawaii Administrative Rules, Section 18-237-13-02.01. In this case, Taxpayer delivers its products to its airline customers while they are still within the territorial boundaries of the State, i.e. while customers' planes are still on the runway at an airport located within the State. Taxpayer's customers accept delivery of the property while within the State, and therefore proceeds from these sales are not entitled to exemption under HRS §237-29.5(a)(1).

Taxpayer's gross proceeds from sales of food products to airlines are exempt under paragraph (2), which exempts amounts exempt under HRS § 237-24.3(2)(C). Taxpayer's gross proceeds are exempt under HRS § 237-24.3(2)(C) for the reasons described above, and therefore are also exempt under HRS § 237-29.5(a)(2).

However, the exemption under HRS 237-29.5(a)(2) is rendered inoperative by Act 105 during the period from July 1, 2011 to June 30, 2013. While section 237-29.5 is not specifically included in the list of exemptions temporarily suspended, Act 105 does temporarily suspend HRS 237-24.3(2)(C). Because HRS 237-29.5 (a)(2) exempts amounts "exempt under section

³ See e.g., Tax Information Release 81-6, Re: General Excise Tax Upon Gross Receipts Derived From the Sale of Liquor and other Beverages During Flights Between the Islands.

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237-24.3(2)" and because amounts under section 237-24.3(2) are not exempt during the period from July 1, 2011 to June 30, 2013, so too amounts are not exempt under HRS 237-29.5(a)(2) during the period from July 1, 2011 to June 30, 2013.

Taxpayer's gross proceeds from their sales of food to airlines were exempt from the General Excise Tax under HRS § 237-24.3(2)(C) prior to the effective date of Act 105. Taxpayer's gross proceeds do not qualify for an exemption to General Excise Tax under HRS §237-29.5(a)(1). While Taxpayer's gross proceeds would be exempt from the General Excise Tax under HRS §237-29.5(a)(2), this exemption is rendered inoperative by Act 105. During the period that Act 105 is in force, taxpayer's gross proceeds are subject to the General Excise Tax at the rate of 4%.

The rulings contained in this letter are based on information and representations submitted by Taxpayer and accompanied by penalty of perjury statements executed by appropriate parties. While this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification on examination.

Except for the specific ruling above, we express or imply no opinion concerning the tax consequences of the facts of this case under any other provision.

The Taxpayer has reviewed the redacted version of this ruling and agreed that it will be available for public inspection and copying.

If you have any further questions regarding this matter, please call me at [Redacted text].

Sincerely,

BENJAMIN R. BROWER
Administrative Rules Specialist