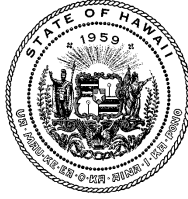


BENJAMIN J. CAYETANO
GOVERNOR

MAZIE HIRONO
LT. GOVERNOR



RAY K. KAMIKAWA
DIRECTOR OF TAXATION

SUSAN K. INOUE
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809

June 23, 1998

TAX INFORMATION RELEASE NO. 98-5

RE: General Excise Tax Exemption for Tangible Personal Property, Including Souvenirs and Gift Items, Shipped out of the State

This Tax Information Release (TIR) provides guidance regarding the application of the general excise tax exemption under section 237-29.5, Hawaii Revised Statutes (HRS), for tangible personal property shipped outside the State where such property is resold, consumed, or used outside the State; the interplay between section 237-29.5, HRS, and section 237-13(2)(C), HRS, which exempts a manufacturer or producer from the general excise tax when the property is sold for delivery outside the State; and an exemption for certain products manufactured, produced, or sold to any person or common carrier in interstate or foreign commerce for consumption outside the State on the shipper's vessels or airplanes.

Tangible personal property includes souvenirs and gift items, such as macadamia nut candies, fruits, t-shirts, liquor, and other sundry items.

The place of delivery of tangible personal property determines whether a sale is subject to the general excise tax. See Haw. Admin. Rules § 18-237-13-02.01(b)(2) (1998), Att. Gen. Op. Nos. 57-49 and 59-15. The general excise tax, therefore, is applicable to the gross income received from the sale of tangible personal property only where the place of delivery is in the State. Haw. Rev. Stat. §§ 237-29.5 (Supp. 1997), 237-13(2)(C) (1993). The "place of delivery" is defined as "the state or place where the purchaser or the purchaser's agent accepts delivery of the property."

I. Applicable Law

The value or gross proceeds arising from the manufacture, production or sale of tangible personal property (property) which is shipped by the manufacturer, producer, or seller (Taxpayer) to a place outside the State, where such property is resold, consumed, or used outside the State is not subject to the general excise tax. Haw. Rev. Stat. § 237-29.5(a)(1) (Supp. 1997)

The Taxpayer must obtain from the purchaser either a certificate prescribed by the Department of Taxation (Department) or alternative documentation which establishes that the Taxpayer has shipped the property to a point outside the State where the property will be resold, consumed, or used outside the State. Haw. Rev. Stat. § 237-29.5(b) (Supp. 1997). See Part V of this TIR.

II. Application of the Law to Manufacturers and Producers

Manufacturers and producers engaged in multiple activities, including sales of property that is manufactured or produced, are exempt from the general excise tax on the value or gross proceeds derived from sales of property shipped outside the State where the property is resold, consumed, or used outside the State. Haw. Rev. Stat. § 237-29.5(a)(1). The principle embodied in section 237-29.5(a)(1), HRS, is also found in section 237-13(2)(C), HRS, which exempts from the general excise tax the gross income received from manufacturing or producing products that are sold for delivery outside of the State. Manufacturers and producers, therefore, are exempt from the general excise tax on the gross income derived from both the manufacture and production of property and the sale of property where the place of delivery is outside the State.

A manufacturer is a person engaged in compounding, canning, preserving, packing, printing, publishing, milling, processing, refining, or preparing for sale, profit, or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities. Haw. Rev. Stat. § 237-13(1)(A) (1993).

A producer means a person who raises and produces agricultural products in their natural state, a person who produces natural resource products, a person engaged in the business of fishing or aquaculture, for sale, or for shipment or transportation out of the State under certain conditions. Haw. Rev. Stat. § 237-5 (1993).

III. When is a Taxpayer Not Liable for the Payment of the General Excise Tax?

The gross income received by a Taxpayer from the sale of tangible personal property is not subject to the general excise tax under sections 237-13(2)(C) and 237-29.5(a)(1), HRS, if the property is shipped outside the State where the property is resold, consumed, or used outside the State. Stated another way, the general excise tax is not applicable where the place of delivery is outside the State. "Place of delivery" is defined as "the state or place where the purchaser or the purchaser's agent accepts delivery of the property." (Emphasis added)

"Accept or Acceptance" is defined as the "purchaser or the purchaser's agent inspecting the property and taking physical possession of the property or having dominion and control over the property."

"Delivery" is defined as "the act of transferring possession of the property, and includes the transfer of goods from consignor to freight forwarder or for-hire carrier, from freight forwarder to for-hire carrier, one-for-hire carrier to another, or for-hire carrier to consignee."

The responsibility for shipping charges or passage of title does not determine the place of delivery.

Example 1: TP manufactures macadamia nut candy. Customers may tour TP's factory and view the candy-making process and purchase candy at the factory's gift shop. TP will ship the candy directly to the customers' out-of-State residences. However, customers are also free to purchase the candy at the factory and arrange for their own shipping of the candy. Customer Z requests that TP send the two dozen boxes of candy Z has purchased to Z's home in Bangor,

Maine. Z receives a receipt for payment of the candy and the candy is loaded onto a truck for transport to a freight forwarder.

TP is not subject to the general excise tax on the income received from Z (manufacture and sale) under section 237-13(2)(C), HRS, and section 237-29.5(a)(1), HRS. The place of delivery is outside the State because Z did not accept delivery of the candy in the State. Z did not accept the candy in the State because Z did not take physical possession of the candy or have dominion and control over the candy. The candy is delivered outside the State to Z's residence in Maine.

Example 2: A, a protea farmer in Kula, and D, an anthurium grower in Hilo, take orders for cut flowers to be shipped to mainland florists. Both A and D are not subject to the general excise tax on the income received from the mainland florists (production and sale). The place of delivery is outside the State because the mainland florists did not accept delivery of the flowers in the State. The mainland florists did not accept delivery of the flowers in the State because the florists did not take physical possession of the flowers or have dominion and control over the flowers. The property is delivered outside the State.

Example 3: TP grows coffee beans for sale both in the State and outside the State. TP agrees to sell coffee beans to a coffee seller in Washington. TP ships the coffee beans to Washington where the coffee seller's agent accepts delivery of the beans at the Seattle dock.

TP is not subject to the general excise tax on the income received from the coffee bean shipment to the coffee seller (production and sale). The place of delivery is outside the State because the coffee seller did not accept delivery of the coffee beans in the State. The coffee seller did not accept delivery of the coffee beans in the State because neither the coffee seller nor its agent took physical possession of the coffee beans or had dominion or control over the coffee beans in the State. The coffee beans are delivered outside the State to Washington.

Example 4: B company advertises the sale of tropical flower arrangements. B company does not actually send the flower arrangements itself but contracts with C company, a grower of tropical flowers, to provide the flower arrangements to out-of-State purchasers. C company will ship the flower arrangements directly to purchasers and charge B company for the deliveries.

B company is not subject to the general excise tax on the income received from these transactions. The place of delivery is outside the State because the purchasers did not accept delivery of the flowers in the State. C company also is exempt from the general excise tax (production and sale). The purchasers did not accept delivery of the flowers in the State because they did not take physical possession of the flowers or have dominion or control over the flowers in the State, despite the fact that both B company and C company are located in Hawaii. The flowers are delivered outside the State as the place of contracting or receipt of purchase price alone is not determinative of the location of the sale. In re Tax Appeal of Heftel Broadcasting, Inc., 57 Haw. 175, 554 P.2d 242 (1976).

IV. When is a Taxpayer Liable for Payment of the General Excise Tax?

The following examples are situations where the place of delivery is in the State and therefore, do not qualify for the general excise tax exemption for tangible personal property shipped outside the State. The place of delivery is in the State because the purchaser accepts delivery in the State.

Example 5: Assume the same facts as Example 1, except that TP sells candy to customer Z at TP's factory and Z takes the candy when Z leaves the factory. TP is subject to the general excise tax on the income received from Z. The place of delivery is in the State because Z accepts delivery of the candy in the State. The candy is delivered to Z in the State. Z accepts the candy in the State by taking physical possession of the candy.

Example 6: X, a tourist from Japan, orders a box of macadamia nut candy, a box of pineapple candy, and a package of beef jerky from the souvenir and gift items brochure of X's tour operator. At the airport, on the day of X's departure back to Japan, the tour operator's personnel give X a bag containing X's candies and beef jerky. The tour operator's personnel request that X check the contents of the bag against X's order slip to ensure that all the items are there in the quantity that X ordered, are the correct items, and are not damaged. X is instructed to take the bag to the airline check-in counter with X's luggage to be checked in if the order matches X's order slip. X finds all of the items are in order and checks in the bag of candies and beef jerky with the rest of X's luggage.

The tour operator is subject to the general excise tax on the value of the candies and beef jerky sold to X. The place of delivery is in the State because X accepts delivery of the candies and beef jerky in the State. The candies and beef jerky are delivered to X at the local airport. X accepted the candies and beef jerky in the State by taking physical possession of the items at the local airport. The baggage check for the bag of candies and beef jerky is indicative of X's ownership of the candies and beef jerky and authorizes X to make a claim against the airline if the candies and beef jerky are damaged or lost.

V. Export Exemption Certificate (Form G-61)

To claim the exemption, section 237-29.5(b), HRS, requires the Taxpayer to take from the purchaser the Department's Export Exemption Certificate (Form G-61), certifying that the purchased property will be shipped to a point outside the State where the property is resold or consumed or used outside the State. The law requires the purchaser to pay to the Taxpayer upon demand the amount of the additional tax imposed upon the Taxpayer if the property purchased is not resold, consumed, or used outside the State. Refer to the attached Form G-61 for further information and instructions concerning the completion, execution, and other requirements.

An alternative form or document may be used to provide the information requested in Form G-61.

All records relating to the manufacture, production, and sale of the property, including Form G-61 or an alternative form or document shall be kept in the English language and maintained in the State for a minimum of three years. Hawaii Administrative Rules §18-231-3-14.25 (1994).

Example 7: Assume the same facts as in Example 1 and that Customer Z receives a receipt for payment of the candy which has Z's name and out-of-state address where the candy will be shipped, a description of the candy, and the purchase price or value of the candy. TP is not required to take the Form G-61 from Z under these circumstances.

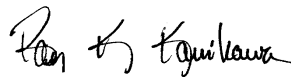
VI. Exemption for Sale of Certain Products Delivered in the State

While Parts I through V of this TIR discuss the general excise tax exemption under section 237-29.5(a)(1), HRS, that is applicable where the place of delivery is outside the State, this part of the TIR explains the application of section 237-29.5(a)(2), HRS, which exempts from the general excise tax the value or gross proceeds arising from the manufacture, production or sale of certain products exempt under section 237-24.3(2), HRS, even if the place of delivery is in the State. Section 237-24.3(2)(A), HRS, exempts manufacturers and producers from the general excise tax on both the manufacture and production and sale of liquor as defined in chapter 244D, HRS, to any person or common carrier in interstate or foreign commerce for consumption outside the State on the shipper's vessels or airplanes. Section 237-24.3(2)(B), HRS, exempts manufacturers and producers from the general excise tax on both the manufacture and production and sale of cigarettes and tobacco products as defined in chapter 245, HRS, to any person or common carrier in interstate or foreign commerce for consumption outside the State on the shipper's vessels or airplanes.

The exemption in section 237-24.3(2)(C), HRS, for sales of agricultural, meat, or fish products grown, raised or caught in the State to any person or common carrier in interstate or foreign commerce for consumption outside the State on the shipper's vessels or airplanes was held to be unconstitutional by the Hawaii Supreme Court in In re Hawaiian Flour Mills, Inc., 76 Haw. 1 (1994). A bill was introduced during the 1998 legislative session to repeal this exemption but the bill was not passed by the legislature. Notwithstanding the lack of legislative clarification of this issue, the Department will administer section 237-23.3(2)(C), HRS, without regard to the requirement that the products be grown, raised or caught in the State.

VII. Superseding TIR No. 88-1

This TIR supersedes TIR No. 88-1, relating to the general excise tax exemption for sales of tangible personal property shipped out of the State. To the extent not consistent with this TIR, the prior determination letters by the Department which refer to title passage are superseded as of the date of this TIR.



RAY K. KAMIKAWA
Director of Taxation

Attachment: Form G-61

HRS Sections Explained: HRS Sections 237-5, 237-13(1) & (2), 237-24.3(2), 237-29.5
Rule Section Explained: HAR Section 18-231-3-14.25

TIR 88-1 is superseded