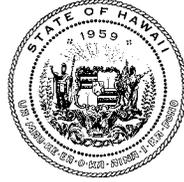


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November 10, 2011

## TAX INFORMATION RELEASE NO. 2011-05

RE: Clarification of what constitutes a transient accommodation furnished on a complimentary or gratuitous basis.

The purpose of this Tax Information Release is to clarify in what circumstances a transient accommodation is deemed to have been furnished on a complimentary or gratuitous basis, or otherwise at no charge, thereby subjecting it to the tax created under Act 103, Session Laws of Hawaii 2011 (the "Complimentary Room Tax").

Act 103 amends Hawaii Revised Statutes section 237D-2 by adding a new subsection which states:

There is levied and shall be assessed and collected each month a daily tax of \$10 for every transient accommodation that is furnished on a complimentary or gratuitous basis, or otherwise at no charge, including transient accommodations furnished as part of a package.

Transient accommodations may be furnished through a variety of transactions and in some of those transactions it may not be immediately clear whether the transient accommodation was furnished gratuitously.

The Department of Taxation (Department) will generally deem a transient accommodation to have been furnished on a complimentary or gratuitous basis, or otherwise at no charge, if that transient accommodation was not furnished in exchange for any consideration.

With regard to HRS § 237D-3(7), the Department interprets Act 103 to overrule only the language specifically referencing "complimentary accommodations" and will still deem the specific transactions listed in the rest of the paragraph to be exempt. In other words, the Department will read the paragraph as follows:

**237D-3 Exemptions.** This chapter shall not apply to:

(7) ~~Accommodations furnished without charge such as, but not limited to, complimentary accommodations,~~ accommodations furnished to contract personnel such as physicians, golf or tennis professionals, swimming and dancing

instructors, and other personnel to whom no salary is paid or to employees who receive room and board as part of their salary or compensation.

The following examples are intended to provide some clarity regarding when the Complimentary Room Tax is applicable and when it is not.

### **Where a Room is Labeled as "Free" but Consideration is Received**

Sometimes transient accommodations may be labeled as "free" but in reality the hotel or owner receives consideration for furnishing the room. One example is the "rent 3, get the 4<sup>th</sup> night free" type of promotion. Though the fourth night is advertised as "free," in reality the hotel is receiving consideration for furnishing the room for that fourth night. It is simply that for marketing purposes, the hotel advertises that it is only receiving consideration for the first three nights. In reality, though, four nights are furnished in exchange for consideration in one single transaction.

Another example is where, during a bargaining process for a larger transaction, the hotel or owner offers to throw in "free" rooms to sweeten the deal. In reality, however, these rooms are not free. They are furnished, along with the rest of what is furnished in the deal, in exchange for consideration in one transaction.

**Example One:** A hotel advertises a deal that states: "Rent 4 nights, get the 5<sup>th</sup> night free" for rooms which are rented at a price of \$100 per night. A customer stays five nights at the hotel and pays the hotel \$400 for the five-night stay. The fifth night was not furnished gratuitously. The hotel received consideration of \$400 in exchange for furnishing the hotel room for five nights. The hotel does not owe the Complimentary Room Tax.

**Example Two:** A couple decides to have their wedding at a hotel. The hotel offers a wedding package where two conference rooms can be rented, along with service staff and food and beverage service, for \$10,000. After paying the \$10,000 and booking the conference rooms, the couple inquires about renting overnight guest rooms for friends and family. As a thank-you for booking the \$10,000 wedding package, the hotel gratuitously offers to furnish the couple four rooms free of charge on the night of the ceremony. These four rooms are subject to the Complimentary Room Tax because they are furnished gratuitously and without any return consideration.

**Example Three:** Assume the same facts as Example Two, except that when negotiating the \$10,000 wedding package with the couple, the hotel offers to throw in four guest rooms free of charge. In this case, the four rooms are not subject to the Complimentary Room Tax because they have not been furnished gratuitously. They are furnished as part of the overall wedding package transaction and are part of the consideration the hotel provides in exchange for the \$10,000 consideration the couple has provided. The hotel must allocate a portion of the \$10,000 paid for the package to the rooms and pay the Transient Accommodations Tax (TAT) on that amount at the regular TAT rate.

**Example Four:** A company decides to hold a weekend Waikiki retreat and needs to rent 52 rooms. The company negotiates with several Waikiki hotels to rent the rooms at bulk rates. A hotel offers the company 50 rooms at its bulk rate of \$100 plus 2 suites for free. The hotel does not owe the Complimentary Room Tax on the 2 "free" suites because they are not being furnished gratuitously. The two suites are being furnished in the same transaction as the 50 regular rooms in exchange for the consideration of \$5,000.

### **Charitable Donations**

Generally, if a hotel or owner gives rooms to charity, those rooms will be subject to the Complimentary Room Tax. If the room is furnished, and the hotel or owner receives no consideration, then the room is subject to Complimentary Room Tax.

**Example Five:** A hotel donates 10 rooms to a charitable organization to auction off as part of a fundraiser. The charity sells each room for \$100 each. The hotel owes the Complimentary Room Tax on each of the ten rooms because it furnished the rooms gratuitously. The consideration paid by the guests was paid to the charity and not the hotel.

**Example Six:** A hotel offers a free night to any member of the armed services returning from deployment. The hotel owes Complimentary Room Tax on any rooms it furnishes under such a promotion because it is receiving no consideration in exchange for the room.

### **Publicity - Rooms Given to Travel Writers**

Sometimes hotels may wish to give rooms to travel writers or other high profile guests. Generally, such free rooms will be subject to the Complimentary Room Tax if the hotel receives no consideration from the guest in exchange for the room.

**Example Seven:** A hotel furnishes a room free of charge to a travel writer hoping she will write a favorable review. The hotel owes the Complimentary Room Tax because the room was furnished gratuitously. The writer has offered nothing in exchange for the free room.

**Example Eight:** Assume the same facts as Example Seven, except that in exchange for the free room, the travel writer agrees to write a favorable review. The hotel does not owe the Complimentary Room Tax because the room is not furnished gratuitously. It is furnished in exchange for a favorable review in a travel publication.

### **Timeshare Presentations**

Sometimes timeshares will offer free stays in rooms to potential purchasers as an enticement to bring that purchaser in for a sales pitch. Generally, in exchange for the room the timeshare will require that the guest attend some type of sales pitch. The guest's agreement to attend this pitch, while not cash, is valuable consideration given in exchange for the room.

**Example Nine:** A timeshare association offers free rooms to guests if they agree to attend a one-hour presentation on purchasing a timeshare. The timeshare does not owe the Complimentary Room Tax because these rooms are not furnished gratuitously. The rooms are furnished in exchange for one hour of the guests' time.

### **Complaints and Unsatisfactory Service**

Sometimes a guest's stay in a transient accommodation is unsatisfactory. One way hotels or owners may appease a complaining guest is by offering additional nights of stay free of charge. Generally, to the extent such additional rooms are given to make up for unsatisfactory nights of stay, the rooms are not subject to the Complimentary Room Tax. If a hotel agrees to provide three nights of stay to a guest and one night is unsatisfactory, providing a fourth night of stay to make up for the first unsatisfactory night is merely repairing unsatisfactory performance under the original contract and is not a gratuitously furnished room for purposes of the Complimentary Room Tax.

**Example Ten:** A guest books a three-night stay in a hotel at a rate of \$100 per night. After the first night, the guest complains that the room was dirty and noisy. The hotel offers the guest a different room of similar value as well as a fourth night free of charge to make up for the unsatisfactory first night. The hotel does not owe the Complimentary Room Tax on the fourth night's stay. By furnishing the fourth night, the hotel is merely completing its performance under the original contract with the guest. The original contract was \$300 in exchange for furnishing three nights of stay in the hotel. However, because the first night was an unsatisfactory experience, the stay was not satisfactory performance under the original contract. Therefore, the fourth "free" night is in effect the third and final night of performance required under the original contract. Thus, the room was not furnished gratuitously.

**Example Eleven:** Assume the same facts as Example Ten, except that rather than offer a fourth night's stay at the hotel, the hotel simply refunds the guest \$100. The hotel does not owe the Complimentary Room Tax on the first night's stay. Though the guest spent the night in a hotel room, and though it was effectively free of charge once the guest received his refund, for purposes of the Complimentary Room Tax the room is deemed to have never been furnished. Similar to Example Ten, the first night's stay was not satisfactory performance under the original contract. By refunding the \$100, the hotel is effectively voiding the contract with respect to the first night's stay for purposes of the Complimentary Room Tax. This means that, for purposes of the Complimentary Room Tax, a transient accommodation was never furnished on that first night and thus no Complimentary Room Tax is owed.

### **Nominal Charges**

A hotel or owner may seek to avoid the Complimentary Room Tax on a gratuitously furnished room by charging a nominal amount such as \$1 per night. The Department will deem such nominal consideration to be no consideration at all. The Complimentary Room Tax is owed for any room furnished in exchange for nominal consideration.

Determining precisely how much consideration is enough to rise above being deemed merely nominal is a highly factual determination. However, if a room is rented in exchange for an amount that is market price, even if that amount is low enough to generate Transient Accommodations Tax revenue lower than \$10 per night, the amount will not be considered nominal consideration. Whether amounts below market rate are merely nominal consideration will be determined on case-by-case bases.

**Example Twelve:** A hotel wishes to furnish a room to a guest free of charge but, not wanting to be subject to the Complimentary Room Tax, instead charges the guest \$1 for the night's stay. The hotel owes the Complimentary Room Tax because it has furnished the room for merely nominal consideration. For purposes of the Complimentary Room Tax, the Department will deem nominal consideration to be no consideration at all.

**Example Thirteen:** A hotel charges \$100 for a one-night stay, the going market rate for such rooms. The hotel does not owe the Complimentary Room Tax of \$10, but merely the Transient Accommodations Tax of 9.25% of \$100, or \$9.25. The hotel would also owe General Excise Tax on the rental receipts collected. Though the room rate charged generates TAT of less than \$10 per night, the amount charged is not nominal consideration for purposes of the Complimentary Room Tax because it is fair market value.

### **Personal Use**

Personal use of property is not subject to the Complimentary Room Tax. For instance, allowing friends and family to stay in a room in a house that is generally used as a room in a bed and breakfast operation is not subject to the Complimentary Room Tax.

**Example Fourteen:** An owner of a timeshare unit is entitled to stay in her unit for one week per year, but rather than occupying the room herself, lets her sister and her sister's family occupy the unit free of charge. Whether the Complimentary Room Tax is owed depends on whether this is deemed to be personal use of the unit. Generally, the Department will deem rooms given free of charge to close friends and family members as personal use and the room will not be subject to the Complimentary Room Tax. Determining whether the friend or family member has a close enough personal relationship with the owner is highly factual and whether the Complimentary Room Tax is owed will vary on a case-by-case basis. However, please note that while the owner in this example likely does not owe the Complimentary Room Tax, the Transient Accommodations Tax is still due under HRS § 237D-2(d). **See Tax Facts 98-4 Question & Answer #6** for more information.

**Example Fifteen:** An owner of a bed and breakfast rents three rooms in his house to transient guests. One of the owner's friends from the mainland visits Hawaii, and the owner allows the friend to stay in one of the rooms free of charge. The Complimentary Room Tax is not owed for the friend's stay. Allowing a friend to stay in a room in one's house is personal use of the room and not commercial use. Therefore the room is not being furnished on a complimentary basis for purposes of the Complimentary Room Tax.

### **Rooms Furnished to Employees**

Hotels, timeshares or other owners or operators of transient accommodations ("TA Furnishers") may allow employees to stay in rooms free of charge for a variety of reasons. Some of these reasons, such as an employee allowed to stay at a hotel pursuant to an employment contract where the employee is provided room and board as part of his salary or compensation, exempt the stay from not merely the Complimentary Room Tax but also the TAT entirely.

In situations where an employee is staying in a transient accommodation free of charge for reasons not specifically exempted by statute, the TA Furnisher may owe Complimentary Room Tax if the employee is not staying for business reasons. If the employee is required to stay in the room for a business purpose, such as, e.g., repair work that requires her to not leave the premises, then that room is being used by the TA Furnisher for business purposes. If the room is being used for business purposes, it is not being furnished gratuitously for purposes of the Complimentary Room Tax. However, if the employee is not required to stay on premises and is free to leave and potentially stay in different accommodations, then that room is not being used for business purposes and the TA Furnisher would owe Complimentary Room Tax.

**Example Sixteen:** As part of his employment contract, a hotel employee is provided room and board in the hotel along with his salary. The hotel does not owe Complimentary Room Tax on the nights that employee stays in the hotel because HRS § 237D-3(7) exempts from TAT transient accommodations provided to employees as part of their compensation.

**Example Seventeen:** A hotel company flies one of its mainland employees to Hawaii for a special job. The hotel employee is required to stay in a room at the hotel while performing the job. The hotel does not owe Complimentary Room Tax on the nights the employee stays at the hotel. Where an employee is required to stay on hotel premises, the room is being used by the hotel itself for business purposes and will not be deemed a furnished transient accommodation for purposes of the Complimentary Room Tax.

**Example Eighteen:** Assume the same facts as Example Seventeen, except that rather than use its own employee, the hotel hires an independent contractor. The independent contract is required to stay in a room while performing the job. The hotel does not owe the Complimentary Room Tax. The independent contractor is a contract person to whom no salary is paid. Rooms furnished to contract personnel to whom no salary is paid are exempt from TAT under HRS § 237D-3(7).

**Example Nineteen:** A hotel employee transfers from the mainland to Hawaii. During the employee's period of initial stay, while searching for permanent accommodations, the hotel allows the employee to stay in a room for free. The hotel owes Complimentary Room Tax on each night the employee stays. Because the hotel has not required the employee to stay in one of its rooms for business purposes, the room is a gratuitously furnished transient accommodation for Complimentary Room Tax purposes.

The Examples in this Tax Information Release are applicable only to the Complimentary Room Tax and cannot be relied upon for the purposes of any other tax. For more information contact the Technical Section at (808) 587-1577 or e-mail at [Tax.Technical.Section@hawaii.gov](mailto:Tax.Technical.Section@hawaii.gov).

  
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