

DEPARTMENT OF TAXATION

Amendments to Chapter 18-237,
Hawaii Administrative Rules

Effective: _____

SUMMARY

1. §18-237-1 is amended.

§18-237-1 Definitions. (a) As used in this chapter:

"Asset used in a trade or business" means tangible personal property, used in the trade or business, of a character which is or has been subject to the allowance for depreciation provided in section 167 of the Internal Revenue Code of 1954, as amended, and which is not property of a kind which is ordinarily included in the merchandise inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of a trade or business. The term shall include, but is not limited to, machinery and equipment or furniture and fixtures used in a trade or business.

"Business, " "engaging in business" includes all activities (personal, professional or corporate), engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, but does not include casual sales.

"Casual sale" means an occasional, isolated, irregular, infrequent or incidental sale or transaction involving tangible personal property which is not ordinarily sold in the usual course of trade or business.

- (1) Application. Section 237-13, HRS, subjects virtually every economic activity to the general excise tax. The sale of tangible personal property may be taxed either by subsection (1), (2), (10) or by section 237-16, HRS. Subsection (1) imposes a tax upon manufacturers. Subsection (2) specifically imposes a tax upon the sale of tangible personal property. Subsection (10) imposes a tax upon any person engaging in any trade, business, activity, occupation or calling not otherwise included in section 237-13, HRS. Section 237-16, HRS, imposes a tax upon

all retailers. Casual sales of tangible personal property, however, are not deemed to constitute doing business or engaging in business.

- (A) When a person engaged in trade or business sells tangible personal property which is not usually carried in his merchandise inventory and the sales thereof do not show a pattern of conduct that he sells tangible personal property other than inventory merchandise, the transaction will be deemed casual and the gross receipts derived therefrom shall not be deemed to constitute gross income.
- (B) When a person engaged in trade or business either sells capital assets (furniture, fixtures, equipment) used in his trade or business because of (1) obsolescence; (2) replacement; (3) damage or (4) such capital assets are used as trade-ins, the transaction will be deemed casual and the proceeds derived from the sale, or the trade-in value will not be deemed to constitute taxable gross receipts.

Example 1:

ABC Corporation is engaged in the retail chain-grocery business and needs new display equipment. Experience has indicated that new display equipment has a useful life of seven years. Accordingly, the taxpayer purchases the new equipment and sells the old equipment. The foregoing sale of the old equipment is not subject to the general excise tax inasmuch as the sale is considered a "casual sale."

Example 2:

Rapid Service Laundry, in an overall plan for modernizing and renovating its existing facilities, sells most of its laundry and dry cleaning equipment and purchases new equipment as replacements. The foregoing sale of laundry and dry cleaning equipment is not subject to the general excise tax.

Example 3:

Oahu Pineapple Company, engaged in the pineapple canning business, decides to discontinue its operations due to competition and major setback suffered as a result of numerous labor disputes. As a consequence, most of its pineapple processing and canning equipment are sold to other pineapple canneries. The foregoing sale of equipment is not subject to the general excise tax.

- (C) When a person engaged in a trade or business exchanges (or transfers) but does not sell, merchandise or assets used in his trade or business pursuant to a plan of partnership, incorporation, reorganization (including statutory merger or consolidation), liquidation, etc., where no gain or loss is recognized under the Internal Revenue Code, the transaction will be deemed a casual transaction such as may occur in the following situations:
- (i) Sole proprietorship to partnership. (owner becomes a partner);
 - (ii) Sole proprietorship to corporation. (IRC section 351, eighty per cent or more controlled by the individual transferor);
 - (iii) Partnership to corporation. (IRC section 351, eighty per cent or more controlled by the transferor partners);
 - (iv) Statutory mergers, consolidations, acquisitions in exchange for stock,

- recapitalization, and the like. (IRC sections 354, 361, and 368);
- (v) Corporate liquidations. (IRC sections 332 to 337); or
 - (vi) Distribution or liquidations of assets of an estate or trust to beneficiaries.
- (D) When a person engaged in a trade or business sells assets which are of like nature as those carried in his merchandise inventory, the transaction will be deemed to have occurred in the usual course of business and will not be deemed a casual transaction.

Example 4:

Hawaii Typewriter Company is a dealer in typewriters, adding machines and other related office machines. It accepts trade-ins of used office machines which are reconditioned by the Company and eventually sold as "used office machines." The Company also withdraws new typewriters and adding machines from its inventory for use in its own business office. The Company capitalizes the cost of the machines and claims deductions under IRC section 167 for income tax purposes. In the ordinary course of business these office machines, which were used in its business office, are also reconditioned and sold by the Company as "used office machines." The sale of these machines, used in the trade or business, are assets which are of like nature as that carried in the merchandise inventory of the taxpayer, and therefore is subject to the general excise tax.

Example 5:

XYZ Motors, an automobile dealer, in the ordinary course of business withdraws a number of new automobiles from its inventory for use as "company cars." XYZ Motors capitalizes the cost of these automobiles and claims depreciation

thereon for income tax purposes. The "company cars" are eventually sold by XYZ Motors as used cars. The foregoing sale of "company cars" is subject to the general excise tax.

Example 6:

Range Dairy Company operates a dairy farm having approximately 500 milking cows. The Company capitalizes the cost of the milking cows and claims deductions under IRC section 167 for income tax purposes. In addition to its regular sales, the Company sells the milking cows whenever they have served their useful purpose. The sale of the milking cows is subject to the general excise tax.

- (E) Where a person engaged in a trade or business sells tangible property which is not usually carried in his merchandise inventory, but by reason of the frequency, number and size, the sales thereof show a pattern of conduct that he sells tangible property other than inventory merchandise, the transaction will be deemed to be in the usual course of business and not a casual transaction.

Example 7:

Rentals Incorporated is engaged in the automobile rental and leasing activity. Every three years or thereabouts, taxpayer makes way for new rental automobiles by selling the old rental automobiles. The sale of the old rental automobiles is subject to the general excise tax. Although the taxpayer is not engaged primarily in the business of selling rental automobiles, there are a sufficient number of recurring sales as to constitute engaging in the business of selling automobiles. Thus, such sales are not considered "casual sales."

Example 8:

Playtime Company derives part of its income from various amusement and vending machines - pinball, cigarette, candy and related machines - located in stores and amusement parlors. Playtime Company has agreements with the foregoing stores and amusement parlors to the effect that receipts from the machines would be divided on a certain percentage. To attract new customers and remain in the market competitively, Playtime acquires new pinball machines every six months and sells the used pinball machines. The sale of those pinball machines is subject to the general excise tax.

- (F) Where a person engaged in trade or business sells his merchandise inventory in bulk, other than in the ordinary course of his trade or business, or where the sale in bulk occurs upon the termination of a business activity which is one of several activities conducted by the business, the transaction will be deemed to have occurred in the usual course of the taxpayer's business and will not be deemed to constitute a casual sale.

Example 9:

Subsequent to losing its lease, ABC Drug Store decides to terminate its business. Accordingly, the entire merchandise inventory is sold in bulk to another drug store. The foregoing sale of merchandise inventory is subject to the general excise tax.

Example 10:

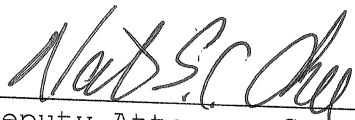
S & S Bicycle Shop is engaged in the business of selling and servicing bicycles. Due to lack of store space and decline in sales, the

taxpayer decides to terminate the "sales" and concentrate on the service activity of the business. The inventory of bicycles is sold in bulk to a large department store. The foregoing sale of merchandise inventory is subject to the general excise tax.

"Employee" means any individual performing services for a person if the relationship between the individual and the person for whom the service is performed is the legal relationship of employer and employee. For purposes of this chapter, whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case. Factors indicating the existence of an employer-employee relationship include, but are not limited to:

- (i) Control and direction of the individual who performs the service, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished;
- (ii) Continuous oversight and supervision of the individual who performs the service;
- (iii) The right to discharge the individual performing the service; and
- (iv) The furnishing of tools and the furnishing of a place to work to the individual who performs the service. [Eff 2/16/82; Am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §§237-1, 237-24(6))

APPROVED AS TO FORM:



Deputy Attorney General

DATE: _____

DEPARTMENT OF TAXATION; Amendment to Chapter 18-237, Hawaii
Administrative Rules; Standard format amendment of §18-237-1 for
pre-hearing approval.
