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STATE OF HAWAII

P.O. Box 259

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June 7, 1996

TAX INFORMATION RELEASE NO. 96-4

RE: The General Excise Tax Rates Levied on Sales of Pesticides to Pest Control Operators.

This Tax Information Release (“TIR”) clarifies the general excise tax rates applicable to sales of pesticides made by suppliers or dealers to pest control operators as defined by section 460J-1, Hawaii Revised Statutes (“HRS”). Specifically, this TIR addresses whether a sale of pesticide to a pest control operator for use in treating the building or structure of a customer qualifies for the general excise tax wholesale rate of one-half per cent.

DEFINITIONS

The following definitions apply with respect to the administration of this TIR:

“Licensed” means licensed under the General Excise Tax laws.

“Pest Control Operator” means a person engaging in the practice of pest control or fumigation as defined by section 460J-1.

“Supplier or dealer” means a person who sells pesticides to licensed pest control operators.

APPLICATION OF THE GENERAL EXCISE TAX

Pesticides used to treat buildings or structures come in a variety of forms. The following are examples which have been the subject of inquiries made to the Department of Taxation and will be discussed later in this TIR:

Example 1. Supplier “S” sells odorless and colorless gaseous pesticides to licensed pest control operator “P”. P applies the pesticides to a customer’s building or structure by tent fumigation. After the tent is removed, the gases dissipate and cannot be perceived by sight, smell, sound, taste, or touch. To alert people to

the presence of toxic pesticides, an irritant such as tear gas, which dissipates shortly after the tent is removed, is also released into the tent.

Example 2. S sells to P powder pesticides which are mixed with a carrier such as water and are sprayed on to a customer's building or structure. When the water dries, a fine coat of the powder pesticide is left on the treated surface. For the purpose of this example, we shall assume that the powder can then be detected only through chemical analysis.

Example 3. S sells to P bait stations containing pesticides which kill pests over a prolonged period of time. The bait stations are made of durable plastic and/or metal and are installed in or on the surrounding soil of a customer's building or structure.

For general excise tax purposes, pest control operators are treated as "contractors" pursuant to section 237-6(3), HRS. Therefore, section 237-4(4), HRS, which sets forth the standards for wholesale transactions involving contractors, is the appropriate section with which to analyze the questions presented in this TIR. Section 237-4(4) states as follows:

Sales to a licensed contractor, of materials or commodities which are to be incorporated by the contractor into the finished work or project required by the contract and which will remain in such finished work or project in such form as to be perceptible to the senses.

As applied to sales to pest control operators, three elements must be satisfied under section 237-4(4) in order for the transaction to be treated as a sale at wholesale. The pesticide must:

- 1) be sold to a licensed pest control operator,
- 2) be incorporated into the treated building, structure, or surrounding soil, and
- 3) remain in the treated building, structure, or surrounding soil in a form perceptible to the senses (emphasis added).

The first requirement is satisfied if the pest control operator has a valid general excise tax license. The second requirement is satisfied if the pesticides are "incorporated into a finished work or project" when they are applied to a building, structure, or the surrounding soil.

The third requirement, the "perceptible to the senses" standard, is also utilized in

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determining whether a sale of tangible personal property is exempt from the use tax (section 238-2, HRS), and was the subject of a Hawaii Supreme Court memorandum opinion. In In re Kaiser Cement, No. 8323 (Haw. Oct. 28, 1982), aff'g No. 1985 (Haw. Tax Appeal Ct., filed May 29, 1981), the court held that coal fuel imported for use by a cement manufacturer did not qualify for the use tax exemption because it was not perceptible to the unaided senses, *i.e.*, sight, smell, sound, taste, or touch, in the finished cement. It was not enough that minute particles of coal could be detected in the cement through chemical analysis. See also TIR 83-7 (Dec. 30, 1983) (which is based on the Kaiser memorandum opinion).

Although the Kaiser case involved a use tax provision, the court's interpretation of the "perceptible to the senses" standard should apply to the similar standard in section 237-4(4). The use tax complements the general excise tax by "mak[ing] all tangible personal property used or consumed in the State subject to a uniform tax burden irrespective of whether it is acquired within the State, making it subject to the [general excise] tax, or from without the State, making it subject to a use tax at the same rate." In re Hawaiian Flour Mills, Inc., 76 Haw. 1 (1994) (quoting Halliburto Oil Well Cementing Co. v. Reilly, 373 U.S. 64 (1963)) (brackets supplied by Hawaiian Flour Mills court). The use tax statute at issue in the Kaiser case imposes a one-half per cent tax on property imported for resale, and also contains a subsection relating specifically to materials or commodities imported by contractors. It uses language identical to and corresponds with the general excise tax statute at issue in this TIR, section 237-4(4). The "perceptible to the senses" standard, therefore, must be construed in the same manner with respect to these corresponding tax provisions.

Thus, for the sale of pesticides to qualify for the wholesale rate under section 237-4(4), the pesticide must remain in the work or project and be perceptible by sight, smell, sound, taste, or touch. If the pesticide is perceptible only through aided means such as chemical analysis or microscopy, then the sale of the pesticide does not qualify for the wholesale rate and is taxable at the four per cent retail rate.

The sale of the gaseous pesticide in Example 1 above does not qualify for the wholesale rate because it does not remain in the treated building or structure. It is odorless, colorless, and dissipates when the tent is removed. Sales of gaseous pesticides like the gaseous pesticide in Example 1 are subject to the general excise tax rate of four per cent. The sale of the irritants such as tear gas to the pest control operator would likewise be subject to the general excise tax rate of four per cent because although a lingering scent may be perceptible for a few hours, it also dissipates. The sale of the powder pesticides in Example 2 would be subject to the four per cent rate because after it is applied to a customer's building or structure, it is detectible only through chemical analysis.

The sale of the bait stations in Example 3 above, on the other hand, would qualify for the one-half per cent wholesale rate because the bait stations and the pesticides in them remain in the building, structure, or surrounding soil in a form which can be seen or touched.

REPORTING SALES OF PESTICIDES

Those taxpayers (suppliers or dealers) who sell pesticides to pest control operators are responsible for reporting the gross receipts from those sales on Form G-45 and G-49, and should determine whether the income should be reported on line 1 (wholesaling) or line 8 (retailing) in accordance with the principles set forth in this TIR.

A handwritten signature in black ink, appearing to read "Ray K. Kamikawa", with a long horizontal line extending to the right.

RAY K. KAMIKAWA
Director of Taxation

HRS Section Explained: HRS §237-4(4)

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