

NetChoice Promoting Convenience, Choice, and Commerce on The Net

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Rep. Sylvia Luke, Chair
House Financial Committee
Hawaii House of Representatives
Hawaii State Capitol

February 8, 2018

RE: Opposition to HB 2417 – Taxation

Dear Chair Luke and members of the committee:

We ask that you do not pass HB 2417 and avoid making the same mistakes as South Dakota.

HB 2417 will be seen by Hawaii consumers as a new tax and could erode your ability to protect Hawaii businesses from out-of-state tax collectors.

First, consider problems created by HB 2417's anticipated legal challenges:

- Will not go into effect for several years, if ever
- Will cost Hawaii taxpayers in attorney's fees and court costs
- May be rendered irrelevant by other state lawsuits or Congressional action

Second, if the HB 2417 survives court challenges, it would:

- Reduce the ability of Hawaii to protect its businesses from burdens imposed by other states
- Rely on new revenue extracted from Hawaii residents – not from out-of-state businesses
- Would generate only minimal new tax revenue
- Establish a new tax regime that is anything but equal, consistent, or fair

Likely seen as a new tax by your constituents

Hawaii residents will likely see this as a new tax since any tax collected will come from the pockets of Hawaii citizens, not from out-of-state businesses.

We polled Tennessee residents on a similar tax in that state, and 56% said requiring them to pay tax on online purchases from out-of-state businesses would be a statewide tax increase. We would likely see similar results in a poll of Hawaii citizens. (see Tennessee poll at NetChoice.org/TNTaxPoll)

HB 2417 is likely to bring burdens on Hawaii businesses from other states

Just by proposing HB 2417, Hawaii creates a dangerous precedent for other state revenue departments to follow. While HB 2417 would apply only to remote sellers, it encourages other states to create similar laws that would impact Hawaii sellers.

No revenue would be generated from HB 2417 for several years, if ever. And HB 2417 fritters away tax dollars on an unnecessary lawsuit

HB 2417 will generate no revenue for the state unless and until the US Supreme Court overturns a century of established federal doctrine.

Following enactment of the law, groups like NetChoice and ACMA will seek an injunction and challenge the law. Immediate injunction of HB 2417 is likely, since even the state of South Dakota¹ stipulated that its similar “Kill Quill” law was unconstitutional.

On March 6, 2017, the State Circuit Court in South Dakota granted a motion for Summary Judgment against the state’s 2016 law, finding:

“Because each of the Defendants lacks a physical presence in South Dakota... the State acknowledges that under *Quill Corp. v. North Dakota*, the State of South Dakota is prohibited from imposing sales tax collection and remittance obligations on the Defendants.”

“The State further admits that this Court is required to grant summary judgment in Defendants’ favor, because of the *Quill* ruling.”

“This Court is duty bound to follow applicable precedent of the United States Supreme Court.”

“This is true even when changing times and events clearly suggest a different outcome; it is simply not the role of a state circuit court to disregard a ruling from the United States Supreme Court.”

If a similar injunction is obtained in Hawaii, the state could not enforce HB 2417.

It is likely that the US Supreme Court will have already decided on the *Quill* question even before the HB 2417 makes its way through the courts. As noted above, courts already enjoined and are now reviewing the legality of a similar law in South Dakota² and Indiana³ and regulation in Alabama.⁴ HB 2417 acts as a pile-on with no material benefit to Hawaii -- while incurring litigation costs for the state.

Passage of HB 2417 would erode state sovereignty

Advocates for HB 2417 claim that the purpose of this bill is to overturn the current *Quill* standard⁵ of physical presence. Today, the *Quill* standard stops tax collectors in California, New York, or Illinois from harassing Hawaii businesses that have no physical presence in those states.

But passage of HB 2417 would remove the protections of *Quill* and reduce the ability of Hawaii to protect its businesses from tax collectors across the country, forcing Hawaii businesses to travel across the country to defend themselves in foreign state courts.

State tax collectors would be the true “winners” if HB 2417 succeeds in overturning the *Quill* standard. Hawaii citizens and Hawaii businesses would be the losers.

¹ See *South Dakota v. Wayfair Inc. et al*, Case No. 3:2016cv03019 (S.D. Dist. Ct. May 15, 2016).

² See Sandra Guy, *South Dakota sues four big online retailers over sales taxes*, Internet Retailer (April 29, 2016).

³ Ind. Code § 34-14-1-1

⁴ See Chris Morran, *Newegg Challenges Alabama Over Collection Of Online Sales Tax*, Consumerist (June 14, 2016)

⁵ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) further confirmed the physical presence standard for sales tax collection. It protected Quill, a Delaware corporation with offices and warehouses in Illinois, California, and Georgia, from North Dakota tax collectors and North Dakota tax rules – a state where Quill had no physical presence.

No new money would come into Hawaii

Even if HB 2417 survived a Supreme Court challenge, *no new money would flow into Hawaii*. Any sales taxes collected as the result of HB 2417 would come from the pockets of Hawaii residents -- not from out-of-state businesses.

Minimal tax revenue would be generated from HB 2417

Today, most of the top e-retailers already collect for Hawaii. That includes Amazon, who accounted for 41% of online sales in Q1 2016.⁶

Some HB 2417's advocates cite a 2009 University of Tennessee⁷ study to suggest a large windfall of uncollected sales taxes. However, the UT study is far out-of-date and fails to account for existing tax collection by Amazon and several other large e-retailers.

Even the US General Accounting Office⁸ predict collections are, at best, less than half of what the outdated University of Tennessee study promises.

The question, assuming HB 2417 survives in court, is whether the minimal tax revenue extracted from Hawaii citizens is enough to justify the legal costs, executive branch overreach, and erosion of state sovereignty?

HB 2417 creates a new tax that is not equal, consistent, or fair

Tax advocates justify HB 2417 by saying it "creates a level playing field for all sellers." However, HB 2417 foists disproportionate collection burdens on catalog and online retailers. When a customer enters a gift shop in Honolulu, the store does not ask for that customer's home address so she can look-up the tax rate and later remit the tax to the customer's home state.

But HB 2417 would impose the burden of look-up, tax filing, and audit -- if the sale occurs through a phone call, mail order, or the internet. We fail to see how that would be equal, consistent, or fair.

We ask that you reject HB 2417 and protect Hawaii businesses from out-of-state tax auditors, protect Hawaii citizens from a new tax, and avoid costly litigation the state is likely to lose.

Thank you for considering our views and please let us know if we can provide further information.

Sincerely,



Carl Szabo
Vice President and General Counsel
NetChoice

⁶ Ken Kam, *The Market Is Underestimating Amazon*, Forbes (May 27, 2016).

⁷ Bruce, Fox, and Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, University of Tennessee (2009).

⁸ U.S. Government Accountability Office, *States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* (Nov. 2017)

