

TAX FOUNDATION

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126 Queen Street, Suite 304, Honolulu, Hawaii 96813, Telephone 536-4587, www.tfhawaii.org

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December 21, 2015

Rules Office
Hawaii Department of Taxation
830 Punchbowl Street, Room 221
Honolulu, HI 96813

Re: **Comments on Proposed Rules Relating to Alternative Methods of Apportionment**

Ladies and Gentlemen:

The Tax Foundation of Hawaii appreciates the Department's efforts to ease taxpayers' compliance burdens and to provide clarifying guidance.

It seems to us, however, that there is a conflict between the proposed amended rules and the governing statute.

Section 235-5(a), HRS, states that section 235-5, relating to allocation and separate accounting, applies to income not subject to part II (namely UDITPA, or the Uniform Division of Income for Tax Purposes Act). Section 235-22, HRS, states that any taxpayer having income from business activity taxable both within and without Hawaii, except for activity as a public utility or purely personal services by an individual, shall allocate and apportion income as provided in UDITPA. Section 235-5(b), HRS, states that income from sources within the State shall be determined by an allocation and separate accounting so far as practicable. We read these provisions as saying that UDITPA rules are primary, and that allocation and separate accounting is only allowed when UDITPA apportionment does not apply. Thus the condition "so far as practicable," because it derives from section 235-5(b), is allowable as a condition only if UDITPA does not apply. Thus we suggest that the original language of section 18-235-5-02(a) be retained.

With respect to the proposed language in new 18-235-5-02(c) referring to the "Internal Revenue Code of 1986, as amended," a delegation issue is raised because the Congress could change the Internal Revenue Code without action by the Department or the Hawaii Legislature. The term "IRC" in the current rule is defined in section 18-235-4-01 and does not raise this issue. Thus we suggest that the original language be retained here as well.

Thank you for the opportunity to submit comments.

Very truly yours,



Thomas Yamachika
President

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