

TAX FOUNDATION

O F H A W A I I

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

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April 19, 2016

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

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Re: **Proposed and Temporary HAR § 18-237D Various Amendments,
Relating to Act 204, SLH 2015
Public Hearing: None**

Ladies and Gentlemen:

Act 204, Session Laws of Hawaii 2015, requires that operators and plan managers of transient accommodations designate an on-island local contact and display the contact's name, phone number and email address inside the unit, as well as in online advertisements or to the guest upon check-in. Act 204 also requires that Transient Accommodations Tax (TAT) license numbers be displayed both inside the unit and in all online advertisements, either directly in the advertisement or by a link, and imposes fines on operators, plan managers, and transient accommodations brokers for failure to comply. Act 204 provides fines for violation of its provisions and provides that fines may be appealed to the director of taxation or the director's designee.

The temporary rules explain how the Department will issue citations and fines for violations of Act 204, explain instances where the Department will issue a written warning in lieu of a citation, and provide procedures for appeals.

Overall, the temporary rules appear to provide a reasonable interpretation of Act 204. We do have some technical comments and suggestions, which are set forth below.

1. Title 14 Override

Section 18-237D-4-08 now states that the rules "apply notwithstanding any contrary provision in title 14, HRS." The statement in the rule appears to be overbroad. Certainly, the rules and its governing statute are specific provisions that should predominate over more general tax provisions. The rule should state this instead. We suggest:

(a) Sections 18-237D-4-08 to 18-237D-4-34 implement section 237D-4, HRS, and apply to specific circumstances. General principles of tax enforcement in title 14, HRS, and the rules adopted thereunder will not necessarily apply to these situations.

2. References to Fraud

Two of the examples in the rules state that a particular violator “may also be subject to penalties for wilful failure to supply information under section 231-35, HRS, as well as other penalties related to fraud.” The examples are Tommy Timeshare in Example 8 and Sally Social in Example 13.

In Example 13, it is stated that Sally Social has no registration and made up a registration number to list with her advertisement. It is not stated whether Tommy Timeshare in Example 8 in fact had a valid registration, only that the registration number in the advertisement was incorrect.

In both examples, the reference to “fraud” is vague, and Tommy Timeshare does not clearly appear to have committed fraud (especially if he in fact has a valid registration). The Department currently has no jurisdiction to enforce civil fraud or “consumer fraud” such as unfair or deceptive acts or practices in section 480-2, HRS. The Department does have jurisdiction to enforce return fraud penalties under section 231-36, HRS, but those would not apply to an advertisement.

Assuming that the Department wishes to emphasize that there can be severe consequences for intentional violations of the requirements of the law, one solution could be to include in Example 8 the fact that Tommy Timeshare in fact had no valid registration, and then change the word “fraud” in both examples to “tax evasion under section 231-34, HRS.”

3. References to Postmark

There are references in the rules to a “postmark” or “United States mail” to establish a date for a particular action. See sections 18-237D-4-21, 18-237D-4-22(a) and (g)(2). To be consistent with section 231-8(c), HRS, we suggest that approved private delivery services (FedEx, UPS, etc.) be allowed as well.

4. Fines Greater than \$5,000

In section 18-237D-4-10(a)(3) and (c)(3), the Department allows itself to issue a fine of greater than \$5,000 per day, but requires that it provide a written explanation of why the fine amount is greater. In order to avoid the impression that the Department is giving itself unbridled discretion in this matter, we would urge the Department to include standards or at least examples of aggravating circumstances that would justify a greater fine.

Thank you for considering these comments.

Very truly yours,

Thomas Yamachika
President

c: Hawai'i Lodging and Tourism Association