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July 11, 2018

Linda Chu Takayama
Director, Department of Taxation
Via Email to Taxpayer.Services@hawaii.gov

Re: Announcement 2018-10 – Retroactive Application of Remote Seller Sales Tax Collection Requirement

Dear Director Takayama:

On behalf of the Council On State Taxation (COST), we are writing to urge you to reconsider the policy position enunciated in Announcement 2018-10, which specifies retroactive application of [Act 041/S.B. 2514](#) (“Act 041”) in light of the U.S. Supreme Court’s recent decision in [South Dakota v. Wayfair, Inc.](#) In *Wayfair*, the Court eliminated the physical presence requirement as a predicate to jurisdictional nexus for remote sales tax collection and remanded the case to South Dakota’s court for further consideration. In addition, the Court referenced several features of South Dakota’s remote seller collection law that “appear designed to prevent discrimination against or undue burdens upon interstate commerce,” including a safe harbor for small sellers, a prohibition against retroactive application, and the benefits for sellers derived from membership in the Streamlined Sales and Use Tax Agreement (SSUTA).

While the Court acknowledged that additional claims may also be addressed on remand, the Court’s comments regarding South Dakota’s law present an initial path for states seeking to implement remote seller collection that would minimize constitutional challenges. We recognize that the Announcement is an attempt to comply with Act 041 which was enacted prior to the *Wayfair* decision. Accordingly, COST urges you to recommend to your legislature to revise the effective date of Hawaii’s bright-line rule for remote sellers and to undertake efforts to adopt sales tax simplification and uniformity as provided under the SSUTA.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce

and today has an independent membership of approximately 550 major corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Consistent with our mission, COST is a strong advocate for simple and uniform sales and use tax laws.

Guidance from the *Wayfair* Decision

The U.S. Supreme Court in *Wayfair* expressly overturned the physical presence requirement set forth in *National Bellas Hess* and *Quill*. The Court, however, did *not* rule on the overall constitutionality of South Dakota's law and remanded the case back to the South Dakota court to address "whether some other principle in the Court's Commerce Clause doctrine might invalidate [South Dakota's law]." The Court recognized that those issues were not yet litigated or briefed and did not resolve them in its opinion. Significantly, however, the Court in two different sections of its opinion highlighted several features of South Dakota's law that "appear designed to prevent discrimination against or undue burdens upon interstate commerce." These features include:

- A safe harbor for sellers who transact only a limited business in the state;
- non-retroactive application; and
- simplification and uniformity achieved through membership in the Streamlined Sales and Use Tax Agreement (SSUTA).

Clearly, states that heed the Court's admonitions regarding these features of the South Dakota law will be better positioned to address future constitutional challenges.

Retroactivity

We understand that the intent of Announcement 2018-10 is to implement Act 041, which was enacted before the *Wayfair* decision and retroactively applies to remote sellers making sales to Hawaii purchasers after December 31, 2017. Retroactive application of the remote seller collection requirement raises Due Process concerns and is particularly egregious because double taxation of the same transaction is a distinct possibility. Purchasers in Hawaii are still liable for use tax payment on remote purchases, and if Act 041 is retroactively enforced, the remote sellers themselves would be equally liable. We urge the Department to delay implementing this law in light of *Wayfair* and request the legislature to change the law to remove its retroactive implementation. Otherwise, it is likely that Hawaii will be exposed to constitutional challenges on this issue.

Sales Tax Simplification and Uniformity Through SSUTA Membership

The other remediating aspect of South Dakota's law identified in *Wayfair* as reducing burdens and minimizing discrimination is sales tax simplification and uniformity as reflected in South Dakota's membership in the SSUTA. Specifically, the Court recognized that:

[SSUTA] standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.

Thus, we also encourage the Department to urge lawmakers to adopt the sales tax simplification and uniformity measures embodied in SSUTA and seek full SSUTA membership. Hawaii has considered legislation in the past to become a member of the SSUTA, but without the Court's guidance regarding the impact such adoption would have on Hawaii's remote seller collection authority.

Conclusion

For the reasons outlined above, we urge you to recommend to the legislature that immediate amendments to Act 041 be made in light of the Wayfair decision. If you have any questions or would like to discuss this matter further, please do not hesitate to contact either of us.

Respectfully,



Nikki E. Dobay
Senior Tax Counsel



Patrick J. Reynolds
Senior Tax Counsel

cc: Gov. David Y. Ige
Sen. Ronald D. Kouchi
Speaker Scott K Saiki
COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director



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July 11, 2018

Via email

Re: Act 041/S.B. 2514 – Retroactive Application of Remote Seller Bright-Line Rule

Dear Governor Ige, Senate President Kouchi, and House Speaker Saiki:

On behalf of the Council On State Taxation (COST), we are writing to urge you to reconsider Act 041/S.B. 2514 (“Act 041”) in light of the U.S. Supreme Court’s recent decision in *South Dakota v. Wayfair, Inc.* In *Wayfair*, the Court eliminated the physical presence requirement as a predicate to jurisdictional nexus for remote sales tax collection and remanded the case to South Dakota’s court for further consideration. In addition, the Court referenced several features of South Dakota’s remote seller collection law that “appear designed to prevent discrimination against or undue burdens upon interstate commerce,” including a safe harbor for small sellers, a prohibition against retroactive application, and the benefits for sellers derived from membership in the Streamlined Sales and Use Tax Agreement (SSUTA).

While the Court acknowledged that additional claims may also be addressed on remand, the Court’s comments regarding South Dakota’s laws present an initial path for states seeking to implement remote seller collection that would minimize constitutional challenges. Because Act 041 was enacted prior to the guidance given in the *Wayfair* decision, COST urges you to revise the effective date of Hawaii’s bright-line rule for remote sellers and to undertake efforts to adopt sales tax simplification and uniformity as provided under the SSUTA.

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Guidance from the *Wayfair* Decision

The U.S. Supreme Court in *Wayfair* expressly overturned the physical presence requirement set forth in *National Bellas Hess* and *Quill*. The Court, however, did *not* rule on the overall constitutionality of South Dakota's law and remanded the case back to the South Dakota court to address "whether some other principle in the Court's Commerce Clause doctrine might invalidate [South Dakota's law]." The Court recognized that those issues were not yet litigated or briefed and did not resolve them in its opinion. Significantly, however, the Court in two different sections of its opinion highlighted several features of South Dakota's law that "appear designed to prevent discrimination against or undue burdens upon interstate commerce." These features include:

- a safe harbor for sellers who transact only a limited business in the state;
- non-retroactive application; and
- simplification and uniformity achieved through membership in the Streamlined Sales and Use Tax Agreement (SSUTA).

Clearly, states that heed the Court's admonitions regarding these features of the South Dakota law will be better positioned to address future constitutional challenges.

Retroactivity

Act 041 was enacted before the *Wayfair* decision and retroactively applies to remote sellers making sales to Hawaii purchasers after December 31, 2017. Retroactive application of the remote seller collection requirement raises Due Process concerns and is particularly egregious because double taxation of the same transaction is a distinct possibility. Purchasers in Hawaii are still liable for use tax payment on remote purchases, and if Act 041 is retroactively enforced, the remote sellers themselves would be equally liable. We urge you to amend the effective date of the law in light of *Wayfair* to avoid its retroactive application. Otherwise, it is likely that Hawaii will be exposed to constitutional challenges on this issue.

In addition to exposing Hawaii to additional constitutional challenges, the retroactive nature of Act 041 violates sound tax policy principles of certainty and predictability. COST's board of directors has adopted the following policy position against retroactive tax laws:

Legislation imposing new or increased tax liabilities attributable to prior periods is fundamentally unfair and in some cases unconstitutional and thus must be avoided. Under no circumstance should legislation imposing new or increased tax liabilities be applied to any periods beginning prior to the date the legislation was enacted.

Retroactive legislation or administrative pronouncements that do not impose new or increased tax liabilities may be appropriate.

Act 041, although not effective until July 1, 2018, is applicable to tax years beginning after December 31, 2017. We encourage you to avoid potential constitutional challenges by revisiting the retroactive nature of Act 041 considering the *Wayfair* decision.

COST is not alone in its view that retroactive tax legislation should be avoided. At its recent meeting on June 28-29, the National Conference of State Legislatures Task Force on State and Local Taxation held an initial vote to approve its [Principles of State Implementation After South Dakota v. Wayfair](#). Those principles encourage states to ensure that they are fully prepared before beginning to enforce their sales tax laws on remote sellers and to consider waiting until January 1, 2019, to begin sales tax collection requirements on remote sellers.

Sales Tax Simplification and Uniformity Through SSUTA Membership

The other remediating aspect of South Dakota's law identified in *Wayfair* as reducing burdens and minimizing discrimination is sales tax simplification and uniformity as reflected in South Dakota's membership in the SSUTA. Specifically, the Court recognized that:

[SSUTA] standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.

Thus, we also encourage you to adopt the sales tax simplification and uniformity measures embodied in SSUTA and seek full SSUTA membership. Hawaii has considered legislation in the past to become a member of the SSUTA but without the Court's guidance regarding the impact such adoption would have on Hawaii's remote seller collection authority.

Conclusion

For the reasons outlined above, we urge you to make immediate amendments to Act 041 in light of the *Wayfair* decision. If you have any questions or would like to discuss this matter further, please do not hesitate to contact either of us.

Respectfully,



Nikki E. Dobay
Senior Tax Counsel



Patrick J. Reynolds
Senior Tax Counsel

cc:

Linda Chu Takayama, Director, Department of Taxation
COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director