

Douglas B. Moylan
Attorney General



Charles H. Troutman
Compiler of Laws

Office of the Attorney General

February 18, 2004

MEMORANDUM

To: Attorney General *Douglas B. Moylan*

From: Compiler of Laws

Subject: Application of "Transparent" GRT Law - P.L. 27-41

Ref: AG 04-0215

You have asked that I look into the various complaints we have received over the implementation of the "transparent GRT law", P.L. 27-41 to see if the implementations are in accordance with that and other applicable law.

FACTUAL SITUATION

There are three scenarios being used by businesses under the new law. First is the *status quo* which is being used by Ross Dress for Less and others. Here the merchant rings up the total of the customer's bill and the GRT portion is nowhere listed or displayed separately.

The second scenario is that implemented by PayLess stores, at least in their Hagåtña store. Here the items as they are priced on the shelf are listed and totaled. This is what the customer pays. Then, on a separate line, not added as a separate part of the customer's total bill, is the statement:

Your approximate GRT is \$_____.

Third is the implementation as done by Macy's and Bestsellers, among others. Here the shelf price is totaled, then the GRT of 6% is added to this just as if it were a sales tax and the customer pays the total of the price of the goods plus the stated GRT. Bestsellers lists, for instance, your receipt in this manner:

Books -	-	-	-	\$10.00
Magazines	-	-	-	5.00
GRT	-	-	-	0.90
TOTAL	-	-	-	\$15.90

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In this instance, the GRT is not listed as being a part of the price on the shelf, though notice of its addition is found on a prominent sign at the counter.

LAWS INVOLVED

There are two laws involved here. The older law, not repealed by P.L. 27-41, is 11 GCA §26115:

§26115. Unfair Competition. It shall be unlawful for any taxpayer under this Chapter to advertise, or hold out to the public in any manner, directly or indirectly, that any tax levied hereunder is not considered as an element of the purchase price. Any person found guilty by a court of competent jurisdiction of violating this Section shall be guilty of a violation punishable by fine of not more than Fifty Dollars (\$50.00) for each separate offense.

SOURCE: GC §19519, as amended by P.L. 13-187.

COURT DECISIONS: “. . . it is clear in this situation that the Defendant-Appellee misrepresented the inclusion of the GRT as part of the purchase price and, further, misrepresented it as a tax above the purchase price which was imposed by the government. The overall message of the Attorney General Opinion is that if additional language indicates that the GRT is not being passed on to the consumer as part of the purchase price it is a violation of Section 26115. This is what occurred in this situation.” *Guam v. Marfega Trading Co., Inc.*, Guam Supreme Court, 1998 Guam 4 [27].

The latest law, P.L. 2-41, states with respect to what the merchant may disclose:

5 GCA §26201

(b) A person engaging in, transacting, conducting, continuing, doing, or carrying on a business in Guam, who is required to pay taxes levied in this Chapter and opts to show to each customer the amount that will be transmitted to the government of Guam as a result of the customer's transaction, may exclude GRT reimbursement collected from the measure of taxable gross receipts.

The Rules promulgated by the Department of Revenue & Taxation to implement this Section provide:

Reg. §26201-3. Levy, Assessment and Collection of Monthly Gross Receipts Tax.

(b) Exclusions. A person who opts to show to each customer the amount that will be transmitted to the Government of Guam as a result of the customer's transaction, may exclude GRT reimbursement collected from the measure of taxable gross receipts.

The Example listed in Item 4 states, where pertinent:

. . . On February 14, 2004, a customer takes his car to Mike's shop to replace his old air conditioning unit with a new unit at a total cost of \$1,643 (\$1,550 for the air conditioning unit and \$93 gross receipts tax). For [sic] Mike opts to take the benefit of the exclusion under §26201(b), the invoice he gives to the customer must separately state the price of the unit and the amount of the applicable gross receipts tax.

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ANALYSIS

Guam's Gross Receipts Tax Law was taken from the GRT of the Territory of Hawaii, 1945 version. Hawaii still retains the GRT, along with its equivalent of 11 GCA §25113. Hawaii has issued General Excise Tax Memorandum No. 4 (1097) to cover their situation, which is the same as Guam's before the passage of P.L. 27-41. Hawaii still requires "a tax on the tax", whereas Guam now permits a merchant to elect to state the GRT and not include the amount of tax in the gross amount taxed. For purposes of this Memorandum, the Hawaii regulation states:

The amount of the "visible pass on" is a separate part of the price charged by the seller. Therefore, customers must be apprised of the seller's intention to add the tax at the time the price of the merchandise or service is quoted. We have repeatedly advised that where it is the intention of the seller of either merchandise or services to add the tax as a separate item, such intention should be prominently noted and be thoroughly understood before the purchase is consummated.

In addition, the General Excise Tax Law makes it unlawful to either advertise or hold out to the public that the general excise tax is not considered nor calculated as part of the selling price charged to the purchaser. Section 237-49 of the Hawaii Revised Statutes deems this practice to constitute unfair competition and prescribes penalties for each violation.

The Guam tax after P.L. 27-41 remains a Gross Receipts Tax, levied "against the persons on account of their businesses . . .". No tax is levied on the customer. That was the law before P.L. 27-41 and is, in fact, the language of P.L. 27-41.

The Supreme Court in *Marfega*, has followed both the reasoning of Guam Attorney General Opinions and that of the Hawaii Regulation (though unstated) when it wrote:

[26] The Attorney General Opinion addressed the question of whether it is "unlawful for a merchant to designate the amount of gross receipts tax arising from a sale of goods or services on an invoice, bill, sales slip, price tag or other document relating to the sale." What the Attorney General opined was that it was lawful to include such information provided that "no additional language is inserted, or verbal representations made, which state or imply that the gross receipts tax is not being passed on to the customers as part of the purchase price." The Appellee could therefore include information about the GRT, so long as it made no representations that it was not part of the purchase price. Appellee argues that this supports its proposition. However, it would seem that the manner in which Appellee referred to the fee, as a "tax" and then followed up by explaining to customers that it was like sales tax, would imply that it was not part of the purchase price. Instead, it was represented as an additional charge over the purchase price, and a government mandated charge at that. Appellee relies on the Attorney General Opinion, but seems to misconstrue its holding and/or the facts at hand.

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Public Law 27-41:2 says that a business may opt "to show to each customer that amount that will be transmitted to the government of Guam as a result of the customer's transaction." This actual language is really a restatement of *Marvega* and the previous Attorney General's Opinion. This Memorandum will not depart from these court and prior Attorney General Opinions.

CONCLUSIONS

Based upon the above we conclude regarding the scenarios presented to us:

1. That it is proper for merchants to continue their practice of not stating a separate amount of GRT. When they do this, they cannot avail themselves of the exemption provided in P.L. 27-41, but this is one of the options permitted by that law.
2. Likewise, it is proper to follow the Payless Supermarkets example wherein they establish a shelf price and maintain that price, but tell the customer how much of that price goes to the GRT. Such a practice follows the letter of P.L. 27-41 where it states that the merchant will show the amount transmitted to the Government as a separate item on the receipt. Payless is free to raise its overall prices as it sees fit since pricing is not restricted by Guam law.
3. It is a violation of existing Guam law and the Hawaiian precedent to treat the GRT as if it were a sales tax, by adding it onto the price of the merchandise or services when the customer arrives at the checkout counter. The Hawaiian procedure should be followed. Thus, the Macy's example complained of, where a "stateside price" is posted on the goods and the GRT added at checkout, is a violation of 5 GCA §26115. Macy's, and any other merchant, may separately state the GRT, but must do so **before checkout**, preferably on the merchandise or at least by prominent notice placed where the customer will see it when entering the store.

It is further misleading to the customer to allege that the GRT was not taken into account prior the applicability of P.L. 27-41. The GRT has always been due on the gross receipts of a sale, whatever that price may be. To state otherwise is to make a false statement, or to admit that the seller has failed to pay a tax owed to the Government, wrong in either case. If a merchant wishes to raise its price over some other published price, it may do so, so long as the fact is stated and only the GRT is listed as a separate item. Thus, Macy's may charge over its "stateside prices", but cannot blame the entire increase on the six percent gross receipts tax, since it owed four percent prior to the recent increase and, by separately stating the tax, actually receives an exemption over the prior 6% method of calculation.

This memorandum cannot address individual complaints, since each must be evaluated on its own merits, with the appropriate proofs supplied by the complainant or investigator. Rather, this Memorandum should be viewed as guidelines for the future to supplement Revenue Reg. §26201-3, or its interpretation.

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ATTACHMENT 1

ADMN-RUL, HI-TAXRPT, ¶65-006, General Excise Tax Memorandum No. 4 —Addition of Tax to Price of Merchandise, , February 1 1987

General Excise Tax Memorandum No. 4 —Addition of Tax to Price of Merchandise, , February 1 1987

Under the General Excise Tax Law, the matter of “visible pass on” of this tax is entirely a matter of contractual agreement between the buyer and the seller.

Whether there is a visible pass on or not, the Department of Taxation will look to the seller for the tax upon the seller's total gross receipts. Any amount added as the tax and collected by taxpayer must be considered as part of the price received, and will be a part of the gross receipts of the taxpayer and must be reported as taxable income.

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In addition, the General Excise Tax Law makes it unlawful to either advertise or hold out to the public that the general excise tax is not considered nor calculated as part of the selling price charged to the purchaser. Section 237-49 of the Hawaii Revised Statutes deems this practice to constitute unfair competition and prescribes penalties for each violation.

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Reissued: May 15, 1984

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