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November 10, 2011

[Redacted Text]
[Redacted Text]
[Redacted Text]
[Redacted Text]
[Redacted Text]
[Redacted Text]

Re: Application of HARPTA to [Redacted Text]

Dear [Redacted Text]:

This responds to the request of May 21, 2010 as supplemented by the email of January 19, 2011 of [Redacted Text] (more commonly referred to as "[Redacted Text]"), requesting a ruling from the State of Hawaii Department of Taxation (the "Department") regarding the application of § 235-68, Hawaii Revised Statutes ("HRS") to sales of real property located in Hawaii that are owned by [Redacted Text]. "[Redacted Text]", is an acronym of the company's full name that had been adopted officially for ease of identification.

SHORT ANSWER

Based on the information in your letter ruling request, §235-68, HRS is inapplicable upon the sale of real property located in Hawaii that has been foreclosed upon by [Redacted Text] and subsequently resold.

FACTS REPRESENTED

[Redacted Text]. This [Redacted Text] increases the supply of money available for mortgage lending and increases the money available for new home purchases.

As the owner of numerous loans, [Redacted Text] at times finds it necessary to foreclose on some properties located in Hawaii. [Redacted Text] may become the owner of such homes upon foreclosing on the homes, after which it will attempt to resell the properties to interested purchasers.

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LAW AND ANALYSIS

Section 235-68, HRS is entitled "Withholding of tax on the disposition of real property by nonresident persons" and is commonly referred to as "HARPTA". HARPTA places a duty on the purchaser of a property located in Hawaii to withhold 5% of the gross amount realized and to remit that amount to the Department, which is treated as an estimated tax payment made for the benefit of the Transferor/seller and is taken out of monies otherwise due to the Transferor/seller. The Transferee/buyer is acting as a withholding agent. When the Transferor/seller files its Hawaii income tax return showing the amount of tax due as a result of the sale (as well as any other Hawaii sourced income), the amount of any taxes due is reduced by the amount of the HARPTA payment, as well as any other estimated tax payments made and amounts withheld at the source. In addition, any State tax credits that the taxpayer/Transferor/seller is entitled to may be applied to the outstanding tax due. Specifically, §235-68, HRS provides in pertinent part:

§235-68 Withholding of tax on the disposition of real property by nonresident persons.

(b) Unless otherwise provided in this section, every transferee shall deduct and withhold a tax equal to five per cent of the amount realized on the disposition of Hawaii real property. Every person required to withhold a tax under this section is made liable for the tax and is relieved of liability for or upon the claim or demand of any other person for the amount of any payments to the department made in accordance with this section.

However, this duty must be read in light of Title [Redacted Text], which created the [Redacted Text]. Specifically, [Redacted Text] provides:

[Redacted Text]

Article VI of the United States Constitution provides that the laws of the United States "shall be the supreme law of the land; . . . anything in the constitution or laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. It is well settled that state law that conflicts with federal law is "without effect." See e.g. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819); Maryland v. Louisiana, 451 US 725, 746, 101 S.Ct. 2114, 2128 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 332 US 218, 230, 67 S.Ct. 1146, 1152 (1947). "The purpose of Congress is the ultimate touchstone" of pre-emption analysis. Retail Clerks v. Schermerhorn, 375 US 96, 103, 84 S.Ct. 219, 222 (1963).

As noted in Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 467 US 7, 104 S.Ct. 291 (1983):

[W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.

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The Department is guided by several basic principals of statutory construction. As noted in Peterson v. Hawaii Elec. Light Co., Inc., 85 Hawaii 322, 327-28, 944 P.2d 1265, 1270-71 (1997):

First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining the legislative intent. One avenue is the use of legislative history as an interpretive tool (block quote formatting, brackets, citations, and quotation marks omitted).

Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law. See e.g. Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722 (1983). It is also preempted if federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S., at 230, 67 S.Ct., at 1152).

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," Malone v. White Motor Corp., 435 U.S., at 505, 98 S.Ct., at 1190, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282, 107 S.Ct. 683, 690 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of expression unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the provisions of **[Redacted Text]**. HRS §235-68 is designed to provide a withholding of tax at the source to encourage compliance by non-residents of State income tax filing requirements. Since **[Redacted Text]** is not subject to State income taxation, there is no need for a withholding of income at the source, and HRS §235-68 is inapplicable. Accordingly, a purchaser of real property in Hawaii owned by **[Redacted Text]** is not required to withhold 5 per cent of the amount realized and to remit the same to the Department.

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CONCLUSION

It is clear that §235-68, HRS as applied to **[Redacted Text]** is preempted by virtue of **[Redacted Text]**, and as such, a purchaser of real property located in Hawaii that is owned by **[Redacted Text]** has no duty to withhold. This ruling is applicable only to **[Redacted Text]**, and shall not be applied retroactively. It may not be used or cited as precedent by any other taxpayer, and is limited to the facts as represented based upon our understanding of the facts. No representation is made as to any other transaction, regardless of the similarities of fact. If it is later determined that our understanding of these facts is not correct, the facts are incomplete, or the facts later change in any material respect, the conclusion in this letter will be modified accordingly. This ruling also may be subject to change due to future amendments to laws, rules, or official Department positions.

If you have any further questions regarding this matter, please email me at mark.j.yee@hawaii.gov. Additional information on Hawaii's taxes is available at the Department's website at www.state.hi.us/tax.

Very truly yours,

s/Mark J.C. Yee

MARK J.C. YEE
Administrative Rules Specialist