

DEPARTMENT OF TAXATION

Amendments to Chapter 18-235
Hawaii Administrative Rules
July 27, 1998

1. Section 18-235-1 is amended and renumbered as follows: §§18-235-1.01 to 18-235-1.17.

§18-235-1.01 Resident/Nonresident, defined.

"Resident" means:

- (1) Every individual domiciled in Hawaii; and
- (2) Every other individual whether domiciled in Hawaii or not, who resides in Hawaii for other than a temporary or transitory purpose.

"Nonresident" means every individual other than a resident. [Eff 2/16/82; am 9/3/94; am and ren §18-235-

1.01 **AUG 28, 1998**] (Auth: HRS §§231-3(9),235-118)
(Imp: HRS §235-1)

§18-235-1.02 Residency, generally. (a) A resident is subject to the net income tax imposed by chapter 235, HRS, on income from all sources, both in the state and outside the state, as set forth in section 18-235-4-02, HAR. A nonresident, however, is subject to the net income tax imposed by chapter 235, HRS, only on income from sources within Hawaii, as set forth in section 18-235-4-03, HAR.

(b) The status of an individual as a resident or nonresident is determined by all of the factual circumstances. [Eff 2/16/82; am 9/3/94; am and ren

§18-235-1.02 **AUG 28, 1998**] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §235-1)

§18-235-1.03 Establishing residency by domicile.

(a) An individual who is domiciled in Hawaii is considered a resident.

- (1) Domicile is the place of the individual's true, fixed, permanent home.
- (2) The domicile is the principal establishment to which the individual has the intention of returning whenever the individual is absent.
- (3) An individual can have several residences or dwelling places in which he or she resides, but can have only one domicile, or permanent residence to which he or she intends to return.

(b) An individual's domicile may change where there is a concurrence of:

- (1) An abandonment of the old domicile with a specific intent to abandon the old domicile;
- (2) An intent to acquire a specific new domicile; and
- (3) An actual physical presence in the new domicile.

(c) The burden of proof as to a change of domicile is upon the individual asserting that a change in domicile has taken place. The individual must establish a change of domicile by clear and convincing evidence.

(d) An individual can acquire a domicile by birth, choice, or operation of law, as set forth in sections 18-235-1-04, 18-235-1-05, and 18-235-1-06, HAR, respectively. [Eff 2/16/82; am 9/3/94; am and ren

§18-235-1.03 **AUG 28, 1998**](Auth: HRS §§231-3(9), 235-118) (Imp: HRS §235-1)

§18-235-1.04 Domicile by birth. (a) "Domicile by birth" is acquired by every individual at birth and continues until replaced by the acquisition of another domicile. A child is given the domicile of the child's parents at the time of the child's birth. A domicile by birth, however, may not be the same place where the child is born. If the parents' domicile is other than where the child is born, the parents' domicile is the domicile of the child.

(b) If a child is born to parents who have different places of domicile, the child's domicile will generally be the same as the domicile of the parent who is able to claim the child as a dependent.

Example 1: A, a domiciliary resident of Hawaii, married a domiciliary resident of Oregon. Their first child was born in Hawaii and their second child was born in Texas. A files a separate Hawaii resident income tax return. A claims both children as dependents.

Conclusion: Both children are deemed to be domiciliary residents of Hawaii because A, a domiciliary resident of Hawaii, claims both children as dependents. [Eff 2/16/82; am 9/3/94; am and ren §18-

235-1.04 **AUG 28, 1998**] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §235-1)

§18-235-1.05 Domicile by choice. (a) "Domicile by choice" is a domicile chosen by an individual to replace the individual's former domicile. An individual can acquire a domicile by choice when:

- (1) The individual is no longer eligible to be claimed as a dependent on another person's federal or Hawaii income tax return; and
- (2) The individual has reached the legal age of majority in Hawaii.

The individual may then voluntarily establish the place of the individual's domicile wherever he or she may be. In doing so, however, the individual must meet all the requirements of law for the purpose of establishing a new domicile.

Example 1: B was born in Honolulu to domiciliary residents of Hawaii, attended grade school and high school in Hawaii, then lived on the mainland while attending college for four years. During college, B voted in Hawaii by absentee ballot, maintained a savings account in Hawaii, and maintained his membership in the Honolulu Jaycees. Upon B's graduation from college, B decided to make his home in California and B did, in fact, establish a permanent domicile there. B bought a home, voted in California elections, became active in community affairs, and joined various school and business clubs. After working for several years in California, B departed for a Trust Territory on a 2-year contract where B is presently working for a mainland contractor.

Conclusion: B is deemed to be a domiciliary resident of Hawaii at birth. During the four-year period that B lived on the mainland while attending college, B remained a resident of Hawaii. A Hawaii domiciliary resident who attends school outside of Hawaii remains a Hawaii domiciliary resident unless the individual establishes a domicile outside of Hawaii. B abandoned B's domicile in Hawaii when a permanent domicile was established in California. B is now

deemed to be a nonresident of Hawaii.

Example 2: C, a resident of Hawaii, attended college on the mainland. While on the mainland, C traveled to a foreign country to perform missionary work. Upon returning to the mainland, C completed college. C then returned to Hawaii and got married. C secured employment with an agency of the United States government and moved to Japan to work. In C's applications for employment, transportation agreement, passport, and other formal documents and papers pertaining to employment in Japan, C stated that C's legal residence was in Honolulu, Hawaii. C continued to make deposits to C's bank in Hawaii. C also opened a bank account in Japan and made some investments through Japanese companies. It was not C's intention to make Japan C's fixed and permanent home. Accordingly, C made no effort to establish a new domicile in Japan nor to abandon the old domicile in Hawaii.

Conclusion: C is deemed to be a resident of Hawaii while attending college on the mainland, while performing missionary work in a foreign country, and while working in Japan. A Hawaii domiciliary resident who attends school outside of Hawaii remains a Hawaii domiciliary resident unless the individual establishes domicile outside of Hawaii. It is apparent that C did not establish the foreign country or Japan as a permanent home. C was in the foreign country only for the purpose of performing missionary work and is in Japan only for the purpose of employment and has not acquired a new domicile. Nor has C abandoned the domicile in Hawaii. Under the facts presented, the same answer would apply if C was working in Korea, Germany, on the mainland United States, or elsewhere.

Example 3: D, a resident of Hawaii, contracts to work for a company in Japan. The contract is a renewable three-year contract. D is married and D's spouse and children accompany D to Japan. D rents a

home and opens bank accounts in Japan. D's children attend local schools in Japan. D does not own any property in Hawaii and has not voted in Hawaii since moving to Japan. At the end of the three-year contract, D renews D's contract with the company in Japan for another three years. At the renewal period, D's applications for employment, transportation agreement, passport, and other formal documents and papers pertaining to employment in Japan stated that D's legal residence was in Honolulu, Hawaii. It was not D's intention to make Japan D's permanent and indefinite home. Accordingly, D made no effort to establish a new domicile in Japan nor to abandon the old domicile in Hawaii.

Conclusion: D is deemed to be a resident of Hawaii during the period that D worked in Japan. It is apparent that D did not establish Japan as a permanent home. D is there only for the purpose of employment and has not acquired a new domicile. Nor has D abandoned the domicile in Hawaii. Under the facts presented, the same answer would apply if D was working in Korea, Germany, on the mainland United States, or elsewhere. [Eff 2/16/82; am 9/3/94; am and ren §18-

235-1.05 **AUG 28, 1998**] (Auth: HRS §§ 231-3(9), 235-118)(Imp: HRS §235-1)

§18-235-1.06 Domicile by operation of law. (a)

"Domicile by operation of law" is assigned or attributed to an individual independently of the individual's residence or intention. In the usual case, domicile by operation of law is applied to those individuals, who, because of certain disabilities, are unable to acquire a domicile by choice. These would include such individuals as minor children and incompetents.

(b) If a child becomes a dependent, for tax purposes, of someone with a different domicile, the child's domicile will generally be the same as the domicile of the individual who is able to claim the child as a dependent.

Example 1: E, a Hawaii domiciliary resident, has one child from an earlier marriage to another Hawaii domiciliary resident. E subsequently marries F, a domiciliary resident of Utah. F provides all of the support for both E and E's child (F's stepchild). F claims the child as a dependent.

Conclusion: The child is deemed to be a nonresident of Hawaii because F, a domiciliary resident of Utah, claims the child as a dependent.
[Eff 2/16/82; am 9/3/94; am and ren §18-235-1.06

AUG 28, 1998] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §235-1)

§18-235-1.07 Establishing residency by residing in the State. (a) An individual who is not domiciled in Hawaii may acquire the status of a resident by virtue of being physically present in Hawaii for other than a temporary or transitory purpose.

(b) Whether or not the purpose for which an individual is in Hawaii will be considered temporary or transitory in character will depend upon the facts and circumstances of each particular case.

(c) An individual will be deemed a nonresident of Hawaii if he or she is in Hawaii for a temporary or transitory purpose, including the following:

- (1) The individual is simply passing through Hawaii to another state or country;
- (2) The individual is in Hawaii for a brief rest or vacation;
- (3) The individual is in Hawaii for health reasons and is receiving medical treatment or recuperating from an illness; and
- (4) The individual's presence in Hawaii is required for a short period to complete a particular transaction or perform a particular contract.

(d) An individual will be deemed a resident of Hawaii if they are in Hawaii for other than a temporary or transitory purpose, including the following:

- (1) The individual is in Hawaii for business purposes which will require a long or indefinite period to accomplish;
- (2) The individual is employed in a position that may last permanently or indefinitely; and
- (3) The individual has retired and moved to Hawaii with no definite intention of leaving.

(e) If an individual has been in Hawaii more than 200 days of the taxable year in the aggregate (not consecutive), the individual is presumed to have been a resident of Hawaii from the time of the individual's arrival. The presumption may be overcome if the individual rebuts the presumption with evidence satisfactory to the Department of Taxation that the

individual maintains a permanent place of abode outside of Hawaii and is in Hawaii for a temporary or transitory purpose.

(f) Since each state's definition of "resident" may be different, it is possible for an individual to be considered a resident of more than one state.

Example 1: G, a civil engineer, is domiciled in New York where G owns a house in which G's family lives. G votes in New York, maintains a bank account there and returns to his home in New York whenever possible. G is employed by a company as supervising engineer of its projects. In 1995, the company enters into a contract for construction work in Hawaii which will require G to spend 18 months in Hawaii. G comes to Hawaii in 1995 and spends almost the entire year living in a rented apartment. G's spouse and family remain in New York except for a summer visit to Hawaii. Upon completion of the project, G will return to New York to await another assignment.

Conclusion: Since G has been in Hawaii more than 200 days of the taxable year in the aggregate, G is presumed to have been a resident of Hawaii from the time of G's arrival. G, however, rebuts the presumption under the above circumstances showing that G maintains a permanent place of abode outside Hawaii and is in Hawaii for a temporary or transitory purpose. Accordingly, G is deemed to be a nonresident of Hawaii.

Example 2: H, a civil engineer, is domiciled in California. H is employed by a company in California. In 1996, H was transferred to Hawaii with the same company. H did not request the transfer to Hawaii. The transfer was made for the convenience of H's employer and H was required to work indefinitely in Hawaii or lose H's position with the company. H's spouse and children accompanied H to Hawaii. H has always considered California to be H's permanent home and always intended to return to California. No affirmative steps were taken either to abandon the

domicile in California or to establish a permanent domicile in Hawaii.

Conclusion: H is deemed to be a resident of Hawaii. Although H is domiciled in California, H is in Hawaii for other than a temporary or transitory purpose since H's employment in Hawaii is for an indefinite period.

Example 3: J, is an attorney employed by a New York law firm, and domiciled in the State of New York, where she owned and occupied an apartment. J, however, suffers from a respiratory disease and was advised by a physician that warm, humid air would be beneficial. As a result, J rented out her apartment and moved to Hawaii. J bought an apartment in Hawaii, opened and maintained a bank account, and joined a church in Hawaii. J, however, made it known to friends and family that she had not quit her job at the law firm and that she planned to return to New York to resume her practice when her health would permit. J otherwise made it known that she was in Hawaii for health purposes only.

Conclusion: J is deemed to be a nonresident of Hawaii. A change of residence for health reasons only will not result in a change of domicile unless it is accompanied by a definite intention to abandon the former domicile and acquire a new one. In this case, J made it clear that she was in Hawaii for health reasons only and intended to return to New York when her health would permit. [Eff 2/16/82; am 9/3/94; am and ren §18-

235-1.07 **AUG 28, 1998**](Auth: HRS §§231-3(9),235-118)(Imp: HRS §235-1)

§18-235-1.08 Residence status, factors

considered. The question of domicile and residency is one of law and fact. A change of domicile will depend upon the acts and declarations of the individual concerned to ascertain whether or not the individual possessed the required intention which the law requires to effect a change of domicile. Similarly, the status of an individual as a resident or nonresident is determined by all the factual circumstances; no single factor is controlling. Some of the relevant factors for determining domicile and residency are:

- (1) The length of time spent in Hawaii;
- (2) Leasing, buying, negotiating for or building a home;
- (3) Ownership and location of a motor vehicle;
- (4) Place of issuance of a license to drive a motor vehicle;
- (5) Location of auto, boat, and airplane registrations;
- (6) Place of marriage;
- (7) Where the residence of one spouse is in issue, the place of residence of the other spouse;
- (8) Residence of the family of the individual;
- (9) Location of schools attended by the individual's children;
- (10) Address at which bank statements, bills, financial data and correspondence concerning other family business is primarily received;
- (11) Location of club, church, and social memberships;
- (12) Place where the taxpayer is registered to vote and exercise of said privilege;
- (13) Location of business interests, profession, or employment;
- (14) Physical location of safe-deposit boxes used for family records and valuables;
- (15) Contributions to local charities;
- (16) Declarations regarding residence made to public authorities, friends, relatives or

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employers, or in documents such as deeds, leases, mortgages, contracts, and insurance policies;

- (17) Proposed location of burial or acquisition of burial plot for the individual or members of the individual's family; and
- (18) Location where the individual's will is admitted to probate.

[Eff 2/16/82; am 9/3/94; am and ren §18-235-

1.08 **AUG 28, 1998**](Auth: HRS §§231-3(9), 235- 118)(Imp: HRS §235-1)

§18-235-1.09 Individual's presence or absence in compliance with military or naval orders, while engaged in aviation or navigation, or while a student. (a) An individual's status as a resident or nonresident shall not change solely because of the individual's presence or absence in compliance with military or naval orders of the United States, while engaged in aviation or navigation, or while a student at any institution of learning.

(b) A nonresident individual who is in Hawaii while on military duty, while engaged in aviation or navigation, or while attending school is not a Hawaii resident unless the individual establishes domicile in Hawaii.

(c) Similarly, a Hawaii domiciliary resident who resides outside of Hawaii while on military duty, while engaged in aviation or navigation, or while attending school, remains a Hawaii domiciliary resident unless the individual establishes domicile in another state or a foreign country.

(d) Spouses of nonresident service members, crew members, or students who come to Hawaii will remain nonresidents of Hawaii if their principal reason for moving to Hawaii was to accompany their spouse, and if it is their intention to leave Hawaii when their spouse is transferred, discharged, or graduates.

Example 1: J is employed by an interstate airline as a crew member. J has no spouse or children. J votes in Pennsylvania, where J was born and raised, and which J regards as J's domicile. J lays over in Hawaii between flights and for rest periods, using hotel accommodations. In 1994, J is physically present in Hawaii for more than 200 days during the calendar year.

Conclusion: J is deemed to be a nonresident of Hawaii. A person shall not be deemed to have gained a residence in Hawaii because of his or her presence in Hawaii while engaged in aviation.

Example 2: Mr. and Mrs. K are residents of Michigan. Their daughter, L, also is a Michigan resident. L came to Hawaii to attend college and took some action to become a permanent resident of Hawaii. L closed her bank account in Michigan and opened a bank account in Hawaii. L also became a member of a local church in Hawaii. Although L works part-time, more than half her support comes from her parents. Her parents claim her as a dependent.

Conclusion: L is deemed to be a nonresident of Hawaii. Although L took some action to become a permanent resident of Hawaii, her principal reason for being in Hawaii is to attend college. A person shall not be deemed to have gained a residence in Hawaii because of his or her presence in Hawaii while attending school. A nonresident individual who is in Hawaii while attending school will not be deemed to be a resident of Hawaii unless the individual establishes domicile in Hawaii. L cannot establish a new domicile in Hawaii because L is claimed as a dependent on her parents' federal income tax return.

Example 3: M, who was born and educated in Hawaii, enlisted in the military and was stationed outside of Hawaii. M intends to return to Hawaii after discharge from the military. Accordingly, M made no effort to establish a new domicile outside of Hawaii nor to abandon M's domicile in Hawaii.

Conclusion: M is deemed to be a resident of Hawaii regardless of the length of M's absence from Hawaii while on military duty. A Hawaii domiciliary resident who resides outside of Hawaii while on military duty remains a Hawaii resident unless the individual establishes domicile in another state or a foreign country. [Eff 2/16/82; am 9/3/94; am and ren

§18-235-1.09 **AUG 28, 1998**] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §235-1)

§18-235-1.10 Aliens. (a) "Alien" means an individual who is not a United States citizen.

(b) An alien is a resident of Hawaii if the alien has permanent resident alien status (green card) and is domiciled in Hawaii, or resides in Hawaii for other than a temporary or transitory purpose. Thus, like all other individuals, the status of an alien as a resident or nonresident for Hawaii income tax purposes is determined by all of the factual circumstances.

(c) Hawaii has not adopted the federal provisions of Internal Revenue Code (IRC) section 7701(b)(with respect to the definition of resident alien and nonresident alien), and therefore, section 7701(b) does not control for Hawaii income tax purposes. In addition, tax treaties between the United States and foreign countries do not apply to sub-nation states' taxing authority and therefore do not control for Hawaii income tax purposes.

(d) In certain situations, a taxpayer may be considered a nonresident alien for federal income tax purposes and a resident for Hawaii income tax purposes. In these situations, the special rules applicable to individuals who are considered nonresident aliens for federal income tax purposes will apply when the individual files a Hawaii resident income tax return.

Example 1: N, a Hawaii resident, married O, a citizen of Australia, while both were attending college in Hawaii. Upon their graduation from college, they both found employment in Hawaii. After their marriage, O filed the required documents and became a permanent resident alien.

Conclusion: O is deemed to be a resident of Hawaii. O is domiciled in Hawaii and became a permanent resident alien upon her marriage to N.

Example 2: P is a Japanese national who is domiciled in Japan. In 1995, P moved to Hawaii to manage a Japanese company's U.S. business operations. P was admitted by the United States Immigration and

Naturalization Service as a nonimmigrant alien. P's authorized stay can be extended periodically. During 1995, P was physically present in Hawaii for more than 200 days during the taxable year.

Conclusion: P is deemed to be a resident of Hawaii. Although P is in Hawaii as a nonimmigrant alien, and is domiciled in Japan, P is in Hawaii for other than a temporary or transitory purpose.

Example 3: Q accepted a tenure track position at the University of Hawaii, and arrived to begin employment on August 1, 1996. Although Q entered the United States on a nonimmigrant alien visa, Q intends to remain in the United States as a permanent resident alien and pursue tenure at the University of Hawaii.

Conclusion: Although Q was not in Hawaii for more than 200 days in 1996, Q is in Hawaii for other than a temporary or transitory purpose. Therefore, Q should file as a part-year resident for tax year 1996 even though the 200 day test of the presumption of residency is not met.

Example 4: Mr. and Mrs. R and their son are citizens of Brazil and are in Hawaii on J visas. Mr. R is a teacher and does not meet the substantial presence test under IRC section 7701(b)(3) and is, therefore, a nonresident alien for federal income tax purposes. Mr. R files a federal Form 1040NR on which his filing status is required to be married filing a separate return. IRC section 6013(a)(1) does not allow the filing of a joint return if either spouse was a nonresident alien at any time during the taxable year. Mrs. R also works part-time in Hawaii. Mr. and Mrs. R and their son were in Hawaii for more than 200 days in 1996 and will be filing as Hawaii residents. Can Mr. and Mrs. R file a joint Hawaii resident tax return?

Conclusion: Section 235-93, HRS, provides that a husband and wife, having that status for purposes of the IRC and entitled to make a joint federal return for

the taxable year, may make a single return jointly of taxes under this chapter for the taxable year. Hawaii has adopted the provisions of IRC section 6013(a)(1) through section 18-235-93(a)(2), HAR. IRC section 6013(a)(1) provides that no joint return shall be made if either the husband or the wife at any time during the taxable year is a nonresident alien. Accordingly, Mr. and Mrs. R cannot file a joint Hawaii tax return. Mr. and Mrs. R must each file separate Hawaii resident tax returns.

Example 5: The facts are the same as stated in Example 14. Can Mr. R claim his son as his dependent on his Hawaii resident tax return?

Conclusion: Section 235-54, HRS, provides that the number of personal exemptions an individual may claim is in part determined by ascertaining the number of personal exemptions that the individual may lawfully claim under IRC section 151. IRC section 873(b)(3), limits a nonresident alien individual to claim, under IRC section 151, a single deduction for personal exemption unless the taxpayer is a resident of a contiguous country or a national of the United States. IRC section 152(b)(3) further states that the term "dependent," for purposes of determining personal exemptions under IRC section 151, does not include any individual who is not a citizen or national of the United States unless such individual is a resident of the United States or country contiguous to the United States. For federal income tax purposes, Mr. R cannot claim his son as a dependent since his son is not a U.S. citizen, U.S. national, resident alien or resident of a country contiguous to the United States. Accordingly, Mr. R cannot claim his son as a dependent on his Hawaii resident tax return.

Example 6: The facts are the same as stated in Example 14. Can Mr. R claim the standard deduction on his Hawaii resident tax return.

Conclusion: IRC section 63(c)(6), which Hawaii

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adopts through section 235-2.4(a), HRS, provides that a nonresident alien individual cannot claim the standard deduction. Accordingly, Mr. R cannot claim the standard deduction on his Hawaii resident tax return. Mr. R must itemize any allowable deductions.

Example 7: Mr. and Mrs. S are in Hawaii on H visas. Mr. S is a college professor. Mr. S meets the federal substantial presence test but files a federal Form 1040NR to claim the treaty benefits which exclude his wages as a professor from federal taxation for two years. Mr. and Mrs. S were in Hawaii for more than 200 days in 1996 and will be filing as Hawaii residents. Will the treaty also exclude Mr. S's wages from Hawaii taxation?

Conclusion: The provisions of income tax treaties are between the United States and the foreign country. Income tax treaties are designed to protect taxpayers from double and discriminating taxation by either treaty country, and normally do not preempt state tax laws. Accordingly, the treaty has no effect on Hawaii income tax law and Mr. S's wages as a professor are subject to Hawaii income tax.

[Eff 2/16/82; am 9/3/94; am and ren §18-235-1.10

AUG 28, 1998] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §235-2.4, 235-54, 235-93)

§18-235-1.11 "Person totally disabled", defined.

- (a) "Person totally disabled" means:
- (1) A person who is totally and permanently disabled, either physically or mentally; and
 - (2) Is unable to engage in any substantial gainful business or occupation because of that disability.
- (b) Whether a person is totally and permanently disabled and whether the disability results in the person's inability to engage in any substantial gainful business or occupation is determined by reference to all the factual circumstances. Among the factors considered are:
- (1) The nature and severity of the disability;
 - (2) The person's education, training, and work experience; and
 - (3) Whether social security benefits have been granted or denied. [Eff 2/16/82; am 9/3/94; am and ren §18-235-1.11 **AUG 28, 1998**]
(Auth: HRS §§231-3(9), 235-118) (Imp: HRS §§235-1, 237-17, 237-24(13))

§18-235-1.12 "Person totally disabled", certification of. (a) The disability of a person claiming to be totally disabled must be certified in a three-step process:

- (1) There must be a medical determination that the person is totally disabled, either physically or mentally;
 - (2) The disability must be permanent; and
 - (3) There must be a determination that the permanent and total disability results in the person's inability to engage in any substantial gainful business or occupation.
- (b) The disability shall be certified by:
- (1) A physician licensed under chapters 453 or 460, HRS, or both;
 - (2) A qualified out-of-state physician who is currently licensed to practice in the state in which the physician resides; or
 - (3) A commissioned medical officer with the United States Army, Navy, Marine Corps, or Public Health Service, engaged in the discharge of one's official duty.

(c) Certification shall be on forms prescribed by the department of taxation. [Eff 2/16/82; am 9/3/94; am

and ren §18-235-1.12 **AUG 28, 1998**] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §§235-1, 237-17, 237-24(13))

§18-235-1.13 "Permanent disability", defined.

"Permanent disability" means a disability that can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than twelve months. The twelve-month requirement is inapplicable when the disability is determined to be a terminal state or where it does actually result in death. [Eff 2/16/82; am 9/3/94; am and ren §18-235-

1.13 **AUG 28, 1998**] (Auth: HRS §§231-3(9), 235-118)
(Imp: HRS §§235-1, 237-17, 237-24(13))

§18-235-1.14 "Substantial gainful business or occupation", defined. (a) As used in this chapter, "substantial gainful business or occupation" means a business or occupation that is both substantial and gainful. It is substantial if it involves significant physical or mental activity even if the individual works on a part-time basis, does less work, is paid less, or has fewer responsibilities than when the individual worked prior to the disability. The business or occupation is gainful if it is done for monetary consideration or profit.

(b) It shall be presumed that an individual whose earned income is greater than \$30,000 for the taxable year is engaged in a substantial gainful business or occupation.

Example 1: Taxpayer retires from employment on disability that is total and permanent. After retirement, Taxpayer accepts another job and Taxpayer's earned income is greater than \$30,000 for the taxable year. Taxpayer is engaged in a substantial gainful business or occupation because Taxpayer's earned income is greater than \$30,000 for the taxable year.

Example 2: Taxpayer retires as a teacher on disability that is total and permanent. Taxpayer begins babysitting children and selling items. Taxpayer's earned income from these two businesses is greater than \$30,000 for the taxable year. Taxpayer is engaged in a substantial gainful business or occupation because Taxpayer's earned income is greater than \$30,000 for the taxable year.

(c) In the case of husband and wife filing a return jointly and only one of the spouses is disabled, only the disabled spouse's earned income is measured.

Example 1: A and B file a joint income tax return. Only A is disabled. A's earned income is less than \$25,000 for the taxable year. B's earned income

is greater than \$30,000 for the taxable year. For purposes of determining whether an individual is engaged in a "substantial gainful business or occupation," only the disabled spouse's earned income is measured when a joint tax return is filed. A is not engaged in a substantial gainful business or occupation because A's earned income is less than \$30,000 for the taxable year.

(d) For purposes of this section, earned income includes wages, salaries, tips, business interest income, other employment compensation, and net earnings from self-employment for the taxable year. Earned income does not include interest, dividends, capital gains, pensions, or deferred compensation.

Example 1: Taxpayer retires on disability that is total and permanent and receives an insurance settlement. Taxpayer does not engage in any other employment. The insurance settlement is invested and Taxpayer receives \$35,000 in interest, dividends, and capital gains during the taxable year. Taxpayer is not engaged in a substantial gainful business or occupation because earned income does not include interest, dividends, and capital gains.

(e) The presumption with respect to the \$30,000 earned income limitation set forth in subsection (b) is applicable to all totally and permanently disabled persons, including the following:

- (1) A person who lost or is born without both feet at or before the ankle;
- (2) A person who lost or is born without both hands at or above the wrist;
- (3) A person who lost or is born without one hand and one foot;
- (4) A person who has an injury or defect resulting in permanent and complete paralysis of both legs or both arms or one leg and one arm; or

- (5) A person who has an injury or defect resulting in incurable imbecility or mental illness.

Example 1: Taxpayer retires on disability that is total and permanent because Taxpayer loses both feet at the ankles in an accident. After retirement, Taxpayer accepts another job and Taxpayer's earned income from that job is greater than \$30,000 for the taxable year. Taxpayer is engaged in a substantial gainful business or occupation because Taxpayer's earned income is greater than \$30,000 for the taxable year. [Eff 2/16/82; am 9/3/94; am and ren §18-235-1.14

AUG 28, 1998] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §§235-1, 237-17, 237-24(13))

§18-235-1.15 Permanent total disability; submission of certification. (a) An individual claiming the tax benefits under the tax laws shall attach to the individual's income tax return the original certification of permanent total disability.

(b) The individual shall retain a copy of the certification in the individual's records and may continue to claim the exemption by attaching a copy of the original certification to the tax return in subsequent years.

(c) Where the statutory requirements are not met or in appropriate circumstances, the department may request additional information or deny the claim for exemption in the first year or subsequent years.
[Eff 2/16/82; am 9/3/94; am and ren §18-235-1.15

AUG 28, 1998] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §§235-1, 237-17, 237-24(13))

18-235-1.16

§18-235-1.16 "Resident estate", defined. "Resident estate" means the same as in section 235-1, HRS. The estate of a decedent who was a resident at the time of death is a resident estate if a Hawaii court appoints a personal representative or administrator to carry on and who does carry on the principal or an ancillary administration of the estate. [Eff 2/16/82; am 9/3/94;

am and ren §18-235-1.16 **AUG 28, 1998**] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §§235-1)

§18-235-1.17 "Resident trust", defined. "Resident trust" means the same as in section 235-1, HRS.

- (1) If the administration of the trust is carried on wholly in the State the trust shall be deemed a resident trust irrespective of the place of residence of the fiduciary or fiduciaries.
- (2) If the sole fiduciary, or all of the fiduciaries if more than one, are residents, domestic corporations, or partnerships formed under Hawaii law, the trust shall be deemed a resident trust irrespective of the place where the trust is administered.
- (3) If the administration of the trust is partly carried on in the State, the trust shall be deemed to be a resident trust if one-half or more of the fiduciaries are residents, domestic corporations, or partnerships formed under Hawaii law. [Eff 2/16/82; am 9/3/94; am

and ren §18-235-1.17 **AUG 28, 1998**] (Auth: HRS §§231-3(9), 235-118) (Imp: HRS §§235-1)

DEPARTMENT OF TAXATION

Amendments to section 18-235-1, Hawaii Administrative Rules, on the Summary page dated July 27, 1998, were adopted on July 27, 1998, following a public hearing held on June 29, 1998, after public notice was given in the Honolulu Advertiser, the Honolulu Star-Bulletin, the Hawaii Tribune-Herald, the Maui News, and the Garden Island News, on May 29, 1998.

These amendments shall take effect ten days after filing with the Office of the Lieutenant Governor.

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RAY K. KAMIKAWA
Director of Taxation

APPROVED:

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BENJAMIN J. CAYETANO
Governor
State of Hawaii

8/13/98

Dated: _____

APPROVED AS TO FORM:

UNOFFICIAL COPY

Deputy Attorney General

AUG 18, 1998

Filed