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KURT KAWAFUCHI
DIRECTOR OF TAXATION

STANLEY SHIRAKI
DEPUTY DIRECTOR

September 15, 2009

[redacted text]
Honolulu, Hawaii [redacted text]

Re: Application of tax incentives to [redacted text]

Dear [redacted text]:

This responds to the request of [redacted text], 2009 of [redacted text] (the Company), requesting a ruling from the State of Hawaii Department of Taxation (the "Department") that the Company is eligible for certain tax incentives under Hawaii law.

Hawaii offers the following tax incentives to qualifying businesses:

1. The high technology business investment tax credit under §235-110.9, Hawaii Revised Statutes (HRS);
2. The income tax exclusion for royalties and other income derived from patents and copyrights received by an individual or a qualified high technology business (QHTB) and developed and arising out of a QHTB under §235-7.3, HRS;
3. The income tax exclusion for income earned and proceeds derived from stock options or stock, including income from dividends from stock or stock received through the exercise of stock options or warrants, the receipt or exercise of stock options or warrants, and the sale of stock options or stock, including stock issued through the exercise of stock options or warrants, under §235-9.5, HRS;
4. The tax credit for research activities under §235-110.91, HRS; and
5. Other miscellaneous tax provisions.

SHORT ANSWER

Based on the information in your letter request for a high technology comfort ruling and the questionnaire, “Does a Company Qualify for Hawaii Tax Incentives?” the Company will qualify for the tax benefits in paragraphs 1, 2, 3 and 4 above, provided that the cash investments received by the Company do not exceed [redacted text]. The Company may also qualify for other miscellaneous income tax and general excise tax incentives.

FACTS REPRESENTED BY THE COMPANY

The Company represents that it is involved in software development incorporating all phases of software development activity, including [redacted text]. The Company designs and develops software [redacted text]. The Company focuses on developing [redacted text].

The Company represents that it creates and provides custom software for [redacted text].

The Company represents that it performs research as defined in I.R.C. 41(d). Specifically, the Company represents that it researches and develops [redacted text].

The Company represents that its software is for ultimate commercial sale, lease, and/or license, and is not merely adaptations of existing business components. The Company has made additional representations, in Exhibit A, regarding jobs, Hawaii costs, tax incentives that may be claimed by the Company or its investors, long term business plans and investments. The Company has agreed that the redacted version of this ruling attached as Exhibit B will be available for public inspection and copying. The Company has also represented that the cash investments to be received by the Company through use of the high technology business investment tax credit under §235 110.9, HRS will not exceed [redacted text].

LAW AND ANALYSIS

The requirements for the tax incentives at issue and their application to the Company are discussed below.

I. High technology business investment tax credit

For investments made in taxable years beginning after December 31, 2000, but before taxable years beginning after December 31, 2010, a nonrefundable high technology business investment tax credit of up to \$2,000,000 per taxpayer is available. The credit is graduated over five years (35% to 10%) from the date of the “investment”¹ in a QHTB for investments made in

¹ “Investment” is defined as “a nonrefundable investment, at risk, as that term is used in §465, IRC, (with respect to deductions limited to amount at risk), in a qualified high technology business, of cash that is transferred to the qualified high technology business, the transfer of which is in connection with a transaction in exchange for stock, interests in partnership, joint ventures, or other entities, licenses (exclusive or nonexclusive), rights to use

tax years 2001 to 2010.² The credit is capped at varying amounts (\$700,000 in the year the investment is made to \$200,000 in the last year). If the tax credit exceeds the taxpayer's income tax liability for any of the five years that the credit is taken, the excess of the tax credit over liability may be used as a credit against the taxpayer's income tax liability in subsequent years until exhausted.

The legislature has recently passed Senate Bill 199 which was enacted into law as Act 178, Session Laws of Hawaii, 2009. For investments received on or after May 1, 2009 and on or before December 31, 2010, additional restrictions apply including:

- Not more than 80% of a taxpayer's tax liability may be offset by utilizing such credits for tax years ending on or before December 31, 2010;
- The credit must be taken ratably over the five year period in accordance with §235-110.9(a), HRS and may not exceed an Investment Tax Credit Allocation ratio of 1:1; and
- No carryover of any unused credits from investments made on or after May 1, 2009 for tax years ending on or before December 31, 2010.

Some of the credit claimed will be recaptured from the investor if at the close of any taxable year in the five-year period: (1) the Company no longer qualifies as a QHTB, (2) the Company or an interest in the Company is sold by the taxpayer investing in the QHTB, or (3) the taxpayer withdraws the taxpayer's investment wholly or partially from the QHTB.

The recapture will be equal to ten percent of the amount of the total tax credit claimed for the investment in the two taxable years prior to the year in which any of the aforementioned events occurs. The recaptured amount must be added to the investor's tax liability for the taxable year in which the recapture occurs.

To be considered a QHTB for purposes of this tax credit, in each of the years for which the credit will be claimed, the Company must employ or own capital or property, or maintain an office, in Hawaii and:

- (1) More than 50% of its total business activities must be qualified research and more than 75% of its qualified research must be conducted in Hawaii (sometimes referred to as the "Activity Test"); or

technology, marketing rights, warrants, options, or any items similar to those included in this definition, including but not limited to options or rights to acquire any of the items included in this definition. The nonrefundable investment is entirely at risk of loss where repayment depends upon the success of the qualified high technology business. If the money invested is to be repaid to the taxpayer, no repayment except for dividends or interest shall be made for at least one year from the date the investment is made. The annual amount of any dividend and interest payment to the taxpayer shall not exceed twelve per cent of the amount of the investment." See §235-1, HRS.

² Taxpayers may continue to claim the credit if the five-year period to claim the credit commences in taxable years beginning before January 1, 2011.

- (2) More than 75% of its gross income must be derived from qualified research and the income from this qualified research must be received from:
 - (a) Products sold from, manufactured, or produced in Hawaii; or
 - (b) Services performed in Hawaii (sometimes referred to as the “Gross Income Test”).³

If a company contracts with another company to perform qualified research, the research will qualify as research performed by the company for purposes of the QHTB activity test only if the contract meets the following requirements:

- (1) The contract must be entered into before the performance of the qualified research activity;
- (2) The contract requires the company to bear the expense of the research even if the project is unsuccessful;
- (3) The contract provides that the research is to be performed on behalf of the company and the company will have the exclusive rights to the research results;⁴ and
- (4) The contract provides that the company performing the research will not claim the Hawaii qualified high technology business investment credit under HRS §235-110.9 or the Hawaii tax credit for research activities under HRS §235-110.91 for the activities performed on behalf of the Company.

The Department has also released Tax Information Release ("TIR") 2008-04 (Certain Prototype Costs That May Be Eligible for the Hawaii Tax Credit for Research Activities under Section 235-110.91, Hawaii Revised Statutes) and Announcement 2008-07 (High Tech Comfort Rulings Relying Upon the Gross Income Test) which are incorporated by reference herein.

A. The Company’s presence in Hawaii

The Company, a corporation, will maintain an office, have employees, and own property in Hawaii. Therefore, for purposes of §235-110.9, HRS the Company meets the requirement that it employ or own capital or property or maintain an office in Hawaii.

B. The Company’s qualified research activities

The term “qualified research” means:⁵

³ This definition of a QHTB differs from the definition of a QHTB in §235-7.3, HRS, which is discussed in Part II of this letter.

⁴ If the Company receives a license to use the results of the research (rather than ownership rights to the results of the research), the term of the license must be for the useful life of product(s) or research.

- (1) The same as in §41(d), Internal Revenue Code (IRC);
- (2) The development and design of certain computer software;
- (3) Biotechnology;
- (4) Performing arts products;
- (5) Sensor and optic technologies;
- (6) Ocean sciences;
- (7) Astronomy; or
- (8) Non-fossil fuel energy-related technology.

(1) The same as in §41(d), IRC

Item (1) of the definition of qualified research above is drawn from IRC §41(d), where it is defined as research undertaken to discover information technological in nature, which constitutes a process of experimentation relating to a new or improved function, performance, reliability, or quality.

“Qualified research” activities must satisfy the following tests under Treasury Regulation §1.41-4:

- (a) The expenditures must qualify as research and experimental expenditures under IRC §174;
- (b) The expenditures must relate to research undertaken to discover information that is both technological in nature and the application of which is intended to be useful in developing a new or improved business component of the taxpayer;⁶ and
- (c) Substantially all of the activities of the research must constitute elements of a process of experimentation.⁷

⁵ §235-110.9, HRS, incorporates the definition of “qualified research” in §235-7.3, HRS.

⁶ Treasury Regulation §1.41-4(3)(i), provides that “[r]esearch is undertaken for the purpose of discovering information if it is intended to eliminate uncertainty concerning the development or improvement of a business component. Uncertainty exists if the information available to the taxpayer does not establish the capability or method for developing or improving the business component, or the appropriate design of the business component. ”

⁷ Treasury Regulations further define a *process of experimentation* as “a process designed to evaluate one or more alternatives to achieve a result where the capability or the method of achieving that result, or the appropriate design of that result, is uncertain as of the beginning of the taxpayer’s research activities. A process of experimentation must fundamentally rely on the principles of the physical or biological sciences, engineering, or computer science and involves the identification of uncertainty concerning the development or improvement of a business component, the identification of one or more alternatives intended to eliminate that uncertainty, and the identification and the conduct of a process of evaluating the alternatives (through, for example, modeling, simulation, or a systematic trial and error methodology). A process of experimentation must be an evaluative process and generally should be capable of evaluating more than one alternative. A taxpayer may undertake a process of experimentation if there is no uncertainty concerning the taxpayers’ capability or method of achieving the desired result so long as the

§41(d), IRC, further clarifies that qualified research does not include any research:

- (a) Conducted after the beginning of commercial production of the business component;
- (b) Related to the adaptation of existing business components;
- (c) Related to the reproduction of existing business components;
- (d) Surveys, studies, market research, etc.;
- (e) Conducted outside of the United States;
- (f) In the social sciences, arts, or humanities; or
- (g) To the extent funded by any grant, contract, or otherwise by another person (or governmental entity).

Hawaii's law conforms to the federal definition of "qualified research" as set forth in §41(d), IRC, and the accompanying Treasury Regulations. Thus, the Company's activities must meet the federal standards of "qualified research" to be classified as such under Hawaii law.

If some of the work is funded by grant, contract, or otherwise by another person or governmental entity, to the extent the work is funded, the requirements of item (1) of qualified research are not met unless the Company retains substantial rights to their research, as defined in §1.41-4A(d)(2), Treasury Regs., and the funding is contingent upon the success of the research. §1.41-4A(d)(1), Treasury Regs.

Where a taxpayer bears the risk of loss with respect to a research project, the project will not otherwise be deemed to be funded and, thus, non-qualifying under §41(d), IRC. See Fairchild Indus., Inc. v. U.S., 71 F.3d 868, 873-74 (Fed. Cir. 1995) ("The statute is designed so that those who bear the risk of financial loss can include the tax credit in their calculation of investment risk.") The Company must also retain "substantial rights to its research." See §1.41-4A(d)(2), Regs. See Lockheed Martin Corp. v. U.S., 85 A.F.T.R.2d 2000-1495, 1502 (Fed. Cir. 2000).

appropriate design of the desired result is uncertain as of the beginning of the taxpayers' research activities. Uncertainty concerning the development or improvement of the business component (e.g., its appropriate design) does not establish that all activities undertaken to achieve that new or improved business component constitute a process of experimentation."

The *substantially all* requirement is satisfied only if 80% or more of the research activities measured in cost or other consistently applied reasonable basis constitutes elements in a process of experimentation.

Thus, the Company states that it is involved in activities that meet the requirements of §41(d), IRC. In Part I of the Questionnaire, the Company checked the box indicating that it performs research as defined in §41(d), IRC. By checking this box, the Company represents the following:

- The Company performs research as defined in §41(d), IRC;
- The planned component is not in commercial production; is not adapting or reproducing existing business components; and is not performing surveys or market research; and
- The Company's work is not in the social sciences, arts, or humanities and is not funded by any grant, contract, or otherwise by another person or governmental entity.

(2) The development and design of certain computer software

"Qualified Research" includes the development and design of computer software for ultimate commercial sale, lease, license or to be otherwise marketed, for economic consideration. With respect to the software's development and design, the business shall have substantial control and retain substantial rights to the resulting intellectual property.

The Company represents that its software is for ultimate commercial sale, lease, and/or license. The Company will own or have substantial control over all rights to the resulting intellectual property. In Part I of the Questionnaire, the Company checked the box indicating that it develops and designs computer software. By checking this box, the Company represents that it meets the requirements of item (2) of qualified research.

C. Activity Test

Under §235-110.9, HRS, a company is a QHTB if it meets one of two tests. Under the Activity Test, a company is a QHTB if more than 50% of its total business activities is qualified research and more than 75% of such qualified research is conducted in Hawaii. Under the Income Test, a company is a QHTB if more than 75% of its gross income is derived from qualified research and from either (i) products sold from, manufactured in, or produced in Hawaii, or (ii) services performed in Hawaii.

The Company has represented that it will meet the Activity Test because it will maintain a Hawaii office, more than 50% of its activities will be in qualified research and more than 75% of those qualified research activities will be conducted in Hawaii. In making this determination, the Company used a numerator that contained the costs of activities in direct support of qualified research and a denominator that included all costs

for all activities.⁸

Based on the Company's representations, the Company will be a QHTB, and investments in the Company will qualify for the high technology business investment tax credit if the activities of the Company are substantially as represented.

Pursuant to Announcement 2008-07, the Department makes no determination as to whether the Company qualifies under the Gross Income Test.

D. Credit Recapture

Section 235-110.9(d), HRS, provides for recapture of credits that have been claimed by a taxpayer where one of the following three events occurs (recapture event):

- (1) The business no longer qualifies as a QHTB;
- (2) The business or an interest in the business has been sold by the taxpayer investing in the QHTB;
- (3) The taxpayer has withdrawn the taxpayer's investment wholly or partially from the QHTB.

Where recapture is triggered, 10% of the amount of the total tax credit claimed by the selling or withdrawing investor in each of the two taxable years prior to the year in which recapture occurs must be added to such investors' tax liability for the taxable year in which the recapture occurs.

The credit cannot be claimed in the year of a recapture event because investors do not have an investment in a QHTB. If a recapture event occurs, the Company should notify the investors that they are not eligible to claim the credit and that some of the credit claimed in prior years shall be recaptured.

E. Annual Survey

If a QHTB accepts any investments after June 30, 2007, the QHTB is required to file an annual survey as described in Act 206 (Session Laws of Hawaii, 2007). Failure to file the survey when due may result in a penalty of \$1,000 per month for each month the annual survey is not filed, not to exceed a total of \$6,000 for any annual survey not filed. Furthermore, by accepting an investment for which an investment credit allowed under section 235-110.9, HRS may be claimed, the QHTB is deemed by statute to have consented to the public disclosure of the Company's name and status as a beneficiary of the investment credit.

⁸ "Business activities" are measured by the cost of these activities, the time spent on these activities, or other consistently applied reasonable basis. This is based upon general principles in the income tax and general excise tax law.

II. Income tax exclusion for royalties and other income from QHTB

Pursuant to §235-7.3, HRS, an income tax exclusion is available for income received by an individual or a QHTB as royalties and other income derived from any patents, copyrights, and trade secrets developed and arising out of a QHTB.⁹ The exclusion may be claimed by the individual or QHTB that owns the patents, copyrights, or trade secrets.

For purposes of the royalty income exclusion, a QHTB is defined as “a business conducting more than 50% of its activities in qualified research.”¹⁰

The term “qualified research” means:

- (1) The same as in §41(d), IRC;
- (2) The development and design of computer software for ultimate commercial sale, lease, license or to be otherwise marketed, for economic consideration. With respect to the software’s development and design, the business shall have substantial control and retain substantial rights to the resulting intellectual property;
- (3) Biotechnology;
- (4) Performing arts products;
- (5) Sensor and optic technologies;
- (6) Ocean sciences;
- (7) Astronomy; or
- (8) Non-fossil fuel energy-related technology.

The Company meets the requirements of items (1) and (2) in the definition of “qualified research” based upon the discussion in Part I relating to the high technology business investment tax credit. Based on the Company’s representations, more than 50% of the Company’s activities will be in qualified research. Based on these facts, royalties and other income derived from any patents, copyrights, and trade secrets developed and arising out of the Company received by an individual¹¹ or a qualified high technology business are excluded from income tax.

⁹ Expenses for royalties and other income derived from any patents, copyrights, and trade secrets by an individual or a QHTB as defined in §235-7.3, HRS, are deductible. See §235-2.4(g), HRS.

¹⁰ This definition differs from the definition of a QHTB in §235-110.9, HRS, which is discussed in Part I of this letter.

¹¹ The performing arts product exclusion in §235-7.3, HRS, is applicable to the author and assignors, licensors, and licensees.

III. Income tax exclusion for income from stock options or stock from qualified high technology business

Section 235-9.5, HRS, provides an exclusion for “all income earned and proceeds derived from stock options or stock,” including stock issued through the exercise of stock options or warrants, from a QHTB or from a holding company of a QHTB¹² by an employee, officer, or director of the QHTB, or investor who qualifies for the high technology business investment tax credit in §235-110.9, HRS, effective for taxable years beginning after December 31, 2000. This exclusion is applicable to dividends from stock or stock received through the exercise of stock options or warrants, the receipt or the exercise of stock options or warrants, and income from the sale of stock, including stock issued through the exercise of stock options or warrants.¹³

For purposes of this income tax exclusion, a QHTB means the same as defined in §235-7.3, HRS, relating to the income tax exclusion for royalties.

The Company meets the requirements of item (2) in the definition of “qualified research” based upon the discussion in Part I relating to the high technology business investment tax credit.

Based on the Company’s representations, more than 50% of the Company’s activities will be in qualified research.

Based on these facts, dividends from stock or stock received through the exercise of stock options or warrants, the receipt or the exercise of stock options or warrants, and income from the sale of stock, including stock issued through the exercise of stock options or warrants, issued by the Company or a holding company of the Company received by an employee, officer, director, or investor (who qualifies for the high technology business investment tax credit) are excluded from income tax.

IV. Tax credit for research activities

The tax credit for research activities in Hawaii provided under §235-110.91, HRS, is similar to the federal credit for increasing research activities under §41, IRC. The Hawaii credit is available for tax years 2000-2005 for research done in the State. Unlike the federal credit, the Hawaii credit may be claimed without increasing research expenses for tax years 2001 to 2005 and the 20% Hawaii credit is refundable (the federal credit is nonrefundable).

¹² A holding company of a QHTB means any business entity that possesses:

- (1) At least eighty per cent of the total voting power of the stock or other interest; and
- (2) At least eighty per cent of the total value of the stock or other interest in the qualified high technology business.

¹³ §165, IRC, is operative for Hawaii income tax purposes and applies to losses sustained from the sale of stock issued through stock options or warrants granted by a QHTB. See §235-2.4(d), HRS.

As discussed in Part I of this letter, Hawaii tax law conforms to the federal definition of “qualified research” as set forth in §41(d), IRC, and accompanying Treasury Regulations. For the same reasons discussed in Part I of this letter the Company is eligible for the Hawaii tax credit for its research activities conducted in Hawaii.

V. Miscellaneous Provisions

Act 221, SLH 2001, provides additional tax incentives, which are not dependent on the Company qualifying as a QHTB.

- **Technology infrastructure renovation tax credit.** A nonrefundable income tax credit of 4% of the "renovation costs" for each commercial building located in Hawaii is available for tax years 2001 through 2010. "Renovation costs" means costs incurred after December 31, 2000, to plan, design, install, construct, and purchase technology-enabled infrastructure equipment to provide a commercial building with technology-enabled infrastructure. Act 178, Session Laws of Hawaii 2009, also limits this credit to 80% of the taxpayer's tax liability for renovation costs incurred on or after May 1, 2009 and on or before December 31, 2010.
- **Expanded related entities exemption.** The related entities exemption which exempts from the general excise tax (GET) amounts received, charged, or attributable for "services" or interest between one "related entity" and another "related entity" is expanded. The use of computer software and hardware, information technology services, and database management between related entities is exempt from the GET. These changes are applicable to gross income or gross proceeds received beginning July 1, 2001.

CONCLUSION

Based solely on the information and representations submitted, the Company qualifies for:

1. The high technology business investment tax credit under §235-110.9, HRS;
2. The income tax exclusion for royalties and other income derived from patents and copyrights received by an individual or a QHTB and developed and arising out of a QHTB under §235-7.3, HRS;
3. The income tax exclusion for income earned and proceeds derived from stock options or stock, including income from dividends from stock or stock received through the exercise of stock options or warrants, the receipt or exercise of stock options or warrants, and the sale of stock options or stock, including stock issued through the exercise of stock options or warrants, under §235-9.5, HRS;

4. The tax credit for research activities under §235-110.91, HRS; and
5. Other miscellaneous tax provisions.

This ruling is applicable only to the Company, and shall not be applied retroactively. It may not be used or cited as precedent by any other taxpayer, and is based on our understanding of the facts that you have represented, and only apply if the amount of cash investments received by the Company does not exceed [redacted text]. In the event that the Company finds it necessary to increase the amount of investment monies to be obtained which qualifies for the high technology business investment tax credit, the Company shall submit a supplemental ruling request to the Department. No user fee shall be assessed on such supplemental ruling request. 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