



NEIL ABERCROMBIE
GOVERNOR

SHAN TSUTSUI
LT. GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1530
FAX NO: (808) 587-1584

FREDERICK D. PABLO
DIRECTOR OF TAXATION

JOSHUA WISCH
DEPUTY DIRECTOR



To: The Honorable Sylvia Luke, Chair
and Members of the House Committee on Finance

Date: Wednesday, February 19, 2014
Time: 2:00 p.m.
Place: Conference Room 308, State Capitol

From: Frederick D. Pablo, Director
Department of Taxation

Re: H.B. No. 2338, Relating to Tax Credit for Research Activities

The Department of Taxation (Department) strongly supports H.B. 2338, an Administration measure, to clarify the intent of Act 270, Session Laws of Hawaii 2013. Clarification to ensure conformance of the State Tax Credit for Research Activities (TCRA) to the federal TCRA provisions will ensure the Department will be able to administer and enforce the provisions of this tax credit.

H.B. 2338 is proposed by the Department to clarify that the State TCRA is not available for research conducted outside of the State, eliminate the requirement that the Department certify all research credit claims, and clarify that if a taxpayer fails to submit to the Department of Business, Economic Development, and Tourism (DBEDT) the economic survey required under the State credit provisions, such failure is a waiver of the right to claim the credit. The measure is effective on July 1, 2014, and applies to taxable years beginning after December 31, 2013.

The federal TCRA is an incremental credit based on increases in research activities under Internal Revenue Code ("IRC") § 41(a). Taxpayers may choose to claim the credit under the Regular Research Credit ("RRC") method or the Alternative Simplified Credit ("ASC") method under IRC § 41(c)(5). The TCRA is a highly technical and extremely complex, such that the Department must rely on the expertise of the Internal Revenue Service in determining whether a TCRA claim is justified.

For example, when the State TCRA did not include the base period calculations for purposes of the credit as it did under Act 221, Session Laws of Hawaii 2001, the Department expended considerable audit resources to determine whether or not taxpayer claims for the TCRA were justified. Because the Hawaii TCRA is a refundable credit, the tendency is for taxpayers to be more aggressive in their approach as to what activities and expenditures fall



within the parameters of the credit.

Validation of tax credit claims requires review of extremely detailed and technical information, and disputes concerning the credit are not easily resolved. It is not uncommon, for example, that audits and the related appeals regarding the federal TCRA involves extensive litigation that may take in excess of ten years for complete resolution. Given that the Department does not have the personnel, resources and expertise to insure that claims for the credit are valid, the administration and enforcement of this credit is very difficult for the Department.

The TCRA is intended to encourage taxpayers to design, develop, and/or improve products, processes, techniques, formulas or software and intended to reward programs that pursue innovation. The Department strongly believes that together, the federal and the State TCRA's provide substantial incentives for such innovation, even for new start-up companies. For example, the ASC method allows taxpayers to claim research credits even if research costs remain the same or when costs may decline as compared to prior years. As such, it is not necessary to eliminate the reference to the base periods. Taxpayers are still eligible for the TCRA even when the amounts spent on qualified research have declined from the previous year.

The RRC equals 20% of a taxpayer's current-year QREs that exceed a base amount, which is determined by applying the taxpayer's historical percentage of gross receipts spent on QREs (the fixed-base percentage) to the four most recent years' average gross receipts. The fixed-base percentage may not exceed 16%, and the base amount may not be less than half of the current-year QREs. The ASC equals 14% of the QREs for the taxable year that exceed 50% of the average QREs for the three taxable years preceding the taxable year for which the credit is being calculated. If the taxpayer has no QREs in any one of the three preceding tax years, the ASC rate equals 6% of the QREs for the taxable year.

H.B. 2338 amends the Hawaii TCRA so that qualifying research activities must be done in Hawaii in order for the costs to qualify for the TCRA. Currently, the law requires that a cost be "incurred" in Hawaii in order for the cost to be qualifying research cost. However, where a cost is incurred is not readily determinable and does not necessarily mean that the research expense was performed in Hawaii. For example, a contract that is negotiated and signed in Hawaii can be classified as incurred in Hawaii, even though under the terms of the contract such research will be performed completely outside of Hawaii. This measure is clarifies that any qualifying research cost must be performed in Hawaii in order to qualify for the TCRA.

This measure also eliminates the requirement that the taxpayer obtain a certification from the Department prior to claiming the credit. This certification requirement does not assist the Department in its compliance efforts and it creates a false impression in the taxpayer that by certifying the credit, the Department has audited and accepted the same. Given the complexity of the credit and the very short timeframe in which the certification must be obtained, it is only possible for the Department to give a cursory overview at the time of certification. Since the



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information sought by the certification will be provided to the DBEDT by means of the survey required by statute to be submitted to DBEDT, certification by the Department is duplicative, unnecessary and provides no meaningful benefits.

Finally, H.B 2338 also makes clear that submission of the survey is a requirement to making a valid and proper claim for the credit. Currently, the statute requires submission of the required survey but imposes no penalty for failure to provide it. In the past, where no substantive penalty was imposed for failure to provide the information, taxpayers were recalcitrant in providing the required information.

For example, a survey was required by virtue of Act 206, Session Laws of Hawaii 2007, for businesses obtaining funds pursuant to the former High Technology Business Investment Tax Credit under Hawaii Revised Statutes section 235-110.9. While Act 206 allowed the imposition of a nominal fine in relation to the substantial amounts raised, it was difficult for the Department to obtain compliance from the businesses required to submit the information. If it is the Legislature's intent to require taxpayers to submit the information, this measure will ensure that such information is provided by denying the credit to a business that fails to comply.

Thank you for the opportunity to provide comments.

Written Statement of
ROBBIE MELTON
Executive Director & CEO
High Technology Development Corporation
before the
HOUSE COMMITTEE ON FINANCE
Wednesday, February 19, 2014
2:00 p.m.
State Capitol, Conference Room 308
In consideration of

HB 2338 RELATING TO TAX CREDIT FOR RESEARCH ACTIVITIES.

Chair Luke, Vice Chairs Nishimoto and Johanson, and Members of the Committee on Finance.

The High Technology Development Corporation (HTDC) **supports** HB 2338 relating to Tax Credit for Research Activities. HTDC agrees that tax incentives are an important piece of the comprehensive strategy for the economic development of our technology industry and should follow the Department of Taxation draft with respect to section 41 of the Internal Revenue Code. HTDC comments that these efforts should be coordinated with HB1704 to build a cohesive strategy.

Thank you for the opportunity to offer these comments.



TAXBILLSERVICE

126 Queen Street, Suite 304

TAX FOUNDATION OF HAWAII

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: INCOME, Credit for research activities

BILL NUMBER: SB 2888; HB 2338 (Identical)

INTRODUCED BY: SB by Kim by request; HB by Souki by request

BRIEF SUMMARY: Amends HRS section 235-110.91 to clarify that the tax credit for research activities shall only be applicable to qualified research activities incurred after December 31, 2012 and shall not include research conducted outside the state.

Also eliminates the requirement that the taxpayer obtain certification for the research credit from the department of taxation. Provides that the failure to of a qualified high technology business to submit the annual survey shall be considered a waiver to claim the credit.

EFFECTIVE DATE: July 1, 2014; applicable to tax years beginning after December 31, 2013

STAFF COMMENTS: This is an administration measure submitted by the department of taxation TAX-03 (14). The legislature by Act 270, SLH 2013, reenacted the tax credit for research activities for taxable years from 2013 to 2019. The proposed measure clarifies that the credit is applicable only to qualifying research activities performed in the state.

The proposed measure also eliminates the requirement that the taxpayer obtain certification by the department of taxation to claim the credit. It appears that due to the complexity of the credit and the very short time frame in which the certification must be obtained, the department is unable to provide more than a cursory overview of the information at the time of certification. Since such information is also provided to the department of business, economic development and tourism, the department of taxation has determined that the certification by the department of taxation is duplicative and unnecessary.

Digested 2/18/14