

ACT 215

H.B. NO. 2396

A Bill for an Act Relating to Capital Investments.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
STATE PRIVATE INVESTMENT FUND
PART I. GENERAL PROVISIONS**

§ -1 **Definitions.** As used in this chapter:

“Board” means the board of directors of the corporation.

“Corporation” means the Hawaii strategic development corporation, a public body corporate and politic and an instrumentality and agency of the State, established under chapter 211F.

“Equity capital” means capital invested in common or preferred stock, royalty rights, limited partnership interests, limited liability company interests, and any other securities or rights that evidence ownership in private business.

“Guarantee” means each guarantee or agreement issued by the corporation as authorized by this chapter.

“Investor group” means any person that is engaged or considered for engagement by the corporation as an investor group pursuant to this chapter.

“Near-equity capital” means capital invested in unsecured, undersecured, subordinated, or convertible loans, or debt securities.

“Person” means any individual, corporation, limited liability company, partnership, or other lawfully organized entity.

“Put option” means a right or privilege to sell an amount of tax credits during a time period ending on the expiration date of the option.

“State” means the State of Hawaii.

“Tax credits” means tax credits issued or transferred pursuant to this chapter and available against liabilities imposed by chapter 235 or 241.

“Taxpayer” means a person subject to a tax imposed by chapter 235 or 241.

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§ -2 **Short title.** This chapter shall be known and may be cited as the "State private investment fund."

§ -3 **Findings and purpose.** A critical shortage of seed and venture capital resources exists in the State and that shortage is impairing the growth of commerce in the State. A need exists to increase the availability of venture equity capital for emerging, expanding, relocating, and restructuring enterprises in the State, and an increase in return-driven, venture capital investments in such enterprises in the State will help to diversify the State's economic base. Accordingly, this chapter is enacted to:

- (1) Mobilize equity and near-equity capital for investment in a broad variety of venture capital partnerships in diversified industries;
- (2) Retain the private sector culture of focusing on rate of return in the investing process;
- (3) Secure the services of high quality managers in the venture capital industry;
- (4) Enhance the venture capital culture and infrastructure in the State so as to increase venture capital investment and promote venture capital investing within the State; and
- (5) Accomplish the foregoing purposes in a return-driven manner with the goal of minimizing any adverse impact on state tax revenues.

The legislature finds that the creation of a state private investment fund, as provided under this chapter, serves an important public purpose by answering the need to increase venture capital and expand the growth of commerce in the State.

§ -4 **Mission of the corporation.** The mission of the corporation, pursuant to this chapter and in addition to those set forth in chapter 211F, shall be to mobilize equity and near-equity capital for investment in such a manner that will result in a significant potential to diversify and stabilize the economy of the State. Notwithstanding anything to the contrary in chapter 211F or otherwise, the corporation shall carry out the purposes, mission, and provisions of this chapter.

PART II. IMPLEMENTATION

§ -11 **Business plan.** To fulfill its mission as the mobilizer of equity and near-equity capital, the implementation of this chapter by the corporation shall be subject to the supervision of the board. The corporation shall develop an annual business plan for the implementation of this chapter. The business plan shall be submitted to the board for its approval and shall be included in its annual report, which shall be published as provided in section -15.

§ -12 **Tax credits.** (a) The State shall issue tax credits to the corporation that may be transferred or otherwise used to reduce the tax liability of any taxpayer pursuant to chapter 235 or 241. The total amount of tax credits that may be issued, and which may be transferred pursuant to this chapter by the corporation is \$36,000,000. Upon compliance with subsection (b), the credits shall be freely transferable by the corporation to transferees and by transferees to subsequent transferees; however, the tax credits so transferred by the corporation shall not be exercisable before July 1, 2005, nor after July 1, 2030. The corporation shall not transfer tax credits except in conjunction with a legitimate call on a corporation guarantee. The corporation shall immediately notify the president of the senate, the speaker of the house of representatives, and the governor in writing if any tax credit is transferred by the corporation in conjunction with a legitimate call on a corpora-

tion guarantee; provided that the corporation shall not be required to make that notification for transfers to subsequent transferees.

(b) Subject to the annual authorization by the legislature, the corporation may transfer tax credits under this section up to the annual amount allowed under subsection (c). Legislative authorization for the tax credits shall be by a separate legislative act.

(c) The corporation shall determine the amount of individual tax credits to be transferred pursuant to this chapter and may negotiate for the sale of those credits subject only to the limits imposed by this chapter. The corporation shall limit the transfer of tax credits that may be claimed and used to reduce the tax otherwise imposed by chapter 235 or 241 for one fiscal year (including any tax credits that are carried over by a taxpayer from a prior fiscal year and used to reduce taxes otherwise imposed in the current fiscal year, as permitted in subsection (g)) to not more than an aggregate total of \$12,000,000 per fiscal year. The board shall clearly indicate on the face of the certificate or other document transferring the tax credit the principal amount of the tax credit and the taxable year or years for which the credit may be claimed.

(d) The corporation, in conjunction with the department of taxation, shall develop a system for registration of any tax credits issued or transferred pursuant to this chapter and a system of certificates that permits verification that any tax credit claimed upon a tax return is validly issued, properly taken in the year of claim, and that any transfers of the tax credit are made in accordance with this chapter.

(e) The corporation may pay a fee and provide other consideration in connection with the purchase by the corporation of a put option or other agreement pursuant to which a transfer of tax credits authorized by this chapter may be made.

(f) The tax credits issued or transferred pursuant to this chapter, upon election by the taxpayer at time of use, shall be treated as a payment or prepayment in lieu of taxes imposed under chapter 235 or 241. Tax credits used pursuant to this chapter shall be claimed as a payment of tax or estimated tax for the purposes of chapter 235 or 241.

(g) If the tax credits under this section exceed the taxpayer's income tax liability under chapter 235 or 241 for any taxable year, or for any other reason is not claimed by a taxpayer in whole or in part in any taxable year, the excess of the tax credit over liability, or the amount of the unclaimed tax credit, as the case may be, may be carried over and used as a credit against the taxpayer's income tax liability in any subsequent year until exhausted, subject to:

- (1) The deadline for the exercise of tax credits imposed by subsection (a); and
- (2) The monetary limit imposed by subsection (c).

§ -13 Investment of capital. (a) The corporation may solicit investment plans from investor groups for the investment of capital in accordance with this chapter. The corporation shall establish criteria for the selection of persons, firms, corporations, or other entities. The criteria shall include the applicant's level of experience, quality of management, investment philosophy and process, probability of success in fundraising, plan for achieving the purposes of this chapter, and such other investment criteria as may be used in professional portfolio management that the corporation deems appropriate. If the corporation decides to engage one or more investor groups to deploy or generate capital, it shall consider and select one or more investment plans and investor groups that the corporation deems qualified to:

- (1) Generate capital for investment with the most effective and efficient use of the guarantee;
- (2) Invest the capital in private seed and venture capital entities in a manner mobilizing a wide variety of equity and near-equity invest-

ments in ventures promoting the economic development of the State; and

- (3) Help build a significant, fiscally strong, and permanent resource to serve the objectives expressed in this chapter.

An investor group engaged by the corporation shall have a manager who is experienced in design and implementation, as well as the management of seed and venture capital investment programs and in capital formation. The corporation may remove and replace any investor group that has been engaged and effect the assignment of assets, liabilities, guarantees, and other contracts of this program to a new investor group, subject to such terms and conditions as may be set forth in the terms of engagement.

(b) With legislative approval pursuant to section -14, the corporation may extend one or more guarantees and secure the performance of such guarantees in the form of a put option, as well as other arrangements selected by the corporation. Without limiting the foregoing:

- (1) The corporation may guarantee loans, lines of credit, and other indebtedness and equity investments and may arrange for, pledge, and assign put options, as well as other agreements to purchase tax credits on such terms as the board may approve from time to time, in order to generate funds to deploy in a manner consistent with this chapter;
- (2) The guarantees of loans, lines of credit, and other indebtedness may extend up to the principal amount plus interest over the term of the guarantee at a rate set by board resolution from time to time, a guarantee of a loan, lines of credit, or other indebtedness in a manner consistent with this chapter; and
- (3) Guarantees of equity capital may extend up to the amount of the investment plus a rate of return set by board resolution from time to time in a manner consistent with this chapter.

Guarantees, in whatever form negotiated by the corporation, may be made for any period of time, but no term shall expire prior to January 1, 2006. The corporation may charge a reasonable fee for costs and the fair compensation of risks associated with its guarantee. Proceeds from the sale of any tax credits may be used to satisfy the contractual guarantee obligation of the corporation. The corporation may contract freely to protect the interest of the State.

(c) If the corporation purchases any security pursuant to an agreement with an investor group, the corporation shall acquire the securities and may invest, manage, transfer, or dispose of the securities in accordance with policies for the management of assets adopted by the corporation.

(d) The corporation may make any contract, execute any document, charge reasonable fees for services rendered, perform any act or enter into any financial or other transaction necessary to carry out its mission. The corporation may employ necessary staff as may be required for the proper implementation of this chapter, the management of its assets, or the performance of any function authorized or required by this chapter necessary for the accomplishment of any such function. Staff shall be selected by the corporation based upon outstanding knowledge and leadership in the field for which the person performs services for the board.

(e) In carrying out the mission of the corporation, as authorized in this chapter, neither the corporation nor its officers, board members, or employees shall be considered to be broker-dealers, agents, investment advisors, or investment adviser representatives under chapter 485. The tax credits issued or transferred pursuant to this chapter shall not be considered securities under chapter 485.

(f) Funds raised or arranged by the corporation pursuant to this chapter shall be invested in seed capital and venture capital investments, as such terms are defined

in chapter 211F, which, to the extent consistent with this chapter, shall be governed by applicable provisions of chapter 211F.

(g) The guarantees extended by the fund shall be payable solely from revenues of the fund and shall be secured solely by those revenues and by the pledges and assignments authorized by this chapter. No holders of guarantees issued under this chapter shall have a right to compel any exercise of the taxing power of the State to pay the guarantees and no moneys other than the revenues of the fund shall be applied to payment thereof. Each guarantee issued under this chapter shall recite in substance that the guarantee is not a general obligation of the State and is payable solely from revenues pledged to the payment thereof, and that such guarantee is not secured directly or indirectly by the full faith and credit or the general credit of the State or by any revenues or taxes of the State other than the revenues specifically pledged thereto.

§ **-14 Indebtedness; legislative approval.** The corporation shall not incur any indebtedness without legislative approval. Legislative approval for the corporation to incur indebtedness shall be by means of a separate legislative act.

§ **-15 Annual reports; evaluation by the board.** (a) The corporation shall publish a separate annual report, in conjunction with its annual audit, and present the report to the governor, the senate president, and the speaker of the house. The annual report shall review the mission of the board and programs implemented according to the objective measures set forth in the corporation's business plan. The corporation shall distribute this annual report by any means that will make it available to the financial community.

(b) Seven years after the corporation has begun operations under this chapter, the corporation shall review, analyze, and evaluate the extent to which the corporation has achieved its statutory mission. The evaluation shall include, but not be limited to, an examination of quantified results of the corporation's programs and plans.

§ **-16 Capital formation revolving fund.** There is established a revolving fund for the corporation to be designated as the capital formation revolving fund. The following shall be deposited into the capital formation revolving fund, all moneys:

- (1) Appropriated by the legislature;
- (2) Received as repayment of loans;
- (3) Earned on investments;
- (4) Received pursuant to a venture agreement;
- (5) Received as royalties;
- (6) Received as premiums or fees charged by the corporation; or
- (7) Otherwise received by the corporation.

§ **-17 Audit; state auditor.** The books and records of the fund shall be audited every year by the state auditor.

§ **-18 Construction.** Nothing contained in this chapter is or shall be construed as a restriction or limitation upon any powers that the corporation might otherwise have under any other law of the State heretofore or hereafter enacted, and the provisions of this chapter are cumulative to those powers. To the extent consistent with this chapter, in administering, implementing, and carrying out the mission of the corporation pursuant to this chapter, the corporation shall be governed by and have the powers and authorities set forth in chapter 211F. This chapter shall be construed to provide an additional and alternative method for the doing of the

things authorized and shall be regarded as supplemental and additional to powers conferred by any other laws.

§ -19 Adoption of rules, policies, procedures, and regulatory and administrative measures; enforceability of guarantees of corporation unaffected. (a) The corporation may adopt rules, policies, procedures, and regulatory and administrative measures necessary to administer the programs of the corporation or convenient for the organizational and internal management of the corporation's and board's responsibilities.

(b) The level, timing, or degree of success of the corporation in mobilizing or ensuring investment in Hawaii businesses or projects shall not compromise, diminish, invalidate, or affect the enforceability of any guarantee of the corporation."

PART II

SECTION 2. This part improves currently available tax incentives developed for the high technology industry. Primary among these is Act 221, Session Laws of Hawaii 2001. Act 221 still contains essential incentives that continue to encourage the growth and development of high technology businesses and associated industries.

SECTION 3. Chapter 235, Hawaii Revised Statutes, is amended by adding two new sections to part I to be appropriately designated and to read as follows:

"§235-A Comfort letters; authority to assess fees; established. The department may assess and collect a fee for the issuance of any comfort letter of the department. All fees collected under this section shall be deposited into the tax administration special fund established under section 235-B.

§235-B Tax administration special fund; established. There is established a tax administration special fund into which shall be deposited fees collected under sections 235-A, 235-110.9, and 235-110.91. The moneys in the fund shall be expended by the department to offset the costs associated with:

- (1) Issuing comfort letters;
- (2) Issuing certificates under section 235-110.9; and
- (3) Issuing certificates under section 235-110.91."

SECTION 4. Section 211F-3, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

~~"(a) The governing body of the corporation shall be a board of directors consisting of [eleven] twelve members[. Eight of the members shall be from the general public and] to be appointed by the governor for staggered terms pursuant to section 26-34[;] as follows:~~

- (1) Three to be appointed directly by the governor;
- (2) Three to be appointed from a list of nominees from the general public submitted by the president of the senate; and
- (3) Three to be appointed from a list of nominees from the general public submitted by the speaker of the house of representatives,

and shall be selected on the basis of their knowledge, skill, and experience in the scientific, business, or financial fields. The director of business, economic development, and tourism, [an appointed] a member from the board of the high technology development corporation[;] appointed by the governor, and [an appointed] a member from the board of the natural energy laboratory of Hawaii authority[;] appointed by the governor, or their designated representatives, shall serve as ex officio voting

members. Not more than two of the ~~[eight appointed]~~ six members of the board~~[,] appointed from the lists of nominees submitted by the president of the senate and the speaker of the house of representatives,~~ during their term of office on the board, shall be employees of the State. ~~[Of the members appointed by the governor, one member shall be appointed from a list of nominees provided by the speaker of the house of representatives and one member shall be appointed from a list of nominees provided by the president of the senate.]~~ All appointed members of the board shall continue in office until their respective successors have been appointed.”

SECTION 5. Section 211F-4, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) The corporation shall have all of the powers necessary to carry out its purposes which shall include but not be limited to the power to:

- (1) Adopt rules pursuant to chapter 91 to carry out the purposes of this chapter;
- (2) Adopt an official seal;
- (3) Sue and be sued, in its own name;
- (4) Finance, conduct, or cooperate in financing or conducting technological, business, financial, or other investigations that are related to or likely to lead to business and economic development by making and entering into contracts and other appropriate arrangements, including the provision of loans, start-up and expansion capital, and other forms of assistance;
- (5) Solicit, study, and assist in the preparation of business plans and proposals ~~[of new or established businesses];~~
- (6) Provide advice and technical and marketing assistance, support, and promotion to enterprises in which investments have been made;
- (7) Coordinate the corporation’s programs with any education and training program;
- (8) Carry out specialized programs designed to encourage the development of new products, businesses, and markets;
- (9) Prepare, publish, and distribute such technical studies, reports, bulletins, and other materials as it deems appropriate, subject only to the maintenance and respect for confidentiality of client proprietary information;
- (10) Organize, conduct, sponsor, or cooperate in and assist in the conduct of conferences, demonstrations, and studies relating to the stimulation and formation of businesses~~;~~ and to fulfilling the objectives and purposes of chapter ;
- (11) Provide and pay for such advisory services and technical, managerial, and marketing assistance, support, and promotion as may be necessary or desirable to carry out the purposes of this chapter;
- (12) Acquire, hold, and sell qualified securities;
- (13) Consent, subject to the provisions of any contract with noteholders or bondholders, whenever the corporation deems it necessary or desirable in the fulfillment of the purposes of this chapter, to the modification, with respect to rate of interest, time of payment of any installment of principal or interest, or any other terms, of any contract or agreement of any kind to which the corporation is a party;
- (14) Accept donations, grants, bequests, and devises of money, property, service, or other things of value that may be received from the United States or any agency thereof, any governmental agency, or any public or private institution, person, firm, or corporation, to be held, used, or applied for any or all of the purposes specified in this chapter. Receipt

- of each donation or grant shall be detailed in the annual report of the corporation. The report shall include the identity of the donor or lender, the nature of the transaction, and any conditions attaching thereto;
- (15) Invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in such investments as may be lawful for fiduciaries in the State;
 - (16) Acquire real property, or an interest therein, by purchase or foreclosure, where that acquisition is necessary or appropriate to protect or secure any investment or loan in which the corporation has an interest; sell, transfer, and convey the property to a buyer and if the sale, transfer, or conveyance cannot be effected with reasonable promptness or at a reasonable price, to lease the property to a tenant;
 - (17) Acquire, own, hold, dispose of, and encumber personal property of any nature, or any interest therein;
 - (18) Enter into agreements or other transactions with any federal, state, or county agency;
 - (19) Make contracts and execute all instruments necessary or convenient for the carrying on of its business;
 - (20) Appear in its own behalf before state, county, or federal agencies;
 - (21) Procure insurance [~~against any losses in connection with its property in such amounts, and from such insurers,]~~ as may be necessary [~~or desirable~~];
 - (22) Appoint officers, employees, consultants, agents, and advisors who shall not be subject to chapter 76, and prescribe their duties and fix compensation within the limitations provided by law;
 - (23) Appoint advisory committees as deemed necessary; and
 - (24) Exercise any other powers of a corporation organized under the laws of the State.”

SECTION 6. Section 235-7.3, Hawaii Revised Statutes, is amended by amending subsection (c), to read as follows:

“(c) For the purposes of this section:

“Performing arts products” means:

- (1) Audio files, video files, audiovideo files, computer animation, and other entertainment products perceived by or through the operation of a computer; and
- (2) Commercial television and film products for sale or license, and reuse or residual fee payments from these products.

“Qualified high technology business” means a business that conducts more than fifty per cent of its activities in qualified research.

“Qualified research” means:

- (1) The same as in section 41(d) of the Internal Revenue Code;
- (2) The development and design of computer software [using fourth generation or higher software development tools or native programming languages to design and construct unique and specific code to create applications and design databases for sale or license;] 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) Nonfossil fuel energy-related technology.”

SECTION 7. Section 235-110.51, Hawaii Revised Statutes, is amended by amending subsection (h) to read as follows:

“(h) The tax credit allowed under this section shall ~~[be available for taxable years beginning after December 31, 2000, and shall]~~ not be available for taxable years beginning after December 31, ~~[2005;]~~ 2010.”

SECTION 8. Section 235-110.9, Hawaii Revised Statutes, is amended to read as follows:

“**§235-110.9 High technology business investment tax credit.** (a) There shall be allowed to each taxpayer subject to the taxes imposed by this chapter a high technology business investment tax credit that shall be deductible from the taxpayer’s net income tax liability, if any, imposed by this chapter for the taxable year in which the investment was made and the following four years provided the credit is properly claimed. The tax credit shall be as follows:

- (1) In the year the investment was made, thirty-five per cent;
- (2) In the first year following the year in which the investment was made, twenty-five per cent;
- (3) In the second year following the investment, twenty per cent;
- (4) In the third year following the investment, ten per cent; and
- (5) In the fourth year following the investment, ten per cent;

of the investment made by the taxpayer in each qualified high technology business, up to a maximum allowed credit in the year the investment was made, \$700,000; in the first year following the year in which the investment was made, \$500,000; in the second year following the year in which the investment was made, \$400,000; in the third year following the year in which the investment was made, \$200,000; and in the fourth year following the year in which the investment was made, \$200,000.

(b) The credit allowed under this section shall be claimed against the net income tax liability for the taxable year. For the purpose of this section, “net income tax liability” means net income tax liability reduced by all other credits allowed under this chapter.

(c) If the tax credit under this section 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. Every claim, including amended claims, for a tax credit under this section shall be filed on or before the end of the twelfth month following the close of the taxable year for which the credit may be claimed. Failure to comply with the foregoing provision shall constitute a waiver of the right to claim the credit.

(d) If at the close of any taxable year in the five year period in subsection (a):

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

the credit claimed under this section shall be recaptured. The recapture shall be equal to ten per cent of the amount of the total tax credit claimed under this section in the preceding two taxable years. The amount of the credit recaptured shall apply only to the investment in the particular qualified high technology business that meets the requirements of paragraph (1), (2), or (3). The recapture provisions of this subsection

shall not apply to a tax credit claimed for a qualified high technology business that does not fall within the provisions of paragraph (1), (2), or (3). The amount of the recaptured tax credit determined under this subsection shall be added to the taxpayer's tax liability for the taxable year in which the recapture occurs under this subsection.

(e) Every taxpayer, before March 31 of each year in which an investment in a qualified high technology business was made in the previous taxable year, shall submit a written, certified statement to the director of taxation identifying:

- (1) Qualified investments, if any, expended in the previous taxable year; and
- (2) The amount of tax credits claimed pursuant to this section, if any, in the previous taxable year.

(f) The department shall:

- (1) Maintain records of the names and addresses of the taxpayers claiming the credits under this section and the total amount of the qualified investment costs upon which the tax credit is based;
- (2) Verify the nature and amount of the qualifying investments;
- (3) Total all qualifying and cumulative investments that the department certifies; and
- (4) Certify the amount of the tax credit for each taxable year and cumulative amount of the tax credit.

Upon each determination made under this subsection, the department shall issue a certificate to the taxpayer verifying information submitted to the department, including qualifying investment amounts, the credit amount certified for each taxable year, and the cumulative amount of the tax credit during the credit period. The taxpayer shall file the certificate with the taxpayer's tax return with the department.

The director of taxation may assess and collect a fee to offset the costs of certifying tax credits claims under this section. All fees collected under this section shall be deposited into the tax administration special fund established under section 235-B.

[(e)] (g) As used in this section:

"Investment tax credit allocation ratio" means, with respect to a taxpayer that has made an investment in a qualified high technology business, the ratio of:

- (1) The amount of the credit under this section that is, or is to be, received by or allocated to the taxpayer over the life of the investment, as a result of the investment; to
- (2) The amount of the investment in the qualified high technology business.

"Qualified high technology business" means a business, employing or owning capital or property, or maintaining an office, in this [State] state; provided that:

- (1) More than fifty per cent of its total business activities are qualified research; and provided further that the business conducts more than seventy-five per cent of its qualified research in this [State] state; or
- (2) More than seventy-five per cent of its gross income is derived from qualified research; and provided further that this income is received from:
 - (A) Products sold from, manufactured in, or produced in this [State] state; or
 - (B) Services performed in this [State] state.

"Qualified research" means the same as defined in section 235-7.3.

(h) Common law principles, including the doctrine of economic substance and business purpose, shall apply to any investment. There exists a presumption that

a transaction satisfies the doctrine of economic substance and business purpose to the extent that the special allocation of the high technology business tax credit has an investment tax credit ratio of 1.5 or less of credit for every dollar invested.

Transactions for which an investment tax credit allocation ratio greater than 1.5 but not more than 2.0 of credit for every dollar invested and claimed may be reviewed by the department for applicable doctrines of economic substance and business purpose.

Businesses claiming a tax credit for transactions with investment tax credit allocation ratios greater than 2.0 of credit for every dollar invested shall substantiate economic merit and business purpose consistent with this section.

[(f)] (i) This section shall not apply to taxable years beginning after December 31, [2005-] 2010.”

SECTION 9. Section 235-110.91, Hawaii Revised Statutes, is amended to read as follows:

“**§235-110.91 Tax credit for research activities.** (a) Section 41 (with respect to the credit for increasing research activities) and section 280C(c) (with respect to certain expenses for which the credit for increasing research activities are allowable) of the Internal Revenue Code shall be operative for the purposes of this chapter as provided in this section; except that references to the base amount shall not apply and credit for all qualified research expenses may be taken without regard to the amount of expenses for previous years. If section 41 of the Internal Revenue Code is repealed or terminated prior to January 1, [2006-] 2011, its provisions shall remain in effect for purposes of the income tax law of the State as modified by this section, as provided for in subsection [(h)] (j).¹

(b) All references to Internal Revenue Code sections within sections 41 and 280C(c) of the Internal Revenue Code shall be operative for purposes of this section.

(c) There shall be allowed to each [taxpayer-] qualified high technology business subject to the tax imposed by this chapter[,] an income tax credit for qualified research activities equal to the credit for research activities provided by section 41 of the Internal Revenue Code and as modified by this section. The credit shall be deductible from the taxpayer’s net income tax liability, if any, imposed by this chapter for the taxable year in which the credit is properly claimed.

(d) Every qualified high technology business, before March 31 of each year in which qualified research and development activity was conducted in the previous taxable year, shall submit a written, certified statement to the director of taxation identifying:

- (1) Qualified expenditures, if any, expended in the previous taxable year; and
- (2) The amount of tax credits claimed pursuant to this section, if any, in the previous taxable year.
- (e) The department shall:
 - (1) Maintain records of the names and addresses of the taxpayers claiming the credits under this section and the total amount of the qualified research and development activity costs upon which the tax credit is based;
 - (2) Verify the nature and amount of the qualifying costs or expenditures;
 - (3) Total all qualifying and cumulative costs or expenditures that the department certifies; and
 - (4) Certify the amount of the tax credit for each taxable year and cumulative amount of the tax credit.

Upon each determination made under this subsection, the department shall issue a certificate to the taxpayer verifying information submitted to the department,

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including the qualifying costs or expenditure amounts, the credit amount certified for each taxable year, and the cumulative amount of the tax credit during the credit period. The taxpayer shall file the certificate with the taxpayer's tax return with the department.

The director of taxation may assess and collect a fee to offset the costs of certifying tax credit claims under this section. All fees collected under this section shall be deposited into the tax administration special fund established under section 235-B.

~~[(d)]~~ (f) As used in this section:

“Basic research” under section 41(e) of the Internal Revenue Code shall not include research conducted outside of the ~~[State-]~~ state.

“Qualified high technology business” means the same as in section ~~235-110.9.~~

“Qualified research” under section 41(d)(1) of the Internal Revenue Code shall not include research conducted outside of the ~~[State-]~~ state.

~~[(e)]~~ (g) If the tax credit for qualified research activities claimed by a taxpayer exceeds the amount of income tax payment due from the taxpayer, the excess of the tax credit over payments due shall be refunded to the taxpayer; provided that no refund on account of the tax credit allowed by this section shall be made for amounts less than \$1.

~~[(f)]~~ (h) All claims for a tax credit under this section shall be filed on or before the end of the twelfth month following the close of the taxable year for which the credit may be claimed. Failure to properly claim the credit shall constitute a waiver of the right to claim the credit.

~~[(g)]~~ (i) The director of taxation may adopt any rules under chapter 91 and forms necessary to carry out this section.

~~[(h)]~~ (j) This section shall not apply to taxable years beginning after December 31, ~~[2000, but not to taxable years beginning after December 31, 2005-]~~ 2010.”

SECTION 10. Act 297, Session Laws of Hawaii 2000, is amended by amending section 10 to read as follows:

“SECTION 10. It is the intention of the legislature in making amendments in this Part to sections 235-7.3, 235-9.5, 235-110.9, and 235-110.91, Hawaii Revised Statutes, that the amendments be ~~[liberally]~~ construed ~~[, and in this regard, the]~~ in a manner consistent with the intent of this Act. The department of taxation is further given latitude to interpret those amendments in light of current industry standards. The amendments made in this Part to sections 235-7.3, 235-9.5, 235-110.9, and 235-110.91, Hawaii Revised Statutes, shall not be construed to disqualify any taxpayer who has received a favorable written determination from the department of taxation under the original provisions of those sections as enacted by Act 178, Session Laws of Hawaii, 1999.”

SECTION 11. Act 221, Session Laws of Hawaii 2001, is amended by amending section 13 to read as follows:

“SECTION 13. It is the intention of the legislature that the amendments in this Act be ~~[liberally]~~ construed~~[-]~~ in a manner consistent with the intent of this Act. The department of taxation is further given latitude to interpret these amendments in light of industry developments. The legislature does not intend by the amendments in this Act to opine on the interpretation taken by any taxpayer or the department of taxation on any issue arising under prior law.”

SECTION 12. Act 178, Session Laws of Hawaii 2003, is amended by:

1. Amending section 66 to read as follows:

“SECTION 66. This Act shall take effect on July 1, 2003[.]; provided that:

- (1) Sections 1, 2, 3, 4, 5, and 6 shall take effect on June 29, 2003;
- (2) Sections 9, 10, 11, 12, 13, 14, 15, and 16 shall take effect on June 30, 2003; and
- (3) [Sections] Section 7 [and 8] shall take effect on July 1, 2004; provided further that any remaining balances in the Hawaii capital loan revolving fund [and the Hawaii strategic development corporation revolving fund] shall lapse to the general fund.”

2. Repealing section 8:

[“SECTION 8. Section 211F-5, Hawaii Revised Statutes, is repealed.”]

PART III

SECTION 13. Any comfort letter or other written communication issued by the department of taxation prior to the effective date of this Act may continue to be relied upon by the taxpayer to whom such comfort letter or other written communication was issued (including the qualified high technology business and its investors) and shall be respected by the department of taxation, notwithstanding any of the amendments contained in this Act, provided that the assumptions and representations contained in such comfort letter or other written communication remain true and accurate in all material respects. The high technology provisions of sections 235-2.4, 235-2.45, 235-7.3, 235-9.5, 235-110.51, 235-110.9, 235-110.91, 235-111.5, and 237-23.5, Hawaii Revised Statutes, in effect at the time of the comfort letter or other written communication shall continue to apply without regard to any amendments to such provisions under this Act with respect to any transactions or investments made or committed prior to the effective date of this Act.

SECTION 14. If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application or application,¹ and to this end the provisions of this Act are severable.

SECTION 15. In codifying the new sections added by section 3 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 16. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.²

SECTION 17. This Act shall take effect on July 1, 2004; provided section 12 shall take effect on June 30, 2004.

(Approved July 13, 2004.)

Notes

1. So in original.
2. Edited pursuant to HRS §23G-16.5.