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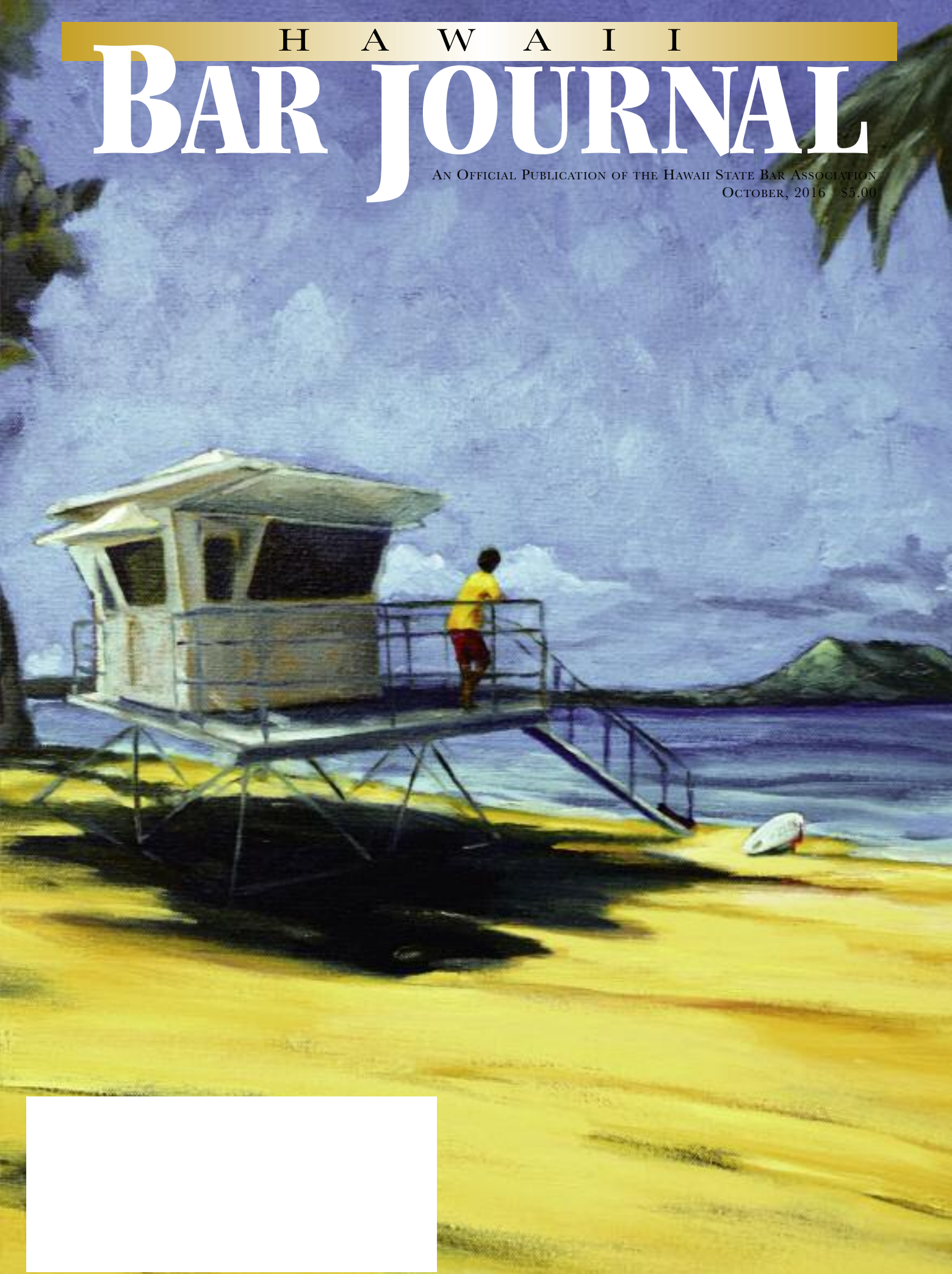

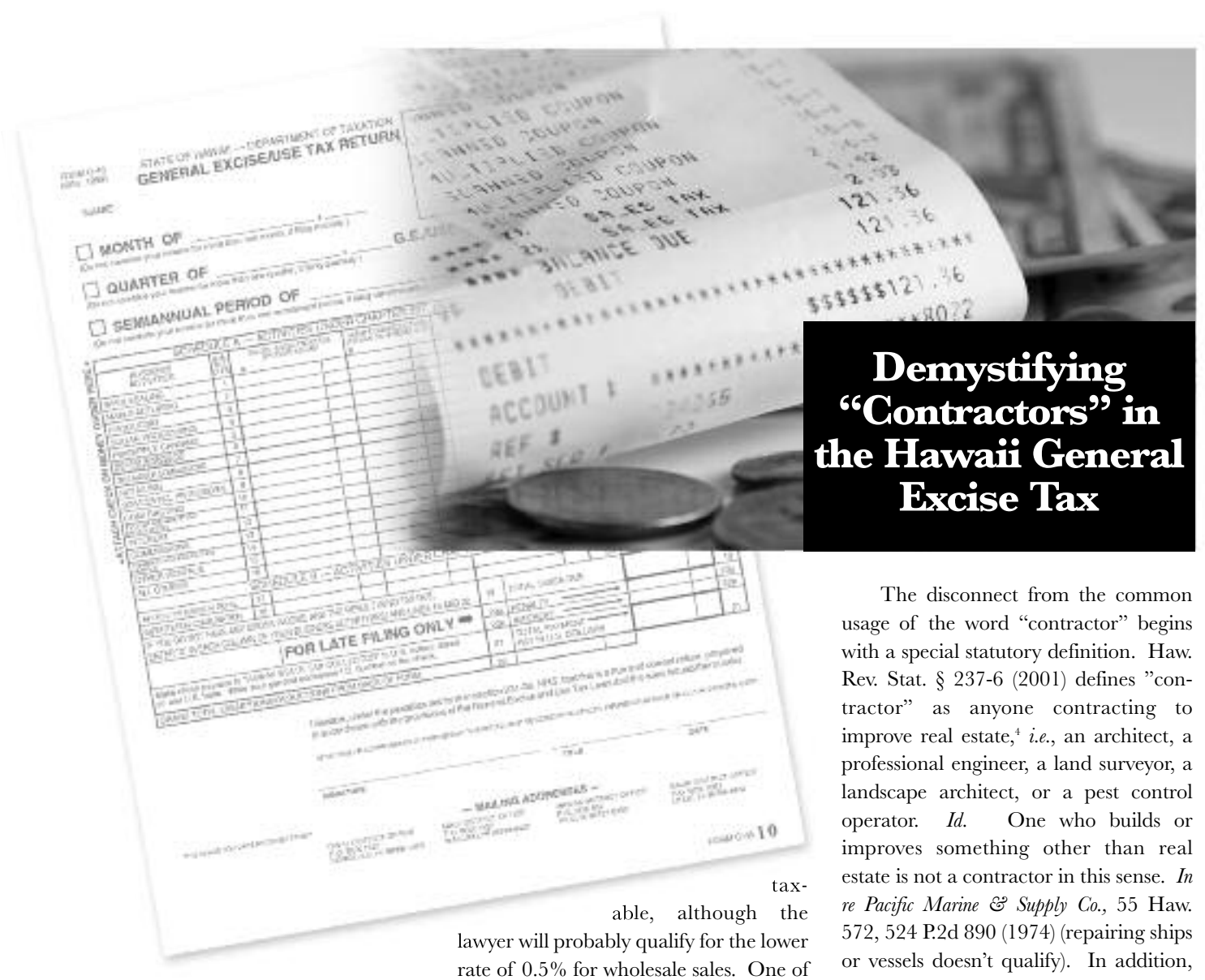

Demystifying "Contractors" in the Hawaii General Excise Tax

by Thomas Yamachika

It's often said that contractors enjoy a special benefit under the Hawaii General Excise Tax ("GET") – a claim that is, for the most part, true. The way "contractors" are defined, plus conflicting and hard-to-find guidance has given rise to broad misunderstanding about how the GET is applied to contractors. This article attempts to give an overview of this area and reconcile the authorities.

The GET, contained in Haw. Rev. Stat. Chapter 237, is a tax on "nearly every economic activity imaginable." *Pratt v. Kondo,* 53 Haw. 435, 496 P.2d 1, 2 (1972). It is a tax not only on retail sales to an end user; businesses selling goods and services to other businesses are exposed to the GET as well. If, for example, a lawyer sells legal services to an accounting firm's client, the sale is taxable, although the lawyer will probably qualify for the lower rate of 0.5% for wholesale sales. One of the many complaints against this tax is that it "pyramids," meaning that goods and services passing through the economic chain from producer to end user may be subjected to tax multiple times.[1]

As applied to contractors, the tax is more favorable because pyramiding is reduced or eliminated. A "contractor" is allowed a deduction for general excise tax purposes for amounts paid to a subcontractor.[2] Haw. Rev. Stat. § 237-13(3)(B) (Sess. Laws 2015). For example, if a taxpayer pays a general contractor $1,000 to build a garage on taxpayer's property and the general contractor brings in a garage door installer at a cost of $300, then the installer (subcontractor) is taxed at 4%[3] on $300 and the general contractor is taxed at 4% on the remaining $700. Double taxation is avoided and the State receives 4% on the whole contract price of $1,000.

The disconnect from the common usage of the word "contractor" begins with a special statutory definition. Haw. Rev. Stat. § 237-6 (2001) defines "contractor" as anyone contracting to improve real estate,[4] *i.e.*, an architect, a professional engineer, a land surveyor, a landscape architect, or a pest control operator. *Id.* One who builds or improves something other than real estate is not a contractor in this sense. *In re Pacific Marine & Supply Co.,* 55 Haw. 572, 524 P.2d 890 (1974) (repairing ships or vessels doesn't qualify). In addition, this article only considers improvements to real estate in Hawaii because if the real estate is located elsewhere, the GET doesn't apply.[5]

Even if a taxpayer has a license that is normally awarded only to contractors, the work that the taxpayer does on a particular project is critical. It is possible for work on one project to qualify as contracting and for work on another to be classified as something else. For example, "an architect or engineer is engaged in contracting when managing a construction project; and is engaged in a service business or calling [*i.e.,* not contracting] when performing a feasibility study or other consultation that is unrelated to a specific construction job."[6]

A license to perform the specific work helps qualify the work, but is not

(*Continued on page 21*)

necessary. Although the Department of Taxation's ("DOT") current administrative rules state that a specialty contractor must be licensed by the Department of Commerce and Consumer Affairs ("DCCA") in order to qualify (unless the work is exclusively on federal property),[7] the DOT has since repudiated that position, stating that it is sufficient if the contractor is "as defined in section 237-6."[8] Thus, in the garage door installer example, even if the installer had no DCCA license, the subcontract deduction is still proper because the installer is improving real estate.[9] However, there seems to be confusion about this principle, even among auditors employed by the DOT. In contrast, a license under the GET is always necessary. Both the contractor and subcontractor need a GET license for the deduction to be honored.[10] The contractor is required to list the subcontractor's GET number on Form G-45/G-49, and Schedule GE when claiming the deduction.[11]

Taxpayers who do not work on a particular construction job but merely sell building materials and supplies do not qualify as subcontractors either. In this case, the purchaser is not allowed a subcontract deduction but the supplier is entitled to the 0.5% wholesale rate. Tax Facts 99-3, *supra* note 5, Q&A 11-12. In such a case, the contractor should give the supplier a resale certificate such as Form G-17, G-18, or G-19 to document that the purchased items were resold. TIR 94-6. If, however, a supplier or materials house not only furnishes materials and supplies but also installs them, the work qualifies as subcontracting. In that case, the supplier should not claim the wholesale rate because its customer can take the subcontract deduction. Tax Facts 99-3, *supra* note 5, Q&A 11.

Taxpayers who only provide services, as opposed to furnishing materials and services, also might not qualify as contracting but may be eligible for the wholesale rate. Services, including transportation services but not including contracting work, that are rendered upon the order or request of a contractor are

eligible for the 0.5% wholesale rate. *See* Haw. Rev. Stat. § 237-4(a)(10)(A)(iii) (Sess. Laws 2015). Services may sometimes be provided on a job site yet not be "contracting" – for example security guard services or interior decoration. Note also that services that constitute "overhead" are not eligible for the reduced rate.[12] Overhead is also specifically defined in the GET, and can be considered services that are not specific to a construction project.[13] To document the wholesale sale of services in this context, the contractor should give the supplier a resale certificate such as Form G-82 to document that the purchased items were resold. Haw. Rev. Stat. § 237-13(6)(B).

Much confusion arises in "government contracting." Although a business that enters into a contract with the federal government is commonly called a contractor, if the business does not improve real estate, it is not considered a contractor or subcontractor for GET purposes, and should not be reporting its income as contracting on its GET returns. The DOT may have added to the confusion by adding to its Tax Facts on contracting a discussion on the "scientific contracts" exemption.[14] However, scientific work qualifying for this exemption rarely qualifies as "contracting" because it does not result in improvement of real estate, and work qualifying as contracting rarely fits the definition of scientific work, although it is possible.[15]

"Federal cost-plus contracting" is a subset of contracting[16] that is allowed even more generous tax treatment than regular contracting because the GET law allows a deduction for "reimbursement of costs incurred for materials, plant, or equipment,"[17] which would include costs of vendors who are not contractors. However, a contractor seeking to deduct vendor costs needs to have a statement from each vendor saying that the vendor elects to report its sales to the contractor for the particular project at the 4% retail rate.[18] This is to prevent the State from getting "whipsawed."

Finally, contractors sometimes procure goods, services, or contracting that is incorporated into the construction project from a vendor not subject to tax in Hawaii. The Use Tax is designed so that if GET would have been imposed on a local seller but the buyer decides to buy from an out-of-state source, the purchaser is taxed to the same extent, thereby leveling the playing field between local and remote sellers.[19] Thus, if a contractor procures goods that are to be incorporated into a project, the Use Tax (reported on the GET returns) would be 0.5%. Haw. Rev. Stat. § 238-2(2)(C) (2015 Supp.). The same would be true for services other than contracting,[20] except that services classified as overhead would be taxed at 4%.[21] If the contractor procures contracting for incorporation into the project, which may happen if design professionals such as architects or engineers are brought in, there is no Use Tax,[22] but no subcontract deduction can be taken because the remote subcontractor has no GET license.[23] The exclusion from Use Tax is reported by checking the "Other" box in section II of Schedule GE, entering the description as "Contracting," and citing Haw. Rev. Stat. § 238-2.3(1)(C).[24]

The construction industry is the fourth largest private industry in Hawaii, as measured by percentage of state GDP, with an estimated $7.7 billion of projects in 2013 alone.[25] Taxpayers contributing to the local economy in this industry should understand the complex rules that apply; it is hoped that this article is a step in that direction.

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1 Legislative Reference Bureau, LRB Notes 2002-7, available at http://lrbhawaii.org/lrbnotes02/0207notes.pdf.

2 Haw. Rev. Stat. § 237-13(3)(B) (Sess. Laws 2015).

3 On Oahu, there is a 0.5% surcharge. Haw. Rev. Stat. § 237-8.6 (Sess. Laws 2015). The surcharge is imposed on any transaction on which a 4% General Excise Tax or Use Tax is imposed. In the contracting context, the surcharge would be imposed on gross income attributable to real property on Oahu. Haw. Admin. Rules §18-237-8.6-07. This article omits any further mention of the surcharge.

4 Haw. Rev. Stat. § 237-6 (2001) states that a "contractor" includes every "person engaging in the business of contracting to erect, construct, repair, or improve buildings or structures, of any kind or description, including any portion thereof, or to make any installation therein, or to make, construct, repair, or improve any highway, road, street, sidewalk, ditch, excavation, fill, bridge, shaft, well, culvert, sewer, water system, drainage system, dredging or harbor improvement project, electric or steam rail, lighting or power system, transmission line, tower, dock, wharf, or other improvements."

5 Department of Taxation, Tax Facts 99-3, Q&A 2-3 (rev. 2007). A revised version of Tax Facts 99-3 is expected to be released later this year.

6 Department of Taxation, Tax Information Release ("TIR") 2009-02, at 5; Tax Facts 99-3, *supra* note 5, Q&A 5.

7 Hawaii Administrative Rules Rule § 18-237-13-03(c), Example 12. This rule was last amended in 1990 and does not reflect statutory changes since then such as Act 169, Sess. Laws of Hawaii 1998.

8 Department of Taxation, Announcement 99-25. Footnote 3 explicitly states that the Department would amend the rules, but that has not happened to date.

9 *Id.* at 2 (Example). DCCA might have a problem with such a business if it did not have a contractor's license, but such an issue would not impact the tax treatment.

10 *Id.*; Haw. Rev. Stat. § 237-13(3)(B).

11 This information is reported in Section VII of Schedule GE (Form G-45/G-49).

12 Tax Facts 99-3, *supra* note 5, Q&A 14-16. See Haw. Rev. Stat. § 237-4(a)(10).

13 Haw. Rev. Stat. § 237-1 (2001) states, "'Overhead' means continuous or general costs occurring in the normal course of a business, including but not limited to costs for labor, rent, taxes, royalties, interest, discounts paid, insurance, lighting, heating, cooling, accounting, legal fees, equipment and facilities, telephone systems, depreciation, and amortization."

14 Tax Facts 99-3, *supra* note 5, Q&A 18. The scientific work exemption is in Haw. Rev. Stat. § 237-26 (2001).

15 *See* TIR 35-71, Examples 5 and 6 (1971). A

notable exception is improvement of a scientific facility, which can qualify for the exemption. *See id.* Example 2.

[16] A federal cost-plus contractor is defined in the same statute that defines "contractor," quoted *supra* note 4, as "a contractor having a contract with the United States or an instrumentality thereof, excluding national banks, where, by the terms of the contract, the United States or such instrumentality, excluding national banks, agrees to reimburse the contractor for the cost of material, plant, or equipment used in the performance of the contract and for taxes which the contractor may be required to pay with respect to such material, plant, or equipment, whether the contractor's profit is computed in the form of a fixed fee or on a percentage basis; and also means a subcontractor under such a contract, who also operates on a cost-plus basis."

[17] Haw. Rev. Stat. § 237-13(3)(C)(i) (Sess. Laws 2015).

[18] Tax Facts 99-3, *supra* note 5, Q&A 27.

[19] *Stewarts' Pharmacies, Ltd. v. Fase*, 43 Haw. 131 (1959); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937).

[20] Haw. Rev. Stat. § 238-2.3(2)(C) (2015 Supp.).

[21] Haw. Rev. Stat. § 238-2.3(3) (2015 Supp.). All of the lower rate classifications in Haw. Rev. Stat. § 238-2.3(1) and (2) expressly exclude overhead.

[22] Haw. Rev. Stat. § 238-2.3(1)(C); Tax Facts 99-3, *supra* note 5, Q&A 28.

[23] *See supra* note 10 and accompanying text.

[24] "Contracting" is the title of the paragraph in the instructions describing this fact pattern. Department of Taxation, General Instructions for Filing the General Excise/Use Tax Returns at 22 (2015).

[25] DBEDT Research and Economic Analysis Division, "Construction and Hawaii's Economy" 2 (Feb. 20, 2014), available at http://files.hawaii.gov/dbedt/economic/data_reports/construction_industry.pdf.

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