July 19, 1918.

OPINION NO. 719.

TAX APPEAL COSTS:

Costs deposited with the Tax Assessor on an appeal to the Tax Appeal Court should not be returned to the Taxpayer, in whole or in part, except upon a judgment of the Tax Appeal Court as provided for by Section 1278, R.L.H. 1915.

Hon. Delbert E. Metzger,
Treasurer, Territory of Hawaii,
Honolulu, T. H.

Dear Sir: Your letter of the 16th instant in which you ask for the opinion of this office relative to the disposition of costs deposited with Tax Assessors on appeal to the Tax Appeal Court, has had the careful consideration both of myself and Deputy Attorney General Joseph Lightfoot.

For the purposes of the opinion your inquiry is divided into three questions, viz.:

First: What practice has prevailed throughout the Territory in the past with respect to such costs so deposited when the appeal has been withdrawn by the Taxpayer or when a compromise has been effected between the Tax Assessor and Taxpayer and no proceedings had in the Tax Appeal Court?

Second: What disposition should be made of the costs deposited by the taxpayer on an appeal to the Tax Appeal Court when a compromise has been effected between the Tax Assessor and the taxpayer and no further proceedings had before the Tax Appeal Court?

Third: What disposition should be made of such costs

when the taxpayer withdraws or abandons his appeal entirely and pays his tax upon the full asessment made by the Tax Assessor?

First Question: Inquiry made of the different Tax Assessors and your predecessor in office reveals the fact that the uniform pratice in this Territory as far in the past "as the memory of man runneth not to the contrary" has been to return to the taxpayer the entire amount of the costs deposited regardless of whether the dispute was settled by a compromise, as suggested in the second question, or by a withdrawal or abandonment of appeal, as suggested in the third question, both hereinabove propounded.

As far as the records of this office show, it seems to have been taken for granted that this was the proper practice, and the question was first raised by Mr. O. T. Shipman, Tax Assessor for the Third Division, who on or about October 19, 1917, requested the opinion of this office relative to this matter.

In response to that request, Mr. Franklin, with the approval of the Attorney General, rendered the following opinion:

"October 19, 1917.

Opinion No. 693.

TAXATION:

Costs on compromise: In the event of a compromise of a tax appeal before trial, there shall be returned to the appellant, from the costs deposited, a part thereof proportionate to the amount for which the appellant shall prevail.

O. T. Shipman, Esq.,
Tax Assessor, Third Division,
Hilo, Hawaii.

Dear Sir: Complying with your verbal request for my

opinion as to the disposition of costs deposited upon a tax appeal when such appeal is compromised before trial, I beg to submit the following:

Section 1278, R. L. 1915, provides:

'Taxation of costs. In the event of an appeal or objection being sustained in whole, the costs deposited shall be returned to the appellant; but if the appeal or objection shall be sustained in part only, then a part of the costs paid proportionate to the amount for which the appellant shall obtain judgment shall be returned to him.'

This Section shows the intent of the Legislature to be that the appellant shall forfeit a part of his deposited costs proportionate to the amount for which he shall pay taxes over and above his return. The fact that the appeal is compromised before trial does not alter the situation, as such compromise is simply a confession of judgment by the appellant to the amount in excess of the original tax return.

Very truly yours,

Cornell S. Franklin,
Deputy Attorney General.

Approved:
Ingram M. Stainback,
Attorney General."

From certain correspondence which I have seen in the possession of Mr. Shipman, this opinion was the cause of considerable adverse comment on the part of counsel for the taxpayer, and apparently Governor McCarthy, the then Treasurer, again discussed the matter with the Attorney General. This last is evidenced by a letter written by the Treasurer and on file in this office, as follows:

"February 1, 1918.

Hon. I. M. Stainback,
Attorney General of Hawaii,
Honolulu, T. H.

Dear Sir: On October 19, 1917, your Mr. Franklin gave an opinion to Mr. Shipman, Assessor Third Division, to the effect that Mr. Shipman should retain certain costs and turn them in as a government realization.

When my attention was drawn to this opinion, I had a talk with you, stating that it had been the custom of the several tax offices, for more than twenty years past, to return the amount of costs, whenever the appeal was not actually taken before the Tax Appeal Court, and my understanding of your position in the matter was that under the circumstances I had better instruct Shipman to return the amount of costs held in dispute.

If I have stated your position in the matter correctly, will you please write to let me know.

Very truly yours,

(s) C. J. McCarthy,
Treasurer, Territory of Hawaii."

I presume that the Treasurer, in using the words "whenever the appeal was not actually taken before the Tax Appeal Court," meant to say "whenever the appeal was not actually prosecuted or tried."

The Attorney General replied to this letter as follows:

"February 26, 1918.

C. J. McCarthy, Esq.,
Treasurer, Territory of Hawaii,
Honolulu.

Dear Sir: Where an appeal has been withdrawn and

the assessment accepted, you may return the costs deposited in such case.

Yours truly,

(s) Ingram M. Stainback,
Attorney General."

It is apparent that the Attorney General receded from the position that he took when he approved of the opinion rendered by Mr. Franklin, without giving any reasons for his change of front on the question.

This matter was again brought to the attention of this office by Mr. Shipman in June, 1918, as will be seen from the following excerpt from a letter by the writer to him, dated June 25, 1918, as follows:

"I note what you say with reference to the refunding of the costs in those appeals, provided the appellants will return to you their certificates of appeal. I have discussed this matter with the Attorney General, and neither of us is certain as to what the procedure should be with regard to the return of costs under circumstances such as those."

I have gone into the history of this matter and the correspondence quite extensively to show that prior to this date the practice has always been to return all costs deposited whether the tax appeals were withdrawn or settled by compromise.

Second Question: An examination of the opinion and correspondence above set forth shows that this department has not, prior to this date, adopted any definite and final opinion as to the law applicable to these facts.

The law relating to the disposition of costs deposited in these cases is found in Section 1278, R. L. H. 1915, and is as follows:

"Taxation of costs. In the event of an appeal or objection being sustained in whole, the costs deposited shall be returned to the appellant; but if the appeal or objection

shall be sustained in part only, then a part of the costs paid proportionate to the amount for which the appellant shall obtain judgment shall be returned to him."

Costs in these cases have been deposited with the Tax Assessors under the provisions of Sections 1270 and 1271, R. L. H. 1915, which costs must be disposed of in accordance with the provisions of Section 1278 above quoted, and it is my opinion that, if the practice heretofore in vogue as set forth in the answer to question one hereof does not conform to the requirements of this section, such practice is illegal and unauthorized.

In order to make this subdivision of our inquiry perfectly clear, a consideration of the provisions of Section 1284, R. L. H. 1915, is necessary. That section provides:

"In each year on or before May 1, each deputy assessor, except the deputy assessors for the districts in which the assessors have their offices, shall make two copies of the assessment of the district, which shall be signed and sworn to by him. One of such copies shall be filed with the assessor of the division. Such list shall, subject to any changes made by any court having jurisdiction, be the list in accordance with which taxes shall be collected. No changes in or additions to such assessments shall thereafter be made, except to add thereto property or taxes that may have been omitted therefrom.

It is clearly apparent from this section that the Legislature did not contemplate or intend that any such disputes between the assessor and taxpayer should be finally compromised by them. It is clearly apparent that no changes call be made in the tax lists after May 1st of each year, either by compromise, except upon a judgment of a Court of competent jurisdiction. The Legislature probably intended to provide against any secret manipulation of the tax lists after they had once been made up and therefore provided that, after May 1st of each year. "Such list shall subject to

any changes made by any Court having jurisdiction, be the list in accordance with which taxes shall be collected. No changes in or additions to such assessment shall thereafter (May lst) be made, except to add thereto property or taxes that may have been omitted therefrom."

This theory is further supported by the provisions of Section 1279, R. L. H. 1915, which provides:

"The assessor shall alter or amend the taxation list and copy thereof, in conformity with the decision of the court."

It has been the practice in the past, as I am informed, for the assessor and the taxpayer to enter into a compromise agreement after May 1st of the taxation year and after the taxpayer's appeal has been perfected; the whole deposit for costs, thereupon, has been returned to the taxpayer, and, without further action in the Tax Appeal Court, the appeal is considered and treated as having been withdrawn or stricken from the docket. I am of the opinion, and so advise you, that there is, at least, no statutory authority, and, I believe, no legal authority of any kind, for such a proceeding. In order to render such compromises effective, judgment should be entered in the Tax Appeal Court for the amount of the compromise and the costs disposed of according to the provisions of Section 1278 above set forth.

If the taxpayer desires to recover any portion of the costs deposited it is his privilege to prepare and have signed and filed in the Tax Appeal court a judgment in conformity with the compromise agreed upon. If the taxpayer refuses to take this course, and attempts to and does file a withdrawal of his appeal, the costs deposited should be disposed of in the method hereinafter set forth in answer to the third question above set forth.

Upon this subdivision of this opinion, therefore, I advise you that in the event of a compromise having been reached, the Tax Assessor should not return to the taxpayer any part of the costs deposited except upon a judgment of a Court having jurisdiction thereof and in accordance with the provisions of Section 1278 above set forth.

Third Question: Our statute is silent as to the disposition of costs on appeal in case of a subsequent acceptance of the assessment by the taxpayer and an actual or implied abandonment or withdrawal of the appeal. The practice, as above pointed out, has been to return these costs to the taxpayer. Such a practice is, in my opinion, unauthorized and in contravention of the terms of the statute and the spirit and intent thereof. The statute relating to appeals in these cases is designed to provide a speedy and economical method of settling the disputes between the Tax Assessor and the taxpayer; but it is designed also to prevent, as far as possible, any resultant loss to the Territory, or diminution of its revenues from taxable sources, by reason of such appeals.

The filing of an appeal by the taxpayer renders necessary, in almost every case, one or more meetings of the Tax Appeal Court with its consequent expense to the Government; in many eases considerable expense is incurred by this department in the preparation for the trial of the appeal; in many cases a trip to one of the other islands by an officer of this department is required, with its attendant expense. In every case, so far as I now know, the Government is put to some expense by reason of the filing of an appeal. The costs deposited by the taxpayer on appeal are required for the protection of the Government against loss in case its contention should be sustained. To allow the taxpayer to set the appellate machinery in motion, with all its at-

tendant expense accruing against the Government, and then to allow the taxpayer, at the last moment and after expenses and costs have accrued, to admit the correctness of the Government's claim, to withdraw or abandon his appeal, and then leave the Government to pay the bill which the taxpayer has, in effect, incurred, would be, in my opinion, a plain violation of the purpose and intent of the statute in this regard. I am of the opinion, therefore, and so advise you, that, under the circumstances set forth under this subdivision of the inquiry, the taxpayer has no legal right or authority to return to the taxpayer any part of the costs so deposited by him on appeal.

The adoption of this opinion as the rule of your department, if it should be sustained by the Courts, would act as a deterrent, in the future, to frivolous appeals.

It maybe that this rule would be considered a hardship upon the appealing taxpayer; if such should be the case, he remedy should be provided by legislation and not by departmental construction of the statute.

I recognize the fact that the tax assessors and the Department of the Treasurer have placed a different construction on this Act for many years, and if this question should ever come before the Courts for judicial determination such departmental construction for such a long number of years might be sufficient to turn the scales the other way.

"The practical construction given to a doubtful statute how the department or officers whose duty it is to carry it into execution is entitled to great weight and will not be disregarded or overturned except for cogent reasons and unless it clear that such construction is erroneous." *Lewis Sutherland Stat. Const.* 2nd. Ed. Sec. 473.

I have no doubt, however, that, if this were a new act,

the Courts would determine the questions herein discussed in accordance with this opinion. I am,

Very truly yours,

HARRY IRWIN,
Deputy Attorney General.

Note.—The Attorney General, being absent on vacation, has taken no part in the consideration of this opinion.