

September 12, 1925.

OPINION No. 1253.

TAXATION; SUCCESSION TAX;
ALIENS:

Resident aliens are entitled to have their succession rights taxed at the same rate as are those of resident citizens.

E. S. Smith, Esq.
Acting Treasurer, Territory of Hawaii,
Honolulu, T. H.

Dear Sir:

In Re Estate of Ng Choon Fat:

In regard to the question of the succession tax upon the Estate of Ng Choon Fat, which passed to Ng Char Shee, I beg to advise you that I have investigated the matter and advise you that the interest of Ng Char Shee is taxable at no greater or higher rate than that of a resident citizen.

The facts, as I understand them, are as follows:

Ng Choon Fat, a Chinese subject, was a resident of Honolulu for many years and died here leaving an estate in the Territory consisting almost entirely of real property which he devised and bequeathed to his wife, also an alien Chinese resident of the Territory.

4 U. S. Compiled Statutes, Section 3491, provides that aliens, becoming bona fide residents of the United States, may acquire real estate in the territories of the United States.

Section 3492, provides that the Act shall not prevent aliens from acquiring lands or any interest therein by inheritance.

Congress having acted upon the subject of inheritance of lands by aliens, any legislation of the Territory upon that subject would be ineffectual. Chief Justice Marshall has said, "the power to tax is the power to destroy", and, therefore, if the Territory had power to tax the inheritance by aliens of real estate by virtue of the fact of their being aliens, it would have the power to put such a prohibitive tax thereon as to destroy the right of inheritance to realty guaranteed by Section 3492.

As to the succession taxation on personality, discriminating between alien residents and resident citizens, it seems to me that the reasoning of *Ex Parte Kotta* (Cal.), 200 Pac. 957, is sound and controlling. In that case the court held that in the absence of a treaty right a tax imposing a poll tax upon aliens alone was violative of the Fourteenth Amendment of the Constitution. The court declared that the tax measure was one for the purpose of producing revenue only and not enacted in the exercise of the police power of the state; and that to lay upon some, a greater burden than was laid upon others in the same calling and condition violated the equal protection clause of the Fourteenth Amendment.

I, therefore, advise you that in my opinion, resident Chinese subjects are entitled to have their rights of succession taxed at the same rate as are those of resident citizens.

Very truly yours,

MARGUERITE K. ASHFORD,

First Deputy Attorney General.

APPROVED:

WILLIAM B. LYMER,

Attorney General.