

September 15, 1925.

OPINION No. 1254.

POLL TAX :

A retired enlisted man of the United States Army, who is an inhabitant of the Territory, is not exempt from the payment of Poll Tax.

Paul J. Jarret, Esq.,
Deputy Tax Assessor,
First Taxation Division,
Honolulu, T. H.

Dear Sir:

You have orally requested the opinion of this department as to whether or not a retired enlisted man is exempt from the payment of poll tax.

The taxpayer, whose name was not disclosed, was formerly an enlisted man in the United States Army and was retired from the Army after the required number of years of service. He is now living in the City and County of Honolulu and engaged in business therein.

Section 1717a of the United States Compiled Statutes (Act June 3, 1916, as amended Act June 4, 1920) provides:

“The Regular Army of the United States shall consist of the Infantry, the Cavalry, the Field Artillery, the Coast Artillery Corps, the Air Service, the Corps of Engineers, the Signal Corps, which shall be designated as the combatant arms or the line of the Army; the General Staff Corps; the Adjutant General’s Department; the Inspector General’s Department; the Judge Advocate General’s Department; the Quartermaster Corps; the Finance Department; the Medical Department; the Ordnance Department; the Chemical Warfare Service; the officers of the Bureau of Insular Affairs; the officers and enlisted men under the jurisdiction of the Militia Bureau; the chaplains; the professors and cadets of the United States Military Academy; the present military store-keeper; detached officers; detached enlisted men; unassigned recruits; the Indian Scouts; the officers and

enlisted men of the retired list; and such other officers and enlisted men as are now or may hereafter be provided for. (39 stat. 166, 41 Stat. 769).”

Enlisted men on the retired list make up a part of the regular army. They are subject to all of the rules and regulations of the army authorities and are subject to being called back into active service at any time. They are not, however, in the active service and are not therefore performing federal functions.

Sections 1302, 1303 and 1304 of the Revised Laws of Hawaii, 1925, provide that every male inhabitant of the Territory shall pay a poll, school and road tax. Section 1305, provides that the tax may be worked out by laboring on the public roads.

Former Attorney General Harry Irwin, in his opinion to the Treasurer of the Territory, dated January 11, 1919, held that an officer of the United States Government (Army Officer) resident in Hawaii, is exempt from the payment of a poll tax. That opinion followed the decision of our local Circuit Court in the case of Wilder v. Noyes and the United States Supreme Court case of Dobbins v. Commissioners, 10 L. Ed. 1022. The court in both cases hold that an officer of the United States cannot be taxed for the reason that such taxation does amount to a taxation of an instrumentality of the Federal government.

In order to be liable for taxes under the sections quoted above, it is necessary that the person be an inhabitant. It is contended by the taxpayers in this case “that he is in the army” and, therefore, not an inhabitant of the Territory. He also contends that any attempt to tax him would be unconstitutional as it would amount to the taxing of an instrumentality of the Federal government. The taxpayer is “in the army” by virtue of the section of the Compiled Statutes quoted above. He is, however, not in the active service. He is not performing federal functions. By

taxing him, we are not taxing an instrumentality of the Federal government; we are not hampering the Federal government in the performance of its functions. He is, also, an inhabitant of the City and County of Honolulu as he is a resident "and is engaged in business here.

In *Ex Parte White*, 228 Fed. 88, the question of whether or not a non-commissioned officer living in the State of New Hampshire was subject to a poll tax was decided. The taxpayer contended that although he was assigned to duty in New Hampshire he was an inhabitant of the State of New York. He had married a New Hampshire woman and had established an apartment for her near his station, and was permitted by the military authorities to visit his wife over the week-ends. The court held that the word "inhabitant" was synonymous with the word "domicile"; that the non-commissioned officer in question had not established his domicile in New Hampshire and was therefore not an inhabitant of the state; that he was an instrumentality of the Federal government and beyond the power of State taxation. It was, also, held that a member of the Army may change his domicile and establish it at any place he wishes, but the intention to change must be clear and must be associated with something fixed and established as indicating such a purpose.

In that case the soldier was not permitted to bring his wife to his station and was compelled by force of circumstances to maintain her in an apartment nearby, but within the jurisdiction of the State of New Hampshire.

In the present case the taxpayer has established his domicile in the Territory. He is living in Honolulu and engaged in business. It is apparent that he intends definitely to make his home here.

It is a general principle of law that, in the case of taxation, exemptions are strictly construed.

It is, therefore, the opinion of this department and you are so advised, that the taxpayer is not exempt from the payment of poll tax for the reasons: (1) That by taxing him you are not taxing an instrumentality of the Federal government, and (2) that he is an inhabitant of the City and County of Honolulu within the meaning of the sections above quoted.

Very truly yours,

C. B. DWIGHT,

Third Deputy Attorney General.

APPROVED:

WILLIAM B. LYMER,

Attorney General.