

October 6, 1925.

OPINION No. 1260.

INCOME TAX: BOARD AND LODGING AS A "GAIN" TAXABLE UNDER THE STATUTE:

The value of articles and/or accommodation received in kind, in addition to cash received as compensation for personal services rendered, constitutes taxable income.

Honorable E. S. Smith,
Acting Treasurer, Territory of Hawaii,
Honolulu, Hawaii.

Dear Sir:

Under date of July 28th the Territorial Treasurer wrote me, requesting my opinion as to whether or not the value of articles and or accommodations received in kind, in addition to cash received as compensation for personal services rendered, constitutes taxable income to the person receiving or enjoying same. The concrete example presented is the case of employes (such as nurses and teachers) receiving, in many instances, lodging or board and lodging in addition to their stipulated wage.

I beg to advise you that in my opinion the value of board and room, etc., furnished as part of the compensation of any employee, should be taxed as income.

The above conclusion is not entirely free from doubt since the decision of our Supreme Court in Frear vs. Wilder, 25 Haw. 603, which holds that R. L. Section 1390 is not a tax levying statute, but is a mere direction as to how to return one's gross income; the case holding that R. L. Section 1388 contains, within itself, the entire tax levying provision.

However, even under the wording of Section

1388 I should hold that the provision that an income tax shall be "levied, assessed, collected and paid annually upon the *gains* . . . from every employment or vocation carried on in the Territory" would include the value of board and lodging furnished as part of the employee's compensation and not merely as a matter of the employer's convenience.

As is stated by a leading authority:

"It is not quite so easy to account for the use of the word 'gain' in conjunction with the two other terms which we have been considering. But it may probably be said that when a tax law employs the phrase 'gains, profits, and income,' to describe what is taxable, the term 'gains' is inserted out of abundant caution, and intended to include an acquisition of the taxpayer which is not to be described as a 'profit,' and which might not be included in the term 'income' if that word were taken in a narrow sense. Property speaking, 'gain' means that which is acquired or comes as a benefit, and in a statute laying an income tax it may mean money received within the year which is not the fruit of a business transaction nor of the labor or exertion of the individual, but something arising from fortuitous circumstances or conditions which he does not control. In this signification, the term would include money received as a legacy or money won on a wager."

Black on Income Taxation, 2nd Ed.
1915, Sec. 224.

Under the above general language I feel that the word "gain" would include lodging or board and lodging received in addition to a stipulated wage.

I accordingly advise you that, although the matter is not entirely free from doubt, I am of opinion that the income tax assessor should assess "gains" of the character under discussion as taxable income.

Very truly yours,

WILLIAM B. LYMER,

Attorney General.