

October 19th, 1932.

OPINION No. 1592.

TAXATION; BUSINESS EXCISE TAX,  
COLLECTION OF BY WITH-  
H O L D I N G PERCENTAGE OF  
PAYMENTS ON ACCOUNT OF  
FEDERAL AID HIGHWAY CON-  
STRUCTION CONTRACTS; FED-  
ERAL AID HIGHWAY CON-  
STRUCTION CONTRACTS,  
WHETHER FEDERAL OR TERRI-  
TORIAL IN NATURE.

Contracts executed by the Territory with private contractors for the construction of highways to be paid for partly out of Federal aid funds under the Federal Highway Act, as amended and supplemented, are purely Territorial and not Federal contracts, and the Federal moneys paid over from time to time, pursuant to said Act as amended and supplemented, to the Territorial Treasurer as agent for the Territory to receive the same, become, upon such payment, Territorial funds; the Treasurer may therefore legally withhold 1% of such moneys on account of the Territorial business excise tax pursuant to Section 6(b) of Act 42, 2nd Special Session Laws of 1932, when making payments therefrom to private contractors on Federal Aid projects.

Honorable Raymond C. Brown,  
Acting Governor of Hawaii,  
Honolulu, T. H.

Dear Sir:

In your letter of October 14, 1932, you enclosed copy of letter of the Honorable E. S. Smith, Territorial Treasurer, wherein he suggested that a ruling be obtained from the Federal Comptroller of the Currency as to certain powers and duties of the Territorial Treasurer

in connection with Federal aid funds payable on account of Federal aid contracts in the Territory.

The Treasurer's question is based upon Section 6 (b) of Act 42 of the Second Special Session Laws of 1932, which provides in part as follows:

"In the case of any contractor entering into a construction contract with the Territory \* \* \* the auditor of the Territory \* \* \* or other officer or agent thereof charged with the disbursement of funds payable to such person under said contract, shall withhold from the amount, or any installment thereof, payable under said contract, one per cent (1%) thereof on account of the tax imposed by this Act upon the doing of business in connection with such contract."

It will be recalled that said Act 42 is the Act which imposes the so-called Territorial "Business Excise Tax".

As a matter of information, I should like to state that before writing the letter above mentioned, the Territorial Treasurer consulted with me and at that time I concurred in his suggestion that if possible the ruling of the Comptroller of the Currency be first obtained on the question involved. Upon second thought, however, I agree with the Acting Governor that in this case the views of the Territory should first be set forth so that they can be presented to the Comptroller of the Currency if his opinion is requested.

The Territorial Treasurer under Section 13 of the Federal Highway Act (U. S. Code, Title 23, Sec. 14) is the Territorial official who has been designated and who is authorized to receive on behalf of the Territory payments of Federal aid moneys under the Federal Highway Act on account of Federal aid contracts. He is, therefore, interested in ascertaining whether or not said Section 6 (b) of said business excise tax Act applies to him in his capacity as custodian of these Federal aid funds.

After a careful examination of the provisions of the Hawaii Federal Aid Highway Act, as amended (Act 78,

S. L. 1925, as amended by Act 53, S. L. 1929, Act 95, S. L. 1931 and Act 64, 2nd Spec. Session Laws, 1932), the provisions of the Federal Highway Act, as amended, and the rules and regulations of the Secretary of Agriculture promulgated under the latter Act, it is the opinion of this Department, particularly in view of those provisions of the latter Act which are to be found in U. S. Code, Title 23, Sees. 11, 12, 13 and 14, that contracts for the construction of Federal aid highways are purely Territorial contracts as between the Territory and the private contractors agreeing to undertake the projects, and are in no sense contracts between the Federal government and any of said contractors. In fact the rules and regulations of the Secretary of Agriculture, as well as the project agreements entered into from time to time between the Federal government and the Territory for the expenditure of Federal aid moneys, definitely negative the existence of any such contracts between the Federal government and the private contractors. And after the Territory has so complied with the provisions of the Federal Highway Act, the rules and regulations of the Secretary of Agriculture promulgated thereunder, and the provisions of the Federal aid project agreements between the Territory and the Federal government, as to entitle it to Federal aid payments, the Federal moneys so paid become Territorial moneys and are no longer Federal moneys as such, although the Territory has obligated itself by contract to pay such moneys to the private contractors concerned.

On the other hand, we know of no restrictions in the Federal Highway Act upon the Territory's power to tax private contractors entering into Territorial Federal aid contracts and there would seem, therefore, to be no objection to the Territory's making the deductions on account of its business excise tax provided for by said Section 6(b) of said Act 42.

It is therefore our opinion that the Territorial Treasurer upon receipt of Federal aid moneys (which as above mentioned thereupon become Territorial moneys) may legally, and should, make the 1% withholdings of payments to contractors required by said Section 6(b).

I might add that I have discussed this matter in some detail with Mr. A. C. Wheeler, Federal Engineer for the Bureau of Public Roads in Hawaii, and that he agrees with me in this interpretation of the Federal Highway Act and the powers of the Territory with respect to Federal aid moneys paid to it.

Respectfully,

C. NILS TAVARES,  
Acting Attorney General.

NOTE: This opinion has been concurred in by the Comptroller General of the United States, See letter dated Dec. 19, 1932, from Comptroller General of the United States to the Secretary of Agriculture, this opinion having been referred to the Secretary of the Interior by Acting Governor Brown by letter of Oct. 21, 1932, and in turn referred by the Secretary of the Interior to the Secretary of Agriculture.

C. N. T. 1/14/33.