TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

C-4539(2), C-4985, C-5226, File 45

November 21, 1941.

OPINION NO. 1792

TAXATION, GROSS INCOME;

Sales to the United States must be included in the measure of the gross income tax.

SAME, LIQUOR TAX;
SAME, TOBACCO TAX;

Sales to the United States are exempt from liquor and tobacco taxes.

SAME, FUEL TAX;

Sales to the United States are specifically exempted from fuel tax by the statute itself.

Campbell C. Crozier, Esq.
Acting Tax Commissioner
Auhau Building
Honolulu, T. H.

Dear Sir:

This opinion relates to the application of territorial taxes in connection with sales to the United

States. In referring to the United States, I include also such instrumentalities as share the immunity of the United States from territorial taxation. From time to time we have considered the claims of various persons and organizations to such tax immunity, and if you have any further problems in that regard we shall be pleased to advise you concerning them, upon submission of the facts.

Reference is made to my letter of April 3, 1940 and Mr. Borthwick's reply of May 10, 1940, also to our Opinion No. 1762 of January 16, 1941, in which it was pointed out that the trend of the authorities was toward the conclusion that the gross income tax might be applied to sales to the United States. In view of the opinion of the Supreme Court of the United States in State of Alabama v. King and Boozer, et al, decided November 10, 1941, you have requested our opinion as to whether or not sales to the United States are exempt from tax.

In Alabama v. King and Boozer, supra the court overruled the cases which supported the tax imnunity of persons making sales to the United States, with respect to such sales, in the following words:

> "* * * The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms or the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Knox, supra; Graves v. Texas Co., supra, we think it no longer tenable. See Metcalf & Eddy v. Mitchell, 269 U.S. 514; Trinityfarm Co. v. Grosjean, 291 U.S. 466; James v. Dravo Contracting Co., 203 U.S. 134, 160; Helvering v. Gerhardt, 304 U.S. 405, 416; Graves v. New York ex rel. O'Keefe, 306 U.S. 466."

We therefore advise you that sales to the United States must be included in the measure of the gross income tax. As pointed out in our Opinion No. 1740 of September 16, 1940 the gross income tax law (Section 3 of Act 141, L. 1935) contains no statutory exemption of such sales, but exempts them only to the extent of the constitutional immunity from taxation, which the Supreme Court now has definitely recognized as nonexistent, at least in the present absence of an express exemption enacted by Congress.

As to liquor and tobacco taxes, as was pointed out in our Opinion No. 1762 these taxes do not stand upon the same footing, since the tax statutes require them to be earmarked and passed on to the purchaser. In said opinion we cited 17 Comp. Gen. 863, 18 Comp. Gen. 832, as indicative of the distinction between the two types of taxes i.e. the gross income tax on the one hand, and liquor and tobacco taxes on the other. While our opinion letter of July 3, 1939 construes such liquor and tobacco taxes as laid upon the seller, to which opinion we still adhere, nevertheless, because such taxes are required to be passed on, the ultimate burden of the tax is on the consumer, as was recognized in our Opinion No. 1762. Such liquor and tobacco taxes are much like the Alabama sales tax involved in the King and Boozer case, which has been construed as a tax on the seller, the ultimate burden of which fails on the buyer. Doby v. State Tax Commission, 174 SO. 323; Long v. Roberts and Son, 176 So. 213.

In Alabama v. King and Boozer, supra, the court held that the Alabama sales tax, required by statute to be passed on to the purchaser as above set forth, could not be imposed if the purchaser was the United States (at the same time holding that the purchaser was not the United States); the court further held that the mere contractual

assumption by the United States of the obligation to pay the tax did not work any tax immunity. Under the Hawaii laws, if the gross income tax is passed on it is merely "passed on economically, by the terms of the contract or otherwise", but the liquor and tobacco taxes, like the Alabama sales tax, are required by the statutes to be passed on to the purchaser and cannot be imposed when the United States is the purchaser.

From and after January 1, 1942 the Hawaii fuel tax will be administered by your office, under Act 26, Sp. S. L. 1941, and it should be pointed out that under that law sales to the United States are specifically exempted by the statute itself. Section 2019, R.L. 1935.

Respectfully,

Rhoda V. Lewis

Rhoda V. Lewis
Deputy Attorney General

APPROVED:

Acting Attorney General