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Op. 56-15

January 30, 1956

Honorable Earl W. Fase
Tax Commissioner
Territory of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in reply to your request for our advice as to the liability of an insurance company for consumption tax upon automobiles which it brings into the Territory for its own use.

It is undisputed that the consumption tax applies unless the "in lieu" provisions of the insurance tax prevent.

By section 3 Of Act 277, S.L. 1955, there was reenacted Act 226 (Ser. C-195), S.L. 1953. That Act deleted certain tax provisions of the Revised Laws' chapter on insurance (chapter 161) and inserted new sections covering the deleted provisions. Section 8488.02 is the "in lieu" provision. As will appear, such a provision has been in effect since 1903.

By Act 69, S.L. 1903, section 23, as part of a law regulating and licensing the insurance business, there was levied a tax together with the following provision:

"* * * which tax when so paid shall be in settlement of all demands of any tax or license or fees of every character for conducting said business of insurance in said Territory, excepting the fees as set forth in Section 19."

This was reenacted by Act 77, S.L. 1905, as follows:

"* * * which taxes when so paid shall be in settlement of all demands of any taxes or licenses or fees of every character imposed by the laws of this Territory, excepting property taxes, and the fees set forth in Section 2620, for conducting said business of insurance in said Territory."

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The version appearing in Act 126, S.L. 1909 was the same, except for the omission of the word "so" before "paid".

The provision enacted by Act 65, S.L. 1911, was the same, except for the introduction of some commas. It read as follows:

"* * * which taxes, when paid, shall be in settlement of all demands of any taxes or licenses or fees of every character imposed by the laws of the Territory, excepting property taxes, and the fees set forth in section 2620, for conducting said business of insurance in said Territory."

This was section 3361 in the Revised Laws of Hawaii 1915, and was construed in the case of Re Taxes, Brewer & Co., 23 Haw. 96. Emphasizing the words "for conducting said business of insurance in said Territory" the court said that this was a statutory declaration that the tax was an excise tax imposed on insurance companies for the privilege of doing business within the Territory. That the tax levied on insurance companies was to be the only tax "for conducting said business of insurance in said Territory" (which the "in lieu" provision with the punctuation it then had plainly stated) evidently was the basis of the Brewer & Co. decision.

The Insurance law was repealed and a new one enacted by Act 115, S.L. 1917. Section 59 of this act imposed a tax, and the "in lieu" provision was set forth as follows:

"* * * which taxes, when paid shall be in settlement of all demands of any taxes or licenses or fees of every character imposed by the laws of the Territory, excepting property taxes, and the fees set forth in section 58 of this Act for conducting said business of insurance in said Territory."

It will be noted that the comma preceding the words "for conducting said business of insurance in said Territory" was omitted. However, upon reading the title of the Act and the provisions as a whole, no intention to depart from the ruling of the Brewer & Co. the case appears.

The comma before the words "for conducting said business of insurance in said Territory", omitted in the 1917 version, again was omitted in the amended section appearing in Act 263,

S.L. 1939. Finally, in the above cited Act 266, S.L. 1953, the words "for conducting said business of insurance in said Territory" were omitted altogether. However, again considering the title of the Act and the provisions as a whole I am of the view that there was no intention to change the nature of the tax.

In the Brewer & Co. case it was pointed out that in the net income tax law there was an express exemption covering insurance companies. As new taxes have been enacted from time to time, it has been the practice of the legislature to expressly exempt insurance companies if an exemption was intended. Thus by Act 42 of the Special S.L. of 1932, section 2, there was an express exemption from the business excise tax, even though by Act 46 of the same session the insurance company tax was again amended and the "in lieu" provision again set out omitting the comma, the omission of which was noted above. So also by Act 44 of the Special S.L. of 1932 enacting the net income tax law there was an express exemption of insurance companies (section 1, now section 5502).

Again in Act 141, S.L. 1935, enacting the general excise tax, section 4, now section 5459 contained an express exemption for the insurance companies. Notably, Act 160 of the same session, enacting the complementary consumption tax, contained no such exemption.

In view of the history of the "in lieu" provisions and the Brewer & Co. case I am of the view that the insurance company tax never was intended to be in lieu of a consumption tax upon a specific purchase, which may or may not occur during the year covered by the annual insurance company privilege tax and has no necessary relationship to the insurance business. See cases collected in 1 A.L.R.2d 465, and the annotated case, Connecticut Light & Power Co. v. Walsh, 134 Conn. 295, 57 A.2d 128.

A problem somewhat similar to that involved here arose in connection with the public utility tax. The question was whether this was in lieu of the vehicle weight tax. By Act 183, S.L. 1933, the legislature clarified the public utility tax in this respect, at the same time stating that it had all along been its intention that the vehicle weight tax would apply notwithstanding the "in lieu" provisions of the public utility tax. It never has been disputed that insurance companies are subject to vehicle weight tax. It seems to me that they are equally

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subject to consumption tax on vehicles brought in by them. Both these taxes are outside the scope of the "in lieu" provisions.

Respectfully,

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Deputy Attorney General

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