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TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

June 17, 1957

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

Dear Sir: Attention: John A. Bell

Re: Lockheed Aircraft

I have reviewed the Lockheed letter of May 22, 1957, concerning two contracts with the United States.

The first contract, according to the Lockheed letter of March 25, 1957, calls for furnishing certain tooling and other equipment for aircraft maintenance. The second calls for aircraft maintenance.

The exemptions allowed by section 117-21.5, RL 1955 (formerly Act 284, SL 1951, as amended by Act 183, SL 1953 and Act 214, SL 1955) do not apply. Subsection (c) specifically states:

> "(c) Nothing in this section shall be deemed to exempt any person engaging or continuing in a service business or calling from any part of the tax imposed upon him for such activity, and he shall not be entitled to deduct any amount for tangible property furnished in conjunction therewith even though he separately bills or otherwise shows the amount of the gross income of such business derived from the furnishing of such property."

From the facts furnished it is clear that Lockheed is not an agent of the United States. It is furnishing to the United States services, and is furnishing property in conjunction with those services.

This matter turns upon a jurisdictional point. The question is to what extent, if any, partial performance of the contract has occurred outside the Territory, as distinguished from mere preparatory activities. The principles involved are those stated in Dravo Contracting Co. v. James, 114 F.2d 242, C.A. 4, 1940, and in a number of other cases which need not be reviewed at this time.

As to this question of partial performance of the contracts the facts presented are not clear. From what is stated, however, it may be that the contracts are similar to those involved in American Motors Corp. v. City of Kenosha, 80 N.W.2d 363, Wisc. 1957, and City of Detroit v. Murray Corp., 234 F.2d 380, C.A. 6 1956, cert. gr. January 14, 1957. The courts differed in those cases as to the right to impose a personal property tax. However, the Court of Appeals which held in favor of the Murray Corporation as to the personal property tax recognized the validity of a privilege tax.

A tax such as the Hawaii tax here involved does not depend upon the place of passage of title, but instead depends upon the place of actual delivery, inspection and acceptance in such manner as to complete all requirements for payment of a certain amount, which is made on the basis of the out-of-state performance. In addition to the Dravo case above cited see as to the importance of the place of final delivery and acceptance Allied Mills v. Department of Treasury, 318 U.S. 740, aff'g 42 N.E.2d 34; Department of Treasury v. Wood Preserving Corp., 313 U.S. 62; Field Enterprises v. Washington, 352 U.S. 806, aff'g 289 P.2d 1010.

It therefore is not possible to reach a conclusion without presentation of the final contracts and of the exact facts (with illustrative documents) as to what is done under the contracts. It is stated that partial payments have been made, but what earned them? And as to the automatic passage of title to after-acquired property This is meaningless if, as seems to be the case from the facts known to me, payments are not automatically earned thereby.

Respectfully,

Rhoda V. Lewis

RHODA V. LEWIS
Deputy Attorney General