NK:n
15a; 16b
Op. 61-27

COPY

AGOP Menu

Main Menu

February 16, 1961

Honorable Earl W. Fase
Director of Taxation
State of Hawaii
Honolulu, Hawaii

Attention: Mr. John A. Bell
Deputy Director of Taxation

Hawaii Aeronautics Commission
State of Hawaii
Honolulu International Airport
Honolulu, Hawaii

Attention: Mr. A. P. Storrs
Director of Aeronautics

Gentlemen:

This is in response to your request for advice as to whether the sales of fuel made under the following circumstances are subject to the tax imposed by Chapter 123 (Fuel Tax Law) of the Revised Laws of Hawaii 1955 as amended:

> "[x] company proposes to import to Hawaii, a product designated as [X] turbine fuel #1, from a foreign country or countries in the Caribbean area. The turbine fuel will be manufactured in the country of export and no further processing will be accomplished in Hawaii. It is proposed that the product will be admitted to the State without the payment of duty and will be stored in tanks pursuant to bonds known as Proprietor's Warehouse Bonds given by the company to the United States in accordance with Treasury regulations. The bonds are conditioned upon a compliance with the provisions and requirements of the Customs laws and regulations relating to the custody and control of the product in bond and its lawful withdrawal under permit of Customs officials.
>
> "The product will be transported by pipeline

> from the storage tanks to other tanks located adjacent to International Airport near Honolulu. At this point it will be pumped into tank trucks operated by employees, bonded by the Customs Service, who will deliver and pump the product into aircraft owned by carriers who purchase the turbine fuel to propel the aircraft in foreign Commerce. From the moment the fuel is imported to Hawaii and stored in facilities of the company (used exclusively for this purpose) until it is pumped into the tanks of the foreign-bound aircraft, it is subject to the supervision and control of Federal Customs officials."

It is the opinion of this office that the tax imposed by section 123-3, R.L.H. 1955 as amended, should be assessed upon the sales of the bonded fuel to aircraft bound for foreign parts.

There would be no question as to the legality of the fuel tax upon the sales herein concerned but for the case of McGoldrick v. Gulf Oil Corp., 309 U.S. 414, which was decided by the United States Supreme Court in 1940. The case involved the validity of the New York City tax on purchasers for consumption of tangible personal property as laid on bunker fuel oil delivered in New York City to foreign bound vessels purchasing the oil as ships' stores for consumption as fuel in propelling them in foreign commerce. The fuel oil had been refined in a bonded manufacturing warehouse from crude petroleum imported in bond. The bonds had been given for the purpose of permitting the importer, under the provisions of Section 309 of the Tariff Act of 1930, Sections 601 and 630 of the Revenue Act of 1932, and the regulations prescribed thereunder by the Secretary of the Treasury, to bring the crude petroleum into the United States, to manufacture it while in bond into fuel oil, and then to withdraw it for sale free of import duty otherwise payable. The Court struck down the city's tax because it was in conflict with congressional policy expressed through the foregoing Acts of Congress for the regulation of foreign commerce in the interest of and for the protection of American manufacturers. Provisions similar to those federal statutes are found in 19 U.S.C. § 1309, 26 U.S.C. §§ 4221, 4521 and 4601. This office is of the view, however, the legality of the Hawaii fuel tax upon bonded aviation fuel herein concerned is governed by West India Oil Co. (Puerto Rico) v. Domenech, 311 U.S. 20 (1940), decided by the United States Supreme Court several months after the Gulf Oil Corp. case.

In the Puerto Rico case the tax challenged was laid on the sale and delivery in Puerto Rico ports of fuel oil imported and stored in bond and then withdrawn, free of federal duty, for use as fuel to vessels covered by Section 309, Revenue Act of 1930 and §§ 601 and 630 of the Revenue Act of 1932, the same federal statutes involved in the Gulf Oil Corp. case. The Court distinguished the Gulf Oil Corp. case and sustained the assessment on the ground that Congress had given its consent to the tax by an amendment to § 3 of the Organic Act of Puerto Rico (44 Stat. 1418). There is here, with respect to the imposition of the aviation fuel tax, an analogous grant of taxing power. By Public Law 85-534, approved July 18, 1958, 72 Stat. 379, Congress amended the Hawaiian Organic Act, approved and ratified Joint Resolution 32. Session Laws of Hawaii 1957 as amended by it, and authorized the issuance of aviation revenue bonds in a sum not to exceed $14,000,000 payable from funds derived from aviation fuel taxes and all other revenues of the Hawaii Aeronautics Commission. It further provided that (a) those bonds "shall be issued pursuant to legislation enacted by the legislature of the Territory which shall provide that so long as any of the bonds are outstanding, aviation fuel taxes shall be levied and collected in amounts at least sufficient to provide for the payment of the principal of the bonds and the interest thereon, as such principal and interest became due, and for such reserve funds and sinking funds as may be provided therefore;" and (b) "the term 'aviation fuel taxes' shall have the same meaning as is now or hereafter ascribed to it by the laws of the Territory of Hawaii." Read in the light of its legislative background, P.L. 85-534 may fairly be construed as Congressional authorization to the imposition of the aviation fuel tax (Section 123-3(a)(2), R.L.H. 1955 as amended) upon any person falling within the meaning of a "distributor" as defined in Section 123-1, R.L.H. 1955 as amended.

Assuming the imposition of the aviation fuel tax on bonded fuel is not governed by the Puerto Rico case, the Gulf Oil Corp. case is still distinguishable on other grounds. Since the time of the latter case, the dominant scheme for the regulation of the importation and exportation of petroleum products has shifted from exemption from customs duty and internal revenue taxes to delegation of power to the Executive branch to control exports and imports (50 App. U.S.C. § 2021-2032; 19 U.S.C. § 1352). Furthermore, it might be noted that in discussing the purpose of § 601 and § 630 of the Revenue Act of 1932, the Court in the Gulf Oil Corp. case said:

> ". . . The obvious tendency of the exemption, from the tax laid upon importation of crude petroleum, when it or its product is used for ships' stores by vessels engaged in foreign commerce is to encourage importation of the crude oil for such use and thus to enable American refiners to meet foreign competition and to recover trade which had been lost by the imposition of the tax." (309 U.S. at 427. )
>
> ". . .'It is believed that this amendment will enable the American manufacturers to compete more favorably with their foreign competitors for this business without any substantial loss of revenue, since the affect of the present law is to force purchases abroad.' It added that the provisions for drawback of the tax on importation 'also relieves American manufacturers from a competitive disadvantage.' From statements made on the floor of the Senate by the sponsor of the bill it appears that one purpose of the exemption was to increase the trade in fuel oil in American ports which had been lost through purchase of fuel in foreign ports by vessels engaged in foreign commerce following the imposition of the tax by § 601(C) (4). 77 Cong. Rec., Part III, 3212-3214." (309 U.S. at pp. 427-428).

Such a purpose of protecting American manufacturers of fuel is not present with respect to aircraft fuel, for while foreign vessels can bring with them to American ports sufficient fuel for their return voyage, airplanes cannot. Then again in the case of sale of bonded fuel (supplies for aircraft of foreign registry) a specific finding of allowance of reciprocal privileges in respect of aircraft of American registry by the foreign country is required to qualify the sale for exemption from federal customs duties and internal revenue taxes. See 19 See 19 U.S.C. § 1309(a) (3): 26 U.S.C. § 4221(e). Reciprocity, on the other hand, is not required in the case of sales to ships registered in foreign countries. These considerations lead to the conclusion that the reasoning of the Gulf Oil Corp. case which was based on provisions relating to supplies for vessels is not applicable to aircraft fuel.

For the foregoing reasons it is advised that the aviation fuel tax may be assessed upon the sales of the imported bonded fuel.

Very truly yours,

/s/ Shiro Kashiwa
SHIRO KASHIWA
Attorney General

Op. 61-27