

October 30, 1918.

OPINION NO. 753.

TAXATION: INHERITANCE TAX:

Under Section 1333, R.L.H. 1915, the Treasurer of the Territory of Hawaii is not obliged to attend at a transfer of stock, nor to make the examination in said section referred to, and a failure on his part to do either or both in no way prejudices the right of the Territory, nor does it release the parties referred to in said section from their legal obligation to retain sufficient property to pay said tax.

SAME: SAME:

The Treasurer of the Territory, when convinced that all the facts necessary for the determination of the amount of the inheritance tax in the case of non-resident decedents have been placed before him, may collect and receipt for the same without resorting to court proceedings, and may certify that all such taxes have been paid or that no taxes are due, according as the facts may warrant.

Hon. Delbert E. Metzger,  
Treasurer, Territory of Hawaii,  
Honolulu, T. H.

Dear Sir: I beg to acknowledge the receipt of your communications of the 15th and 19th inst., together with copies of correspondence with the Bishop Trust Company in re Estate of Charlotte P. Dodge, deceased. I apprehend from parts of this correspondence that certain papers submitted to you by the Bishop Trust Company with reference to these matters have been returned by you to the Company, and are not now available for my examination.

The specific question upon which you seek the advice of this office is contained, I believe, in the last paragraph of your letter of the 19th instant, as follows:

“Mr. Sutton seems to think that it is not only the right

of the Treasurer to make a judicial determination as to whether or not the tax is due and fix the amount, but that it is his duty to do so, and certify to these findings; that if he fails to make claim for the Territory on ten days' notice that he is thereafter barred. If this is true, I should like to know it at once.

The answer to this question involves a consideration of a provision of Section 1338, R.L.H. 1915. This section of the law was analyzed to some extent in my letter to you dated September 6, 1918. In that letter you were advised that certain parts of Section 1333 applied in common to both resident and non-resident decedents and certain other parts to non-resident decedents only. It is there provided that

"Failure to serve such notice *and to* allow such examination *and to* retain a sufficient portion or amount to pay such tax *and* penalty . . . shall render such (persons) liable" to a penalty.

I am of the opinion that this section imposes no absolute duty on you as Treasurer, either to consent to the transfer or to make such examination of the securities as is provided for in said Section, and the burden and responsibility is placed entirely on the parties seeking to make the transfer to protect the interest of the Territory by (a) notifying the Treasurer of any intended transfer, (b) allowing an examination by the Treasurer, and (c) retaining sufficient property in their hands to pay the tax and penalty.

The section also provides that "it shall be lawful for the Treasurer to examine said securities, etc." A failure on your part to make such examination, or to give such written consent to the transfer would not, in any degree, release those seeking to make the transfer from the responsibility imposed on them by this section.

No difficulty can arise in this connection where the estate of a resident decedent is concerned. In such a case the facts are either in evidence before the Probate Court, or they can readily be made available in Probate Proceed-

ings. The difficulty arises almost entirely with regard to non-resident decedents. The statute certainly is not unambiguous in this regard.

A provision of Section 1333 relating to estates of non-resident decedents provides as follows,

"Nor shall any such safe deposit company, trust company, etc., deliver or transfer any securities, deposits or other assets of the estate of a non-resident decedent . . . without retaining a sufficient portion or amount thereof to pay any tax and penalty which may thereafter be assessed on account of the delivery or transfer of such securities, deposits, or other assets . . . unless the treasurer consents thereto in writing."

This portion of the section clearly authorizes you to consent to a transfer. The only practical circumstances, in my opinion, which would authorize you to give such consent, would be where you have agreed upon the amount of the tax and accepted payment of the same, or where you are convinced that there is no tax due upon such a transfer. Such written consent on your part might be slightly different from a certificate to the effect that no tax is due, but it would enable the transferor to make the transfer and probably would not bar the Territory from attempting to collect the tax from the transferee in case it should be later discovered that the transfer was, in fact, taxable.

As to what may be considered *convincing proof* of the facts necessary for a determination that no transfer tax is due presents a question of some difficulty.

While I believe that in all cases where you have any practical doubt as to the facts, ancillary administration of the estate should be had in our local courts, yet I do not believe that this course would be absolutely necessary where you can be otherwise convinced that you have all the facts before you, necessary for a decision of the question. This would not be a judicial decision by you. Section 1341 imposes upon you the duty of collecting all taxes that may be

due and payable under the Inheritance Tax Law. A decision by you on facts not in dispute as to the amount of the tax, if any, is no more a judicial decision on your part than a decision by a tax collector as to the amount of property tax due in any specific case. In many instances, such a decision by your department would save in small estates a considerable sum of money which would otherwise be expended by reason of the administrator or executor being forced to resort to ancillary administration proceedings for the purpose of settling the amount of the tax.

In the case now under consideration, to-wit, The Estate of Charlotte P. Dodge, deceased, while I have not the papers before me, I understand from Mr. Sutton that the certified copies of the probate proceedings had in the domicile of the non-resident decedent show all necessary facts except the fact of the citizenship of said decedent. I understand that these certified copies show affirmatively the value of the estate, the legatees and their relationship to the decedent and all other necessary facts upon which to base a determination as to the amount of the tax, if any, except the fact of citizenship. If you can be convinced by affidavit or otherwise upon this question of citizenship, then you would have all necessary facts before you upon which to base a final determination as to the amount of the tax, if any.

In my opinion, it is impossible to lay down any general rule for your guidance in arriving at a determination in all cases. There will undoubtedly be occasions when it will be necessary to obtain a judicial decision of the questions involved and the amount of the tax.

While it is undoubtedly technically true that the statute does not require you to furnish any certificate showing no tax due or claimed, yet in view of the provision of the statute which authorizes you to consent to a transfer without requiring the transferor to retain sufficient stock to pay the tax (which consent, as a matter of practice, you would

not sign unless the tax had actually been paid or unless no tax was due), I am of the opinion that such a certificate would amount in effect to a consent to such transfer, and therefore fairly within the contemplation of the statute and fairly within your powers as the officer of the Government having this particular business in charge.

You would not hesitate to give a receipt for the payment of a tax, and I can see no legal objection to your signing a certificate, when convinced of the fact that no inheritance tax is due or assessable in any particular estate.

I am forced to the conclusion that the provisions of this section relating to the taxation of the estates of non-resident decedents are not as clear and free "from ambiguity as I would like to see them. I believe, however, that upon the question here presented, the foregoing affords a safe working construction of these provisions.

Yours very truly,

HARRY IRWIN,  
Attorney General.