December 29, 1922.

OPINION No. 1060

TAXATION OF MONEYS IN HAND.

TERRITORIAL MONEYS IN BANKS. Section 1240, as amended, and Section 1246, as amended, of the Revised Laws provide, respectively, for the taxing of "moneys in hand" and for the exemption from taxation of "real and personal property belonging to the Territory". NO "moneys in hand" at the banks used as Territorial depositaries—under Chapter 87 of the Revised Laws—are exempt from taxation as Territorial property, notwithstanding the words, in Section 1165, "shali be deemed to be in the territorial treasury".

Honorable Henry C. Hapai,
Treasurer of the Territory of Hawaii,
Executive Building,
Honolulu, Hawaii.

Sir:

You have asked to be legally advised as to whether or not the Territorial banks, acting as depositaries of Territorial moneys, are taxable for "all moneys in hand", under Section 1240, as amended, of the Revised Laws.

The reason which has been offered contra is that Section 1246, as amended, provides that "real and personal property belonging to the Territory" "shall be exempt from taxation" and that some of the "moneys in hand" in those banks, on January 1 of each year, are personal property of the Territory and hence exempt.

In support of the claim that the deposits are property of the Territory, it has been urged that certain phraseology in Section 1165 is such as to show an

"express purpose of rendering such deposits exempt from taxation" and that there was "no other apparent reason for its insertion".

That section provides, *inter alia:* "Not more than seventy-five per cent of any moneys in the Territorial treasury may be deposited * * * and any sum so deposited shall be deemed to be in the Territorial treasury". The words which have been thought sufficient to make the deposits exempt from taxation are these—"shall be deemed to be in the Territorial treasury".

Title XIII of the Revised Laws is "Treasury", and Chapter 87 thereunder, of which Section 1165 is a part, is entitled "Deposit of Money in Banks". The chapter first authorizes, in Section 1165, the Treasurer to deposit Territorial moneys in the banks; later provides, in Section 1167, for the securities which he shall take; makes it possible, in Section 1169, for further security in the form of an indemnity bond; states, in Section 1170, that the Treasurer shall not be responsible for the moneys deposited; and finally concludes, in Section 1171, with a statement as to what shall be deemed and counted as cash. Neither the chapter as a whole, nor any section therein, purport to deal, in any way, with taxation. What was intended by the words in question was that, insofar as the Treasurer's accounts were concerned, the deposits were deemed to be in the treasury. This view is fortified by the somewhat similar expression at the close of the chapter, in Section 1171: "Such certificate or certificates of deposit, receipt or receipts and all balances of such deposits shall be deemed and counted as cash."

In other words, as a matter of bookkeeping, not taxing, and to give the Treasurer a clean bill of health, the deposits "shall be deemed to be in the Territorial treasury * * * and counted as cash."

This view means that "deemed" should be read as "deemed for the purpose of accounting". The opposite view requires that "deemed" should be read as "deemed for all purposes, including taxation".

That the latter is not tenable should be apparent from a recognition of the fact that the Territorial moneys and those of private parties, when once deposited in a bank, become commingled and then it may no longer be said that any portion thereof belongs to anyone but the bank. After a person has deposited five twenty-dollar gold pieces in a bank, he ceases to have any ownership in those pieces. In lieu thereof, he has—what is ordinarily just as good—a *chose in action,* an enforceable legal claim, against the bank for the value of those pieces of gold. It is the same, of course, with the money deposited by the Territory. The ownership of the depositor is terminated in that tangible personal property that becomes commingled with other deposits and the depositor thereupon becomes the owner of a form of personal property which is intangible, that is, a right to demand payment of an equivalent value in money—in other words, a credit. The relation between a bank and one of its depositors is not that of bailee and bailer, respectively, but that of debtor and creditor.

The taxation of intangible credits is not involved in this present question only the taxing of "moneys in hand", a form of tangible personal property so known.

The burden is upon a bank to show what part, if any, of the "moneys in hand" on January 1 are exempt as personal property belonging to Territory". However, the deposits of the Territory and of all other depositors are commingled and no effort is made to distinguish them, as it is well understood that, at the instant of making a deposit, the depositor gives up to the bank his property right in that specific property which he deposits and obtains instead a valid claim against the bank for the worth of that property. On January 1, as on any day, the only "personal property" right to the "moneys in hand" at a bank is that of the bank.

This being so, there is no warrant for trying to differentiate among those moneys in a bank, as if the specific moneys belonged to different depositors.

Suppose a bank, on January t, has on hand $1,-600,000, but had received—in addition to a total of $15,000,000 of deposits from private parties—$ 1,650,-000 of Territorial moneys. Would it be urged that all of the $1,600,000 was property of the Territory? To say that that amount should be divided so as to make the same ratio between its two parts as between the sum of the Territorial deposits and the sum of all other deposits, would be to recognize that the ownership is in the bank and merely suggest an equitable way of enforcing, by apportionment, the claims of the depositors-creditors of the bank.

This consideration of the matter shows that it does not work out practically to construe "deemed" as "deemed for all purposes, including taxation".

It must be remembered that, while the general rule is that revenue laws are to be construed strictly against the governmental authority, nevertheless

> "The proposition that exemptions from taxation are strictly construed, in other words, that taxation is the rule and exemption the exception, is well settled. Bishop v. Gulick, 7 Haw. 627, 630; O. R. & L. Co. v. Shaw, 12 Haw. 76. As the United States supreme court puts it, 'a doubt is fatal to the claim' of exemption. Theological Seminary v. Illinois, 188 U. S. 662, 672."
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> *Tax Assessor vs. Wood,* 18 Haw. 485.

So, if there should be any doubt as to the status of these "moneys in hand" at a bank, on January 1,

that doubt would be fatal to the bank's claim of exemption from taxation.

It is not necessary for the Territory to establish that these "moneys in hand" are not exempt, but, on the other hand, the burden is imposed on the banks of proving definitely and beyond a doubt that these moneys, specifying them, are the property of the Territory and hence exempt.

It is my opinion that the banks cannot do this—that these "moneys in hand", at the banks, do not belong to the Territory and are taxable.

Respectfully,

JOHN ALBERT MATTHEWMAN,

Attorney General.