

January 27, 1925,

OPINION No. 1200.

INCOME TAX:

TIME OF PURCHASE OF REAL ESTATE. Where property was purchased pursuant to an agreement of sale, the date of the purchase is not that of the agreement.

TAXING STATUTE. The Supreme Court case of Frear vs. Wilder, Assessor, 26 Hawaii 603, being unreversed, adherence to it means that, in considering the taxability of "the gains, profits and income" of a person engaged in the business of buying and selling real estate, it is immaterial to consider the time of purchase of property which was sold at a profit within the taxation period.

Mr. John A. Palmer,
Income Tax Assessor,
First Taxation Division,
Box 2867, Honolulu, Hawaii.

Sir:

Upon the 7th instant you referred to me a letter of inquiry from the Chinese Mutual Investment Company of Hawaii, Limited, and requested that I advise you upon the law involved.

I now confirm in writing my views upon this matter as orally expressed some days ago.

The facts submitted are that A, on November 15, 1921, entered into an agreement of sale with B for the purchase of the latter's property and took possession of the same, making periodic payments toward the purchase price. A made the last payment on November 15, 1923, and then received a deed to the property. On March 15, 1924, A sold this property, making a net profit of \$1,000 therefrom.

The statute involved is §1307 of the Revised Laws, reading:

"Sec. 1307. Income includes what. In estimating the gains, profits and income of any person or corporation, there shall be included all income derived from interest upon notes, bonds and other securities, except such bonds of the Territory of Hawaii or of municipalities created by this Territory, the principal and interest of which are by the law of their issuance exempt from all taxation; profits realized within the taxation period from sales of real estate, including leaseholds purchased within two years; dividends upon the stock of any corporation; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property, less the amount expended in the purchase or production of the same, and in the case of a person not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance, and all other gains, profits and income derived from any source whatsoever during said taxation period."

The words from the above with which we are especially concerned are:

"Profits realized within the taxation period from sales of real estate, including leaseholds purchased within two years;"

The question is whether or not A, upon the facts and the statute above set forth, should make an income tax return of the \$1,000 profit realized by him from the sale of that real estate.

In the words last quoted, the presence of a comma after "real estate" and the absence of one after "leaseholds," induces one to think that the two year period applies only to sales of leaseholds. However, there appears no reason why that should be so. Punctuation alone should not be controlling.

"It seems to be well settled that punctuation is a fallible standard of the meaning of a statute; and the last resort as an aid in its interpretation, though it may be resorted to as such aid when the meaning of the statute is doubtful."

25 R. C. L. 965,
36 Cyc. 1117.

Considering then that the two year period applies

to sales other than those of leaseholds, did A purchase this land on November 15, 1921, or on November 15, 1923? Certainly on the latter date. It was then that he acquired title. On November 15, 1921, A had nothing more than B's promise that A should later have the property if A fulfilled certain requirements.

Thus it appears that A should be taxed upon this \$1,000 for the reason that the profit-realizing sale occurred within the taxation year 1924 and the purchase within the period of the two years, 1923 and 1924.

However, if the decision of the Supreme Court in the case of *Frear vs. Wilder, Assessor*, decided September 27, 1920, is to be fully respected, it must be considered that Sec. 1307, quoted above, "merely prescribes the method to be pursued by the taxpayer in returning his gross income." The Supreme Court held, in effect, that notwithstanding the indication, upon the face of Sec. 1307, that its purpose is to help define "the gains, profits and income" mentioned in Sec. 1305, nothing mentioned in Sec. 1307 is taxable unless included within Sec. 1305, and that Sec. 1307 is a statute providing for the making of returns, even though Secs. 1309 and 1310 deal specially and conclusively with returns.

Frear vs. Wilder, Assessor,
25 Hawaii 603, 608.

This Supreme Court case may be thus summarized: Upon Christmas Day, 1919, Mr. B. F. Dillingham, mother of Mrs. Walter F. Frear, made a present to the latter of personal property of the value of \$90,000. The tax assessor treated this gift as income because Sec. 1307 contains the words, "money and the value of all personal property acquired by gift or inheritance." Under protest, Mrs. Frear paid the income tax assessed, \$1636, and the matter was submitted to the Supreme Court upon an agreed state-

ment of facts. Notwithstanding the use of the word "gift" in Sec. 1307, the Supreme Court held that the provisions of Sec. 1307 were not determinative as to what was to be taxed.

It is doubtful whether the *Frear* case will be followed by the Supreme Court in any other case involving the same or similar questions. To say that it provides for making a return of gross income is to infer that its scope is greater than what has been termed "the taxing statute," Sec. 1305. However, a person engaged in the business of buying and selling real estate would, under Sec. 1305, be taxed upon *all* his profits "received"—as the statute was amended to read—within the taxation period, irrespective of the times of purchase, and Sec. 1307 would apparently require a return of the profits received within the taxation period on only those transactions which *began* within that period and the one year just preceding. That is anomalous, surely.

With the *Frear* case unreversed, a logical application of it, in my opinion, means that profits made in the business of buying and selling real estate should be taxed under the broad provisions of "the taxing statute," Sec. 1305, practically ignoring the two year provision in Sec. 1307.

Thus it works out that, even if A, in the case under consideration, had purchased his property on November 15, 1921—that being more than two years before January 1, 1925—he should be taxed, for the \$1,000 profit, under the taxing provisions of Sec. 1305, as amended by Act 163, 1921.

Herewith accompanying, I return to you the documents which were transmitted with your letter to me.

Respectfully,

JOHN ALBERT MATTHEWMAN,

Attorney General.