February 5, 1925.

OPINION No. 1202.

TAXATION:
MONEY IN BANKS. Much of the money on hand In local banks on January 1 of each year having escaped taxation for the years 1910 to 1922, inclusive, due to a misunderstanding of the statutes, it is now not only permissible for, but obligatory upon, each assessor to make the necessary additions to his "assessment or tax list" for each of those thirteen years, pursuant to the mandatory provisions of §1267 of the Revised Laws.

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

Sir:

I have just received your letter, written and delivered since our conversation of a few moments ago, wherein you say:

> "I hand you copy of Opinion No. 1582 of the Supreme Court of the Territory of Hawaii, October Term, 1924, re Taxes The Bank of Hawaii, Limited. I respectfully ask your opinion if said opinion is applicable to Section 1267, R.L.H. 1915, and to what extent, to wit: number of years the Territory of Hawaii is entitled to taxes in this connection."

This opinion of the Supreme Court puts beyond further question the proper interpretation of Act 123, 1909, now appearing as Chapter 87 of the Revised Laws with the title, "Deposit of Money in Banks," as to which I advised you in my Opinion No. 1060 rendered upon December 29, 1922.

In its original form the law became effective April 27, 1909. On January 13, 1910, Attorney General Hemenway advised that the moneys deposited by the

Territory with the banks under the act in question "should not be considered as taxable in the hands of the depositaries" and suggested "that it might be wise to secure a judicial determination of this question in the usual way." Unfortunately no such adjudication was had until this decision of the Supreme Court rendered two days ago.

Since 1896 there has been on the statute books what now appears as §1267 of the Revised Laws, in which an assessor is told in mandatory terms to add to his assessment or tax list, for the year or years when omitted, any property theretofore omitted from assessment and taxation. Hence the assessors understood, and probably also the banks, that, if the advice of Attorney General Hemenway was not promptly followed as to securing a judicial determination, the question then somewhat uncertainly passed upon by the Attorney General might arise again and possibly cause embarrassment to the banks if the final adjudication should be that all money on hand January 1 should be taxed irrespective of any consideration as to whether or not the government was a depositor.

The section of the Revised Laws here involved reads:

"Sec. 1267. Addition of unreturned property. Each successor shall at any time add to his assessment or tax list for the year or years when omitted, any person or property theretofore omitted from assessment and taxation: notice thereof shall be given to the owner, if known, within ten days after such addition; and any such notice addressed to him at his last known place of residence and sent by mail, postage prepaid, shall be a sufficient notice."

In my opinion it is just as much the duty of an assessor, under the foregoing section, to add to his "assessment or tax list" for 1910 unassessed personal property possessed by a bank upon January 1, 1910, as it is his duty to make a proper assessment of the personal property possessed by the same bank upon January 1, 1925. His duties are mandatory. He

is not allowed any discretion, once it is known as a fact that assessments in the past were not made which should have been made. The tax lists to be affected by considering §1267 in conjunction with this Supreme Court decision are for the years 1910 to 1922, inclusive.

It will be no defense to the banks that the assessors will now act tardily. The banks have profited by an error which will be corrected without depriving them of any rights whatever.

"With respect to the assessment of property which was taxable under the existing statutes, but which for some reason has escaped taxation, there is even less constitutional difficulty than in the case of retroactive legislation. Taxes are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the state may proceed by all proper means to compel the performance of the obligation. . . . The completion of the tax roll for a given year creates no vested right in the owners of property subject to taxation that the assessment shall not thereafter be modified or amended to their detriment, and the legislature has power to provide for the re-valuation of property which has been undervalued in previous years and or the assessment and collection of taxes to the extent of such undervaluation."

26 R. C. L. 351.

It is my understanding of the law that the assessors are in duty bound to "pick up" this personal property in the banks untaxed for thirteen years. The assessors may be compelled by mandamus to perform their duties in this matter. It is not a proper subject for compromise.

There will be no penalties for delinquency, in the form of interest charges, until after the new assessments have been made for the past years involved.

Respectfully,

JOHN ALBERT MATTHEWMAN,

Attorney General.