November 1, 1926.

OPINION No. 1389.

TAXATION: ASSESSMENTS:

The Tax Assessor may correct errors in assessments, even after May first, by way of equitable adjustment or compromise, if such correction is not prejudicial to the tax payer.

H. P. Seidemann, Esq.,
Technical Director,
Commission of Public Accountancy,
Honolulu, Hawaii.

Dear Sir:

With regard to your request of October 26th for an opinion upon the powers of a tax assessor to make changes in valuation, I must request that you amplify your questions before attempting to answer same unqualifiedly and in detail. In the form in which they are stated they are too general (by reason of a failure to state the particular facts and circumstances involved) to permit of specific and categorical answers.

Perhaps, however, I can in substance answer these questions by a brief discussion of certain general powers which the law, in my opinion, grants to the Tax Assessor, and by the discussion hereinafter set out you will gather that, in general terms, I answer these three questions in the affirmative, always providing that proper and justifying facts exist.

The position taken by Miss Ashford in our departmental opinion No. 1284, dated November 19th, 1925, and approved by me, to the effect that the Assessor (as distinguished from the deputy assessor) may, under proper circumstances, make changes in the tax lists after May 1st of each year, is in my opinion eminently sound. Said Opinion 1284 would seem to be a sufficiently clear answer to the questions propounded in your letter of October 26th, the ruling in said Opinion (as per the syllabus) being: "The Assessor may correct errors in assessments, if such correction be not prejudicial to the tax payer, after May 1st"; and the discussion on page three of said Opinion setting out the theory of such adjustments, in full.

Not only would the changes referred to apply to (a) the correction of clerical errors, (b) meeting adjustments made by the tax appeal court and (c) the designation as "uncollectible" of delinquent taxes earlier listed as collectible (these three types of changes in the tax lists having, I understand, been acquiesced in by you as within the Assessor's powers), but the Assessor should also adjust changes occasioned by judgments of courts *other than* the tax appeal court (e. g. the Supreme Court) and he undoubtedly has the further power, *in a proper case*, to make such changes as represent a compromise adjustment of values. This last type of change, I understand, is in your opinion beyond the power of the Assessor to make, but I am entirely clear that the case is lawfully within the Assessor's powers.

This entire matter depends upon considerations of the right and power of *compromise.* You, I believe, dispute the right of the Assessor to make, in general, compromise adjustments, while this Department has heretofore ruled, and I now repeat the ruling, that the Assessor has power at any time to change and adjust assessments when justice, equity, and fair dealing require it, entirely independent of those provisions in the statutes relating to tax appeals through the tax appeal court.

This proposition is, I submit, fundamentally sound. Suppose the Assessor assesses property at $10,000., and the tax payer neglects to take an appeal until his time for doing so has expired; and suppose, before payment, the Assessor discovers that a fair assessment is only $5,000. Must the Assessor, through this department, file suit to collect a tax on the basis of a $10,000. valua-

tion, knowing that this is $5,000. too much? Must he attempt to collect the inequitably high figure? Or, to avoid doing so, is he compelled to perform the absurd gymnastics of (1) instituting suit for the tax on $10,000. and, upon the hearing, (2) appear in court and admit that a tax on $5,000, only, is justly due? Certainly not. The law cannot contemplate such an absurd and expensive procedure. Even though the tax lists are closed, the Assessor can, and should, in such a case, change his assessment to the proper figure.

So much for the fundamental principle (aside from statute) of the right to make compromise adjustments. It is a power which the Assessor or the Attorney General has, independent of statute.

Your view would deny the right of compromising tax claims under any circumstances. But I beg to differ with your view both on general principle and by reason of statutory recognition of this right of compromise as appears from Sec. 1358, R. L. H., 1925, hereinafter discussed.

I am aware that former Attorney General Irwin in Opinion No. 1025 apparently holds that the Assessor does not possess the authority and discretion which I hold him to be vested with. The said opinion, on the point directly covered by it (i. e. that taxes become due January 1 and, a just assessment having been made, the Assessor is without power to remit any portion of said tax because said property is transferred to the Government during the current year) is entirely sound, and it is only in certain language employed in the general discussion that statements inconsistent with my position appear. If it is fair to say that Judge Irwin's said opinion in substance would hold contrary to my present holding, I am constrained to rule that Judge Irwin is in error.

Thus, on the fifth page of said Opinion 1025, the statement is made:

"A general survey of all Territorial statutes * * * convinces me that * * * once a tax been legally assessed and rendered certain in amount, the tax assessor is without authority to remit the whole or any part of the same."

And on page four, it is stated that:

"The Legislature did not intend to and did not grant to any tax assessor or other public accountant any discretion whatever in compromising any governmental claims."

The first quotation above may well refer to the specific point under discussion by Judge Irwin, namely the lack of authority to "remit" a part of a tax imposed by reason of a transfer of the property to the government before the end of the current year—and if so, the statement would be correct.

As to the second statement quoted, Sec. 1358 of the Revised Laws of Hawaii, 1925, expressly recognizes the right and authority of the assessor or other proper officer in general to compromise tax claims.

That section reads as follows:

"Taxation of costs. In the event of an appeal or objection being sustained in whole, the costs deposited shall be returned to the appellant; or if the appeal or objection be sustained in part only, *or if an agreement or compromise is made between the appellant and the tax assessor* or other proper officer of the government, whereby a reduction is made in the total amount of the assessment, then a part of the costs proportionate to the amount for which the appellant shall obtain judgment, or proportionate to the amount of the reduction, as the case may be, shall be returned to the appellant."

The above statute does not confer the right of "agreement or compromise" (which means "adjustment or compromise") but it clearly *recognizes it as existing,* and if the Tax Assessor may compromise and adjust an assessment, by reducing same, *after* suit is filed, of course he may do so prior to the filing of suit with attendant annoyance and expense.

I repeat: The above statute does not *create* this

right of adjustment, but *recognizes it as a fundamental existing right.*

My ruling is:

1. That in the absence of statutory prohibition, Assessors may adjust exorbitant assessments *at any time;* and

2. R. L. Sec. 1358 clearly recognizes the existence of this right and authority.

With regard to the propriety of the Assessor accompanying all adjustment lists sent to the Auditor with his reasons therefor, I feel that this should be done as a matter of public interest, and you will be pleased to know that the Tax Assessor for the First Division is already at work on your "Form B-9b-409, Revised 10-26" setting out the reasons for all changes in the tax list heretofore made, and he will hereafter follow this course, setting out always, in detail, the character of and reason for such changes. He is also being advised (by service of our Opinion 1390 herewith enclosed) that his use of the term "uncollectible taxes" to apply to adjustments is improper and confusing—so that in future all of those adjustments should be thoroughly clear and the reports self-explanatory.

If your form of Credit Adjustment blanks were not completed, I would suggest, in addition to your "Group A" "Group B" and "Group C," a further classification to be known as "Group D" to embody "Changes by Compromise." Inasmuch, however, as those forms are already printed, I suggest that your present wording of "Group B" be amended (a rubber stamp being used) to read: "Adjustment by Court Order 'or Compromise." This will cover orders of other than tax appeal courts and other cases of adjustment or compromise as above discussed.

I believe this opinion will answer all of the questions propounded in your letter of October 26th. When justice and equity require such action the changes re-

ferred in questions 1 and 2 may be made; and, under the same circumstances, changes additional to those referred to in question 3 may likewise be made.

Respectfully submitted,

WILLIAM B. LYMER,

Attorney General.