

November 23, 1928.

OPINION NO. 1513

CORPORATIONS — FOREIGN — LIABILITY TO TERRITORIAL INCOME TAX:

Section 1389, Chapter 103, Revised Laws of Hawaii, 1925, contemplates the assessment of the income tax upon net income derived by foreign corporations from business carried on in the Territory of Hawaii when distinguishable and ascertainable as such.

Honorable Henry C. Hapai,  
Treasurer, Territory of Hawaii,  
Honolulu, Hawaii.

Sir:

Under date of September 14th, 1928, you requested the opinion of this Department relative to foreign corporations doing business in the Territory of Hawaii, and their liability to pay a Territorial income tax upon profits derived therefrom.

You predicate such request upon a letter from Mr. Henry Glass, Income Tax Assessor, to you, dated September 13, 1928, copy of which you enclosed. It appears from Mr. Glass's letter, as supplemented by an oral conference with him, that mainland corporations have been selling merchandise in the Territory of Hawaii through various agencies and in various ways. In some instances such mainland business houses have maintained permanent agents in this jurisdiction with and without offices. In other instances temporary agencies and offices have been maintained. Sales of goods have been negotiated directly and indirectly, in some cases dependent upon approval at the situs of the particular business house concerned, and in other cases perfected in this jurisdiction. Payment has been made in various ways, sometimes di-

rect to the mainland house, sometimes direct to the agent. In the latter case, such payments are deposited with local banks, either to the credit of the mainland house or to the agent. In respect to such deposits there may be either one of two relations created between the mainland house as principal and the agent as agent, namely, trust relationship or debtor-creditor relationship. Warehouses and show rooms are maintained by some, and by others neither warehouse nor show room. There may be various arrangements as to the shipments of goods. Some shipments are sent direct to the customer from the mainland. Some shipments are sent direct to the agent upon consignment. There are cases of goods being shipped direct to the agent with no particular purchaser in mind, to be disposed of by him as there may be demand. In no instance is there any case of a temporary break in transit through this jurisdiction, but to the contrary, every shipment completes its transit, and there is a permanent break, giving to such goods a permanent situs in this jurisdiction. The title appears to be more or less shifting. It can reasonably be conceded that unless the goods are shipped from the mainland subject to the buyer's risk at the place of shipment, that title is not vested in the purchaser until the goods have been delivered and payment assured. It follows, therefore, from the facts set forth, although limited in scope, that the sales in the majority of cases are made in this jurisdiction, dependent, however, in each instance upon when title passes.

Section 1389 Chapter 103, Revised Laws of Hawaii, 1925, provides that "there shall be levied, assessed, collected and paid annually, except as hereinafter provided, a tax of five percentum on the net profit or income above actual operating and business expenses derived during such taxation period, from all property owned, and every business, trade, employment or vocation, carried on in the Territory, of all corporations doing business for

profit in the Territory, no matter where created, and organized \* \* \*.”

This section contemplates the taxation of income derived by a foreign corporation from every business, trade, employment or vocation carried on in the Territory. It must necessarily resolve into a question of fact whether a corporation is carrying on a business, trade, employment, or vocation for profit in the Territory. It must necessarily follow that such business cannot be ascertained from the form in which it is conducted, but from the substance.

A reasonable test would be as to whether the activities carried on in the Territory create a net income to the particular corporation, definite and subject of being stamped with a local character.

In tile cases of *Shaffer vs. Carter*, 64 L. Ed. 445, and *Nat. Leather Co. vs. Mass.*, 72 L. Ed. 603, the Supreme Court of the United States recognizes that a state can, consistently with due process of law, impose an annual tax upon the net income derived by non-residents from any business, trade or profession carried on by them within its borders, and that such a state income tax upon the net income of a non-resident derived from business carried on by him in the state is not a burden on inter-state commerce. Such tax is held plainly sustainable even if it includes gains from inter-state commerce.

In *Shaffer vs. Carter, supra*, it is said, at page 456:

“And we deem it clear upon principle, as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the state, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders.”

And at page 459:

“It is urged that, regarding the tax as imposed upon the business conducted within the state, it amounts in the case of appellant’s business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the state. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross received as in *Crew Levick Co. vs. Pennsylvania*, 246 U. S. 292, 62 L. Ed. 295, 38 Sup. Ct. Rep. 126, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce.”

The tax necessarily must be confined to that income ascertainable in its relation to the business done in the Territory and a reflection thereof.

You are advised therefore, that foreign corporations doing business in the Territory are subject to the Territorial income law, when and where the facts justify the conclusion that business is being carried on for profit in this jurisdiction.

It is suggested that your office require all such corporations to file the return provided for in Section 1392, Revised Laws of Hawaii, 1925. It is further suggested that those foreign corporations that have not complied with Section 3498, Revised Laws of Hawaii, 1925, requiring the filing of annual exhibits, be required to do so. Upon the filing of such return and exhibits, it may then be possible upon examination to determine the nature and scope of the business done in the Territory, if any. Each case should be considered by you separately, and the facts should justify in each instance the assessment entered.

Very truly yours,

H. T. KAY,

First Deputy Attorney General.

APPROVED:

H. R. HEWITT,

Attorney General.