June 6, 1934.

OPINION NO. 1603

TAXATION, INSURANCE COMPANIES; NATURE OF TAX.

The tax provided in section 3473, R. L. 1925, as amended by Act 46, 2nd Sp. S. L. 1932, is an excise tax imposed on insurance companies for the privilege of doing business in Hawaii.

SAME; SAME.

The tax imposed under section 3473, R. L. 1925, as amended, is based upon the principle that the business which is done depends upon the Territory's consent.

INSURANCE; "DOING BUSINESS," WHAT CONSTITUTES.

Independent of other acts the continuance of a foreign insurance company's obligation under insurance contracts written prior to its discontinuance of business in the Territory does not constitute doing business in the Territory when the company has no officers, agents, or office in the Territory and the premiums are remitted direct to a foreign office.

SAME; SAME.

In connection with such insurance a company may do business within the Territory where it maintains an office, has agents or collects premiums within the Territory.

SAME; SAME.

Adjustment of losses within the Territory by a foreign insurance company may constitute "doing business."

SAME; SAME.

If losses are adjusted by a foreign insurance company at a foreign office the company is not doing business in Hawaii.

SAME; SAME.

If an insurance company solicits business, has offices or agents, collects premiums or writes insurance in the Territory it is doing business in Hawaii.

SAME; SAME.

Where residents of the Territory apply for insurance by mail to a foreign office of a foreign insurance company and the insurance is written at such office and the premiums are remitted direct to such office the company is not, by reason of such insurance, doing business in Hawaii.

Mr. Henry A. Nye,
Deputy Insurance Commissioner,
Honolulu, T. H.

Sir:

This is to acknowledge receipt of your letter of May 14, 1934, requesting our opinion as to whether or not the 2½ per cent tax (provided for in section 3473, R. L. 1925, as amended by Act 46, 2nd Sp. S. L. 1932) on the net premiums of $80,913.62 received by the Mutual Life Insurance Company of New York during the calendar year 1933 is due and collectible from said company.

Section 3473, R. L. 1925, as amended by said Act 46, 2nd Sp. S. L. 1932, in so far as applicable, provides as follows:

"* * * All insurance companies or corporations doing business in the Territory must file with the commissioner annually, on or before the fifteenth

day of April in each year, a statement, under oath, setting forth the total business transacted and the amount of gross premiums received by the companies or corporations, during the year ending December 31 next preceding from all risks located in, and all business done within the Territory. * * * and all life insurance companies shall pay to the treasurer, through the insurance commissioner, a tax of two and one-half per centum on the grow premiums received from all business done within the Territory, during the year ending on the preceding 31st day of December, less return premiums, re-insurance in companies or corporations authorized to do business in the Territory, when the re-insurance is placed through or with local agents, and operating and business expenses, which taxes, when paid shall be in settlement of all demands of taxes, licenses or fees of every character imposed by the laws of the Territory, excepting property taxes, and the fees set forth in Section 3472 for conducting the business of insurance in the Territory. Said taxes shall be due and payable on the thirtieth day of June, succeeding the filing of the statement provided for in this section. * * *"

The foregoing section was originally enacted as section 59 of Act 115, S. L. 1917, and is substantially the same as section 3361, R. L. 1915, which was repealed by section 62 of said Act 115. See Op. Att'y Gen. No. 1500.

The 2½ per cent tax mentioned in section 3473 is an excise tax imposed on insurance companies or corporations, whether of domestic or foreign origin, for the privilege of doing business in the Territory. *In Re Taxes C. Brewer & Co., Ltd.,* 23 Haw. 96, 100. As a privilege tax, the tax rests upon the assumption that what business is done depends upon the Territory's consent. *Provident Savings & Life Assurance Society v. Kentucky,* 60 L. Ed. 167, 171.

Hence, the crucial question is whether or not the company was "doing business" within the Territory during the calendar year 1933. If this question is answered in the affirmative, the company is subject to the provisions of section 3473 and the said net premiums are subject to the tax.

This question is partly one of fact. For this reason, in our letter of May 11th, we requested information as to the company's conduct in withdrawing from the Ter-

ritory and as to the conduct of its affairs thereafter. We regret that you were unable to furnish us will all of the information we requested.

From the information furnished this Department, we understand that the Mutual Life Insurance Company of New York is a foreign insurance company which commenced to do business within the Territory on October 1, 1903; that it duly qualified by complying with all of the provisions of law in respect to foreign insurance companies; that it continue to do business and held a certificate of authority up to April 15, 1932, on which date it did not renew its application for such a certificate and purported to discontinue business and withdraw from the Territory; that since said last mentioned date the company has not renewed its application for a certificate and consequently has had no certificate for the years 1932, 1933 and 1934; that at the time of the purported withdrawal it had in excess of $4,000,000 of insurance in effect in the Territory, and that its obligation, at least as to a part of the said insurance, continued during the year 1933; that all premiums paid to the company during the year 1933 were remitted by the policy holders direct to the company through its California office; that the company had $4,251,956 of insurance written and in force in the Territory on December 31, 1932, and that it wrote upon lives of residents of the Territory $24,032 of new insurance during the year 1933; that $460,518 of insurance in force on December 31, 1932, ceased to be in force during 1933; that the company during said year received, in the aforesaid manner, $114,828.23 of renewal premiums from insurance that was in effect on December 31, 1932, and $1,055 57 premiums from the said new policies issued during the year 1933; and that the net premiums received by the company during the year 1933, amounted to $80,913.62 after deducting from the gross premiums dividends in the amount of $30,386.91 and operating expenses in the amount of $4,583.27.

The foregoing statement of facts includes all of the material facts given in your letters and, as will hereinafter appear, is incomplete and insufficient to base a definite opinion upon.

An analysis of the foregoing facts discloses that the company's transactions during the year 1933 were of the following general character: (1) Insurance written prior to April 15, 1932 (the date of the company's alleged withdrawal) upon risks within the Territory remained in force and the company's liability continued thereunder and it continued to receive and accept renewal premiums thereon, which said premiums were remitted by the policy holders direct to its California office; (2) that the company probably adjusted and paid losses under the policies issued prior to April 15, 1932; (3) the company designated the insurance commissioner as an agent upon whom process might be served; (4) the company issued $24,032 of new policies to residents of the Territory and received the sum of $1,055.57 as premiums upon such new insurance; and (5) the company incurred and paid $4,583.27 for operating expenses. The foregoing items will be discussed seriatim:

(1) Insurance written prior to April 15, 1932 (the date of the company's alleged withdrawal) upon risks within the Territory remained in force and the company's liability continued thereunder and it continued to receive and accept renewal premiums thereon, which said premiums were remitted by the policy holders direct to its California office. In our opinion such transactions, standing alone, do not constitute "doing business" in the Territory within the meaning of the statute. The tax in question, as heretofore pointed out, is a privilege tax. The tax rests upon the foundation that what is done by the company depends upon the Territory's consent. But the continuance of the contracts of insurance already written by the company was not dependent upon

the consent of the Territory. These policies were contracts already made. The Territory could not destroy them or make their continuance, independent of other acts within its limits, a privilege to be granted or withheld Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the Territory's control.

Moreover, the continuance of the obligation and the acceptance of premiums tendered by policy holders was a plain duty of the company—a duty which it could not evade and a contractual obligation that the Territory could not impair.

Inasmuch as the continuance of the obligation did not rest upon the consent of the Territory and was not a privilege to be granted or withheld, it did not, independent of other acts, constitute a doing of business within the meaning of the statute. It could not therefore be taxed. *Provident Savings & Life Assurance Society v. Kentucky, supra; Hunter v. Mutual Reserve Life Insurance Co.,* 54 L. Ed. 1155; *State v. Connecticut Mutual Life Insurance Co.,* 61 S. W. 75; 32 C. J. 997

Acts might be done within the Territory in connection with such old policies (as, for example, in maintaining an office or agents, although new insurance was not written or solicited) which would be considered to amount to the doing of a local business. You may possibly secure additional data disclosing the doing of such business by this company. In such case it would be the actual transaction of business that would furnish the ground of tax exaction and not the mere existence of the obligation under the policies previously written.

If the company employed or had agents, attorneys in fact or representatives within the Territory, or maintained offices, or collected premiums or solicited business in Hawaii it would be "doing business" within the Territory and would be subject to the tax. Such liability

would attach because of the actual transaction of business.

We understand that all of the 1933 renewal premiums on insurance issued prior to April 15, 1932 were remitted by the Hawaii policy holders direct to the company's California office. The receipt, acceptance and collection of such premiums without the Territory did not amount to the doing of business in Hawaii but was business done at the place where the premiums were received. Neither the policies were renewed or continued nor the money paid in Hawaii. Such acts were performed in a foreign state. The postal or express authorities were not the agents of the company but of the insured. Until the money reached the foreign office of the company and was received by it, it was not the money of the company, nor was the insured entitled to a renewal. If the money was lost enroute it was not the loss of the company, but of the insured. *Provident Savings & Life Assurance Society v. Kentucky , supra; Minnesota Commercial Men's Association v. Benn,* 67 L. Ed. 573.

The legislature has the power to provide in substance that foreign insurance companies ceasing to transact business in and withdrawing from the Territory shall continue to thereafter pay the tax on that part of its business which remains in force. *State v. Connecticut Mutual Life Insurance Co., supra. Section* 3473, however, does not so provide.

(2) That the company probably adjusted and paid losses under the policies issued prior to April 15, 1932.

As to the adjustment of losses by agents of the company within the Territory upon insurance written and issued within the Territory after the date of the alleged withdrawal, we are of the opinion that this would be a doing of business within the Territory.

Assuming that the adjustment of any losses, if made within the territory, would constitute a doing of business, we are of the opinion that if the facts as developed

by you show that all losses were adjusted and settled at some office of the company without the Territory, and that the settlements were made by checks or drafts mailed therefrom, this would not constitute a doing of business within the Territory for the reason that such transactions would take place without the Territory and could not be interfered with by the Territory. *Baldwin v. Iowa State Traveling Men's Association,* 40 F. (2d) 357; *Minnesota Commercial Men's Association v. Benn, supra.*

(3) The company designated the insurance commissioner as an agent upon whom process might be served.

Such designation was made prior to the time the company purported to withdraw from the Territory, and although still effective, at least as to business written prior to the company's purported withdrawal, it does not constitute a doing of business in the absence of any actual transaction of business. *Kasprzak v. Mutual Life Assurance Company of Canada,* 1 F. Supp. 915.

(4) The company issued $24,032 of new policies to residents of the Territory and received the sum of $1,055.57 as premiums upon such new insurance.

From the statement filed by the company it appears that the company wrote and issued to residents of the Territory during the year 1933 $24,032 of new insurance and policies. Without a further showing by the company we feel that this item discloses that the company was "doing business" within the Territory within the meaning of those words as used in the statute and that it is subject to the statutory tax for the privilege of doing business here.

However, if, upon proof by the company, you are convinced that the policies in question were not solicited by agents within the Territory but were applied for by mail to a foreign office of the company and were issued from such foreign office to residents of the Territory,

and the policy holders thereafter remitted the premiums due under the policies direct to some foreign office of the company, we believe that the company would not be "doing business" within the Territory. This conclusion presupposes that the insurance was not solicited within the Territory by agents or representatives of the company and that the company maintained no offices here. As stated in *State v. Connecticut Mutual Life Insurance Co., supra:*

> "We think it clear that a foreign insurance company, which issues to a citizen of Tennessee a policy, is not doing business in Tennessee if it receives the application in a foreign state, and without solicitation in Tennessee, and if it, in addition, executes and delivers the policy and receives the premiums in such foreign state. In such case there cannot be said to be any 'doing of business' in Tennessee by the foreign corporation that would subject it to tax. A tax in such cases would be invalid, and such legislation would be unconstitutional and void."

See, also, *Allgeyer v. Louisiana,* 41 L. Ed. 832; *Kasprzak v. Mutual Life Assurance Company of Canada, supra; Minnesota Commercial Men's Association v. Benn, supra; Frawley, et al, v. Pennsylvania Casualty Co.,* 124 Fed. 259, 263; *Rausch v. Commercial Travelers' Mutual Acc. Ass'n,* 38 F. (2d) 766; *Baldwin v. Iowa State Traveling Men's Association, supra.*

We feel that the company should be given the opportunity of showing the way in which the new insurance was solicited, accepted, written and issued and the manner in which the premiums were paid. Such a showing should identify the policies and policy holders and disclose the manner in which the physical examinations of applicants were held together with the names of the physicians making the examinations.

In the absence of such a showing we believe that you should treat the item of $24,032 as insurance solicited and written within the Territory and that you should exact the tax upon the sum of $80,913.62.

However, if, after such a showing, you are con-

vinced that the aforesaid insurance falls within the rule laid down in *Allgeyer v. Louisiana, supra,* and *State v. Connecticut Mutual Life Insurance Company, supra,* we believe that so far as the said new insurance and premiums are concerned, the tax is not due.

(5) The company incurred and paid $4,583.27 for operating expenses.

The company by its statement discloses that it incurred $4,583.27 of operating expenses. The character of these expenses does not appear. The company should be called upon to explain their character. The amount of such operating expenses seems large for a company which claims it was not "doing business" here. If any of the expenses were for carrying on transactions within this Territory, the expenses incurred are convincing evidence that the company was doing business here during the year 1933.

We believe that where this opinion calls for the securing of further facts from the company that such facts should be evidenced by affidavits made by proper officials and by photostatic copies of its records. Such affidavits and records should show in detail the company's operations in respect to Hawaii business. Possibly important data can be secured from Mr. Richard Trent.

We believe that the foregoing covers all of the facts set forth in your letters of the 7th and 14th instants.

Respectfully,

J. V. HODGSON,
Second Deputy Attorney General.

APPROVED:

W. B. PITTMAN,
Attorney General