July 1, 1935.

OPINION NO. 1619

TAXATION, GROSS INCOME; "DOING BUSINESS", WHAT CONSTITUTES.

Where a person who is engaged in no other trade, business, profession or occupation deposits money in a savings account in a bank and receives interest thereon, such person is not "doing business" within the terms of the Gross Income Tax Act.

SAME; SAME.

Where a person, who is engaged in some trade, business, profession or occupation, the gross receipts of which are taxable under the Gross Income Tax Act, deposits money in a savings account

of a bank and receives interest thereon, such person is subject to the Gross Income Tax and should apply for a license.

Honorable William Borthwick,
Tax Commissioner,
Honolulu, T. H.

Sir:

We understand that you desire our opinion as to whether interest received on money on deposit in a savings account in a bank is subject to the tax imposed by Act 141, L. 1935, and as to whether a person having such a deposit should, under section 21 of the Act, apply for and receive a license.

It is difficult, without having actual facts, to answer this question upon any hypothetical set of facts. The answer may differ accordingly as certain facts are presented or absent. For the purpose of this opinion we shall assume two separate sets of circumstances. The first is where a person who is engaged in no other trade, business, profession or occupation deposits money in a savings account in a bank and receives interest thereon. Such cases arise when employees, in receipt only of salaries or wages for the services they render their employer and who carry on no other trade, profession or occupation, deposit a part of such salaries or wages in such an account or where a person engaged in no trade, business, profession or occupation makes a casual sale of property and deposits all or some of the money received in such an account. The second set of circumstances exist when a person, engaged in some trade, business, profession or occupation, the gross receipts of which are taxable under the Act, deposits money in a savings account in a bank and receives interest thereon. Such a case would arise where a producer, manufacturer, wholesaler, retailer, contractor or professional

person, as defined in the Act, deposits a part of his capital in such an account.

We shall consider first the question, namely, whether interest received on money on deposit in a bank in a savings account, belonging to a person engaged in no other trade, business, profession or occupation, the gross receipts of which trade, business, etc., are taxable under the Act, is subject to the tax imposed by the Act and as to whether such a person should apply or and receive a license. This necessitates an examination of the character and provisions of the Act.

It must first be noted that neither the person nor his gross income are specifically exempted under section 4 of the Act. Furthermore, the definition of "gross income" contained in section 1 does not exclude gross receipts from such transactions.

It clearly appears from the title and all provisions of the Act that it is in the nature of an excise tax, the subject of the tax being "the privilege of engaging in certain occupations" and the measure of the tax being the gross income. This being so, the question arises as to whether such a person is exercising any "privilege" or is engaging in any "occupation." The term "privilege" has a very broad meaning. It was stated in *Seven Springs Water Co. vs. Kennedy,* 299 S. W. (Tenn.) 792, 793 that "the term 'privilege' embraces any and all *occupations* that the legislature may in its discretion choose to declare a privilege and tax as such." See also *Western Union etc. Co.* vs. *State of Kansas,* 216 U. S, 1,54 L. Ed. 355; *Ogilvie* vs. *Halley,* 210 S. W. (Tenn.) 645; *In re Watson,* 97 N. W. (S.D.) 463; *Norman vs. Southwestern R. Co.,* 157 *S.* E. (Ga.) 531; *Moore vs. State Board,* 40 S. W. (2d) (Ky.) 349; *State v. Yelle,* 25 P. (2d) (Wash.) 91. The term "occupation" is also extremely broad and includes any business, trade, profession, pursuit, vocation, or calling. *State vs. Welsh,* 251 N. W. (S. D.) 189, 202.

The question now arises as to whether the legislature

has declared that the facts set forth in our first proposition constitute a privilege. If it has not so declare, the magnitude of the deposits or receipts is immaterial. On the other hand, if it has, it makes no difference how small the deposits or gross receipts may be.

Section 2 of the Act imposes "privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income * * *." The term "business," as used in the Act, is defined in section 1 as "all *activities* (personal, professional, or corporate) engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect, but shall not include casual, sales." It is apparent from sections 1 and 2 that some "activity" must be engaged in before a person is engaged in any business. No activity is engaged in when a person who is not otherwise engaged in any trade, business, profession or occupation, deposits money in a bank and periodically is credited with or receives interest thereon. The motive for making such deposits may be and very often is the desire of a person to merely protect his property or to accumulate property without engaging in business or to accumulate sufficient money to commence engaging in business. Clearly such people are not doing business. In our opinion, under such circumstances, the mere receipt of interest on the indebtedness of the bank or on the property owned amounts to no more than receiving the ordinary fruits that arise from the ownership of property. The element of engaging in a business or occupation is lacking. The Act does not purport to tax the mere ownership of property or the legal incidents thereof.

The Act also defines the term "gross income," but that is a different matter, and has nothing to do with the question of whether such a person is engaged in business, except that all portions of the Act are to be considered in arriving at the intention which underlies any part of

it. It is declared in section 1 that the term "gross income" means "* * * all receipts * * * by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees, or other emoluments however designated * * *." This does not enlarge the meaning of the term "business," as therein defined, but merely provides that where a business is in fact engaged in, then its gross receipts shall include all of the receipts above mentioned. *Norman* vs. *Southwestern R. Co., supra.*

Hence under the hypothetical set of circumstances first above mentioned we do not believe that such a person is subject to the payment of the tax and that he need not apply for and receive a license.

The second question as to whether interest received on money on deposit in a bank in a savings account belonging to a person carrying on a trade, business, profession or occupation, the gross receipts of which trade, business, etc., are taxable under the Act, is subject to the tax imposed by the Act must be answered in the affirmative.

Activity is engaged in "with the object of gain or economic benefit." This is the meaning of "business" as used in the Act. Being engaged in business the person is exercising a privilege. The exercising of a privilege is the subject of the tax. The measure of the tax is the gross income. As heretofore pointed out the term "gross income," is, in part, defined as "all receipts * * * by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated * * *." The interest is a receipt by reason of the investment of the capital of the business. Hence it is subject to the tax.

The possession of large assets, including capital on deposit in a bank, is a business advantage of great value. It may give credit which will result in more economical business methods. It may give standing which will facilitate purchases. It may enable a person to

enlarge the field of his activities and in many ways give him business standing. In short, the possession of such capital and the inclusion of income derived therefrom in arriving at the measure of the tax, has a fair relation to the business itself and may contribute materially to its proper and economical conduct. *Pollock* vs. *Farmers Loan & T. Co.,* 157 U. S. 429, 39 L. Ed. 759 and *McCach* vs. *Minehill & S. H. R. Co.,* 228 U. S. 295, 57 L. Ed. 842.

Hence, such a person is subject to the tax imposed and should apply for a license.

This opinion being based upon hypothetical facts is furnished only as a general guide. Inferences or rulings other than upon the matters actually decided should not be taken from it or read into it. The opinion is expressly confined to the questions actually decided. It has been impossible to foresee or decide all cases of the same nature. As cases arise containing more or different facts they should be called to the attention of this department.

So that misunderstanding does not arise and out of an abundance of caution we desire to state that this opinion does not decide that the gross income from loans and investments are not taxable. Such receipts are the income of a "business" within the meaning of the statute, for the making of loans and investments is an activity "engaged in or caused to be engaged in with the object of gain or economic benefit." It requires of one so engaged active and discriminate judgment. Being a "business," within the meaning of that term as used in the Act, the gross income therefrom is subject to the tax. *Laing* vs. *Fox,* 175 S. E. (W. Vs.) 354, 360.

Respectfully,

J. V. HODGSON,
Acting Attorney General.