January 6, 1936.

## OPINION NO. 1630

STATUTES; CONSTRUCTION AND OPERATION.

Principles of *stare decisis* held applicable to insurance commissioner's ruling and followed for eighteen years, and construing words "gross premiums received" in section 6850, R. L. 1935 to exclude "dividends" credited, especially where legislature during such period had amended the law once and re-enacted it without change upon two occasions; statute being doubtful and the insurance commissioner's construction not being palpably wrong.

WORDS AND PHRASES; "DIVIDEND."

"Dividend" in insurance terminology does not represent a bare share of corporate profit apportioned to a stockholder, but is a share of surplus allocated to a policy-holder which represents a return of a portion of the premium not needed to meet losses and expenses, and may include a distribution of earnings.

TAXATION, INSURANCE COMPANIES; LIABILITY OF PERSONS AND PROPERTY.

Section 6850, R. L. 1935 construed as requiring a deduction from the gross amount of premiums received of the premiums or part thereof which have been returned.

STATUTES ; CONSTRUCTION AND OPERATION.

A construction of a statute adopted by the legislature or executive departments



of the Territory and for over eighteen years accepted by the various agencies of the Government and the people, where the meaning of the statute is doubtful and the legislature or administrative construction is not patently erroneous or palpably wrong, will usually be accepted as correct by the Courts.

Ernest K. Kai, Esq.,
Deputy Insurance Commissioner,
Honolulu, T. H.

Sir:

This will acknowledge receipt of your favor of December 9, 1935, requesting the opinion of this department as to whether or not a life insurance company which credits a policy-holder with the excess of premiums collected over the cost of the insurance for the preceding year may be permitted, when computing its tax, to deduct from the "gross premiums received" the amount of the so-called dividends.

Section 6850, 1935 provides in part as follows:

"* * * all life insurance companies shall pay to the treasurer, through the insurance commissioner, a tax of two and one-half per centum on the gross premiums received from all business done within the Territory, during the year ending on the preceding December 31, 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 6849 for conducting the business of insurance in the Territory * * * ".

The life insurance companies referred to are companies operating on the mutual plan. Such companies, we understand, do business upon the following basis. A table of mortality is adopted showing a higher death rate than will probably be realized, and it results at the

end of the year that the amount necessary to take care of death losses is less than that contemplated in fixing the amount of the premiums. A rate of interest is assumed likely to be realized upon the invested assets of the company during the life of the policy, and this rate of interest is in fact lower than that which the company actually realizes. The expenses of conducting the business of the company as well as unforeseen contingencies, such as excessive death losses and investment losses, are taken into account in fixing premiums. The provision for such expenses and contingencies is also greater than is actually required. Upon the assumed factors just stated, the level or contract premium rates are computed; this being done as a measure of precaution, with knowledge that the premium so stipulated will be in excess of the company's requirements. Premiums being so calculated, it results at the end of the year that the company has a surplus arising out of level premiums collected not necessary for its financial needs. Policies issued by such companies contain provisions with reference to the distribution of this surplus. It is usually provided that upon payment of the second annual premium and each year thereafter while the policy is in force, it will be credited with such share of the surplus as may be apportioned thereto by the company, and that each share of the surplus, at the option of the holder of the policy may be (a) payable in cash, or (b) applied in reduction of premiums, or (c) used to purchase a nonforfeitable paid-up addition, or (d) left with the company to accumulate with interest, payable at the maturity of the policy or withdrawable in cash on demand.

The share of the surplus thus apportioned to the policy is commonly called a dividend, although such use of the word is said in some of the cases to be inapt. This use of the word, however, has been so persistent that "dividend" has obtained a distinct and peculiar



meaning in insurance terminology. This meaning is recognized by standard lexicographers as well as in insurance circles. See Webster's New International Dictionary. Such a dividend does not represent a bare share of corporate profit apportioned to a stockholder, but is a share of surplus allocated to a policy-holder which represents a return of a portion of the premiums not needed to meet losses and expenses and may include a distribution of earnings. As thus defined, the word "dividend" will be used in this opinion instead of more cumbersome phraseology sometimes employed.

The portion of section 6850 heretofore quoted was first enacted in the year 1917. It succeeded a similar provision in a former statute. We understand that under both the former statute and this statute that it was the ruling of the insurance commissioner that, in computing the taxes thereby imposed, the amounts credited by an insurance company as dividends might be deducted in arriving at the "gross premiums" received by the insurance company. This ruling has been followed from the enactment of the statute until the present time.

While it seems to us a mistake to say that profits do not enter into dividends at all, nevertheless the dividends under consideration are not like dividends which a shareholder receives upon his stock in a corporation. In the latter case the shareholder takes the dividends without obligation. If a policy-holder, however, takes the dividend, he must return it, if we may use the expression, to keep his margin good.

The assessment of gross premiums received is quite a common method of taxation of insurance companies. Statutes similar to ours have been enacted in many of the States and the same question here presented has arisen in many jurisdictions.

The following cases apparently sustain the proposition that the words "gross premiums received" do not include the aforesaid dividends. *German Alliance Ins.*

*Co.* vs. *Van Cleave,* 61 N. E. (Ill.) 94; *State* vs. *Fleming,* 97 N. W. (Neb.) 1063; *People* vs. *Miller,* 70 *N.* E. (N. Y.) 10; *State* vs. *Hibernia Ins. Co.,* 38 La. Ann. 465; *Mutual Ben. Life Ins. Co.* vs. *Commonwealth,* 107 S. W. (Ky.) 802; *State* vs. *Wilson,* 172 P. (Kan.) 41, L. R. A. 1918D, 955; *State* vs. *Hyde,* 241 S. W. (Mo.) 396; *Commonwealth* vs. *Penn. Mutual Life Ins. Co.,* 97 Ad. (Pa. ) 677; *Commonwealth* vs. *Metropolian Life Ins. Co.,* 98 Atl. (Pa.) 1072; New York *Life Ins. Co.* vs. *Chaves, 153* P. (N.M.) 303; *Penn. Mutual Life Ins. Co.* vs. *Henry,* 70 So. (Miss.) 452; *Mutual Benefit Life Ins. Co.* vs. *Richardson,* 219 P. (Cal.) 1003; *Metropolitan Life Ins. Co.* vs. *State* 144 N. E. (Ind.) 420; *New England Mutual Life Ins. Co.* vs. *Reece,* 83 S. W. (2d) 238; Mutual Ben. Life Ins. Co. vs. *Herold,* 198 Fed. 199; *State* vs. *Jay,* 260 P. (Wyo.) 180.

On the other hand the following cases apparently sustain the proposition that the words "gross premiums received" do include the aforesaid dividends and that they must be included in the measure of the tax. New *York Life Ins. Co.* vs. *Burbank,* 216 N. W. (Ia.) 742; *Northwestern Mut. Life Ins. Co.* vs. *Roberts,* 171 P. (Cal.) 313; *Cochrane* vs. *National Life Ins. Co.,* 235P. (Colo.) 569; *People* vs. *State Treasurer,* 31 Mich. 6; *New York Life Ins. Co.* vs. *Wright,* 122 S. E. (Ga.) 706; *King* vs. *Aetna Life Ins. Co.,* 167 S. E. (S.C.) 12; *New York Life Ins. Co.* vs. *Robertson,* 103 So. (Miss.) 222.

Probably some of the foregoing cases may be distinguished. In truth, there are points of distinction between most of the cases due to the use of language in the various statutes slightly different from the language used in other statutes including our own statute. None of the statutes, however, are dissimilar, and it may be said that the respective propositions heretofore advanced find support in the foregoing authorities.



After a careful examination of the many cases we have the impression that the weight of the decided cases rather favors the proposition that such dividends are not subject to the tax in question. Such seems to be the impression of the law-writers.

In a note to the case of *State* vs. *Wilson,* 172 Pac. 41, L. R. A. 1918-D, 955, the editor makes this statement:

"The question whether or not a tax upon insurance premiums will cover the gross premium fixed, or the amount actually collected and used by the company for insurance purposes, not including money returned to the policy-holders as the difference between the actual cost of the insurance and the fixed premium, generally styled a dividend, depends very largely upon the language of the statute. Generally, however, where the statute authorizes an assessment or a tax upon the gross annual premiums collected by the insurance company it is construed to refer to money actually collected and used for insurance purposes and not to include the fixed premium, where the company returns to the policy-holder or credits upon his annual premiums the difference between the fixed premium and the actual cost of the insurance:"

The foregoing is substantially repeated in 26 R. C. L, 187.

From Cooley on Taxation, section 941, we take the following:

"The most common form of taxation at the present time, both of domestic and foreign insurance companies, is a tax on gross premiums received. * * * There is some conflict as to whether premiums returned are to be deducted, due in part to the different wording of the statutes. Most of the statutes are construed as requiring a deduction from the amount of premiums received of the premiums or part thereof which have been returned, including unearned premiums returned on cancellation of the policy, and also premiums rebated."

See also 61 C. J. 31O.

It should be remembered that the insurance commissioner since 1917 has ruled that "gross premiums received" do not include the dividends. The statute, since it was so construed by the commissioner, has been amended upon one occasion and re-enacted by the legis-

lature on two occasions. During this period from 1917 to 1936 there have been legislative examinations of the office of the insurance commissioner, reports of the insurance commissioner open to the legislature, and the legislature had the means of knowing that the insurance commissioner was construing "gross premiums received" to exclude dividends credited. Notwithstanding the foregoing, the legislature twice re-enacted the law in question without change of phraseology. Under such circumstances we feel obligated to respect the ruling of the commissioner made in 1917 and adhered to for eighteen years.

In *State* vs. *Nashville Baseball Club,* 154 S. W. 1151, 1154, the general rule is stated in this language:

"A construction of a statute or the Constitution, not emanating from judicial decision, but adopted by the legislative or executive departments of the State, and long accepted by the various agencies of government and the people, will usually be accepted as correct by the courts."

This rule has been recognized in many cases and has found frequent application in tax controversies in which it has been announced that the construction placed upon a statute of doubtful meaning by the officer whose duty it is to execute the statute is entitled to great consideration. *Austin* vs. *Shelton,* 127 *S.* W. (Tenn.) 446; *Chattanooga Plow Co.* vs. *Hays,* 140 S. W. 1068.

When such an administrative construction persists for a long period, without legislative action, courts are particularly loath to disturb that construction.

When the legislature re-enacts without change a statute that has been construed by officers charged with its enforcement, and that construction is probably within the knowledge of the legislature, such action of the legislature is generally deemed to be an adoption of that construction. It amounts to a construction by the legislature of the language it has used. Or as said by the Supreme Court of the United States in *Johnson* vs.



*Manhattan Railroad Company,* 289 U. S. 479; 77 L. Ed. 1331, such "re-enactment operates as an implied legislative approval of the prior construction—in other words, as a re-enactment of the statute as before construed".

Unless the meaning of the statute is clear and the administrative or legislative construction inconsistent with that meaning, we find no dissent from the proposition that courts will adhere to such construction long since adopted and prevailing. The decisions are quite numerous and are collected in 59 C. J. 1064 an 25 R.C.L. 1043.

It is impossible to say that the construction of the statute so as to include within the term "gross premiums received" the aforesaid dividends is free from doubt when a contrary view has been taken by so many courts of high repute as heretofore set out. Likewise it is impossible to say that the construction placed upon these words by the commissioner in 1917 was palpably wrong or patently erroneous when that construction is sustained by so much eminent authority. We feel obliged therefore to advise you that "gross premiums received" as those words are used in section 6850, R. L. 1935 do not include the dividends to policy-holders credited on their premiums. This is an application of principles of *stare decisis.*

*New England Mutual Life Ins. Co.* vs. *Reece, supra.*

This opinion is confined to the aforesaid dividends credited by mutual life insurance companies and should not be construed to include other companies or other deductions.

Respectfully yours,

J. V. HODGSON,
First Deputy Attorney General.

APPROVED:

W.B. PITTMAN,
Attorney General.