March 23, 1938.

OPINION NO. 1665

TAXATION, INSURANCE COMPANIES; NATURE OF TAX.

Section 6850, R. L. 1935, imposing a tax of 2½ per cent on gross premiums received from all business done within the Territory by insurance companies, provides for a tax on the privilege of doing business during the year in which the premiums were received and not during the year in which the tax is collected.

INSURANCE COMPANIES: LIABILITY FOR TAX.

Section 6850, R. L. 1935 imposes a tax on the business of insurance companies, and it was not the intention of the legislature to exempt such companies from a tax on its first year operation although the tax is levied and collected the following year.

Mr. Norman D. Godbold, Jr.,
Deputy Insurance Commissioner,
Territory of Hawaii,
Honolulu, T. H.

Dear Sir:

This is in reply to your letter dated February 3,

1938, for an opinion of this department as to whether or not the Pacific Mutual Life Insurance Company of California and/or the Pacific Mutual Life Insurance Company is liable to the Territory of Hawaii for a premium tax of 2½ per cent on the gross premiums received on all business done within the Territory of Hawaii for the calendar year ending December 31, 1936, and from January 1, 1937, to April 15, 1937.

You state that the Pacific Mutual Life Insurance Company of California was, for many years, licensed to do business in the Territory of Hawaii, and that it was last licensed by the Territory for the year commencing April 15, 1936; that on July 26, 1936, the "Pacific Mutual Life Insurance Company" was incorporated and it re-insured the business of the old Company; that the new Company continued to operate in the Territory of Hawaii, under the Certificate of Authority issued the old Company, until April 15, 1937, by collecting premiums through their local agent; that they refused to pay the tax in question on the ground that the premium tax imposed by section 6850, R. L. 1935, is a privilege tax payable prospectively for the privilege of doing business in the ensuing year, but measured by the premiums collected in the preceding year, and that it had paid for its privilege to do business from April 15, 1936, to April 15, 1937, by payment of the tax measured by the gross premiums collected in 1935.

Section 6850, R. L. 1935, relates to annual business and taxation statements, taxes, and penalty, and the part thereof which is important here provides as follows:

"All insurance companies or corporations doing business in the Territory must file with the commissioner annually, on or before April 15 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. * * * 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 Tcrritory, 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. Said taxes shall be due and payable on June 30, succeeding the filing of the statement provided for in this section. Any organization failing or refusing to render such statement and to pay the required taxes above stated, for more than thirty days after the time so specified, shall be liable to a penalty of twenty-five dollars for each day of delinquency, and the taxes may be collected by distraint, and the penalty recovered by an action to be instituted by the commissioner in the name of the Territory, in any court of competent jurisdiction, and the commissioner shall revoke and annul the certificate of authority of the delinquent organization until the taxes and fine, should any be imposed, are fully paid."

The 2½ per cent tax mentioned in section 6850, *supra*, is an excise tax imposed on insurance companies or corporations, whether foreign or domestic, for the privilege of doing business in the Territory of Hawaii. In *Re Taxes C. Brewer & Co., Ltd., 23* Haw. 96; Op. Att'y Gen. No. 1603.

It is imposed for the privilege of doing business in the year in which the premiums were received by the insurance companies, and not for the ensuing year as contended by the Pacific Mutual Life Insurance Company. *Carpenter* v. *People's Mutual Life Insurance Co., et al, 65* P. (2d) 827; *Carpenter* v. *Pacific Coast Insurance Ass'n et al.,* 74 P. (2d) 511 (Cal. 1937); *Carpenter* v. *People's Mutual Life Insurance Co., et al., 74* P. (2d) 508 (Cal. 1937); *Commissioner of Insurance* v. *National Life Insurance Company,* 273 N. W. 592, 280 Mich. 344; *State* v. *National Life Insurance Co.,*

275 N. W. 26 (Iowa 1937); *Gully* v. *Pilot Life Insurance Co.,* 165 So. 610 (Miss. 1936) ; *People* v. *Metropolitan Surety Co.,* 144 N. Y. S. 201.

In *Carpenter* v. *People's Mutual Life Insurance Co., et al., supra,* the People's Mutual Life Insurance Company was doing business in the state of California in 1932. On November 10, 1932, however, the court, on petition of the state insurance commissioner, adjudged the company insolvent, terminated its right to do business, and appointed the insurance commissioner as liquidator. In 1933 the State Equalization Board assessed and levied a tax based on certain percentage of gross premium received by said company from business done by it in California for the calendar year 1932. The state comptroller filed a claim for the tax in question but was rejected by the liquidator. After holding that the tax on the gross premiums received by the People's Mutual Life Insurance Company was a franchise tax for the privilege of doing business in the state, the court held that "the trial court, therefore, was correct in holding that People's Mutual Life Insurance Company became liable for the tax here in question during 1932, because it received in the course of doing business the premiums upon which the tax was imposed, and such tax is for the privilege of doing business during the year in which the premiums were received by the insurance company." The Supreme Court of California granted a hearing in this case upon the petition of both appellant and respondent, *Carpenter* v. *People's Mutual Life Insurance Co., et al.,* 74 P. (2d) 508, and held that the District Court of Appeals correctly decided that the gross premium tax is imposed for the privilege of doing business during the year in which the premiums were received by the insurance company.

In *Carpenter, Insurance Com'r* v. *Pacific Coast Insurance Association, et al., supra,* the Pacific Coast Insurance Association was doing business in the state

throughout the year 1931, and until January 19, 1932, when it was adjudged insolvent and ordered liquidated. The court on page 512 said:

> "(1) The first and main issue is whether a tax and penalties on gross premiums may be assessed in March of a year following that in which the premiums were earned, notwithstanding the fact that at the time of the assessment the company is no longer engaged in business. On this issue the case is governed by Carpenter v. People's Mutual Life Insurance Co., 74 Pac. (2nd) 508, recently decided by this court. Under the holding in that case, it would have been entirely proper for the state to assess and collect its tax and penalties in 1932 for operations of defendant company during the year 1931."

Commissioner of Insurance v. *National Life Insurance Co., supra.* In the case, the state of Michigan filed a claim against one P. J. Lucey, receiver of the National Life Insurance Company, for tax on the gross premiums received by that Company while doing business in Michigan, The National Life Insurance Company did business in the state of Michigan during the calendar year 1933 up to October 17th, 1933, when it was dissolved. The Statute of Michigan provided that every foreign insurance company, admitted to do business, and doing business in this state, shall as a condition precedent to the privilege of doing business, pay to the treasurer of the state of Michigan, on the first day of January, of each year, or before the first day of April next thereafter, a tax of 2 per cent on the gross premiums received in the state, for year ending December 31 of the preceding year. The receiver contended that the 2 per cent tax mentioned above is a franchise tax for the privilege of doing business, and is payable as a condition precedent to the privilege of transacting business for the ensuing year. The court held that "the statute imposes the specific tax upon gross premiums received by the insurance company each year, and its payment is compliance with the tax levy during such calendar year and not for the ensuing

year." The court adopted the following view expressed by the trial judge:

"* * * If the objections are well founded the conclusion obviously follows that the legislature has, in effect, exempted from the specific tax foreign insurance companies during the first year of operation in Michigan. By way of illustration let us assume that a company organized under the laws of another state enters the state, for instance, on the second of January, 1937, continues in business here during that year, and withdraws on the thirty-first of December. Under the theory advanced no specific tax would be due to the state. It does not seem to me that the statute is fairly susceptible of such construction. Obviously the practical result would be a discrimination against local insurance companies. It cannot be assumed that any such result was intended."

In *State* v. *National Life Insurance Co., supra,* the Iowa court held that section 7022 of the Code of Iowa 1935, which provided that every foreign insurance company in the state shall pay a 2½ per cent tax on the gross premium received by it for business done during the preceding year, imposed a tax upon premiums received during the year, payable at the end of the year. It is a levy for business done in the preceding year and not for the ensuing year. The court rejected the contention of the appellee (Insurance Co.) that section 7023, which provided that the Commissioner of Insurance shall not issue the annual certificate unless receipt is presented showing payment of tax computed on premiums received in business in Iowa for the previous year, indicates that the tax is collected for the privilege of doing business for the ensuing year and on page 30 said:

" * * * Section 7023 is in the nature of a club behind the door, a sort of threat or penalty to induce the company to come through with the tax when ascertained, and the amount of the tax can not be ascertained until after the year has ended. In other words, the tax is not imposed for the privilege of continuing in business but for the privilege of engaging in business. The company when it came into this state knew that the law was on the statute books, and that it would be required to meet this burden, and that

the state would demand at the end of the year, for the privilege of doing business, the tax of 2½ per cent of the grow premiums received for that year. There isn't anything hard to understand or difficult of comprehension about it. To say that the Legislature intended that the statute imposing the tax did not begin to operate until the company had been here twelve months is cerainly a strained and labored construction of the simple words of the statute. Under appellee's theory, the company would be exempt from taxation on its first year's business. If the Legislature intended to exempt the foreign insurance companies for one year to induce them to come into the state, it would have been an easy matter to have said something about it."

In *Gully* v. *Pilot Life Insurance Co., supra,* the insurance company in question, qualified to do business on March 1, 1932, attempted to withdraw from the state on or about November 1, 1932. The statute levied a flat privilege tax and a tax of 2¼ per cent on the gross amount of premiums collected on business done within the state. The court said on page 611:

"We think it was the manifest intention of the Legislature to impose a tax on both the straight privilege and a premium tax for the yearly period, and the fact that the appellee withdrew from the state before the period expired did not relieve it of its obligation to pay the premium tax on premiums collected on business written in the state during the yearly period beginning on March 1, 1932, and ending on February 28, 1933."

People v. *Metropolitan* Surety *Company, supra.* In this case, the Surety Company was dissolved in January 1909, and a receiver was appointed. The state instituted this suit to collect a tax on the gross premium received by the company during the preceding calendar year. The court held that the tax levied in 1909 was for the privilege it enjoyed in 1908.

We feel that it was not the intention of the legislature to exempt insurance companies from payment of the 2½ per cent tax on its first year's business. If this is what the legislature had intended it would have expressly mentioned it. We agree with the views expressed by California Supreme Court in *Carpenter* v. *People's Mutual Life Ins. Co., supra,* that "there is no reason

why a tax based upon business done during one year may not be levied and collected in the following year. Payment of the tax may precede the exercise of the privilege or it may follow it, depending on the system the legislature chooses to provide; and where, as here, the tax is in proportion to the amount of business alone it is both equitable and convenient that it be paid after the conclusion of the year in which the privilege is exercised."

The Pacific Mutual Life Insurance Company cites *State* v. *General American Life Insurance Company,* 272 N. W. (Neb.) 555, *McNall* v. *Metropolitan Life Ins. Co.,* 70 Pac. (Kans.) 604, and *In Re Taxes C. Brewer & Co.,* 23 Haw. 96, in support of its conclusion that section 6850, *supra,* imposes a tax payable prospectively for the privilege of doing business for the ensuing year but measured by premiums collected in the past year. The Nebraska and Kansas courts reached this conclusion without any discussion on the point in question and support the minority view. Furthermore, the *Brewer* case, *supra,* does not support the conclusion that section 6850, *supra,* imposes a tax payable prospectively for the privilege of doing business for the ensuing year.

We, therefore, are of the opinion that the Pacific Mutual Life Insurance Company of California and its successor are liable for the premium tax on all business done within the Territory for the calendar year ending December 31, 1936, and from January 1, 1937 to April 15, 1937.

Very truly yours,

S. B. KEMP,
Attorney General.