

June 19, 1939.

OPINION NO. 1713

TAXATION, UNEMPLOYMENT RELIEF; DIVIDENDS OF NATIONAL BANKS, TAXABILITY OF.

The dividends of national banks, local as well as those not doing business in the Territory, are not subject to the unemployment relief tax.

SAME; DIVIDENDS OF FOREIGN CORPORATION, RETURNS AND PAYMENTS OF TAX NOT WITHHELD.

The dividends of foreign companies received by individuals are required to be returned by section 8 of the unemployment relief tax law, and pursuant to section 13 the tax commissioner, by rule, may provide for the return and payment of the tax on dividends of foreign corporation received by corporations, partnerships, associations, trusts, estates and other entities.

SAME; FEES AND COMMISSIONS, RETURNS AND PAYMENTS OF TAX NOT WITHHELD.

Pursuant to section 13, the tax commissioner, by rule, may provide for the return and payment of the tax on compensation, including fees, commissions, bonuses, etc., not included in the measure of the gross income tax.

Honorable Wm. Borthwick,
Tax Commissioner,
Territory of Hawaii,
Honolulu, T. H.

Sir:

With reference to the Unemployment Relief Tax and referring to your letter of May 29 and my letter of May 26, there are matters requiring attention as follows:

(1) The taxability of dividends of national banks (a) domestic, and (b) foreign, in view of the definition of "dividends" in section 1 of Act 209, L. 1933, as amended in 1939.

Prior to the 1939 amendment, the Act referred to the income tax law for the definition of "dividends". The definition of "dividends" which was adopted by the 1939 amendment was copied from the income tax law as originally enacted by Act 44, 2d Sp. S. L. 1932. The 1939 session of the legislature having amended the Unemployment Relief and Welfare Act to provide that references to chapter 65, R. L. 1935 shall include any amendments of said chapter 65, the original definition of "dividends" as contained in chapter 65 evidently was copied into the Unemployment Relief Act verbatim in order to avoid the adoption of the 1935 amended definition of "dividends" contained in the income tax law, chapter 65 having been amended by Act 120, L. 1935.

While the law thus includes dividends of national banks in the definition of "dividends", as was likewise true prior to the 1939 amendment by reference to the income tax law, the law does not purport to apply to any dividends which, under the constitution or the laws of the United States, cannot legally be taxed. (Sec. 23.) Under Title 12 U. S. C. sec. 548, subsec. 2, the shares of a national bank cannot be taxed except by the state

where the bank is located. *Tappan v. Merchants' National Bank*, 19 Wall. 490, 22 L. Ed. 189. The dividends received from national banks not doing business in the Territory cannot be taxed by Hawaii.

Likewise, under Title 12 U. S. C. sec. 548, the Territory cannot tax dividends of the local national bank, having elected another method of taxation by chapter 62a, R. L. 1935, Act 131, L. 1935.

(2) The taxability of foreign dividends received by corporations, partnerships, associations, trusts, estates and other entities. The law provides in section 9 for the assessment and collection of a tax on all dividends paid during the month by any company, local or foreign. With respect to foreign companies, individuals who are in receipt of dividends from such foreign companies are required to make returns by section 8, but it has been contended that this does not apply to corporations, trusts, etc. Section 15 as amended in 1939 clearly contemplates that there are other persons besides individuals liable to file returns of compensation and dividends received by them. By section 13 it is provided that the rules of the commissioner shall provide for the making of returns concerning, and the payment of, any taxes imposed by this chapter, in any situations not specifically covered by this chapter. I believe it will be advisable to frame a general rule covering all payments which are not subject to the withholding provisions, in order to cover this situation and the situation noted in the next paragraph.

(3) Under the law as amended in 1939 the compensation which is subject to tax includes certain fees, commissions, and the like where not included in the measure of the gross income tax. It will be necessary to consider the various situations as they arise and it may be that all such commissions and fees are included in the measure of tax under the general excise tax law. If you discover such fees, commissions, bonuses, etc., escaping taxation, and you are in doubt as to whether

the general excise tax law applies, we will be glad to give an opinion upon the submission of the facts. Meanwhile, a rule broad enough to cover the return and payment of such tax, should any be found due, should be adopted.

Very truly yours,

RHODA V. LEWIS,
Deputy Attorney General.

APPROVED:

J. V. HODGSON,
Attorney General.