TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu

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March 6, 1940

OPINION NO 1729

TAXATION; JUDGES:

Article III, Section 1 of the United States Constitution does not apply to legislative courts and consequently both of the judges of the United States District Court for Hawaii are liable for Unemployment Relief and Welfare taxes and net income taxes without regard to the time of taking office.

SAME; SAME:

Certain judges of the Supreme Court and Circuit Courts, holding terms which commenced in 1939 and after July 1, 1939, are liable for Unemployment Relief and Welfare taxes and net income taxes upon compensation for services rendered during their new terms of office, since Section 80 of the Organic Act does not prohibit the application of such taxes when imposed before the assumption of a new term of office, and the Public Salary Tax Act of 1939 and Act 241, L. 1939 did impose such taxes before the new terms of office commenced.

SAME; SAME:

It is concluded for the present that the Unemployment Relief tax and net income tax should not be applied to the salaries of judges of the Supreme Court or Circuit Courts whose terms commenced before 1939, nor to the salaries of the judges who commenced new terms in 1939 insofar as received for services rendered during the prior terms of office; the Attorney General expressly reserves reconsideration of this question, particularly as to the net income tax, upon further clarification of the status of Evans v. Gore, 253 U. S.. 245.

TAXATION; NET INCOME TAX;
GROSS INCOME TAX:

From a constitutional viewpoint a tax on net income is more apt to be valid than a tax on the gross proceeds, though recent cases tend to uphold taxes on the gross proceeds as well.

STATUTES; CONSRUCTION:

The history of Section 80 of the Organic Act is reviewed.

STATUTES; IMPLIED REPEAL:

The Public Salary Tax Act did not repeal the prohibition contained in Section 80 of the Organic Act as to the diminution of judges' salaries.

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

Dear Sir:

The Hawaii Unemployment Relief and Welfare Act, Act 209, L. 1933, was amended at the 1939 session of the legislature, Act 241 (Ser. A-44) L. 1939, so as to raise the question for the first time as to the liability to that tax of certain judges who receive their salaries from the United States, that is, (1) the judges of the United States District Court for Hawaii; (2) the judges of the Supreme Court; (3) the judges of the various Circuit Courts. This amendment applies to compensation received on and after July 1, 1939.

It further appears that by reason of the decisions of the United States Supreme Court in Graves v. N. Y. ex rel O'Keefe, 306 U. S. 466, and State Tax Commission v. Van Cott, 306 U. S. 511, the Public Salary Tax Act of 1939, c. 59, 76th Congress, 1st Session, and Act 241 (Ser. A-44) L. 1939, the question arises as to the liability of the said judges for territorial net income tax upon their salaries.

You have requested our opinion upon these questions.

In general it may be stated that the fact that the source of these salaries is the Federal government no longer presents an obstacle, Graves v. O'Keefe, supra, Public Salary Tax Act of 1939, supra. The more particular question concerns the application and effect of Article III, Section 1 of the United States Constitution (in so far as District Court judges are concerned) and Section 80 of the Organic Act (in so far as judges of the Supreme Court and Circuit Courts are concerned).

(1) The judges of the United States District Court for Hawaii are not covered by Section 80 of the Organic Act, which does not in terms apply to them. While Article 111, Section 1 of the Constitution of the United States provides:

> "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office."

it is well settled that this provision applies only to the constitutional courts of the United States and not to the legislative courts. Williams v. U. S. 289 U. S. 553; Bland v. Commissioner of Internal Revenue, 102 Fed.(2d) (C.C.A. 7th) 157; Magruder v. Brown, 106 Fed. (2d) (C.C.A. 4th) 428. It also is well settled that the territorial courts are legislative courts, and not "inferior courts" to which Article III, Section 1 of the Constitution applies. American Insurance Co. v. Canter, 1 Pet. 511, 546; O'Donoghue v. U. S. 289, U.S. 516, 535 (a case passing upon the courts of the District of Colombia and distinguishing territorial courts). It seems equally clear that the United States District Court for Hawaii is regarded by the Supreme Court of the United States as a territorial court, not a District Court of the United States, and that it is a legislative court. Mookini v. U.S., 303 U. S. 201, 205. Moreover, the United States District Court for Hawaii and the territoral courts were not created by Congress as constitutional courts, since the term of office in one instance is fixed at six years, and in the other at four years, whereas judges of the constitutional courts "hold their offices during good behavior." Art. III, Sec. 1. U. S. Const., American Insurance Co. v. Canter, supra.

It follows from the foregoing that the judges of the United States District Court for Hawaii in my opinion are liable both for Unemployment Relief and Welfare tax and also for net income tax, regardless of the time of taking office.

(2) The Chief Justice and Associate Justices of the Supreme Court and the judges of the Circuit Courts are mentioned in Section 80 of the Organic Act, which provides:

> "The salaries of all officers other than those appointed by the President shall be as provided by the legislature; but those of the chief justice and the justices of the supreme court and judges of the circuit courts shall not be diminished during their term of office."

The principle involved is undoubtedly the came as that embodied in Art. III, Sec. 1 of the United States Constitution, that is, the independence of the judiciary was intended to be preserved. The leading cases construing the constitutional the constitutional provision are Evans v. Gore, 253 U. S. 245, Miles v. Graham, 268 U. S. 501, and O'Malley v. Wooodrough, 307 U. S. 277. The supreme Court of the Territory has not decided a case arising under Section 80 of the Organic Act, although in 1920 the Court said of the 1901 income tax act that it required the salaries received by the members of that court to be included in the returns of the judges but that such salaries were universally recognized as being nontaxable by virtue of Section 80 of the Organic Act. Frear v. Wilder, 25 Haw. 603, 607. One of the above cited United States Supreme Court cases was decided the same year, and the other two were decided later.

In 1920 in Evans v. Gore, supra, the plaintiff had taken office long before the enactment of the Revenue act of 1918. By the Revenue Act of 1918, 40 Stat 1065, the compensation of all federal judges was specifically included in gross income, although the previous income tax acts had exempted the compensation of judges then in office. Stressing the need of a sound and independent judiciary, the court held that the Constitution forbade an indirect diminution as well as a direct one, and that any law which witheld or took away from a judge a part of that which he had been promised by law for his services was within the prohibition, even though others engaged in private employment were subjected to a like tax. And the court cited Dobbins v. Commissioners of Erie County, supra, (which did not involve a net income tax), and Collector v. Dey, 11 Wall 113, the latter case being one of those overruled by Graves v. O'Keefe, supra. It further was held that the Sixteenth Amendment, relating to income taxes, did not affect the case, since it did not render taxable as income anything not so taxable before, but merely relieved the income tax from the apportionment clause.

The next case was Miles v. Graham, supra, decided in 1925 This case also arose under the Revenue Act of 1918 but involved a judge who took office after that act was enacted. At the time he took office the compensation for the office was fixed at $7500. It was held that the tax, though previously imposed, diminished the compensation contrary to Art. III, Sec. 1. In other words, the court held that when Art. III, Sec. 1 required that the judge receive a compensation which should not be diminished during his continuance in office it meant that the compensation should be fixed in a statute for that purpose, that the compensation as fixed in that statute at the time the judge took office should apply, and should not be diminished by any tax imposed either before or after the judge took office.

The matter last came before the Supreme Court of the United States in O'Malley v. Woodrough, supra, decided May 22, 1939. The revenue Act of 1932 provided that the compensation of a judge taking office after June 6, 1932 should be taxed. The plaintiff took office after the enactment of the Revenue Act of 1932 and after June 6, 1932 the court upheld the tax. In the prevailing opinion by Mr. Justice Frankfurter the history of this question is reviewed and Evans v. Gore, supra, is treated as the basic precedent, despite the fact that that case involved a judge who took office before the tax was imposed. The opinion refers to the articles which have criticized that case and to the many cases (other than Federal) which have rejected it as authority. The court further said of the Revenue Act of 1932:

> "* * * Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article 3, Section 1 of the constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article 3, Section 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material

burden of the government whose Constitution and laws they are charged with administering."

The court further referred to the fact that by the Public Salary Tax Act of 1939, Sec. 22 (a) of the Internal Revenue Code has been amended so as to include in gross income the compensation of judges taking office on or before June 6, 1932, as well as of those taking office after that date. The court remarked that that section was not before it, and then substantially overruled Miles v. Graham which related, as did the Woodrough case, to a judge taking office after the tax act.

It seems to me that the basic reasoning of the court in the Woodrough case is inconsistent with Evans v. Gore as well as with Miles v. Graham. As previously noted the court took pains to point out the shaky foundations of Evans v. Gore, referring to Miles v. Graham only at the end of its opinion, end the court's reasoning in my opinion shows that it considered that the doctrine of Evans v. Gore was before it, although only the factual situation in Miles v. Graham was present. In other words, in departing from Miles v. Graham the court could have taken either of two positions: (1) that Art. III, Sec. 1, does not require the compensation of the judges to be fixed in a statute for that purpose, and that the "compensation" referred to is that in effect at the time the judge takes office as diminished by any tax acts then on the books; or (2) that the compensation to which the constitution refers is that fixed by Congress in the statute for that purpose but that a nondiscriminatory tax does not diminish that compensation. The court's opinion apparently takes the latter position, as can be seen from the above quoted statement as to the position taken by Congress, which the court approved, though perhaps the court relies also on the first position in its reference to the fact that the judge took office after the common duty had been imposed upon him of contributing to the maintenance of the government, the latter part of the quoted statement, however, again taking the position that the compensation was not diminished and holding that it was but a common duty of citizenship to pay the tax. The dissenting opinion treats the majority opinion as intended to destroy Evans v. Gore (307 U. S. 277, at p. 297) and the commentators have so treated it, or have recognized the basic reasoning that the tax does not diminish the compensation. See 122 A. L. R. 1393, 1395; C.C.H. Federal Tax Serving, 1940 Vol. 1, 52.273; 53 Harvard L. R. p. 137; 37 Mich. L. R. p. 1314; Magruder v. Brown, supra, 106 Fed. 2d (C.C.A. 4th) 428, 430; Black v. Graves 12 N.Y.S. 2d 785, aff'd. 24 N. E. (2d) 478 (upholding a tax on the salary of a judge was in office when the tax was imposed.)

Turning now to Section 80 of the Organic Act I am confronted with several preliminary questions before proceeding to apply to Section 80 of the Organic Act the principles to be derived from the foregoing precedents, namely: (a) did the Public Salary Tax Act of 1939 remove the limitation imposed by Section 80 of the Organic Act; (b) what is the intent of Section 80 of the Organic Act in view of the fact that the prohibition against diminution of salaries is contained in a law of no higher authority than the law which fixes the salaries; (c) when did the Unemployment Relief tax and when did the net income tax take effect in relation to the judges' salaries, in general and aside from the meaning of Section 80 of the Organic Act; (d) what, if any, distinction should be made between the Unemployment Relief and Welfare tax, which is a tax on the gross salary as such, and the net income tax, which is a tax on net income from all sources within the Territory; (e) does the law authorize a tax on some of the judges and not on others.

(a) In my opinion the Public Salary Tax Act of 1939 did not remove the limitation imposed by Section 80 of the Organic Act. The Public Salary Tax Act, in so far as it relates to the extension of the powers of the Territory, has the same intent as in the case of the Satates, that is, the removal of the bar which existed because of the federal source of the salary. In that act the territories are treated the same as the states, with one immaterial exception, and there is no reason to find a different purpose in the case of the territories than in the case of the states. In this situation the holding in Evans v. Gore, supra, that the Sixteenth Amendment of the Constitution did not remove the prohibition contained in Art. III, Sec. 1, since the Sixteenth Amendment was intended merely to remove the bar of the apportionment clause, is a sound precedent. Evans V. Gore has not been affected by O'Malley v. Woodrough, supra in this respect.

(b) The third paragraph of Section 80 of the Organic Act, already quoted, is ambiguous on its face. It provides that the salaries of all officers other than those appointed by the President shall be as provided by the legislature, but those of the judges shall not be diminished during their term of office. When this paragraph is read alone the word "those" refers back to salaries of officers other than officers appointed by the President, i.e., salaries fixed by the legislature. But these judges are appointed by the President and their salaries are fixed not by the legislature but by Congress in the Organic Act itself. Yet the clause in question is not so worded that it could.

have been intended as a prohibition on Congress itself, nor could such a prohibition be effective in a law of no greater authority than any other act of Congress, unless on some theory of contract; the contract theory, however, finds no support in the Organic Act, taking into consideration the wording above noted and the fact that this clause is placed in Section 80 while the salaries are fixed by Section 92. The historical background explains this peculiar wording. Article 82 of the Constitution of 1852, Article 65 of the Constitution of 1864, Article 65 of the Constitution of 1887 and Article 83 of the Constitution of 1894 contained a provision, as to the Supreme Court, identical with the provision of Article III, Section 1 of the Constitution of the United States. The Organic Act as originally drawn provided that the judges of the Supreme Court and Circuit Courts were to be appointed by the Governor, and that the salaries of all officers other than those appointed by the President should be as provided by the legislature but those of the chief justice and the justices of the Supreme Court and the judges of the Circuit Courts should not be diminished during their term of office. As so drafted the provision plainly was an adaptation of the previous provision contained in the Hawaiian Constitutions and the same provision in Article III, Section 1 of the United States Constitution, and was of like effect. It then was proposed in the Senate to amend this section so as to provide for appointment by the President. At that time it was pointed out that the salaries should be paid by the United States if the President was to appoint the judges. (Congressional Record, Vol. 3, Part 3, p. 2122, col. 2). The amendment providing for appointment by the President was debated and adopted (Ibid pp. 2180, 2246); later an amendment was offered fixing the salaries of the judges and providing for payment thereof by the United States (Ibid p. 2326, col. 2), and was adopted (Ibid p. 2386, col. 2; p. 4464, col. 2; p. 4733, col. 2; p. 4766, col. 1). Apparently, after the amendments with respect to the method of appointment and salaries had been made no further consideration was given to the diminution clause. The result of this clause having been left as it was will be considered below.

(c) It is necessary to determine when the Unemployment Relief tax and when the income tax took effect in relation to the judges' salaries (in general and aside from the meaning of Section 80 of the Organic Act) in order to ascertain to what extent O'Malley v. Woodrough, supra is determinative. Prior to Act 241, (Ser. A-44) L. 1939 the Unemployment Relief and Welfare Act did not apply to federal salaries. Effective April 12, 1939, Congress authorized such a tax by Section 4 of Title I of the Public Salary Tax Act of 1939, supra, upon compensation received on or after January 1, 1939 (Sec. 207, Title II, Public Salary Tax Act, supra), and the Supreme Court recognizes that Congress may authorize the tax, Graves v. O'Keefe, supra, Van Alden v. The Assessor, 3 Wall. 573, 585. By Act 241 (Ser. A-44) L. 1939 the Unemployment Relief and Welfare Act amended so as to include federal salaries in the scope of the tax. By section 6 of said Act 241 this amendment took effect as of July 1, 1939. Therefore, as to all judges holding terms commencing after July 1, 1939 such terms commenced after the law had imposed the tax burden. It appears that the terms which commenced in 1939 all commenced after July 1, 1939-

As to the net income tax it might be argued that this tax has been a liability of the judges all along, and that hence there was no new tax levy after the commencement of the term of any present judge. While I think this is literally true because Section 2033-2 (i) R. L. 1935 never did confer immunity, as decided in Graves v. O'Keefe, supra, and the 1939 amendment of the income tax law therefore was merely clarifying amendment, still in the administration of the law the tax was not actually applied to any federal salaries received prior to 1939 and the Territory is prohibited from attempting such collection now except in a few instances. Public Salary Tax Act supra, Title II, Sec. 207. Therefore the imposition of the net income tax upon the judges should be regarded as commencing with the compensation received in the year 1939 (the assessment year 1940) and not before.

However, it is not necessary to rely on the ground that the income tax law always did apply to federal salaries to find that the law imposing an income tax on federal salaries was in effect at the time the new terms of the judges commenced in 1939. Section 1 of Act 241 (Ser. A-44) L. 1939 specifically provided that the paragraph of the existing law which recognizes immunity of receipts exempt from taxation under an income tax act of a Territory should not be deemed to apply to compensation paid for or attributable to services performed for the United States. By Section 6 of the Act, said Act 241, L. 1939, took effect upon its approval (May 16, 1939) subject to certain other provisions, one of which was that Section 1 (amending the income tax law) "shall apply to all income taxes due January 1, 1940 or for the taxable year 1939, and also to all compensation received from the United States in other taxable years which the laws of the United States permit the TerritOry to subject to income tax." Section 1 therefore was effective immediately upon approval although it applied only so far as the United States permitted, that is (a) to

compensation received in 1939, i.e. the taxes for the taxable year 1939 which became due January 1, 1940 under the general rules governing territorial income taxes (Oleson v. Borthwick, 33 Haw. 766); also (b) to compensation received in other years which the United States permitted the Territory to tax (see Section 207 of Title II, Public Salary Tax Act, re corporate instrumentalities).

The judges who commenced new terms after the approval of said Public Salary Tax Act and said Act 241, L. 1939, thereof or did take office after they had been charged with payment of the tax, making the situation the same as in O'Malley v. Woodrough, supra.

However, as to the compensation received for services performed during the terms of office held by them at the time of enactment of said Public Salary Tax Act and Act 241, L. 1939 the judges who now hold new terms commencing in 1939 fall into the same category as the judges who now hold tense commencing before 1939. In other words, if Section 80 of the Organic Act forbids the taxation of judges already in office at the time of imposition of a tax, for like reasons it forbids the application of the tax to salaries received for services during a term of office existing when the tax is imposed, even though such term of office is terminated before the tax becomes due or payable. This observation applies both to the Unemployment Relief tax and the net income tax.

(d) The distinction, if any, between the Unemployment Relief tax, which is a tax on the gross salary as such, and the net income tax, which is a tax on the net income from all sources, depends upon the reasoning which governs the interpretation of Section 80 of the Organic Act. There are two lines of reasoning upon which a tax on or applying to the salary of a judge has been supported: (1) that a general, nondiscriminatory tax does not diminish the compensation; or (2) that a net income tax, upon consideration of its particular nature, does not diminish the compensation. Some of the state cases and legal writers which uphold the tax on the salary of a judge stress the particular nature of a net income tax, Poorman v. State Ed., 99 Mont. 543, 45, P. (2d) 307; Du Pont v. Green, 8 Harr. (Del.) 566, 195 Atl. 273; 20 Columbia L. R. 794; while others emphasize the nondiscriminatory nature of the tax and the fact that is a part of a common burden, or they rely on both grounds, Taylor v. Gehner, 329 Mo. 511, 45 S. W. (2d) 59; Black v. Graves, supra, 12 N.Y.S. 2d, 785, aff'd. 24 N.E. (2d) 478; Martin v. Wolfford, 269 Ky. 411, 107 S. W. (2) 267; 30 Yale L. J. 76, 79; 45 Law Quarterly R. 291; 19 Mich. L. R. 117; 43 Harvard L. R. 318. The common burden of the tax was stressed in O'Malley v. Woodrough, supra.

As to a general, nondiscriminatory tax upon the gross salary as such, at least one case supports it, Northumberland County v. Chapman, 2 Rawle (Pa.) 73; but other authorities, including another Pennsylvania case, may be contra, the difficulty being in ascertaining from the cases the character of the tax. See 11 A.L.R. 532, 534. It is assumed in some of the cases which sustain a net income tax that a tax on salary as such would not be valid, Poorman v. State Bd., supra, Martin v. Wolfford, supra. Chief Justice Taney in his letter to the Secretary of the Treasury, 157 U.S. 701, Mr. Justice Field in his concurring opinion in Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, and Attorney General Hoar in his opinion, 13 Op. Att'y. Gen. 161, were dealing with a tax on the gross salary, which they thought invalid. (As to the nature of the taxes involved in these opinions see the opinions and also Revenue Act of 1894, 28 Stat. c. 348, p. 508, Secs. 28 and 33).

The opinion of Attorney General Palmer, 31 OP. Att'y, Gen. 475, points out the distinction between an invalid tax on gross receipts and a valid one on net income under the commerce and exports clauses. It also should be noted that Graves v. O'Keefe, supra, overruled only the salary cases invalidating net income taxes and did not specifically overrule Dobbins v. Commissioner, supra, which involved a tax upon the office, roughly measured by the gross salary. On the other hand there is a tendency in the Supreme Court of the United States to sustain a tax on the gross proceeds or price where previously only a net income tax was sustained. See James v. Dravo Contracting Co., 302 U.S. 134, McGoldrick v. Berwind-White Coal Mining Co., U.S. Sup. Ct. January 29, 1940, 84 L. Ed. (Adv. Sh.) 343; McGoldrick v. Felt & Tarrant Mfg. Co.; U.S. Sup. Ct. January 29, 1940, 84 L. Ed. (Adv. Sh.) 360.

The only conclusion which can be reached is that though a tax on the gross proceeds may also be valid, a net income tax is more apt to be valid. It has special reasons to support it, being further removed from the source of the income.

(e) The last point which must be examined before proceeding to apply to Section 80 of the Organic Act the principles to be derived from the precedents is the question

whether the law authorizes a tax on some of the judges and not on others. It appears that the legislature intended to tax all of the persons who could be taxed and that the invalidity of the tax as to come of the judges would not invalidate it as to others Section 5, Act 241 (Ser. A-44) L. 1935.

In applying the precedents and basic reasons to the interpretation of Section 80 of the Organic Act I shall not proceed beyond the exact holding in O'Malley v. Woodrough, supra. In interpreting the organic Act, I consider myself governed by the decision of the Supreme Court of the United States in Evans v. Gore, supra, regardless of my personal views or the probable future treatment of that case, a matter more fully discussed below.

The Woodrough case clearly supports the net income tax upon compensation received for services performed during the terms of office which commenced in 1939, after the enactment of the Public Salary Tax Act and Act 241, L. 1939, or which shall commence hereafter, for the Woodrough case definitely holds that there is no diminution of salary by such tax at least as to a judge who takes office after the tax act.

The Unemployment Relief tax also is valid as applied to the compensation received for services during the new terms which commenced after July 1, 1939. Section 80 of the Organic Act only provides that the salaries of the judges shall not be diminished during their term of office. Hence, even if it were definitely decided that a tax on the gross salary as such does diminish the salary the Unemployment Relief tax would be valid in instances of new terms of office commencing after the tax was imposed. The case which holds that the date of imposition of the tax is immaterial is Miles v. Graham which has been substantially overruled. Moreover Miles v. Graham rested on language which is not contained in the Organic Act, namely the provision that the judges "shall, at stated times receive for their services a compensation." This was held by Miles v. Graham to be a direction that the compensation should be definitely fixed and not left to be determined after study of the tax acts, though such tax acts were already enacted. This line of reasoning was supportable as applied to Article III, Section 1, of the United States Constitution, since the words "during their continuance in office" were not eliminated thereby but were held to apply to amendments of the salary act. However, as previously noted, the direction to the legislature to fix the compensation is missing from the Organic Act, and Miles v. Graham never could have been the rule as to the Organic Act

As to the judges whose terms commenced before 1939 O'Malley v. Woodrough in its exact holding does not support either tax and I therefore advise you not to apply these taxes to the judges whose terms commenced before 1939. I personally am convinced that the majority of the United States Supreme Court, as shown by its opinion in O'Malley v. Woodrough "intends to destroy the decision in Evans v. Gore" (quoting from the dissenting opinion, 307 U. S. 297) and that eventually it will be settled law that a net income tax at least does not "diminish" the salary of a judge who is required to include his salary with his other income before applying the allowed deductions, whether or not the tax was imposed before the term of office commenced. As to what rule will develop with regard to a tax on a gross salary as such it would be difficult to say under the present decisions; perhaps it eventually will be recognized that a general nondiscriminatory tax even of this character does not "diminish" the salary of a judge, but no decision of this character in the immediate future is anticipated. A case on net income tax should arise under the Federal income tax law, by reason of the amendment of I.R.C. Sec. 22 (a) by Section 3 of the Public Salary Tax Act. When and if it is determined that a certain tax, such as a net income tax, does not "diminish" the compensation of a judge, even though he took office before the tax was imposed, I then will advise you to commence applying that tax to such judges; for after reviewing the history of the Organic Act, I am of the opinion that the word "diminished" in Section 80 means no more than the same word in Article III, Section 1, of the United States Constitution, or similar articles of other constitution.

My conclusions on these questions may be summarized as follows:

1. Both taxes apply to both of the judges of the United States District Court of Hawaii.

2. Both taxes apply to the territorial judges whose terms commenced after July 1, 1939. These include Honorable James L. Coke, E. C. Peters, Francis M. Brooks, A. M. Cristy, and J. Frank McLaughlin. However, neither tax should be applied to these judges on salary received for services rendered during the terms of office held by them at the time of enactment of the Public Salary Tax Act of 1939 and Act 241, L. 1939. The exempt part will be for services rendered as follows:

Honorable James L. Coke, to August 21, 1939;

Honorable E. C. Peters, to August 21, 1939;

Honorable Francis M. Brooks, to August 21, 1939;

Honorable A. M. Christy, to August 30, 1939;

Honorable J. Frank McLaughlin (no prior term of office).

3. The Unemployment Relief and Welfare tax and the net income tax do not apply to the judges whose terms commenced before July 1, 1939. These include Honorable S. B Kemp, Carrick H. Buck, Daniel H. Case, Louis Le Baron, John A. Matthewman, E. E. Stafford, and James W. Thompson; reserving reconsideration of this point, however, and particularly as to the net income tax, upon further clarification of the status of Evans v. Gore, supra.

Respectfully,

(s) J. V. Hodgson
Attorney General

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