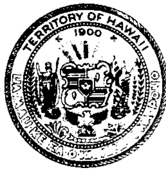


TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

March 20, 1940

OPINION NO. 1730

TAXATION; NET INCOME TAX; EXEMPTIONS:

Compensation received from the United States by officers and enlisted personnel for services in the National Guard is not exempt from income tax under Act 241, Laws 1939.

TAXATION; HAWAII UNEMPLOYMENT AND RELIEF TAX; EXEMPTION:

Compensation received from the United States by officers and enlisted personnel for service in the National Guard is not exempt from the Unemployment and Relief Tax under Act 241, Laws 1939.

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

Dear Sir:

Attention Mr. Earl W. Fase

We acknowledge the receipt of your letter of December 29, 1939, asking us whether or not the compensation received from the United States by officers and enlisted personnel for service in the National Guard is exempt from the Unemployment and Relief Tax under paragraph (c) of Section 3 of Act 209, L. 1933 as amended, and the

net income tax under paragraph (j) of Section 2033-2, Ch. 65, R. L. 1935 as amended. The amendments to these laws are set forth below.

The exemption under the net income tax law is found under Act 241, L. 1939, providing:

> "(j) Compensation received from the United States by officers and enlisted personnel for service in the regular army, navy, or marine corps, including the respective reserve corps of the United States."

Paragraph (j) above, as originally introduced in the legislature, read as follows:

> "(j) Compensation received from the United States by officers and enlisted personnel for service in the regular army, navy, or marine corps."

The exemption under the Unemployment and Relief Tax is also found under Act 241:

> "(c) Compensation received from the United States by officers and enlisted personnel for service in the regular army, navy, or marine corps, including the respective reserve corps of the United States, shall likewise be exempt."

Paragraph (c) as originally introduced provided:

> "(c) Compensation received from the United States by officers and enlisted personnel for service in the regular army, navy, or marine corps, shall likewise be exempt."

It may be observed that in the course of their legislative histories the exemptions were amended by the insertion

of the phrase "including the respective corps of the United States."

It may be noted that in neither the original draft nor the amendment thereto is the National Guard specifically mentioned. If the Guard is to be exempted it must bring itself within the clause immediately referred to above.

A brief reference to the National Defense Act of 1916 will prove helpful to the discussion of the problem. The Act of 1916 (Ch. 134, 39 U. S. Stat. 166) provides: "That the Army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States * * *." Under this Act the Officers' Reserve Corps (Sec. 37), Enlisted Reserve Corps Sec. 55) and the National Guard (Sec. 58) are all provided for.

The Act of 1916 was amended in 1920 by Ch. 227, 41 U. S. Stat. 759. Section 1 thereof was amended to read in part as follows: "That the Army of the United States shall consist of the Regular Army, the National Guard while in the service of the United States, and the Organized Reserves, including the Officers' Reserve Corps and the Enlisted Reserve Corps."

In 1933 the National Defense Act was further amended by 48 U.S. Stat. 153, whereby Section 1 was amended to read as follows:

> "Section 1. That the Army of the United States shall consist of the Regular Army, the National Guard of the United States, the National Guard while in the service of the United States, the Officers' Reserve Corps, the Organized Reserves, and the Enlisted Reserve Corps."

The foregoing excerpts from the National Defense Act serve to illustrate that when Congress set up the National Guard it constituted it an entity separate and apart from the Reserve Corps. The Act as a whole contains many other illustrations which show that the Reserve Corps and the National Guard are distinct bodies.

We note, however, that the National Defense Act makes all officers of the National Guard of the United States reserve officers (48 U. S. Stat. 155) and speaks of the National Guard as "a reserve component of the Army of the United States." (48 U. S. Stat. 155) These provisions, however, do not make the National Guard a part of the Reserve Corps.

The fact that the framers of the exemption statutes made no mention of the National Guard is persuasive evidence that they did not intend to include it. It would have been a simple matter to have specifically named the National

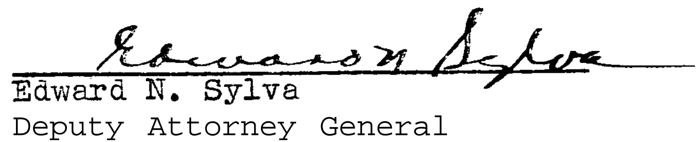
Guard just as the regular army, navy and marine corps were so mentioned. The original bill as it stood certainly did not include the National Guard. When it was amended by the insertion of the phrase "including the respective reserve corps of the United States," we cannot see how the legislature had in mind the National Guard, for they again failed to name it specifically. Whatever may be included in this phrase, we are certain it does not cover the Guard. In all probability the phrase embraces the Reserve Corps of these three arms of the service. The use of the words "including" and "respective" seem to bear this out.

Statutes granting exemptions are most strictly construed and one attempting to bring himself within the exemption must show by clear and convincing proof that the legislature intended to apply the exemption to him. Our Supreme Court in In Re White, 33 Haw. 217 (1934) lays down the rule on page 218:

> "It is a well-known rule of law applicable here that exemptions from taxation must be strictly construed against the exemption. Berryman v. Board of Trustees of Whitman College, 222 U. S. 334. And it is also fundamental that the burden of proof is upon the party claiming an exemption to make it entirely clear that by contract or otherwise the property is not subject to taxation. Metropolitan St. Ry. Co. v. New York, 199 U. S. 1. The rule also is, exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power unless its intention to do so has been declared in clear and unmistakable terms. St. Louis v. United Ry. Co., 210 U.S. 266, 275.

We therefore feel that the legislature did not intend to include officers and enlisted personnel within the exemption clauses under consideration, and therefore hold that they are not entitled to the exemptions under Act 241, L. 1939.

Respectfully yours,



Edward N. Sylva
Deputy Attorney General

APPROVED:

Attorney General