



TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

45, 5

November 12, 1940

OPINION NO. 1751

TAXATION; PUBLIC UTILITIES TAX;
LIABILITY TO TAX:

The liability of a company to public utilities tax does not depend upon its having a certificate of public convenience and necessity under Section 7958, R.L. 1935, it being sufficient that it falls within the definition of "public utility" contained in Section 7940, R.L. 1935.

SAME; SAME; EXEMPTIONS; MEASURE OF TAX:

The public utilities tax is to be computed upon the full twelve months gross income of the preceding year even though the company was exempt from the tax during a portion of the preceding year.

SAME; SAME; SAME; SAME:

The public utilities tax is to be computed upon the full twelve months gross income of the preceding year even though the statute to which reference is made in the tax act stated that the term "public utility" should not include the company until June 30 of said preceding year.

SAME; SAME; NATURE OF TAX; TAX YEAR:

The Public Utilities Tax is in the nature of a property tax, imposed as of January 1 for the tax year then commencing, measured by the gross

income from public utility business of the preceding year computed under the law as it reads as of January 1 of the tax year.

SAME; GROSS INCOME TAX; EXEMPTIONS; PUBLIC UTILITIES:

The exemption from gross income tax upon the ground that the taxpayer is a public utility does not apply during any part of the year unless the taxpayer is subject to public utilities tax for the tax year in question.

SAME; SAME; TAX YEAR:

The tax year for gross income taxes is the year ending December 31 during which the gross income is received or accrues.

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

Dear Sir:

Your letter of October 18 presents the following questions:

1. A corporation starts operating a business which comes under the definition of a public utility in January 1937, and applies for a certificate from the Public Utility Commission. A certificate is issued in October 1939. Under these circumstances, when did this corporation become liable to public utility taxation? If the answer is January 1, 1940, should the full twelve months of the preceding calendar year be used

as a base or only the three months' operation from October to December?

2. Certain public utilities received tax exemptions under and pursuant to Section 14 of each of the following acts:

Act 24, L. 1927, ratified by Congress Mar. 2, 1928,
45 Stat. 159

Act 29, L. 1929, ratified by Congress April 12,
1930, 46 Stat. 161

Act 256, L. 1931, ratified by Congress March 5,
1932, 47 Stat. 61

Act 268, L. 1931, ratified by Congress February
15, 1933, 47 Stat. 807

Such exemptions all expired on a date five years from the approval by Congress. In assessing the public utilities tax for the year following the expiration of the exemption should the full twelve months' operations of the preceding year be used as the measure of tax, or only the period from and after the expiration of the exemption?

3. In measuring the tax upon Inter-Island Airways, Limited, for the tax Year 1936 based upon 1935 gross income, should the full year's operations be included, or only the period from and after June 30, 1935, upon consideration of the proviso of Section 7940, R.L. 1935?

You also have presented an additional question with respect to gross income tax, as follows:

4. Referring to the public utilities which are

the subject of question No. 2, would the payment of public utilities tax measured by gross income from public utilities business of the preceding year entitle such a public utility to a refund of gross income tax paid in the preceding year; upon (a) the full year's operations or (b) the portion of the period after the special statutory exemption expired?

In reply to these questions we respectfully advise you as follows:

1. A company may be a public utility within the meaning of Section 7940, R.L. 1935, and consequently subject to public utilities tax (Section 2141, H.L. 1955), even though said company does not have a certificate of public convenience and necessity under Section 7958, R.L. 1935. The holding of such certificate is necessary in order that the operations of the company may be lawful, but such certificate is not necessary in order that the company may be classed as a public utility under Section 7940, 2.L. 1935. Assuming that the company commenced business as a public utility after January 1, 1937 it would become subject to the public utilities tax on January 1, 1938.

2. The group of public utilities which were exempted for five years under the acts above cited received

their exemption in the following form:

"Section 14. Exemption from taxation. That all property of every kind and nature, forming or used as part of such electric system, including this franchise, shall be exempt, except as provided in Section 13, from any and all taxes under the Territory of Hawaii until the expiration of five years from and after the date of approval of this Act by the Congress of the United States."

Section 13, referred to by this section, does not affect the case.

Although this Section 14 was framed as an exemption of the property from taxation, when the public utilities tax was imposed by the 1932 act such property tax exemptions were deemed sufficient to exempt these companies from the public utilities tax upon the theory that the public utilities tax was in the nature of a tax on the property. Ops. Atty. Gen. (1935) No. 1615.

These companies all became subject to public utilities tax as of January 1 following the expiration of the applicable exemption, and the tax in each instance should be measured by the full twelve months' gross income of the preceding year. For example, where the exemption expired February 15, 1938 the public utility became subject to public utilities tax as of January 1, 1939, measured by the 1938 gross income. The tax is in lieu of the property taxes which otherwise would accrue as of January 1, 1939. It is a tax for 1939, assessed as of January 1, 1939, and the fact that the tax is measured by 1938 gross income does not make it

a tax for 1938. Oahu Railway and Land Co. v. Waterhouse, S.P. 193, Circuit Court, First Circuit, June 29, 1933; Oleson v. Borthwick, 33 Haw. 766 (concerning the income tax law which is made applicable to the public utilities tax by Section 5 of Act 43, 2d Sp. S.L. 1932, Section 2144, R.L. 1935). By Act 152, L. 1933, the Legislature specifically stated that in enacting the Public Utilities Tax Act to take effect on and after January 1, 1933 it intended to impose a tax in the year 1933 measured by 1932 gross income. Therefore it is clear that the tax is imposed for the year in which it is due and payable, as of January 1, though measured by the previous year's income, and it is not a tax on the previous year's income deferred as to payment until another year.

If receipts to February 15, 1938 were to be excluded from the measure of the 1939 tax it would have to be upon the theory that a tax on the same would be a 1938 tax on the property from which the income was derived. This is not the case. The tax due as of January 1, 1938 (measured by 1937 gross income) was the equivalent of the 1938 property tax, and this exemption already has been enjoyed.

3. Inter-Island Airways, Limited, was excluded from the jurisdiction of the Public Utilities Commission by Act 100, L. 1927, which added to the section defining the

term "public utility" (then Sec. 2208, R.L. 1925) the following proviso:

"Provided, however, that the term 'public utility' as used in this chapter shall not, until and after June 30, 1933, mean and include any person, firm, co-partnership or corporation in so far as such person, firm, co-partnership or corporation owns or operates an aerial transportation enterprise solely as a common carrier."

By Act 202, L. 1933 this provision was amended so as to specify June 30, 1935 instead of June 30, 1933. Act 32, Sp. S.L. 1933 also amended Section 2208, R.L. 1925, since which time this proviso has read:

"* * * provided, further, that the term 'public utility', as used in this chapter shall not until, but shall after, June 30, 1935, mean and include any person, insofar as such person owns or operates an aerial transportation enterprise solely as a common carrier. "

This proviso was not enacted as a tax exemption and antedates the Public Utilities Tax Act. The purpose was to exclude air carriers from the jurisdiction of the Public Utilities Commission for the period stated in the Act. House Journal, 1927, p. 438.

The position taken by the Airways is that its 1936 public utilities tax should be measured by only half its gross income, that is, by its gross receipts from and after June 30, 1935. This position is based upon the proposition that the tax is measured by the gross income from the public

utility business, and that "for the first half of 1935 these gross receipts by definition are not from public utility business." In my opinion this position is not tenable. The result would be that for 1936 the company would pay only half its "in lieu" tax, though subjected to the full property tax during all prior years when it did not pay public utilities tax. This unreasonable result is not required by the statute.

The statute does not say that an air carrier shall not be classed as a public utility except for the period from and after June 30, 1935. That the statute does say is that "the term public utility', as used in this chapter shall not until, but shall after, June 30, 1935, mean and include" a carrier by air. In other words, up until June 30, 1935 the statute is to be read as though it contained the words "except air carriers" after that date it is to be read without the exception. The statute must be applied exactly the same as if it had been amended on June 30, 1935.

The nature of the tax has been reviewed above, in connection with your second question. Oleson v. Borthwick, supra, answers the point at issue. It was there held that though the income tax law up until Act 120 (Ser. A-45) L. 1935 provided that dividends "shall not be included in gross income", and though the tax in question was assessed upon

dividends received in 1934, the assessment was correct because the amendment was made effective as of January 1, 1935. The tax was based upon net income, which the act said meant gross income less deductions. Applying the reasoning presented by the Airways in this matter the tax should not have applied, since the 1935 tax was based on gross income for 1934 (less deductions) and gross income did not include dividends until January 1, 1935. Yet the court held otherwise. So here, the tax for 1936 is based upon 1935 gross income from public utility business, which includes all of the 1935 income although this expression did not include the Airways gross income until June 30, 1935. The reason is, as stated in Oleson v. Borthwick, supra:

"An amendment to a statute as to all acts subsequently done so thoroughly becomes a part of the original statute that the latter will be construed as it stands after the amendment is introduced."
(p. 775)

The 'tax date' was January 1, 1935. * * *

"The law, as it existed at that time, specifically imposed a tax on corporate dividends, hence it was the plain official duty of the commissioner to assess the tax involved in this submission."
(p. 787)

The court said further that it would not have been necessary to date the act back to January 1, 1935 to catch all dividends received in 1935 and that an amendment enacted any time in 1935 would have subjected all 1935 dividends to the 1936 tax.

(p. 777). Clearly, then, a change in the law as to the extent of the term "gross income from utility business" effective June 30, 1935 subjects all 1935 gross income to the 1936 tax, applying the law as changed and in effect on January 1, 1936.

4. As previously stated, the public utilities tax assessed as of January 1, 1939, for example, is a tax for the year 1939, though measured by 1938 gross income. The gross income tax upon 1938 gross income, on the other hand, is a tax for the year 1938. Section 10 of Act 141 (Ser. A-44) L. 1935. Each taxpayer receives his license for the current year upon condition that he shall pay the taxes accruing under the license i.e. upon the gross income of the licensed year. Section 21, Act 141, L. 1935. The provision that the gross income tax shall not apply to: "Public utilities * * * with respect to their public utilities business, upon the gross income from which they pay an annual tax under the provisions of the Revised Laws of Hawaii 1935, chapter 69" (See. 4 (1) (c), Act 141, L. 1935) naturally refers to payment of the annual public utilities tax for the year for which exemption from gross income tax is sought. So also the Public Utilities Tax Act in providing that the public utilities tax shall be imposed in lieu of other taxes naturally means in lieu of other taxes for the

particular tax year. It is generally assumed and understood that exemptions from one tax because of payment of another are to be judged according to liability for the other tax for the tax. year in question. See Re Taxes H.M. von Holt, 28 Haw. 246, 254.

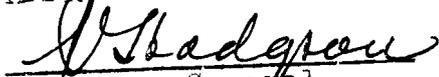
Accordingly, a company which is net subject to public utilities tax for the tax year 1938, for example, because it was exempt from property taxes as of January 1, 1938, is subject to gross income tax for the year 1938. When it lost its exemption on February 15, 1938 its gross income tax liability nevertheless did not cease until December 31, 1938, because it did not "pay an annual tax under chapter 69" until 1939. Therefore, payment of public utilities tax in 1939 would not entitle the taxpayer to any refund, and it is not necessary to go into the meaning of the refund provisions of the law in this connection. No double taxation results because the 1939 tax is in lieu of property taxes and other taxes for 1939, even though the 1938 income is used as the measure of the tax.

Respectfully,



Rhoda V. Lewis
Deputy Attorney General

APPROVED:


Attorney General