TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

2, 45, C-5395
November 3, 1941

OPINION NO. 1787

TAXATION, GENERALLY;
SAME, POLL TAXES;

Refunds:

Poll taxes collected prior to the enactment of Act 10, L. 1941 from persons exempted by that Act cannot be ordered to be refunded by the Legislature at its Special Session of 1941.

APPROPRIATIONS;

Public purpose:

Public money may be expended only for a public purpose and there must be at least a moral obligation to support the recognition of a claim against the government.

TAXATION, GENERALLY;

Exemptions:

The allowance of tax exemptions is a matter of legislative policy and there is no moral obligation to allow such exemptions.

STATUTES;

Validity; partial invalidity:

A statute which makes a retroactive tax exemption as to taxes already due and payable, and provides for refunds to persons who have paid, which refunds cannot legally be made, is also invalid insofar as it provides for the cancellation of the tax delinquencies of those who have not paid, since this provision is not severable from the refund provision.

Honorable James D. Reid
Auditor, Territory of Hawaii
Territorial Office Building
Honolulu, Hawaii

Dear Sir:

Act 76, Sp. S. L. 1941 was passed by the Legislature over the Governor's veto. A copy of the veto message is annexed hereto. You have requested our opinion as to the validity of this Act.

This Act provides that additional exemptions from the poll tax enacted by Act 10, L. 1941 are made effective as of January 1, 1941 and that refunds shall be made out of the general fund if poll taxes have been collected from exempt persons in 1941.

Said Act 10, L. 1941 added the following poll tax exemptions:

(1) A person in attendance at school outside the Territory.

(2) A person on ordered active duty as a member of the national guard, naval militia, or organized reserves (officers or enlisted).

(3) A person inducted or drafted under the Selective Service Training Act of 1940, or any other similar act.

(4) A person on active service in the Coast Guard.

(5) A convict in the territorial prison.

(6) A person who, on January 1 of the tax year, has been absent from the Territory for a year or more.

In my opinion the refunds provided for by the bill can not legally be made. In Smithies v. Conkling, 20 Haw. 600, 604, and 20 Haw. 675, it was held that the Legislature cannot refund taxes which have been lawfully collected and where no moral obligation to refund them is involved. The court expressed the opinion that a moral obligation was involved as to a portion of the taxes, pro rated from June 14, 1900, when the license law under which the taxes were collected came into conflict with the Constitution

of the United States; being a tax upon the selling of imports it became void from and after the effective date of the Organic Act. The court referred to "the moral obligation which the Legislature felt was owing to the claimants by reason of their having been required to pay license fees for which the government gave them nothing in return." The court further said that: "The failure of the quid pro quo, however, did not occur till June 14, 1900, up to which date the license holders received what they paid for * * *", and held that the portion of the taxes covering the period up to June 14, l900, could not be refunded.

The present situation involves no failure of the quid pro quo. The taxes were collected from the taxpayers as "inhabitants" of the Territory, which, as this law has been construed, means that on January 1, 1941 the taxpayers were domiciled in the Territory. Op. Let. Atty. Gen (December 11, 1935 F.45,)No. 1533. Their domicile was not lost by any of the facts which, by Act 10, L. 1941, placed them in an exempt class. There was no change in circumstances such as was involved in Smithies v. Conkling, supra, whereby the taxes were rendered illegal and uncollectible. The granting of such exemptions was and is purely a matter of legislature policy, not moral obligation.

In the case of In re Guiteras' Estate, 204 N.Y. S. 267, 270, in holding invalid a retroactive tax exemption statute which provided for refunds and the cancellation of tax delinquencies the court said:

> "* * * If the Legislature may cancel the taxes of charitable corporations retroactively or direct a refund, it could, for example, authorize the return of the income tax paid in 1922 to persons within designated classes, or cancel state taxes due from specifically named corporations or individuals, thereby transferring the burden of taxation to less favored classes.* * *"

The very situation which the court pictured to exemplify the evil involved in that statute is present here. The fact that a New York constitutional provision was involved in that case is immaterial in view of the fact that the same fundamental law applies in the Territory, namely that moneys may not be drawn from the treasury to benefit private persons, but only for public purposes. In re Queen's Hospital, 15 Haw. 663; In re Cummins, 20 Haw. 518.

The refunds cannot be supported as a bonus to members of the armed forces of the United States. While bonus laws have been supported in some cases (7 A.L.R. 1636; 13 A.L.R. 587; 15 A.L.R. 1359) this law is not such a law. The refunds attempted to be made involve

many classes of persons besides the armed forces; moreover, no refund is provided for the members of the regular army, navy and marine corps exempted by Act 239, L. 1941.

As to the taxes which have not been collected and would be forgiven by this bill, this portion of the bill cannot stand alone, even if it were in itself a valid provision which in my opinion it would not be. However, it is unnecessary to go into that point since a court would undoubtedly conclude that the Legislature would not have made the exemption retroactive had it known that taxpayers who had paid the tax could not receive the same benefit as those who had not paid; this of course would invalidate the whole Act under the well known general rule. 11 Am. Jur. Sec. 155, p. 842. To forgive the delinquent taxpayers since relief cannot be afforded to those who have paid would result in an unjust discrimination. In re Stanford's Estate, 126 Cal. 112, 58 Pac. 462, 465; State ex rel Matteson v. Luecke, 260 N.W.(Minn.) 206; State v. Hunt, 9 N.E. 2d (Ohio) 676, 683, aff'd l0 N.E. 2d 155; but see Demoval v. Davidson County, 87 Tenn. 214, 10 S. W. 353. The Act as passed did not provide for such discrimination, and a court would not presume that the Legislature would have passed the Act without the refund provision.

No opinion is expressed as to whether or not this Act makes a sufficient appropriation for the refunds if they validly could be made.

Respectfully,

/s/ Rhoda V. Lewis

Rhoda V. Lewis
Deputy Attorney General

APPROVED:

/s/ [illegible]

Attorney General