TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

45

July 29, 1942

OPINION N0. 1822

TAXATION: GR0SS INCOME TAX (ACT 141, L. 1935): CONSUMPTION TAX (ACT 160, L. 1935): INTERSTATE COMMERCE: DUE PROCESS OF LAW.

Conclusions reached in Opinion No. 1717 of July 18, 1939 as supplemented and partly superseded by opinion letters of September 30, 1940 (No. 1289), July 28, 1942 (No. 932), and October 22, 1941 (No. 753), re interstate commerce and re consumption tax on contractors and on buyers of automobiles for mainland delivery, summarized.

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

Dear Sir:

Since our opinion of July 18, 1939, No. 1717, we have written you two opinion letters, dated September 30, 1940 (No. 1289) and July 28, 1942 (No. 932), and all of these opinions and letters concern interstate commerce problems in connection with the gross income tax and consumption tax. The two opinion letters reviewed the more recent authorities at considerable length and supplemented the opinion of July 18, 1939, superseding it in part.

Without duplicating those letters by going into authorities and reasons we will here summarize the conclusions reached in those three opinions and opinion letters. We also have included in this summary the conclusion reached in our opinion letter of October 22, 1941, F. 45, No. 753, re computation of the consumption tax in certain cases.

1. The first consideration is the practical one of the collectibility of the tax and the person to be assessed, i.e.:

(a) The tax can be collected from non-resident corporations doing business through one or more local employees under the circumstances already outlined to you.

(b) Where the sales representative of a mainland firm is a commission merchant or broker, not an employee, he himself is the taxpayer, as we advised in our letter or September 30, 1940.

(c) Local firms and persons handling their own sales business in the Territory of course are the proper persons to assess.

(d) A bona fide purchasing agent retained by the buyer, not the seller, is not liable to tax.

2. On July 18, 1939 we advised you that local firms making sales to buyers who receive local delivery are

liable to gross income tax even though the orders are filled by shipments from the mainland. On September 30, 1940 we advised you that it makes no difference whether or not goods of the same type are carried in stock, whether or not the price is f.o.b. a mainland point,or whether or not the price is lower than would apply on a sale from local stocks.

3. On September 30, 1940 we advised you that the gross income tax applies to sales locally solicited by mainland sellers through their own employees or through commission merchants or brokers, where the local representative also does other acts, such as passing on credit, handling complaints, or collecting the purchase price, and where there is local delivery of the goods. As to who should be assessed, see paragraph 1.

4. On July 25, 1942 we advised you that subject to the practical limitations imposed by problems of collectibility (see paragraph 1) the gross income tax applies where there is an established course of business done through local solicitors, and that the solicitation itself may be the subject of the tax provided there is local delivery of the goods.

5. On July 20, 1942 we further advised that in deciding which orders have been locally solicited a showing that the purchaser instead of the sales representative dropped

the order in the mail would not be decisive. If the local representative is paid on a commission basis there should be included as local sales all sales as to which commission was locally earned. In other cases it will be necessary to consider whether and to what extent catalogue sales are promoted or serviced by the local representative.

6. The term "local delivery" as used throughout this opinion means the actual transfer of possession to the buyer, whether effected by means of an independent carrier or by the seller. Constructive delivery through shipment on an independent carrier on consignment to the buyer is deemed immaterial.

7. In our opinion letter of September 30, 1940 we also considered the following situation:

> "(9) The B. Company is a motor car dealer in Honolulu. A resident of Honolulu turns in his car and receives a credit on a new car which he arranges to have delivered to him personally on the mainland. In the contract of sale the B. Company appears as the seller. The contract is made in Honolulu. The B. Company arranges to have the car delivered at a mainland factory or through a mainland automobile dealer who receives a "service charge" from the B. Company for getting the car ready and servicing it. The price is the price at point of delivery, not the Honolulu price. The price is paid in Honolulu. The Honolulu resident brings the automobile back with him to Honolulu."

We advised you that gross income tax did not apply after consideration of the following circumstances, i.e.:

that the delivery of the car on the mainland appeared to be more than a formal part of the transaction, as it involved the servicing of the car for the customer and the acceptance of the car by the customer as a satisfactory performance of the contract with the remedy thereafter limited to action on the warranties; that the delivery took place at an established place of business on the mainland and might there be subjected to tax; and that so far as appeared, delivery was taken outside the Territory not to evade the Territory's tax but for the buyer's convenience. We further advised you that consumption tax would apply when and if the buyer brought the car back to Hawaii. On October 22, 1941 we advised you that upon such proof as you deem suitable as to the amount of the bona fide trade-in credit for the old car and as to the acceptance of responsibility by the local dealer for the gross income tax in connection with the sale, if any, of the car traded in, the buyer may be allowed credit for the trade-in against the value subject to consumption tax.

8. On September 30, 1940 we advised you that contractors are subject to the consumption tax where they buy materials in such manner that the gross income tax does not apply. However, they may not be subjected to more tax than would have applied to the transaction had the materials been bought locally.

9. The so called "Tax Primer" is not an officially adopted set of rules -- it is merely an information bulletin. Since that information was circulated radical differences in interstate commerce doctrines have been announced by the Supreme Court and applied in the opinions of this office.

10. Section 3 of the gross income tax law, Act 141, L. 1935, as amended, does not specifically exempt interstate commerce from tax but only to the extent of Constitutional requirements. The fact that interstate commerce is being done does not conclude the tax question. In tax cases the question is not whether interstate commerce is involved but whether there is a prohibited burden on that commerce.

11. Questions as to whether mainland firms doing business without gross income licenses would be liable to prosecution for doing business without a license, or could be enjoined from doing business without a license, have not been considered. The tax provisions are separate and divisible from the licensing features of the law.

Respectfully,

Rhoda V. Lewis,
Deputy Attorney General

APPROVED:

(s) Ernest H. Kai

Attorney General