TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

45

December 5, 1942

OPINION NO. 1830

TAXATION; NET INCOME TAX; PUBLIC WELFARE TAX.

Perquisites are part of the compensation subject to tax unless furnished solely for the convenience of the employer.

SAME; SAME; SAME.

If perquisites are furnished under a contract, or if cash payments are made in lieu of perquisites, such facts in themselves demonstrate that the perquisites are not being furnished solely for the convenience of the employer. There are other cases where the perquisites constitute inducement to the employment or are furnished to the employee as a matter of right. In all such cases the perquisites are part of the compensation and taxable. as such.

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

Dear Sir:

This opinion is in reply to your letter of May 8, in which you request advice as to the application of the net income tax and public welfare tax where room, board, laundry and similar perquisites are furnished: (1) under a written contract therefor; (2) in the absence of a written contract

therefor. You also request our advice as to (3) the treatment of cash payments made in lieu of perquisites; and (4) the method of collecting public welfare tax due with respect to payments of compensation not made in cash.

The income tax law, Chapter 65, R.L. 1935, provides that "gross income" includes:

> "* * * all gains, profits and income derived or received from any and every source in the Territory, whether or not connected with a trade or business * * * and also all commissions, fees, wages, salaries, bonuses, and every and all other kinds of compensation paid for or attributable to personal services * * *." (R.L. 1935, Sec. 2033-1.)

The public welfare tax law, as revised by Act 213, L. 1941, provides that "compensation" includes:

> "* * * commissions, fees, wages, salaries, bonuses, and every and all other kinds of compensation paid for or attributable to personal services * * *." (Public Welfare Tax Law, Sec. 1 (c).)

The general rule is that where perquisites are furnished solely for the convenience of the employer the value thereof does not constitute income to the employee, but in other instances the gain to the employee through the reduction of his living or other expenses is recognized as constituting part of his compensation. Compare Ralph Kitchen, 11 B.T.A. 855, and Charles A. Frueauff, 30 B.T.A. 449, with Arthur Benaglia, 36 B.T.A. 838, and Green v. Kanne, U.S.D.C. Hawaii, March 12, 1938. Differences in the conclusions reached in the above and other cases are occasioned by differences in views as to the facts rather than as to the law.

This matter, as you know, was the subject of two opinions by Attorney General Lymer, in the first of which he

concluded that board and lodging received by employees was taxable income. (Ops. Atty. Gen. (1925-26) No. 1260, Oct. 6, 1925.) In his second opinion, No. 1336, March 30, 1926, Attorney General Lymer reiterated:

> "I still hold to the correctness of my views expressed in said opinion, and reiterate my belief that the value of room and board, etc., furnished as part of the compensation of the employee, and not furnished as a matter of the employers convenience, is subject to the provisions of our income tax law." (Ops. Atty. Gen. (1925-26) p. 420.)

The conclusion reached, however, in this opinion was that:

> "* * * the value of living quarters, heat, light, etc., furnished to plantation laborers; of the 'subsistence and quarters' often furnished to nurses in hospitals; and of quarters furnished teachers in rural districts as an incentive intended to secure their services -- should not be considered as income subject to taxation * * *." (p. 434.)

In my opinion Attorney General Lymer, in his opinion No. 1336, supra, placed undue emphasis upon the case of Jones v. United States, 60 Ct. Cl. 552, 5 A.F.T.R. 5297, which involved the perquisites of an army officer. The position of an army officer as a part of the military establishment is not comparable to any situation in civilian life. For this reason and other reasons stated herein, you should make a re-examination of tax liability in each situation covered by Opinion No. 1336, supra, as well as other similar situations.

If board, lodging and similar perquisites are furnished solely for the convenience of the employer, then necessarily the employer is free to terminate the furnishing thereof at will. If the employee has a contract right to have

the perquisites furnished such contract right is wholly incompatible with the theory that the perquisites are furnished solely for the convenience of the employer. Hence, the answer to your first question, concerning the furnishing of perquisites under a written contract therefor, is that the tax applies.

In answer to your second question as to tax liability in the absence of a written contract for the perquisites: The same rule would apply to an oral contract or to a contract implied from the facts. There are many cases where without any contract having been made the perquisites nevertheless are understood to be one of the inducements to the employment or are furnished to the employee as a matter of right, and hence termination of the perquisites would occasion consideration on the part of the employer as to whether or not the compensation should be adjusted, and on the part of the employee as to whether or not the new employment conditions were satisfactory. In all such cases the perquisites are part of the compensation and taxable as such. This has come to be recognized by employers in this Territory for purposes of the Hawaii unemployment compensation tax and the federal social security taxes. The issue as to the compensatory nature of such perquisites is the same under the net income tax law and public welfare tax law as under the Hawaii Unemployment Compensation Law and the aforesaid federal employment tax provisions. Under recent legislation such as the Agricultural Adjustment Act and the Fair Labor Standards Act, in which it becomes necessary to measure the compensation paid to employees,

the employers themselves are the first to insist, whenever the issue relates to the adequacy of any given wage, that in addition to the cash payment, the employee receives a cash equivalent in perquisites, thus increasing his real compensation. In the light of new conditions and the changing attitude of employers in this field, it is appropriate that former views of the facts be brought in line with existing conditions. Accordingly, I recommend that you promulgate regulations on this subject.

In answer to your third question as to the treatment of cash payments made in lieu of perquisites: The fact that such payments are made, in itself demonstrates that the perquisites are not being furnished solely for the employers convenience and are compensatory in nature. S.S.T. 321, C.B. 1938-2, 323; S.S.T. 348, C.B. 1939-1, 304. Such cash payments clearly must be included in the tax base.

Your fourth question concerns the method of collecting public welfare tax due with respect to payments of compensation not made in cash. Under Section 13 of the Public Welfare Tax Law you have power to prescribe all needful rules for this purpose. Provisions of this nature should be included in your regulations on this subject.

A memorandum relating to the proposed regulations is enclosed for your guidance.

Respectfully,

Deputy Attorney General

Rhoda V. Lewis

APPROVED:

James Anthony

Attorney General of Hawaii