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TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

May 17, 1946

OPINION NO. 1856

CORPORATIONS, FOREIGN; QUALIFICATION OF.

A foreign corporation "doing business" in the Territory is not exempt from the requirement that it qualify and pay the $50 fee therefor, on the ground that it is engaged solely In interstate or foreign commerce, or in the performance of federal construction oontracts.

Honorable W. D. Ackerman Jr.
Treasurer, Territory of Hawaii
Honolulu, T. H.

Dear Sir:

Transmitted herewith is a copy of a letter of May 2 to the Tax Commissioner relating to the doing of business by foreign corporations in Hawaii. This concerns questions arising under the general excise tax law (chapter 101, R. L. 1945) where interstate sales are involved.

In part 2A of this letter, page 4, the operations of a California corporation acting as a "good will export

representative", or broker, obtaining business for mainland manufacturers are described as follows:

> "A California corporation has established an office in Honolulu, in charge of the president of the company. At the present time he is not drawing a salary, but he expects to in the future. This corporation represents mainland manufacturers, who ship directly to the customers and the customers remit directly to the factories. No invoicing or handling of merchandise is done by the corporation. These factories pay the corporation its commissions at the end of each month, based on a percentage of the business done In Hawaii. The corporation calls itself a 'good will export representative' from which I assume that it is a broker, continuously engaged in obtaining orders and stimulating business for the manufacturers it represents. It does not appear whether these orders are accepted here, nor do I oonsider this material."

This corporation clearly is "doing business" in Hawaii, and is subject to suit and to taxation. International Shoe Company v. State of Washington, U. S. Sup. Ct. Dec. 3, 1945. The question arises as to whether this corporation must qualify to transact business in this Territory under section 8391, R. L. 1945. I am of the opinion that it must.

Section 8391, R. L. 1945, is part of chapter 157, which has two features. Said section 8391 (formerly section 6770, R. L. 1935) relates to qualification to do business, and section 8392 imposes a fee of $50 therefor. These requirements relate to the privilege of exer-

cising the corporate franchise in Hawaii. Section 8393 (formerly seciton 6772, R. L. 1935) relates to the actual maintenance of an office or doing of business by a foreign corporation which does not have all of its capital invested in the Territory, and imposes an annual license fee of $100. This has been characterized as a "to do" tax, and has been distinguished from the mere qualification to do business; a foreign corporation qualified under sections 8391 and 8392 is not necessarily subject to the annual license fee imposed by section 8393, and if it maintains no office and does no business in a given year it owes no fee for that year, even if it has not withdrawn from the Territory. (Op.Let.Atty.Gen. (Oct. 30, 1942) No. 1544).

Section 8393, imposing the annual license fee, expressly exempts "any corporation engaged solely in the business of foreign or interstate Commerce, or while solely employed by the government of the United States". No such language is contained in sections 8391 and 8392, relating to qualification to do business.

In an opinion letter of January 31, 1940, F. 46, No. 105, I advised you that the statutory exemption of corporations engaged solely in interstate or foreign com-

merce or solely employed by the government of the United States extended over and applied to the requirement of qualification to do business. This was based on a misconstruction or the ease of Cannell & Chaffin Inc. v. Deering, 26 Haw. 74. The only defense presented in that case, as stated by the court (p. 77), was failure to procure the annual license. The court did not consider the qualification requirements. You are now advised that there is no express legislative exemption of corporations engaged solely in interstate and foreign commerce, or solely employed by the United States, from the requirements of section 8391 or the $50 fee imposed by section 8392.

Such corporations constitutionally may be required to comply with these requirements. Union Brokerage Co. v. Jensen, 322 U.S. 202, 209, (foreign corporation engaged in foreign commerce as a customhouse broker required to obtain a certificate of authority to do business and to pay a fee of $50, representing the cost of supervision); E. E. Morgan Co. v. Arkansas, 150 S.W. 2d 736, Ark. 1941, appeal dismissed for want of a substantial federal question, 314 U.S. 571, rehearing denied 314 U.S. 711 (foreign corporation entering the state solely to

perform a federal construction contract must comply with state requirements as to admission of foreign corporations).

Accordingly, you are advised that the California corporation above described is required to comply with sections 8391 and 8392, R. L. 1945, and, in general, that foreign corporation whose activities are such that they are "doing business" in the Territory (which must be determined upon the facts in each case) are not exempt from such requirements because they are engaged solely in interstate or foreign commerce, or in performing contracts with the federal government.

Respectfully,

RHODA V. LEWIS
Assistant Attorney General

APPROVED:

C. NILS TAVARES
Attorney General