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Op. 56-104

October 9, 1956

Honorable Earl W. Fase
Tax Commissioner
Territory of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in reply to your letter of September 25, 1956 with which you have forwarded a protest of a proposed net income and general excise tax assessment.

Land owned in fee simple was condemned by the Territory for highway purposes. Separate awards were made, one for the fee simple interest in the lands condemned and the other for the loss of immature and unharvested sugar cane crops destroyed by the highway construction.

Pursuant to advice given you by the undersigned you have treated the cane stools as part of the realty. However, with this exception, you have treated the crop award as taxable under chapter 102 to the extent of the profit remaining after the deduction of crop costs, and as taxable under chapter 101 upon the gross amount.

The taxpayer contends that the growing crops were real property and that the awards for the crops were proceeds from the involuntary conversion of real property.

Taxability under chapter 102 does not depend upon whether this contention is correct. The profit in any event is taxable. This is not "capital gain"; to the contrary it is gain from the disposition of property held primarily for sale or other disposition. See Watson v. Commissioner, 345 U.S. 544, 1953. In order for gains from real property to be exempt under section 5506 (b) they must be capital gains, and must not be from steak in trade or from property properly includable in inventory or from property "held primarily for sale or other disposition to customers in the ordinary course of trade or business.

The taxpayer questions the distinction made between cane stools and crops. Cane stools are like fruit bearing trees in an

orchard, while the crop is like the fruit itself. The Watson case above cited makes the distinction clear.

As to the question of taxability under chapter 101, I need further information.

Section 314, R.L.H. 1945, as amened by Act 200, L. 1947, governing eminent domain, provides that "the value of the property sought to be condemned with all improvements thereon shall be assessed"; this is in contrast with the provision in effect before the 1947 amendment that the land and improvements be separately assessed. The question arises as to why there was a separate award for crop damages, instead of one award for the entire property as improved with the immature crop. I need full information as to how the crop award and the award for the land were computed in each instance. This information should show the amount of each award for land and crop respectively, and the elements going into each computation. It is desirable that the taxpayer be given an opportunity to furnish this information, if it desires to do so.

Very truly yours,

Rhoda V. Lewis

RHODA V. LEWIS
Deputy Attorney General