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491:45,OLC
Op. 56-48

April 10, 1956

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

Dear Sir:

You have requested our opinion in the following matter:

The United States Government contracts with certain authorized carriers to transport the household goods of service personnel, house to house. Origin is in the Territory of Hawaii and destination in the continental United States, or vice versa. The carrier receives a stated amount per hundred weight for the carriage house to house, including pick-up and unloading. In addition, there are charges for packing and unpacking, storage, and certain other charges for extra services.

The water transportation is performed by a regular surface carrier. The other services are performed by the contracting carrier or by others with whom it in turn contracts for the performance of them. These other companies are hereinafter referred to as transfer companies. They are not authorized carriers. They act as agents for authorized carriers, as well as performing hauling service and the like.

All of the authorized carriers are foreign corporations. Some have qualified to do business in the Territory and some have not. Those who have not are represented here by transfer companies. The transfer companies are Hawaiian corporations or foreign corporations which have qualified to do in Hawaii a general business, intrastate as well as interstate.

As above noted, some of the authorized carriers are foreign corporations who have qualified to do business in the Territory. These have qualified to do a general business, intrastate as well as interstate. They do not employ a transfer company.

My conclusions are as follows:

1. The tax imposed by chapter 101 is a privilege tax on account of activities in this Territory. Among other activities, the exercise of corporate powers is specifically a subject matter of the tax (Sec. 5443, second paragraph).

2. Transportation between points in the Territory and points outside the Territory, or vice versa, is not taxed by chapter 101. Pacific Express Co. v. Siebert, 142 U.S. 339, 350, followed in McCaw and Keating v. Tax Commissioner, 40 Haw. 121, 175, aff'd 216 P.2d 700, cert. den. 348 U.S. 927.

3. Authorized carriers who are foreign corporations and have entered the Territory, maintaining employees or owning or operating property here, are taxable by the Territory. Even though as pointed out below, pick-up and delivery are part of the interstate carriage when not made the subject of a separate charge, there are other services performed by these foreign corporations which are strictly local such as packing and unpacking. Therefore these companies are not beyond the taxing power of the Territory. See Spector Motor Service v. O'Connor, 340 U.S. 602, 609-610, and Railway Express Agency v. Virginia, 347 U.S. 359, 368-369. As the Court said in the first cited case:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. Interstate Pine Line Co. v. Stone, supra; International Harvester Co. v. Evatt, 329 U.S. 416; Atlantic Lumber Co. v. Comm'r of Corporations and Taxation 298 U.S. 553."

4. In contracting to move property to and from the piers for a separate charge the transfer companies are engaged in a taxable activity, whether or not interstate commerce is involved. Canton R. Co. v. Rogan, 340 U.S. 511; M. & M. Transportation Co. v. City of New York, 84 N.Y.S.2d 128, aff'd 91 N.Y.S.2d 834, cert. den. 339 U.S. 948; Interstate Pipe Line Co. v. Stone, 337 U.S. 662; Stone v. Dunn Bros., 80 S.2d 802, 81 S.2d 712, appeal dismissed for want of a substantial federal question, 350 U.S. 878, 100 L.Ed. Adv. Sh. 76, Nov. 7, 1955. So also as to storage for which a separate charge is made, and the packing and unpacking services and other special services for which separate charges are made.

5. The transfer companies are not protected by Joseph v. Carter & Weekes Co., 330 U.S. 422. That case covers stevedoring services rendered to a water carrier, but does not cover more remote activities. Canton R. Co. v. Rogan, supra, 340 U.S. 511, 515.

6. Authorized carriers who have entered the Territory, maintaining employees or owning or operating property here, are in the same position as the transfer companies so far as there are involved separate charges for storage, packing and unpacking, and other special services as pointed out above. However, their contract of carriage covers transportation from a point in the Territory to a point outside the Territory and vice versa, for a lump sum. The tax law does not purport to apply to this. The lump sum cannot be broken down to ascertain portion derived from carriage to and from the piers, since the parties themselves did not so contract as to set this up as a separate activity for which there was a separate charge.

7. One or two of the transfer companies have contracted to furnish transportation from a point in the Territory to a point outside the Territory and vice versa, for a lump sum. While these transfer companies are not authorized carriers but instead render services to the authorised carriers, their method of contracting protects them so far as these services are concerned. However, most of the transfer companies are under no obligation so far as carriage outside the Territory is concerned. They do not pay for the water transportation, nor do they bring the property to, or remove it from, the pier in the continental United States. They perform pickup, delivery, transfer, and other services in the Territory for which they are paid by the authorized carrier an amount determined by an agreed formula. They are taxable upon these in-the-Territory services.

8. It was noted above that the transfer companies also acts as agents. Only one instance of a separate fee for the agency services has come to my attention. In this case the transfer company receives a commission on long distance hauls made on the mainland of shipments originating in the Territory. Such agency services are subject to a gross receipts tax, such as is here involved, as distinguished from a flat license tax. Cf. Nippert v. Richmond, 327 U.S. 416.

9. In summary, all packing, unpacking, storage and special services for which a separate charge is made and all pickup, delivery and hauling services for which a separate charge

is made, are taxable. Pickup, delivery, storage and hauling incidental to an interstate movement and not the subject of a separate charge are not taxable.

Very truly yours,

RHODA V. LEWIS
Deputy Attorney General