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Op. 57-136

TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

November 1, 1957

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

Dear Sir:

Reference is made to a letter of October 3, 1957 from Procter and Gamble Distributing Company citing the case of Commonwealth of Pennsylvania v. Eastman Kodak Co., 385 Pa. 607, 124 A.2d 100 and taking the position that the manner in which the company does business in the Territory of Hawaii is identical to the manner in which Eastman Kodak conducted business in the state of Pennsylvania. The company submits that the "Eastman Kodak case supports our position that the Procter and Gamble Distributing Company is not liable for the payment of Hawaii corporation income tax." We do not agree with this contention.

The Eastman Kodak case followed Roy Stone Transfer Corp. v. Messner, 377 Pa. 234, 103 A.2d 700, a common carrier case. The Roy Stone Transfer Corp. case cited Spector Motor Service v. O'Connor, 340 U.S. 602, in which it was held that a privilege tax cannot be imposed upon the carrying on of interstate transportation, even though the tax is measured by net income.

The Pennsylvania Supreme Court construed the tax law involved as one imposing an excise tax for the privilege of doing business in Pennsylvania. The Hawaii net income tax is not a privilege tax.

Furthermore, the Pennsylvania court overlooked the distinction between a tax on the privilege of carrying on interstate transportation and a tax on the privilege of carrying on interstate commerce that consists in the sale of goods. The latter type of interstate commerce is not protected from the imposition of a privilege tax, as made clear by Field Enterprises Inc. v. State of Washington, 47 Wash.2d 852, 289 P.2d 1010, affirmed 352 U.S. 806.

The imposition of an income tax which is not a privilege or franchise tax presents a question under the due process clause. It is required that a fair allocation of income be made. The Interstate Commerce Clause imposes no different requirements in respect

of the imposition of a net income tax. West Publishing Co. v. McColgan, 27 Cal.2d 705, 166 P.2d 861, affirmed 328 U.S. 823, 90 L. Ed. 1603, citing United States Glue Co. v. Oak Creek, 247 U.S. 321, 62 L. Ed. 1135, International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, and other cases. The Spector case has not changed this, as was explained by the Supreme Court of Minnesota in Minnesota v. Northwestern States Portland Cement Co., 84 N.W.2d 373.

We already have taken the position that the maintenance of an office is not essential to the application of the net income tax. Reference is made to our letter of June 9, 1952 (F. 45, No. 1149) concerning warehoused tobacco products used to fill orders sent to the mainland. The maintenance in the Territory of resident employees who regularly and continuously solicit business in itself is sufficient for the imposition of a fairly measured tax. International Shoe Co. v. Washington, 326 U.S. 310 (one of the cases cited by the Supreme Court of the United States in affirming the West Publishing Co. case).

Respectfully,

Rhoda V. Lewis

RHODA V. LEWIS
Deputy Attorney General

APPROVED:

Herbert Y.C. Choy

HERBERT Y. C. CHOY
Attorney General