RVL:rs
167:45,OLC

OP 57-5

January 8, 1957

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

Dear Sir:

This concerns the application of the tax exemption allowed by Act 284, L. 1951, as amended by Act 183, L. 1953 and Act 214, L. 1995, in the following situation:

Tuna, canned in the Territory is shipped to the mainland f.o.b. a mainland point upon orders of the United States. If the exemption does not apply, the tax is that imposed by subsection A of section 5455 upon the activity of canning, not the tax imposed by subsection B upon the activity of selling. The question is whether the tax exemption applies when the activity, if not exempt, falls under subsection A. I am of the view that it does not.

<u>Stone</u> v. <u>Green Lumber Co.,</u> 1 So.2d 764, Miss. 1941, related to an exemption providing that:

> "'In computing the amount of tax Ievied under this act, there shall be excepted from the gross income of the business, or gross proceeds of sales, as the case may be, so much thereof as is derived from sales to the United states government * * *.'"

The question involved was the tax on the privilege of manufacturing. After citation of cases it was hold:

> "In these cases, neither the ultimate disposition of the manufactured products nor the existence of exemptions affecting liability for tax upon the sales thereof was held to affect liability for the privilege tax as a manufacturer. The gross income of the business or the gross proceeds of the sales remains the basis upon which to compute this tax, whether computed from sales in interstate commerce, sales

> of products exempt from sales taxes, popularly so-called or sales to the United States government, even though the gross income derived from such sales may be exempt from a tax thereon as sales."

It is argued that the exemption here is not similarly worded and the case does not apply. No such distinction can be made. To say that certain gross proceeds of sales shall be excepted in computing the amount of tax (as in Mississippi) is if anything broader than to say that such gross proceeds of sales shall be excluded from the measure of the tax (as in Hawaii).

The measure of the subsection A tax is "value * * * , for sale, as shown by the gross proceeds derived from the sale thereof". Gross proceeds of sales are the starting point for determining "value". The value cannot exceed the gross proceeds of sales but may be less certain expenses. See <u>American Mfg. Co.</u> v. <u>St. Louis,</u> 250 U.S. 459; paragraphs (1)-(4) of subsection A and paragraphs (4) and (5) of subsection B, and section 5456. On the other hand, where "gross proceeds of sales" are themselves the measure of the tax, as in subsection B, paragraph (1), there are no deductions for expenses of any kind. See section 5444, second paragraph.

As above shown, there is a real difference between using gross proceeds of sales to determine value, which is the measure of the tax, and using gross proceeds of sales as the direct measure of the tax. The latter is done only when the tax is upon the privilege of selling. Only in that situation does the exemption apply.

Paragraph (3) of subsection (a) of the exemption act expressly provides that the person making the exempt sale shall "be deemed to be a licensed seller". This again shows that the subject matter of the exemption is the privilege of selling.

The 1953 amendments further limit the exemption by providing that, as to certain products, there must be furnished certificates of the purchasers showing that such products have been purchased for use and consumption in the Territory. Prior to the amendment such products had been warehoused here in such a manner that completed sales occurred in the Territory and subsection B would have applied except for the exemption. Until the amendments were enacted there was no way to withhold the exemption even though the products were withdrawn from the warehouse for shipment to other Pacific islands. The result was out

of line with the purpose of the exemption. As stated in the committee report on the 1953 bill (S. C. R. 262, H.J. 591):

> "Your Committee believes that it was not the purpose of Act 284 to exempt products which normally would be exported by the manufacturers and carry the tax rate applicable to the 'manufacturing' activity."

The 1953 amendments met the situation by providing that, where use was not to be in the Territory, the subsection A manufacturing tax was to apply. Thus such products might enjoy a lower measure of tax. See paragraph (3) of subsection A. Specific provision for application of the manufacturing tax in this situation would have been surplusage if it was applicable anyway upon removal of the exemption, but under our interpretation of the exemption provision that was not the case.

Respectfully,

RHODA V. LEWIS
Deputy Attorney General