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Op. 58-104



TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

June 12, 1958

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

Dear Sir:

Reference is made to our conference of June 2, 1958 concerning a letter of Mathurin and Anna Dondo, husband and wife, date May 29, 1958 and addressed to the assessor of Maui County.

This letter states that Mr. and Mrs. Dondo "are paying the first installment of the 1958 Territorial income tax under protest." According to the assessor, the letter was accompanied by payment of the first installment of estimated tax.

Mr. and Mrs. Dondo make certain claims of exemption under the portion of section 121-3(a) of the Income Tax Law of 1957 having to do with persons who take up residence in the Territory after attaining the age of 65 years. It is not the purpose of this letter to go into the merits of that claim, but rather to outline the procedure by which such a matter should be handled.

You have advised me that Mr. and Mrs. Dondo, when in Honolulu recently, called on the Assistant Tax Commissioner to discuss this matter, and were advised to present their questions in writing. Subsequently a copy of our opinion letter of September 5, 1957 was sent to them. As stated in that letter:

"In the situation here presented, intangible personal property will be deemed to have its situs at the place of domicile of the owner, unless under the particular circumstances it has acquired a situs elsewhere, and will be deemed to be 'owned * * * in the Territory' if it has its situs in the Territory, but not otherwise."

The letter of May 29, 1958 does not present enough facts on which to reach a conclusion as to whether under the particular circumstances here involved the situs of the income-producing intangible

personal property is within or outside the Territory. Under the procedure below outlined Mr. and Mrs. Dondo will have an opportunity to present all the facts having to do with this question of situs, as well as all the facts having to do with their claim that section 121-3(a) applies to them. However, at this time the most that could be accomplished would be to issue an administrative ruling on the facts as they now appear. That would not be final administrative action and court review could not be had at this time.

The letter of May 29, 1958 from Mr. and Mrs. Dondo states: "We request that if the court decides in our favor, all payments made be refunded to us." However, any court review would be premature at this time.

We have concluded that the amount paid at the time of the filing of the May 29, 1958 letter should not be placed in the litigated claims fund as an appeal or suit would be premature at this time. Mr. and Mrs. Dondo should be advised that they should:

Renew their protest and make a complete statement of the facts and their position, attaching this statement to the return for the taxable year filed in 1959 and computing the income in the return in accordance with the position so taken.

Seek court review in 1959 after filing of the return for the taxable year, if the Tax Commissioner disagrees with the protest and accordingly makes an assessment.

The procedure for handling this matter and the reasons therefor are as follows:

1. In the first place, it is important to note that an estimated tax payment is not refundable until after the close of the taxable year, here the taxable year 1958. See Cumulative Bulletin 1954-1, page 159.

2. Following the close of the taxable year, taxpayer should make his return under section 121-31(b) of the Income Tax Law of 1957.

3. A taxpayer who protests the validity of any provision of the law, rules, regulations or instructions, should prepare his return in conformity with his own views as to the correct amount of taxable income. To protect himself from penalty (see section 115-43(b) (3)) the taxpayer should set out his protest in the return or by a statement attached to the return, so as to disclose the dispute, furnish all the facts involved, and state his position.

4. When there is no such protest the Tax Commissioner ordinarily will refund the amount of estimated tax payment shown by the return to be an overpayment, unless the taxpayer has elected to apply this amount as a credit against the estimated tax for the next taxable year.

Such a refund does not preclude the making of an assessment by the Tax Commissioner at any time that the Commissioner finds there is taxable income which has not been assessed, provided the taxable year is still open under section 121-45 of the Income Tax Law of 1957. See Mary R. Milleg, 19 T.C. 395.

However, the Tax Commissioner upon receipt of the return instead of making a refund of the amount which the taxpayer claims is an overpayment may make an assessment and apply the amount of claimed overpayment on the assessment, subject to court review.

5. If the return of the taxpayer shows that the taxpayer is protesting the validity of any provision of the law, rules, regulations or instructions, it is the duty of the Tax Commissioner to investigate the protest and decide whether it will be allowed by the Commissioner. If the Tax Commissioner is in disagreement with the taxpayer an assessment then should be made and the amount of claimed overpayment applied on the assessment, subject to court review. The above procedure is indicated by the next to the last paragraph of Article 23(c)(1) of Regs. 58-2, but is set forth in more detail here.

6. As stated in section 121-44(b) the remedies provided by appeal or under section 34-24 are exclusive. As to an appeal, this-remedy lies when a person is "aggrieved by any assessment" (section 121-46 of the Income Tax Law of 1957). Therefore an appeal must await the making of an assessment. Unless there are grounds for a jeopardy assessment, an assessment can be made only following the close of the taxable year.

7. As to section 34-24, Revised Laws of Hawaii 1955, this relates to payment under protest "of a claim in favor of the Territory," to be followed by an action in the Circuit Court within 30 days after payment of the protested amount. The Circuit Court jurisdiction is not as broad as on an appeal. However, assuming that the Circuit Court would have jurisdiction of the particular case, nevertheless such an action cannot be brought until after the Territory has made its claim, which again means an assessment first must be made.

8. Upon receipt of a taxpayer's return making a protest prompt action should be taken to investigate the matter, determine the Tax Commissioner's position, and issue an assessment

if the Tax Commissioner is in disagreement with the taxpayer. upon issuance of the first notice of assessment the taxpayer will have an opportunity to revise or add to his protest. Upon issuance of the second notice of assessment the amount of refund claimed by the taxpayer but disallowed by the Tax Commissioner will be applied on the assessment. This amount will not be entered as a credit in the assessment itself. Instead it will be deemed paid on the date of the second notice of assessment within the meaning of section 34-24 and section 116-21, R. L. 1955. The amount then will be held awaiting action by the taxpayer as stated in paragraph 9.

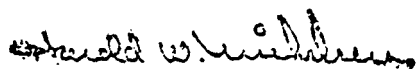
9. The taxpayer may appeal from the assessment within twenty days after the assessment as provided by section 121-46. Or the taxpayer may, if the Circuit Court has jurisdiction, proceed under section 34-24 by bringing suit on his protest within thirty days after the assessment. If the taxpayer does either the money should be placed in the litigated claims fund. If the taxpayer does neither the case is the same as any other case of a payment made pursuant to an assessment.

Respectfully,

(S) RHODA V. LEWIS

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APPROVED:



Acting Attorney General