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Op. 64-9

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
Honolulu, Hawaii

February 25, 1964

The Honorable Edward J. Burns
Director of Taxation
State of Hawaii
425 Queen Street
Honolulu, Hawaii

Attention: Mr. J. A. Bell
Deputy Director of Taxation

Dear Sir:

This is in response to your request for an opinion as to the meaning of Section 117-16(c), Revised Laws of Hawaii 1955, as amended by Act 87 of the Session Laws of Hawaii 1963.

The typical case you present to clarify your question is the following: "Hauling contractor A accepts a substantial hauling job. Although A has a number of trucks he does not have enough to complete the job within the prescribed time, so A subcontracts with hauling contractor B to do a part of the hauling. This arrangement provides that B will bill A for the hauling he does and at a profit to A. A's customer has no dealings with B. A's customer pays A and A reports his income from the job and pays the general excise tax at the 3 1/2% rate. A pays off B for the work he has done for him. B takes the position that since he rendered his services to A, the intermediary in this transaction, he is entitled to report his income and pay the general excise tax at the wholesale rate for the service business."

At the outset, it should be made clear the crux of the question is whether B should be taxed at the wholesale or at the retail rate under the General Excise Tax Law.

It is our view that B should be taxed at the retail rate because under the above typical case B does not come

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within the purview of Section 117-16(c), R.L.H. 1955, as amended, or within the purview of Act 87, Session Laws of Hawaii 1963.

Section 117-16(c) originated as Act 165 of the 1951 legislative session. Section 4 of Act 165 amended section 5455.02 of Chapter 101, R.L.H. 1945, which section was added to by Act 252 of Session Laws of 1949. Section 4 of Act 165 redesignated Act 252 as "a" and then had the new provisions of Act 165 designated as "b", "c", "d" and "e". Subsection "c" is the present section under consideration. To this subsection "c", minor amendments were made by Act 68, S.L. 1953, Sec. 117-16, Revised Laws of Hawaii 1955, Act 1 of the Special Session of 1957, Act 4 of the Session Laws of 1960, followed by a clarifying amendment in 1963 with the enactment of Act 87.

When the present section under consideration was first enacted in 1951, the committee report indicated that certain injustices were to be rectified of which one was that of "services furnished by one who is merely an intermediary where the services are rendered by another taxpayer as in the case of tire recappers". House Committee Report 369 on H.B. 729, House Journal 1951 Session, p. 501. This committee report is not helpful in providing legislative intent.

Where the words of a statute are ambiguous, the meaning of ambiguous words may be sought by "examining the context, with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning". Section 1-18, R.L.H. 1955, as amended. Not only the context of the statute but also "the reason and spirit of the law, and the cause which induced the legislature" to enact a particular statutory provision may be considered to determine legislative intent. Section 1-18, R.L.H. 1955, as amended.

Some light may be cast upon the "reason and spirit" of the law by the fact that Act 165, Session Laws of 1951, provided special provisions to relieve certain taxpayers of tax burdens where they parceled out their work to another or where gross income was divided with other taxpayers. These instances of tax relief were enumerated in different subsections. The fact that different subsections were used to determine the relevant taxpayers is significant in that tax relief was meant to be given to only certain circumscribed groups of taxpayers. Who are the taxpayers in subsection "c" of Act 165, Session Laws of 1951, the

relevant part of the subsection stating that "a tire recapper, photo-printer, auto paint shop or the like" rendering services to an intermediary under certain circumstances would be subjected to the wholesale rate instead of the retail rate? The above-quoted phrase is ambiguous. It enumerates two classes of tradesmen - a tire recapper and a photo-printer followed by an inanimate object, a paint shop, with the "catch-all" phrase "or the like".

It would be appropriate here to mention that if the legislature intended to include all service-type businesses under this subsection "c" of Act 165, Session Laws of 1951, there would have been no need to mention certain enumerated types of businesses. Thus, not all service type businesses come within the purview of Act 165. We have to decide then what types of businesses are included under said subsection "c".

An examination of the placement of punctuation marks or of the use of the word "or" after the words "auto paint shop" does not help to determine the legislative intent. That a comma has been placed after the words "recapper" and "photo-printer" but not before the word "or" after the words "auto paint shop" does not necessarily indicate significance for the purpose of interpreting this subsection. Neither can we find significance in the use of the word "or" instead of the word "and".

We must therefore turn to an examination of the words associated with the ambiguous words to determine the meaning of the ambiguous words. The words "or the like" in context could be construed in four ways: first, they may refer only to an auto paint shop; second, they may refer to businesses that are similar to an auto paint shop; third, they may refer to various types of businesses that are similar to the tire recapping business, the photo-printing business and the auto paint shop business; and fourth, they may refer to all service type businesses. We have already discounted the fourth construction. The first construction is not tenable either since the use of the words "or the like" would have been mere surplusage, and in the context of the statutory provision, these words cannot be mere surplusage. The words "or the like" could refer to the third construction. However, for our purposes here, it does not matter whether we do or do not include all three types of businesses within the general "catch-all" phrase "or the like". It is our view, therefore, that the words "or the like" refer to the auto paint shop business and similar type businesses that clean, repair or restore to useful

service tangible personal property. The legislative intent thus inferred may be said to be confirmed by Act 87, Session Laws of 1963. The phrase "a tire recapper, photo-printer, auto paint shop or the like" found in subsection "c" of Act 165, Session Laws of 1951, as amended, was changed by Act 87, Session Laws of 1963, to the following: "a photo-printer (or the like), tire recapper, auto painter or any other person engaged in the business of cleaning, repairing or otherwise restoring to useful service tangible personal property". Thus, it can be seen that subsequent clarifying legislation makes clear the meaning of the words "or the like" following the words "auto paint shop". Interpretation of a statute by subsequent legislation has been given consideration by the courts. In 50 Am. Jur., Statutes § 337 at 328, can be found the following statement:

"The interpretation of a statute by the legislative department of the government may go far to remove doubt as to its meaning. This fact is recognized by the courts which regard it as proper, in determining the meaning of a statute, to take into consideration subsequent action of the legislature, or the interpretation which the legislature subsequently places upon the statute."

Act 87, Session Laws of 1963, therefore, confirms the view taken that the words "or the like" were to be construed with reference to certain characteristics commonly associated with the auto paint shop business. Act 87 expresses this in terms of a business of "cleaning, repairing or otherwise restoring to useful service tangible personal property". The clarifying words of Act 87, quoted above, cannot be construed to include the hauling business.

The committee report on Senate Bill No. 1031, which was enacted into law as Act 87, clearly excludes the hauling business from the purview of Act 87. The committee report states that the law, before the clarification made by Act 87, "was not meant to, nor does it in fact include, transportation activities or other service activities not of the above nature even though such services were rendered on behalf of an intermediary".

In conclusion, a hauling contractor rendering services on behalf of an intermediary does not come within

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the purview of Section 117-16(c), R.L.H. 1955, as amended,
or within the purview of Act 87, Session Laws of Hawaii
1963.

Very truly yours,

/s/ Clifford I. Arinaga

CLIFFORD I. ARINAGA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General