MKS:n
15a
Op. No. 65-29

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

November 29, 1965

Honorable Edward J. Burns
Director of Taxation
State of Hawaii
Honolulu, Hawaii

Attention: Mr. Ralph W. Kondo
Deputy Director of Taxation

Dear Sir:

This is in response to your recent letter wherein you requested an opinion from this office as to the applicability of Hawaii's General Excise Tax to sales of tangible personal property made to Federal Credit Unions. It is our opinion that Hawaii's general excise tax is not applicable to these sales.

Hawaii's general excise tax is imposed by Chapter 117, Revised Laws of Hawaii 1955, as amended, and section 117-14 thereof provides that the tax shall be levied and collected against persons on account of their business and other activities in the State. Subsection 117-14(b)(1) specifically imposes the general excise tax upon those persons engaged in the business of selling any tangible personal property to purchasers in the State.

It should be noted that the incidence and liability of Hawaii's general excise tax is upon the seller of the tangible personal property and not the purchaser. In the problem at hand, the Federal Credit Unions are purchasers of the tangible personal property. Therefore, if any taxes are due the State from these sales, the liability of the tax is upon the seller and not the purchasing Federal Credit Unions.

Hawaii's general excise tax law provides that the sales of tangible personal property made to the United States, its agent, or its instrumentality, by a seller licensed to do business in Hawaii, is exempt from the general excise tax

if said agency or instrumentality is constituted so as to be immune from the levy of the tax under Chapter 119. Section 117-21.5 provides in part:

> "Exemptions of sales and gross Proceeds of sales to federal government. (a) Any provision of law to the contrary notwithstanding, there shall be exempted from, and excluded from the measure of, the taxes imposed by chapters 117, . . . all sales, and the gross proceeds of all sales, of:
>
> . . .
>
> "(3) Other tangible personal property hereafter sold by any person licensed under chapter 117 to the United States (including any agency or instrumentality thereof that is wholly owned or otherwise so constituted as to be immune from the levy of a tax under chapter 119), but the person making such sale shall nevertheless, within the meaning of chapters 119 and 117, be deemed to be a licensed seller. . . ." (Emphasis added.)

Under the provisions of Chapter 119 which imposes the Hawaii Consumption Tax, a purchaser of property is defined to exclude the following:

> ". . . 'Purchaser' . . . does not include . . . any person immune from the tax imposed by this chapter under the constitution and laws of the United States. . . ."

Under Chapter 119, "person" includes an association like the Federal Credit Union. Section 119-1 provides in part:

> ". . . 'Person' includes any . . . association, corporation, trust or any group or combination acting as a unit, and the plural as well as the singular number as may be appropriate. . . ."

The Federal Credit Union Act was enacted by Congress on June 26, 1934, 48 Stat. 1216, and is codified as Title 12 of the United States Code, sections 1751 to 1772. Section 1768 pertains to the taxation of Federal Credit Unions and provides in part:

> "The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. . . ." (Emphasis added.)

The Federal Credit Union Act of 1934 is one of many acts enacted by Congress during the pre-Depression and Depression years to extend finances and credit throughout the nation by means of corporations and institutions created for such purposes. Other laws enacted during this period of time extended finances and credit to Federal land banks, national farm associations, national agricultural credit corporations, livestock loan companies, and many other like corporations and institutions. All of these laws contained some provisions granting a measure of tax exemption to these credit agencies from state taxation, and the language employed in these statutory provisions defining the degree of exemption to be afforded these agencies was very similar in nature.

We have not found any reported case concerning the applicability of section 1768 where a state attempted to apply its sales, use, or consumption tax against a Federal Credit Union. A similar type of tax exemption statute is section 26 of the Federal Farm Loan Act of 1916, codified as 12 U.S.C. 931. It provides in part:

> "Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income therefrom, shall be exempt from Federal, State, municipal, and local taxation, except upon real extate held, purchased, or taken by said bank or association. . . ."

The Supreme Court of the United States had occasion to construe the meaning of the above quoted section in the case of Federal Land Bank v. Bismark Lumber Company, 314 U.S. 95 (1941). The North Dakota Supreme Court held that

the Federal Land Bank of St. Paul was liable for the North Dakota Sales Tax (whose incidence was on the purchaser) when the Federal Land Bank purchased lumber and building materials from the Bismark Lumber Company. The Supreme Court of the United States reversed the decision of the North Dakota Supreme Court. It stated at page 99:

> "The unqualified term 'taxation' used in § 26 clearly encompasses within its scope a sales tax such as the instant one, and this conclusion is confirmed by the structure of the section. In reaching an opposite conclusion the court below ignored the plain language, 'That every Federal land bank . . . shall be exempt from Federal, State, municipal, and local taxation,' and seized upon the phrase, 'including the capital and reserve or surplus therein and the income derived therefrom,' as delimiting the scope of the exemption. The protection of § 26 cannot thus be frittered away. We recently had occasion, under other circumstances, to point out that the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle (citing cases). If the broad exemption accorded to 'every Federal land bank' were limited to the specific illustrations mentioned in the participial phrase introduced by 'including,' there would be no necessity to except from the purview of § 26 the real estate held by the land banks. . . . a broad construction is indicated by Congress's intention to advance credit to farm borrowers at the lowest possible rate. The legislative history of similar exemption clauses in other statutes supports our interpretation of § 26. . . ."

By analogy, we think it is clear that the congressional intent in the enactment of the tax exempt statute of the Federal Credit Union Act was to give section 1768 broad application. Therefore, section 1768 does not permit the states to tax Federal Credit Unions except as to real and personal property, and only if said property is taxed to the same extent as similar property in the state.

The nature of the Hawaii consumption tax was described by the Supreme Court of Hawaii in the case of Stewarts' Pharmacies v. Tax Comm'r Fase, 43 Haw. 131 (1959). It described the tax in the second paragraph on page 134 as follows:

> "The Consumption Tax Law imposes a tax with respect to the use or consumption in the (State) of property in the hands of consumers as to which the excise tax on retailers has not been paid. It was enacted to complement the General Excise Tax Law. The rate of tax under it is equated to the excise tax on retailers. It serves the same function as the complementary use tax in a state which has a sales tax law." (Emphasis added.)

Consumption and use taxes are generally held to be in the nature of excise taxes and not property taxes. 47 Am.Jur. Sales and Use Taxes § 42; 129 ALR 235. Accordingly, other state use or consumption taxes, similar to Hawaii's consumption tax, have been deemed excise and not property taxes. See Douglas Aircraft Co. v. Johnson, 90 P.2d 572 (Calif. 1939); Brandtjen & Kluge v. Fincher, 111 P.2d 979 (Calif. 1941); Vancouver Oil Co. v. Henneford, 49 P.2d 14 (Wash. 1935); Spokane v. State, 89 P.2d 826 (Wash. 1939). Hence, the use and consumption of tangible personal property by a Federal Credit Union in Hawaii falls within the prohibition of section 1768, and therefore, a Federal Credit Union would be immune from the levy of the tax under Chapter 119.

Consequently, these sales of tangible personal property made to the Federal Credit Unions are exempt from Hawaii's general excise tax (Chapter 117) since a Federal Credit Union is "so constituted as to be immune from the levy of the tax under Chapter 119 . . ."

In summary, it is our opinion that an interpretation of Hawaii's tax laws and the Federal Credit Union Act necessarily concludes that the sales of tangible personal property made by sellers licensed to do business in Hawaii to Federal Credit Unions, as so constituted under the provisions of 12 U.S.C. sections 1751-1772, are not subject to Hawaii's general excise tax. Hence, these sellers are exempt from paying the tax pursuant to subsection 117-21.5(a)(3), Revised Laws of Hawaii 1955, as amended.

Very truly yours,

/s/ Melvin K. Soong

MELVIN K. SOONG
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General