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Op. No. 66-16

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
Honolulu, Hawaii
May 11, 1966

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

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

Dear Sir:

This opinion is submitted pursuant to your request for advice as to whether the Hawaii general excise tax is applicable to sales of tangible personal property made to National Banks. You also ask whether such sales to National Banks should be treated similarly to sales made to Federal Credit Unions as discussed in Attorney General's Opinion 65-29. In that opinion, this office advised that sales of tangible personal property made to Federal Credit Unions would be exempt from the application of Hawaii's general excise tax.

It is our opinion that Hawaii's general excise tax is not applicable to sales of tangible personal property made to National Banks. Therefore, this opinion concurs with the advice rendered in Attorney General's Opinion 65-29 as to the nonapplicability of Hawaii's general excise tax to these types of sales of tangible personal property.

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 tangible personal property to purchasers in the State.

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The incidence and liability of Hawaii's general excise tax is upon the seller of the tangible personal property. Since the sales of the tangible personal property are being made to the National Banks, the liability of the tax, if there is any to the State from these sales, is upon the seller and not the National Banks.

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 application of Hawaii's general excise tax if said agency or instrumentality is wholly owned or so 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 measures 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.)

We view a National Bank as a federal agency or instrumentality so constituted as to be immune from the levy of the tax under Chapter 119 and therefore sales of tangible personal property made to National Banks are exempt from Hawaii's general excise tax.

Chapter 119, Revised Laws of Hawaii 1955, as revised by Act 155, Session Laws of Hawaii 1965, imposes the Hawaii use tax and under section 119-1, a "purchaser" of property is defined as not including "any person immune from the tax under the Constitution and laws of the United States.

Furthermore, subsection 119-3 (a) provides that the tax "shall not apply to any property, or to any use of such property, which cannot legally be so taxed under the Consitution or laws of the United States. . . ."

National Banks were created under the laws of the United States in order to promote its fiscal policies. Mercantile Bank v. New York, 121 U.S. 138, 154 (1887). The banks, their property, and their shares, cannot be taxed under state authority except as Congress consents, and then only in conformity with restrictions attached to this consent. First Nat. Bank & Trust. Co. v. Town of West Haven, 62 A.2d 671 (Corm. 1948): First Nat. Bank v. Anderson, 269 U.S. 341, 347 (1926). Taxation of a National Bank by a state in any manner other than that allowed by the Federal statutes is void. First Nat. Bank v. Adams, 258 U.S. 362 (1922).

State taxation of National Banks and of National Bank shares is comprehensively controlled by provisions of the National Bank Act (The National Bank Act, June 3, 1864, c. 106, 13 Stat. 99). The Act authorizes the legislature of each state to determine and direct, subject to its provisions, the manner and place of taxing all shares of National Bank associations located within its limits. 12 U.S.C. 548; 51 Am.Jur. Taxation § 254. In detail, the National Bank Act provides that the several states may (1) tax the shares of stock of a bank within its limits or (2) include dividends derived from the shares of stock in the taxable income of an owner or holder thereof, or (3) tax such banking associations on their net income, or (4) tax such banking associations according to or measured by their net income, provided the conditions set forth in the Act are complied with. But the imposition by any state of any one of these four forms of taxation is to be in lieu of the others except as provisions are made with reference to the right to impose a franchise tax measured by the net income from the bank, and an income tax upon the individual income from dividends from National Bank stock. The statute permits state taxation of the real property of such banks. 12 U.S.C. 548(3). Personal property and the capital of National Banks cannot be taxed by a state. 51 Am.Jur. Taxation § 254.

The nature of the Hawaii use tax is described in section 119-2 which imposes the tax. That section provides in part:

"Imposition of tax exemptions. There is hereby levied an excise tax on the use in this State of tangible personal property which is imported, or purchased from an unlicensed seller, for use in this State. . . ." (Emphasis added.)

A state excise tax based upon the use of tangible personal property in that state is not one of the four permissible forms of state taxation that may be imposed on National Banks as set forth in the National Bank Act. 12 U.S.C. 548. Hence, the use by a National Bank in Hawaii of tangible personal property which has been imported or purchased from an unlicensed seller would not subject that bank to the levy of the use tax under Chapter 119.

Moreover, it has been held that a state cannot impose a tax on the personal property of a National Bank. Security-First National Bank v. Franchise Tax Board, 359 P.2d 625 (Calif. 1961); Clark v. First National Bank, 224 N.Y.S. 10 (1927). Although Hawaii does not have a personal property tax, yet it is arguable that a tax on the use of personal property of the National Banks within the meaning of § 119-2 as aforesaid would fall within the prohibitive sphere of taxation established by Congress.

Consequently, the sales of tangible personal property made to National Banks are exempt from the application of Hawaii's general excise tax (Chapter 117) since a National Bank is a federal agency or instrumentality "so constituted as to be immune from the levy of the tax under Chapter 119. . . ."

To summarize: Hawaii's use tax cannot be applied to the use of tangible personal property of a National Bank located in Hawaii which has been imported or bought from an unlicensed seller. Such a tax is not one of the four methods of state taxation the National Bank Act permits to be applied to National Banks or their shares. Since Hawaii's general excise tax exempts from its application the sales of tangible personal property made to Federal agencies or instrumentalities which are immune from the levy of the use tax under Chapter 119, these sales of tangible personal property made by licensed sellers to National

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Banks are not subject to Hawaii's general excise tax. Hence, these sellers are exempt from paying the general excise 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/ Kenneth K. Saruwatari

KENNETH K. SARUWATARI
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