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Op. No. 68-21

August 5, 1968

Dr. Thomas K. Hitch, Chairman
Committee on Taxation and Finance
Constitutional Convention of Hawaii of 1968
Honolulu, Hawaii

Dear Dr. Hitch:

This is in reply to your letter of July 29, 1968 requesting an opinion of this office on whether section 2, Article VI, of the Constitution of the State of Hawaii is redundant in that the protection provided by that section is already guaranteed by section 1 of Article XIV of the Constitution of the United States and by section 4 of Article I of the Constitution of the State of Hawaii, both of which ensure equal protection of the laws.

The equal protection clauses of the Federal and State Constitutions require substantial equality of taxation. It is the opinion of this office that, to that extent, section 2 of Article VI is redundant. However, section 2 of Article VI may require strict equality of taxation, and if that exacting standard is desired, then section 2 of Article VI would not be redundant.

Section 2 of Article VI of the Constitution of the State of Hawaii reads as follows:

"Section 2. The land and other property belonging to citizens of the United States residing without the State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof."

Although the language of this provision is quite broad, it would seem reasonable to imply certain limitations.*

*This section has not been interpreted by the Supreme Court of Hawaii.

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For example, the requirement of a uniform rate of taxation for residents and nonresidents would seem to presuppose that the property be of the same class.

Section 2 of Article VI precludes the State, in the exercise of its power to tax, from discriminating against nonresidents. The equal protection clauses of the Federal and State Constitutions also proscribe, to a certain extent, the use of a classification based on residency under the taxation power of the State. Numerous decisions of the Supreme Court of the United States have held that a tax on property of the same class unreasonably discriminating against nonresidents is a denial of equal protection of the laws.

Southern Ry. Co. v. Greene, 216 U.S. 400,
54 L.Ed. 536, 30 S.Ct. 287 (1910);

Louisville & Nashville R.R. Co. v. Gaston,
216 U.S. 418, 54 L.Ed. 542, 30 S.Ct. 291
(1910);

Air-Way Corp. v. Day, 266 U.S. 71, 69 L.Ed.
169, 45 S.Ct. 12 (1924);

Hanover Ins. Co. v. Harding, 272 U.S. 494,
71 L.Ed. 372, 47 S.Ct. 713 (1926);

Wheeling Steel Corp v. Glander, 337 U.S.
562, 93 L.Ed. 1551, 69 S.Ct. 1296 (1949).

However, the equal protection clause requires only substantial quality:

"The equal protection clause does not require a State to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions." Lawrence v. State Tax Commission of State of Mississippi, 1932, 286 U.S. 276, 284,

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285, 76 L.Ed. 1102, 52 S.Ct. 556. See also:
Welch v. Henry, 1938, 305 U.S. 134, 83 L.Ed. 87, 59
S.Ct. 121; Ohio Oil Co. v. Conway, 1929, 281 U.S.
146, 74 L.Ed. 775, 50 S.Ct. 310, and cases cited.

Therefore, the equal protection clause would not invalidate the imposition of a tax at a higher (but not substantially higher) rate for a nonresident than a resident on property of the same class. However, section 2 of Article VI may be more far-reaching due to the specificity of its proscription. Consequently, it may bar even insubstantial rate differentials based on residency.

In conclusion, section 2 of Article VI of the State Constitution is redundant to an extent in that substantial equality of taxation is already provided by the equal protection clauses of the Federal and State Constitutions. However, it is likely that section 2 of Article VI establishes a more stringent standard of equality.

In reply to your question regarding the necessity of changing section 6 of Article VI should a proposal authorizing the issuance of industrial development bonds be adopted, we are of the opinion that no change in section 6 of Article VI would be necessary. Whatever conflict there might appear to be between that authorization and the "public purpose" requirement of section 6, Article VI should be resolved by the well-settled rule of constitutional interpretation:

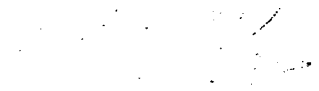
"When general and special provisions of a constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in instances where the special provisions do not apply." 16 C.J.S. Constitutional Law § 25.

Very truly yours,

APPROVED:

BERT T. KOBAYASHI

Bert T. Kobayashi
Attorney General


Morton King
Deputy Attorney General