Opinion No. 57-198

August 12, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Mr. George Franklin, Liquor Director, Bureau of Revenue, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. "Whether open messes may purchase alcoholic liquors without the liquor excise stamps attached as required by the New Mexico Excise Stamp Tax, . . ."

2. "Whether open messes may possess and/or sell alcoholic liquors to which excise stamps have not been affixed."

3. "Whether open messes may purchase alcoholic liquors without regard to the minimum prices established pursuant to the New Mexico Liquor Fair Trade Law, . . ."

4. "Whether open messes may sell alcoholic liquors without regard for the liquor fair trade law."

5. May open messes procure liquor by direct shipment from out-of-state suppliers?

CONCLUSIONS

1. No.

2. No.

3. Yes.

4. Yes.

5. No.

OPINION

ANALYSIS

Generally, the New Mexico Liquor Code provides, in part, that taxes shall be imposed and collected on the sale of alcoholic beverages, and further, that it shall be unlawful for any licensee to sell at prices below that established by agreement, except upon

contracts to the Departments of the Federal Government and this State. §§ 46-7-1; 46-9-1; 46-9-11, N.M.S.A., 1953 Compilation.

The Buck Act, dating from 1940, and as amended in 1954, 4 U.S.C.A. 105-110, removed the cloak of Federal immunity from all individuals relative to their liability for the payment of state imposed sales, use, and income taxes. Excepted from this expressed receding of state sovereignty over Federal areas were transactions carried on by and for the benefit of the United States or its instrumentalities. Accordingly, it is upon this point of inquiry that a study must be made in an attempt to resolve the questions tendered.

In **Standard Oil of California vs. Johnson,** 316 U.S. 481, the Court was confronted with the status of Army Post Exchanges in the realm of Federal instrumentalities. In resolving the issue against the State of California's sovereign right and privilege to tax any but instrumentalities, as aforesaid, the Court pointed out the following:

"On July 25, 1895, the Secretary of War, under authority of Congressional enactments (16 Sta. 315, 319; 18 Stat. 337) promulgated regulations providing for the establishment of post exchanges. These regulations have since been amended from time to time and the exchange has become a regular feature of Army posts. That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law.

* * *

. . ., we conclude that post exchanges as now operated are arms of the Government deemed by it essential of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution of federal statutes."

Accordingly, this state has recognized the immunities reserved by the Government in its move to recede limited taxing authority and granted tax relief to post exchanges.

Attorney General's Opinion No. 5825, in recognizing the instrumentality status of the exchanges, specifically distinguished therefrom open messes or clubs operated as voluntary associations, sanctioned by military authority but not provided for by law. It was reasoned in the aforesaid opinion that open messes (officer and NCO clubs), while operated under strict military jurisdiction and by duly assigned military personnel, had no inception in Constitutional or Congressional provisions, and further, existed and were maintained from funds not appropriated for the public need. It was further pointed out that under the Act of March 2, 1899, § 17, 30 Stat. 981; 10 U.S.C.A. 1350, the sale or dealing in intoxicating liquors on military premises was prohibited. Thus, if alcoholic beverages were being sold, dispensed, or consumed in open messes, such must be considered entities not subject to military law or regulation and consequently not instrumentalities. This reasoning is questioned in light of present law.

Considering the theory upon which the Johnson Case turned, supra, open messes are provided for in AR 230-60, which in part provides:

"Military sundry funds governed by these regulations are instrumentalities of the United States and are entitled to all immunities and privileges of such instrumentalities."

and continuing:

"a. Officers' and noncommissioned officers' open messes as adjuncts of the Army provide services essential to messing, billeting, and recreation of officers, warrant officers, noncommissioned officers, and their dependents.

* * *

"b. The term 'open mess' as used in these regulations will be interpreted to include messes, and associations of officers and noncommissioned officers, organized for messing, billeting, and recreational purposes and is used to distinguish the open type mess from a field ration mess. . . ."

Statutory authority for this regulation may reasonably be found in the Act of 10 August 1956, 70 A Stat. 157, which declares:

"Secretary of the Army: powers and duties * * * (b) The Secretary is responsible for and has the authority necessary to conduct all affairs of the Department of the Army, including . . .

"(1) functions necessary or appropriate for the training, operation, administration, logistical support and maintenance, welfare, preparedness, and effectiveness of the Army, . . ."

It has been presented that a necessary factor in the proof of instrumentality status is that of appropriation, and further, that such appropriation be considered in maintenance and operating funds. It is our opinion that such a test is valid and generally may be self sustaining, however is not exclusive. Under the provisions of ARs 210-55, 230-5 and 230-60, detailed requirements are set out in the use of government (military) buildings and facilities, troop labor, projects approvable involving non-appropriated funds, use of funds, inspections of activities, records, and facilities by authority of appropriate commanders, and basic concept and purpose of the nonappropriated fund system. The responsibility for troop welfare, as called for by this Act of 10 August 1956, supra, is well approached in these last cited regulations.

In **Maynard & Child vs. Shearer,** (Kentucky), 290 S.W. 2d 790, (1956), the Kentucky Court was confronted with determining the status of an officers club organized at Ft. Knox in relation to its liability for a state consumer's tax on alcoholic beverages imported and sold. Among other allegations by plaintiff, it was pointed out that officers clubs were

instrumentalities of the Federal Government and Consequently immune from state taxes of the nature imposed. The Court pointed out that:

"The Congress of the United States, in the year 1940, passed a resolution generally known as the Buck Act, . . ., receding to the states sufficient sovereignty to collect taxes, in certain circumstances, in federal areas. Section 105 (2) provides:

'No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any state * * * having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a federal area; and such state or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any federal area within such state to the same extent and with the same effect as though such area was not a federal area.'

However, in section 107 (a) is found the following exception:

'The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any **instrumentality** thereof, or the levy or collection of any tax with respect to sale, **purchase,** storage, or use of tangible personal property sold by the United States or any **instrumentality** thereof to any authorized purchases.'

* * *

While a post exchange provides for various services an officers' club provides for an officers' mess and various other recreational services for the members. They are subject to the control of the commanding officer of an Army post and managed by Army officers. We see little difference in legal character and legal contemplation between a post exchange and an officers' club. We, therefore, hold the officers' club to be an instrumentality of the United States, within the meaning of the Buck Act, and accordingly exempt from state taxation, unless it can be proved that the officers here involved got together for the purpose of avoiding the prohibition against the sale of liquor imposed by section 28, Act of Congress, Feb. 2, 1901, 31 Stat. 758, 10 USCA § 1350, or unless the proof shows that the association of officers was not in fact an officers' club under the war department regulations."

It has been further reasoned that since, under section 28, Acts of Congress, 2 Feb. 1901, supra, the sale of alcoholic beverages is prohibited on military reservation etc., that any club or association could not thereby be clothed with the immunities provided instrumentalities of the prohibiting authority. This contention, while well taken, but apparently not tested is overcome by the following considerations:

"Under Act March 2, 1899, § 17, 30 Stat. 981, which in effect prohibited the sale of intoxicating drinks in any premises used for military purposes for the United States, it was held no officer or private soldier could be detailed in the canteen section of post

exchanges to sell intoxicating drinks, either directly or indirectly, nor could a license or permission be given by the commanding officer to a private person to sell liquors in any encampment, fort, or premises used for military purposes by the United States, but that said section did not prevent the continuance of the sale of intoxicating drinks through the canteen section of post exchanges as heretofore organized, by civilians employed for that purpose. (1899) 22 Op. Atty. Gen." 426 n. 10 U.S. CA § 1350.

Of recent and far greater importance is Section 6, 1951 Amendments to the Universal Military Training and Service Act (65 Stat. 88, 50 USC App 473), which provides, in part, as follows:

"The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors **to or by members of the Armed Forces** or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps." (Emphasis Supplied)

In accordance with reasonable rules of statutory law, it may be concluded that the Act of 1899 and subsequent statutes effecting prohibitions against sales of intoxicating beverages on military reservations by and to military personnel have been repealed by implication. See also AR 210-65 (30 June 55).

Article 9, Chapter 46, N.M.S.A., 1953, which is commonly referred to as the Fair Trade Article of the Liquor Code, provides for trade practices generally protecting contractual rights, among agreed to minimum, wholesale and retail prices. § 46-9-1, N.M.S.A., 1953. Further, sales at prices below provided for "cost" are prohibited. § 46-9-11 There is, however, provided by § 46-9-11 (C) (2) an exception to-wit:

"(C) The foregoing provisions of this section shall not apply to wholesale or retail sales of spirituous liquor, beer or wine which the chief of division shall find in writing, upon sworn written application to him for consideration thereof and finding thereof, come within any of the following classification:

* * *

(2) Spirituous liquors, beer or wine to be sold upon contract to the departments of the federal government, this state or the institutions of either;"

Accordingly, it is our opinion that open messes, when conducted in accordance with the provisions herein considered, supra, are instrumentalities of the Federal Government and exempt from the requirements of the Alcoholic Beverage Fair Trade Laws of this State.

Section 72-16-6, N.M.S.A., 1953, provides as follows:

"No excise taxes of the state of New Mexico, direct or indirect, shall be imposed upon the sale, use, delivery or storage of articles of merchandise to or by any instrumentality of the armed forces of the United States engaged in resale activities, except those state excise taxes which are specifically authorized by Acts of Congress of the United States, **and except those excise taxes levied on spirituous liquors and wine as they are defined in section 61-101, New Mexico Statutes Annotated, 1941 Compilation (46-1-1)"** (Emphasis Supplied)

The language of the afore quoted statute plainly manifests a legislative intent to relieve any instrumentality of the Armed Forces from the payment of taxes as otherwise provided. The language further indicates, regardless of being compiled with and among the emergency school tax provisions, applicability to all manner of excise taxes provided. The specific exceptions are clear and the effect of the exception as to spirituous liquors and wine upon a determination of instrumentality status of either post exchanges or open messes is easily recognized.

It is, therefore, our opinion, in view of § 72-16-6, supra, that Federal instrumentalities, as such, are not exempt from the excise stamp tax, as provided for in Article 7, Chapter 46, N.M.S.A., 1953.

Finally, consideration is given to the question of procuring alcoholic beverages by open messes from out-of-state suppliers. Section 46-5-21 provides, in part, as follows:

"(a) Before any person, except licensed New Mexico wholesalers, shall directly or indirectly sell, offer for sale, or ship into the state of New Mexico, any alcoholic liquors, he shall procure from the division a nonresident license and shall pay therefor annually in advance the sum of one hundred dollars ($ 100). Such license shall entitle the holder thereof to exercise the privileges of a nonresident licensee or and from July first of any year up to and including June thirtieth of the following year. Nonresident license fee shall be prorated in the manner provided in section 703 (46-5-16).

(b) Nonresident licensees may sell, offer for sale or ship into the state of New Mexico alcoholic liquors only to licensed New Mexico distillers, brewers, rectifiers, winers and wholesalers. Nonresident licensees shall not sell, offer for sale or ship alcoholic liquors to retailers, dispensers, clubs or consumers.

* * *"

and further, § 46-10-7 provides that:

"(a) It shall be unlawful for any person on his own behalf or as the agent of another person, except a licensed New Mexico wholesaler, rectifier, or the agent of either, directly or indirectly to sell, or offer for sale, for shipment into the state of New Mexico, or ship into the state of New Mexico any alcoholic liquors unless such person or his principals shall have secured a nonresident license as provided in section 707 (46-5-21) of this act.

* * *"

and in § 46-10-8:

"(a) It shall be a violation of this act for any registered common carrier to deliver any shipment of alcoholic liquors from another state to any person in the state of New Mexico, without receiving, at the time of delivery to such person, a permit issued by the division covering the quantity and class of liquor to be delivered, and said shipment so delivered is required to have been transported from the shipper designated in the permit to the consignee therein designated and from the point of origin to the destination, both, designated in said permit.

(b) It shall be a violation of this act for any person other than a registered common carrier to transport from another state, and deliver in this state, any alcoholic liquor unless such person has in his possession on entering the state of New Mexico a permit from the division for the quantity and class of liquor to be delivered, and designating the name of the shipper and consignee, and the point of origin and destination of such liquor.

* * *"

Referring to the three sections last quoted, we find, generally, that only licensed nonresident suppliers shall be permitted to import alcoholic beverages into New Mexico, that such importations may be made only to licensed New Mexico wholesalers or distilleries and further, that such importations shall be permitted only when approved by the Division of Liquor Control.

It is our opinion, in view of the statutory provisions hereinabove considered and the expression of law found in **Johnson vs. Yellow Cab Transit Co.,** 321 U.S. 383, and followed in Attorney General's Opinion No. 5825, supra, that the exercise of control, as provided, is not a restriction upon interstate commerce, a burden upon the Federal Government or any instrumentality thereof, and of prime importance, due exercise of the police powers retained by the sovereign state.

It is further our opinion that all deliveries of alcoholic beverages to post exchanges and open messes located on and within the confines of ceded military reservations in New Mexico must be made by licensed New Mexico wholesalers or distributors.

All findings and conclusions expressed in Attorney General's Opinion No. 58-25 (1953) differing or contradictory to those herein stated are specifically overruled.

It is hoped that this opinion fully answers the inquiries put.