

Opinion No. 59-190

November 19, 1959

BY: OPINION OF HILTON A. DICKSON, JR., Attorney General

TO: Mr. W. K. Aldridge Division of Liquor Control Bureau of Revenue Santa Fe, New Mexico

QUESTION

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1. May salted wines of not more than 20% of alcohol by volume and containing not less than 1.5 grams of salt per 100 cubic centimeters, which under federal law are exempt from rectification tax, be marketed in New Mexico free from the state excise tax and in non-licensed outlets such as grocery stores and other food stores?

CONCLUSION

See analysis.

OPINION

{*293} ANALYSIS

"It has generally been held that compounds which are distinctively known and used as drugs, medicinal, toilet, **or culinary** preparations are not intoxicating liquors, within the statutes, no matter how large a proportion of alcohol they may contain, where they cannot practically be taken as a beverage for the sake of the alcohol which they contain because of their repulsive taste or smell, because the effect of the alcohol is counteracted by the other ingredients, or because of their systematic effects if taken in excess doses." **48 Am. Jur. Intoxicating Liquors, § 10.** . . . (Emphasis supplied)

The test is whether or not the concoction is potable, particularly where the statute defines alcoholic liquors as beverages. The language of Section 46-1-1, N.M.S.A., 1953 Compilation, Pocket Supplement, reads in part as follows:

"The term 'wine' shall be construed to include the words 'fruit juices' and shall mean all alcoholic **beverages** obtained by the fermentation of the natural sugar contained in fruit or other agricultural products . . ." (Emphasis supplied).

A discussion of this definition may be found in **C.J.S., Intoxicating Liquors, §§ 1-10.** Excerpts from these sections, which are pertinent to your question are as follows:

"§ 1. . . . Fitness for beverage purposes is an essential attribute of intoxicating liquor, and, notwithstanding a liquor contains the requisite amount of alcohol, it is not an intoxicating liquor if it is unfit for beverage purposes, . . ."

"2. . . . The word 'beverage,' as used in the statutes relating to intoxicating liquors, means a liquor that is capable of being drunk, and, in determining whether a liquor is capable of being used as a beverage, the test applied is not limited to the case of an average individual with average tastes. . ."

We are of the opinion that in order to permit salted (cooking) wines to be sold in food store outlets without the payment of excise tax, the question must first be either judicially or administratively determined: "Is the concoction in question capable of being {*294} used as a beverage?" If the answer is in the affirmative, then because of its alcoholic content, it would definitely be within the scope of our law pertaining to the sale of alcoholic liquors. If the question is answered in the negative, then no liquor tax would have to be paid on it and the product could be marketed in food stores without a license.

Whether the preparation in question is potable or not is a question of fact which this office cannot determine. As Chief of the Division, you must decide on the facts whether or not this salted wine may be used as a beverage. If it cannot be so used, your submitted question is answered in the affirmative; if the salted wine can be used as a beverage, then the answer to your submitted question is in the negative and the wine can only be sold under the general licensing and regulatory laws of this State pertaining to alcoholic liquors, including Section 46-7-1, N.M.S.A., 1953 Compilation, Pocket Supplement, relating to the payment of excise taxes thereon.

By: B. J. Baggett

Assistant Attorney General