by filing of a criminal proceeding through the prosecutor of said county. In such event the constitutionality of said provision of said law could be judicially determined.

TLW:ar

OFFICIAL OPINION NO. 66

July 19, 1949.

Mer. Bernard E. Doyle, Chairman,
Alcoholic Beverage Commission,
Illinois Bldg., Room 201,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of June 6, 1949 which reads as follows:

"Will you kindly give me your official opinion as to whether or not the excise and enforcement taxes on alcoholic malt beverages are applicable to beer sold at military post exchanges or sold in other United States government areas?"

In the case of Standard Oil Company of California v. Johnson (1942), 316 U. S. 481, 62 Supreme Court, 1168 it was held:

"Army post exchanges are 'arms of the government' deemed by it essential for performance of 'governmental functions,' and they are integral parts of the War Department, share in fulfilling duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes, * * *"

Our Indiana Appellate Court in the case of Department of Treasury v. Midwest Liquor Dealers (1943), 113 Ind. App. 569 held that the excise tax as provided by statute was a privilege tax imposed by the State of Indiana upon the manufacturer or wholesaler for the privilege of sale or gift, or the withdrawal for sale or gift, of alcoholic beverages and not a direct tax upon the commodity itself intended to be passed
on to the ultimate consumer and the fact that it is so passed on through the usual channels of trade is only incidental.

In the case of Alabama v. King & Boozer (1941), 314 U. S. 1, 62 Supreme Court 43, wherein the court had before it the question as to the applicability of the sales tax of the State of Alabama levied upon a contractor who was doing construction work under a contract with the United States government and being paid on the “cost-plus” plan, it was held:

“No constitutional immunity of the United States from state taxation prevents a State from applying its sales tax to a purchase of building materials by one who buys them for use, and uses them, in performing a ‘cost-plus’ building contract for the Government, although the contract provides that the title to such materials shall vest in the United States upon their delivery, inspection, and acceptance by a Government officer, at the building site, and that the contractor shall be reimbursed by the Government for the cost of the materials, including the tax.”

This case was followed by the case of Curry, Commissioner of Revenue of Alabama, v. United States, decided November 10, 1941, 314 U. S. 14 in which case the court said on page 17:

“For the reasons stated at length in our opinion in the King & Boozer case, we think that the contractors, in purchasing and bringing the building materials into the state and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government; and they are not relieved of the tax, to which they would otherwise be subject, by reason of the fact that they are Government contractors. If the state law lays the tax upon them rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the King & Boozer case, by concession of the Government and on authority, the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed
on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."

In my opinion these cases are authority for the proposition that the tax now being considered can not be considered as a tax upon the post exchange or upon any other United States governmental instrumentality merely because it perchance may be included in the purchase price.

Section 12-801 Burns' 1942 Replacement (Acts 1935) Chapter 226, Section 40 Clause A, Page 1056; 1939, Chapter 30, Section 5, Page 79, provides as follows:

"An excise tax at the rate of four cents (4c) a gallon is hereby imposed and levied upon the sale within this state of alcoholic malt beverages. * * * The commission shall prescribe the form and denomination of tax stamps provided for in this subsection and shall prescribe the manner of affixing the same to the barrels, kegs, cases or cartons containing bottles or cans of alcoholic malt beverages * * *

"Brewers or other persons shipping or transporting alcoholic malt beverages into this state from without this state may purchase tax stamps from the commission, and shall affix in the manner prescribed by the commission, the proper tax stamps to each barrel * * * to be shipped or transported into this state for consumption or sale herein.

"Only tax paid alcoholic malt beverages may be imported into this state for delivery or use herein, * * *. Nothing herein contained shall require tax stamps to be attached to any container of alcoholic malt beverages being shipped from another state in continuous transit through this state, or to a United States military reservation within this state.

"* * *

"The commission shall promulgate rules and regulations to relieve brewers from the liability to affix stamps on beer intended to be shipped and which is actually shipped out of this state by such brewers for sale outside this state."
"Beer wholesalers within this state who receive beer upon which the tax has been paid shall be entitled to a refund of the amount of such tax on all such tax-paid beer shipped out of this state by such wholesaler for sale outside the state or sold within the state under circumstances exempting such beer from the tax. The commission shall promulgate rules and regulations governing the form of application for and the evidence required to establish the right to such refund." (Our emphasis.)

Section 12-446, Burns' 1947 Pocket Supplement (Acts of 1945) Chapter 357, Section 13, Page 1737 provides for an additional excise tax of four cents (4c) a gallon upon the sale and/or possession for sale within this state of alcoholic malt beverages. This act further provides that the payment, collection and enforcement of the additional excise tax shall be made in the same manner and paid by the same person as provided for the payment and collection and enforcement by Section 12-801, Burns', supra. This act specifically provides that the tax shall not apply to nor be payable on the sale for delivery outside of the State of Indiana, or withdrawal for sale for delivery outside of the State of Indiana.

There is likewise an enforcement tax of three-fourths cent ($\frac{3}{4}c$) on each gallon of alcoholic malt beverages. Acts of 1941, Chapter 237, Section 7, Page 958; 12-428 Burns' 1942 Replacement. Under the provisions of this act the manufacturer of alcoholic malt beverages is made liable for the payment of this tax in respect to any and all gifts, sales or withdrawals for sale of alcoholic malt beverages by him to any person or persons within the State of Indiana, and the wholesaler is made liable for the payment of said tax in respect to any and all gifts, sales or withdrawals for sale by him of alcoholic malt beverages not manufactured within the State of Indiana. This act empowers the commission to fix and determine the times, manner and methods of the collection and payment of the tax. The act further provides that the enforcement tax shall not apply or be payable on alcoholic malt beverages withdrawn for sale for delivery outside the State of Indiana and sold for delivery outside the State of Indiana. Summarizing, we see that the excise and enforce-
The enforcement tax is levied upon the manufacturer and the wholesaler. The manufacturer is not liable or taxable on beer sold outside of the state, and the wholesaler is entitled to a refund on all beer sold by him outside the State of Indiana. Likewise the enforcement tax is not required on beer sold outside the State of Indiana.

I think, therefore, that upon the basis of the authorities and statutes heretofore cited that the state, without violating any constitutional rights, may levy such a tax and that the same is collectable unless prevented under jurisdictional ground or grounds of exemption.

The sole question resolves itself, in my opinion, into a question of whether or not army camps or other areas which have been ceded to the United States under the statutes of the State government, are outside of the State of Indiana within the purview of the intoxicating liquor statute.

In this connection, I call your attention to the case of Brooks Hardware Company v. J. B. Greer et al, 87 Atlantic 889; 111 Maine 78; 46 L. R. A. N. S. 301. In this case the National Home for Disabled Volunteer Soldiers was summoned as trustee. The principal defendant was defaulted. It was admitted that the alleged trustee had entered into a written contract with the principal defendant for the complete construction of the improvements of the sewage and drainage system of the Eastern Branch of the National Home for Disabled Volunteer Soldiers, located at Chelsea, in the county of Kennebec, Maine. The case was heard upon the preliminary question whether the National Home could be legally charged as trustee in this action, and the justice ruled that it could not be so charged. The court arrived at the conclusion that it did not have jurisdiction to summons this National Home as trustee unless the Home, which is not a domestic corporation, had a place of business or was doing business within this state. After discussion of the Act relative to cession which is similar to the Act of this state on the same subject, the court said, quoting from page 305 supra:

"If by this act of cession the territory ceded ceased to be territory over which the state of Maine has jurisdiction, and became territory over which the United States has exclusive jurisdiction and supremacy,
then it follows that the Home has no place of business, and is not doing business, 'within this state,' for the import of those words as used is "within the jurisdiction of this state'. The language used in this ceding act is practically identical with that used in the ceding acts passed by other states, where land has been purchased by the United States for public purposes, from which fact it is reasonable to infer that the use of such uniform language of cession was at the instance of the United States; and an examination of the cases in which this language has been construed discloses the reason for its use to be in the fact that its construction, by both Federal and state courts, has been definite and consistent from an early date."

Thereafter a number of cases are discussed, but the Court finally comes to the conclusion that the Homes, although regarded as a corporate existence having the right to sue and be sued, does not have its place of business "within this state."

I likewise call your attention to the case of Surplus Trading Company v. R. A. Cook, 281 U. S. 647-658, wherein the Supreme Court of the United States said:

"'The constitution of the United States declares that congress shall have power to exercise "exclusive legislation" in all "cases whatsoever" over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings. When therefore a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased by the very terms of the constitution ipso facto falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted. * * "' (Our emphasis.)

See also Standard Oil Company of California v. California (1934), 291 U. S. 242. Here the State of California had levied a license tax upon every distributor for each gallon of motor vehicle fuel sold and delivered by him in the State of California. The distributor had sold and delivered to the post..."
exchange, the Presidio of San Francisco, 420 gallons of gasoline. The distributor contended that because of cession of this area to the United States for military purposes it was a sale outside of the State of California. The holding of the Supreme Court of California was to the effect that the area was within the geographical confines of the state and for this purpose said military reservation was to be included like all other territories. The holding of the Supreme Court of California was reversed by the Supreme Court of the United States. The holding being that since the state ceded to the United States exclusive legislative jurisdiction over the Presidio, she is now without power to impose taxes in respect of sales and delivery made therein, that the area in question was beyond the field of operation of California law. See also: Arlington Hotel Company v. Fant et al, 278 U. S. 489. I likewise call your attention to Attorney General's Official Opinion No. 66, dated November 12, 1948, wherein it was held that the Federal Penitentiary at Vigo County, Terre Haute, Indiana, was not a part of Vigo County, State of Indiana.

In this connection the question now presents itself, has the wholesaler the right to sell without the State?

In my opinion the various powers granted to the wholesaler under Section 12-508 Burns' 1942 Replacement and the provisions for refund (Burns' 12-801 supra) certainly authorize the wholesaler to sell outside the State.

I conclude from the authorities as well as the statutes cited, supra, that the taxes in question can not be considered as a tax upon the United States Government instrumentality or area such as a military camp or post exchange merely because perchance it may be included in the purchase price: That the excise tax is a tax imposed upon the manufacturer and wholesaler: That the manufacturer may sell to any governmental area without paying the tax or placing the stamp on the container: That the wholesaler receiving the beer from the manufacturer on which the excise tax had been paid by the manufacturer may sell directly to the governmental area and in which case he shall be entitled to a refund of the tax paid. As for the enforcement tax, the manufacturer may likewise sell directly to the governmental area without payment of the tax and without the stamp having been placed upon the container. That as to the wholesalers, they may
likewise sell directly to a governmental area without payment of the enforcement tax or the placing of stamps on the containers, but here I believe it well that the Commission by rule and regulation should determine the procedure or set up the machinery for this type of sale.

There is likewise an excise tax on alcoholic spirituous beverages, 12-802 Burns' 1942 Replacement, Acts 1935, Chapter 226, Section 40, page 1056; 1939 Chapter 130, Section 5, page 79, where again it is provided that the excise tax shall not apply to or be payable on the sale for delivery outside of the State of Indiana or withdrawal for sale for delivery outside the State of Indiana. This tax is levied and imposed against any permittee holding any distillers permit, or a rectifier's permit, or a liquor wholesaler's permit or a dining-car liquor permit, or a winery permit, or a wine wholesaler's permit, or a dining-car wine permit, or a boat wine permit, authorized to be issued under the terms of the act.

Under Section 12-516 Burns', Acts of 1939, Chapter 30, Section 3, page 79, liquor wholesalers are permitted to sell only to a person holding a permit entitling such person lawfully to receive from such wholesaler alcoholic spirituous beverage. There is no provision for refund of excise tax on alcoholic spirituous beverage, Section 12-802, supra, as is provided for beer wholesalers, 12-801 supra. However, under Section 12-919a, Acts of 1939, Chapter 30, Section 6, page 79, it is provided:

"Notwithstanding any other provisions in this act the commission may authorize the sale of alcoholic beverages to any officer or person legally entitled to purchase the same, and the delivery to such person on a military reservation or other reservation within this state which is under the authority of the United States government or any department thereof, if such sale and delivery is authorized by said government or department thereof having control of said reservation."

I construe this Section as an exception to the provision found in 12-516, supra, that is to say that liquor wholesalers can only sell to a person holding a permit except, however, that the commission may within its discretion authorize the sale and delivery to an officer or person on a military reserva-
tion or other reservations within the state which is under the authority of the United States government or any department thereof, provided that same is legally authorized by said government or department thereof having control of said reservation. In my opinion, therefore, a liquor wholesaler may sell to a military reservation or governmental area only when specifically authorized to do so by the commission and in which case the excise tax is not applicable. It is my opinion further that the excise tax is not applicable when sold directly to the military reservation or to the officers or persons thereon directly by the distiller.

FEC:ar

OFFICIAL OPINION NO. 67
July 26, 1949.

Mr. Otto K. Jensen,
State Examiner,
State Board of Accounts,
State House, Room 304,
Indianapolis 4, Indiana.

Dear Sir:

Your request of May 28, 1949, for an official opinion is as follows:

"Your official opinion is requested on a question about H. B. 191, (Chapter 32, Acts of 1949), as follows:

1. Do the provisions of said Chapter 32 violate the provisions of Article 1, Section 23 of the Constitution of Indiana?

"If your answer to the foregoing question is in the negative, will you please state what qualifications a cemetery must have in order that it may be maintained by a township.

"If your answer to the question is in the affirmative, would Chapter 337, Acts of 1947 now be controlling in the care and maintenance of cemeteries therein referred to."