ALCOHOLIC BEVERAGE COMMISSION: Enforcement tax, whether same applies to beer sold to a post exchange located in an army camp owned by the United States Government and located within Indiana.

September 24, 1943.

Mr. Bernard E. Doyle,
Excise Administrator,
Alcoholic Beverage Commission,
Illinois Building,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion with reference to the responsibility for the payment of enforcement taxes on alcoholic beverages shipped to Government Reservations within the State of Indiana. You propound four questions which are as follows:

"1. Is an Indiana brewer, selling to an Indiana wholesaler, who in turn sells to a Post Exchange, located in an Army Camp owned by the United States Government and located within Indiana, subject to the enforcement taxes?

2. Is an Indiana brewer, selling direct to a Post Exchange, located in an Army Camp owned by the United States Government and located within Indiana, subject to the enforcement taxes?

3. Is an out-of-state brewer, selling direct to a Post Exchange, located in an Army Camp owned by the United States Government and located within Indiana, where title passes in another state, subject to the enforcement taxes?

4. Is an out-of-state brewer, selling direct to a Post Exchange, located in an Army Camp owned by the United States Government and located within Indiana, where title passes in the Army Camp, subject to the enforcement taxes?"

The enforcement tax act referred to by you is Section 7 of Chapter 237 of the Acts of the General Assembly of Indiana
of 1941 and so far as necessary for this discussion provides as follows:

"For the purpose of securing funds for the enforcement of the provisions of this act, there is hereby levied and imposed upon the manufacturers and wholesalers of alcoholic malt beverages, * * * in respect to the gift, sale or withdrawal of all alcoholic beverages by them respectively, as more specifically herein provided, an enforcement tax, which tax shall be in addition to any and all license fees and other excise taxes required to be paid by any such person or persons.

"The manufacture of alcoholic malt beverages shall be liable for and shall pay said 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.

"The wholesaler of alcoholic malt beverages shall be liable for and shall pay 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.

"* * *

"The enforcement tax imposed and levied by this section shall be calculated and paid at the rate of three-quarters of one cent (\(\frac{3}{4}c\)) on each gallon of alcoholic malt beverages, * * * which are given or sold, or withdrawn for gift or sale in the state of Indiana.

"* * *

"The enforcement tax provided for in this section shall not apply or be payable on alcoholic beverages withdrawn for sale for delivery outside the state of Indiana and sold for delivery outside the state of Indiana, nor shall the enforcement tax provided for in this section apply to or be payable on the sale or withdrawal of wine to any pastor, rabbi or priest for sacramental or religious purposes only."

Burns' Indiana Statutes Annotated, 1933, 1942 Replacement, Section 12-428;
Section 7, supra, as above indicated is a part of Chapter 237 of the Acts of the General Assembly of Indiana of 1941, which amended the Alcoholic Beverages Act and added certain supplemental sections of which Section 7 is one. In interpreting this section, therefore, it should be considered as a part of the Indiana Alcoholic Beverages Act, and not some independent legislation without definite relation to the general act.

I think it must be regarded as settled that Post Exchanges, as now operated, are arms of the Government deemed valuable for the essential performance of governmental functions. As said by the Court in the case of Standard Oil Co. v. Johnson, 316 U. S. 481 at page 485:

"From all of this, we conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance 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 and federal statutes. * * *

In the consideration of the questions before me, it is therefore necessary to determine against whom the tax is laid. The language of the statute, I think, is very clear upon this subject, definitely placing the liability upon the manufacturer where the sale is by the manufacturer direct; and where the beer is not manufactured within the State of Indiana and is sold in Indiana through licensed wholesalers, the statute clearly states that the wholesaler shall be liable and shall pay the tax. Any liability of the Governmental Exchanges purchasing the beer would be nothing other than the possibility or probability that such tax would be added to the price by the person legally liable for the tax as provided in the statute. This, however, as has been held by the United States Supreme Court, does not amount to the placing of the tax burden upon the Federal Agency in the legal sense. On that subject, you are referred to the case of Alabama v. King and Boozer, decided by the Supreme Court of the United States on November 10, 1941, and reported in 314 U. S. at page 1. In this case the question was 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. The holding of the Court is sufficiently set out in paragraph 1 of the syllabus which reads as follows:

“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 material 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.”
I think these cases are authority for the proposition that the enforcement tax now being considered cannot be considered as a tax upon the Post Exchange merely because perchance it may be included in the purchase price. I call your attention also in this connection to Section 13 of Title 4 U. S. C. A. which, among other things, provides as follows:

“(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, 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.”

In defining terms used in the act, Section 18 of Title 4, supra, provides, among other things, as follows:

“The term ‘sales or use tax’ means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 12 of this title are applicable.” (Our emphasis)

Section 12 referred to relates to authority to tax motor vehicle fuel sold on military reservations.

Referring now again to the enforcement tax, it will be noted that the language used in describing the tax is almost the same as I have underlined above to define the term “sales or use tax.” Note the language of the Act:

“The manufacturer of alcoholic malt beverages shall be liable for and shall pay said 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.” (Our emphasis)
Even though such tax is an enforcement tax, I think it is a sales tax within the terms of Section 13, supra, Title 4 of U. S. C. A.

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 collectible unless prevented under jurisdictional grounds or grounds of exemption. The questions propounded by you are quite different from the question under consideration in Pacific Coast Dairy, Inc. v. Department of Agriculture of California et al., decided by the United States Supreme Court on March 1, 1943, if for no other reason because it involved the authority of the Federal Government in a Federal area in the absence of special modifying authority by Congress, whereas as applied to the present questions, permission has been given by Congress to the levying of such a tax even though the transaction may in whole or in part have occurred in the Federal area.

It remains to be considered as to whether the sales referred to in your questions are not subject to the tax on jurisdictional grounds or on grounds of exemption. The question of exemptions is to be determined on the basis of the language of the statute, which provides as follows:

“The enforcement tax provided for in this section” (referring to Sec. 7, supra) “shall not apply or be payable on alcoholic beverages withdrawn for sale for delivery outside the state of Indiana and sold for delivery outside the state of Indiana, nor shall the enforcement tax provided for in this section apply to or be payable on the sale or withdrawal of wine to any pastor, rabbi or priest for sacramental or religious purposes only.”

Burns’ Indiana Statutes Annotated, 1933, 1942 Replacement, Section 12-428.

The sole question then resolves itself into a question of the correct construction of the language “withdrawn for sale or delivery outside the state of Indiana and sold for delivery outside the state of Indiana,” and is applicable, of course, only to such army camps as have been ceded to the United
States under the statutes of the State governing the same. In this connection, I call your attention to the case of Brooks Hardware Company v. J. B. Greer et al., 87 Atl. 889; 111 Maine 78; 46 L. R. A. (N. S.) 301. The action in this case was an action of assumpsit brought in the Supreme Judicial Court for Kennebec County, Maine, in which 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 said county of Kennebec, and the plaintiff introduced evidence tending to show a balance due the principal defendant in the hands of the treasurer of the Home at the time of the service of the writ upon the alleged trustee. The case was heard by the presiding justice 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 because it was a disbursing agent of the United States government. The Court said, quoting from page 303 of 46 L. R. A. (N. S.):

"The question thus presented leads at once to an inquiry as to the creation and constitution of the National Home for Disabled Volunteer Soldiers, and its character and functions. It was established under the provisions of an act of Congress, approved March 21, 1866, and now embodied in U. S. Rev. Stat. Sections 4825 et seq. p. 3337."

It will be unnecessary to refer to all of the discussion by the Court except to say that as a result of that discussion the Court arrived at the conclusion that it did not have jurisdiction to summon 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 Home, although regarded as a corporate existence having the right to sue and be sued, does not have its place of business “within this state.”

See Farley v. Scherno, 101 N. E. 891;
See 65 C. J. 1255.

Basing my opinion upon the above authorities, it follows that question numbered 1 should be answered in the affirmative. This result follows because the initial sale is to a wholesaler and not a sale direct to the army post.

The second question is answered in the negative.

The answer to the third question is likewise in the negative.

The answer to the fourth question is likewise in the negative.

The above answers are all predicated upon the assumption that the army post has been ceded to the United States pursuant to the laws of the State of Indiana.