OFFICIAL OPINION NO. 24

August 27, 1969

Mr. John R. Smock, Chairman
Alcoholic Beverage Commission
911 State Office Building
Indianapolis, Indiana

Dear Mr. Smock:

This is in response to your written request for an Official Opinion on the following questions:

> "1. Whether prepared cocktails containing spiritous beverages which contain 21% or less absolute alcohol by volume shall be taxed on the basis of being a vinous beverage when said cocktail contains some vinous content.
>
> "2. Further, if answered in the affirmative, can said prepared cocktails be sold under the authority of a two-way permit, i.e. grocery stores, supermarkets, etc."

The answer to your first question is no. Section 40 of Chapter 226 of the Acts of 1935 as amended sets forth the rate of tax imposed upon various alcoholic beverages. Clause (b) of said Act, as found in Section 12-802 of Burns' (1956 Repl.), Indiana Statutes provides for an excise tax on "wine tonics and/or alcoholic spiritous beverages, including wines, containing more than twenty-one (21) per cent of absolute alcohol." Whereas, Clause (c), as found in Section 12-803, *supra,* provides for an excise tax to be levied upon "alcoholic vinous beverages containing twenty-one (21) per cent *or less* of absolute alcohol." It should be noted, however, that both sections contain the following exception to the classes of beverages described in the body of these sections:

> "[B]ut beverages not containing more than fifteen (15) per centum of absolute alcohol * * * mixed with carbonated water and/or other sanitary and potable ingredients by the manufacturer and/or bottler thereof, and sold in container filled by such manufacturer or bottler, and which are suitable for immediate consumption direct from the original container, shall be

> subject to the rate of tax * * * imposed on alcoholic vinous beverages."

Because of the foregoing exception, it is unnecessary to categorize those beverages which contain fifteen per cent or less of absolute alcohol. Such beverages, including prepared cocktails, need only comply with the following requirements, 1) the alcoholic beverages contained therein be mixed with either carbonated water and/or other sanitary and potable ingredients by the manufacturer or bottler, 2) be sold in a container filled by such manufacturer or bottler and 3) be suitable for immediate consumption direct from the original container. Further, there is no requirement that alcoholic beverages within this category contain any vinous content to qualify for the rate of tax imposed by Section 12-803, *supra.*

In determining how an alcoholic beverage should be taxed, the alcoholic content of which by volume resides between fifteen and twenty-one per cent, it is necessary to establish whether such beverage predominantly is a vinous beverage. Burns' Section 12-803, *supra,* specifically states:

> "The alcoholic vinous beverages referred to in this paragraph shall include only alcoholic vinous beverages containing twenty-one (21) per centum or less of absolute alcohol."

Acts of 1935, Ch. 226, Sec. 3, as amended and found in Burns' (1956 Repl.), Section 12-303 (p) defines "alcoholic vinous beverages" as follows:

> "The words 'wine' or 'alcoholic vinous beverages' or 'vinous beverages' whenever used in this act, shall be construed to mean any alcoholic beverages obtained by the *fermentation* of the natural sugar contents of fruits or other agricultural products containing sugar, including necessary additions to correct defects due to climatic, saccharine and seasonal conditions, and also the fortification thereof, but in no case shall said beverages therein defined, having alcoholic content, contain more than twenty-one (21) per cent of absolute alcohol reckoned by volume." (My emphasis)

Subsection (o) of the foregoing Chapter of Acts of 1935 defines "alcoholic spiritous beverages" as follows:

> "(o) 'Alcoholic spiritous beverages' shall be construed to mean any beverage containing alcohol obtained by *distillation* mixed with drinkable water and other substances in solution and including among other things, brandy, rum, whiskey, and gin, but not including wines containing less than twenty-one (21) per cent of alcohol reckoned by volume * * *" (My emphasis)

"Wine" and "spiritous beverages" are defined by statute in terms of the manufacturing processes involved and not in terms of alcoholic content. Therefore, in order to classify a "prepared cocktail" by applying the above definitions, it is necessary to determine the alcoholic beverage which predominates therein. If the predominant alcoholic beverage contained in a given "prepared cocktail" is not a malt article, it must be either a wine or a spiritous liquor. If such beverage is obtained by the fermentation process, it must be classified as a wine. If, on the other hand, it is obtained by the process of distillation, which would include, among other things, brandy, rum, whiskey and gin, such beverage is appropriately classified as an alcoholic spiritous beverage.

It is my opinion that prepared cocktails containing both spiritous and vinous beverages and having a content of 21% or less of absolute alcohol by volume cannot be taxed as a wine unless the predominate alcoholic beverage contained therein meets the statutory requirements of a vinous beverage. Since your first question has been answered in the negative, it is unnecessary to reply to your second question.