CONSTITUTIONAL LAW - INTERSTATE COMMERCE - Tax on beer to be sold or shipped in interstate commerce as violative of the commerce clause of the United States Constitution.

10-23

October 18, 1933.

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Honorable Charles F. Carter,
Room 404 Capitol Building,
Jefferson City, Missouri.

Dear Sir:

Your letter of September 23, 1933 has been received in which is contained a request for an opinion in the following terms:

> "Would you please give me your opinion as to the constitutionality of putting a tax upon the beer made in this state and shipped to other states. I believe under the police regulations or the license power of the state that we could get a tax upon the stuff shipped out of this state."

The Constitution of the United States Article I, Section 8, Clause 3, provides that Congress shall have power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" and this commerce clause as early as Gibbons v. Ogden, 9 Wheat. 1 (1824) was held by the United States Supreme Court to give to Congress an exclusive power to regulate interstate commerce and to prohibit the several states from so regulating it so that Missouri could not either tax or regulate interstate commerce directly.

Furthermore, a tax or regulation cannot discriminate against interstate commerce even if the same subject of the tax could be reached by a statute which did not discriminate against interstate commerce. This is illustrated by the case of Welton v. Missouri, 91 U. S. 275 (1876), 23 L. ed. 347. In that case the court said:

> "But the court in its decision replied, that it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance; that a tax on the occupation of an importer was a tax on importation, and must add to the price of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself."

The court in that case held that such a tax was invalid. Although admittedly the state in that case could have levied a valid tax on the occupation of peddling goods which would be applicable to persons peddling goods which had been imported into the state, still that case held that it was not within the constitutional rights of a state to base the tax on the fact that the goods had been imported. For this reason Missouri could not enact a tax statute applicable solely to beer to be shipped outside of the state because in such a case the basis of the tax would be the fact that the goods would

be shipped in interstate commerce and therefore a discrimination against such commerce.

If a statute should be enacted expressly taxing all beer originating in this state, and not discriminating in any way against beer to be shipped outside of the state or to be sold in interstate commerce, such a statute could levy a tax in various possible methods. A discussion of such methods and their validity follows.

I. An occupation tax on the manufacture of beer in this state would be valid under the authority of American Mfg. Co. v. St. Louis, 250 U. S. 459 (1918) in which such a tax was upheld on manufacturing and in which the court said:

> "The question is whether an ordinance of the city of St. Louis, levying against manufacturers, especially as against plaintiff in error, a West Virginia corporation, a tax imposed as a condition of the grant of a license to carry on a manufacturing business in that city, but the amount of which is ascertained by and proportioned to the amount of sales of the manufactured goods, whether sold within or without the state, and whether in domestic or interstate commerce, is void as amounting to a regulation of commerce among the states and thus intrenching upon the power of the national Congress under art. 1, Sec. 8 of the Constitution, or as amounting to a taking of plaintiff's property without due process of law, in contravention of the 14th Amendment."

The fact that the tax is measured by goods some or all of which are immediately to be shipped in interstate commerce does not affect the result so long as the tax is on a valid subject such as the occupation of manufacturing. Oliver Iron Co. v. Lord, 262 U. S. 172 (1923) in which the court said:

> "Mining is not interstate commerce, but, like manufacturing is a local business, subject to local regulation and taxation. Kidd v. Pearson, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Supt. Ct. Rep. 6; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 245, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 444, 59 L. ed. 1397, 1400, 35 Sup. Ct. Rep. 902; Hammer v. Dagenhart, 247 U. S. 251, 272, 62 L. ed. 1101, 1105, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; United Mine Workers v. Coronado Coal Co. 259 U. S. 344, 410, 66 L. ed. 975, 995, 42 Sup. Ct. Rep. 570. Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

II. A tax on gross receipts from the sale of beer some of which sales were made in interstate commerce would not be valid for a tax on gross receipts from interstate commerce has been held in Galveston, Houston &

San Antonio Ry. Co. v. Texas, 210 U. S. 217 (1908) even where non-discriminatory to be a tax on such commerce and prohibited by the commerce clause.

III. A tax on the net income from the sale of such beer even though part of the sales were in interstate commerce would be valid under the authority of the case of United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, but presumably you would not be interested in such a tax in view of the existence in Missouri of an income tax.

IV. A franchise tax also presumably would not be entirely satisfactory to you as it would only be applicable to corporations and your inquiry did not deal with a tax on corporations alone.

V. An inspection fee which would apply to goods to be sold in interstate commerce would be valid under the authority of Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345 (1898) because the Constitution of the United States Article I, Section 10, Clause 2 provides as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;"

However, inspection fees cannot be used as sources of revenue on goods in interstate commerce as was pointed out by the court of the last cited case as follows:

> "If the state law of Texas which is complained of is really an inspection law, it is valid and binding, unless it interferes with the power of Congress to regulate commerce; and, if it does thus interfere, it may still be valid and binding until revised and altered by Congress. The right to make inspection laws is not granted to Congress, but is reserved to the states; but it is subject to the paramount right of Congress to regulate commerce with foreign nations, and among the several states; and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws."

For a similar reason the police power of Missouri would not justify a revenue-raising measure because although the states are allowed to infringe to a certain extent on interstate commerce by regulations to protect the health, welfare and morality of their citizens they cannot under the guise of the police power validly raise revenue. The Supreme Court of the United States in Mugler v. Kansas, 123 U. S. 623 (1887) in discussing this problem said:

> "It belongs to that department (referring to the Legislature) to exert what are known as the police powers of the state, and to determine, primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.
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> It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

For the above reasons it is our opinion that an occupation tax on the manufacture of beer in this state not in any way discriminating against or referring to the fact that part of such beer will or may be sold or shipped in interstate commerce would be a valid tax, and that of the types of taxes above discussed such a tax would seem to be the most desirable.

Very truly yours,
EDWARD H. MILLER,

APPROVED: ASSISTANT ATTORNEY GENERAL.

ATTORNEY GENERAL.