TAXATION ) Sales tax not applicable to sales to Army Officers' and
) Noncommissioned Officers' Clubs.

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Honorable L. M. Chiswell
Supervisor
Sales Tax Unit
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this Department, concerning the exemption from application of Missouri Sales Tax of purchases by officers' clubs and noncommissioned officers' clubs at United States Army installations in this state.

Section 11409, House Bill No. 303, Sixty-fifth General Assembly, exempts from the Missouri Sales Tax, among other transactions, "any retail sale which the State of Missouri is prohibited from taxing under the constitution or laws of the United States of America,"

In the administration of the Missouri Sales Tax Act the taxable transaction upon sales of goods to clubs has been considered to occur at the time of the purchase by the club rather than at the time of the sale by the club to its members. In view of such application of the law, the question thus becomes one of whether or not a sale by a Missouri merchant to a commissioned or noncommissioned officers' club at Army installations is such a transaction as is exempt under Section 11409, because the State of Missouri may not under the Constitution or Laws of the United States tax such transaction.

Army officers' and noncommissioned officers' clubs are established pursuant to Army Regulations No. 210-60.

Paragraph 3 of such regulations provides:

> "3. Definition.--a. Officers' and noncommissioned officers' clubs and messes as adjuncts of the Army at post level provide certain services essentially for the convenience, recreation, and social welfare of the officers, warrant officers, and

> noncommissioned officers and their families stationed thereat. Clubs and messes may include such branches and departments as are necessary to conduct and control properly the activities authorized. Officer and noncommissioned officer club and mess funds are sundry funds as defined in AR 210-50, which together with these regulations will govern club and mess operations."

Paragraph 8 of such regulations provides:

> "8. Legal Status.--Clubs governed by these regulations are integral parts of the Military Establishment, are wholly owned Government instrumentalities, and are entitled to the immunities and privileges of such instrumentalities except as otherwise directed by the War Department."

Subsection b. of Paragraph 29 provides:

> "b. State.--Clubs and messes operated pursuant to these regulations are entitled to the same immunity from State and local taxes as are other instrumentalities of the United States."

We find no cases in which the question of immunity from state taxation of such clubs as those under consideration has been determined by the courts. The nearest analogy appears to be cases in which the matter of taxation of transactions involving Army post exchanges has been considered. In the case of Pan-American Petroleum Corporation v. Alabama, 67 Fed. (2d) 590, the Circuit Court of Appeals for the Fifth Circuit considered the question of the application of an excise tax imposed by the State of Alabama upon the sale of petroleum products to Army post exchanges situated in Alabama. The court held that the tax was applicable. In so holding, the court described a post exchange as follows at l. c. 591:

> "Furthermore, a post exchange is, of course, not the government, nor is it a department

> or instrumentality thereof. On the contrary a post exchange is a voluntary, unincorporated cooperative association of Army organizations, in which all share as partners in the benefits and losses. The government has no share in the profits, and is not bound by the losses. We are, therefore, of the opinion that sales made by appellant to the post exchanges at Camp McClelland and Maxwell Field are not exempt from the state excise taxes."

However, in the case of Standard Oil Company v. Johnson, 316 U.S. 481, 86 L. Ed. 1611, the United States Supreme Court considered a California Statute which imposed a license tax measured by gallonage on the privilege of distributing motor vehicle fuel. Sales to the Government of the United States or any department thereof for official use of the Government were exempt under a provision of the law. The case before the Supreme Court involved the question of whether or not sales to Army post exchanges were subject to the tax. The court held that such sales were within the exemption provided for sales to the Government of the United States. The court discussed the status of post exchanges as follows: (86 L. Ed. l. c. 1615.)

> "On July 25, 1895, the Secretary of War, under authority of Congressional enactments promulgated regulations providing for the establishment of post exchanges. These regulations have since been amended from time to time and the exchange has become a regular feature of Army posts. That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law.
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> "Congressional recognition that the activities of post exchanges are governmental has been frequent. Since (March 2) 1903, Congress has repeatedly made substantial appropriations to be expended under the direction of the Secretary of War for construction, equipment, and maintenance of suitable buildings for post exchanges. In (March 4) 1933 and (June 26) 1934, Congress ordered certain moneys derived from disbanded exchanges to be handed over to the Federal Treasury. And in (June 16) 1936, Congress gave

consent to state taxation of gasoline sold by or through post exchanges, when the gasoline was not for the exclusive use of the United States.

"The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary. The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.

"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 intrusted to it, and partake of whatever immunities it may have under the constitution and federal statutes. In concluding otherwise the Supreme Court of California was in error."

In view of the similarity between the authority for and the purposes and methods of operation of Army post exchanges and Army officers' and noncommissioned officers' clubs, we feel that the Standard Oil case may be relied upon for establishing the status

of such clubs and holding that such clubs are likewise "integral parts of the War Department; share in fulfilling the duties intrusted to it, and partake of whatever immunities it may have under the constitution and federal statutes." We perceive no reason for any distinction between commissioned officers' and noncommissioned officers' clubs in this regard.

Such being the status of the organizations under consideration, the question then is whether or not the doctrine of implied constitutional immunity of instrumentalities of the Federal Government from state taxation applies to the Missouri Sales Tax. This doctrine, which has as its basis the "rhetorical flourish" of Chief Justice Marshall in McCullough v. Maryland, 4 Wheat. 316, that "The power to tax involves the power to destroy" has in recent years been subjected to limitation by the Supreme Court of the United States.

In the case of Alabama v. King and Boozer, 314 U. S. 1, a sales tax imposed by the State of Alabama was held applicable to a contractor engaged in the performance of a contract with the United States on a cost plus basis. The King and Boozer ruling was considered, by the Ninth Circuit Court of Appeals in the case of Broadhead v. Borthwick, 174 Fed. (2d) 21, sufficient grounds for upholding the imposition of a tax imposed by the Territory of Hawaii upon gross proceeds of sales to United States Army Post Exchanges. The tax there involved was imposed upon the vendor. The Missouri Sales Tax is, by its terms, imposed upon the vendee, (Section 11412, Laws of 1947, Volume II, page 431) although collected by the vendor (Section 11411, Laws of 1947, Volume II, page 431). However, no case has been decided in which a State Sales Tax has been upheld when the responsibility for the tax rested directly on the Government of the United States or an instrumentality thereof. (See Powell, The Waning of Tax Immunities, 57 Harvard L. Review 633, 657.) In the absence of such holding we feel that the intergovernmental immunity must still be considered applicable insofar as sales to the Government of the United States, or its instrumentalities, is concerned.

CONCLUSION

Therefore, this Department is of the opinion that sales to officers' and noncommissioned officers' clubs of the United States Army are sales to instrumentalities of the Government of the United States, and that the State of Missouri may not constitutionally impose a sales tax upon such transactions.

Respectfully submitted,

APPROVED:

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RRW/feh