INTOXICATING LIQUORS: Army Post Exchanges and C.C.C. camps' canteens not liable for "gallonage" on intoxicating liquors and non-intoxicating beer, as it is collectible from manufacturer or first vendor.

June 12, 1942

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Mr. W. G. Henderson
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Mr. Henderson:

Your letter of April 6, 1942, requesting an opinion has been referred to me. Omitting caption and signature, such opinion request is as follows:

> "I respectfully request an opinion upon the following subjects.
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> "This Department is collecting gallonage tax on all intoxicating liquor and beer going into Jefferson Barracks, Fort Leonard Wood and Camp Crowder. It has been argued that in view of the fact that these camps are located on Federal Reservations that the State of Missouri has no right to charge this tax. If possible, could you include in this same opinion, Civilian Conservation Camps with respect to the State of Missouri collecting gallonage tax and also charging a state permit fee.
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> "We are not considering charging a state permit fee for the army camps, but have taken a position that canteens at Civilian Conservation Camps should have a state permit. The position that the Civilian Conservation Camps has taken is further explained by the enclosed correspondence between this office and officials of the United States Government."

The first question to be considered is whether or not

the State of Missouri can collect a "gallonage" tax on intoxicating liquor and beer shipped into army camps, to-wit, Fort Leonard Wood, Camp Crowder, Jefferson Barracks, and also Civilian Conservation Camps in this State.

Referring to the Statutes, we will cite you to Section 4900, R. S. Mo. 1939, Sub-sections "(a)" and "(c)", and Section 4925, R. S. Mo. 1939. In speaking of gallonage the statute provides (Sec. 4900, Sub-sections "(a)" and "(c)":

> "(a) For the privilege of selling in the state of Missouri spirituous liquors, including brandy, rum, whiskey, and gin, and other spirituous liquors and alcohol for beverage purposes, there shall be paid, and the supervisor of liquor control shall be entitled to receive, the sum of eighty cents ($.80) per gallon or fraction thereof."
>
> "(c) The amounts required to be paid by this section shall be evidence by stamps or labels purchased from the supervisor of liquor control and affixed to the container of such spirituous liquor. The person who shall first sell such liquor in this state shall be liable for such payment and shall purchase, affix and cancel the stamps or labels required to be affixed to such container."

Section 4925, supra, provides as follows:

> "For the inspection and gauging of all malt liquors, containing alcohol in excess of three and two-tenths (3.2%) per cent by weight, there shall be paid, and the supervisor of liquor control shall be entitled to receive, the sum of sixty-two (62¢) cents per barrel."

Also, we will cite you to Sections 4956 and 4957, R. S. Mo. 1939, which prescribe the following:

"Sec. 4956. The supervisor of liquor control shall be entitled to receive, and shall collect, for the inspection of non-intoxicating beer, inspection fees at the rate of sixty-two cents (62¢)per barrel for the inspection of all nonintoxicating beer manufactured or brewed in this state for sale in this state, or manufactured or brewed in another state and shipped or transported into this state for sale subject to the provisions of this article."

"Sec. 4957. Nonintoxicating beer brewed or manufactured in this state for shipment and sale outside of this state shall be exempt from the inspection fees by this article required to be collected for the inspection of nonintoxicating beer brewed or manufactured for sale in this state, but shall be inspected by the supervisor of liquor control as required by this article."

The Supreme Court of Missouri, in the case of John Bordenheir Wine & Liquor Co. et al. v. City of St. Louis et al. 135 S. W. (2d) 345, held that the fees as set out in Section 4900, supra, were in the nature of inspection fees and not license fees, and, therefore, such fee is not regulatory, but a revenue measure or tax.

It seems to be plain that the person first selling spirituous liquor in this State is subject to pay the "gallonage". Therefore, as far as distillers, located in the State are concerned, they are required to pay this "gallonage", in view of the fact that they are the first one to sell their products in this State. But, what about distillers and manufacturers who are residents of another state and ship their merchandise into Missouri for sale in this state? If the Federal Government purchases said liquors or beer from out of state companies, and has it shipped into this state, who is then liable for the "gallonage?" For answer to this, we will cite you to Section 4932, R. S. Mo. 1939, which provides as follows:

> "Any person who shall haul or transport intoxicating liquor, whether by boat, airplane, automobile, truck, wagon, or other conveyance, in or into this state, for sale, or storage and sale in this state, upon which the required inspection, labeling or gauging fee or license has not been paid, shall upon conviction thereof, be deemed guilty of a misdemeanor."

This section is construed by us as meaning that if any distiller ships spirituous liquor into this state without paying the "gallonage" fee, the person hauling such products will be deemed guilty of a misdemeanor. In other words, before any company sells commodities of this type in this state, it must first pay the inspection or "gallonage" fees.

This is further borne out by reading Section 4900, R. S. Mo. 1939, sub-section "(d)" which is as follows:

> "(d) Any person who sells to any person within this state any intoxicating liquors mentioned in subsection (a) of this section, unless the same be contained in a container stamped or labeled as provided in this act, shall be guilty of a felony and shall be punished by imprisonment in the state penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail for a term of not less than one month nor more than one year, or by a fine of not less than fifty dollars nor more than one thousand dollars, or by both such fine and imprisonment."

As to "malt liquors" containing alcohol in excess of three and two tenths (3.2%) per cent by weight, we will cite you to Section 4889 R. S. Mo. 1939, relative to the power of the Supervisor of Liquor Control to make regulations concerning intoxicating liquors. This section provides as follows:

> "The supervisor of liquor control shall have the authority to suspend or revoke for cause all such licenses; and to make

the following regulations (without limiting the generality of provisions empowering the supervisor of liquor control as in this act set forth) as to the following matters, acts and things; fix and determine the nature, form and capacity of all packages used for containing intoxicating liquor of any kind, to be kept or sold under this act; prescribe an official seal and label and determine the manner in which such seal or label shall be attached to every package of intoxicating liquor so sold under this act; this includes prescribing different official seals or different labels for the different classes, varieties or brands of intoxicating liquor; prescribe all forms, applications and licenses and such other forms as are necessary to carry out the provisions of this act; prescribe the terms and conditions of the licenses issued and granted under this act; prescribe the nature of the proof to be furnished and conditions to be observed in the issuance of duplicate licenses, in lieu of those lost or destroyed; establish rules and regulations for the conduct of the business carried on by each specific licensee under the license, and such rules and regulations if not obeyed by every licensee shall be grounds for the revocation or suspension of the license; the right to examine books, records and papers of each licensee and to hear and determine complaints against any licensee; to issue subpoenas and all necessary processes and require the production of papers, to administer oaths and to take testimony; prescribe all forms of labels to be affixed to all packages containing intoxicating liquor of any kind; and to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this act, as are not inconsistent with this act."

The last provision of this statute prescribes, "And to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this act, as are not inconsistent with this act." As can be seen from Section 4925 R. S. Mo. 1939, supra, although the statute provides for the payment of a gallonage tax, it does not prescribe who shall pay such "gallonage". Therefore, in accordance with Section 4889 R. S. Mo. 1939, above cited, the Supervisor has made a regulation to govern who shall pay the gallonage tax. This regulation is part of Regulation #17. It provides:

> "Malt liquor * * * * * must be inspected and labeled and the Inspection fee paid while in the hands of the brewer."

In accordance with the above, we are of the opinion that the "gallonage" tax on malt liquor, to-wit, beer containing more than three and two-tenths (3.2%) per cent alcohol by weight shall be paid by the brewer or manufacturer in this State. As to the out of State brewers or manufacturers, the Supervisor has also made a regulation under the authority above, which regulation is the last paragraph in Regulation #17 and provides:

> "Any malt liquor * * * * * * * * * * shipped into, sold or offered for sale in this State without the Missouri inspection stamps, labels or certificates of appropriate number and denomination being affixed thereto, shall be deemed to be contraband, by the Supervisor or his inspectors, seized and disposed of as such."

As to who shall pay the gallonage on "Non-intoxicating" beer, it will be seen that in Section 4956 R. S. Mo. 1939, cited above, the Supervisor shall collect an inspection fee at a rate specified in such statute. However, this statute, as in the case of Section 4925, supra, does not specify who is to pay the tax. This is set up in

Section 4951 R. S. Mo. 1939, which is as follows:

> "Every person who shall maintain or operate any brewery in this state for the brewing or manufacture of nonintoxicating beer within this state, shall cause such nonintoxicating beer to be inspected by the supervisor of liquor control of this state."

The liability for "gallonage" on "Non-intoxicating beer" manufactured out of this state is set up in Section 4972 R. S. Mo. 1939. This section provides:

> "Any person who shall sell, or offer for sale, any nonintoxicating beer within this state, which has not first been inspected and labeled as required by the provisions of this article, or which is contained in any package or packages not having thereon the certificate of the supervisor of liquor control required by this article, or any person who shall fail to destroy said certificate or label after the contents of such package are disposed of, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for a term of not more than one year, or by a fine of not less than fifty dollars($50.00) nor more than one thousand dollars($1000.00) or by both such fine and jail sentence."

In other words before the manufacturer or brewer in another State can sell non-intoxicating beer in this state to anyone, including the Federal Government, the beer must be inspected, which presumes the payment of the inspection fee or gallonage tax.

Furthermore, this construction of the Statutes is borne out by the actual practice, which practice is that

before spirituous liquor, malt liquors and non-intoxicating beer are brought into this state, the "gallonage" is always paid by the shipper. Consequently, no further "gallonage" is to be collected after such manufacturer or shipper has paid it and the Federal Government would not be required to pay any "gallonage" because, (1) the manufacturers of this state are required to pay such fee since they sell it first in the state, and (2) the manufacturers out-state pay this "gallonage" fee before it is shipped into the state.

The above conclusions will refer to Camp Crowder, Fort Leonard Wood and the Civilian Conservation Camps, but we do not think that they will refer to Jefferson Barracks. In 1892, Jefferson Barracks and the territory attached thereto was ceded to the United States and is not a part of the State of Missouri.

This Department has written three opinions dealing with state taxation in connection with Jefferson Barracks. The first opinion written November 5, 1937, dealt with collection of state tax on Athletic shows: the second written on April 26, 1938, dealt with liquor tax and the third written on January 15, 1940 dealt with State Liquor Regulations. All three opinions held that the State of Missouri could not tax Athletic shows in or the shipments of liquor consigned to Jefferson Barracks. See Laws of Mo. 1892, Extra Session #16: U. S. Const. Section 8, Article I.

Now as to the second question, which seems to be whether or not the State of Missouri can force Civilian Conservation Camps to have a permit before liquor and beer is sold in their canteens or post exchanges. The Civilian Conservation Camps have been held to be a government instrumentality. In U. S. v. Query, et al., 21 Fed. Supp. 784, the court said:

> "The Civilian Conservation Corps camp exchange is a governmental undertaking. It has its existence by virtue of Congressional legislation, Act June 28, 1937, 16 U. S. C. A. Sec. 584 et seq. Federal funds are used to pay the expenses in connection with its conduct, operation, and management. Act June 28,

1937, Sec. 17, 16 U. S. C. A. Sec. 584p. The federal statute creating the camp exchange provides that it be established and operated in accordance with regulations prescribed by the Director, at the camps designated by him. Section 17, Act June 28, 1937, 16 U. S. C. A. Sec. 584p. The camp exchanges in South Carolina were established in pursuance thereof. The camp exchange is an integral and necessary part of the Corps which is engaged in providing employment as well as vocational training to unemployed citizens of the United States for the performance of useful work and in salvaging and conserving the natural resources of the United States. Such a function of the government is authorized under article 1, Sec. 8, cl. 1, of the Federal Constitution. A high state of morale and contentment is necessary to a full consummation of the objectives of the Corps, to create and maintain which the institution of the camp exchange was established as an essential element of the program for unemployment relief. It is operated in a building erected and maintained by federal funds on lands privately owned, but leased for a specified term by the United States. It was not created for private gain, but wholly for governmental purposes. It is not conducted primarily for profit, but is operated essentially for the welfare of the camp's enrollees in furtherance of the objectives of the Corps. Sales to outsiders are strictly prohibited by the statute creating the camp exchange. It follows that the Civilian Conservation Corps camp exchange is a federal instrumentality. * * * * * * * * * * * * * * * * "

In Standard Oil Company of California v. Charles G. Johnson, Treasurer of the State of California, Case No. 1125, October Term, 1941, decided June 1, 1942, the court held that post exchanges were Government instrumentalities and are "arms of the Government deemed by it essential for the

performance of governmental functions."

From information received by this department, the "canteens" in the Civilian Conservation Camps are operated in the same manner as those in the army camps. Therefore, the same law would apply to the "canteens" or "post exchanges" in each place.

In McCulloch v. State of Maryland, 4 Wheaton 316, 4 L. Ed. 579, the court held that the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the Constitutional laws enacted by Congress to carry into effect the powers vested in the National Government.

Also, in Johnson v. Maryland, 65 L. Ed. 126, the Supreme Court stated:

> "With regards to taxation, no matter how reasonable or how universal or undiscriminating, the states' inability to interfere has been established since McCulloch v. Maryland, (supra). The decision in that case was not put upon consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way at least, the instrumentalities of the United States."

In October 1940, the Buck Resolution was passed, which set up certain exemptions to the general rule that Government instrumentalities could not be taxed. Said amendment is under Title 4, U. S. C. A., Sections 13, 14 and 15. These sections provide as follows:

> "Sec. 13. (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.

"(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940. Oct. 9, 1940, c. 787, Sec. 1, 54 Stat. 1059.

"Sec. 14. (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect 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.

"(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940. Oct. 9, 1940, c. 787, Sec. 2 54 Stat. 1060.

"Sec. 15. (a) The provisions of sections 13 and 14 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

> "(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy. Oct. 9, 1940, c. 787, Sec. 3, 54 Stat. 1060."

In other words, a tax of the instant kind is not made an exception to the general rule and therefore a permit to sell liquors and beer is not required on the part of the Civilian Conservation Camps. In support of this contention, we will cite Falls City Brewing Co., Inc. v. Reeves, et al, 40 Fed. Supp. 35, D. C. Ky. 1941. In this case the Post Exchange at Fort Knox, Kentucky, was selling malt beverages without first having secured a license from the State of Kentucky. Apparently, the Post Exchange was operated in the same manner as the ones in the Civilian Conservation Camps. In this case the court said:

> "The Court is accordingly of the opinion that the Post Exchange at Fort Knox, Kentucky, is a federal instrumentality within the purview of the exemption clause of the Buck Resolution, being section 3 of the House Resolution 6687; that neither the defendant Captain Robert Stevenson, nor the defendant Post Exchange is required to purchase a license from the Commonwealth of Kentucky authorizing them or either of them to engage in the business of selling malt beverages, and that the Commonwealth of Kentucky is without right to levy or to impose its regulatory statutory provisions, on the sale of malt beverages sold by the Plaintiff Falls City Brewing Company to the Post Exchange at Fort Knox, Kentucky, for resale to the authorized purchasers from that organization. Counsel for plaintiff will prepare and tender for entry a proper judgment in accordance with this opinion."

This case went to the Circuit Court of Appeals and was affirmed and then on a writ of certiorari to the United States Supreme Court. However, the Supreme Court sent it back to the District Court because appeal would not lie to the Circuit Court of Appeals but directly to the Supreme Court. The question of taxation was not passed on by the Supreme Court and, therefore, remains as the District Court decided it at the present time.

CONCLUSION

(a) It is the conclusion of this department that the Federal Government is not liable for "gallonage" on intoxicating liquors, malt liquors and non-intoxicating beer, shipped or destined to be shipped to Army Camps and Civilian Conservation Corps Camps for the following reasons:

(1) The distillers of spirituous liquors in this State, must pay the gallonage fee, regardless of the destination, since they are the first persons to sell in this State. Distillers of spirituous liquor out of this State must pay "gallonage" or inspection fee in order for their product to enter this State.

(2) Brewers of intoxicating malt liquors in this State, are by Statute and regulation, required to pay the inspection fees while in their hands.

(3) Brewers and manufacturers of Non-intoxicating beer in this State are required to have such beer inspected by the Supervisor.

(4) Brewers of intoxicating malt liquors and non-intoxicating beer out of this State, are required by Statute and regulation, in order to have their product enter this State, to pay the required inspection fees.

In other words a "gallonage" tax is a tax on the manufacturer or vendor and not the vendee. Since the Federal

Government does not manufacture spirituous liquor or malt liquor or non-intoxicating beer, they would not be liable for the tax.

This conclusion must not be construed to mean that liquors or beer shipped into Army or C. C. C. Camps should be free of "gallonage" tax. Since it is paid by the brewer, distiller or manufacturer, it is not necessary for the Federal Government to pay such tax.

(b) It is further the opinion of this department that a "post exchange" or "canteen" in a Civilian Conservation Corps Camp, is not required to purchase a State Permit to sell liquors or beer, since it is a government instrumentality and is not subject to regulation by the State of Missouri

Respectfully Submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK
Attorney-General

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