

Opinion No. 53-5825

October 20, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Elfego Baca Director, State Liquor Division Bureau of Revenue Santa Fe, New Mexico

{*233} In your letter of recent date you referred to NCO Clubs and Officers' Clubs as distinguished from Post Exchanges and state that it is contemplated that such clubs be authorized to sell alcoholic liquors or Military Reservations and in this connection {*234} you ask our opinion on three questions, as follows:

1. Does a shipment of beer to a Post Exchange on a ceded Military Reservation require a transportation permit as provided in §§ 61-1007 -- 1008, N.M.S.A., 1941 Comp.?
2. Does the New Mexico excise stamp tax on alcoholic liquors apply to shipments of alcoholic liquors to or purchase by NCO Clubs and Officers' Clubs operating "open messes"?
3. Does a shipment to or purchase of alcoholic liquors by an NCO Club, Officers' Club, or other "open messes" require a transportation permit from the State of New Mexico as provided in §§ 61-1007 -- 1008, N.M.S.A., 1941 Comp.?

In connection with your first question, § 61-1008 of the 1941 Compilation requires a common carrier to have a transportation permit issued by you in order to transport into New Mexico alcoholic liquors for delivery in this State. Under § 61-101, alcoholic liquors are defined as covering all kinds of distilled or rectified spirits, potable alcohol, whiskey, rum, gin or any other similar alcoholic beverages including all blended or fermented beverages and including beer, wine and ale. It is thus apparent that beer, which is the only beverage authorized to be sold at a Post Exchange under Federal law, would come within the provisions of this Section. The Buck Act, 4 USCA 105-1010, authorizes states to impose an excise tax upon the sale of liquor in Federal areas although instrumentalities of the Federal government are specifically exempted from such authority granted to the states. Since several courts have held, and it seems to be unquestioned, that Post Exchanges are instrumentalities of the Federal government, the exacting of an excise tax upon sales to Post Exchanges is therefore not authorized where the Post Exchange is upon a Military Reservation under exclusive Federal jurisdiction. It is also to be noted that under Ch. 81, L. 1951, they are exempted from excise liquor stamp tax as an instrumentality of the Armed Forces of the United States.

Although the State cannot exact such an excise tax upon the sale of beer to Post Exchanges, under its police power it can provide and enforce reasonable regulations and control of the transportation of beer into the State for sale or delivery to Post Exchanges in Federal areas under the authority recognized by the Supreme Court in

Johnson vs. Yellow Cab Transit Co., 321 U.S. 383 and Carter vs. Virginia, 321 U.S. 131. In the Yellow Cab case, the Supreme Court held that although a state may not prohibit transportation of liquor into a Federal area, yet it could regulate and control the transportation through the State in order to suppress and control illegal diversions of liquor.

Authorities holding that Post Exchanges are governmental instrumentalities are U.S. vs. Query, 121 F. 2nd 631, and Standard Oil Co. of Calif. v. Johnson, 316 U.S. 481. This latter case goes into the elements which are present in the case of Post Exchanges to make them Federal instrumentalities and these necessary elements will be mentioned later in connection with your following questions.

In answer to your second question, regarding the excise stamp tax on alcoholic liquors shipped to or purchased by NCO Clubs and Officers' Clubs operating upon Military Reservations, it is recognized that the Supreme Court of this State has, upon various occasions, held that where the Federal government has exclusive jurisdiction over an area {*235} that State laws do not apply. Arledge vs. Mabry, 52 N.M. 303. However, since the Buck Act became effective in 1945, the Federal government in effect has ceded back to the State the jurisdiction to exact excise taxes against persons or enterprises upon Federal Military Reservations, which are not Federal instrumentalities. It is thus not controlling whether the entire area of such a reservation be acquired by condemnation or in some other manner since we shall assume that the Military Bases involved are under the exclusive jurisdiction of the Federal government except for the Buck Act.

The controlling question seems to be whether or not NCO Clubs and Officers' Clubs operating upon such Reservations are Federal instrumentalities. If so, they would be exempt from the State tax in the same manner as Post Exchanges. However, we do not believe that such clubs are, in fact, Federal instrumentalities and for that reason feel that the excise stamp tax on alcoholic liquors shipped to or purchased by them would apply. In the case of Standard Oil Co. vs. Johnson, supra, the Supreme Court of the United States pointed out the factors that go to make up a Federal instrumentality. They are established under authority of congressional enactments and authorized regulations of the War Department. They have been recognized as governmental instrumentalities by Congress and Congressional appropriations have frequently been made for them to be expended under direction of the Secretary of War. Upon being disbanded, the law requires that the surplus monies on hand be turned back to the Federal Treasury. Regulation and control is under the Commanding Officer having jurisdiction over the Post Exchanges.

As to NCO Clubs and Officers' Clubs, it is true that they are under the control and supervision of the Commanding Officer of the respective Military area. Otherwise, they do not have any of the factors above mentioned such as congressional appropriations to finance their operation; and upon being disbanded the assets of the Clubs are paid, not to the Federal Treasury, but to the Army Central Mess Fund in Washington, D. C. Thus the clubs under consideration meet only one test, which is that of supervision and

control by the Commanding Officer and we do not feel that this is sufficient to constitute such clubs as Federal instrumentalities. I have found no case specifically holding that such clubs are Federal instrumentalities, but there are a few cases implying that they are not. In the case entitled *One Hundred Second Cavalry Officers' Club vs. Heise*, 21 SE 2nd 400, an Officers' Club was allowed to have unstamped liquor upon the Military area and the Court held that the taxing authority had no power to allow unstamped liquor under such circumstances in the Officers' Club, thus implying that the Club was not a Federal instrumentality exempt from tax.

We are not unmindful of such cases as *Collins vs. Yosemite Park Co.*, 304 U.S. 518, and *U.S. vs. Cordy*, 58 F. 2nd 1013, holding that in Federal areas where the United States has exclusive jurisdiction, a state may not tax or regulate activities in such areas. These cases, however, were decided prior to the enactment of the Buck Act, which ceded back to the states certain jurisdiction.

War Department regulations based upon 10 U.S.C.A. 1350 make a distinction between Post Exchanges and NCO and Officers' Clubs. This statute prohibits the sale of beer, wine or intoxicating liquor at any Post Exchange, canteen or Army Transport. This has been construed as not {*236} to prohibit the sale of 3.2 per cent beer. However, by authorizing the sale of alcoholic liquors in such clubs, the War Department must recognize the fact that such clubs are not Federal instrumentalities, else authorization of such sales would violate the foregoing statute.

In answer to your third question relative to transportation permits required for purchase by or shipment of alcoholic liquors to NCO Clubs and Officers' Clubs, in our opinion this question must be answered in the affirmative that the sections of the State law requiring such transportation permits do apply.

If our conclusion is correct that such clubs are not Federal instrumentalities, and we so hold, then by virtue of the Buck Act the State has jurisdiction to levy the excise stamp taxes upon such clubs within a Military area, which is otherwise under the exclusive jurisdiction of the Federal government. It is possible that the power to tax does not include the power to regulate liquor traffic in the Federal area but certainly we believe that it would include the power to regulate and control transportation of the liquors through the state and into the Federal area for delivery to such clubs. This conclusion is supported by *Johnson vs. Yellow Cab Transit Co.*, 321 U.S. 383; *Carter vs. Virginia*, 321 U.S. 131; and *Duckworth vs. Arkansas*, 314 U.S. 390.

In summation, it is therefore the opinion of this office that the transportation of beer or other alcoholic liquors to a Post Exchange or NCO Club or Officers' Club on a ceded Military Reservation requires a transportation permit, and shipments of alcoholic liquors to NCO Clubs and Officers' Open Meses through the State require payment of State excise stamp tax.

By: C. C. McCulloh

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