

Opinion No. 37-1616

April 26, 1937

BY: FRANK H. PATTON, Attorney General

TO: Mr. William G. Johnson Division of Liquor Control Santa Fe, New Mexico

{*84} In your written memorandum for an opinion from this office you ask the following question:

"May the State of New Mexico, under Chapter 130, Laws of 1937, impose an excise stamp tax on beer sold by a New Mexico wholesaler to a United States Army Post, said beer being billed to and paid for by the United States Government?"

The authorities on this proposition are many and arise on varying and differing fact situations. It may be stated as a general principle that, in the absence of Congressional consent, it is not within the power of a state to tax the instrumentalities, means, agencies and operations whereby the United States Government is enabled to carry into execution its legitimate powers and functions. See 61 C. J. 371, and also *Indian Motorcycle Company vs. United States*, 75 L. Ed. 1277.

In the case of *Panhandle Oil Company vs. State of Mississippi*, reported in 72 L. Ed. 857, the Supreme Court of the United States, by a divided court, held that the State of Mississippi could not impose what is generally known as an excise tax on gasoline where the sale was to the Federal Government for use in its coast guard fleet or Veterans' Hospital, which the United States is empowered by the Constitution to maintain and operate.

Again in *Graves vs. Texas Company*, 80 L. Ed. 1236, it was held by the Supreme Court of the United States that a state excise tax upon storers of gasoline accruing at the time of withdrawal from storage, could not constitutionally be imposed in respect of gasoline withdrawn for the purpose of sale to the United States for use in performing governmental functions.

Assuming that the purchase of beer is in the nature of a purchase of food supplies for the Army Post, we are of the opinion that the situation would be analogous to the situations found in the gasoline tax cases just cited.

In other words, the wholesale liquor dealer's right to make sales to the United States is not given by the State and does not depend on state laws. It results from the authority of the national government under the Constitution to choose its own means and sources of supply. While this state may impose charges upon a wholesale liquor dealer for the privilege of carrying on a trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.

Being familiar with no Congressional consent for any such taxation, it is our opinion that an excise stamp tax can not be imposed on beer sold by a wholesaler to a United {*85} States Army Post under the fact situation you have stated.

By: FRED J. FEDERICI

Asst. Atty. Gen.