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NATIONAL MILITARY HOME—DAYTON—CIGARETTE SALES AND
 LICENSE TAX NOT APPLICABLE TO SALE TO INMATES—AP-
 PPLICABLE TO SALES MADE TO GENERAL PUBLIC.

SYLLABUS:

1. *The Liberty Stores, Inc., which has been authorized by the governing officials of the National Military Home at Dayton to operate a store for the sale of general merchandise, cigarettes, tobacco, etc., is to the extent that it sells cigarettes to the inmates of said institution, an agency of the United States fulfilling a governmental purpose, and the Ohio cigarette sales and license taxes are not applicable to its sales of and business of selling cigarettes at the Home to said inmates.*

2. *In so far as in said store The Liberty Stores, Inc., sells cigarettes to members of the general public, as distinguished to said inmates, it is not acting as an agency of the United States fulfilling a governmental purpose, and it must procure the state license tax to engage in such business and must comply with the state cigarette sales tax with regard to the sale of cigarettes made to the general public.*

COLUMBUS, OHIO, July 2, 1932.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of your request for my opinion as to the applicability to the sale of cigarettes by The Liberty Stores, Inc., on the premises of the National Military Home, at Dayton, Montgomery County, Ohio, of Amended Senate Bill No. 324 (114 O. L. 805) passed by the 89th General Assembly, which provides for the levy of an excise tax on the sale of cigarettes and for a license tax on the business of dealing in cigarettes.

The facts revealed by investigation show that on June 1, 1931, a contract was entered into by and between the Special Disbursing Agent, Central Home, National Military Home, Dayton, Ohio, party of the first part and The Liberty Stores, Inc., of Dayton, Ohio, party of the second part, and approved by the Governor of said institution, which, in consideration of a stipulated monthly payment, provides that the party of the first part grants to the party of the second part the exclusive right to operate at said Central Home what is termed the "Home Store" for the sale of general merchandise, fruits, candy, cigars, tobacco, etc.; rents for this purpose to the second party a storeroom with fixtures located in one of the institution's buildings; and agrees to furnish sufficient heat, light and water to carry on the business. The contract specially provides that said Governor shall have the right to regulate the hours of opening and closing, to exercise strict supervision over the character and quality of articles offered for sale, to designate the hours and days for the sale of merchandise to hospital patients and the character of merchandise sold to said patients and to exercise supervision over the general operation under said lease.

Said "Home Store" was, up until a few years ago, operated by the institution itself, the purpose being to make available to the inmates the articles sold. Then it was decided to accomplish the same purpose by granting to private parties the right to conduct said store. The storeroom is in one of the barracks buildings situated practically in the center of the Home grounds. Although sales are made

to such members of the general public who may come to the store, most of the sales are made to the disabled veterans who are inmates of the institution.

Assuming that the concession was granted to The Liberty Stores Inc., by authority of the proper governing officials of said institution, the question is presented as to whether the state cigarette sales and license taxes must be paid by a corporation to which has been granted the right to conduct a store upon the grounds of said institution for the benefit of its inmates when, though some sales are made to the general public, the great majority of sales are made to such inmates.

Section 2 of Amended Senate Bill No. 324 imposes "an excise tax on sales of cigarettes." Section 3 provides that said tax shall be paid by the purchase of stamps, that, except as otherwise provided by rules of the tax commission under authority of the act and unless such stamps have been previously affixed, they shall be affixed by each wholesale dealer in this state prior to delivery of cigarettes to any retail dealer in this state and that each retail dealer in this state shall immediately upon receipt of cigarettes at his place of business affix such stamps unless they have been previously affixed thereto or shall observe other instructions which need not be here mentioned. Section 13 provides for the imposition of a fine upon retail dealers in this state who have cigarette packages in their possession not bearing the required stamps, with certain exceptions. Section 16 provides for the imposition of a penalty upon whoever sells cigarettes in this state without there having been first affixed to each individual package the stamps required by the act to be affixed.

Section 5 provides that no person shall engage in the wholesale or retail business of trafficking in cigarettes within this state without having a license therefor, with certain exceptions. Section 12 provides for the imposition of a fine upon whoever engages in the wholesale or retail business of trafficking in cigarettes without having a license therefor. Section 23 provides for the imposition of a fine upon whoever, being engaged in the business of trafficking in cigarettes, fails to post and keep constantly displayed in a conspicuous place in the building where such business is carried on, a license issued by the county auditor of the county wherein such business is located. Section 1 provides that "person" includes corporations.

The Soldiers' Home at Dayton was established in pursuance of a statute passed by Congress, approved March 21, 1866, and entitled "An Act to amend an Act entitled 'An Act to incorporate a national military and naval Asylum, for the Relief of the totally disabled Officers and Men of the Volunteer Forces of the United States.'" Said act (14 Stat. 10) constituted the President, Secretary of War and Chief Justice of the United States and certain other persons a board of managers of an establishment for the care and relief of certain disabled soldiers, conferring perpetual succession and empowering the board to make by-laws and regulations for carrying on the business and government of the asylum, to procure suitable sites for such asylums and to erect necessary buildings.

In April, 1867, the Ohio legislature passed an act entitled "An Act Ceding to the United States of America jurisdiction over certain lands and their appurtenances of the National Asylum for disabled volunteer soldiers, and exempting the same from taxation" (64 O. L. 149). This act was amended in May, 1868, and became embodied in the General Code as sections 13843 and 13844, which read as follows:

Section 13843.

"Be it enacted by the General Assembly of the State of Ohio, That jurisdiction of the lands and their appurtenances, which may be acquired by donation or purchase by the managers of the national asylum for disabled volunteer soldiers within the state of Ohio, for the uses and purposes of the said asylum, be and is hereby ceded to the United States of America; provided, however, that all civil or criminal process issued under the authority of the state of Ohio or any officer thereof, may be executed on said lands and in the buildings which may be located thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid; and the officers, employes and inmates of said asylum who are qualified voters of this state, by complying with the requirements of the laws that now are in operation or that hereafter may be enacted regulating state, county and township elections in this state, shall have the right of suffrage at all township, county and state elections in the township in which the said national asylum shall be located."

Section 13844.

"That the land so acquired by the national asylum for disabled volunteer soldiers, with their appurtenances and all the buildings which may be erected thereon, and all the personalty of every kind, now held, or which may hereafter be held by the board of managers for the uses and purposes of said asylum, shall forever hereafter be exempted from all state, county and municipal taxation and assessment whatever, so long as the same shall remain the property of the United States, for the uses of the national asylum."

In August, 1867, said board of managers purchased in fee simple the land in Montgomery County upon which it established what was later known as the "Central Branch" of the Soldiers' Home, the deeds being executed by private citizens, formerly owners of the land, to "The national asylum for disabled volunteer soldiers." See *Renner vs. Bennett*, 21 O. S. 431, at 432.

Under these circumstances, occasion first arose in 1869 to determine the effect of the cession by the State to the United States of jurisdiction over these lands. In *Sinks vs. Reese*, 19 O. S. 306, where it was held that residents of Ohio who became inmates of the Soldiers' Home ceased to be residents of Ohio and could not therefore vote in Ohio elections, the court said:

"Here, then, is an institution invested with corporate powers, established by the government of the United States for its own purposes—the relief and support of its disabled volunteer soldiers. (p. 314)

* * * * * * * * *

By becoming a resident inmate of the asylum, a person though up to that time he may have been a citizen and resident of Ohio, ceases to be such; he is relieved from any obligation to contribute to her revenues, and is subject to none of the burdens which she imposes upon her citizens. He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is the State of Indiana or Kentucky, or the District of Columbia. * * * the grounds and buildings of this asylum have been detached and set off from the State of Ohio, and ceded to another government, and placed under its exclusive jurisdiction for an indefinite period." (p. 316).

Later, by an act approved January 21, 1871 (16 Stat. 399) and entitled "An Act ceding certain Jurisdiction to the State of Ohio," Congress provided:

"That the jurisdiction over the place purchased for the location of the 'National Asylum for Disabled Volunteer Soldiers,' under and by virtue of the act of Congress of March third, eighteen hundred and sixty-five, entitled 'An Act to incorporate a National Military and Naval Asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States,' and the act of March twenty-first, eighteen hundred and sixty-six, amendatory thereto, and upon which said asylum is located, is hereby ceded to the State of Ohio, and relinquished by the United States. And the United States shall claim or exercise no jurisdiction over said place after the passage of this act: Provided, That nothing contained in this act shall be construed to impair the powers and rights heretofore conferred upon the board of managers of the National Asylum for Disabled Volunteer Soldiers, incorporated under said act, in and over said territory."

Several important decisions, bearing upon the respective spheres of power of the federal and state governments at the Soldiers' Home, have been handed down since the re-cession of jurisdiction to Ohio. In *Renner vs. Bennett*, 21 O. S. 431, (1871), another election contest case, the following remarks were made in defining the jurisdiction ceded to Ohio and in explaining the powers reserved by the proviso to the corporation:

"The thing relinquished is 'exclusive jurisdiction'. The thing reserved is 'the powers and rights conferred upon the board of managers incorporated under said act'. Exclusive jurisdiction is nothing less than absolute sovereignty, the unlimited power to make, apply, and execute laws. It is the power to enact a code or codes of laws, not for specified and limited objects, but for any and all purposes, and to establish and regulate courts for the enforcement of those laws; and an executive department to carry them into effect. * * *. This charter is a grant of specified and limited corporate powers, and no matter how numerous and extensive they may be, there is still left in the sovereignty, that residuum of power which constitutes sovereignty or general jurisdiction. * * * this corporation is but an instrumentality of the general government, its creature and trustee, and therefore, whatever is reserved to the corporation, is in effect reserved to the United States. * * * the State resumes its jurisdiction, subject only to such rights and powers as the corporation, or, if you please, as the United States, acting by and through the corporation, could claim under its present charter. In other words, nothing is reserved by the proviso above the dignity of corporate rights and powers." (pp. 441, 442)

In *Ohio vs. Thomas*, 173 U. S. 276 (1899) the Governor of the Soldiers' Home at Dayton, who was admitted to be in charge of the mess halls of the institution, was prosecuted for the violation of a state law requiring persons in charge of eating houses who serve oleomargarine therein, to display a placard giving notice of that fact. It appeared that the oleomargarine had been purchased by money appropriated under that itemization by Congress and that it had been served under

the directions of the board of managers of the institution. The United States Supreme Court declared:

“In making provision for so feeding the inmates, the governor, under the direction of the board of managers and with the assent and approval of Congress, is engaged in the internal administration of a Federal institution, and we think a state legislature has no constitutional power to interfere with such management as is provided by Congress. (p. 282.)

* * * * *

In asserting that this officer under such circumstances is exempt from the state law, the United States are not thereby claiming jurisdiction over this particular piece of land, in opposition to the language of the act of Congress ceding back the jurisdiction the United States received from the state. The government is but claiming that its own officers, when discharging duties under Federal authority pursuant to and by virtue of valid Federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed.” (p. 283.)

In May, 1902, the Ohio legislature passed an act (95 O. L. 368 and 536, now Sections 13770 to 13772, General Code) giving consent to the United States to acquire land required for governmental purposes, ceding to the United States exclusive jurisdiction over land so acquired for all purposes except the service of civil and criminal process and exempting such land from taxation. A short time thereafter, apparently apprehensive lest said Ohio act of May affected jurisdiction over the Soldier's Home at Dayton, Congress, by a law approved July 1, 1902, (32 Stat. 732), passed another act receding to Ohio jurisdiction over the Soldiers' Home in substantially the same terms employed in the first act of recession passed in 1871, *supra*. Hence, the situation is now the same as it was before the Ohio act of 1902 was passed.

Since that time the United States Circuit Court in *Howell vs. United States*, 7 O. L. R. 121 (1910), held that the laws of Ohio governing the administration of the estates of decedents are applicable to the estates of deceased inmates of the Soldiers' Home at Dayton, and the Supreme Court of Ohio, in *Overholser vs. National Home for Disabled Soldiers*, 68 O. S. 236, in holding that the Home was not liable for torts, said:

“This eleemosynary corporation, as it has already been denominated by this court, *Renner vs. Bennett*, 21 Ohio St., 442, therefore remains in all respects, as it was originally, an institution of the government of the United States for the administration of a charity of the United States.” (p. 247.)

Perusal of the foregoing statutes and decisions impels the conclusion that the laws of Ohio are generally in force over the territory of said Soldiers' Home. There is, however, one important exception, namely—Ohio laws cannot be effective there which would interfere with the operation of the institution as an instrumentality of the federal government serving the function of conducting a home for disabled soldiers.

There is no doubt in my mind that the maintenance upon the grounds of the Soldiers' Home of a store for the purpose of affording to those who, in the country's service, have become incapacitated, an opportunity to purchase such small

articles of personal indulgence as their limited means may permit, is a pursuit properly attributable to the United States governmental function of conducting a home for disabled soldiers. And, if the proper governing authorities of the Soldiers' Home, instead of providing this service directly, see fit to furnish it through a concessionnaire, I see no reason why such concessionnaire in making these commodities available to the inmates of the Home is not an instrumentality of the United States fulfilling a proper governmental function.

Since the right of taxation where it exists is necessarily unlimited in its nature and carries with it inherently the power to embarrass and destroy (*Austun vs. Aldermen*, 7 Wall. 694, 699), the United States Supreme Court has construed the federal constitution as placing a definite limitation upon the power of states to impose a tax upon federal instrumentalities. These principles were recently summarized in *Indian Motorcycle Company vs. United States*, 283 U. S. 570, 575-576, thus:

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. * * *. Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. * * * .

Of course, the reasons underlying the principle mark the limits of its range. Thus *as to persons or corporations which serve as agencies of government, national or state, and also have private property or engage on their own account in business for gain, it is well settled that the principle does not extend to their private property or private business, but only to their operations or acts as such agencies*; and, in harmony with this view, it also has been held *where a state departs from her usual governmental functions and 'engages in a business which is of a private nature' no immunity arises in respect of her own or her agents' operations in that business*. While these decisions show that the *immunity does not extend to anything lying outside or beyond governmental functions* and their exertion, other decisions to which we now shall refer show that it does extend to all that lies within that field." (Italics the writer's.)

To impose the Ohio cigarette sales tax and the cigarette license tax, respectively upon the sale of and upon the business of selling cigarettes by The Liberty Stores, Inc., *to disabled soldiers* upon the grounds of the Dayton Soldiers' Home, where such sales and business are authorized by the proper governing authorities of said Home and conducted for the benefit of the inmates, would be to impose a tax upon the operations of a federal agency in its fulfillment of a governmental function, which cannot be done under the constitution.

This immunity, however, does not extend to the sale of and business of selling cigarettes to members of the general public, as distinguished from the inmates who reside upon the Home grounds. It is for the benefit of the disabled soldiers and not for the benefit of the members of the general public that the United States

maintains this institution. The sale of cigarettes to members of the general public can in no sense be considered within the pale of the governmental function of conducting a home for the relief and support of disabled soldiers.

In *Susquehanna Power Company vs. Tax Commission*, 283 U. S. 291, 294, Mr. Justice Stone, in delivering the opinion of the court, said:

“The exemption of an instrumentality of one government from taxation by the other must be given such a *practical construction as will not unduly impair the taxing power* of the one or the appropriate exercise of its functions by the other.” (Italics the writer’s.)

Applying, by authority of the Supreme Court, such a practical construction as will not unduly impair the taxing power of Ohio or the appropriate exercise of the functions of the United States, common sense dictates that the line of demarcation be drawn between the operations of The Liberty Stores, Inc., as an agency of the United States in serving the inmates of the Soldiers’ Home and its operations as a private business serving members of the general public. (See *South Carolina vs. United States*, 199 U. S. 437, for distinction made between taxing governmental operations and operations of an ordinary private business.) Any other interpretation would result in an extensive evasion of the cigarette taxes and an impairment of the state’s revenue, for members of the general public, wholly unconnected with the Home, would flock there to buy cigarettes, and The Liberty Stores, Inc., would be given an unwarranted advantage in competition with other merchants who sell to the general public—vicious consequences never intended by the constitution.

Attention is called to *Nikis vs. Commission*, 144 Va. 618, where it was held that one who conducted a retail merchandise business in a railroad station located in Virginia on land purchased by the United States to be used for the approach of the Francis S. Key bridge but which land had not come under the exclusive jurisdiction of the United States, must procure the license, required by Virginia, for the conduct of a retail merchandise business.

Answering your question specifically, I am of the opinion that:

1. The Liberty Stores, Inc., which has been authorized by the governing officials of the National Military Home at Dayton to operate a store for the sale of general merchandise, cigarettes, tobacco, etc., is, to the extent that it sells cigarettes to the inmates of said institution, an agency of the United States fulfilling a governmental purpose, and the Ohio cigarette sales and license taxes are not applicable to its sales of and business of selling cigarettes at the Home to said inmates.

2. In so far as in said store The Liberty Stores, Inc., sells cigarettes to members of the general public, as distinguished to said inmates, it is not acting as an agency of the United States fulfilling a governmental purpose, and it must procure the state license tax to engage in such business and must comply with the state cigarette sales tax with regard to the sale of cigarettes made to the general public.

Respectfully,
GILBERT BETTMAN,
Attorney General.