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1. TAX — PUBLIC ACT 819, H.R. 6687, 76 CONGRESS — DOES NOT GRANT TO OHIO CONSENT OF FEDERAL GOVERNMENT — COLLECT FROM VENDORS, INTOXICATING LIQUORS, PURCHASED OUTSIDE OF OHIO, OR IN INTERSTATE COMMERCE, SOLD OR CONSUMED ON LANDS, CEDED BY OHIO TO FEDERAL GOVERNMENT, THE "MARK-UP" OR "GALLONAGE TAX" REQUIRED BY DEPARTMENT OF LIQUOR CONTROL — PAID TO STATE TREASURY — SECTIONS 6064-3, 6064-10 G.C.

2. LIQUOR PURCHASED IN OHIO — DEPARTMENT LIQUOR CONTROL — OFFICERS' CLUB, SITUS, FEDERAL AREA — PURCHASE PRICE MUST INCLUDE SO-CALLED "MARK-UP" AND "GALLONAGE TAX."

SYLLABUS:

1. Public Act No. 819 (H. R. 6687), as enacted by the Seventy-sixth Congress, does not grant to the State of Ohio consent of the Federal Government to collect from vendors of intoxicating liquors, purchased outside of Ohio or in interstate commerce, sold or consumed on lands ceded by the State of Ohio to the Federal Government, the "mark-up" required to be made by the Department of Liquor Control by Section 6064-3, General Code, or the "gallonage tax" required by Section 6064-10, General Code, to be paid by the Department of Liquor Control to the State Treasury.

2. If liquor is purchased in the State of Ohio from or through the Department of Liquor Control by an officers' club located in a federal area, the purchase price of such liquor must, under authority of Section 6064-3, General Code, include the so-called "mark-up" and "gallonage tax" as therein described.

Columbus, Ohio, June 18, 1942.

Hon. Jacob B. Taylor, Director, Department of Liquor Control,
Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion in which you inquire whether under the authority or consent of the Federal Government, as contained in Public Act No. 819, as enacted by the Seventy-sixth Congress, sometimes referred to as the "Buck Resolution" and as "H.R. 6687," the state of Ohio has the same jurisdiction to collect what is re-

ferred to in your letter as the "gallonage tax" and "mark-up" with respect to sales of liquor made to "Wilbur Wright Officers' Club," Patterson Field, "Officers' Club, Fifth Corps Area," Fort Hayes, "Officers' Club, Ravenna Ordinance Plant," Ravenna, Ohio, and "Army Country Club, Columbus General Depot," Columbus, Ohio; further, whether, if such authority is granted by such act, "the state 'mark-up' and/or the gallonage tax on all spirituous liquor sold by the Ohio Department of Liquor Control" is "a 'use tax' within the meaning of this Act;" also whether, by reason of the consent granted by such act, the Department of Liquor Control has "the authority to arrange for all such sales to the above-named officers clubs to be made through state Liquor Stores in order to insure the full collection by the state of such tax (Mark-up and gallonage tax)."

In an opinion rendered by me which is reported in Opinions of the Attorney General for 1941, at page 17, I analyzed the provisions of such Public Act No. 819 or H.R. 6687 in detail, so that a review of that opinion is not necessary here. It may be well to quote my conclusions with respect to the limits of such act as set forth in the first and second paragraphs of the syllabus thereof:

> "1. By the enactment of H.R. 6687 by the 76th Congress, the federal government has empowered the state to levy and collect taxes on or with respect to sales, purchases, storage and use of personal property, taxes measured by sales, receipts from sales, purchases, storage or use of personal property, and taxes measured by income or gross receipts by persons, firms or corporations within or upon federal property located within the geographical limits of the state.
>
> 2. In such Act the federal government has not consented to the levy or collection of such taxes from or against itself or its instrumentalities, except in cases where sales are made by its instrumentalities to persons other than those therein defined as authorized purchasers."

Inasmuch as such act purports to authorize the collection of "sales and use tax" and "income tax" from persons within "federal areas" and Congress has defined such terms so as to include taxes which are not within the popular conception of the terms "sales tax," "use tax," "income tax" and "federal area," it may not be amiss to quote herein the definitions of such terms as so defined:

> "As used in this Act * * *

(b) The term 'sales or use tax' means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 10 of the Federal Highway Act, approved June 16, 1936, are applicable.

(c) The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts. * * *

(e) The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any state shall be deemed to be a Federal area located within such state."

In determining whether the state may levy and collect taxes from persons or concerning transactions within a federal area, it is well to keep in mind certain well settled principles. Thus, the state may not tax property which is not located in or which has no tax situs within its boundaries. It may not tax transactions carried on outside of its territorial jurisdiction. State Tax on Foreign-held Bonds, 15 Wall., 300; McCullough v. Maryland, 4 Wheat., 316; Anderson v. Durr, 100 O.S., 251; Tax Commission v. Kelly Springfield Tire Company, 38 O.App., 109. It would thus follow that when a state cedes to the Federal Government absolute jurisdiction over certain property, it divests itself of the jurisdiction thus ceded and thereafter may not exercise the sovereign right of taxation therein. However, it is possible for a state to cede to the Federal Government a limited jurisdiction of property within its borders and to retain the remainder of the jurisdiction not so ceded. Collins v. Yosemite Park & Curry Co., 304 U.S., 518; James v. Dravo Construction Co., 302 U.S., 134. It is likewise established that the Federal Government may reconvey or recede the territory, which has been conveyed to it, back to the state. If such can be done, it would naturally follow that the Federal Government could cede a lesser portion of its jurisdiction, and the state could accept such portion.

There is one further reason why a state could not tax sales made within such area operated by the Federal Government. That reason is that the state may not tax either the Federal Government or one of its agencies without its consent. Graves v. New York, 306 U.S., 306; South Carolina v. United States, 199 U.S., 437, 451; Federal Land Bank v. Grosland, 261 U.S., 374.

In view of the fact that such act only purports to grant consent to the states to collect "sales or use tax" and "income tax" within federal areas, it is self-evident that if the "gallonage tax" and "mark-up" referred to in your inquiry do not come within the definition of "sales or use tax" or "income tax" as above quoted from the act under consideration, it is unnecessary for the purpose of your question to determine their exact nature.

The "mark-up," to which you refer, is the obligation created by the Board of Liquor Control under the power given it in Section 6064-3 of the General Code. Such section, in so far as is material to your inquiry, reads:

> "The board of liquor control shall have power * * *
>
> 2. From time to time to fix the wholesale and retail prices at which the various classes, varieties, and brands of spirituous liquor shall be sold by the department. Such retail prices shall be the same at all state liquor stores which may be established pursuant to this act. In fixing selling prices, the department may compute an anticipated gross profit of not to exceed thirty per cent of the retail selling price based on costs, plus the sum required by section 6064-10 of the General Code to be paid into the state treasury."

The obligation which you refer to as a "gallonage tax" is that described in the following language contained in Section 6064-10, General Code:

> "In any event (a) a sum equal to one dollar for each gallon of spirituous liquor sold by the department during the period covered by the payment shall be paid into the state treasury to the credit of the general revenue fund in the manner provided by law; * * *"

In an opinion rendered by my predecessor in office (Opinions of the Attorney General for 1937, Vol. III, page 2255), it was ruled that the state of Ohio had no authority to require the payment of the gallonage tax on liquor imported into Fort Hayes, Wright and Patterson Fields Military Reservations. Such opinion is based upon the well established doctrine that the state of Ohio has no jurisdiction to levy or collect taxes except from subjects within her geographical jurisdiction or to levy a tax or charge upon sales within lands ceded to the United States or imposts upon imports into such federal areas without the consent of the Federal Government. However, said opinion is not necessarily controlling at the

present time for the reason that the Federal Government has in said Public Act No. 819 granted its consent to so tax. Since the federal courts have held that a state may tax subjects within a federal area with its consent (United States v. Bekins, 304 U.S., 27, 52, Baltimore National Bank v. State Tax Commission, 297 U.S., 209, 211), it becomes self-evident that such opinion is not conclusive, as the Federal Government has, in such Public Act No. 819, granted its consent to so tax.

In such opinion, the Attorney General raised the question as to whether or not the "gallonage tax" was a tax but found it unnecessary to answer the query in order to reach his conclusion. Many definitions of the term "tax" are to be found in the reported decisions. However, for the purposes of your inquiry, it is necessary only to consider whether the "mark-up" and the "gallonage tax" are taxes of the varieties defined as "sales or use taxes" or "income taxes" in such Public Act No. 819.

In such Section 6064-3, General Code, the legislature does not, in terms, purport to levy a tax, but rather authorizes the Board of Liquor Control to fix wholesale and retail selling prices of intoxicating liquor, and, in so doing, provides that "in fixing selling prices, the department may compute an anticipated gross profit of not to exceed thirty percent of the retail selling price based on costs, plus the sum required by Section 6064-10 of the General Code to be paid into the state treasury."

As stated in Educational Films Corporation of America v. Ward, 282 U.S., 379: "the nature of a tax must be determined by its operation rather than by the particular descriptive language which may have been applied to it." Similarly, it would seem that whether an exaction is or is not a tax, and if a tax the nature thereof, should depend more upon its operation and effect than upon the particular descriptive language given to it by the legislature.

In Meriwether v. Garrett, 102 U.S., 472, 514, the court defined the term "tax" as follows: "A tax is an impost levied by authority of government upon its citizens for the support of the state." In the case of the "mark-up" there could be little question but that the funds there sought to be raised are for the support of the state. The Liquor Control Act, Sections 6064-1 to 6064-67a, General Code, provides that such moneys as may be derived from the operation of the system shall, to the extent necessary for the operation of the system, be used for the payment of

such costs, any excess being payable into the state Treasury. However, the language of such section does not specify that the sum is levied against any citizens of the state, but rather that such thirty per cent. shall be added to the cost of the liquor before sold by the Department of Liquor Control either at wholesale or retail.

In Roosevelt Hospital v. New York, 84 N.Y., 108, the court defined "taxes" as follows: "Taxes are public burdens imposed generally upon the inhabitants of the whole state, or upon some civil divisions thereof, for governmental purposes, without reference to particular benefits or particular individuals or property." It would therefore appear that the "mark-up" provided for in Section 6064-3, General Code, supra, is not a tax, since all of the attributes of a tax as above defined are not present.

There is another consideration which indicates that the General Assembly did not regard the "mark-up" as a sales tax. In Section 5546-2, General Code, the legislature has provided that the sales tax provisions shall be applicable to and require the collection of a sales tax on liquor only when sold by a retailer. If the "markup" is in fact a tax, it would appear to be more in the nature of an excise tax upon the privilege enjoyed by the Department of Liquor Control for engaging in the business of selling liquor by a monopolistic method. However, this I am not called upon to determine. Suffice it to say that such "mark-up" is not a sales tax and consequently is not authorized by the "Buck Resolution."

The legislature has prescribed the price at which the monopoly may vend its wares — cost plus thirty per cent. of selling price. This view is to some extent supported by the view taken by the Supreme Court of the United States in South Carolina v. United States, 199 U.S., 437, and Ohio v. Helvering, 292 U.S., 360, that when a state entered into the business of merchandizing intoxicating liquors it was not engaging in a governmental business but "takes on the character of a trader." In view of the reasoning hereinabove set forth, I am of the opinion that when the state of Ohio created the Department of Liquor Control and placed in it the monopolistic power of sale of liquors in Ohio and fixed the price at which it could vend its wares, such regulation as to price was more nearly intended as a rate-schedule rather than a sales or use tax.

I come now to a consideration of the "gallonage tax." Unless such "gallonage tax" comes within the definition of a "sales or use tax" or an

"income tax" as defined in Public Act No. 819, the Federal Government does not consent to its collection.

Referring again to Section 6064-10, General Code, the question arises as to whether such tax is "levied on sales with respect to, or measured by sales, receipts from sales, purchases, storage, or use of tangible property." The so-called "gallonage tax" is, in terms, measured by the gallons of liquor sold by the Department of Liquor Control rather than the amount of receipts from the sales, purchases, storage or use of liquors; that is, the one dollar per gallon would be payable by the Department of Liquor Control to the state Treasury whether the gallon of liquor were sold for two dollars or ten dollars per gallon. The contribution to the state Treasury is not dependent upon or measured by the sale or sales price. The event of the sale merely is the condition upon which the contribution becomes due and payable to the Treasurer, and is not the measure of the tax. Obviously, the "gallonage tax" is not a tax measured by receipts from sales, purchases, storage or use of tangible personal property. It is thus evident that it is not a "sales or use tax" unless it be so by reason of being a tax levied on, or with respect to, sales of tangible personal property.

The question then remains as to whether it comes within this category. In the case of Winter v. Barrett, 352 Ill., 441, the court was called upon to consider the nature of a tax levied against a person engaged in selling personal property at retail and denominated in the act as a "sales tax." Such court held that such tax, even though measured by a percentage of the gross sales, was not a property tax, a tax on consumers or an income tax, but was rather an occupation tax. The court in that case said that "the price charged for articles sold is merely the measure of the tax to be paid." If such case correctly states the nature of the tax, it would impel the conclusion that the "gallonage tax" is an occupational or excise tax measured by the quantum of the liquor dealt in and unrelated to the price charged or gross receipts from the business engaged in. In Western Lithograph Company v. State Board of Equalization (Calif.), 78 Pac. (2d), 731, the court had occasion to consider the nature of such tax, when the occasion arose as to whether a refund was due to the vendor by reason of the fact that he had paid a tax with respect to wares sold to a national bank. Such court affirmed the view that the tax was an occupation tax and, although measured by the sales price, was not a tax upon the purchase by the federal instrumentality. (In the

California law, provision is made that the amount of the tax may be collected by the vendor from the purchaser.) In Lash's Products Company v. United States, 278 U.S., 175, the United States Supreme Court had occasion to consider the question of a tax imposed by Section 628 of the Revenue Act of 1918, which imposed a tax of ten per cent. on sales by the manufacturers of soft drinks, which sum was added to and included in the sales price. In that case, the court laid down the rule that where a manufacturer-vendor pays a tax for the privilege of vending and includes the tax in the sales price of the commodity, the purchaser does not, as a matter of law, pay a tax; he pays only the purchase price. The court said: "The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is a part of the price * * * "

Whatever may be the exact nature of the obligations in question, it does not appear to me that the necessary elements are present to bring such obligations within the purview of the definition of "sales or use taxes" or "income taxes" as defined in such Public Act No. 819. If such be true, it would appear that no consent on the part of the Federal Government is contained in such statute to collect such taxes in "federal areas," if such charges be taxes.

You do not inquire as to the exact nature of the "mark-up" or "gallonage tax," whether it be a tax or whether it be merely a device to transfer moneys from the Department of Liquor Control to the State Treasury. I therefore have not given consideration to such propositions and herein express no opinion concerning the same.

If I am correct in my opinion to the extent hereinabove expressed, it would necessarily follow that:

1. If liquor was bought within the jurisdiction limits of the state of Ohio by army officers' clubs, either at wholesale or retail, for resale at such clubs, the purchase price at which they could acquire the liquor would include, as a portion thereof, the "gallonage tax" and the "mark up" which the Department of Liquor Control is required to make, such items being a portion of the "sales price." (See sub-section 3 of Section 6064-3, General Code.)

2. Since a federal area, the jurisdiction of which has been ceded to the United States Government, is not a part of the state of Ohio (see

Sections 13770-13772, General Code; Opinions of the Attorney General, 1932, Vol. II, page 828; Opinions of the Attorney General, 1933, Vol. III, page 2008), it is elemental that the state of Ohio can neither regulate nor tax transactions carried on therein (see Opinions of the Attorney General above cited; In re Ladd, 74 Fed., 31; Commonwealth v. Clary, 8 Mass., 72; Fort Leavenworth Railroad Company v. Lowe, 114 U.S., 525, 532; Surplus Trading Company v. Cook, 281 U.S., 647); except to the extent consented to by the United States Government. United States v. Bekins, 304 U.S., 27, 52.

It is well established that a state's jurisdiction to tax does not extend to property or transactions beyond its territorial jurisdiction.

1 Cooley — Taxation, 4th Ed., Sec. 92, p. 219;
State Tax on Foreign-held Bonds, 15 Wall., 300;
McCullough v. Maryland, 4 Wheat., 316;
Dewey v. Des Moines, 173 U.S., 193;
Savings & Loan Society v. Multnomah, 169 U.S., 421;
Great Southern Life Insurance Co. v. Austin, 112 Tex., 1;
Safe Deposit, etc., Co. v. Virginia, 280 U.S., 83;
Southern Railway Co. v. Kentucky, 274 U.S., 76.

To the extent that the areas in question have been ceded to the United States Government, it would naturally follow that they bear the same relation to the state of Ohio as do the other states and territories. See Sinks v. Reese, 19 U.S., 306. If such be true, it naturally follows that the state of Ohio has no more power to tax or otherwise regulate sales made from some other state or territory to persons residing in such area than it would a sale made by a person residing in Pennsylvania to a person in Indiana.

I have not herein considered the question as to whether the various officers' clubs mentioned in your inquiry are or would constitute "authorized purchasers" within the meaning of Public Act. No. 819. In view of my conclusion, as herein expressed, that the "mark-up" and "gallonage taxes" are neither "sales or use taxes" nor "income taxes" within the meaning of such act, consideration of such question is unnecessary.

I have not herein considered the question as to whether the clubs mentioned in your inquiry are required to comply with the Ohio Sales Tax Law with respect to sales by the drink to be consumed on the premises and to collect the sales tax thereon from the customer. You did not in-

quire as to such question. Since it would come within the rule laid down in Opinion No. 3362 mentioned above, I assume that you have no doubts with reference thereto.

Specifically answering your inquiries, it is my opinion that:

1. Public Act No. 819 (H.R. 6687), as enacted by the Seventy-sixth Congress, does not grant to the state of Ohio consent of the Federal Government to collect from vendors of intoxicating liquors, purchased outside of Ohio or in interstate commerce, sold or consumed on lands ceded by the state of Ohio to the Federal Government, the "mark-up" required to be made by the Department of Liquor Control by Section 6064-3, General Code, or the "gallonage tax" required by Section 6064-10, General Code, to be paid by the Department of Liquor Control to the State Treasury.

2. If liquor is purchased in the state of Ohio from or through the Department of Liquor Control by an officers' club located in a federal area, the purchase price of such liquor must, under authority of Section 6064-3, General Code, include the so-called "mark-up" and "gallonage tax" as therein described.

Respectfully,

THOMAS J. HERBERT
Attorney General.