3838

1. LIQUOR — STATE OF OHIO — NO POWER TO TAX OR REGULATE IMPORTATION OF SPIRITUOUS LIQUORS INTO FEDERAL MILITARY RESERVATIONS — EXCLUSIVE JURISDICTION CEDED TO UNITED STATES.
2. OHIO DEPARTMENT OF LIQUOR CONTROL — NO AUTHORITY TO GRANT OR REFUSE TO GRANT CONSENTS FOR IMPORTATION OF SPIRITUOUS LIQUOR INTO FEDERAL MILITARY RESERVATIONS—SECTION 4301.19 RC.
3. OHIO DEPARTMENT OF LIQUOR CONTROL—WITHOUT AUTHORITY TO MAKE SALES AT WHOLESALE OF SPIRITUOUS LIQUOR TO PURCHASERS OTHER THAN HOLDERS OF PERMITS—SALES MUST BE MADE AT RETAIL PRICE FIXED BY BOARD TO ORGANIZATIONS LOCATED ON FEDERAL RESERVATIONS — EXCLUSIVE JURISDICTION CEDED TO UNITED STATES.

SYLLABUS:

1. The State of Ohio has no power to tax or regulate the importation of spirituous liquors into Federal military reservations, the exclusive jurisdiction over which has been ceded to the United States. (Opinion No. 1320, Opinions of the Attorney General for 1937, p. 2255, and Opinion No. 5228, Opinions of the Attorney General for 1942, p. 413, approved and followed.)

2. The provisions of Section 4301.19, Revised Code, confer no authority on the Ohio Department of Liquor Control either to grant or refuse to grant consents for the importation of spirituous liquor into Federal military reservations, the exclusive jurisdiction over which has been ceded to the United States.

3. The Ohio Department of Liquor Control is without authority to make sales at wholesale of spirituous liquor to purchasers other than holders of permits issued under authority of the Ohio Liquor Control Act, and is without authority to make sales of spirituous liquor at other than the retail price fixed by the board to organizations located on federal reservations, the exclusive jurisdiction over which has been ceded to the United States.

Columbus, Ohio, May 11, 1954

Hon. Anthony A. Rutkowski, Director, Department of Liquor Control
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

"I respectfully request your opinion on the following questions:

"1. Does the Ohio Department of Liquor Control have the legal authority to sell spirituous liquor to the United States Armed Forces stationed in camps or military installations in the State of Ohio, for sale at retail at said camps or military installations, and if so, at what price other than the established retail price, said United States Armed Forces not being the holders of any type of retail liquor permit issued by the Ohio Department of Liquor Control.

"2. Does the Ohio Department of Liquor Control have the legal authority to issue consents to the United States Armed Forces stationed in camps or military installations in the State of Ohio, to purchase spirituous liquor direct from the distiller without the payment, to the Ohio Department of Liquor Control, of the mark-up and gallonage tax provided by law.

"I am aware of the Attorney General's Opinions reported in 1937, Opinions of the Attorney General No. 1320, and in 1942, Opinions of the Attorney General No. 5228, which appear to be in conflict."

Each of these questions involves a consideration of the power of the state to exert its police power and its power to lay taxes with respect to persons, property and transactions on federal reservations or exclaves within the geographical limits of which the United States has acquired exclusive jurisdiction. Such jurisdiction is ordinarily acquired in Ohio by virtue of the 17th subclause of Section 8, Article I, United States Constitution, and Sections 159.03, 159.04 and 159.05, Revised Code, Sections 13770, 13771, and 13772, General Code. The operation and effect of these constitutional and statutory provisions in conferring exclusive jurisdiction on the United States was pointed out in my Opinion No. 1877, Opinions of the Attorney General for 1952, p. 720, and need not be here made the subject of further discussion, for I assume, in the instant case, that such exclusive jurisdiction has been obtained with respect to the federal reservations mentioned in your inquiry.

The application of the Ohio Liquor Control Act with respect to the importation of spirituous liquors into such federal reservations was considered in Opinion No. 1320, Opinions of the Attorney General for 1937, p. 2255, the syllabus in which is as follows:

"The State of Ohio has no power to tax or regulate the importation of spirituous liquors into federal army forts and

reservations, the exclusive jurisdiction over which has been ceded to the United States either by special cessions acts or the General Cessions Act of 1902."

In reaching the conclusion that the state was without power to impose a tax on such importation, the writer of this opinion referred to the following headnote in Standard Oil Co. v. California, 291, U.S., 242:

"A state is without power to levy a license tax in respect to the selling and delivery of goods on a military reservation included within the territorial limits of the state but over which the full legislative authority has been ceded to the United States by an Act of the state legislature."

As to the exercise of the police power on such reservations, the writer said, p. 2259:

"* * * The Supreme Court of Ohio has recently indicated, however, that in its opinion the provisions of the liquor Control Act were adopted under the police power of the state. State, ex rel. Superior Distributing Co. v. Davis, et al., 132 O.S. 308, 321, when the court thus indicated the above it was considering the Liquor Control Act in its entirety and it is reasonable to infer that the court did not mean that none of the provisions of the said Liquor Control Act were tax measures. Nevertheless, the possibility that the court might hold that all of the Liquor Control Act was enacted under the police power is worthy of consideration.

"In the case of In re Ladd, 74 Fed. 31, it was held that the criminal laws of a state ceased to be in force within ceded territory and that laws which regulated the sale of intoxicating liquors and punishing unlicensed sales were inoperative within such territories. This opinion by the Federal Circuit Court was cited with approval in U.S. v. Unseuta, 281 U.S. 138, 143, and therefore has the authority of the Supreme Court of the United States. To a similar effect is the case of Commonwealth v. Clary, 8 Mass., 72, wherein it was held that Massachusetts statutes pertaining to the sale of intoxicating liquors were inoperative within the boundaries of ceded federal lands. * * *"

The particular question presented in the inquiry which resulted in the rendition of the 1937 opinion, supra, was the authority of the department to grant "consents" to import spirituous liquors on federal reservations under the provisions of Section 6064-12, General Code, which read in part as follows:

"* * * If any persons shall desire to purchase any variety or brand of spirituous liquor which is not in stock at the state

> liquor store where the same is ordered, the department shall immediately procure the same, by order or otherwise, upon the making of a reasonable deposit by the purchaser in such proportion of the approximate cost of the order as shall be prescribed by the rules or regulations of the board. The customer shall be immediately notified upon the arrival of the spirituous liquor so ordered at the store at which it was ordered. Unless he pays for the same and accepts delivery thereof within five days after the giving of such notice, the department may place such spirituous liquor in stock for general sale, and the deposit of the customer shall be forfeited."

This provision is presently found without substantive change in Section 4301.19, Revised Code. There is also to be found, it may be noted parenthetically, a provision for a special consent to the importation of spirituous liquor for resale by permittees. In the provisions of Section 4305.35, Revised Code, formerly Section 6064-19, General Code, such special consent constitutes the subject of the board's rule No. 35. It is not believed, however, that such provision would be applicable in the instant case for the reason that the statute rather plainly indicates that the provision in question is applicable only in the case of permittees.

The writer of the 1937 opinion, after reference to the several legal authorities indicated above, made the following statement with reference to the question of "consents to import", p. 2260:

> "* * * In your letter you refer to the Department being requested to issue consents for the importation into Fort Hayes and Wright and Patterson Fields Military Reservations. Hereinbefore I have pointed out that the state has no taxing or police jurisdiction over such federal lands and therefore in my opinion the Department of Liquor Control *has no authority to grant or refuse to grant such consents to import.* * * *" (Emphasis added.)

The question of the power of the state to tax and control liquor imports on federal reservations was again brought to the Attorney General for consideration in Opinion No. 5228, Opinions of the Attorney General for 1942, p. 413. In this opinion the writer did not question the accuracy of the 1937 opinion, supra, but noted that the question before him was that of the effect, if any, of the so-called Buck Resolution of October 9, 1940, 54 Stat. 1059, Title 4, Sections 105, 106 and 107, United States Code. A partial analysis of the provisions of this act is found in the first two paragraphs of the syllabus in Opinion No. 3362, Opinions of the Attorney General for 1941, p. 17, as follows:

"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."

The writer of the 1942 opinion, supra, after noting this analysis, stated the questions then before him as follows, p. 416:

"* * * 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 eqaul 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 considering these questions the writer called attention to divers judicial definitions of a "tax" but did not find it necessary precisely to define either the "mark-up" or the "gallonage tax," holding it sufficient to point out that neither the one nor the other is a "sales or use tax," or an "income tax." He referred to the statement in Ohio v. Helvering, 292 U.S., 360, that when a state undertakes to operate a liquor monopoly it does not do so in a governmental capacity but "takes on the character of a trader," and by this reference strongly implied that both the mark-up and the gallonage tax were pricing devices, and that the latter was also a device to provide for a minimum periodical transfer of profits to the state treasury.

It will thus be seen that the 1942 opinion approves and follows the 1937 opinion and I am unable to perceive any basis for a supposed conflict between them on the question of the power of the state to regulate the sale of spirituous liquors on federal reservations.

These conclusions would be sufficient to dispose of your inquiry relative to "consents to import" except for the necessity of considering the effect, if any, of a recently announced policy of the United States Department of Defense relative to procurement of spirituous liquors for importation and use on federal military reservations. Such policy, I understand, is stated by the Department as follows:

> "It is the policy of the Department of Defense in order to cooperate with monopoly States in the matter of the control of the purchase of distilled spirits, that messes and clubs in military establishments located within such monopoly States will purchase distilled spirits in accordance with procedures prescribed by duly constituted legal control authorities, provided these authorities offer sale of such beverages to such messes and clubs as such mark-up prices for wholesale bulk purchases as is reasonably required to effect such control.
>
> "This policy is promulgated in order to effect cooperation with control authorities in monopoly States and is not to be construed as an admission of any legal obligation to submit to such control."

It is to be observed that this statement is not intended as an admission of any legal liability either to pay taxes normally imposed by the state or to submit to state control in the exercise of the police power. This is in harmony with the view expressed in my Opinion No. 1877, Opinions of the Attorney General for 1952, p. 720, wherein, on the authority of Renner v. Bennet, 21 Ohio St., 431, I concluded, p. 725:

> "* * * after the power of 'exclusive legislation' has been acquired by Congress under the provisions of the 17th clause of Section 8, Article I, U. S. Constitution, it can be relinquished only by a congressional enactment which expressly or by necessary implication provides therefor, * * *."

In this situation the question presented, where the clubs and messes operating on the military reservations concerned have temporarily and partially waived their admitted immunity from state liquor control laws, is whether the Ohio Department of Liquor Control may make sales to them in "wholesale bulk purchases" at reasonable "mark-up prices."

In the 1942 opinion, supra, the second paragraph of the syllabus reads:

> "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."

This conclusion was stated in the body of the opinion in the following language, p. 420:

> "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 2 of Section 6064-3, General Code.)"

The reference to purchases "either at wholesale or retail" would indicate that the writer saw no difficulty in extending to this category of purchasers the privilege of purchasing at wholesale prices fixed by the department.

In Section 4301.04, Revised Code, we find the following provision analogous to "sub-section 2 of Section 6064-3, General Code," to which reference is thus made:

> "The board of liquor control has the following powers:
>
> "(A) The board may fix the wholesale and retail prices at which the various classes, varieties, and brands of spirituous liquor shall be sold by the department of liquor control. Such retail prices shall be the same at all state liquor stores. 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 4301.12 of the Revised Code to be paid into the state treasury. On spirituous liquor manufactured in Ohio from the juice of grapes or fruits grown in Ohio, the department shall compute an anticipated gross profit of not to exceed ten percent."

The power of the department to sell spirituous liquors at wholesale prices appears to be provided for in the following language in Section 4301.10, Revised Code:

"(A) The department of liquor control shall:

"* * * (3) Put into operation, manage, and control a system of state liquor stores for the sale of spirituous liquor at retail and to holders of permits authorizing the sale of such liquor, and by means of such stores, and such manufacturing plants, distributing and bottling plants, warehouses, and other facilities as it deems expedient, establish and maintain a state monopoly of the distribution of such liquor and its sale in packages or containers; * * *"

This statutory language clearly suggests that the authority of the department to sell at prices other than retail is limited to sales to "holders of permits only." Any doubt that may be entertained on this matter, however, is disposed of by reference to the board's regulation No. 36 in which it is provided that "The department will sell spirituous liquor at wholesale to all retail dealers holding the proper permits within the state." Administration regulations of this sort, of course, have the force and effect of law, and I find nothing in the statute or any other regulation of the board which would indicate that the department's wholesale transactions are not to be limited to sales to retail dealers.

There are, of course, no constitutional considerations which would inhibit the state from charging the usual retail price to include the usual mark up and so-called "gallonage tax" in the case of sales to such organizations, for it must be remembered that where such sales are made the representatives of the organizations concerned, as a matter of physical necessity, will leave the federal reservations on which they are located and come into the territorial jurisdiction of Ohio for the purpose of consummating the sale and securing delivery.

The effect of the statutory language and of the pertinent regulations of the board above noted was apparently not considered by the writer of the 1942 opinion, nor were any reasons advanced therein for the seeming

assumption that wholesale privileges could be extended to the organizations here involved. What the writer was actually concerned with was the inclusion of the gallonage tax and the mark-up in the price in the event sales were made in Ohio to this class of purchasers.

In view of the clear implication in the language above noted that wholesale sales are to be limited to permit holders, and in view of lack of any supporting reasons for the implication to the contrary in the 1942 opinion, it seems necessary to me to conclude that sales at wholesale to the organizations here involved are unauthorized. I conclude, therefore, that the department is without authority to make sales of spirituous liquor to organizations of the category described in your inquiry, for such organizations are not only not "the holders of permits" but, for the constitutional reasons already pointed out, they cannot be required to secure such permits.

Accordingly, in specific answer to your inquiry, it is my opinion:

1. The State of Ohio has no power to tax or regulate the importation of spirituous liquors into Federal military reservations, the exclusive jurisdiction over which has been ceded to the United States. (Opinion No. 1320, Opinions of the Attorney General for 1937, p. 2255, and Opinion No. 5228, Opinions of the Attorney General for 1942, p. 413, approved and followed.)

2. The provisions of Section 4301.19, Revised Code, confer no authority on the Ohio Department of Liquor Control either to grant or refuse to grant consents for the importation of spirituous liquor into Federal military reservations, the exclusive jurisdiction over which has been ceded to the United States.

3. The Ohio Department of Liquor Control is without authority to make sales at wholesale of spirituous liquor to purchasers other than holders of permits issued under authority of the Ohio Liquor Control Act, and is without authority to make sales of spirituous liquor at other than the retail price fixed by the board to organizations located on federal reservations, the exclusive jurisdiction over which has been ceded to the United States.

Respectfully,
C. WILLIAM O'NEILL
Attorney General