

**OPINION
69-370**

January 7, 1969 (OPINION)

Honorable Bernice Asbridge
State Treasurer

RE: Taxation - Alcoholic Beverages - Federal Instrumentalities Exempt

This is in response to your letter in which you ask for an opinion on the construction of Section 5-03-04 of the North Dakota Century Code, as amended by the 1967 Legislature. You also enclosed correspondence and reference material you received from the commanding officer of an air base in North Dakota, which material, amongst other things, referred to AFR and military directives and manuals.

Your specific question is whether or not beer and liquor sold to officers' clubs are subject to the North Dakota taxes. Apparently the question arises over the fact that an opinion was issued to the Honorable John Erickson, State Treasurer, on August 21, 1959, which held that sales of beer and liquor to officers' and noncommissioned officers' clubs were subject to the North Dakota taxes. However, since then the Legislature has amended the law (Section 5-03-04), which now provides for an exemption. Section 5-03-04, as amended, provides as follows:

COLLECTION OF TAXES. The taxes imposed by this chapter shall be paid by wholesalers to the state treasurer on or before the fifteenth day of each month. Liquor wholesalers shall make such payments based on the total gallonage sold the preceding calendar month. Beer wholesalers shall make such payments based on the total gallonage purchased from brewers the preceding calendar month. Sales of beer and liquor to instrumentalities of the federal government on military reservations shall be tax exempt. Upon satisfactory proof a tax credit shall be allowed beer wholesalers for beer purchased, but which cannot be sold in North Dakota. A tax credit shall be allowed wholesalers on bad accounts which are charged off for income tax purposes, but a prorata tax shall again be paid on any accounts subsequently collected. If any wholesaler makes an overpayment of taxes due, the state treasurer shall issue a credit applicable to future obligations or certify such amount to the department of accounts and purchases for a refund. Any remittance within one dollar of the correct amount due may be accepted by the state treasurer as the correct amount due. (Emphasis supplied.)

The underscored language specifically exempts the sale of beer and liquor to instrumentalities of the federal government, if same are located on a military reservation. We are now faced with the question whether or not officers' and noncommissioned officers' clubs on military reservations are instrumentalities of the federal government. In

an effort to resolve this question, we have corresponded with the Department of the Air Force at Washington and received pertinent regulations, manuals and directives on the subject matter. AFM 176-3, Section A, 1, states that an open mess is an activity and is an instrumentality of the United States Government. In Paragraph 2 of same, it provides that the installation commander may authorize officers' and noncommissioned officers' open messes with approval of the major command. Paragraph 32 of same provides that the sales by the open messes are limited to certain items, including malt beverages, and that sales of alcoholic beverages are to be in accordance with AFR 34-57. Paragraph 5 (February 9, 1968) of said regulation provides as follows:

- a. Alcoholic and malt beverages by the drink will be sold only to authorized adults. When authorized by the installation commander, alcoholic and malt beverages may be sold by open messes or other sundry funds for consumption on the premises in:
 - (1) Open messes.
 - (2) The golf club house.
 - (3) Transient officers quarters
 - (4) Transient noncommissioned officers quarters.
 - (5) Facilities operated by other sundry funds on installations outside the United States.
- b. When authorized by the installation commander, packaged malt beverages may be sold by open messes."

The foregoing regulation does not authorize packaged or bulk sales of alcoholic beverages as distinguished from malt beverages or beer. Throughout these regulations we repeatedly find the terms "officers'" and noncommissioned officers' open mess", but we do not find the terms or expressions "officers'" or "noncommissioned officers' clubs." In correspondence with the Department of the Air Force, dated December 5, 1968, we were informed that there was no legal, substantive, or administrative distinction, but only a distinction as to terminology in that colloquially "open messes" are frequently referred to as "clubs."

In *Maynard & Child, Inc. v. Shearer* (Ky. 1956) 290 S.W.2d. 790, the Court held that the officers' club was an instrumentality of the United States government and was exempt from the State excise taxes, unless it can be proved that the officers got together for the purpose of avoiding the prohibition of the sale of liquor imposed by Section 1350 of Title 10, or unless proof showed that the association of officers was not, in fact, an officers' club under War Department regulations.

This suggests that instances can exist where military personnel might organize and operate clubs which are not instrumentalities of the United states government. The

pertinent regulations referred to earlier herein clearly provide that such open messes may be established only with approval of the military command or major command. While there may be a presumption that authority has been obtained to operate a club in accordance with military regulations, the State has no direct knowledge that this is a fact. Neither is the state in a position to know what sales of alcoholic beverages are permitted in military establishments. It is conceivable that in certain areas the sale may be limited to malt beverages, and in other bases, the on-sale of liquor is permitted. While the DOD directive dated May 4, 1964 authorizes, under certain conditions, sale outlets of packaged or bulk alcoholic beverages, we are not aware of an AFR directive or manual which specifically authorizes bulk or packaged sales of alcoholic beverages on military basis in the United States. We make this comment to illustrate that such activities are subject to the internal control pursuant to pertinent directives from the DOD and AFR and other military directives and manuals.

It does appear that, under certain conditions where authority is granted and approval obtained by the proper military personnel, alcoholic beverages may be sold for consumption on the premises. We also recognize the Legislative enactment which specifically exempts from North Dakota taxes sales of the alcoholic beverages to instrumentalities of the United States government. The burden rests with the person claiming the exemption.

It is, therefore, our opinion that in order to qualify for the exemption, the transaction data, such as purchase order, invoice or sales slip, must, in addition to the name of the mess or club to which the alcoholic beverages are sold, specifically state that the purchaser is an instrumentality of the United States government and must be signed by a duly authorized representative of such instrumentality. If the invoice, data or sales slip does not state that it is purchased by an instrumentality of the United States, and is not signed by a duly authorized representative of such instrumentality, such sale will not be entitled to an automatic exemption from the State taxes. As an example, the invoice or transaction memoranda should be substantially in the following manner: "Noncommissioned officers, Minot Air Force Base, North Dakota, an instrumentality of the United States government" and must be signed by a duly authorized representative of such instrumentality.

HELGI JOHANNESON
Attorney General