3817.

APPROVAL, BONDS OF MARIETTA TOWNSHIP RURAL SCHOOL DISTRICT, WASHINGTON COUNTY, OHIO, $722.39.

COLUMBUS, OHIO, January 15, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3818.

APPROVAL, BONDS OF PORT WASHINGTON—SALEM VILLAGE SCHOOL DISTRICT, TUSCARAWAS COUNTY, OHIO, $5,496.83.

COLUMBUS, OHIO, January 15, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3819.

APPROVAL, BONDS OF GRANGER RURAL SCHOOL DISTRICT, MEDINA COUNTY, OHIO, $1,546.74.

COLUMBUS, OHIO, January 15, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3820.

APPROVAL, BONDS OF ALLEN COUNTY, OHIO, $24,000.00.

COLUMBUS, OHIO, January 15, 1935.

Industrial Commission of Ohio, Columbus, Ohio.

3821.

TAX AND TAXATION—BOTTLED BEVERAGES SOLD TO CAMP EXCHANGES FOR RESALE TO MEMBERS OF CIVILIAN CONSERVATION CORPS CAMPS NOT EXEMPT FROM TAXES IMPOSED BY SECTION 6212-49b, G. C.

SYLLABUS:

The fact that bottled beer and other bottled beverages are sold to camp exchanges for the purpose of being there sold at retail to officers and members of Civilian Con-

servation Corps camps, does not exempt such sales from the taxes provided by Section 6212-49b, General Code.

COLUMBUS, OHIO, January 15, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of a communication from you in which you request my opinion as to whether or not sales of bottled beverages, including beer, as defined by Section 6212-63 of the General Code, which are made to camp exchanges at Civilian Conservation Corps camps in this state for the purpose of resale to and consumption by the officers and men composing the personnel of such camps, are subject to the taxes provided for by Section 6212-49b of the General Code of Ohio.

Pertinent facts with respect to the operation of Civilian Conservation Corps camps and with respect to the establishment and operation of camp exchanges are stated in your communication as follows:

> "1. All rights to the use and occupancy of lands upon which the Civilian Conservation Corps Camps are located, excepting lands owned by the United States, are acquired by lease from the owners thereof, pursuant to an Act of Congress, excepting lands owned by the State, the use and occupancy of which are by mutual agreement between the United States and the State of Ohio.
>
> 2. Camp exchanges are established under the authority of the War Department, through its regulations, for the purposes primarily of supplying the officers and members composing the personnel of said camps, with articles of ordinary use and consumption at a minimum cost and not supplied by the Government; to afford to the men rational recreation and amusement; and through the profits arising from the operation of such exchanges to provide, where necessary, the means for improving the company messes; also, to promote the welfare, good order and discipline of the officers and men constituting the personnel of said camps.
>
> 3. The Civilian Conservation Corps Camps are likewise established through regulations of the War Department for the purpose of giving effect to an Act of Congress, passed in the exercise of its welfare powers, providing for the general welfare of the Nation by affording employment to its needy unemployed.
>
> 4. Camp exchanges are owned by the Companies participating in the benefits arising from the operation thereof and are financed from the company funds of such Companies.
>
> 5. The company funds are made up of profits realized from the operation of the camp exchanges and from what are commonly known as "mess savings," which represent the difference between the amount allowed and issued by the Government for the subsistence of the Company and the amount actually used for such purpose.
>
> 6. All purchases of merchandise for re-sale, and the re-sale thereof to the personnel of said camps for consumption thereat, are made through and by the said camp exchanges, and no profit from re-sales inures to the benefit of any individual or corporation, profits, if any, going to the credit of the company fund to be used *solely* for welfare purposes in connection with camp activities of the company or companies participating in the exchange.
>
> 7. If for any reason a Company, owning a company fund, ceases to exist, such fund must be covered into the United States treasury as "miscellaneous

receipts", neither former officers nor the men of such Company being entitled to participate personally in such fund, or any part thereof.

8. Under the said regulations of the War Department, said camp exchanges are authorized by the company commanders, who are the representatives of the Corps Area Commanders, who in turn are authorized to execute the role of the War Department within their various corps areas, the Adjutant General having the general authority of supervision of welfare activities carried on at all of said camps.

9. The said regulations of the War Department point out in detail the authority under which the said camps are created, organized and their activities carried on; provide for the control and government thereof; the housing, supplying, transportation and maintenance of members; accounting and procurement procedure and fiscal transactions; medical services to members and their welfare.

10. The business activities and management generally of said exchanges are carried on by the exchange officers and such assistants as may be necessary, who are charged with the proper conduct of such activities and management, and all accounts and fiscal transactions are regularly and thoroughly audited as required under the said regulations of the War Department."

The term "beer" is defined by Section 6212-63, General Code, to "include beer, lager beer, ale, stout and porter and other brewed or fermented beverages containing one-half of one per centum, or more, of alcohol by volume but not more than 3.2 per centum of alcohol by weight". Sections 6212-49b, General Code, provides that in addition to the tax on barrel beer, imposed by Section 6212-49, General Code, "A tax is hereby levied upon the sale within this state of beverages in sealed bottles, at the rate of one-half cent on each six ounces of liquid content or fractional part thereof. Only one sale of the same article shall be used in computing the amount of tax due hereunder. The tax hereby imposed shall not apply to the sale or distribution of beverages (other than beer) in sealed bottles retailing for five cents or less."

It does not appear that any of the sales here in question have been made upon territory within the State which has been ceded to the United States or which has otherwise been removed from the jurisdiction of the State. In this situation the question here presented with respect to the right of the State to impose the taxes provided for by Section 6212-49b, General Code, arises solely by reason of the suggested view that the camp exchanges referred to in your communication may be agencies or instrumentalities of the Federal Government and that sales of beer and other bottled beverages to such camp exchanges may for this reason be immune from taxation at the hands of the State. In this connection it is to be noted that it is an established principle that the agencies and instrumentalities by which the United States exercises its governmental powers are exempt from taxation by the states; and that, as a rule correlative to this principle, the agencies and instrumentalities whereby the states carry on their governmental powers are likewise exempt from taxation by the United States. However, as pointed out in the opinion of the court in the recent case of *Helvering, Commissioner* vs. *Powers,* 55 S. C. Reports, 171, 79 L. Ed. 141, these principles of implied immunity from taxation are subject to inherent limitations. As to this it is to be noted that the rule with respect to the exemption or immunity of the agencies and instrumentalities of the one government from taxation by the other is to be given such practical construction and application as will not unduly impair the taxing power of the one or the appropriate exercise of its function by the other. *Susquehanna Power Company* vs. *State Tax Commission,*

283 U. S. 291; *Metcalf and Eddy* vs. *Mitchell,* 269 U. S. 514, 523, 524. The court in its opinion in the case of *Fox Film Corporation* vs. *Doyal,* 286 U. S. 123, 128, said:

> "The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*M'Culloch* vs. *Maryland,* 4 Wheat. 316, 436, 4 L. ed. 579, 608), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' *Indian Motocycle Co.* vs. *United States,* 283 U. S. 570, 576, 579, 75 L. ed. 1277, 1281, 1282, 51 S. Ct. 601. Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (*Johnson* vs. *Maryland,* 254 U. S. 51, 55, 56, 65 L. ed. 126, 128, 129, 41 S. Ct. 16), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' *Willcuts* vs. *Bunn,* 282 U. S. 216, 225, 75 L. ed. 304, 306, 71 A. L. R. 1260, 51 S. Ct. 125."

In the case of *Burnett, Commissioner* vs. *Jergins Trust,* 288 U. S. 508, it was said that "The application of the doctrine of the implied immunity of instrumentalities of a state or the Federal Government from taxation by the other must be practical and should have regard to the circumstances disclosed". Touching this question the court in the case of *Shaw, State Auditor,* vs. *Gibson-Zahniser Oil Corporation,* 276 U. S., 575 held that "What instrumentalities of government will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them". And further in the opinion of the court in this case it was said on the authority of a number of previous decisions of the Supreme Court of the United States, that "There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks".

As a matter pertinent in the consideration of the application of the rules of law above noted it is observed that although the Civilian Conservation Corps and the essential activities thereof have been established and directed by executive orders of the President under authority of the Act of Congress approved by the President under date of March 31, 1933 for the purpose of carrying on emergency conservation work, camp exchanges which have been set up at the Civilian Conservation Corps Camps throughout the country have not been established by any Act of Congress or by executive order of the President, but they have been established pursuant to authority granted by the War Department. In this connection it is, perhaps, pertinent to note that by Executive Order No. 6200, issued by the President under date of July 11, 1933, the Director of the emergency conservation work provided for by said Act and Executive Order was authorized and directed, among other things, to furnish "athletic and other supplies, equipment, radios, suitable books for traveling libraries on Forestry and other subjects, properly balanced between fiction and non-fiction; newspapers and periodicals; and miscellaneous items as may be necessary for the instruction, recreation, amusement and welfare of the enrolled members of the Emergency Conservation Work". Although it is obvious that some of the recreational and educational activities and instrumentalities may be carried on and used in quarters set up for the use of the camp exchange, this Executive Order of the President is not the authority by which camp exchanges as such have been established.

Regulations of the War Department, which have been promulgated by the order

of the Secretary of War, set out the authority under which Civilian Conservation Corps Camps are created and organized and provide for the control and government thereof. These regulations also provide with respect to the matter of housing, transportation and maintenance of members, as to accounting and fiscal transactions, medical services to members and also as to the general welfare of the members of such camps. In section 7 of said regulations it is provided, among other things, that "The Adjutant General will have supervision over all welfare activities". By this same section of said regulations provision is made for the establishment of camp exchanges as follows:

> "Camp commanders may, in their discretion, authorize the operation of camp exchanges at work camps to be conducted in accordance with army regulations. Exchanges, when established, will carry certain articles not provided by the Government, as, for example, toilet articles, tobacco, cigarettes, candy, etc. Prices will be kept at a minimum. The camp will be operated by the welfare officers, assisted by members of the Civilian Conservation Corps. The granting of concessions is not advisable."

Without recapitulating or otherwise discussing the facts stated in your communication with respect to the establishment and operation of camp exchanges at Civilian Conservation Corps Work Camps I am inclined to the view that there is nothing to indicate that the activities of these camp exchanges are carried beyond those which are common to post exchanges which, by a like regulation of the War Department, have been set up at and in connection with army posts throughout the country. And, I take it, that the views entertained by the courts with respect to the essential nature, purpose and operations of post exchanges are, with respect to the question at hand, equally applicable to camp exchanges which have been set up in connection with Civilian Conservation Corps work camps. In the case of *Keane* vs. *United States,* 272 Federal 577, where the question before the court was whether proof of a conspiracy to defraud a post exchange would sustain an indictment for conspiracy to defraud the United States it was held as indicated by the syllabus in the report of the case as follows:

> "A military post exchange, which is a voluntary association of companies, detachments, or other army units at military posts, permitted, but not required, by a special regulation of the War Department for the purpose of conducting for the benefit of the members of such units what is in effect a co-operative store and place of entertainment, with their own funds, and for whose contracts and obligations the United States is not responsible, and in whose funds it has no interest, though its business is conducted by an officer detailed for the purpose, held not a 'department of the government,' and proof of a conspiracy to defraud a post exchange held not to sustain an indictment, under Criminal Code, Sec. 37 (Comp. St. Sec. 10201), for conspiracy to defraud the United States."

In the case of *People* vs. *Standard Oil Company,* 218 California 123, decided by the Supreme Court of California under date of May 1, 1933, that court had under consideration the question whether the state of California could impose an excise tax on sales of gasoline made to the post exchange at the Presidio Military Reservation in San Francisco. After discussing the contention made by the Standard Oil Company, the taxpayer in this case, that the taxes there in question could not be imposed for the reason that the sales were made to the post exchange on territory that had been ceded

to and was owned by the United States, the court in its opinion, among other things, stated:

"It is next urged that a sale to the army post exchange is a sale to a department of the government of the United States for official use of said government. Manifestly those sales are neither to a 'department' of the government nor for official use. The gasoline was sold to the exchange for resale to certain classes of persons for their private consumption. We have no hesitation in concluding that the legislative intent was to include the sales in question in computing the tax. But these observations do not determine the cause. We are pointed to the decision of the Supreme Court of the United States in the case of *Panhandle Oil Co.* vs. *Mississippi,* 277 U. S. 218 (48 Sup. Ct. 451, 452, 72 L. Ed. 857, 56 A. L. R. 583), where the court used language showing that an important question is here involved. There, as here, the state of Mississippi imposed an excise tax upon distributors of gasoline measured by sales within that state. The state sued the oil company to recover balances represented by sales to the United States for use of its Coast Guard service operating in the Gulf of Mexico and for its veterans' hospital at Gulfport. The sales were made directly to the government and the court held that said statute was inoperative as to them, using language in part as follows: 'The states may not burden or interfere with the exertion of national power or make it a source of revenue, or take the funds raised or tax the means used for the performance of federal functions . . . The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital . . .' This was a five-four decision of the court; Justices Holmes, Brandeis, McReynolds and Stone dissented, Justices Holmes and McReynolds writing opinions.

But it seems to us that a well-founded distinction may be found between the sales there involved and sales to an army post exchange. The commanding officer of an army post is not required to organize the post exchange unless there is need for it or unless the units present desire to participate therein or unless the personnel is sufficient to profitably maintain and support such an institution. In other words, a post exchange is at most but a government agency, designed to operate for the welfare of the troops such activities as a general store, meat or vegetable market or gasoline station, or a restaurant, gymnasium, recreation room, library or theater. Thus it is not properly described by the word 'department' of the government in its activities. It is largely a co-operative institution, intended to supply the needs and promote the moral and civic betterment of the troops at the post. It is supervised by an exchange council, composed of the commanding officers of the respective units represented in the organization. The funds of the exchange are not public moneys within the meaning of the Revised Statutes (Rev. Stats., secs. 5488, 5490, 5492). The exchange is not instituted by the aid of funds from the United States nor are its avails paid into the treasury. It is a voluntary, unincorporated, co-operative association in which all units share the benefits and all assume a position analogous to that of partners. In the event of the inability of the post exchange to pay its debts, the organizations which participate in it are supposed themselves to pay off all such obligations in pro-

portion to their respective interests in the exchange. Neither the government nor the officers of the post wherein the exchange is located or liable for its debts. The property of the post exchange is not to be treated as property belonging to the United States. The exchange itself is liable for certain federal taxes, such as the stamp tax imposed by the Internal Revenue Act, the freight tax imposed by the War Revenue Act of 1917, a floor tax on tobacco under the Revenue Act of 1919, section 702; sales of ice cream and soft drinks by a post exchange are subject to tax under the same act. From these and other observations that might be made, touching the nature of the organization of an army post exchange, we are of the opinion that it is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located and that it is not one of those agencies through which the federal government directly exercises its constitutional or sovereign power."

The Supreme Court of California in the course of its opinion and decision sustaining the tax there in question cited in support of its conclusions the case of *Thirty-first Infantry Post Exchange* vs. *Posadas,* 54 Philippine Reports, 866. In this case it was held by the Supreme Court of the Philippine Islands as is indicated by the syllabus in the report of the court and decision in this case as follows:

"The basic rule that, without Congressional consent, no Federal agency or instrumentality can be taxed by State authority, together with its qualifications, applies not only to the States of the American Union, but also to unincorporated territories with the status of the Government of the Philippine Islands.

A tax may be levied by the Government of the Philippine Islands on sales made by merchants to Post Exchanges of the United States Army in the Philippines. The tax laid upon Philippine merchants who sell to Army Post Exchanges does not interfere with the supremacy of the United States Government, or with the operations of its instrumentality, the United States Army, to such an extent or in such a manner as to render the tax illegal. The tax does not deprive the Army of the power to serve the Government as it was intended to serve it, or hinder the efficient exercise of its power."

The decision of the Supreme Court of California in the case of *People* vs. *Standard Oil Company, supra,* sustaining taxes imposed by the state of California upon sales of gasoline made by the Standard Oil Company to the army post exchange at the Presidio, was reversed by the Supreme Court of the United States in the case of *Standard Oil Company vs. California,* 291 U. S. 242, where it was held that taxes on such sales were not imposable by the state. The decision and judgment of the Supreme Court of the United States in this case was based wholly upon the ground that the sales in question were made to the army post exchange on territory which had been ceded to the United States by the state of California and over which the state of California had no jurisdiction with respect to matters of taxation. This is indicated by the head note in the report of the case which head note reads as follows:

"A state license tax is not imposable in respect of a sale and delivery of gasoline to an army post exchange on a military reservation over which the state has ceded to the United States exclusive jurisdiction without reserving any right to exercise its legislative authority."

And with respect to the question at hand it is submitted that it is a matter of some significance that although the contention that the post exchange at the Presidio was a government agency, and that for this reason the state had no authority to impose the taxes therein questioned, was apparently urged as a reason why the decision and judgment of the Supreme Court of California sustaining the taxes should be reversed. The Supreme Court of the United States wholly ignored this contention in deciding the case.

In this connection it is noted that the decision of the Supreme Court of California on this point is cited with approval by the United States Circuit Court of Appeals, of the Fifth Circuit in the case of *Pan American Petroleum Corporation* vs. *State of Alabama,* 67 F. (2d) 590. As originally filed this case was an action by the state of Alabama to collect excise taxes upon sales of gasoline and other petroleum products by the Pan American Petroleum Corporation to post exchanges at Camp McClellan and Maxwell Field. After disposing of the question presented by the fact that these sales were made upon government reservations by noting that the taxes in question were levied not only upon sales of gasoline but also upon the privilege of withdrawing gasoline from storage for the purpose of selling the same the court in its opinion, addressing itself to the question there presented as to whether these post exchanges were government departments, agencies or instrumentalities, said:

> "It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to the United States, either directly, or indirectly through one of its departments, for government use. *Panhandle Oil Co.* vs. *State of Mississippi,* 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583. There a sale of gasoline was made direct to the United States for the use of the coast guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the government, for then also the United States would have been the real purchaser. But the tax here is not on the sale but is on the withdrawal of the gasoline. Furthermore, a post exchange is, of course, not the government; nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary, unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the post exchanges at Camp McClellan and Maxwell Field are not exempt from the state excise taxes. *People* vs. *Standard Oil Co.* (Cal. Sup.) 22 P. (2d) 2."

The only case indicating a contrary view on this question is the case of *Dugan* vs. *United States,* 34 Court of Claims, 458. In this case, which was decided by the United States Court of Claims under date of June 5, 1899, it was held that the post exchange at Jefferson Barracks, Mo. was an agency of the Federal Government and that such exchange was exempt from the payment of special federal taxes for the sale of such articles and commodities as the regulations of the War Department permitted to be sold at the post exchange. Aside from the consideration that this case has not been followed by the later authorities, it is to be observed that this case was not one involving the levy of state taxes. Moreover it is noted that the post exchange there in question was one which was required to be established by the army regulations while the camp exchanges involved in the present inquiry are not required to be set up but are established as a matter wholly in the discretion of the company commanders.

Upon the considerations above noted I am of the opinion that the fact that the

bottled beer and other beverages referred to in your communication were sold to camp exchanges for the purpose of being sold at retail to officers and members of Civilian Conservation Corps camps, does not exempt such sales from taxes provided by Section 6212-49b, General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3822.

APPROVAL, TRANSCRIPT OF PROCEEDINGS RELATING TO CANAL LAND LEASE CANCELLATIONS—FAIRFIELD RUBBER COMPANY, WILLIAM F. PIXLER, HOBART BROTHERS COMPANY.

COLUMBUS, OHIO, January 15, 1935.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a number of transcripts covering your proceedings upon certain applications filed with you by the owners of canal land leases, for a cancellation of such leases for various reasons set out in the respective applications. These applications, designated with respect to the names of the lessees making such applications for concellation, and with respect to the numbers of the leases involved in the applications, are as follows: The Fairfield Rubber Company, Hocking Canal Lease No. 230; William F. Pixler, Defiance, Ohio, Miami and Erie Canal Lease No. 264; Hobart Brothers Company, Troy, Ohio, Miami and Erie Canal Lease No. 292.

The applications for the concellation of the leases here in question have been filed with you under House Bill No. 467, enacted by the 90th General Assembly, 115 O. L. 512. Section 6 of this act (Sec. 478-6, G. C.) provides that if at any time any lessee or lessees of the state of Ohio can no longer economically use the canal lands leased to them by the state of Ohio such lessee or lessees may file with the Superintendent of Public Works a sworn statement of facts pertaining to such lease, setting forth the reasons why such lease cannot be used any longer by them and requesting the cancellation of such lease. By section 7 of this act (Sec. 478-7, G. C.) it is provided that upon receipt of such sworn statement the Superintendent of Public Works shall make a thorough investigation of all the facts pertaining to such lease and, if he is satisfied that such representations are true, and that all accruing rentals due thereon have been paid in full up to the next semi-annual rental payment date, he may, with the approval and joint action of the Governor and Attorney General, direct the cancellation of such lease.

The reasons assigned in each case for the requested cancellation of the leases above referred to are predicated on economic and other changed conditions which make it impossible or undesirable for the lessees to carry these leases any longer. These reasons thus assigned for the requested action on your part for the cancellation of the leases are such that they are sufficient in point of law to justify you in taking this action if, upon investigation, you have found such representations to be true. Assuming, as I do, that you have in each case made the necessary investigation of facts and that all rentals due under the lease have been or will be paid before the cancellation of such lease or leases are made effective, no reason is seen for not joining with you in the findings which