3460

BEER, ALE, LAGER, STOUT AND OTHER MALT LIQUOR, CONTAINING NOT MORE THAN 7% ALCOHOL BY WEIGHT — WHOLESALE DISTRIBUTORS — B-1, B-2 PERMITS — EFFECT, AMENDMENT, JUNE 4, 1935, TO SECTION 6064-15 G.C. — PROPORTIONAL REFUNDER PERMIT FEES — ADDITIONAL FEES — SECTION 6064-66 G.C., EFFECTIVE SEPTEMBER 5, 1935, SINCE REPEALED.

SYLLABUS:

Wholesale distributors of beer, ale, lager, stout and other malt liquors containing not more than seven per centum of alcohol by weight, who held B-2 permits under Section 6064-15, *General Code, of the original Liquor Control Act* (115 *v. Pt.* 2,118), *were, upon the amendment of such section in the act of June* 4, 1935, *which authorized the sale of malt liquor of the above kinds by B-*1 *permit holders and the surrender and cancellation of B-2 permits issued under the old law, with a proportional refunder of the permit fees paid therefor, required to pay the additional fees of "five cents per barrel for all beer and other malt liquor distributed and sold in Ohio in excess of five thousand barrels during the year covered by the permit," even though Section* 6064-66, *General Code (since repealed), authorizing surrender of the old B-2 permits, with consequent refunders, did not become effective until September* 5, 1935.

Columbus, Ohio, February 24, 1941.

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

Dear Sir:

I have your letter with enclosures with reference to the refund of certain liquor permit fees sought to be obtained by the Wholesale Beer

Association of Ohio, Inc. on behalf of a number of wholesale distributors of beer and other malt beverages "containing not more than seven per centum of alcohol by weight." Some thirty-six claims, in varying amounts and totaling approximately $1500.00, are presented. The facts upon which these claims are based sufficiently appear in the opinion.

Prior to the passage by the 91st General Assembly of Amended Substitute Senate Bill No. 2 (approved by the Governor on June 4, 1935; 116 v. 511, 551), Section 6064-15, General Code, read in part as follows:

> " * * * Permit B-1: A permit to a wholesale distributor of beer to bottle, distribute, or sell such product for home use and to class C-1, class D-1, D-4, D-5, class E and class F permit holders under such regulations as may be promulgated by the department. The fee for this permit shall be computed on the basis of annual sales and distribution of beer. The initial fee shall be one thousand dollars for each distributing plant or warehouse and said initial fee shall be increased at the rate of five cents per barrel for all beer distributed and sold in Ohio in excess of five thousand barrels during the year covered by the permit.
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> Permit B-2: A permit to a wholesale distributor of wine to bottle, distribute or sell such product for home use and to class C-2, class D-2, D-4, D-5, and class E permit holders, in sealed containers only. The fee for this permit shall be five hundred dollars for each distributing plant or warehouse; and said initial fee shall be increased at the rate of ten cents per wine barrel of fifty gallons for all wine distributed and sold in Ohio in excess of twelve hundred and fifty such barrels during the year covered by the permit. * * * "

In the act of June 4, 1935, that part of Section 6064-15, above quoted, was amended in the respects indicated by the asterisks and words emphasized:

> " * * * Permit B-1: A permit to a wholesale distributor of beer to bottle, distribute, or sell * * * *beer, ale, lager, stout and other malt liquors containing not more than seven per centum of alcohol by weight;* for home use and to * * * *retail* permit holders under such regulations as may be promulgated by the department. The fee for this permit shall be computed on the basis of annual sales and distribution of beer *and other malt liquor.* The initial fee shall be one thousand dollars for each distributing plant or warehouse and said initial fee shall be increased at the rate of five cents per barrel for all beer *and other malt liquor* distributed and sold in Ohio in excess of five thousand barrels during the year covered by the permit.

Permit B-2: A permit to a wholesale distributor of wine to bottle, distribute or sell such product for home use and to class C-2, class D-2, D-3, D-4, D-5 and class E permit holders. *No B-2 permit holders shall distribute, sell, or offer for sale any wine manufactured outside the state unless it has been purchased from a B-5 permit holder provided, however, that this provision shall not appy until January* 1, 1936 *to holders of B-2 permits issued prior to May* 1, 1935. The fee for this permit shall be one hundred dollars for each distributing plant or warehouse; and said initial fee shall be increased at the rate of ten cents per wine barrel of fifty gallons for all wine distributed and sold in Ohio in excess of twelve hundred and fifty such barrels during the year covered by the permit. * * * "

In Opinion No. 4348, Opinions, Attorney General, 1935, Vol. 1, p. 705, the then Attorney General held as follows:

"Sections 6064-1, 6064-15, 6064-41, 6064-41a and 6212-48, General Code, as contained in Amended Substitute Senate Bill No. 2, passed by the 91st General Assembly May 23, 1935 and approved by the Governor June 5, (sic.) 1935, are laws providing for tax levies as the phrase is used in Section 1d of Article II of the Constitution and went into effect when approved by the Governor."

In the act of June 4, 1935, in which Section 6064-15, supra, was amended, Section 6064-66, General Code, subsequently repealed (117 v. 628, 655, 4-29-37), was enacted. This section reads:

"Holders of B-2 permits who surrender their permits for cancellation by the department in the event that the liquor control act is amended so as to allow holders of B-1 permits to sell ale, porter, stout and other malt liquors containing more than 3.2 per centum of alcohol by weight and not containing more than seven per centum of alcohol by weight, shall be refunded by the department of a proportionate amount representing the unexpired portion of their permit year, excepting that no refunder shall be made if the unexpired portion of the license year shall be less than thirty days; such refund shall be made from the moneys in the custody of the treasurer of state and subject to the order of the department and at the next distribution of permit fee revenues, the amount so refunded shall be withheld from the moneys, if any, due to the subdivision which received the original fee."

On the question of the effective date of this section this office held in Opinion No. 4396, Opinions, Attorney General, 1935, Vol. 1, p. 759, as follows:

"Sections 154-3 * * * 6064-66 and 13393-1, as enacted in Amended Substitute Senate Bill No. 2 passed by the Ninety-first General Assembly, are statutes which do not contain any pro-

vision which provides for a tax levy and therefore are subject to referendum and do not go into effect as law until ninety days after the same has been approved by the Governor and filed with the Secretary of State."

At page 763 of the opinion proper, it was said with reference to Section 6064-66 that it "is clear from a reading of the provisions of this section that the same provides for a refunder to certain permit holders of their unexpired permit fees and in no way provides for a tax levy. It therefore follows that this section does not go into effect until September 5, 1935."

I agree with my predecessor in office that Section 6064-15, supra, as amended by the 91st General Assembly, became effective upon its approval by the governor on June 4, 1935, and that Section 6064-66, supra, did not become effective until September 5, 1935.

Properly to understand the changes made in that part of Section 6064-15, above quoted, by the act of June 4, 1935, it is necessary to consider Section 6064-1, General Code, as enacted in the original Liquor Control Act (115 v. Pt. 2, 118). This section provided in part that:

"'Beer' includes all beverage containing one-half of one per centum or more of alcohol by weight but not more than 3.2 per centum of alcohol by weight.

'Wine' includes all intoxicating liquors containing not more than seventeen per centum of alcohol by volume."

From these definitions it will be seen that beer or other malt beverages, with a higher alcoholic content than 3.2 per centum by weight, were classed as "wine" and that in order lawfully to engage in the business of being a wholesale distribtuor of such beverages it was necessary to hold a B-2 permit. After the amendment of June 4, 1935, holders of B-1 permits were not only permitted to sell so-called "high-powered beer" and the other malt liquors named in the section, but were required to have such a permit and pay the taxes fixed by the statute before distributing such liquors.

As you shall have noted, the tax fixed in the original Liquor Control Act for a B-1 permit was the same as that fixed in the amendment under consideration, while the initial fee or tax for a B-2 permit was reduced from five to one hundred dollars.

In connection with the changes under consideration, your attention

is invited to Opinion No. 5942, Opinions, Attorney General, 1936, Vol. II, p. 1226, in which it was said as follows at pp. 1228 and 1229:

> "In order to construe the provisions of Section 6064-66, General Code, it is necessary to consider the circumstances surrounding the enactment of that section. Under the Liquor Control Act (Sections 6064-1 et seq., General Code), as originally enacted in House Bill No. 1, in the Second Special Session of the 90th General Assembly, it was necessary for a person desiring to sell and distribute at wholesale beer containing more than 3.2 per centum of alcohol by weight, to secure a Class B-2 permit, which permit was issued for the sale and distribution of wine at wholesale. * * *
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> In the amendment of the various provisions of the Liquor Control Act, in Senate Bill No. 2, 116 O.L., the definition of 'wine' was amended * * *.
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> Likewise, the provisions of Section 6064-15, General Code, pertaining to the issuance of B-1 permits were also amended so as to permit the holder of such a permit to sell both beer and high-powered beer under such license. * * *
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> Prior to the effective date of the amendment of Section 6064-15, General Code, in reference to B-1 permits, it was necessary for a great many persons selling at wholesale beer and high-powered beer to renew their B-1 and B-2 permits. The legislature by the amendment of Section 6064-15, General Code, having enlarged the privileges conferred by the issuance of such a B-1 permit so as to include the sale of high-powered beer under such permit, deemed it proper to provide for a refund to those holders of B-1 permits who had taken out B-2 permits in order to sell high-powered beer during the interim preceding the effective date of the amendment. The legislature, to effectuate that purpose, enacted Section 6064-66, General Code. * * * "

It is contended on behalf of the claimants that, since they were holders of B-2 permits as well as B-1 permits on June 4, 1935, and since the amended statute did not provide for the surrender and cancellation of their B-2 permits, with consequent proportional surrender of the fee paid therefor, until September 5, 1935, your department was without authority to exact the additional permit fee of five cents per barrel "for all beer and other malt liquor distributed and sold in Ohio in excess of five thousand barrels during the year covered by the permit." With this contention I am constrained to disagree.

In the first place, it must be remembered that the state has absolute power with reference to the prohibition or regulation of traffic in intoxicating liquors. As said by Mr. Justice McReynolds, in the case of Ziffrin v. Reeves, Commissioner of Revenue, et al., 308 U.S. 132, 60 Sup.Ct.163, 84 L.Ed.128 (1939):

> " * * * Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. * * *
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> Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less. * * * The state may protect her people against evil incident to intoxicants. * * * " (p. 135 L.Ed.)

Likewise, the state may levy excise taxes (Art. XII, Sec. 10, Const.), which is the character of the permit fees or taxes here involved. That is to say, the permit fees exacted under the provisions of Section 6064-15, General Code, are levied with a dual purpose: First, as a method of regulating and controlling the liquor traffic, and, second, to produce substantial revenue for the state. This being true, the minute the act of June 4, 1935, became law, all persons coming within its provisions were required to comply therewith. And the mere fact that a wholesaler of malt liquor had a B-2 permit issued under the former law which he could not surrender and obtain a refund until ninety days after the effective date of the statute imposing the tax, makes no difference.

As stated in 8 O.Jur. 587:

> "It is a well-settled principle of law that a license is not a contract between the state and the licensee. Since this is so, *free latitude is reserved by the legislature to impose new or additional burdens on the licensee,* or to alter the license, or to revoke or annul it, and this is the general rule, *notwithstanding an expenditure of money by the licensee in reliance thereon, and regardless of whether the term for which the license was given has expired.* * * *." (Emphasis mine.)

See also State ex rel. Zugravu v. O'Brien et al., 130 O.S. 23 (1935).

Moreover, another well settled principle of the law prevents the allowance of the instant claims for refunds. As above demonstrated, permit fees are taxes; and taxes "voluntarily paid without legal duress and especially if paid without objection or protest, cannot, in the absence of express statutory permission, be recovered back even though illegally assessed" (38 O.Jur. 1231). See also the case of The Benoline Co. v. The State, ex rel. Bettman, Atty. Gen., 122 O.S. 175 (1930), involving

an attempt to recoup taxes voluntarily paid on a type of motor vehicle fuel which was not included in the statute imposing such taxes. In the opinion in that case Judge Kinkade said at page 179:

> " * * * This being true, the law gave to the taxpayer his day in court, and a clear, full, and complete opportunity to have al his rights then and there adjudicated; and that being true, he cannot pay and then later sustain the claim that it was an involuntary payment and secure recoupment in his favor.
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> These taxes were paid after an opinion had been given out by the attorney general in June, 1925, to the effect that the entire motor vehicle fuel was subject to the tax which the state exacted at that time. The tax officials of the state believed that to be true, and evidently the taxpayers believed that to be true. At least they did not then test the question in court. The undisputed facts attending these payments in 1925 and 1926 fall very far short of being sufficient to make the payments involuntary.
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> We have no difficulty in reaching the conclusion that the excise taxes that were collected in the years 1925 and 1926 were in contemplation of law paid voluntarily by the taxpayers, and that they cannot be recouped in these actions against the taxes of 1927."

In the memorandum submitted on behalf of the claimants, Opinion No. 715, Opinions, Attorney General, 1937, Vol. II, p. 1279, is cited as authority for the proposition "that the holder of a permit was * * * entitled to the privileges of that permit until it expired, was canceled or revoked." An examination of this opinion, however, shows that it did not so hold. What was held in that opinion is succinctly set forth in the last paragraph of the opinion on page 1291, which reads:

> "In my opinion the rights and duties prevailing under the unexpired permits are concurrent. As long as rights are recognized under an expired permit the permit holder is bound by the fees imposed on said permit. The payment of permit fees being a burden attached to the privilege of holding a permit said permit is inseparable from the benefits. Certainly if the unexpired permits remain in force until their expiration dates said permits are governed as to rights and duties by the law under authority of which they are issued."

Nothing whatever was said with reference to the power of the Legislature to impose additional taxes on permit holders, the opinion only holding in this respect that where a statute under which a permit had been issued was repealed "with no provision for refunder," it would be presumed that the Legislature intended existing permits to continue until their expiration with all the burdens imposed by the law so repealed.

In view of the foregoing and for the reasons stated, it is my opinion that:

Wholesale distributors of beer, ale, lager, stout and other malt liquors containing not more than seven per centum of alcohol by weight, who held B-2 permits under Section 6064-15, General Code, of the original Liquor Control Act (115 v. Pt. 2, 118), were, upon the amendment of such section in the act of June 4, 1935, which authorized the sale of malt liquor of the above kinds by B-1 permit holders and the surrender and cancellation of B-2 permits issued under the old law, with a proportional refunder of the permit fees paid therefor, required to pay the additional fees of "five cents per barrel for all beer and other malt liquor distributed and sold in Ohio in excess of five thousand barrels during the year covered by the permit," even though Section 6064-66, General Code (since repealed), authorizing surrender of the old B-2 permits, with consequent refunders, did not become effective until September 5, 1935.

Respectfully,

THOMAS J. HERBERT,
Attorney General.