STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1941--1942

have forgotten some specific instance, there are no funds created by the State of such a nature that any person, or group of persons, or any institution, has obtained contractual rights against the State that can be enforced.

The State has encouraged some of the institutions to proceed on the theory that a certain annual amount equivalent to some fixed percentage of the principal of a trust fund will be received annually for the benefit of the inmates of the institution. This has been a fixed policy for many years. The State can change that policy as I suggested above at any time, and the only question that can arise is one concerning the wisdom of such a change.

If I have not given you the answers you want, let me know and I will go into the matter further.

Very truly yours,

FRANK I. COWAN
Attorney General

April 14, 1941

The Attorney General
William D. Hayes, State Auditor

In Publication of Municipal Audits.

I have your memorandum of April 11th. I do not know of any law preventing any head of a department from disclosing the private information contained in his department, but I seriously question the wisdom of making such public disclosures.

My personal feeling is that when you make an audit for a town you are acting in an official capacity. When the town receives the report, that report immediately becomes a public record. If the town officials for any reason conceal the contents of the report the auditor might very well feel it his duty to make the facts public. In the meantime, as I said, I believe the information you acquire should be regarded as confidential. This, however, does not in my opinion go so far as to preclude your delivering such information to any other State official who may have reason to see it.

F. I. C.

April 21, 1941

State Liquor Commission
98 Water Street
Augusta, Maine

Gentlemen:

In considering the matter of your inquiry as to whether or not the State Liquor Commission may properly grant rebates of excise taxes

to wholesalers in respect to malt liquors sold and delivered by them to post exchanges, canteens, etc., located in Federal areas, which taxes have been previously paid by such wholesalers, I think that, in addition to other laws, it is necessary to consider, separately, each of the two provisions of our Maine statutes relating to such taxes.

Section 21-A of Chapter 268 of the Public Laws of 1933, which was enacted by Section 2 of Chapter 236 of the Public Laws of 1937, reads in part as follows:

> ". . . . A wholesale licensee who imports malt liquors shall pay an excise tax on the following basis: case containing 24 12-ounce bottles, 9c; case containing 24 16-ounce bottles, 12c; case containing 12 24-ounce bottles, 9c; case containing 12 32-ounce bottles, 12c; $1.24 for a barrel, 62c for a half barrel, and 31c for a quarter barrel."

It will be noted that this tax is levied against "a wholesale licensee who *imports* malt liquors" into this state. The tax is not laid on the sales of such malt liquors nor because of any sale. True, it appears that the importation of such liquors into this state is with a view of selling it; but the fact remains that the importation of it is not part of the sale but preliminary to it. See Wheeler Lumber Co. v. United States, 281 U. S. 572.

It is my opinion that so far as this particular section of the law is concerned the taxes levied and imposed by it are collectible by the state from the wholesalers, and that the State Liquor Commission should not grant rebates of such taxes on the grounds or for the reason that the sales of malt liquors by the wholesalers were made to persons, post exchanges, canteens, etc., located in Federal areas. According to my views and as to this particular section the question of whether the purchaser of malt liquors from a wholesaler is or is not an instrumentality of the United States is immaterial and does not affect the right of the state to the taxes levied and imposed by this section.

Section 2 of Chapter 15, Private and Special Laws of 1937, as amended by Section 3 of Chapter 236 of the Public Laws of 1937, the emergency deficiency tax, reads as follows:

> "There is hereby levied and imposed, in addition to any other taxes now in effect thereon, an excise tax to be known as the 1936-7 Deficiency Tax on all malt liquor sold in the state of $3.72 on each and every barrel containing not more than 31 gallons and at a like rate for any other quantity or for the fractional parts of each barrel."

It will be noted that by this particular section the tax is "levied and imposed . . . on all malt liquor *sold* in the state . . ."

In the case of Panhandle Oil Co., vs. Mississippi, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, the State of Mississippi imposed upon distributors and retail dealers in gasoline, for the privilege of engaging in the business, an excise tax of so much per gallon upon the

sale of gasoline sold in the state. The oil company, a dealer, was sued by the state for certain sums alleged to be due under the tax statute, and resisted payment with respect to sales made by it to the United States Government for the use of the Coast Guard and Veterans' Hospital in Mississippi. The Supreme Court sustained the claim to exemption on the ground that the necessary effect of the tax was directly to retard, impede, and burden the exercise by the United States of its constitutional powers to carry on government instrumentalities.

In view of the decision in the Panhandle Oil Co. case it appears to me that instrumentalities of the United States are probably not subject to the burden of the tax imposed by this section of our Maine laws now under consideration. It is, therefore, my opinion that the State Liquor Commission may properly grant rebates of the taxes imposed by this section to wholesalers in respect to malt liquors sold by them to instrumentalities of the United States performing governmental functions, assuming, of course, that such wholesalers have previously paid such taxes to the state without having reimbursed themselves when, or since, making the sales to such instrumentalities. I feel, however, that considerable care should be exercised in determining the question of what is an instrumentality of the United States immune from state taxation. This question is not a simple one. In the case of Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, we find such statements as the following: "Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application." ". . . . it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule." ". . . . it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance." Also it appears that the courts are not in accord on the question of what constitutes an instrumentality of the United States; for instance, see Dugan v. United States, 34 C. Cls. 458, (1899), and Pan American Petroleum Corp. v. Alabama, 67 F. (2d) 590. (C. C. A. 5th 1933). It is quite obvious then that no rebates of taxes levied and imposed by this provision should be granted unless and until proof is furnished to the Commission, and it is made to appear to the satisfaction of the Commission, that the activity or agency to which the malt liquors are sold is an instrumentality of the United States.*

Very truly yours,

WILLIAM W. GALLAGHER
Assistant Attorney General

*Procedure changed by Statute, 1943.