STATE OF MAINE

Inter-Departmental Memorandum Date March 29, 1962

To Hon. Frank E. Hancock Dept. Attorney General

From John W. Benoit, Asst. Atty. General Dept. Bureau of Taxation

Subject Sales and Use Tax Law re the Portsmouth Naval Shipyard Cafeteria

On March 14, 1962, this office received from you the five-page letter addressed to your office by Richard L. Bonello, Legal Officer for the Portsmouth Naval Shipyard, which correspondence requested an opinion concerning the Naval Base Cafeteria and related services.

On March 14, 1962, I requested of Lieutenant Bonello a copy of the contract for hire between the Restaurant Board, so-called, and the concessionare. The contract in copy form plus annex and addendum was received here March 27, 1962.

THE OPINION

The Issues:

The request for an opinion presents two issues for consideration:

A. Does the State of Maine possess taxing jurisdiction for the purpose of levying sales taxes upon retail sales of tangible personal property to civilian employees and military personnel when such sales occur in a cafeteria located on Federal Government property, such property being within the exterior limits of the State of Maine?

B. Under the given facts does the sales tax fall upon an instrumentality of the Federal Government?

Issue A:

The argument advanced challenging the taxing jurisdiction of Maine re sales taxes may be reduced to the following syllogism:

Major premise: If the Federal Government possesses exclusive jurisdiction in and over certain land ceded it by a state, then any subsequent effort to reassert jurisdiction, i.e., jurisdiction to levy sales tax, is illegal without consent of the United States Government.

Minor premise: Exclusive jurisdiction in and over certain land has been ceded by the State of Maine to the Federal Government, without any saving clause re sales tax jurisdiction.

Conclusion: The taxation of sales transacted in a cafeteria located upon said land is illegal.

The above contention disregards the Buck Act so-called, i.e., Public Act No. 819, (54 Stat. 1059, 1060). The material portions of the Act are:

"State, and so forth, taxation affecting federal areas; sales or use tax.

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area were not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occuring, after December 31, 1940.
July 30, 1947, C. 389, s. 1. 61 Stat. 641."
4 U.S.C.A. 105.

The following cases are cited in the index to section 4, U.S.C.A. 105:

> "Under this section, Congress intended to recede to the state sufficient sovereignty over federal areas within its territorial limits to enable state to levy and collect taxes named in this section and section 106 (concerning income tax) of this title. Davis v. Howard, 1947 206 S.W. 2d 467, 306 Ky. 149." 4 U.S.C.A. 105, Index to Notes, (parenthesis mine).

> "Under this section, the jurisdiction of the State of Oklahoma was extended to the Fort Sill Military Reservation with reference to a use tax on property used on such reservation. Bowers v. Oklahoma Tax Commission, D.C. Okl. 1943. 51 Supp. 652." 4 U.S.C.A. 105, supra.

See also Hill v. Joseph, 1954, 129 N.Y. S. 2d 348, 205 Misc. 441 holding that sales taxes were properly imposed by New York and New Jersey, under agreement, upon sales at concession at Statue of Liberty on Bedloe's Island, New York.

Further cases re the Act are: Yosemite Park & Curry Co. v. Johnson (1938), 10 Cal. (2d) 707, 76 P. 2d 1191;(Rainier National Park Co. v. Henneford (1935), 182 Wash. 159, 45 P. 2d, 617; certiorari denied 296 U.S. 64, 56 S. Ct. 307; Gross Income Tax Division v. Pearson Construction Co. (1957), --Ind.--141 N.E. 2d 448; and McKee v. Bureau of Revenue (1957),--N.M.--315 P. 2d 832.

For the definition of "Federal area", "State" and "sales and use taxes" see 4 U.S.C.A. 109.

In setting forth the reasons for the passage of the Buck Act, I borrow from an article published in a leading tax publication:

> "It is a little surprising to note that until as late as 1939 the great preponderance of governmental activities, both Federal and state, was deemed to be exempt from sales or use taxes. Every acre of Federal land or of occupation was looked upon as a sort of oasis in which no state taxes could be imposed upon the sales or other business activities carried on there. As late as 1940 it was held that

a state had no authority to collect a use or privilege tax on gasoline sold on a Federal reservation. There can be no question but that this was the general rule until passage of the Hayden-Cartwright Act by Congress in 1936, and that the rule was applicable to sales, use, storage and other types of license taxes.

A simple example of this type of governmental exemption should be sufficient to illustrate the inequitable consequences both as between the taxing state and a neighboring state. In most western states, Federal land holdings are extensive and in some places exceed the areas privately owned. Because some Federal reservations occupy up to the center line of a city street, Federally licensed traders could sell free of any taxes on one side of the street, while private merchants across the street were subject to such sales, use and license taxes as the state chose to levy. A mile or so away, across a state line, no such taxes were imposed. Thus the taxing jurisdiction found itself competing for revenue against both tax-free jurisdictions, and the merchants in the taxing state were competing against tax-free sales.

The Hayden-Cartwright Act provided in substance that all taxes levied by any state upon sales of gasoline and other motor fuels could be levied in the same manner and to the same extent upon such fuels sold in any Federal territory or area, except when sold to or for the exclusive use of the Federal Government.

Congress passed in December 1940 what was in effect an amendment to the Hayden-Cartwright Act. This new act, generally referred to as the Buck Act, provided in substance that all kinds and types of businesses carried on in whole or in part in Federal territories or areas located within a state or states would be subject to the same sales, use, license, income and other taxes of general application imposed by such state or states upon similar transactions in such state or states."
George D. Brabson, The Journal of Taxation, October 1957, page 204.

In the first instance there was a ceding of land and jurisdiction by various states to the Federal Government followed later by the National Government's giving back to these states a taxing jurisdiction over certain transactions occurring on such land.

The fact that a service man aboard a Federal Government installation located in Maine acquires no residence in this state for the purpose of suing for divorce is not material to the issue.

Issue B:

The contentions presented concerning the second issue are:

a. that because funds procured by the Restaurant Board from cafeteria sales are used for the purpose of subsidizing costs of picnics and dinners, for welfare and recreational purposes and for the purchase of cafeteria equipment, there exists a policy parallel to that possessed by nontaxable Navy Exchanges;

b. that because "Boards" have been recognized by Courts as being instrumentalities of the Federal Government, this Restaurant Board should also be viewed as being in the same category and therefore exempt from the tax in issue.

Under Maine case law and the Sales and Use Tax Law of Maine the retailer is the taxpayer.

> "Sec. 3. Sales tax.
>
> A tax is imposed at the rate of 3% on the value of all tangible personal property, sold at retail in this State . . . ."
>
> "There can be no doubt that it was the retailer, and not the consumer, who was intended to be taxed by the . . . Law . . . ." W. S. Libby Company v. Ernest H. Johnson, 148 Me. 410, 1953.

Thus, the concessionaire is the retailer under our law rather than the Restaurant Board and it necessarily follows that the concessionaire is the recognized taxpayer pursuant to the law.

I note from a reading of the agreement between the Restaurant Board and the concessionaire no provisions supporting the contention that the concessionaire is an instrumentality of the Federal Government. The scope of the agreement evidences a contrary intention of the parties:

> "1. Scope. The Concessionaire shall . . . establish, manage, and operate such cafeteria-type food services . . . ."

The Board, according to the preface portion of the agreement, is ". . . a representative of the civilian employees of the Portsmouth Naval Shipyard . . . ." In view of such representation can it be said that the Board is, at the same time, principal for the concessionaire? To answer the querie in the affirmative requires one to disregard the existence of the long-standing principle involving conflicts of interest. The tenor of the agreement regarding the intention of the parties is not ambiguous.

Per the agreement the concessionaire pays for the cost of the food, bonds and insurance premiums, transportation and material handling charges, taxes incurred in connection with the operation of the food or related services, utility charges and depreciation of equipment in certain instances. Too, the agreement provides that "all losses under this agreement shall be borne by the Concessionaire." It is not necessary to go further into the provisions of the writing.

The conclusion one must reach on this issue after viewing the agreement and law is that though the Board may be an instrumentality of the Federal Government, the concessionaire is not to be so classified and because the law looks not to the Board but to the concessionaire under the Sales and Use Tax Law there is no breach of law.

Denouement:

The answers to the issues must be as follows:

A. To issue A, yes.

B. To issue B, no.

JWB:epd