Special

OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Geo. H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. O-1295
Re: Are beer distributing stores subject to payment of the chain-store tax (Article 1111d Penal Code of Texas).

In your letter of July 20, 1939, you request an opinion of this Department as to whether or not beer distributing stores should be required to pay the chain-store tax.

There could be no question that beer distributing places are "stores" within the meaning of the Texas Chain Store Tax Act Section 7 of Article 1111d provides as follows:

> "The term 'store' as used in this Act shall be construed to mean and include any store or stores or any mercantile establishment or establishments not specifically exempted within this Act which are owned, operated, maintained, or controlled by the same person, agent, receiver, trustee, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, at retail or wholesale."

The Supreme Court of Texas in the case of Hart, et al. vs. Cooper, et al., 110 S. W. (2d) 696, in regard to the definition of the term "store", stated as follows:

> "The statutes having defined the word, we are not concerned with its usual meaning. Under that definition a mercantile establishment at which goods, wares, or merchandise

> of any kind, except those exempted, are sold is a store and is taxable as such, and this even though it may also be a distributing point."

As beer distributing stores do not come within the exemptions set out in Section 5 of the Act, we must necessarily conclude that they are subject to the payment of the tax.

We have examined closely the brief submitted by the Attorney for the Beer Company concerned here, but we are unable to agree with either his reasoning or his result. He bases the contention that these beer distributing stores are not subject to the chain-store tax on two grounds.

First, he states that because the Beer Act, Article 667 of the Penal Code, sets up a tax schedule for beer distributing places, that these stores are therefore not subject to payment of the chain-store tax.

This Department has previously ruled in Opinion No. O-797, addressed to Honorable J. C. Patterson, County Attorney of Knox County, that the tax set-up in the Liquor Control Act is a license fee and not an occupation tax. This opinion relied on the cases of Bradley vs. Texas Liquor Control Board, 108 S. W. (2d) 300, and City of Ft. Worth vs. Gulf Refining Company, 125 Tex. 512, 83 S. W. (2d) 610. For additional authority see Texas Liquor Control Board vs. Blacher, 115 S. W. (2d) 1030, Texas Liquor Control Board vs. Warfield, 110 S. W. (2d) 646, and Texas Liquor Control Board vs. Jones 112 S. W. (2d) 227.

On the other hand, the tax set out in the Texas Chain Store Act is an occupation tax and not a license fee. The Supreme Court of Texas so held in the case of Hurt vs. Cooper, supra:

> "It is sometimes difficult to determine whether a given statute should be classed as a regulatory measure or as a tax measure. The principle of distinction generally recognized is that when, from a consideration of the statute as a whole, the primary purpose of the fees provided therein is the raising of revenue, then such fees are in fact occupation taxes, and this regardless

> of the name by which they are designated. On the other hand, if its primary purpose appears to be that of regulation, then the fees levied are license fees and not taxes . . . . . "

> "Applying this principle to the act in question, we experience no difficulty in reaching the conclusion that the so-called license fees levied thereby are primarily occupation taxes . . . . . "

A license fee and an occupation tax may both be levied against the same business.

> " . . . . . Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax . . . . . A tax does not imply a license. There is no necessary connection whatever between them. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed. And so far is the tax from being necessarily a license that provision is frequently made by law for the taxation of a business that is carried on under a license existing independent of the tax . . . . . " 17 Rul. Case Law 479-480.

The Beaumont Court of Civil Appeals in the case of City of Beaumont vs. Sam's Loan Office, Inc., 51 S. W. (2d) 882, in construing a municipal ordinance which regulated auction sales within the city of Beaumont, stated as follows:

> " . . . . . The right to assess an occupation tax and the right to regulate a business by requiring the payment of a license fee invoked two entirely different governmental powers. That municipal corporations have the power to require the payment of both an occupation tax and a license

> fee by one in the same business was directly held by the court in Xydias Amusement Co. v. City of Houston, supra, upon an argument so conclusive that it is necessary only to cite that case."

This case was later reversed by the Commission of Appeals, however, on the ground that the municipal ordinance was vague.

The exact question involved here confronted the Supreme Court of Florida in the case of Dunlop Tire & Rubber Co., et al v. Lee, State Comptroller, 171 So. 331. In construing the Florida Chain Store Tax Act (Chapter 16848), the court said as follows:

> "The circuit court properly held that the business of appellant as the owner and operator of retail tire stores was subject to the special license taxes imposed by chapter 16848, notwithstanding it was already licensed and paying taxes under chapter 12412, Acts 1927, Laws of Florida, specially applying to tire and tube dealers." See also Liggett Drug Co. v. Lee (Fla.) 171 So. 326.

Second, the Attorney for the Beer Company contends that the following section from the Beer Act excludes the imposition of the Chain Store Tax upon these beer distributors:

> "Unless otherwise herein specifically provided by the terms of this act, the manufacture, sale, distribution and possession of beer, as herein defined, shall be governed exclusively by the provisions of this Article."

Certainly, nothing in the Chain Store Tax Act or the Beer Act expressly exempts beer-distributing stores from the Chain Store Tax. If such stores are to be exempt, such exemption could be found only by implication. A close analysis of this section, however, indicates that the particular act in question shall govern exclusively only "the manufacture, sale, distribution and possession of beer". Certainly, there is nothing in this language to exclude the right of the Legislature to tax

these beer-distributing places as they did in the Chain Store Tax Act. The Attorney cited no authorities, and the writer was unable to find any to bear out his contention that the section which he cites would exclude the Legislature from so taxing them.

You are, therefore, advised that beer-distributing stores are not exempt from payment of the Texas Chain Store Tax.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Billy Goldberg

Billy Goldberg
Assistant

BG:RS APPROVEDSEP 9, 1939

Gerald C. Mann

ATTORNEY GENERAL OF TEXAS