STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 86-14

TO: Larry G. Looney
Chairman
Idaho Department of Revenue and Taxation
700 West State Street, P.O. Box 36
Boise, Idaho 83720
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Under Idaho Code § 23-1319, wine produced in Idaho is taxed \$.20 per gallon, whereas wine produced out of state, but sold in Idaho, is taxed \$.45 per gallon. Is this tax preference constitutional?

2. If the preference provided by Idaho Code § 23-1319 is unconstitutional, must the state refund those taxes in excess of \$.20 per gallon, paid by distributors of non-Idaho produced wine?

CONCLUSION:

1. The legal guideline issued by our office on March 21, 1984, is withdrawn and this opinion substituted therefor. Based upon the U.S. Supreme Court decision in Bacchus Imports Ltd., et al. v. Dias, 468 U.S. 263, 82 L.Ed. 2d 200, 104 S.Ct. 3049 (1984), we now conclude that § 23-1319 is unconstitutional as a violation of the commerce clause of the U.S. Constitution.

2. Because § 23-1319 is unconstitutional, distributors of non-Idaho produced wine are entitled to a refund for those taxes paid in excess of \$.20 per gallon, provided they comply with the procedure and time limit set forth in § 23-1319(c) and (d) in making a refund claim.

ANALYSIS:

Originally, § 23-1319 applied a single tax on all wine sold or produced for use in the state of Idaho. 1971 Idaho Sess. Laws, Ch. 156, p.767. However, in 1984, that section was amended to create the differential tax between Idaho and non-Idaho produced wines:

> Upon all wines sold by a distributor or winery to a retailer or consumer for use within the state of Idaho pursuant to this act there is hereby imposed an excise tax of forty-five cents (45¢) per gallon on all wines produced outside the state of Idaho, and there is hereby imposed an excise tax of twenty cents (20¢) per gallon on all wines produced inside the state of Idaho.

1984 Idaho Session Laws, Ch.283, pp.656-657.

On March 21, 1984, this office issued a legal guideline which construed the differential tax as constitutional. Our analysis in that guideline was based largely on the Hawaii Supreme Court's decision in Matter of Bacchus Imports, Ltd., 565 P.2d 724 (1982). In that case, the state of Hawaii had imposed a substantially similar tax at wholesale on all alcoholic beverages with specific exemptions provided for certain locally produced products. The purpose of the exemption was to encourage development of the Hawaiian liquor industry.

The Hawaii Supreme Court held that the challenged exemption was a rational means to a legitimate state purpose and thus did not violate the equal protection clause. The court further held that the statutory exemption for Hawaiian products had not been applied selectively to discourage imports or to threaten the federal treasury and thus did not violate the import-export clause. Finally, the court held that the selective tax did not violate the commerce clause because it did not discriminate against interstate commerce and was fairly related to services provided by the state.

In Bacchus Imports, Ltd., et al. v. Dias, 468 U.S. 263, 82 L.Ed.2d 200, 104 S.Ct. 3049 (1984), the U.S. Supreme Court overturned the decision of the Hawaii Supreme Court and ruled that the differential liquor tax was clearly discriminatory and thus was unconstitutional as a violation of the commerce clause.

The Court affirmed that although a state can encourage the development of domestic industry, it cannot tax interstate transactions or take other discriminatory action which favors local business over out-of-state business. Bacchus Imports, Ltd., 82 L.Ed. 2d at 209. See also, Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 50 L.Ed.2d, 514, 97 S.Ct. 599 (1977); and Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959). The Court found irrelevant the assertion by Hawaii that its intent was to aid local businesses rather than harm out-of-state producers. Id. at 211.

Hawaii raised the additional argument that even if the exemption violated the commerce clause, the twenty-first amendment to the United States Constitution saved it. Hawaii relied on section 2 of the amendment which reads: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Supreme Court indicated that, under the twenty-first amendment, a state may be properly concerned with matters such as temperance. However, state laws which constitute mere economic protectionism are not "entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." Id. at 212. The purpose of the Hawaii statute was clear and that was to aid local business. Such a purpose, the Court ruled, was a clear violation of the commerce clause and no real concern of the twenty-first amendment. Id. As a result, the statute was declared unconstitutional. See also, Stein Distributing Co. v. Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms, 779 F.2d 1407 (9th Cir. 1986).

If challenged in court, § 23-1319 likely would be declared unconstitutional for substantially the same reasons. When § 23-1319 was amended, the purpose was quite clear. Preferential treatment was given in order to aid the growth and development of the Idaho wine industry. Idaho House of Representatives, Revenue and Taxation Committee, minutes, February 21, March 2 and 23, 1984. Under Bacchus Imports, Ltd., such a preference would be found to violate the commerce clause. Furthermore, no claim can be made that the preference was enacted to combat the perceived evils of alcohol pursuant to the twenty-first amendment since the express purpose was to aid the Idaho wine industry.

Your second question concerns any remedy which might be imposed as the result of the unconstitutionality of the preferential tax. Whether refund is the proper remedy for an unconstitutional tax is left largely up to state law. In Bacchus Imports, Ltd., the U.S. Supreme Court remanded to the state court, but in footnote 14 pointed out that state law might mandate a full refund given an unconstitutional tax. In our case, Idaho Code § 23-1319 does mandate a refund for taxes illegally collected.

In 1986, Idaho Code § 23-1319 was amended to provide for an administrative refund procedure. 1986 Idaho Sess. Laws, Ch. 73, p.201. Subsections (c) and (d) of § 23-1319 now read:

> (c) If the tax commission determines that any amount due under this chapter has been paid more than once or has been erroneously or illegally collected or computed, the commission shall set forth that fact in its records and the excess amount paid or collected may be credited on any amount then due and payable to the commission from that person and any balance refunded to the person by whom it was paid or to his successors, administrators or executors. The commission is authorized and the state board of tax appeals is authorized to order the commission in proper cases to credit or refund such amounts whether or not the payments have been made under protest and certify the refund to the state board of examiners.
>
> (d) No credit or refund shall be allowed or made after three (3) years from the time the payment was made, unless before the expiration of that period a claim is filed by the taxpayer. The three (3) year period allowed by this subsection for making refunds or credit claims shall not apply in cases where the tax commission asserts a deficiency of tax imposed by law, and taxpayers desiring to appeal or otherwise seek a refund of amounts paid in obedience to deficiencies must do so within the time limits elsewhere prescribed by law.

This statutory procedure effectively negates the general rule of law that a state is not required to refund taxes paid under a tax later found to be illegal unless the taxpayer paid the taxes under protest. Thus, any tax paid by distributors which is illegal would be subject to refund pursuant to the procedure and time limits set forth in § 23-1319(c) and (d).

It should also be noted that the refund provisions would not be invalidated if the tax preference portion of the statute is held unconstitutional. The severance clause contained in the original enactment, 1971 Idaho Sess. Laws, Ch. 156, will allow the remainder of the statute, including the refund procedure, to stand.

AUTHORITIES CONSIDERED:

Constitutions

Article 8, § 8, United States Constitution

Twenty-first amendment, United States Constitution

Idaho Statutes

Idaho Code § 23-1319

Idaho Code § 63-3049

Chapter 73, 1986 Idaho Sess. Laws

Chapter 156, 1971 Idaho Sess. Laws

Cases

Bacchus Imports Ltd., et al. v. Dias, 468 U.S. 263, 82 L.Ed. 2d 200, 104 S.Ct. 3049 (1984)

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed. 2d 514 (1977)

Stein Distributing Co. v. Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms, 779 F.2d 1407 (9th Cir. 1986)

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959)

DATED this 11th day of December, 1986.

JIM JONES
Attorney General
State of Idaho

JIM JONES

Analysis by:

DANIEL G. CHADWICK
Deputy Attorney General
Intergovernmental Affairs

cc: Idaho Supreme Court
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