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ARIZONA ATTORNEY GENERAL

March 15, 1971

DEPARTMENT OF LAW LETTER OPINION NO. 71-8-L (R-37)

REQUESTED BY: THE HONORABLE JAY C. STUCKEY
Arizona State Representative

QUESTION: Is there any constitutional objection to proposed legislation to impose a tax on each container of bottled beverage which would not apply to returnable bottled beverage containers on which a refundable deposit had been collected?

ANSWER: No.

In answer to your letter to the Attorney General requesting an opinion concerning proposed legislation on the taxation of bottled containers, it is our opinion that the proposed legislation is constitutional.

Since this tax is a police measure, the amount of the tax must be reasonably related to the cost of enforcement. City of Tucson v. Stewart, 45 Ariz. 36, 48, 40 P.2d 72. If the statute were challenged in court on this ground, we would have to prove that the amount of the tax was reasonably related to the cost of cleaning and removing such litter from highways and other public areas.

If this tax were challenged in litigation, we might be faced with the contention that "bottled beverages" is an unreasonable classification, and thus violates the equal protection clause. Since the courts are very lenient in permitting classification for purposes of excise taxes, we could probably prove the reasonableness of the classification.

Whether or not the tax violates the commerce clause or the due process clause depends upon the subject of the tax and circumstances. This is an excise tax on the purchase of containers for sale in Arizona. This type of tax cannot be imposed on the exercise of a privilege outside of the taxing jurisdiction. A state may not lay a tax on the privilege of

engaging in interstate commerce. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357.

Where the tax is applied to a purchase in the State of Arizona, then there is a sufficient local incident and there would be no violation of the commerce clause or the due process clause in that event. Where the tax applies to purchases by a wholesaler outside of the State of Arizona, even though the intention is to sell the containers in Arizona, imposition of the tax under such circumstances could be challenged on the grounds that it would violate the due process clause of the Constitution. An answer to this objection is that the tax applies to the business of selling bottled beverages at wholesale, and sales in Arizona to retailers are a sufficient local incident on which to base imposition of the tax.

There are several possible ways in which the proposed legislation could be revised to minimize this objection. Some of the possibilities are:

1. Levy the tax on wholesale purchases in Arizona.
2. Levy the tax on wholesale sales in Arizona.
3. Provide that the statute shall not be construed as requiring the application of the tax to any transaction which Arizona is barred from taxing by the United States Constitution.
4. Provide that claim for refund could be made for containers on which a tax was paid which were subsequently sold outside of Arizona.

A similar provision of our statutes, A.R.S. § 42-1205.B, apparently has not been challenged in any appellate proceeding since it was enacted in 1946. One possible problem in administering this type of statute is that of how to determine what beverages were purchased "for resale within the state."

Respectfully submitted,


GARY K. NELSON
The Attorney General