

Opinion No. 197.

Liquor Control Board—Alcoholic Tax  
Unit—Sale of Liquor.

**Held:** Regulation No. 25 is unnecessary for the purpose of the administration of the liquor control act or for carrying out the provisions of the act or the orderly and efficient administration thereof. It is ineffective for any purpose. It was without the authority of the board to make and is void and of no effect.

August 23, 1946.

Hon. Sam C. Ford  
Governor  
State Capitol  
Helena, Montana

Dear Governor Ford:

You advised me that the Montana Liquor Control Board has issued the following regulation:

"REGULATION No. 25. The Board does not oppose the issuance of Federal wholesale stamps or basic permits in Montana to licensees under the Montana Retail Liquor Act or to associations of licensees, provided that the holders thereof do at all times conform to and comply with all regulations of the United States government, all regulations of the Montana Liquor Control Act, and provided also that no liquor shall be shipped into Montana by said stamp or basic permit holders unless said liquor has been ordered by the Montana Liquor Control Board and is shipped to the Montana Liquor Control Board."

You advise me as follows:

"On numerous occasions the Montana Liquor Control Board under agreement with the Montana Liquor Dealers Association and with licensees in the state have allowed the Montana Liquor Dealers Association and said licensees to purchase liquor outside of the state which was not available for one reason or another to the Montana Liquor Control Board and that said liquor would be shipped to the Montana Liquor Control Board. The Montana Liquor Control Board would then allow the Montana Retail Dealers Association or said licensee to repurchase this liquor from the Montana Liquor Control Board after the Montana Liquor Control Board had figured its regular mark-up and the Montana Excise Tax in the selling price.

"This helped to alleviate the shortage of liquor during the war and the period of the shortage of liquor."

You further advise:

"This matter was taken up with the Alcoholic Tax Unit of the United States and was approved as all right as long as there is only one purchase

of such liquor made by any one individual or association in one year's time.

"A few months ago the Alcoholic Tax Unit decided that it was necessary for these purchasers to hold basic United States wholesale permits because of the fact that they were selling in wholesale quantities."

You request my opinion "whether the Montana Liquor Control Board has the authority under the law to issue such a regulation and not oppose the issuing of Federal Basic Wholesale Permits in Montana?"

In Opinion No. 196, Volume 21, Reports and Official Opinions of the Attorney General, recently issued by this office, I pointed out the several provisions of the Montana Liquor Control Act (Chapter 105, Laws of 1933, and Chapter 84, Laws of 1937) dealing with the sale and possession of intoxicating liquor in Montana. In that opinion I held there was no authority under our law for the purchase of intoxicating liquor by a licensee, permittee or other person for the purpose of resale at wholesale, except to the Montana Liquor Control Board. It was further held in that opinion that, while under the Liquor Control Act the board was authorized to make rules and regulations, such rules and regulations must be in conformity with the provisions of the Liquor Control Act.

In giving authority to the board to make rules and regulations, the legislature—while vesting some discretion in the board—confined its authority to makes rules necessary "for the purpose of the administration of this act . . . and the carrying out of the provisions of this act and for the orderly and efficient administration hereof . . ." Section 22 of Chapter 84, Laws of 1937, provides:

"For the purpose of the administration of this act the board shall make, promulgate and publish such rules and regulations as the said board may deem necessary for carrying out the provisions of this act and for the orderly and efficient administration hereof, except as may be limited or prohibited by law and the provisions of this act, such rules and regulations so made and promulgated shall have the force of statute . . ." (Emphasis mine.)

Therefore, in advising you whether or not the rule in question here is within the authority of the board to make, it must be determined if such rule is for the purpose of the administration of the act, and is necessary for carrying out the provisions of the act and the orderly and efficient administration thereof.

In Opinion No. 196, referred to above, the provisions of the federal act concerning the issuance of basic permits were discussed. It was pointed out that, under the provisions of Section 203 and 204 of Title 27, U. S. C. A., the only necessity for a basic permit is to authorize a person or concern to purchase for resale at wholesale distilled spirits, etc., or to receive or sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits. The state or any of its agents or political subdivisions are not required to have such a permit.

The Montana Liquor Control Act authorizes the purchase and sale of intoxicating liquor only at retail through state liquor stores from stock in said stores, by licensees or permittees. While there is no specific provision in the liquor law concerning the sale or purchase of liquor at wholesale, it is reasonably implied the board itself has exclusive authority to purchase liquor at wholesale for the purpose of resale at retail through its state stores to licensees and permittees, under the provisions of the law.

It was held in the opinion referred to there was no prohibition against the purchase of intoxicating liquor for resale at wholesale by a wholesale liquor dealer to the Liquor Control Board, and the wholesale dealer could not possess the liquor within the State of Montana.

A licensee under the state law would have no authority by virtue of his license to sell at wholesale. A licensee, however, regardless of his license, or any person, could act as a wholesale dealer in the sale of intoxicating liquor to the board. But such wholesale dealer could not possess intoxicating liquor within the state.

It would therefore appear—from a consideration of the provisions of the Montana Liquor Control Act and the provisions of the federal acts concerning basic permits—the resolution in

question is not necessary for the purpose of the act or for the issuance of the basic permit.

In speaking of the authority of the Liquor Control Board to make rules and regulations under the provisions of Section 22, supra, our Supreme Court, in the case of *McFatrige v. District Court*, 113 Mont. 81, 122 Pac. (2d) 834, said concerning certain rules which the board had made pertaining to the showing to be made by an applicant for a license, such conditions not being specifically required under the act:

“The board has undertaken to supplement the law by rules and regulations of its own adoption, vesting in itself the discretionary power it has attempted to exercise. This, of course, it cannot do. The board is an administrative body, functioning as a bureau of the executive department of the state government. It has no law making power . . . The board is authorized to make rules and regulations, but these must be limited in their purpose and effect as aid in the administration of the law . . . The power to enact statute law was not, and could not, be delegated to the board . . . All these articles of regulations undertake to widen the scope of the law and extend the powers of the board to matters beyond the purview of the legislative enactment.” (Emphasis mine.)

The purpose and intent of the Liquor Control Act, clearly expressed by its provisions, are the absolute and sole control of the liquor traffic by the state by the sale of liquor solely at retail through state liquor stores. Sale of liquor at wholesale is not provided in the act and is not one of the purposes thereof.

The policy of the board in permitting licensees and associations of licensees to locate intoxicating liquor outside the State of Montana which could not, for some reason or other, be located and purchased by the board itself, and said licensees or association of licensees advancing money for the purchase thereof by the board direct from the distillers or wholesalers was before the Supreme Court in the case of *Carey v. McFatrige*, 115 Mont. 278, 142 Pac. (2d) 329. While the court in that case held the transaction pre-

sented to it under the facts to be lawful, it did not hold the licensees or association of licensees could act as wholesale dealers to the board in the sale of the liquor so located by them. On the contrary, the court distinctly held title or possession of the liquor should not at any time be in the licensees or association of licensees, but in the Liquor Control Board, for sale through state liquor stores.

Among questions presented to the court in the Carey case, supra, and upon which a decision was requested, was the following (pages 284, 285, Montana Report):

"4. May the Montana Liquor Control Board legally establish a policy of permitting persons entitled to purchase liquor in Montana, to locate such liquors and advance money for its purchase, title to be in the Montana Liquor Control Board, and then after paying the Montana excise tax and mark-up, purchase such liquor through state stores, receiving credit for the money so advanced." (Emphasis mine.)

In answering this question in the affirmative, the court said at pages 292 and 293 of the Montana Report:

"It is suggested that certain references indicate that the liquor was being purchased by the dealers or by the Board as agent for the dealers. But the written contracts above recited constituted a purchase of the liquor by the board . . ." (Emphasis mine.)

The contracts referred to by the court in the above quotation appear on pages 285 through 289. These contracts, it will be noted, are between the sellers, the buyer, and the company—the sellers being "Foster & Company," the buyers "The Montana Liquor Control Board," and the Company "The American Distilling Company." (Page 285.)

Under the facts presented in the Carey case, the licensees or association of licensees did not act or pretend to act as wholesale dealers. Their only part in the transaction was to "locate" the liquor. Therefore, even in this transaction, there was no necessity for the licensees or association of licensees to have a federal basic permit.

It would therefore appear the regulation here in question is not only not "necessary for carrying out the provisions of this act" or for the "orderly and efficient administration hereof . . ." but such regulation can have no effect insofar as the issuance of the permit is concerned, for the reason the basic permit is issued by the federal government under a federal statute, and the issuance thereof or refusal to issue could not be affected by either the sanction of the board or by its approval, as expressed in the resolution.

Again, it may be pointed out, if the purpose of the regulation is to give authority to licensees or association of licensees to purchase intoxicating liquor for resale at wholesale to others than the Liquor Control Board, it is clearly outside the authority of the board to make such regulation, because it is contrary to the provisions of the Liquor Control Act. And if the purpose is to authorize the purchase of intoxicating liquor for the purpose of resale to the board, it is unnecessary because, as pointed out herein, there is no prohibition under our statutes against the wholesale of liquor by any person to the board, providing the liquor is not possessed within the state; and the permission, sanction or approval of the board for the issuance of the basic permit is unnecessary and of no effect.

It is therefore my opinion Regulation No. 25 is unnecessary for the purpose of the administration of the Liquor Control Act or for carrying out the provisions of the act or the orderly and efficient administration thereof. It is ineffective for any purpose. It was without the authority of the board to make and is void and of no effect.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General