



STEVE CLARK
ATTORNEY GENERAL

STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

(501) 371-2007

OPINION NO. 85-61

February 22, 1985

The Honorable John C. Ward
State Representative
State Capitol
Little Rock, Arkansas 72201

HAND DELIVERED

Dear Representative Ward:

You have requested an official opinion concerning the constitutionality of the gallonage tax on wines manufactured in the State of Arkansas in light of a recent United States Supreme Court opinion - Bacchus Imports, Ltd. v. Dias, 52 U.S.L.W. 4979 (June 26, 1984).

Arkansas Statutes Annotated §48-402 (Repl. 1977) provides for levy and collection of seventy-five cents (75¢) tax on each gallon of vinous liquor sold in Arkansas except for wines fermented and manufactured within the State of Arkansas. For the privilege of manufacturing wine and selling it at a winery, a tax of five cents (5¢) is imposed by Ark. Stat. Ann. §48-608 (Repl. 1977) to be paid by the manufacturer upon completion of fermentation. In addition, Ark. Stat. Ann. §48-418(a) levies five cents (5¢) on Arkansas native wine. Thus, non-native wine is taxed at a rate of 75¢ while native wine is taxed 10¢ per gallon.

In Bacchus, *supra*, the constitutionality of the Hawaii excise tax of 20% on wholesale liquors was challenged because of its exemption for certain locally produced alcoholic beverages. The exemption was enacted by the Hawaii legislature to encourage development of the Hawaii liquor industry. The promoters of the exemption urged and the Hawaii Supreme Court accepted that the tax did not illegally discriminate against interstate commerce because incidents of the tax was on wholesalers of liquor and the ultimate burden borne by Hawaiian consumers. However, the United States Supreme Court found that since the tax impacted wholesalers, it could be challenged by them. *Id.* at 4890.

Many arguments were raised in Bacchus in support of the exemption, i.e. that (1) Hawaii liquors really did not compete with other products, thus posing no competitive threat; (2) it was a legitimate state objective to encourage local industry; (3) no patent discrimination existed against interstate trade and (4) that the effect on interstate commerce was incidental.

Clearly, the Arkansas Legislature's intent as expressed in Ark. Stat. Ann. §48-402 is to exempt Arkansas-manufactured wine from tax to encourage the growth of that industry. In Bacchus, the U.S. Supreme Court deemed such an exemption "economic protectionism" and violative of the Commerce Clause - Art. I, §8, Cl.3.

According to Bacchus, supra, it is my opinion that the exemption granted in Ark. Stat. Ann. §48-402 for Arkansas native wines is constitutionally suspect.

The forgoing opinion, which I hereby approve, was prepared by Deputy Chief of Staff R.B. Friedlander.

Sincerely,

A handwritten signature in dark ink, appearing to read "Steve Clark", written over the typed name.

STEVE CLARK
Attorney General

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