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OPINION	:	No. 79-912
of	:	December 28, 1979
GEORGE DEUKMEJIAN Attorney General	:	
Rodney Lilyquist, Jr. Deputy Attorney General	:	

SUBJECT: OUT-OF-STATE RETENTION OF ALCOHOLIC BEVERAGES—The Department of Alcoholic Beverage Control may not adopt a regulation allowing a retail licensee to transport alcoholic beverages to a warehouse facility maintained by the retailer outside the State of California for "temporary retention" prior to sale in California.

The Honorable Baxter Rice, Director of the Department of Alcoholic Beverage Control, has requested an opinion on the following question:

May the Department of Alcoholic Beverage Control adopt a regulation allowing a retail licensee to transport alcoholic beverages to a warehouse facility maintained by the retailer outside the State of California for "temporary retention" prior to sale in California?

CONCLUSION

The Department of Alcoholic Beverage Control may not adopt a regulation allowing a retail licensee to transport alcoholic beverages to a warehouse facility maintained by the retailer outside the State of California for "temporary retention" prior to sale in California.

ANALYSIS

The Department of Alcoholic Beverage Control (hereinafter "Department") is considering whether to adopt a rule[1] allowing a retail licensee under certain conditions to purchase alcoholic beverages in California, transport the alcoholic beverages out of state for "temporary retention," and then return the alcoholic beverages to California for sale at the licensee's retail premises. The question presented is whether the adoption of such a rule would come within the Department's rule-making power as set forth in Business and Professions Code section 25750.[2] We conclude that issuance of the proposed rule would be an invalid exercise of the Department's authority.

Section 22 of article XX of the California Constitution provides:

> "The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State of alcoholic beverages.
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> ". . . .
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> "The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the legislature, to license the manufacture, importation and sale of alcoholic beverages in this State and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would he contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.
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> ". . . .

[1] The proposed rule has been numbered "5.1" and is attached hereto as an appendix.

[2] All unidentified section references hereinafter are to the Business and Professions Code.

> "The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of alcoholic beverages contained in the original packages, where such alcoholic beverages are not to be consumed on the premises where sold; and may provide for the issuance of all types of licenses necessary to carry on the activities referred to in the first paragraph of this section including, but not limited to licenses necessary for the manufacture, production, processing, importation, exportation, transportation, wholesaling, distribution, and sale of any and all kinds of alcoholic beverages."

In implementing the constitutional provision, the Legislature has enacted the Alcoholic Beverage Control Act (§§ 23000–25762) (hereinafter "Act"). The purposes of the legislation are stated in section 23001 as follows:

> "This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes.

Besides the Act's comprehensive statutory scheme, the Department has issued detailed rules covering its regulatory functions. (Cal. Admin. Code, tit. 4, §§ 1–150.) Promulgation of the regulations is authorized under the provisions of section 25750, which states:

> "The department shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of section 22 of Article XX of the Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that section or by this division, not inconsistent with any of the provisions of any statute of this State, including particularly the provisions of this division and the provisions of Chapter 5 [commencing with Section 11500] of Part 1 of Division 3 of Title 2 of the Government Code."

In *Duke Molner Etc. Liquor Co. v. Martin* (1960) 180 Cal. App. 2d 873, 880–881, the Court of Appeal noted that

> ". . . as a result of the constitutional provisions, Legislative enactment and administrative rules and regulations, a complete and comprehensive set of laws . . . cover the liquor industry. It is generally agreed that the liquor industry is one which greatly affects the public health, safety, welfare and morals of the people [citation], that those in the industry must operate subject to strict control of constitutional authorities. [Citation.]"

In essence, the question that we must resolve here concerns the proper relationship between the Department's regulations and the constitutional and statutory provisions which the Department must administer.

As previously noted, the Department's constitutional mandate allows it to "have the exclusive power . . . in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State . . . ." (Cal. Const. art. XX, § 22.) The statutory rule-making authority of the Department similarly requires that all Department regulations be "not inconsistent with any of the provisions of any statute of this State." (§ 25750.) Government Code section 11373 requires that "each regulation adopted, to be effective. must be within the scope of authority confirmed," while Government Code section 11374 provides, "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."

The Supreme Court has addressed the general issue of the scope of administrative regulations on numerous occasions, stating "no regulation is valid if its issuance exceeds the scope of the enabling statute" (*Wildlife Alive v. Chickering* (1976) 18 Cal. 3d 190, 205), and "An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment." (*Whitcomb Hotel, Inc. v. Cal. Emps. Com.* (1944) 24 Cal. 2d 753, 757.) Moreover, "administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them. They must conform to the legislative will if we are to preserve an orderly system of government." (*Morris v. Williams* (1967) 67 Cal. 2d 733, 737.) This fundamental doctrine is applicable not only to statutes creating the agency and statutes which the agency must administer, but also to any other statutes enacted by the Legislature, regardless of the motivation of the agency. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal. 3d 392, 419–420.)

Accordingly, we must decide whether the provisions of the Department's proposed Rule 8.1 would be contrary to any statutory enactments of the Legislature.

In implementing the constitutional authorization of issuing "licenses necessary for the manufacture, production, processing, importation, exportation, transportation,

wholesaling, distribution, and sale of any and all kinds of alcoholic beverages" (Cal. Const. art. XX, § 22), the Legislature has devised a system for licensing *specific locations* in California and restricting licensed activities to those premises for which a license has been granted. (§§ 23300, 23355, 23394.5, 24040, 24041.) Section 24040 limits the issuance of a license "to a specific person and, except in the case of licenses authorizing the sale of alcoholic beverages on trains or boats, or the service of alcoholic beverages on airplanes shall be issued for a specific location." Section 23355 authorizes a licensee 'to exercise the rights and privileges specified in this article and no others at the premises for which issued during the year for which issued."

Significantly in this regard, however, storage of alcoholic beverages is not restricted to the licensed premises of the retailer under the following limited conditions of section 23106:

> "(a) Wine stored in a winery or wine cellar bonded under the internal revenue laws of the United States and brandy in bulk stored in an internal revenue bonded warehouse may be stored by or for any licensee without the necessity of any license by the person furnishing or providing the storage space.
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> "(b) Beer and wine upon which excise taxes have been paid to the State at the rate fixed under Part 14 of Division 2 of the Revenue and Taxation Code [commencing with § 32001] may be stored by or for any licensee in any *private* or *public warehouse or elsewhere in this State* without the necessity of any license by the person furnishing or providing the storage space or any special additional license by the licensee.
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> "(c) Any other alcoholic beverage may, without the necessity of any additional license, be stored by or for a licensee in *private warehouses* approved by the department, if *within the limits of the county in which the licensee's licensed premises are located,* or in a public warehouse within that county, or may be stored in bond in a public warehouse outside that county if the public warehouse is also a United States customs bonded warehouse, a United States internal revenue bonded warehouse, or United States bonded wine cellar." (Emphasis added.)[3]

[3] Additionally, California Administrative Code, title 4, section 29 states:

"No retailer shall store alcoholic beverages packed in cases in any warehouse located on the licensed premises of a manufacturer, rectifier, or wholesaler."

Proposed Rule 8.1 does not purport to cover the storage[4] of alcoholic beverages in a winery, a wine cellar bonded under the internal revenue laws of the United States, an internal revenue bonded warehouse, or a public warehouse.[5]

Rather, it specifies a "warehouse facility maintained by the retailer outside this State for temporary retention." Such a warehouse would be a "private warehouse," defined under section 23035 as "any place maintained by a licensee, other than his licensed premises, for the storage but not for the sale of alcohol or alcoholic beverages owned by the licensee."[6]

We believe that section 23106 expresses a legislative intent to limit the storage of alcoholic beverages by a licensee at locations controlled by the licensee to (1) licensed premises within the state, (2) an approved private warehouse within the state or (3) in the case of tax-paid beer and wine, "elsewhere in this State." Understandably, we can find no authority for the Department to issue a license for premises outside Che state's territorial jurisdiction or to approve a private warehouse located outside the state. Under section 23355, therefore, the rights and privileges of a licensee in the storage of alcoholic beverages at locations controlled by him would be restricted to locations within the state.

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[4] Although the proposed rule is stated in terms of "temporary retention," we have no doubt that the alcoholic beverages would be placed in the warehouse facility for "storage" within the meaning of section 23106. "Storage" may be defined as "the holding and housing of goods between the time they are produced until their sale." (Webster's New Internat. Dict. (3d ed. 1966) P. 2252.) The familiar rule of giving effect to statutes "according to the usual, ordinary impact of the language employed in framing them" (*In re Alpine* (1928) 202 Cal. 731, 737; accord, *Moyer v. Workmen's Comp. Appeals Bd*. (1973) 10 Cal. 3d 222, 230) is applicable here.

[5] Under section 23036, a "public warehouse" is defined as:

> ". . . any place licensed f or the storage of, but not the sale of, alcohol or alcoholic beverages for the account of other licensees and includes United States custom bonded warehouses and United States internal revenue bonded warehouses when the bonded warehouses are used for storage of alcoholic beverages for the account of another licensee."

[6] California Administrative Code, title 4, section 76 states:

> "Whenever a licensee desires to store alcoholic beverages, other than state tax-paid beer or wine, in a private warehouse, such licensee shall make application for approval of such warehouse to the district office of the department. The application shall specify the location of the warehouse, by whom maintained, the name of the licensee and the types of licenses, together with the numbers thereof, held by him. The district supervisor may approve the application if he is satisfied that the stated facts are correct. The applicant shall be given written notice of such approval, and he shall post it inside and near the entrance to the warehouse."

Since proposed Rule 8.1 would allow the storage of alcoholic beverages by a licensee in his own warehouse outside the state, we conclude that the provisions of the proposed rule would violate the intent of the Legislature as expressed in section 23106.

We believe that a comparison of the provisions of section 23106 and proposed Rule 8.1 is dispositive of the issue presented. However, section 23661 also merits discussion in light of its application to the importation of alcoholic beverages into the state.[7] The latter statute provides in part:

> "Except as otherwise provided in this section, alcoholic beverages may be brought into this state from without this state for delivery or use within the state *only by common carriers and only when the alcoholic beverages are consigned to a licensed importer, and only when consigned to the premises of the licensed importer or to a licensed importer or customs broker at the premises of a public warehouse licensed under this division.*
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> "The provisions of this chapter are not applicable in the case of alcoholic beverages which are sold and delivered by a licensee in this State to another licensee in this State, and which in the course of delivery are taken without this State through another state *without any storage thereof in such other state."* (Emphasis added.)

The first paragraph of section 23661 is plainly consistent with section 23106 and our conclusion with regard to proposed Rule 8.1. A licensed retailer storing alcoholic beverages outside the State of California would not meet the conditions of the first paragraph of section 23661 for transporting the alcoholic beverages from an out-of-state warehouse to a location within the state. (See Cal. Admin. Code, tit. 4, § 8; 26 Ops. Cal. Atty. Gen. 191, 191–192 (1955).)

The exception to the first paragraph of section 23661 as contained in the second paragraph thereof would also be unavailable for lending statutory support to proposed Rule 8.1. The second paragraph requires that the alcoholic beverages not be stored outside the state, something that proposed Rule 8.1 would allow. Consequently, sections 23106 and 23661 may be construed together and harmonized (see *Moyer v. Workmen's Comp. Appeals Board* (1973) 10 Cal. 3d 222, 230; *Steilberg v. Lackner* (1977) 69 Cal. App. 3d 780, 785) while proposed Rule 8.1 may not be so interpreted.

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[7] Section 2 of the 21st amendment to the United States Constitution provides:

"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."

We believe that the Legislature has clearly spoken concerning whether a licensed retailer may purchase alcoholic beverages in California and store them in his own warehouse located outside the state. The statutory requirement that such storage facilities must be located within the state allows for ready accessibility by Department employees in determining whether adulteration, dilution, misbranding, or mislabeling of alcoholic beverages has occurred. (See §§ 25751, 25753, 25755.) Proposed Rule 8.1 would be inconsistent with the purposes of the legislative scheme and would alter and enlarge its governing provisions.[8]

Accordingly, we conclude that the Department may not adopt a regulation allowing a retail licensee to transport alcoholic beverages to a warehouse facility maintained by the retailer outside the State of California for "temporary retention" prior to sale in California.

PROPOSED ADOPTION OF RULE 8.1

8.1 Retail Licensee: Out-of-State Transit and Temporary Retention.

Any retail licensee who lawfully purchases from another licensee in this State alcoholic beverages manufactured in California, or alcoholic beverages which have been brought into this State from without this State for delivery and use within the State, as provided for by Section 23661 of the Business and Professions Code, may transport the alcoholic beverages so purchased to a Free Port (as hereinafter defined) warehouse facility maintained by the retailer outside this State for temporary retention and delivery to his licensed retail premises in California or a private or public warehouse in California as permitted by Section 23106 of the Business and Professions Code, provided the retailer complies with the following terms and conditions:

(a) The retailer shall complete a form prescribed by the department to apply for approval of such temporary retention at a Free Port out of state in the course of delivery to California licensed retail premises.

(b) The records of all transactions involving the purchase, temporary retention, distribution, and inventory of alcoholic beverages shall be maintained at one of the retailer's licensed premises in California as required by Sections 23334 and 25752 of the

[8] The provisions of proposed Rule 8.1 relating to a "Free Port" warehouse facility, "continuous transit," maintenance of records in California, Department inspection of the out-of-state warehouse, and restriction to California excise tax paid alcoholic beverages do nor remedy the proposed regulation's infirmities. None of these conditions can be said to conform the proposed rule with the statutory scheme.

Business and Professions Code, and the records shall be made available to the department upon request.

(c) The licensee shall permit the department to make any examination of the books and records and to visit and inspect the retailer's Free Port warehouse facilities under the same authority granted the department pursuant to Section 25753 of the Business and Professions Code.

(d) The California excise tax paid alcoholic beverages purchased by the retailer shall be temporarily retained in and/or distributed from the Free Port warehouse facility. No alcoholic beverages other than as provided for above may be stored or temporarily retained in the retailer's Free Port warehouse facility.

Alcoholic beverages delivered to California licensed retail premises via the Free Port warehouse facility as provided for in this rule shall be deemed to be in continuous transit from the time and place first purchased by the retailer.

Such delivery to California licensed retail premises via the Free Port warehouse facility shall not be considered the exportation or importation of alcoholic beverages from or to California. A distilled spirits excise tax exception under Revenue and Taxation Code Section 32211 or a beer and wine tax credit as provided in Section 32176 of the Revenue and Taxation Code shall not be applicable to the taxpayer.

For the purpose of this rule Free Port is defined as an out-of-state warehouse for personal property consigned to such warehouse for temporary retention in transit to a final destination in California, which personal property is deemed under the law of the state in which such warehouse is located to have acquired no situs in such state for purposes of taxation, including without limitation "free port" warehouses pursuant to Article X of the Nevada Constitution and Section 361.160, *et seq.*, of the Nevada Revised Statutes.

Violation of any of the terms and conditions of this rule shall be grounds for the suspension or revocation of the retailer's license.

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