

M e m o r a n d u m**280.0160**

To: Mr. Burnett Sheehan

Sacramento
October 2, 1950

From: E. H. Stetson

Subject: --- --- ---

Mr. E--- R. H--- has discussed with me the determination made against the above brewery on July 27, 1949.

The only item remaining in dispute appears to be that portion of the self-consumed merchandise item representing ex-tax purchases of beer can openers. The audit does not state the reason for regarding these purchases as taxable, but presumably it was on the theory that they were given away.

Mr. H--- tells me that originally the practice was to furnish an opener with each case of beer, but that as the customers' supplies accumulated openers were furnished upon request to purchasers of beer. He also argues that the opener is necessary to the proper opening of the cans and that it is a trade custom that purchasers are entitled to openers. We believe that this argument is quite sound, particularly in view of the provisions of Section 55.7 of the Alcoholic Beverage Control Act, prohibiting any licensee from giving directly or indirectly any premium, gift, or free goods in connection with the sale of any alcoholic beverages. The Alcoholic Beverage Control Division has informed me that they do not regard the furnishing of these openers as in any way violative of Section 55.7. It would appear, accordingly, that we could very properly consider the breweries as in fact reselling the openers to their customers, and thus not be subject to tax measured by the purchase price as self-consumed merchandise.

With respect to the breweries' liability for sales tax on the theory that they are selling the openers, this would be true only with respect to sales to customers who use the openers, as, for example, on-sale dealers who use the openers to open beer cans for their customers. Off-sale dealers would presumably furnish the openers to their customers along with cans of beer sold to the customers.

Mr. H--- is agreeable to regarding ten per cent of the sales as taxable on the theory that they are sales for use by on-sale establishments. He thinks this estimate is high, but is willing to make it sufficiently high so that there can be no question but what tax would be paid on all sales of the openers to on-sale establishments. He states that it would be very difficult to check this matter accurately. Unless you believe there is some reason to question the sufficiency of this estimate, we recommend it be accepted.

If you wish to make any comments in connection with this matter, we shall be glad to give consideration thereto.

EHS:ph

cc: Honorable George R. Reilly