

**Memorandum**

Mr. Ed King  
Excise Taxes Section

Date January 9, 1992

From Janet Vining  
Tax Counsel

Subject :

This is in response to your September 26, 1991 memorandum to Assistant Chief Counsel Larry Augusta concerning request for an interstate alcoholic beverage transporter permit. I apologize for the delay in responding to your questions.

argues that, since it is authorized by the Interstate Commerce Commission to transport general commodities in interstate commerce, the Board should issue it an interstate alcoholic beverage transporter's permit. For the reasons set forth below, I conclude that does not qualify for a transporter's permit.

is authorized by the Interstate Commerce Commission to engage in transportation as a contract carrier by motor vehicle. is authorized to transport general commodities (except certain explosives, household goods, and commodities in bulk) under continuing contracts with commercial shippers or receivers of such commodities.

Section 23661 of the Alcoholic Beverages Control Act (California Bus. & Prof. Code) states, 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,... (Emphasis added.)

Revenue and Taxation Code Section 32109 requires that any common carrier, except railroad and steamship companies, must register with the Board and apply for an interstate alcoholic beverage transporter's permit before engaging in the business of transporting shipments of alcoholic beverages into the state.

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California statutory law makes clear that, with certain exceptions not relevant here, only common carriers may bring alcoholic beverages into the state, and that such common carriers, except railroad and steamship companies, must obtain an interstate alcoholic beverage transporter's permit from the Board before transporting alcoholic beverages into the state. Since [redacted] is authorized by the Interstate Commerce Commission to operate as a contract carrier, rather than a common carrier, it is not permitted to transport alcoholic beverages into the state and cannot obtain an interstate alcoholic beverage transporter's permit.

[redacted] argues on behalf of [redacted] that the State of California has no right to interfere with the rulings of the Interstate Commerce Commission by requiring [redacted] to obtain a transporter's permit before it transports alcoholic beverages into the state. [redacted] argues that this requirement puts an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

The power of the states to control the traffic in liquor, under the Twenty-first Amendment to the United States Constitution, is absolute, and, therefore, the Commerce Clause of the federal constitution does not bar a state from adopting the rules to govern the importation of liquor for use and sale within its boundaries. Wylie v. State Board of Equalization (1937) 21 F.Supp. 604, State Board of Equalization of California v. Young's Market Co. (1936) 299 U.S. 59. Thus, [redacted] arguments concerning the Commerce Clause are not persuasive.

However, even if the requirements of the Alcoholic Beverages Control Act were unconstitutional, Article 3.5 of the California Constitution prohibits the State Board of Equalization from declaring the statute unconstitutional, or refusing to enforce it on the basis that it is unconstitutional, unless an appellate court has made a determination that the statute is unconstitutional. There has been no such ruling by any court.

Please contact me if you have any further questions concerning this matter.

*Janet Vining*

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cc: Mr. E. V. Anderson  
Mr. Monte Williams  
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