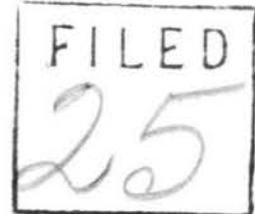


FOOD AND DRUGS:

The Food and Drug Commissioner cannot collect inspection fee on carbonic gas.

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Honorable Edward L. Drum
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri.

Dear Sir:

This Department is in receipt of your letter of May 27, 1937, requesting an opinion on the following question:

"May the State Food and Drug Commissioner collect an inspection fee on carbonic gas, in tanks, used in the preparation of soft drinks?"

Section 13116, R. S. Missouri, 1929, is as follows:

"The food and drug commissioner of this state shall cause to be inspected by chemical analysis samples of all non-intoxicating liquors or beverages or so-called 'soft drinks' of every kind manufactured or sold in this state, which shall be understood to include those containing less than one-half of one per cent, of or no alcohol, including ginger ale, ginger beer, hop ale, soda water, bevo, unfermented grape juice, cider, carbonated beverages, coca-cola, unfermented cereal or malt beverages, all non-intoxicating

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beverages and flavored beverages, seltzer water, mineral water and other waters used and sold for beverage purposes, and also all fountain syrups, flavors and extracts intended for use in the preparation and concoction of so-called 'soft drinks'."

Section 13120, R. S. Missouri, 1929, is as follows:

"The commissioner shall be entitled to receive for inspecting, three-fifths cent for each gallon of non-intoxicating liquid beverage manufactured or sold in this state; five cents per gallon for all fountain syrups; three-fourths of a cent per ounce for all flavors or extracts used in the manufacture or concoction of beverages not otherwise inspected. All fees received by the commissioner shall be paid into the State Treasury."

We must construe the statutes; supra, to see if by implied direction or implication, the Legislature intended to make carbonic gas subject to an inspection fee. It can not be denied, we think, that the Legislature did not expressly make such a provision.

It will be noticed that each of these sections refer to liquid beverages, and that the inspection fee is placed on gallons, or ounces. The article upon which the state food and drug commissioner is attempting to collect an inspection fee in the instant case, is carbonic gas, and although it is probably possible to measure gas in gallons or ounces, we think the usual rule for the measure of gas is in cubic meters.

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The Legislature in enacting the above statutes, placed a rather large inspection fee on fountain syrups and flavors or extracts "used in the manufacture or concoction of beverages not otherwise inspected." It is a matter of common knowledge to man, of which the Legislature was no doubt aware, that carbonic gas is an ingredient used in the preparation of nearly all soft drinks. Had the Legislature intended to make carbonic gas subject to an inspection fee, they could have expressly said so and fixed a definite measure on which the fee was to be collected, as they did with reference to syrups, flavors or extracts.

In State ex rel v. Sweany, 195 S. W. (Mo. Sup.) l.c. 716, the court in construing a statute, said:

"It would be but to do violence to the plain language used to hold that it expressed an intention to apply provisions other than those expressly mentioned. To so hold would be to violate the well-known canon of statutory construction, viz., that the expression of one thing is the exclusion of another."

In State ex rel v. Holtcamp, 181 S. W. (Mo. Sup.) 1007, the court laid down the rule that it could not enlarge and change the scope of the statutes, and in this ruling said at l.c. 1009:

"If justification there be for this unusual and peculiar course, it must be found in the written law."

CONCLUSION

Therefore, it is the opinion of this Department, that the collection of an inspection fee on carbonic gas is not authorized by statute in this state. That to hold otherwise would be contrary to rule: that those

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charged with the interpretation of statutes will not enlarge and change their scope. The Legislature in Sections 13116 and 13120, supra, enumerated the items which the commissioner shall cause to be inspected and upon which he is entitled to collect an inspection fee, and by the enumeration excluded all other items not expressly mentioned. Had the Legislature intended to make carbonic gas subject to an inspection fee, it would have been included in the enumerated items.

Respectfully submitted,

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APPROVED:

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