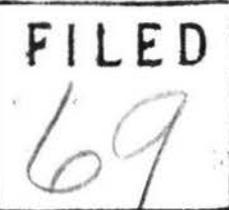


INSPECTION OF BEVERAGES: Right to inspect and collect fee therefor.

June 28, 1938.



Honorable Harry F. Parker,
State Health Commissioner,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of your request for an opinion, which is as follows:

"Section 13116, 13120a and 13124 (Revised Statutes 1929) set forth the duties of the State Food and Drug Commissioner relative to the inspection and collection of inspection fees on all beverages sold in this state.

"The City of Excelsior Springs has recently completed, with the aid of the Federal Government (P.W.A.) a project which among other activities, bottles and sells mineral water and other beverages. This activity, known as the Mineral Water System, according to my understanding is operated by the city under a special board.

"I am requesting an opinion from your office as to whether or not it is my duty, as State Food and Drug Commissioner, to collect the inspection fee for all beverages sold in Missouri by this municipally owned bottling plant either natural water or prepared beverages in accordance with the Beverage Inspection Law, Section 13115 to 13139 inclusive. In other words does your interpretation

of the law exclude the prescribed inspection tax on a bottling plant due to it being municipally owned."

In response to your request above, we note that Section 13116, R. S. Mo. 1929, makes it the duty of the Food and Drug Commissioner to inspect, or cause to be inspected, samples of all non-intoxicating liquors, or beverages, or so-called "soft drinks", of every kind manufactured or sold in this state, and said section defines such beverages as including mineral waters. Said section, as pertinent here, reads 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 * * * mineral waters and all other waters used and sold for beverage purposes, * * *."

Section 13120 allows the Commissioner a fee of three-fifths of a cent for each gallon of such beverage that is inspected.

However, Section 13124 does not permit the collection of the fee for such beverages as are manufactured, prepared or bottled in this state and exported outside the state for sale.

If, as you state, the City of Excelsior Springs bottles and sells in this state the beverage, or beverages, in question for profit, then the fact that the bottling plant is municipally owned would not exempt it from inspection or the payment of the required inspection fee, because the statutory enactments referred to herein are manifestly attributable to the rights of the state in the exercise of its police power to safeguard the public health. The Supreme Court has spoken concerning the police power of the state in the case of State ex inf. Attorney-General v. Curtis, 319 Mo. 1. c. 326, as follows:

"Proper disposition of sewage is essential to public health, and the passage of laws making such possible is obviously a proper exercise of the police power. (Morrison v. Morey, 146 Mo. l. c. 562; Dillon on Mun. Corp., pars. 93-96; Cooley on Taxation (4 Ed.) 202.) This power resides in the people of the State. (Sec. 2, Art. II, Constitution of Missouri; State v. Layton, 160 Mo. l. c. 489.) It may be exercised through municipalities and other agencies (28 Cyc. 693), but can never be surrendered or bargained away."

Hence, if the State were to recognize, or abide by, any claimed exemption from the inspection and payment of fees in question on the part of Excelsior Springs, such recognition on the part of the State in such case would be tantamount to a surrender or bargaining away of its police power.

Again, in the case of Cocoa Cola Bottling Co. v. Mosby, 289 Mo. l. c. 469, the court, speaking concerning the statutes on inspection of beverages, said as follows:

"The fact that these and other preparations, especially those intended for food or drink, are so extensively made and so generally used, is the moving cause of legislation of the character here under review. In short, it is but another illustration of the exercise of the police power, inherent in the State as a sovereignty, needing no organic grant for its existence and demanding legislative aid only to give it form and provide a procedure for its operation."

Consequently, your right of inspection and exaction of a fee therefor would be justified on the ground of a proper exercise of the police power of the State, if for no other reason.

However, your right of inspection and collection of fees can be justified on another ground. Where a municipality engages in an activity for profit, such as the sale of mineral waters and other beverages, it is operating in a proprietary capacity and not a governmental one respecting such activity. Consequently, if a municipality operates in a proprietary capacity, it is subject to the same general laws as a private corporation.

In the case of *Asher v. City of Independence*, 177 Mo. App. 1. c. 7, the court said:

"We agree with defendant that in the operation of a public utility for profit, the city was not acting in its governmental capacity, but was subject to the same rules and duties as would have governed and devolved upon a private corporation engaged in such business."

In the case of *Riley v. Independence*, 258 Mo. 1. c. 681, the court said:

"Cities undertaking to run the lighting business must assume the same responsibilities as private persons and private corporations running like plants."

Hence, if a city engages in an activity for profit, whether it be a light plant, bottling plant, or any other business, it is subject to such rules and regulations of law as any private corporation engaged in the same activity would be.

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CONCLUSION

It is the opinion of this office that you have the right to inspect samples of mineral waters, and collect a fee therefor (and as well the other beverages mentioned if such fall within the category defined in Section 13116) bottled for sale and sold in this State by the city's municipally owned plant.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR