

MUNICIPALITIES: Not subject to inspection as
provided in Section 13120
R. S. 1929.

4-23
April 19, 1937

Mr. Garland Pendleton, Inspector
Division of Food & Drug
State Board of Health
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your request
for an opinion under date of March 27th, 1937 wherein
you state as follows:

"As inspector in the Division of Food
and Drugs of the State Board of Health
of Missouri, I am writing for an opinion
on the following:

"The Mineral Water System in Excelsior
Springs, Mo., which is a municipal owned
plant, has been bottling soda and mineral
water for some time and selling same in
that city also in other cities and terri-
tory adjacent to that city to various
retailers, such as drug stores, hotels and
restaurants. This company claims exemption
from the State inspection tax of three fifths
of a cent a gallon on the grounds that they
are a municipal owned plant. Now as they
are in direct competition of all the bottling
companies in this part of Missouri, it would
seem that they should come under the same
inspection laws of the State as the other
companies and have the same regulation and
pay the same inspection fee as all the rest.

"I respectfully request a ruling or your
opinion on the above question."

Section 13116, R. S. of Mo. 1929 provides for the inspection by chemical analysis of soda and mineral waters by the Food and Drug Commission.

Section 13118, R. S. of Mo. 1929 provides that every person, persons or corporations bottling soda and mineral waters shall submit samples for inspection.

"Every person, persons, or corporation who shall erect or maintain a plant, factory, or establishment, for the manufacture, preparation or bottling of any such non-intoxicating beverages or so-called "soft drinks", or of fountain or other syrups, flavors and extracts intended for use in the preparation or concoction of such beverages or "soft drinks", for the purpose of offering the same for sale to persons in the state, shall cause samples of same to be inspected by the food and drug commissioner of this state, and when so inspected as herein required the same may be sold in this state. Every such person, persons, or corporation shall furnish to such commissioner upon demand by him from time to time such samples for inspection as he may deem necessary".

Section 13120, R. S. of Mo. 1929 provides the fees of the Commissioner for inspection, thus:

"Fees entitled to for inspecting.- 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."

Mr. Garland Pendleton

-3-

April 10, 1937.

You state that the plant bottling soda and mineral waters at Excelsior Springs, Missouri, refuses to pay the inspection tax of three-fifths of a cent a gallon on the grounds that they are a municipally owned plant.

Section 6 of Article X of the Missouri Constitution exempts the personal property of a municipal corporation and provides in part that

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation."

Exemption in almost the same words is provided by Section 9743, R. S. of 1929.

In the case of *State v. Wenneker*, 145 Mo. 230, 1.c.237, the Court declaring the reason for the exemption of property of the State and its municipalities from taxation, said:

"The reason for exempting from taxation property of the State and its municipalities is plain. Judge Cooley in his work on *Taxation* (2 Ed), p. 172, expresses it thus: 'All such property is taxable if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself'."

In the case of *State ex rel. Missouri Portland Cement vs. Smith*, 90 S.W. (2d) 405, the Court held that the imposing of a tax upon every retail sale of tangible personal property was not violative of Section 6, Article 10 of the Missouri Constitution and Section 9743, supra, providing that property of state should be exempt from taxation since the tax was an 'excise' and not a 'property tax'.

April 19, 1937

The Court, on p.406, distinguishes between a property tax and an excise tax, as follows:

"It is elementary that the power of the Legislature in matters of taxation for public purposes is unlimited, except in so far as restrained by the State or Federal Constitution or inherent limitations on the power to tax. Cooley on Taxation (4th Ed.) vol. 1, sec. 69, p.171. It has been said that taxes fall naturally into three classes, capitation or poll taxes, taxes on property, and excises. 'Excises, in their original sense, were something cut off from the price paid on a sale of goods, as a contribution to the support of government. The word however has come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excises include every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.' 26 R.C.L., Sec. 18, p.34. The same text, in pointing out the distinction to be drawn between property taxes and excise taxes, says 'If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise,' 26 R.C.L., Sec. 19, p.35. Cooley on Taxation (4th Ed.) vol. 1, sec. 42, p.127, defines excises as 'taxes laid upon the manufacturer's sale or consumption of commodities within the country, upon licenses to

pursue certain occupations, and upon corporate privileges.' Under these general definitions of the term, as well as upon the authority of the many adjudicated cases, we think it so clear as not to be open to question that the tax in controversy is an excise, and not a property, tax. See *Independent School District v. Pfost*, 51 Idaho, 240, 4 P. (2d) 893, 84 A.L.R. 820; *Crockett v. Salt Lake County*, 72 Utah, 337, 270 P. 142, 60 A.L.R. 867; *Portland v. Kozer*, 108 Or. 375, 217 P. 833; *Standard Oil Company v. Brodie*, 153 Ark. 114, 239 S.W.753; *Wiseman v. Phillips (Ark.)* 84 S.W.(2d) 91; *Pierce Oil Corporation v. Hopkins (C.C.A.)* 282 F. 253; *Monamoto^o Oil Co. v. Johnson*, 292 U.S. 86, 54 S.Ct.575, 78 L.Ed.1141. It will be observed that the exemptions granted by the Constitution and the statute, supra, are limited by express terms to the real and personal property of the several bodies mentioned. Accordingly, article 10, section 6, of the Constitution, has been held to have no application to collateral inheritance taxes (*State ex rel. v. Henderson*, 160 Mo.190, 60 S.W. 1093), nor to license fees (*State v. Parker Distilling Co.* 236 Mo. 219, 139 S.W.453). And we think in this instance the statute does not impinge upon the constitutional provision pointed out nor violate the statute relied on and is valid."

In the instant case the burden is placed on the business as distinguished from a burden laid directly on persons or property and under the general definition as pointed out in the Portland case, supra, the inspection fee is an excise, and not a property, tax.

On p.407 of the same opinion the Court pointed out that the weight of authority as applied to political subdivisions included municipalities seems to be that exemption from property taxes does not ordinarily extend to excise taxes, but the rule is not absolute and is dependent upon the circumstances of each case, thus:

"We pass now to the question of the intent of the Legislature with respect to imposing a tax on sales or transactions wherein a subordinate branch of the executive department (which the highway department was held to be in *State ex rel. v. Hackmann*, 314 Mo.33, 282 S.W.1007) becomes the purchaser. Respondent invoked the rule that exemption from property taxes does not extend to excise taxes, and asserts the language of the act itself, together with the record of the General Assembly in considering this particular legislation, evinces a legislative intent to impose the tax upon such agencies. The weight of authority seems to be that, as applied to counties, municipalities, and other subdivisions, exemption from property taxes does not ordinarily extend to excise taxes. See *Independent School District v. Pfof*,

Hr. Garland Pendleton. -7- April 19, 1937.

the other cases cited, supra. But the rule is not absolute, and is dependent upon the circumstances of each case. 26 R. C. L., Sec. 276, p.315."

Examining the Section dealing with inspection of beverages, we find that the inspection fee is to be imposed upon "every person, persons, or corporation."

In the case of City of Webster Groves v. Forrest Smith, 102 S.W. (2d) 618, l.c.619, the State Auditor sought to impose an excise tax upon the privilege of engaging in the business of selling water service. The defense was that the Act was not applicable to a municipal corporation.

The Act in question, Laws of Missouri, Extra Session 1933-34, p.155, 166, which was repealed by the 58th General Assembly Laws of Missouri, 1935, p. 411, provided that (Section 2A, p. 157) "for the privilege of a person engaging in the business * * *."

Person as used in the Act is defined in Section 1 thereof (p.156) as follows:

" 'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

Plaintiff-appellant contended that it would not come within this definition, that, within the meaning of the Act, it was not a person upon whom the tax is imposed and that the Act does not apply to a municipality. The State Auditor took the position that the word 'corporation' as used in the foregoing definition should be taken and construed to include a municipality, it being a municipal corporation. The Court in its opinion said:

"In definition and legal classification and terminology a well-settled distinction exists, and is recognized generally, between a 'corporation' and a municipal corporation'. Each term has a distinct and commonly accepted meaning. As illustrative, reference may be had to our statutes. The numerous statutory provisions relating to the organization, powers, etc. of municipalities are collected and classified under the designation 'municipal corporations'. See for example chapter 38, R. S. 1929, Sec. 6090 et seq. (Mo. St. Ann. Sec. 6090 et seq., p.5266 et seq.) Municipalities are variously referred to in our Constitution as cities or towns and municipal corporations. 'In common parlance, towns, cities and other municipal organizations are not known as corporations.' Linehan v. City of Cambridge, 109 Mass.212. Reverting to statutory language in this state, the term 'corporation' is used and refers to private and business corporations and the statutes relating to such corporations are assembled under the designation or classification of 'corporations.' See for example chapter 32, R.S.1929, Sec. 4526 et seq. (Mo. St. Ann. Sec. 4526 et seq., p.1983 et seq.) Likewise where the

term 'corporation' is used in our Constitution it uniformly refers to private or business organizations of individuals. Neither by the language of the Constitution nor statutes is the term 'corporation' so used as to apply to and include a municipality or municipal corporation and where a city or town is referred to, in the sense of being a corporate entity, the term 'municipal corporation' is used. Looking to the context of the act as a whole, we find no language or provisions therein from which an implication necessarily arises that it was the legislative intent to include a municipal corporation within the act. Indeed we find nothing in the other provisions of the act which so much as tends to show such an intent. The provision for verification of the return to be made to the state auditor requires that it 'be verified by the oath of the tax-payer, if made by an individual, or by the oath of the President, Vice-President, Secretary, or Treasurer of a corporation if made on behalf of a corporation.' While the persons thus specifically named are the usual officers of private corporations, they are not, except treasurer, officers of a municipality. Further the collocation of 'corporation' with the words 'individual', 'firm', 'copartnership', etc., indicates that a private corporation and not a municipality was meant. In view of the foregoing considerations, the meaning commonly ascribed to the word 'corporation' both in popular usage and legal nomenclature and absence of language indicating a legislative intent to use it in a

April 19, 1937.

different sense we must assume it was used in its ordinary and commonly understood meaning and the assumption legitimately follows that had the Legislature intended to include a municipality in the act it would have done so by specific language to that effect. It is our conclusion that the word 'corporation' as used does not include a municipality and therefore a municipality is not within the act. The decisions of this court in *Public Service Commission v. City of Kirkwood*, 319 Mo. 562, 4 S.W. (2d) 773, and the *City of Columbia v. Public Service Commission*, 329 Mo. 38, 43 S.W. (2d) 813, lend support to such conclusion."

As pointed out in the *Missouri Portland Cement Company* case, *supra*, whether municipalities are exempt from excise taxes, depends upon the circumstances of each case. Looking into the context of the Act as a whole, we find no language or provisions therein from which an implication necessarily arises that it was the legislative intent to include a municipal corporation within the Act. Further, we believe that the use of the words 'corporation' with the words 'person or persons' indicates that a private corporation and not a municipality was meant.

In view of the foregoing we are of the opinion that the municipal water system in Excelsior Springs, Missouri, which is a municipally owned plant, is not subject to the inspection fee, as provided in Sec. 13120, *supra*.

Respectfully submitted,

APPROVED:

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

WM. ORR SAWYERS
Assistant Attorney-General