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OPINION LETTER NO. 93-88

The Honorable Michael P. David
Representative, District 63
State Capitol Building, Room 233A
Jefferson City, Missouri 65101

Dear Representative David:

This opinion letter is in response to your questions which can be summarized as follows:

Does Section 311.332.3, RSMo Supp. 1987 authorize a licensed wholesaler to classify as close out merchandise packages or bottles of a brand or trade name limited to a size or capacity of that brand or trade name, e.g., half pints only?

Is the term "item" in the definition of close out merchandise under this section synonymous with the term "brand"?

Section 311.332, RSMo was repealed and reenacted in 1987. Subsections 2 and 3 of Section 311.332, RSMo Supp. 1987 provide as follows:

2. Except as provided in subsection 3 of this section, any wholesaler licensed to sell intoxicating liquor and wine containing alcohol in excess of five percent by weight to persons duly licensed to sell such intoxicating liquor and wine at retail may offer a price reduction of not more than four percent of his price schedule for any brand, age, proof, and size bottle or package. Such price reduction shall apply for a thirty-day period, shall not be offered by any wholesaler more than three times in any calendar year, and shall not be offered during successive months.

3. Any wholesaler licensed to sell intoxicating liquor and wine containing alcohol in

excess of five percent by weight to persons duly licensed to sell such intoxicating liquor and wine at retail may offer a price reduction of more than four percent of the scheduled price on close out merchandise. "Close out merchandise" is any item which has been in the wholesaler's inventory for more than six months. The price of close out merchandise may be decreased, but shall not be increased, monthly for up to and including six consecutive months. A wholesaler shall not purchase any item of intoxicating liquor or wine of the same year and vintage he has classified as close out merchandise during the period of such classification. A wholesaler shall not purchase, sell, or offer to sell any item of intoxicating liquor or wine of the same year and vintage he has classified as close out merchandise until eighteen months have elapsed since the wholesaler's last offer to sell the item as close out merchandise. This subsection shall become effective January 1, 1988. (Emphasis added.)

Subsection 3 of Section 311.332 became effective January 1, 1988.

Under subsection 2 of Section 311.332, any licensed wholesaler may reduce the price of his merchandise as therein defined by not more than four percent of his price schedule for any "brand, age, proof, and size bottle or package". Subsection 3 of Section 311.332 defines close out merchandise as any "item. . .". In that same subsection the wholesaler is prohibited from purchasing any "item of intoxicating liquor or wine" of the same year and vintage he has classified as close out merchandise during the period of such classification.

The principal rule of statutory construction is to determine legislative intent from the plain words of the enactment. Bartlett and Company Grain v. Director of Revenue, 649 S.W.2d 220, 223 (Mo. 1983). Section 1.090, RSMo 1986. Under the plain meaning rule the main object of statutory interpretation is to determine the legislative intent from the language used and to give effect to the intent. In so doing, words used in the enactment are given their plain and ordinary meaning. Springfield Park Central Hospital v. Director of Revenue, 643 S.W.2d 599, 600 (Mo. 1983).

In Webster's New World Dictionary, Second College Edition, 1982, the word "item" is defined as "an article; unit; separate thing; particular". It has equally been applied by the dictionary definition "to any single thing or small section that is part of a whole structure, stresses the distinctness of a thing as an individual unit in a whole".

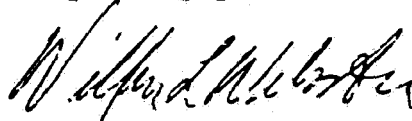
Brand is defined thereunder as "an identifying mark or label on the products of a particular company; trademark".

In reviewing the current rules and regulations of the Division of Liquor Control, Department of Public Safety, particularly 11 C.S.R. 70-2.190(2)(A)1, wholesalers post prices for new brands which must be authorized by the supervisor of liquor control. 11 C.S.R. 70-2.190(2)(A)2 provides that "(A)ny new "items" in the state, including new products, new sizes or new proofs being posted on supplemental schedules may be posted at any price the wholesaler desires. This category of new items must be posted within the same calendar month. ..."

Additionally, under the rules and regulations of the Division of Liquor Control, 11 C.S.R. 70-2.190(2)(F)1, "item" is defined as "... either a bottle or a case of intoxicating liquor or wine scheduled as hereby required."

"Item" has a distinct and separate meaning from "brand". The Missouri legislature in its 1987 repeal and reenactment of Section 311.332 recognized the basic difference between these two plain and ordinary words. "Item" is something less than "brand". The clear legislative intent when applying rules of construction authorizes a licensed wholesaler to classify as close out merchandise packages or bottles of a brand or trade name limited to size or sizes. Classifying a size or sizes as close out merchandise does not require classifying the entire brand of which the size or sizes may be a part thereof. The word "item" is not synonymous with "brand" for the purposes of Section 311.332, RSMo Supp. 1987.

Very truly yours,



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