FOOD AND DRUG: Natural fruit juices are not included in the definition of soft drinks and are not subject to the Beverage Inspection Act.
SOFT DRINKS:

March 11, 1950

FILED
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Dr. Buford G. Hamilton
Director, Division of Health
Jefferson City, Missouri

Dear Sir:

I.

We received the following request for an official opinion from this department:

> "We would like to have an official opinion from your department on the following question under Section 1 of the Beverage Inspection Act of the State of Missouri. The term 'soft drinks' as used in this Act are defined as follows:
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> > 'Soft drinks shall be held to mean and include all beverages of every kind manufactured and 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 carbonated beverages, still drinks, seltzer water, artificial or natural mineral waters and all other waters used and sold for beverage purposes.'
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> "We would like to know if Welch's Grape Juice concentrated, orange juice, lemon juice, grape fruit juice, pineapple juice, apricot juice, and apple juice are included under the definition of soft drinks.
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> "It is our understanding that all of these juices are normally diluted with water before they are consumed. Some of these juices such as Welch's Grape Juice are sold in bottles while others such as orange juice and lemon juice and some others are sold in cans."

II.

Section 9980.1, R.S.A., Laws Mo. 1943, page 585, defines the term soft drinks as follows:

> "* * *The term 'soft drinks' as used in this Act shall be held to mean and include all beverages 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 carbonated beverages, still drinks, seltzer water, artificial or natural mineral waters and all other waters used and sold for beverage purposes.* * *"

Prior to the enactment of this definition by the Legislature in 1943, the term "soft drinks" was defined by Section 9957, R. S. Mo. 1939, as follows:

> "* * *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, coco-cola, unfermented cereal or malt beverages, all non-intoxicating beverages and flavored beverages, seltzer water, mineral waters and all 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.'" (Underscoring ours.)

It should be noted that unfermented grape juice and cider were removed from the list of beverages which would be constituted to be soft drinks according to the Legislature when the Laws of 1943 were enacted. This would seem to indicate an intention on the part of the Legislature to omit natural fruit juices from being classed and defined as a soft drink.

The Supreme Court of Missouri in the case of Coca-Cola Bottling Co. v. Mosby, 233 S.W. 446, 289 Mo. 462, considered the constitutionality and purpose of Section 9957, supra, and the entire soft drink inspection act. The court said that the Act prescribes specifically the products to be inspected; it prohibits the manufacture and sale of such products as not pure and wholesome; it requires samples of such products to be

submitted for inspection by manufacturers and requires sellers of products not manufactured in this state to file affidavits of the manufacturer with the inspector that he may determine the purity of the products; and requires the inspection of such products; it prescribes the fees for inspections, and directs the work of the inspector. The court held that the Act is an inspection measure and not a revenue measure. The court found that the Act was constitutional and a proper exercise of the statutory authority.

The present Beverage Inspection Act by Section 9980.7, R.S.A. 1939, Laws 1943, page 585, Sec. 7, provides for an affidavit to be filed with the State Board of Health, now the Division of Health, by the manufacturer or bottler or other reputable person having actual knowledge of the composition of such beverages, syrups, or flavors stating that no material which is not pure, clean or wholesome was used in the manufacture of same.

Section 9980.8 R.S.A. 1939, Section 8 of Laws 1943, page 585, requires persons engaged in the manufacture or bottling, within this state, of any non-intoxicating beverage or soft drink as defined by the Act, not to use any substance materially or chemically in the manufactured bottling or preparation of such beverages which is not pure, clean and wholesome. The Act continues to be an inspection measure.

A reference to the definition of the word "juice" is necessary for an understanding of the statute defining soft drinks.

The word "juice" is defined as follows:

> "* * *'The extractable fluid contents of plant cells or plant structures consisting of water holding sugar or other substances in solution.' Webster's Dictionary. 'The fluid part of animal or vegetable matter; especially the expressible watery matter in fruits, containing usually the characteristic flavor.' Standard Dictionary."
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> "'Juice' as used in law excepting manufacturer of nonintoxicating cider and fruit juice from penalties for manufacture of liquor is sap obtained by expression." Words and Phrases, Vol. 23, page 346.

Judge Otis in the case of United States v. Burnett, 53 Fed. (2d) 219, l.c. 233 defines cider as the expressed juice of apples. He said in this case:

> "1. The word 'fruit,' whatever else it may include, certainly includes grapes, and the words 'fruit juices' certainly include the juice of grapes or grape juice. Cider and grape juice certainly are the products of manufacture. They are manufactured by expressing from apples and grapes, respectively, their juices. There is no other conceivable way in which either cider or grape juice can be manufactured."

The United States Circuit Court of Appeals in the case of U.S. v. Phez Co., 28 Fed. Rep.(2d) 106, affirmed the same case reported in 25 Fed. Rep.(2d) 1011, and said:

> "* * *The evidence was that Loju was made by adding water and sugar to loganberry juice, the water being two parts to one of the juice, and that Phez consisted only of sweetened loganberry juice, to be diluted by the addition of water to make it fit for use as a beverage. * * *it is conceded that Phez is not included in the term 'other soft drinks,' and that the judgment for the recovery of the tax paid thereon was properly rendered by the court below. Phez, which is unfermented loganberry juice with sugar added, is admittedly not a soft drink, or taxable within the meaning of the act, for the reason that before it becomes acceptable as a beverage water must be added thereto; but it is contended that Loju is a soft drink, and taxable as such, for the reason that before it is placed upon the market water and sugar are added. To assert, however, that it is potable as a soft drink, is not to answer the question whether in the Revenue Act it was included among the beverages subjected to taxation as embraced in the words 'other soft drinks.' The act dealt with two distinct kinds of beverages: First, a fruit juice, namely, unfermented grape juice, derived by extracting by mechanical means the juice of the grape; and, second, certain named artificial soft drinks mixed, compounded, or manufactured from various ingredients, at the close of which enumeration, in order to prevent the exclusion of possible other soft drinks of the same nature and similarly manufactured, the lawmakers added the words 'and other soft drinks.'

> "Loju is not thus manufactured of divers ingredients; it is nothing but unfermented loganberry juice, diluted with water and sweetened, and it is not of the nature of the soft drinks which are specified. The case is one for the application of the rule of ejusdem generis, in accordance with which such terms as 'other,' 'other things,' 'others,' or 'any other,' 'when preceded by a specific enumeration, are commonly given a restricted meaning and limited to articles of the same nature as those previously described,' 25 R.C.L. 997, United States v. Stever, 222 U.S. 167, 174, 32 S. Ct. 51, 56 L. Ed. 145, United States v. Nixon, 235 U.S. 231, 35 S. Ct. 49, 59 L. Ed. 207. That sweet cider which is sold in bottles as a beverage and is obviously a soft drink, is not included in the term 'other soft drinks,' is held in the leading case of Monroe Cider Vinegar & Fruit Co. v. Riordan (C.C.A.) 280 F. 624, a decision which was followed in Sterling Cider Co. v. Casey (D.C.) 285 F. 885, and Casey v. Sterling Cider Co. (C.C.A.) 294 F. 426. In the Monroe Cider Case it was said: 'As is well known, there are hundreds, perhaps thousands, of manufactured soft drinks with tradenames which are made up of various components, and it was naturally impossible for Congress to attempt to enumerate this large collection of soft drinks, and no doubt Congress intended, under the act under consideration, to tax all kinds of soft drinks in which, among other things, carbonated or artificial waters, or extracts, or sirups, or other ingredients of one kind or another, were used. It is plain, however, that it never was the legislative intent to include sweet cider, for there can be no other explanation of specific mention of unfermented grape juice, on the one hand, or of ginger ale, sarsaparilla, etc., on the other.' The reasoning which led to that conclusion as to sweet cider applies with equal force to Loju." (Underscoring ours.)

If natural fruit juices are construed to be included within the definition of soft drinks as a still drink then fresh orange juice prepared in restaurants would be subject to the control of the Division of Health and the inspection tax.

In the case of Horn & Hardart Co. v. U.S., 14 Fed. Supp. 509, the United States government collected a tax of .02¢ per gallon on orange juice expressed from the fruit by the plaintiff in its restaurants in New York City. In the year 1932, plaintiff sold and served to its customers at its various restaurants 50,340 gallons of orange juice on which they paid a tax of $1,006.81. The government collected the tax from them on the ground that the orange juice was a still drink and subject to the tax imposed by Section 615(a)(4) and the Revenue Act of 1932. The plaintiff filed suit in the court of claims to recover the tax paid. The evidence proved that the orange juice was served to the plaintiff's customers without the addition of water, sugar, or any other element and without change from its natural state. The tax was collected under the provisions of Section 615(a) of the Revenue Act of 1932, which reads: (l.c. 511 and 512)

"'There is hereby imposed---

"'(1)Upon all beverages derived wholly or in part from cereals or substitutes therefor, containing less than one-half of 1 per centum of alcohol by volume, sold by the manufacturer, producer, or importer, a tax of 1½ cents per gallon.

"'(2) Upon unfermented grape juice, in natural or concentrated form (whether or not sugar has been added), containing 35 per centum or less of sugars by weight, sold by the manufacturer, producer, or importer, a tax of 5 cents per gallon.

"'(3) Upon all unfermented fruit juices (except grape juice), in natural or slightly concentrated form, or such fruit juices to which sugar has been added (as distinguished from finished or fountain syrups), intended for consumption as beverages with the addition of water or water and sugar, and upon all imitations of any such fruit juices, and upon all carbonated beverages, commonly known as soft drinks (except those described in paragraph (1), manufactured, compounded, or mixed by the use of concentrate, essence, or extract, instead of a finished or fountain syrup, sold by the manufacturer, producer, or importer a tax of 2 cents per gallon.

"'(4) Upon all still drinks (except grape

juice), containing less than one-half of 1 per centum of alcohol by volume, intended for consumption as beverages in the form in which sold (except natural or artificial mineral and table waters and imitations thereof, and pure apple cider,) sold by the manufacturer, producer, or importer, a tax of 2 cents per gallon.'

* *

"It is not contended that the orange juice produced and sold by plaintiff was taxable under section 615(a)(3), which covers unfermented fruit juices in natural form 'intended for consumption as beverages with the addition of water or water and sugar.' The sole question presented, therefore, is whether it was subject to the tax imposed on still drinks by section 615(a)(4).

* *

"* * *One of the oldest rules of statutory construction is that, where there is, in the same statute, a particular enactment, and also, a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. United States v. Chase, 135 U.S. 255, 10 S. Ct. 756, 34 L. Ed. 117. The construction of the applicable statutes falls squarely within this rule. Section 615(a)(3) is a particular enactment dealing with the tax on fruit juices, while section 615(a)(4) is a general enactment dealing with the tax on still drinks. Even if unfermented fruit juices in their natural state might otherwise fall into the classification of still drinks, they are not taxable under subsection (a)(4) for the reason that they are specifically dealt with in subsection (a)(3) and are exempt from the tax there imposed.

"We think that if Congress had intended to tax

> unfermented fruit juices intended for consurption as beverages in their natural state, it would have declared that intention directly, as could easily have been done by making all fruit juices, without exception, subject to the tax. Congress, however, did not do this, but imposed a tax only on such unfermented fruit juice as was intended for consumption as a beverage with the addition of water or water and sugar, indicating clearly the intent that fruit juices intended for consumption in their natural state be tax free. Expressio unius est exclusio alterious.
>
> "(4) The orange juice prepared by plaintiff and served in its natural form, without the addition of water or water and sugar, to customers as a part of a meal, was not subject to a tax of 2 cents per gallon under section 615 of the Revenue Act of 1932. The plaintiff is therefore entitled to recover the amount of the tax paid, and a judgment in its favor for $1,006.81 with interest is awarded."

If we should attempt to hold that fruit juices are subject to the Beverage Inspection Act as a beverage then we should consider the definition of a beverage. A beverage is a liquid for drinking; usually a drink artifically prepared and of an agreeable flavor. U.S. v. Robason, Kansas D.C. 38 Fed. Supp. 991, 992.

Under the rule of ejusdem generis making unlawful use of branded or marked and other beverage containers by persons other than owners, held not to include milk bottles and cans, especially in view of usual definitions of "beverage" as drink artifically prepared. Climax Dairy Co. v. Mulder, 242 P. 666, 669, 78 Colo. 407.

> "It is a recognized rule of interpretation that ---
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> "In cases of doubt or uncertainty, acts in pari materia either before or after, and whether repealed or still in force may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions. * * * *' Vane v. Newcombe, 132 U.S.

220, 235, 10 Sup. Ct. 60, 33 L. Ed. 310; Stout v. Board of Commissioners, 107 Ind. 343, 348, 8 N.E. 222; Tiger v. Western Investment Co. 221 U.S. 286, 306, 31 Sup. Ct. 578, 55 L. Ed. 738."

The United States Court of Appeals in the case of Casey v. Sterling Cider Co., 294 Fed. Rep. 426, again held that sweet cider was not taxable as a soft drink under the Revenue Act that taxed other soft drinks. This court said that it would amount to writing into the statute the term sweet cider which was not there. That agreed with the finding of the court in the Monroe Cider Vinegar & Fruit Co. case. This court also said that "unfermented grape juice as such and in its natural state is not drunk as sweet cider is in its natural state. Unfermented grape juice is commonly drunk when water or water and sugar are added and when so used is a compounded or mixed drink. When so used it undoubtedly becomes a soft drink." (Underscoring ours.)

The United States Revenue Act, 1921, taxing soft drinks is somewhat similar to our Beverage Inspection Act but it included unfermented grape juice as being a taxable beverage. Our former definition of soft drinks also included unfermented grape juice and cider. Since the Legislature omitted unfermented grape juice and cider from the new definition of the term soft drinks we conclude that it was their intention to exclude all natural fruit juices from the application of the Beverage Inspection Act, to include all artificial manufactured drinks of the same general nature as defined in Section 1 of the Act.

CONCLUSION

We are, therefore, of the opinion that it is clear that the Legislature, in enacting the Beverage Inspection Act, Laws 1943, did not intend to classify Welch Grape Juice concentrated; unfermented grape juice, orange juice, lemon juice, grapefruit juice, pineapple juice, apricot juice, and apple juice or cider as a soft drink, provided that the same is the juice extracted from the natural fruit and that it is in its natural state, but beverages that are manufactured or created by the use of parts of natural fruit juices and the use of artificial flavoring and water would be included in the term soft drinks.

Respectfully submitted,

APPROVED:

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