COMMISSIONER OF LABOR AND INDUSTRIAL INSPECTION:

Has the right to inspect and collect inspection fees from gasoline filling stations and bulk stations.

October 13, 1939

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Mr. Earl H. Shackelford
Commissioner of Labor
Jefferson City, Missouri

Dear Sir:

We received your letter dated September 20, 1939, in which, in the following terms, you request our opinion:

> "Enclosed is a copy of a letter from their Mr. J. P. Greve, which is self-explanatory.
>
> Please let me have your opinion as to whether or not this department has a right to inspect and collect an inspection fee from gasoline filling stations and bulk plants."

The provisions of Section 13218, R. S. 1929, Mo. Stat. Ann., page 4779, are the following:

> "The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine

> shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforçe all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating tos aid establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors, may administer oaths and take affidavits in matters concerning the enforcement of the various inspection laws relating to these establishments: Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

This opinion is concerned solely with statutory construction in which the intention of the legislature governs.

I. The rule recognized in City of Ozark v. Hammond is not applicable to Section 13218, R. S. Mo. 1929.

The letter of Mr. J. P. Greve, dated September 18, 1939, states: "As has been pointed out in correspondence with your department and with the Attorney General, the Missouri courts have repeatedly held, as is held in City of Ozark v. Hammond, 49 S. W. (2d) 129, that in construing taxing statutes general words, such as 'all other mercantile establishments'

or similar language following statutory enumerations of occupations taxable by cities, do not authorize the taxation of businesses or occupations not specifically named in the statute. In otherwords, general language will not extend taxing authority to include businesses or occupations not specifically named or mentioned in a statute. Of course, the statute under consideration is enacted pursuant to police power and is not a taxing statute, but the same rule of construction is undoubtedly applicable to both types of statutes."

In City of Ozark v. Hammond, 49 S. W. (2nd) l.c. 131, 329 Mo. 1118, a city of the fourth class sought to apply to a certain bakery business its ordinance imposing a license tax. Section 7287, R. S. 1929, Mo. Stat. Ann. page 5871, provides, in the following terms, that said city can not impose a license tax upon a business unless it is specially (not in general words) named as taxable in the city charter, or by statute:

> "No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

The City of Ozark had no charter, and such power as it had to impose a license tax was granted by Section 7046, R. S. 1929, Mo. Stat. Ann. page 5762, of which the court said, at l.c. 131:

> "That business, as described and set forth in the agreed statement of facts, is nowhere specially named in said section 7046. It is true that the long enumeration therein of the specific occupations which it authorizes cities of the fourth class to tax is followed by the words, 'and all other business, trade and avocations whatever,' but those words cannot be construed to in-

> clude the business avocation of the baking co pany; the rule ejusdem generis cannot be invoked in the face of said section 7287. (See cases last referred to.)" (Emphasis ours)

The case of City of Ozark v. Hammond, supra, has no application to said Section 13218, because in that case the right (to tax) in question was by said Section 7287 limited to special words in Section 7046; and, because the right (to inspect) here considered, is not limited to special words in Section 13218 by any statute or decision. The rule recognized in City of Ozark v. Hammond, supra, that a municipal taxing ordinance can not be broader than the specific grant by charter or statute, is applicable only to the taxing power of municipalities; it is a statutory rule and not one of interpretation. It was so ruled in Fischbach Brewing Company v. City of St. Louis, 95 S. W. (2nd) 335, 340, 231 Mo. App. 793.

II. A filling station is included in the term "mercantile establishment", and is included in the term "garage".

The letter of Mr. J. P. Greve, dated September 18, 1939, states: "Section 13218 enumerates a long list of buildings which the Commissioner of Labor has the duty to inspect, and after such enumeration the statute recites that it shall inspect 'all other manufacturing, mechanical and mercantile establishments and workshops.' It is our contention that under the above mentioned line of authorities the language last quoted does not authorize or impose upon the Commissioner the duty of inspecting any buildings or establishments other than those specifically enumerated in the statute."

By an opinion dated July 10, 1933, this office advised you as follows:

> "In your 7th inquiry you ask regarding your right to inspect gasoline filling stations. 'Gasoline filling stations'

> are mercantile establishments under Section 13218. They, therefore, may be inspected by your Department where they are located in cities of over 3,000, if they employ at least one employee, but they may not be inspected in cities under 3,000 population excepting where such filling station employs ten or more persons."

We adhere to that opinion, and to the opinion of this office to the same effect, dated March 22, 1937. The ejusdem generis rule referred to in City of Ozark v. Hammond, supra, was stated as follows by the Supreme Court of Missouri in State ex rel Goodloe et al v. Wurdeman, 227 S. W. 64, 67, 286 Mo. 153:

> "It is a familiar rule of statutory construction that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind."

A mercantile establishment is defined as "any place where goods, wares and merchandise are offered for sale." Ballentine Law Dict. page 810, citing 16 A.L.R. 542.

Affirming a decree enjoining the violation of restrictions in a deed, the Supreme Court of Massachusetts, said: "The sale of oil, tires and other automobile accessories in the building was plainly a use for a mercantile purpose." Abbott et al Steigman 161 N. E. 596, 597, 263 Mass. 585.

Said Section 13218 specifically includes "garages". Within the above definitions, the selling of automobile parts, accessories, gasoline, oil, tires, equipment and many other related articles by garages, or by filling stations, regardless of their other functions, brings them within the classification of the general words "mercantile establishment" in said Section 13218. We believe the legislature intended the general words "mercantile establishment" to refer to and include garages and things of the same kind. A filling station is manifestly the same kind of

thing as a garage, a part of the functions of which are the same as those of a filling station. That they are things of the same kind is illustrated by cases which hold that the term "garage" includes a filling station.

The Supreme Court of New Jersey, in Northern New Jersey Oil Company v. Board of Adjustment, 142 Atl. 557, 558, 6 N. J. Misc. 698, (1928) said:

> "The contention of the prosecutor is that the prohibition against garages does not apply to a gasoline service station. The word 'garage' has been adopted into the English language from the French. It means 'a station in which motor cars can be sheltered, stored, repaired, and made ready for use.' Until a few years ago, the gasoline service station was not known. The service now rendered by it was to be found only at garages. There are different kinds of garages. At some machines can be furnished with gas and oil. At others repairs are made. At others cars can be stored or hired. All those places are referred to as garages. In view of the fact that gasoline would be furnished at the building which the prosecutor desires to erect, we deem that it is a garage within the meaning of the ordinance. Upon this ground we think that the action of the board of adjustment should be affirmed."

The same court held that a filling station is within the meaning of the word "garage", in Wilinski et al v. Haddon Twp. 153 Atl. 97, 9 N. J. Misc. R. 140 (1931).

The two cases last mentioned construed zoning ordinances, and are analogous to the situation here considered because both involved construction of a statute enacted under the police power.

As to the nature of the business of a filling station establishment, in some cases it may appear that the owner bought crude products to sell again at said establishment after processing. Regarding a transaction parallel in principle, the Supreme Court of Missouri said:

> "It is immaterial that the defendant, by his labor, changed the form of the goods sold. If he dealt in selling them at a store, stand or place occupied for that purpose, he is a merchant (for the purpose of this act); and it is also immaterial that the store, stand or place may have been also occupied for some other purpose."

State vs. Whittaker, 33 Mo. 457, l.c. 459.

> "If he keeps at a store, stand or other place, in stock articles manufactured by him for sale in the ordinary course of trade, he is a merchant."

Kansas City v. Brewing Co., 98 Mo. App. 590, l.c. 594, 73 S. W. 302.

> "The manufacturer of a patented article, who also sells it in the usual course of business in his store or factory, would probably come within the exception of sec. 4 (exempting merchants)".

Ozan Lumber Co. v. Bank, 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195.

The business of a merchant is mercantile, and the place where it is conducted is a mercantile establishment.

From all the foregoing, it is clear that a filling station is included in the term "mercantile establishment".

But irrespective of the general words "mercantile establishment", in said Section 13218, upon the authority of Northern N. J. Oil Company v. Board of Adjustment, supra, and Wilinski et al v. Haddon Twp., supra, the Commissioner of Labor and Industrial Inspection has the right to inspect filling stations, because they are included in the term "garages", which is one of the specific words in said Section 13218.

III. The duty of inspection imposed upon the Commissioner of Labor and Industrial Inspection by Section 13218 is not affected by Section 13399, R. S. 1929, which imposes a different duty of inspection upon the State Oil Inspector.

The letter of Mr. J. P. Greve, dated September 18, 1939, states: "The foregoing construction is supported by the fact that the Missouri legislature enacted a specific statute, namely, Section 13399, relative to the inspection of premises at or on which gasoline and motor vehicle fuels are kept and sold at retail. There certainly was no occasion for the enactment of said Section 13399 if Section 13218 authorized the inspection of filling stations. Certainly, the legislature did not intend to impose upon two separate departments of the state government the same duty of inspection."

Section 13218, R. S. 1929, Mo. Stat. Ann. page 4779, has already been quoted.

Section 13179, R. S. 1929, Mo. Stat. Ann. page 4765, provides:

> "The object of this department shall be to collect, assort, systematize and present in annual report to the governor, to be by him transmitted biennially to the general assembly, statistical details and information relating to all departments of labor in the state, especially in its relations

> to the commercial, industrial social, educational and sanitary condition of the laboring classes and to the permanent prosperity of the productive industries of the state."

The provisions of Section 13399, R. S. 1929, Mo. Stat. Ann. page 4324 are:

> "It is hereby made the duty of the inspector of oils, in addition to his other duties, either in person or by deputy or special agent, at least once in every six months, to minutely and carefully inspect and examine all premises in this state at or on which gasoline and motor vehicle fuels are kept and sold at retail: Provided, such sales at such premises shall aggregate on an average, more than two hundred gallons monthly. And it is hereby made the duty of said inspector, his deputies and special agents, to examine the surroundings, environments and construction of said premises and see the same are kept in such condition as to be reasonably safe from fire and explosion, and not likely to cause injury to adjoining property or to the traveling public."

From said Sections 13179 and 13218, we gather the opinion that the duty of inspection there imposed has reference chiefly to the welfare of the "laboring classes". Section 13399 is chiefly concerned with prevention of "injury to adjoining property or to the traveling public". Any reference therein to the welfare of the "laboring classes" is only by remote inference. While it is true that under Sections 13218 and 13399, the same premises may be inspected by two different departments, the two inspections are of a distinctly different nature and purpose. We believe the legislature did not intend to

substitute the remote inferential protection to the "laboring classes" provided by Section 13399 for the salutary benefits which accrue to them under the administration of the Commissioner of Labor and Industrial Inspection, and which are safeguarded by the inspection required by Section 13218.

"There is no express repeal of the prior existing law, and I do not think the language is sufficient to produce that result by implication. * * The settled rule of construction is that if by any fair interpretation all the sections can stand together, then there is no repeal by implication. * * * The law does not favor repeals by implication." McVey v. McVey 51 Mo. 406, l.c. 420. The propositions applicable to filling stations are applicable to bulk stations, because they are part of the same ultimate transaction. Having the right to inspect, the Department of Labor and Industrial Inspection has a right to collect an inspection fee, under Section 13219, R. S. 1929, Mo. Stat. Ann. page 4779.

CONCLUSION

It is our opinion that the Department of Labor and Industrial Inspection has a right to inspect and collect an inspection fee from gasoline filling stations and bulk plants.

Respectfully submitted,

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APPROVED:

W. J. BURKE
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