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State of Louisiana
DEPARTMENT OF JUSTICE
P.O. BOX 94005
BATON ROUGE
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OPINION 12-0227

55-B INTOXICATING LIQUORS- Permits, Licenses & Fees
55-C INTOXICATING LIQUORS- Power to control and
validity of regulation.

Troy Hebert, Commissioner
Louisiana Office of Alcohol & Tobacco
Control
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La. R.S. 26:2 La. R.S. 40:607
La. R.S. 26:241 La. R.S. 40:636
La. R.S. 26:421

Wine ice cream is considered an alcoholic beverage and is therefore subject to the regulatory provisions of Title 26. However, because ice cream containing any alcohol is an adulterated food and the sale of adulterated foods is prohibited by La. R.S. 40:636, wine ice cream may not be sold in the State of Louisiana.

Dear Mr. Hebert:

Our office received a request from you concerning whether Mercer's Wine Ice Cream is considered an alcoholic beverage subject to the provisions of Title 26 of the Louisiana Revised Statutes which requires that a manufacturer obtain a permit from the Office of Alcohol and Tobacco Control prior to engaging in business in the state of Louisiana.¹ Your request letter indicates that Mercer's Wine Ice Cream is an ice cream product manufactured by Mercer's Dairy located in Boonville, New York. The ice cream includes alcohol (wine) of various volumes, up to five percent.

The Alcoholic Beverage Control Law is found in Chapter 1 of Title 26 and defines "alcoholic beverage" as "any fluid or solid capable of being converted into fluid, suitable for human consumption and having an alcoholic content of more than six percent by volume, including alcohol."² Because the alcoholic content of Mercer's Wine Ice Cream is less than six percent by volume, it does not meet the definition of "alcoholic beverage" set forth in Chapter 1 of the Alcoholic Beverage Control Law and the provisions and permit requirements under Chapter 1 of Title 26 do not apply.

The Alcoholic Beverage Control and Taxation Law is found in Chapter 2 of Title 26 and states:

¹ See La. R.S. 26:71 and La. R.S. 26:271.

² La. R.S. 26:2 (1).

(1) "Alcoholic beverages" means any fluid or any solid capable of being converted into fluid, suitable for human consumption, and containing more than one-half of one percent alcohol by volume, including malt, vinous, spirituous, alcoholic or intoxicating liquors, beer, porter, ale, stout fruit juices, cider, or wine.

(a) "Beverages of low alcoholic content" means alcoholic beverages containing not more than six percent alcohol by volume.

(b) "Beverages of high alcoholic content" means alcoholic beverages containing more than six percent alcohol by volume.³

Based upon the facts you provided to our office, Mercer's Wine Ice Cream contains alcohol up to five percent by volume and is a solid capable of being converted into a fluid suitable for human consumption. Therefore, it meets the definition of "beverages of low alcoholic content" under La. R.S. 26:241 (1). However, La. R.S. 26:421 (2) provides that the provisions contained in Chapter 2 of Title 26 do not apply to the sale of flavoring extracts, syrups, and food products.

The Alcoholic Beverage Control and Taxation Law does not define the word "food" or "food product" for the purposes of the exemption contained in La. R.S. 26:421. The rules of statutory construction instruct that "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the language."⁴ "The words of a law must be given their generally prevailing meaning."⁵ Webster's dictionary defines the word "food" as:

material consisting of carbohydrates, fats, proteins, and supplementary substances (as minerals vitamins) that is taken or absorbed into the body of an organism in order to sustain growth, repair, and all vital processes and to furnish energy for all activity of the organism.⁶

We also note that "ice cream" is defined by the Food and Drug Administration as:

a food produced by freezing, while stirring, a pasteurized mix consisting of one or more of the optional dairy ingredients specified in paragraph (b) of this section, and may contain one or more of the optional caseinates specified in paragraph (c) of this section subject to the conditions hereinafter set forth....⁷

³ La. R.S. 26:241.

⁴ La. R.S. 1:3.

⁵ La. C.C. art. 11.

⁶ Webster's Third New International Dictionary, Unabridged 884 (Philip Babcock Gove, Ph.D. ed., G. & C. Merriam Company 1976) (1909).

⁷ 21 C.F.R. § 135.110 (a)(1).

Considering the above definitions we believe "ice cream" is a food product that would ordinarily be exempt from the Alcoholic Beverage Control and Taxation Law; however, La. R.S. 26:241 further provides in subsection "C" that:

No one shall knowingly sell any of the above exempt products for beverage purposes or under circumstances from which he may reasonably deduce the intention of the purchaser to use them for beverage purposes.⁸

The Louisiana Office of Alcohol and Tobacco Control previously found that Mercer's Wine Ice Cream would be regulated under Title 26 as an alcoholic beverage.⁹ This finding clearly indicates the Office of Alcohol and Tobacco Control believes ice cream containing alcohol may be used by the purchaser for beverage purposes.

The doctrine of contemporaneous construction is a well recognized tool of statutory interpretation. It provides that when an administrative body has over a long period of time placed an interpretation upon a legislative enactment, the interpretation of said body is entitled to great weight in the determination of the meaning of the legislative enactment.¹⁰

Based on the doctrine of contemporaneous construction, we defer to the decision of the Office of Alcohol and Tobacco Control and find that ice cream containing alcohol is an alcoholic beverage of low alcoholic content subject to regulation under Title 26.

Your request letter also expresses concern that ice cream containing alcohol may be an adulterated food under Chapter 4 of Title 40 which governs Public Health and Safety. Louisiana Revised Statute 40:636 prohibits the introduction into commerce, delivery for introduction into commerce, receipt in commerce, or the possession in any place where sales are made to the public any food that is adulterated. Louisiana Revised Statute 40:607 (A) (11) states:

A. A food is considered adulterated if it has been found to be such by any department of the United States government, or ... (11) if it is a confectionary **or ice cream that contains any alcohol**, resinous glaze, or nonnutritive substance, except harmless coloring, harmless resinous glaze, harmless flavoring, natural gum, and pectin; provided, that this Paragraph shall not apply to any confectionary by reason of its containing

⁸ La. R.S. 26:421 (C).

⁹ See Correspondence dated July 27, 2007, from Commissioner Murphy J. Painter to Mercer's Dairy, which states: "please be advised that, according to our research and the information supplied in your faxed correspondence, Mercer's wine ice cream would be considered an alcoholic beverage for purposes of Title 26 of the Louisiana Revised Statutes."

¹⁰ *Ouachita Parish School Board v. Ouachita Parish Supervisors Association et al.*, 362 So.2d. 1138, 1142 (La.1978); *Washington v. St. Charles Parish School Board*, 288 So.2d 321, 323 (La.1971).

less than ten percent by volume of alcohol or to chewing gum by reason of its containing harmless nonnutritive masticatory substance.

[Emphasis added.]

Although La. R.S. 40:607 provides an exception for confectionaries containing alcohol it does not provide an exception for ice cream containing alcohol. Under La. R.S. 40:607 an ice cream containing any alcohol is an adulterated food. Louisiana Revised Statute 40:636 prohibits:

(1) The introduction or delivery for introduction into commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(2) The adulteration, or misbranding, of any food, drug, device, or cosmetic in commerce.

(3) The receipt in commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof in the original unbroken package for pay or otherwise.

(4) The forging, counterfeiting, simulating, or falsely representing or, without proper authority, using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under the provisions of this Part.

(5) The possession in any place where sales or service is made to the public of any food, drug, device or cosmetic that is adulterated or misbranded.

(6) The using by any person to his own advantage, or the revealing, other than to the department, its officers or employees, or to the courts when relevant in the trial of any case under this Part, any information acquired under authority of R.S. 40:612 through R.S. 40:615 or R.S. 40:631 concerning any method or process which, as a trade secret, is entitled to protection.

[Emphasis added.]

We note that wine ice cream is relatively new to the market, and some states such as New York have amended their laws to deal with this unique product.¹¹ If Mercer's Wine Ice Cream or similar products are to be sold in the State of Louisiana it will have to be addressed by the legislature as ice cream containing any alcohol currently meets the definition of adulterated food contained in La. R.S. 40:607.

¹¹ See NY AGRIC. & MKTS. § 200 (14); NY ALCO. BEV. CONT. § 3 (1); and NY PUB. HEALTH § 1352-C.

We hope that this opinion has addressed the questions you have raised regarding the regulation of wine ice cream. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

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BY: 
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JDC: EGA