

4499.

DEPARTMENT OF LIQUOR CONTROL—AMOUNT OF WINE TAX STAMPS TO BE AFFIXED TO WINE CONTAINER—REFUND FOR UNUSED STAMPS—FIXING RETAIL SELLING PRICE OF WINE.

SYLLABUS:

1. *If the Department of Liquor Control fixes the retail selling price for wine, as provided by section 6064-8, General Code, the price so fixed determines the amount of wine tax stamps which must be affixed to the container of wine as required by section 6064-41, General Code. In the event the Department of Liquor Control does not fix the retail selling price for wine as required by law, the actual selling price received by a retailer at the time of sale determines the amount of wine tax stamps that must be affixed to the container of wine.*

2. *By virtue of the provisions contained in sections 6064-42 and 6212-49e, General Code, the Treasurer of the State of Ohio can make a refund for unused or spoiled wine tax stamps to a purchaser of such stamps, from moneys appropriated by the legislature for such purposes.*

Wine tax stamps which, after being affixed to a container and cancelled as required by law, are removed by the retailer of wine before the container of wine is sold, because the selling price as fixed by the retailer, where the Department of Liquor Control has failed to fix a retail selling price, is lower at the time of sale than at the time the stamps were affixed, may be redeemed by the Treasurer of State as unused stamps.

COLUMBUS, OHIO, August 2, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your letter which reads in part as follows:

“In the administration of the taxation provisions of the Liquor Control Act—especially Sections 6064-41, 6064-42 and section 6064-45 relating to the taxation of the sale or distribution of wine, questions have arisen as follows, viz:

1. As to whether the phrase, ‘retail selling price,’ as employed in said Section 6064-41, Ohio General Code, shall be construed to mean, ‘the ordinary, customary or usual price,’ paid for wine by the consumer generally *at the time of the affixation of the stamps*, to the containers thereof as required under the provisions of said Sections 6064-42 and 6064-45, Ohio General Code, or shall such phrase be

construed to mean, 'the ordinary, customary or usual price, actually realized from the sale of such wine.'

2. If the said phrase shall be construed to mean 'the ordinary, customary or usual price' paid for wine by consumers generally *at the time of the affixation of the stamps* as provided in said sections 6064-42 and 6064-45, and such wine, after having been so stamped, is *later sold in substantial quantities and at a substantially lower level of price than indicated by the stamps affixed to the containers thereof*, is there any authority under the law for refund of the difference between the tax as indicated by the stamps so affixed to such containers and the tax as computed upon the price level actually realized from the sale of the wine?

3. If wine, to the containers of which there have been affixed stamps as indicated in sub-paragraph (2), is actually sold at a level appreciably in excess of the price as indicated by the stamps so affixed to such containers, is the excess of the price so realized over and above the price indicated by the stamps so affixed subject to the tax of ten per centum levied under the provisions of section 6064-41, Ohio General Code?

The question of subparagraph (2) is now brought up specifically by several taxpayers, and notably by the Standard Drug Company of Cleveland. This company with its chain of retail stores has paid over four hundred dollars under protest against a charge based upon the retail price set at the time of receipt rather than the much lower price at which certain wines were later sold.

It appears probable that the period of greatest fluctuation in wine prices has passed, but no doubt some substantial fluctuations are inevitable. The turnover of wine in the hands of retail dealers is sometimes quite slow."

Sections 6064-8 and 6064-41, General Code, as amended in Amended Substitute Senate Bill No. 2 enacted by the 91st General Assembly, are pertinent to your inquiry. Section 6064-8, General Code, reads in part as follows:

"The department of liquor control shall have all the powers and duties vested in and imposed upon a department * * *. The powers of the board of liquor control * * * shall be exercised by the board in the name of the department. In addition thereto, the department shall have and exercise the following powers:

* * *

6. For the purpose of carrying out the provisions of this section, to determine the retail selling price as defined in * * * the liq-

uor control act of each brand and class of wine offered for sale in this state. The determinations of the department under this paragraph shall be certified to the tax commission of Ohio and shall be posted, filed, and published in the manner provided in * * * section 6064-3 of the General Code with respect to rules, regulations and orders of the board of liquor control. The commission and all *persons whose duty it is under * * * the liquor control act to affix stamps for the payment of the tax on the sale of wine, imposed by * * * the liquor control act, shall be guided by such determinations in the administration and observance of said taxing provisions.* Any holder of a permit deeming himself aggrieved thereby may appeal from the determination of the department to the board of liquor control, whose decision thereon shall be final." (Italics the writer's).

Section 6064-41, General Code, provides:

"For the purpose of providing revenues for the support of the state, a tax is hereby levied on the sale or distribution in Ohio of wine, excepting for known sacramental purposes, and prepared and bottled highballs, cocktails and other mixed beverages, at the rate of ten per centum of the retail selling price thereof. Only one sale of the same article shall be used in computing the amount of tax due hereunder. For the purposes of this section and of section * * * 6064-42 to 6064-49, both inclusive, * * * of the General Code, the term 'retail selling price' means the ordinary, customary, or usual price paid by the consumer and the words 'sale' and 'sell' include exchange, barter, gift, offer for sale and distribution."

Under the provisions of section 6064-15, General Code, as amended by the 91st General Assembly, wine may be sold at retail for consumption on the premises where sold and for home use, by the holder of an A-2 permit (permit to manufacture wine), for home use by the holder of a D-2 permit (permit to distribute wine at wholesale), by the package for consumption off the premises where sold by the holders of C-2 and D-2 permits (permits to sell wine at retail), for consumption on the premises where sold by holders of D-2, D-3, D-4 and D-5 permits (permits to sell wine at retail).

On a reading of that part of section 6064-8, quoted herein, and section 6064-41, General Code, it is evident that the legislature intended to have the retail selling price of wine fixed by the Department of Liquor Control before the same was offered for sale in Ohio by the various permit holders authorized to sell wine at retail. The phrase "at retail" is defined in section 6064-1, General Code, as amended by the 91st General Assembly in Amended Senate Bill No. 2, as follows:

“The term ‘at retail’ means for use or consumption by the purchaser and not for resale.”

The phrase “retail selling price”, as used in section 6064-8 and 6064-41, is defined in the latter section to mean:

“The ordinary, customary or usual price *paid* by the consumer.”
(Italics the writer’s).

Under the provisions of section 6064-8, General Code, it is the duty of the Department of Liquor Control to determine and fix the retail selling price for each brand and class of wine which is to be offered for sale in Ohio. This, I am informed, the Department has not done. Once the retail sale price for wine is fixed by the Department of Liquor Control, the same determines the tax that is to be levied and paid on the sale of such beverage at retail. Such determination by the Department of Liquor Control would make it possible for a manufacturer, wholesale distributor or retailer of wine to comply with the provisions of sections 6064-42, 6064-45, 6212-49c and 6212-49e, General Code, in the matter of affixing and canceling wine stamps and possessing bottled wine with such stamps being affixed.

Section 6064-42, General Code, provides in part as follows:

“The tax hereby imposed shall be paid by the purchase of stamps. Such stamps shall be designed or procured and sold, purchased, affixed to each bottle or other container, and cancelled in the manner and at the time provided in sections 6212-49c to 6212-49g, both inclusive, of the General Code, relating to the tax imposed upon the sale of bottled beverages; excepting that the commission may by regulations provide that the denominations of such stamps shall represent the retail selling price of the wine, the sale of which is taxed thereby, instead of the amount of the tax thereon. The commission, the treasurer of state, the auditor of state, and county treasurers shall have and exercise with respect to the administration of the tax imposed by this act, all the powers and duties vested in or imposed upon said commission and other officers named herein by the provisions of said sections of the General Code; and manufacturers and bottlers of, and wholesale and retail dealers in wine, and railroad companies, express companies and other public carriers transporting shipments of wine shall be subject to, with respect to the tax hereby imposed, the same duties, and entitled to the same privileges as are provided by any of said named sections of the General Code.”

Section 6064-45, General Code, reads as follows:

“Whoever, being a retail dealer in this state, has in his possession bottled wine not bearing the stamps required to be affixed to each bottle; or fails to produce, upon demand by the commission, invoices of all wine purchased or received by him within two years prior to such demand, unless upon satisfactory proof it is shown that such non-production is due to providential or other causes beyond his control, shall be fined not less than twenty-five dollars nor more than one hundred dollars.”

Section 6212-49c, General Code, reads in part as follows:

“Unless the bottle in which a beverage is offered for sale in this state has been sealed with a crown procured and affixed as herein provided, a stamp shall be affixed to each such bottle of an aggregate denomination not less than the amount of the tax upon the contents thereof. The stamp or stamps, so affixed, shall be prima facie evidence of payment of the tax imposed by sections 6212-49a to 6212-49t, both inclusive, of the General Code. Excepting as may be otherwise provided in the rules and regulations prescribed by the commission under authority of sections 6212-49a to 6212-49t, both inclusive of the General Code, each manufacturer or bottler of beverages in this state shall, within twenty-four hours of the time of its manufacture or bottling in this state, and prior to delivery of any bottle to any wholesaler, jobber, retailer, distributor, or any other person whatsoever in this state, affix such stamps to each such bottle, unless a crown has been affixed thereto as herein provided, and cancel the stamp or stamps so affixed by writing across the face thereof the name of such manufacturer or bottler and the date of cancellation.

Excepting as may be otherwise provided in the rules and regulations prescribed by the commission under authority of sections 6212-49a to 6212-49t, both inclusive, of the General Code, and unless such stamps or crowns have been previously affixed, such stamps shall be so affixed by each wholesale dealer in this state and cancelled, by writing across the face thereof the name of such wholesale dealer and the date of cancellation, within twenty-four hours after such bottled beverage comes into the possession of such wholesale dealer and prior to the delivery of any bottle to any retail dealer or other person in this state.

Each retail dealer in this state shall immediately upon the receipt of any bottled beverage at his place of business, and prior to

disposing of the same in any way, so affix such stamps to each bottle unless such stamps or crowns shall have been previously affixed thereto and shall cancel the same by writing or stamping his name and the date of cancellation across the face thereof.

Whenever any bottled beverage is found in the place of business of a retail dealer without the stamps or crowns so affixed and cancelled, the prima facie presumption shall arise that such bottled beverage is kept therein in violation of the provisions of sections 6212-49a to 6212-49t, both inclusive, of the General Code."

Section 6212-49e, General Code, reads in part:

"The commission shall have authority to promulgate such rules and regulations as it may deem necessary to carry out the provisions of sections 6212-49a to 6212-49t, both inclusive, of the General Code, and may adopt different detailed regulations applicable to diverse methods and conditions of sale of bottled beverages in this state, prescribing, in each class of cases, upon whom, as between the manufacturer or bottler, the wholesale dealer and the retail dealer, the primary duty of affixing stamps shall rest, in cases in which stamps are required, and the manner in which stamps or crowns shall be affixed. A copy of such regulations shall be furnished to each proper holder in this state in such manner as the commission may determine. Any such rule or regulation so furnished, excusing a manufacturer or a wholesale dealer from affixing stamps under the circumstances of the particular case, shall be a defense in the prosecution of such dealer for violation of section 6212-49m of the General Code."

Unless the retail selling price is fixed by the Department of Liquor Control, as required by section 6064-8, General Code, it is apparent that it is impossible for a manufacturer, wholesale distributor or retailer of wine to conform to or comply with the requirements of section 6212-49c, General Code, in respect to the affixing and cancelling of wine stamps. This is particularly true in respect to a manufacturer or wholesale distributor of wine because such persons are in no position to determine the retail selling price of their product or to know what price a retailer will charge for his wine when it is sold at retail. Likewise, failure of the Department of Liquor Control to determine and fix the retail selling price of wine places the retail dealer in a difficult position in so far as complying with the requirements of section 6064-45, General Code, is concerned. In order to comply with that section, it is necessary that a retailer fix a price for wine which price may not be the actual selling price of the wine at the time the wine is sold, by him. However, there is no provision in sections 6212-49c to 6212-49g, inclusive,

or in the liquor control act which provides or requires that a retailer of wine shall determine or fix the price of wine before the same is offered for sale in Ohio. From a reading of all the pertinent statutes quoted and cited herein, it is quite evident that it was the legislative scheme, in so far as the taxing of the sale of wine in Ohio was concerned, to have the Department of Liquor Control predetermine the retail price at which each brand and class of wine was to be sold and that the amount of the tax to be paid on such sale was to be based on the selling price affixed by the Department of Liquor Control. In the event the selling price was fixed by the Liquor Control Department, it could then be said that the phrase "retail selling price", as used in section 6064-41, General Code, meant the price which was expected to be paid for the wine at the time of sale and that the expected selling price was to determine the amount of stamps which was to be affixed to the container of wine while in the possession of the retailer for the purpose of sale and that this price and not the actual sale price determined the amount of wine stamps to be affixed to the container. Thus it would follow that where the Department of Liquor Control has failed to fix the retail selling price for wine, a retailer could fix the retail selling price and such determination could be made at the time the sale actually took place and tax stamps affixed to the container in an amount equal to such selling price. Inasmuch as the tax provided for in section 6064-41, General Code, is a tax on the sale of wine and not on the act of manufacturing, processing or possessing wine, there is no reason why a retailer of wine cannot fix the selling price for such wine at the time of sale and pay the required tax on such actual selling price of wine, providing of course the Department of Liquor Control has not fixed the price as required by section 6064-8, General Code. If the retailer, in order to comply with section 6064-45, General Code, has predetermined the price for which the wine is to be sold and has affixed the necessary wine stamps to the container of wine and subsequently sells the wine at a lower price, the stamps that should be affixed would be in the amount equal to the lower selling price. If the wine is sold at a higher price than the predetermined price previously fixed by the retailer, it would be necessary for the retailer to affix the required amount of additional stamps to the container.

Under the provisions of sections 6064-42 to 6212-49e, General Code, the Treasurer of the state of Ohio is authorized to redeem and pay for any unused or spoiled stamps. Section 6064-42, General Code, reads in part:

"The treasurer of state shall pay for redeemed stamps issued pursuant to this act and shall make refunds pursuant to this act from an appropriation to him for the purpose of defraying the expense of administering this act.

In addition to the refunds authorized by the sections of the General Code mentioned in this section, under the circumstances

therein named, the holder of a class G permit and/or permit B-3 shall be entitled to a refund of the actual amount of tax paid on sales of wine for sacramental purposes, upon condition that he make affidavit that such wine was so sold, and furnishes from the purchaser a written acknowledgment that he has received such wine, and that the price paid therefor does not include the amount of the tax, together with a statement showing the face value of the stamps on the containers of wine so received, and the name and address of the purchaser."

Section 6212-49f, General Code, reads in part:

"The treasurer of state shall redeem and pay for any unused or spoiled stamps or crowns on written verified requests made by the purchaser, his administrators, executors, successors, or assigns. Such payment shall be made from an appropriation to the state treasurer for the purpose of defraying the expenses of administering sections 6212-49a to 6212-49t, both inclusive, of the General Code."

In construing a statute containing provisions similar to the provisions in section 6212-49e, this office in an opinion to be found in the Opinions of the Attorney General for 1933, at page 178, held that a cigarette tax stamp was not used until the package to which it had been affixed had been sold and delivered to the consumer. The statute considered in that opinion read in part as follows:

"Section 9 of the act states:

"* * * The Treasurer of State shall redeem and pay for any unused stamps on written verified requests made by the purchaser, his administrators, executors, successors, or assigns.* * *"

The syllabus of that opinion reads:

"Under section 5894-9, General Code, the Treasurer of State has authority to redeem and pay for cigarette stamps that have been sold to purchasers in accordance with provisions of the cigarette law, out of the cigarette tax fund when said stamps have been purchased, affixed to packages of cigarettes and cancelled, but due to the fact that the cigarettes contained in said packages have become stale or old on the shelves of the wholesaler or retailer, have been separated from the unsold packages upon which they were originally affixed."

In the course of my opinion, I said, at page 181, that:

“Since the tax is on the sale of cigarettes, it would seem to follow that until such sale, no tax should rightfully be collected by the State. However, in order to facilitate the collection of the tax, the legislature provided for the sale of stamps to wholesalers and others and for the affixing of such stamps to cigarette packages prior to their sale by wholesalers or retailers. Evidently recognizing the fact that it had provided that stamps purchased by dealers had to be affixed to the packages of cigarettes by wholesalers or by retailers within twenty-four hours after receipt by said retailers and prior to the sale of such cigarettes, under the provisions of section 3 of the act (section 5894-3, General Code, and that the tax was imposed on the sale of cigarettes, it would seem reasonable that the legislature considered that if the stamps should become torn, mutilated or spoiled or the packages of cigarettes to which the stamps were affixed would never be sold, it would be only just that the purchaser of the stamps be reimbursed.

The word ‘use’ is defined in Webster’s New International Dictionary as ‘To make use of; to convert to one’s services; to avail one’s self; to employ.’ Hence, the word ‘unused’ means ‘Not made use of’ or ‘Unemployed.’ As the tax is on the ‘sale of cigarettes,’ it seem reasonable that the legislature in inserting the word ‘unused’ before ‘stamps’ in section 5894-9, General Code, meant stamps affixed to packages that had not been sold.”

In view of the conclusion reached in that opinion and the provisions of section 6212-49e, General Code, it follows that so long as the Department of Liquor Control fails to fix the usual selling price for the purpose of tax in accordance with section 6064-8, General Code, a retailer of wine would be entitled to a refund of the difference between the tax as indicated by the stamps affixed to the container at the time the retailer fixed the price for such wine and the tax as computed upon the selling price actually realized from the sale of wine. However, under such circumstance, the excessive wine stamps would have to be removed from the container before the retailer would be entitled to a refunder as provided in section 6212-49e, General Code.

It should be observed that when the Department of Liquor Control fixes the usual selling price of wine, then there would be no authority for such refunds when wine is sold at less than the price fixed by such Department. Clearly, when wine is given away, it is a sale as defined by the legislature, for the purpose of this tax and such wine is undoubtedly taxable upon the basis of selling price fixed by such Department; this is true because the act makes the basis upon which the tax is computed the ordinary, customary or usual price as fixed by the Department of Liquor Control. It is only in the absence of a price being so fixed that there is justification for taxing these sales upon the actual selling price.

Summarizing, it is my opinion that:

1. If the Department of Liquor Control fixes the retail selling price for wine, as provided by section 6064-8, General Code, the price so fixed determines the amount of wine tax stamps which must be affixed to the container of wine as required by section 6064-41, General Code. In the event the Department of Liquor Control does not fix the retail selling price for wine as required by law, the actual selling price received by a retailer at the time of sale determines the amount of wine tax stamps that must be affixed to the container of wine.

2. By virtue of the provisions contained in sections 6064-42 and 6212-49e, General Code, the Treasurer of the State of Ohio can make a refund for unused or spoiled wine tax stamps to a purchaser of such stamps, from moneys appropriated by the legislature for such purposes.

Wine tax stamps which, after being affixed to a container and cancelled as required by law, are removed by the retailer of wine before the container of wine is sold, because the selling price as fixed by the retailer, where the Department of Liquor Control has failed to fix a retail selling price, is lower at the time of sale than at the time the stamps were affixed, may be redeemed by the Treasurer of State as unused stamps.

Respectfully,

JOHN W. BRICKER,

Attorney General.

4500.

BOARD OF EDUCATION—REGISTRATION OF SCHOOL BUSES—DRIVER MUST BE REGISTERED AS CHAUFFEUR—SCHOOL BUSES EXEMPT FROM MOTOR VEHICLE LICENSE TAX—PHYSICAL EXAMINATION OF SCHOOL BUS DRIVERS.

SYLLABUS:

1. *A person employed by a board of education to drive a motor vehicle for the transportation of school children to and from school must be duly registered as a chauffeur, in accordance with Section 6302, General Code.*

2. *Motor vehicles, however owned, having a seating capacity of more than five persons, exclusive of the driver, and used exclusively to transport school children attending any grades embraced within those of a high school or an elementary school or kindergarten, to and from school or to and from any school function, whether the school attended be a public or private school or the school function be one of a public or private school, are exempted from*