

OPINION NO. 70-092

Syllabus:

1. The term "sale" within the phrase, "sales of motor vehicles," as used in Section 5739.021, Revised Code (133 Ohio Laws H 855, effective July 7, 1970), is defined by Section 5739.01 (B), Revised Code, inter alia, to include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted, for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental.

2. The term "acquired" within the phrase, "motor vehicles acquired," as used in Section 5741.021, Revised Code (133 Ohio Laws H 855, effective July 7, 1970), refers to the acquisition of title or possession, or both, of a motor vehicle resulting from and pursuant to a retail sale transaction subject to the tax imposed by Section 5739.021, Revised Code, which would include the acquisition of a motor vehicle by transfer of possession via lease or rental agreements.

3. The county tax levied pursuant to Section 5741.021, Revised Code, shall be due and payable in and to the county in which the original storage, use, or consumption of the motor vehicle was made in this State, provided such county has, by resolution of the county commissioners, levied such tax.

4. The county tax levied pursuant to Section 5741.021, Revised Code, shall not be applicable to any storage, use, or consumption in any county other than the county in which the original storage, use, or consumption of the motor vehicle was made in this State, provided such tax has been paid or would have been paid had the county in which the original storage, use, or consumption of the property was made in this State levied a tax pursuant to Sections 5739.021 and 5741.021, Revised Code, on the property.

5. The county use tax is to be determined upon the full price of the transaction. The tax shall, as regards rentals, be measured by the total of the installments thereof that are involved in such transaction. There is no statutory authority for allocating the county use tax paid between counties based upon multi-county storage, use, or consumption of property.

6. For purposes of determining the applicability of the county use tax provided by Section 5741.021, Revised Code, the county of "original storage, use, or other consumption" is a question to be determined from the surrounding facts in each situation.

7. The nexus for county sales and use taxation pursuant to Sections 5739.021 and 5741.021, Revised Code, is predicated and determined upon a "per transaction" basis. The determination of whether one or more transactions are involved is to be made with reference to the surrounding facts.

To: G. W. Porterfield, Tax Commissioner, Columbus, Ohio
By: Paul W. Brown, Attorney General, July 24, 1970

Your request for my opinion sets forth the following questions pertaining to Amended House Bill No. 855, enacted by the 108th General Assembly:

"(1) Do the terms 'sales of motor vehicles' in Section 5739.021 and 'motor vehicles acquired' in 5741.021 refer only to transactions wherein title is transferred or do they include also transfers of possession by way of leases or rentals?

"(2) If the terms identified above include leases or rentals, what constitutes a 'use, storage, or other consumption' of motor vehicles in a county levying the tax?

"(3) Can a 'use, storage, or other consumption' of motor vehicles be restricted to either the county in which the lessor is located or the lessee's county of residence, or would it occur also in any county in which the lessee operates the vehicle? For example, the lessor is located in A county, lessee's residence is B county, the vehicle is also used in C and D counties, and all four counties have levied the tax.

"(4) If the 'use, storage, or other consumption' occurs in any county where the vehicle is operated, would all such tax levying counties be entitled to the tax on the full rental price or is there a basis for allocating the rental price as the tax base between taxing counties, or portions of the rental price between taxing and non-taxing counties, from the standpoint of both the seller who must collect the tax and the state with its obligation to return the proper revenues to the counties?

"(5) If leases or rentals are involved, how is the term "acquired" to be construed so as to determine the status of transactions predicated upon agreements entered into prior to May 1, 1970 but where the lessee remains in possession, as for example in a month to month agreement?"

The Ohio sales tax is provided by Chapter 5739, Revised Code, the Ohio use tax is provided by Chapter 5741, Revised Code. It may be appropriate to remark that the "use tax" is complementary or supplemental to the "sales tax" and is not

designed to duplicate it; Celina Mutual Ins. Co. v. Bowers, 5 Ohio St. 2d 12 (1965). The Ohio sales tax and the Ohio use tax are both excise taxes; Sections 5739.02 and 5741.02, Revised Code.

In the opinion of Celina Mutual Ins. Co. v. Bowers, supra, the Court stated:

"* * * the Ohio sales and use taxes are on transactions-- the exercise of a privilege, viz., the right to acquire and use tangible personal property, and they apply only to the transactions by which that privilege is exercised. * * *"
(Emphasis by Court)

Your inquiry is in reference to the taxation of transactions involving motor vehicles.

Section 5739.02, Revised Code, reads in part:

"* * * an excise tax is hereby levied on each retail sale made in this state.

* * * * * * * *

"In the case of a sale, the price of which consists in whole or in part of rentals for the use of the thing transferred, the tax shall, as regards such rentals, be measured by the installments thereof."

Section 5739.01, Revised Code, as pertinent here, reads in part:

"As used in sections 5739.01 to 5739.31, inclusive, of the Revised Code:

* * * * * * * *

"(B) 'Sale' and 'selling' include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted; * * * for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever;

* * * * * * * *

Amended House Bill No. 355, enacted by the 108th General Assembly, effective July 7, 1970, amended, inter alia, Sections 5739.021 and 5741.021, Revised Code, which now read in pertinent part:

Sec. 5739.021. "For the purpose of providing additional general revenues for the county and paying the expenses of administering such levy, any county may levy a tax at the rate of one-half of one per cent in addition to the tax imposed by section 5739.02 of the Revised Code upon every retail sale, ex-

cept sales of motor vehicles, made in the county. * * *"

Sec. 5741.021. "For the purpose of providing additional general revenues for the county and paying the expenses of administering such levy, any county which levies a tax pursuant to section 5739.021 of the Revised Code shall levy a tax at the same rate levied pursuant to section 5739.021 of the Revised Code on the storage, use, or other consumption in the county of motor vehicles acquired on or after the effective date of this act by a transaction subject to the tax imposed by section 5739.02 of the Revised Code and, in addition to that imposed by section 5741.02 of the Revised Code, on the storage, use, or other consumption in the county of tangible personal property which is subject to the tax levied by this state as provided in section 5741.02 of the Revised Code. * * *"

The word "sale" within the phrase "sales of motor vehicles" is defined by Section 5739.01, supra, and as defined includes transactions wherein title is transferred and transfers of possession by way of leases or rentals.

Section 5741.02, supra, reads in pertinent part:

"* * * an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property,
* * *"
(Emphasis added)

Section 5741.01, Revised Code, reads in pertinent part:

"As used in sections 5741.01 to 5741.22, inclusive, of the Revised Code:

* * * * * * * *

"(B) 'Storage' means and includes any keeping or retention in this state for use or other consumption in this state.

"(C) 'Use' means and includes the exercise of any right or power incidental to the ownership of the thing used."

The word "consumption" not being expressly defined in Section 5741.01, supra, and being a word of common use, such word must be given its plain and ordinary meaning. It may be interpreted eiusdem generis with reference to the adjoining words, "storage" and "use." As used in Section 5741.021, supra, the phrase, "storage, use, or other consumption" has the same meaning as such phrase is used in Section 5741.02, supra.

Section 5741.021, supra, reads in part:

"* * * any county which levies a tax pursuant to section 5739.021 of the Revised Code shall levy a tax at the same rate levied

pursuant to section 5739.021 of the Revised Code on the storage, use, or other consumption in the county of motor vehicles acquired * * * by a transaction subject to the tax imposed by section 5739.02 of the Revised Code * * *
(Emphasis added)

Based upon the portion of Section 5741.021, supra, above quoted, I conclude that the county tax levied is limited to transactions which are subject to the sales tax imposed by Section 5739.02, supra, i.e., for which sales tax is due the State of Ohio. Transactions not subject to the sales tax imposed by Section 5739.02, supra, for whatever reason, cannot otherwise be subject to the county use tax imposed by Section 5741.021, supra.

Transactions subject to the sales tax imposed by Section 5739.02, supra, are or are not subject to a properly adopted county use tax pursuant to Section 5741.021, supra, dependent upon the facts involved in each individual situation.

Section 5741.021 (C), supra, pertinent here, reads as follows:

"The tax levied pursuant to this section shall not be applicable to any storage, use, or consumption of property not within the taxing power of a county under the constitution of the United States, or the constitution of this state or to property on which a tax levied by a county pursuant to section 5739.021 or 5741.021 of the Revised Code has been paid or would have been paid had the county in which the original storage, use, or other consumption of the property was made in this state levied a tax pursuant to such sections on the property."
(Emphasis added)

A county may impose the county use tax adopted pursuant to Section 5741.021, supra, on a transaction involving the storage, use, or other consumption of tangible personal property in the county when such county is the county in which the original storage, use, or consumption was made in this State; or when such county in which the original storage, use or consumption of the property occurred has adopted the county use tax authorized by Section 5741.021, supra, but has failed to require the payment of such tax.

In response to your third question, the nexus for purposes of county use tax is neither the county in which the lessor is located nor the lessee's county of residence, as such, even though such factors may reflect upon the lessee's intended county of original storage, use or other consumption of the motor vehicle involved. The county of "original storage, use or other consumption" is to be determined by reference to the county where the actual storage, use or other consumption of the property occurs. Upon determination of the county of original storage, use or other consumption, such county, assuming such county has levied the county use tax, is entitled to impose the county use tax upon the full price involved in the transaction subject to the tax imposed by Section 5739.02, supra.

In response to your fourth question, even though a motor vehicle is or may be intended to be stored, used or otherwise consumed in various counties, the original county would be entitled to impose the tax and the tax having been based upon the full rental price, is not then subject to the imposition of such tax by any other county with reference to this same transaction. Each taxable "sale" transaction, of course, is subject to the imposition of the county use tax providing the statutory nexus is met. There is no provision for allocating any county use tax between counties based upon multi-county storage, use or other consumption.

Your fifth question refers to the term "acquired." Such term is used in connection with sales tax transaction referred to in Section 5741.021, supra:

"* * * shall levy a tax * * * on the storage, use or other consumption in the county of motor vehicles acquired on or after the effective date of this act by a transaction subject to the tax imposed by section 5739.02 of the Revised Code * * *"

Sales transactions, via leases, rentals, or otherwise, consummated prior to the effective date of this Act (July 7, 1970) are not, by the terms of Section 5741.021, supra, as amended, effected by or subject to the county use tax as enacted by Amended House Bill No. 855, here involved. Prior sales of motor vehicles remain subject to the prior provisions of Sections 5739.021 and 5741.021, supra. The nexus for county sales and use taxation is predicated and determined upon a "per transaction" basis. In this frame of reference the determination of whether a single transaction or multiple transactions are involved is to be made with reference to the surrounding facts. In principle such determination will be the same whether sales tax due the State of Ohio pursuant to Section 5739.02, supra, or use tax due a county pursuant to Section 5741.021, supra, is involved.

Based on the foregoing, therefore, it is my opinion and you are hereby advised that:

1. The term "sale" within the phrase, "sales of motor vehicles," as used in Section 5739.021, Revised Code (133 Ohio Laws H 855, effective July 7, 1970), is defined by Section 5739.01 (B), Revised Code, inter alia, to include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted, for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental.

2. The term "acquired" within the phrase, "motor vehicles acquired," as used in Section 5741.021, Revised Code (133 Ohio Laws H 855, effective July 7, 1970), refers to the acquisition of title or possession, or both, of a motor vehicle resulting from and pursuant to a retail sale transaction subject to the tax imposed by Section 5739.021, Revised Code, which would include the acquisition of a motor vehicle by transfer of possession via lease or rental agreements.

3. The county tax levied pursuant to Section 5741.021, Revised Code, shall be due and payable in and to the county in

which the original storage, use, or consumption of the motor vehicle was made in this State, provided such county has, by resolution of the county commissioners, levied such tax.

4. The county tax levied pursuant to Section 5741.021, Revised Code, shall not be applicable to any storage, use, or consumption in any county other than the county in which the original storage, use, or consumption of the motor vehicle was made in this State, provided such tax has been paid or would have been paid had the county in which the original storage, use, or consumption of the property was made in this State levied a tax pursuant to Sections 5739.021 and 5741.021, Revised Code, on the property.

5. The county use tax is to be determined upon the full price of the transaction. The tax shall, as regards rentals, be measured by the total of the installments thereof that are involved in such transaction. There is no statutory authority for allocating the county use tax paid between counties based upon multi-county storage, use, or consumption of property.

6. For purposes of determining the applicability of the county use tax provided by Section 5741.021, Revised Code, the county of "original storage, use, or other consumption" is a question to be determined from the surrounding facts in each situation.

7. The nexus for county sales and use taxation pursuant to Sections 5739.021 and 5741.021, Revised Code, is predicated and determined upon a "per transaction" basis. The determination of whether one or more transactions are involved is to be made with reference to the surrounding facts.