

Upon examination of said abstract of title, the last certification of which is made by the abstractor under date of January 31, 1931, I find that said John F. Frey has a good merchantable title to the above described property, free and clear of all incumbrances except the taxes for the year 1930, which taxes are unpaid and are a lien upon this property. With respect to said taxes for the year 1930, I am advised by the abstractor's certificate that the tax duplicate of said county has not yet been made up and placed in the hands of the treasurer for the collection of taxes, and that the books of the treasurer will not be opened for the collection of taxes until March 1, 1931.

The abstract of title tendered to the state by said John F. Frey has been properly executed and acknowledged by him and by his wife, Louise Frey, and the form of said deed is such that it is sufficient to convey the above described property to the state of Ohio by fee simple title, free and clear of the inchoate dower right of said Louise Frey, and free and clear of all incumbrances whatsoever.

Encumbrance record No. 1125 has been properly executed and approved and the same shows that there is a sufficient balance of unincumbered funds to pay the purchase price of said property, which is the sum of three thousand nine hundred dollars.

It likewise appears that the purchase of the above described property has been approved by the board of control, and that said sum of three thousand nine hundred dollars to pay the purchase price of said property, was released by said board under date of May 5, 1930.

I am herewith returning with my approval, said abstract of title, warranty deed, encumbrance record No. 1125 and certificate of the board of control.

Respectfully,

GILBERT BETMAN,

*Attorney General.*

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2908.

CIGARETTE LICENSE—SELLING AT RETAIL—BUSINESS DISCONTINUED—NO TIME LIMIT FOR FILING CLAIM FOR REFUND—HOW REFUND PAID—PAID BY COUNTY AUDITOR AFTER ANNUAL SETTLEMENT MADE.

SYLLABUS:

1. *Under the provisions of section 5896, General Code, when a person discontinues the business of selling cigarettes at retail, there is no time limit for the filing of a claim for refund of a portion of the assessment paid.*

2. *When a person discontinues the business of selling cigarettes at retail and fails to file a claim for refund until after the county auditor has made his annual settlement with the state, county, township and municipalities as provided by law, a refunder should be made by the county auditor from the general fund, and said fund should be reimbursed by deducting the amount from the proper proceeds in the county treasury credited to the subdivisions sharing in the assessment made, and if there are insufficient funds therein, the amount should be deducted proportionately from the amounts paid said subdivisions at the next tax settlement.*

COLUMBUS, OHIO, February 4, 1931.

HON. RAYMOND E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

“I wish to inquire if there is any limitation on the time within which a person engaged in the retail sale of cigarettes has to apply for a refunder under Section 5896 of the General Code, by reason of the discontinuance of the retail sale of cigarettes.

The facts are that along about March 26, 1930, the owner of a golf club, located in Wood County, made application to the County Auditor for a refund on his retail cigarette license of \$50 paid by him in 1929, stating that he had discontinued the sale of cigarettes on December 1, 1929. He also asked for a rebate on the balance of the year which ended May 26, 1930. He was informed by the County Auditor, in a letter dated March 27, 1930, that it was necessary to make an affidavit as to the date of his discontinuing the retail sale of cigarettes and surrender his license, along with the affidavit to the County Auditor. On September 25th the man brings in an affidavit, dated April 3, 1930, to the effect that he had discontinued the retail sale of cigarettes at his golf club on December 1, 1929.

The County Auditor has made his settlement as to his cigarette license funds for 1929 to the State, and the different political subdivisions, as provided by law. The Auditor now desires to know if the person has forfeited his right to a refunder by his delay in furnishing the affidavit and surrendering the license, or if he should issue a refunder order for the proportionate amount due to the dealer and deduct the same from his next settlement of the cigarette license funds to the State Auditor.

I have read the section and inasmuch as there is no limitation placed as to the time in which the claims shall be presented for refunder, and as we are satisfied that the person making the affidavit is honest in his claim, and that he did discontinue the sale of cigarettes on December 1, 1929, it is my opinion that the Auditor should issue a refunding order and that the amount of the same should be deducted in the next settlement the Auditor has with the State Auditor.”

Section 5896, General Code, to which you refer, reads as follows:

“When the person, firm, company, corporation or co-partnership described in section fifty-eight hundred and ninety-four, which has been so assessed, and which has paid or is charged upon the tax duplicate with the full amount of such assessment, discontinues such business, the county auditor shall issue to such person, firm, company, corporation or co-partnership, a refunding order for a proportionate amount of the assessment. Provided, that the amount of such assessment retained in the county treasury shall not be less than one-fifth of a whole year's assessment.”

From the provisions of the above section, it is evident that the legislature has not specifically required that an application, accompanied by an affidavit of discontinuance, be filed by a licensee before a county auditor may make a refund of a portion of a paid assessment for the privilege of selling cigarettes at retail. Although no affidavit is required by law to be filed in order to perfect the

dealer's claim arising from the discontinuance of business, nevertheless it would appear that the county auditor, in his discretion, may demand evidence to show that the fact of discontinuance is true. The procedure followed, i. e. requiring an affidavit, is commendable practice. A brief reference to the history of the above section will show that the legislature intended that the county auditor be satisfied of the fact of discontinuance before making a refunder.

On April 24, 1893, the legislature first passed an act "To tax the business of trafficking in cigarettes or cigarette wrappers." (See 90 O.L. 235.) Section 3 of the act contained provisions that are now found in Section 5896, *supra*, and read in part as follows:

"\* \* \* Provided, further, that whenever any person, firm, company, corporation or co-partnership engaged in such business, which has been assessed as aforesaid, and which has been paid or is charged upon the tax duplicate with the full amount of said assessment, discontinues such business, the county auditor, *upon being satisfied of that fact*, shall issue to such person, firm, company, corporation or co-partnership, a refunding order for a proportionate amount of such assessment, except that it shall in no case be less than one-fifth of the whole amount to be assessed in any one year."

It is to be noted that when a person discontinued business the county auditor, upon being satisfied of that fact, was charged with the duty of refunding a proportionate amount of the paid assessment. Obviously, evidence could be requested by the auditor to satisfy himself of the fact of discontinuance.

On May 18, 1894, the legislature repealed the act of 1893, but re-enacted a similar act (91 O. L. 311). The identical provision in section 3 of the act of 1893 was again incorporated in section 3 of the new act.

When the codifying commission of 1910 carried the provisions of section 3 of the act of 1894 into the General Code as section 5896, the words "upon being satisfied of that fact" were dropped. It is my opinion that the codifying commission believed these words to be unnecessary and did not intend to change the law in any way.

Having determined that an application and proof of discontinuance may be requested by the auditor, it becomes necessary to see if any time limit for presenting the claim can be implied. A reference to section 5534, General Code, will be helpful on this point. That section provides in part that any person who has used motor vehicle fuel on which a tax has been paid, for a purpose other than operating or propelling motor vehicles on the highways, shall be reimbursed for the tax paid, provided that an application for refund be filed with the Tax Commission of Ohio within ninety days from the date of purchase.

It is to be noted that the legislature in that section saw fit to make a time limitation of ninety days for the filing of an application for refund. In the absence of any such provision in section 5896, *supra*, it would seem that no such limitation was intended in the case of an application for a refund for a cigarette assessment. Hence, I am of the opinion that there is no time limitation for the filing of an application for refunder under section 5896, *supra*.

Having reached the conclusion that the party has not forfeited his right to a refunder by his delay in filing the affidavit and surrendering the license, it now becomes necessary to consider in what manner the county auditor may take care of this refund, in view of the fact that he has made his annual settlement of the cigarette license funds for the year 1929-1930, and there probably are

no cigarette revenues on hand to meet the claim. I am informed by the Auditor of State that the annual settlement is made on July 10th of each year. As to this matter, I may refer you to an opinion of the Attorney General, found in Opinions of the Attorney General for 1915, volume II, page 1270. The second paragraph of the syllabus of that opinion reads as follows:

"Refunding orders drawn under section 5896, G. C., should be drawn against the general county fund and such fund should be reimbursed by charging the amount of the refunder against the undivided proceeds of collections of cigarette assessments in the treasury to the credit of the state and county and the city, village or township to which the original assessment, on account of which the refunder was made, was distributed and in the same proportion as such original distribution was made under the statute, and if there are not sufficient of such proceeds of assessments, to the credit of any such beneficiaries, the amount chargeable against it should be deducted from the undivided tax distribution due it at the next settlement."

You will note that a refunder is made from the general fund of the county, and if there are not sufficient proceeds of assessments to the credit of the subdivisions to which the assessments were distributed in the first instance, the amount should be deducted from the undivided tax distribution made at the next settlement. This next settlement will occur on July 10, 1931. Hence, your conclusions are correct.

Accordingly, I am of the opinion that a refunder should be made to the owner of the golf club at this time from the general fund of the county and that the county auditor should deduct the amount paid from the next settlement, which will occur on July 10, 1931.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

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2909.

STATUTORY CONSTRUCTION—LAW ENACTED LATER IN PERIOD  
OF TIME PREVAILS.

*SYLLABUS:*

*As between Section 6864 as contained in House Bill 67 (Norton-Edwards Act) and Section 6864 as contained in Amended Senate Bill 86, Section 6864 contained in House Bill 67 was the later enactment, and is now in force and effect.*

COLUMBUS, OHIO, February 4, 1931.

HON. ROBERT N. GORMAN, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Acknowledgment is hereby made of the request from one of your assistants for my opinion, which reads as follows:

"In the 5th Volume of Page's Ohio cumulative Code Service on