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TAX COMMISSIONER—PRIMARY DUTY TO FURNISH TO SEVERAL COUNTY CLERKS OF COURTS FORMS REQUIRED UNDER AMENDED SENATE BILL 111, 99 GENERAL ASSEMBLY—ENFORCEMENT OF SALES AND USE TAX ON CASUAL SALE OF AUTOMOBILES AND HOUSE TRAILERS.

SYLLABUS:

It is the primary duty of the Tax Commissioner to furnish to the several county clerks of courts the forms required under Amended Senate Bill No. 111, enacted by the Ninety-ninth General Assembly, for the enforcement of the sales and use tax on the casual sale of automobiles and house trailers.

Columbus, Ohio, November 5, 1951

Hon. Frank T. Cullitan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

Your request for my opinion reads in part as follows:

"A tax is levied by the State of Ohio on the casual sale of motor vehicles and house trailers. Pursuant thereto sales tax return form No. 12, prescribed by the Tax Commissioner, is currently used by the Clerk of the Common Pleas Court of Cuyahoga County and all other county clerks in large quantities. The expense of having these forms printed is considerable. Our county clerk is about out of these forms, and the Cuyahoga County Prosecutor has advised him that there appears to be no authority to expend county funds for these forms. The Mahoning County Prosecutor has similarly advised the Mahoning County Clerk of Courts.

"* * * Since these forms are constantly being used, you are respectfully requested to furnish an Opinion as promptly as practicable on the following question: Is the Clerk of Courts for Cuyahoga County obliged to expend county funds to provide sales tax return form No. 12 in use under General Code Sec. 5546 et seq.? Of course this question carries the corollary: Is not the Tax Commissioner of the State of Ohio required to furnish to the Clerk the report form ST 12?"

Your inquiry raises a specific question relating to the duty of furnishing the Sales Tax Return Form No. 12. Reference should be directed to the pertinent provisions of Section 5546, et seq., General Code, as amended by the Ninety-ninth General Assembly in Amended Senate Bill No. 111, which became law on the 20th day of May, 1951. That act reads in part as follows:

Section 5546-2, General Code:

"For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crises, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the *purpose of reimbursing the state for the expense of administering*

this act, an excise tax is hereby levied on each retail sale made in this state of tangible personal property on and after the first day of January, 1935, with the exceptions hereinafter mentioned and described, as follows: * * *."

"The tax hereby levied does not apply to the following sales: * * *."

"7. Casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property except as to casual and isolated sales of motor vehicles and house trailers. * * *"
(Emphasis added.)

Section 5546-5, General Code:

"The tax commissioner shall design and procure the prepaid tax receipts herein provided for. * * *"

Section 6290-5, General Code:

"Application for a certificate of title shall be made upon a form hereinafter prescribed by this chapter; * * *

"The clerk of courts, except as hereinafter provided, shall refuse to accept for filing any application for certificate of title and shall refuse to issue certificate of title, when the motor vehicle or house trailer was transferred in the state of Ohio after the effective date of this act unless prepaid tax receipts required by section 5546-3 of the General Code are presented with the application in the manner and form to be prescribed by the commissioner or unless the applicant submits with the application, payment of such tax by cash, certified check, draft or money order payable to the clerk of courts who shall issue a receipt therefor in the form prescribed by the commissioner, or a receipt issued by the commissioner showing the payment of the tax. Such receipts shall be deemed to be consumers' portions of prepaid tax receipts for the purposes of sections 5546-26a to 5546-26e inclusive of the General Code and shall be subject to redemption thereunder in the same manner and at the same rate as therein provided with respect to the redemption of consumers' portions of prepaid tax receipts.

"For receiving and disbursing such taxes paid to the clerk of courts, he shall be allowed to retain a poundage fee of 1%. The poundage so received shall be paid into the general fund of such county. In the case of casual sales of motor vehicles or house trailers, the purchase price for the purpose of determining the tax by the clerk of courts shall be the purchase price on an affidavit executed and filed with the clerk of courts by the vendee and shall be prima facie evidence of the amount for the purpose of determining the tax, in a form to be prescribed by the com-

missioner. When the transfer to the applicant was made in some other state or in interstate commerce after the effective date of this act, the clerk of courts, except as hereinafter provided, shall refuse to issue any certificate of title unless the tax imposed by section 5546-26 of the General Code has been paid as evidenced by a receipt issued by the commissioner, or unless the applicant submits with the application payment of such tax by cash, certified check, draft or money order payable to the clerk of courts. For receiving and disbursing such taxes paid to the clerk of courts, he shall be allowed to retain a poundage fee of 1%. * * *

“The clerk of courts shall forward all payments of taxes, less poundage fee, to the treasurer of state in a manner to be prescribed by the commissioner and shall furnish such information to the commissioner as he may require.”

From the above provisions, it is evident that Amended Senate Bill No. III changed the wordage of the statutes relating to casual and isolated sales of motor vehicles and house trailers to the extent that they are now taxable under the sales and use tax law. This act of the legislature placed duties upon the Tax Commissioner as well as the county clerks of courts. It is clear that a clerk of courts at the time of transfer of titles of motor vehicles now has the duty of collecting the sales and use tax on casual and isolated sales of motor vehicles or house trailers. The clerk is further required to collect the sales and use tax based upon the amount listed in an affidavit to be executed by the purchaser and, upon payment, to issue a receipt to the purchaser that is redeemable under Sections 5546-26a to 5546-26e, inclusive, General Code. The third duty that is imposed upon the clerk of courts is to make a report as to the collection of the tax. On the other hand, the Tax Commissioner is charged with the duty of prescribing the form for the affidavit, as well as the receipt given by the clerk to the purchaser, and for the report form to be rendered by the clerk as to the collection of the tax.

As you have pointed out in the papers attached to the request, the Tax Commissioner has prescribed the forms to be used in the above instances. This form is known as Sales Tax Form No. 12, and is so constructed to be able to serve the purposes of the three above mentioned forms. In other words, Sales Tax Form No. 12 embodies an affidavit, a receipt and a report as required by the above cited statutes. Since the Tax Commissioner has prescribed this form, was it the further intention of the legislature that the Tax Commissioner also supply the forms to the eighty-eight county clerks of courts? A reading of the act of the legisla-

ture shows that there are no specific directives contained therein as to this particular question. It therefore behooves us to examine the various provisions of the act to determine the legislative intent in this matter. A reading of the purpose clause in Section 5546-2, General Code, shows that the legislature intended that the revenues collected by sales tax would reimburse the state for expenses of administering the sales tax act. It can certainly be said that the cost of procuring forms necessary for the administration of the act is a cost or expense attributable to the administration of the act. Since the language of the legislature intended that the state be reimbursed, it would therefore logically follow that it should be the state that should pay the expenses of administering the act. This deduction is further supported by the language of Section 5546-5, General Code, which provides that the Tax Commissioner shall procure the receipts under the provisions of this act. This Sales Tax Form No. 12 is a receipt under the provisions of Section 6290-5, General Code, quoted above, and, consequently, if the Tax Commissioner is required to procure the receipts, he should necessarily have to pay for them. It is therefore my opinion that the expenses and cost of procurement of Sales Tax Form No. 12 are a proper expense of the State of Ohio under the provisions of this act.

I am not unmindful of the language of Section 6290-5, General Code, quoted above, which provides that the clerk of courts for "receiving and disbursing such taxes" is allowed a poundage fee of 1%. The use of the word "poundage" by the legislature, which has a definite legal meaning, would further support my opinion in this case. Crew, J., speaking for the Supreme Court of Ohio in the case of *Major v. International Coal Company*, 76 Ohio St., 201, at page 209, had this to say regarding the purpose of poundage:

"* * * as a compensation to the sheriff for the risk incurred in handling and disbursing money actually received by him in his official capacity. * * *"

From the above interpretation of the word "poundage" it is clearly evident that poundage is a return for the risk incurred in handling money and not a return for costs or expenses in carrying out a duty imposed upon an official by the State of Ohio. I do not deem that the poundage allowed was contemplated by the legislature to be used to defray the costs of administering this act.

I am further not unmindful of the fact that there is a duty upon the clerk of courts to collect the sales tax as outlined under the provisions of the statutes quoted above and that where there is a duty imposed upon a public official it necessarily follows that any costs or expense in carrying out that duty should be paid from public funds. In my opinion, as a consequence of this right-duty relationship, it would not be an illegal expenditure for the clerk to procure Sales Tax Forms No. 12 if he should run out of them and for some reason they were not made available immediately by the Tax Commissioner. However, it is still the primary duty of the State of Ohio, acting through the Tax Commissioner, to provide the clerk of courts with the proper forms as required above.

Respectfully,

C. WILLIAM O'NEILL
Attorney General