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1. TAX COMMISSIONER OF OHIO—NOT LEGALLY OBLIGED TO ISSUE DUPLICATE CERTIFICATE OF ABATEMENT TO REPLACE ORIGINAL CERTIFICATE LOST OR DESTROYED.
2. NO STATUTORY PROVISION TO ISSUE DUPLICATE CERTIFICATE—TAX COMMISSIONER HAS DISCRETIONARY RIGHT TO DO SO—MAY REQUIRE AFFIDAVIT SETTING FORTH FACTS DEEMED PERTINENT—MAY REQUIRE INDEMNITY BOND IN AMOUNT DEEMED APPROPRIATE.

SYLLABUS:

1. The Tax Commissioner of Ohio is not legally obliged to issue a duplicate certificate of abatement to replace an original certificate that has been lost or destroyed.

2. Although there is no statutory provision requiring the Tax Commissioner of Ohio to issue a duplicate certificate of abatement when the original has been lost or destroyed, he has a discretionary right to do so and as a condition thereto, may require an affidavit setting forth that the original certificate of abatement had never been received or had never been transferred or assigned and such other facts as are deemed pertinent. Said Tax Commissioner may further, in his discretion, require the execution of an indemnity bond in an amount deemed appropriate.

Columbus, Ohio, July 24, 1945

Hon. C. Emory Glander, Tax Commissioner of Ohio
Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

“On September 28th, 1943 Certificate of Abatement No. 277 in the amount of \$390.65 was issued to a company representing overpayment of franchise taxes for the year 1941 and 1942.

We are advised by said corporation that this Certificate of Abatement was never received and if it is in existence its whereabouts is unknown to any of the officers or agents of the corporation. Accordingly it is requested that a duplicate Certificate of Abatement be issued.

Although I am advised by the Treasurer of State, in a letter dated May 16th, 1945, that said Certificate of Abatement No. 277 had not been redeemed as of said date I am reluctant to issue a duplicate certificate without requiring an adequate means of protecting the state in the event the original and duplicate are subsequently presented for redemption.

Inasmuch as you join with me in the issuance of Certificates of Abatement it occurs to me that you will want to consider this problem also. As I see it the following questions require an answer:

1. Is the Tax Commissioner required to issue a duplicate Certificate of Abatement under the aforesaid circumstances?

2. If a duplicate should be issued would it be advisable to require an affidavit stating the original Certificate of Abatement had never been received or had never been transferred or assigned and that the person making the affidavit would be personally responsible to the state for issuing such certificate?

3. Likewise, would it be advisable to require the applicant or corporation to furnish a bond at least in an amount equal to the amount of the certificate as a guarantee to the state?"

Your authority to issue a certificate of abatement is found in Section 1464-3, General Code, which reads in part as follows:

"All other powers, duties and functions of the department of taxation, other than those mentioned in Sections 1464-1 and 1464-2 of the General Code, are hereby vested in and assigned to, and shall be performed by the tax commissioner, which powers, duties and functions shall include, but shall not be limited to the following powers, duties and functions: * * *

2. To exercise the authority provided by law relative to remitting or refunding taxes or assessments, including penalties and interest thereon, illegally or erroneously assessed or collected, or for any other reason overpaid except as provided in paragraph 9, Section 1464-1 of the General Code; and in addition to the authority so provided by law, the tax commissioner shall have authority as follows: On written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, or on his own motion, to investigate the facts and to make, in triplicate, a written statement of his findings; and, if he shall find that there has been an overpayment, issue, in triplicate, a certificate of abatement, payable to the taxpayer or his or its

assigns or legal representative and showing the amount of the overpayment and the kind of tax overpaid. One copy of such statement shall be entered on the journal of the tax commissioner, one shall be certified to the attorney general and one certified copy shall be delivered to the taxpayer. All copies of the certificate of abatement shall be transmitted to the attorney general, and if the attorney general finds the certificate to be correct he shall so certify on each copy, and deliver one copy to the taxpayer, one copy to the tax commissioner, and the third copy to the treasurer of state. *The taxpayer's copy may be tendered by the payee or transferee thereof to the treasurer of state as payment, to the extent of the amount thereof, of any tax of the same kind; * * **

(Emphasis added.)

It is to be observed that in no event is the designated payee in a certificate of abatement, or any transferee, entitled to be paid in cash. In such respect the certificate differs from a warrant on the state treasury. It might further be noted at this point that said section makes no reference to your right to reissue a certificate to replace one previously issued and I am unable to find any other code provision that specifically grants such authority. However, I do not believe that by reason of there being no specific statutory provision to cover the situation I am, therefore, warranted in summarily disposing of the matter by advising that you are completely powerless to issue a certificate to replace the one that appears to have been lost.

Your attention is directed to the following statement appearing in 34 Am. Jur. 591, under the title "Lost Papers and Records," to-wit:

"A lost instrument may be said to be one which can not be found after careful and thorough search, and the term may cover an instrument which has been stolen, burned or otherwise destroyed. There is no fixed rule as to the degree of diligence required in making search for the instrument to constitute it a lost one. Each case must necessarily depend upon its own facts and circumstances."

As above stated, there is no fixed rule to cover every case. However, the context of your inquiry is such, together with additional facts brought to my attention, that I feel justified in assuming the original of the certificate of abatement in question is a lost or destroyed instrument. There are various statutory provisions in this state that afford

relief when a document is lost. Section 2293-32, General Code, provides as follows:

“Whenever bonds, notes, checks or *certificates of indebtedness*, issued by a *subdivision or other political taxing unit* of this state are lost or destroyed, *said subdivision or taxing unit* may reissue to the holder or holders duplicates thereof in the same form and signed as the original obligations were signed, which obligation so issued shall plainly show upon its face that it is a duplicate of such lost bond, note, check or certificate, upon proof of such loss or destruction, upon payment of the reasonable expense thereof, and upon being furnished with a bond of indemnity, satisfactory to the bond issuing authority, against all loss or liability for or on account of the obligations so lost or destroyed.”
(Emphasis added.)

Section 12345, General Code, et seq., relates to the restoration of lost or destroyed records. Section 8572-28, General Code, which is found in the chapter of the Code relating to registration of land titles, provides that in the event of a duplicate certificate of title being lost or destroyed, another may be issued to replace it.

There are other provisions in the General Code that deal with lost papers or documents. However, an examination of the just noted sections, as well as certain sections which need not be alluded to herein, leads me to the view that they are applicable under particular circumstances and are not sufficiently broad in scope to cover the situation presented by your inquiry. But they disclose that the General Assembly has not been unmindful of the difficulties that may arise when a document is lost. Consequently, it would seem that in an effort to iron out such difficulties these various remedial sections were enacted. I desire, however, to direct particular attention to Section 246, General Code, which reads:

“Whenever it is made to appear to the satisfaction of the auditor of state, by affidavit or otherwise, that any warrant on the state treasury by him issued has been lost or destroyed prior to its presentation for payment, and there is no reasonable probability of its being found or presented, such auditor may issue to the proper person a duplicate of such lost or destroyed warrant, provided that before issuing such duplicate said auditor of state shall require of the person making such application a bond in double the amount of such claim, payable to the state of Ohio, with surety to the approval of said auditor and of the treasurer

of state, and conditioned to make good any loss or damage sustained by any person or persons on account of the issuance of said duplicate and the subsequent presentation and payment of the original. The form of said bond is to be prepared by the attorney general and the bond when executed filed in the office of the treasurer of state. The duplicate warrant issued shall be plainly stamped or marked so that its character may be readily and easily ascertained, and in no event shall any liability attach to the treasurer of state on account of his paying any duplicate warrant issued under authority of this section."

In 1922 one of my predecessors had occasion to consider the right of a county auditor to issue a duplicate warrant to replace a lost warrant. See Opinion No. 3212, Opinions of the Attorney General for 1922, page 481. The second branch of the syllabus of that opinion reads:

"Although the General Code makes no provision authorizing a county auditor to issue a duplicate warrant in lieu of one issued, but lost or destroyed before redemption, it would seem in such cases, that a practical solution of the difficulty may be found in following the general policy of section 246, G. C., in which event the county auditor should require sufficient security to insure himself against any loss occasioned by reason of the issuance of said duplicate warrants."

In 1927 the then Attorney General also passed upon a somewhat analogous situation. A county auditor sought to exact an indemnity bond from the Commissioner of Motor Vehicles as a condition to the re-issuance of his duplicate warrant. It might be pointed out, as disclosed by the request for an opinion, that the original warrant had printed thereon in plain type the words "this warrant must be cashed within thirty days." I do not understand, however, that in the case of a certificate of abatement there is any limitation such as has just been noted. This opinion may be found in Opinions of the Attorney General for 1927, page 1719 and in specific answer to the first question it held as follows:

"* * * I am of the opinion that the Bureau of Motor Vehicles, being an agency of the state and in fact the state itself, is not within the purview of the *statute above quoted* and a county auditor is without authority to require a bond of indemnity from the Bureau of Motor Vehicles as a condition precedent to the issuance of a duplicate warrant in place of a warrant which has been lost, destroyed or misplaced." (Emphasis added.)

The "statute above quoted" was Section 2293-32, General Code, which I have previously quoted. Reliance was placed on the provisions of that section as the basis for the authority of the county auditor to issue a duplicate warrant. This is made manifest by the syllabus of that opinion, which reads:

"Inasmuch as the state is not bound by the terms of a general statute unless it be so expressly enacted, a county auditor is without authority to require a bond of indemnity as contemplated in Section 2293-32, General Code, from the Bureau of Motor Vehicles as a condition precedent to the issuance of a duplicate warrant to replace one that has been misplaced, destroyed or lost."

As previously stated herein, I do not believe said Section 2293-32 is applicable to the situation presented by your inquiry. Strictly speaking, it seems to me it could be successfully maintained that a certificate of abatement differs from the "certificate of indebtedness" referred to in said section. Also, it can be urged it is highly improbable it was contemplated by the General Assembly that, as Tax Commissioner, any right was intended to be conferred upon you to act pursuant to said section.

It is believed, however, it is hardly the spirit of the law, in the light of the several remedial sections herein mentioned, that the company entitled to the certificate of abatement should be utterly without recourse of some sort. To say the least, and without regard as to where the responsibility may rest for the certificate becoming lost, said company has been denied the right to utilize the certificate for any purpose whatever. And, while I do not wish to go on record as suggesting that an action could be successfully prosecuted, particularly in the absence of some statutory provision pursuant to which you are authorized to act, nevertheless there is the possibility an action could be successfully maintained. In connection with the right of one to enforce a lost or destroyed instrument, it is stated in 34 Am. Jur. 608, as follows:

"Loss or destruction of a written instrument does not extinguish the rights and obligations of the parties. Not only may the instrument be restored or re-executed, but an appropriate suit or action may be prosecuted to enforce the right created by it. In several states, statutes now provide expressly for bringing actions on lost bills and notes or other instruments. * * *

A municipal corporation may be compelled to pay lost municipal bonds on receiving proper security, for it will be as adequately protected as would an individual under similar circumstances."

It should be noted, however, that this quoted matter is merely a general discussion of the proposition and its applicability to suits directed against public officials may be doubted.

With the foregoing in mind, I come now to your several questions. There being no statutory enactment pursuant to which you may be legally compelled to issue a duplicate certificate of abatement and it being doubtful as to whether any clear remedy to compel you to do so is available, I am obliged to hold, in specific answer thereto, that the Tax Commissioner of Ohio is not legally obliged to issue a duplicate certificate of abatement to replace an original certificate that has been lost or destroyed.

Your second and third questions will be considered together. In 1922 the then Attorney General found a "practical solution." Whether you desire to adopt a similar course is a matter calling for the exercise of your sound discretion. I do not conceive it to be my right or duty to express any conviction as to whether, in view of the facts presented in the inquiry, you should exercise that discretion and issue a duplicate certificate. I, therefore, conclude by stating, with respect to your second and third questions, that although there is no statutory provision requiring the Tax Commissioner of Ohio to issue a duplicate certificate of abatement when the original has been lost or destroyed, he has a discretionary right to do so and as a condition thereto, may require an affidavit setting forth that the original certificate of abatement had never been received or had never been transferred or assigned and such other facts as are deemed pertinent. Said Tax Commissioner may further, in his discretion, require the execution of an indemnity bond in an amount deemed appropriate.

Respectfully,

HUGH S. JENKINS

Attorney General