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1. TAX, SALES—TAXES LEVIED UNDER SECTION 5546-2, G. C.—ILLEGALLY OR ERRONEOUSLY PAID OR PAID ON AN ILLEGAL OR ERRONEOUS ASSESSMENT—VENDOR WHO PAID SUCH TAXES, ENTITLED TO REFUND, UPON APPLICATION — REGARDLESS WHETHER PAYMENT MADE UNDER PROTEST OR WHETHER PETITION FOR REASSESSMENT WAS FILED—SECTIONS 5546-8, 5546-9a, G. C.
2. PERIOD OF NINETY DAYS WITHIN WHICH APPLICATION FOR REFUND MUST BE FILED BEGINS TO RUN AT TIME OF KNOWLEDGE TAXES WERE ILLEGALLY OR ERRONEOUSLY PAID, OR PAID ON AN ILLEGAL OR ERRONEOUS ASSESSMENT.
3. VENDORS EXCLUSIVELY ENGAGED IN RETAIL UNIT SALES OF LESS THAN NINE CENTS PER UNIT—NINETY DAY PERIOD BEGAN TO RUN FROM FEBRUARY 21, 1945, DATE OF DECISION, SUPREME COURT OF OHIO, WIN-SLOW-SPACARB, INC. v. EVATT, 144 O. S. 471.

## SYLLABUS:

1. When taxes levied under Section 5546-2, General Code, have been illegally or erroneously paid or paid on an illegal or erroneous assessment, the vendor who has paid such taxes is, upon making application therefor in accordance with the terms of Section 5546-8, General Code, entitled to a refund thereof, regardless of whether payment of such taxes was made under protest and regardless of whether a petition for reassessment was filed pursuant to the terms of Section 5546-9a, General Code.

2. The period of ninety days within which such application for refund must be filed begins to run when it is learned for a certainty that such taxes were illegally or erroneously paid, or paid on an illegal or erroneous assessment.

3. In cases involving taxes paid by vendors engaged exclusively in making retail unit sales of less than nine cents per unit, such ninety day period began to run from the date of the decision of the Supreme Court of Ohio in the case of Winslow-Spacarb, Inc. v. Evatt, 144 O. S. 471, to-wit, February 21, 1945.

Columbus, Ohio, November 3, 1945

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

Dear Sir:

I am in receipt of your letter in which you request a formal opinion in answer to the following questions:

"1. Is a vendor entitled to a refund under Section 5546-8, General Code, where such vendor did not file a petition for reassessment pursuant to Section 5546-9a, General Code, or where such vendor did not make payment of the taxes under protest or did not exhaust all other administrative remedies prior to seeking refund?

2. From what date does the period of 90 days within which an application for refund may be filed, as provided in Section 5546-8, General Code, begin to run?"

In your letter you refer to a number of applications for refunds of sales taxes which have been filed with the Department of Taxation as a result of the decision of the Supreme Court of Ohio in the case of Winslow-Spacarb, Inc. v. Evatt, 144 O. S. 471.

In your first question there are three separate and distinct parts. The first of these is, is a vendor entitled to a refund under Section 5546-8 of the General Code, where a vendor did not file a petition for reassessment under Section 5546-9a of the General Code. The third of these is, is a vendor entitled to a refund under Section 5546-8, General Code, where such vendor did not exhaust all other administrative remedies prior to seeking refund? These two parts of your first question will be considered together for the reason that there is provided in the Sales Tax Act only one administrative remedy, namely, the filing of a petition for reassessment under Section 5546-9a, General Code.

The pertinent part of Section 5546-8, General Code, is as follows:

“\* \* \* The treasurer of state shall redeem and pay for any unused or spoiled tax receipts at the net value thereof, and he shall refund to vendors the amount of taxes illegally or erroneously paid or paid on any illegal or erroneous assessment where the vendor has not reimbursed himself from the consumer. \* \* \* In all cases an application shall be filed with the tax commission on the form prescribed by it and must be filed within a period of ninety days from the date the tax receipts are spoiled, or from the date it is ascertained that the assessment or payment was illegal or erroneous. On filing of such application the tax commission of Ohio shall determine the amount of refund due and shall certify such amount to the auditor of state. The auditor of state shall thereupon draw a warrant for such certified amount on the treasurer of state to the person claiming such refund. For the purpose of paying such refund the treasurer of state shall place ten thousand dollars collected in a special fund to be known as the sales tax rotary fund; and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to ten thousand dollars.”

The pertinent part of Section 5546-9a, General Code, is as follows:

“In such cases the commissioner shall have power to make an assessment against such vendor or consumer, based upon any information within his possession, or that shall come into his possession. The commissioner shall give to the vendor or consumer, written notice of such assessment. Such notice may be served upon the vendor or consumer personally or by registered mail.

The commissioner shall first issue assessments against the vendor, unless it be shown that the consumer refused to pay the tax after demand by the vendor, or the commissioner. An assessment issued against the vendor shall not be considered an election of remedies, nor a bar to an assessment against the consumer for the tax applicable to the same transaction, unless payment in full is made by the vendor.

The commissioner shall have like power to make an assessment against any vendor who fails to file a return required by Section 5546-12b of the General Code or fails to remit the proper amount of tax due under Section 5546-12a of the General Code. Notice of such assessment shall be made in the manner prescribed above.

Unless the vendor or consumer, to whom said notice of assessment is directed, shall, within thirty days after service thereof, either personally or by registered mail, file a petition in writing, verified under oath by said vendor, consumer, or his duly

authorized agent, having knowledge of the facts, setting forth with definiteness and particularity the items of said assessment objected to, together with the reason for such objection, said assessment shall become and be deemed conclusive and the amount thereof shall be due and payable, from the vendor or consumer so assessed, to the treasurer of state. In every case where a petition for reassessment as above described, shall be filed, the commissioner shall assign a time and place for the hearing of same and shall notify the petitioner thereof by registered mail, but the commissioner shall have the power to continue the same from time to time as may be necessary."

At the outset of this opinion, permit me to point out that the Supreme Court in the Winslow-Spacarb, Inc. case, supra, found inter alia :

"The retail sales of a vendor engaged exclusively in the making of separate sales of a commodity at a price of less than nine cents per unit are not subject to a tax under Section 5546-2, General Code, and Section 5546-12a, General Code, does not apply to the sales of such vendor or to him."

In this case the decision of the Supreme Court was predicated upon a sales tax assessment based exclusively on unit retail sales of tangible personal property where the selling price was less than nine cents.

Section 5546-2, General Code, the tax levying section of the Sales Tax Act, contains this sentence :

"If the price is less than nine cents, no tax shall be imposed."

Your request for my opinion is not limited to the class of sales transactions which were the subject of the Winslow-Spacarb, Inc. decision. Your attention is specifically directed to the fact that in that case there were retail sales of a vendor engaged *exclusively* in making separate retail sales at a price of less than nine cents per unit. Your question is a comprehensive and general one which involves assessments, the audits of which contain items of unit retail sales exclusively of less than nine cents per unit, of items of unit retail sales exclusively of nine cents and more, and a combination of unit retail sales of items of less than nine cents and nine cents and more.

In the first part of your question numbered 1, there are involved only cases where assessments have been made and paid. Where no assessment

has been made, there can not be filed with the Tax Commissioner a valid petition for reassessment under Section 5546-9a, General Code, and unless an assessment has been paid, there can be raised no question of a refund by a vendor.

In the case of an assessment involving exclusively retail unit sales of less than nine cents per unit and which was paid, the vendor is entitled to a refund of the amount of the taxes paid for the reason that the payment was made on an illegal assessment.

In cases of illegal and erroneous assessments which have been paid and the audits of which contain items of unit retail sales exclusively of nine cents or more, or which contain a combination of unit retail sales of items of less than nine cents and nine cents and more, the taxpayers are entitled to refunds. When taxes levied under Section 5546-2, General Code, have been illegally or erroneously paid, the taxpayers are entitled to refunds. Of course, it is assumed that the vendors in all of these cases have made applications therefor in accordance with the terms of Section 5546-8, General Code.

In support of this opinion, your attention is directed to a discussion of the subject of tax refunds appearing in 51 Am. Jur. on the subject of taxation, as follows:

Section 1168, at page 1006:

“Since statutory authority is necessary for permitting refund or allowing recovery of wrongful taxes voluntarily paid, it follows that if such a right is granted to an aggrieved taxpayer, and a remedy is provided, the right must be exercised in the manner provided by the statute and the remedy must be sought in like manner. \* \* \* When the statute conditions the right to recover back a tax paid on the beginning of an action within a certain time from the date of payment, the Court is without jurisdiction to entertain an action brought after that time.”

Section 1169, at page 1007:

“Where it has been definitely determined that taxes have been illegally exacted, legislation, whether mandatory or permissive in form, pertaining to a refund of such illegal exactions, has been held to impose a mandatory duty on the taxing body to refund.”

Section 1179, at page 1012:

“A statute may authorize a refund even though the tax payment was voluntary or was made without protest.”

The following cases further support the above statements:

State v. Blatt, 41 N. M. 269:

“If right is granted to aggrieved taxpayer to recover taxes paid under protest and a remedy is provided, right must be exercised in manner provided by statute, and remedy must be sought in like manner.”

Bank v. Board of Supervisors, 168 Ia. 501: In this case there was involved a taxing statute and a provision for a refund to the taxpayer of any tax erroneously or illegally paid. The taxing statute was held to be invalid. The first branch of the syllabus is:

“It is the duty of the board of supervisors, whenever taxes have been illegally exacted, to direct the county treasurer to repay the same.”

Another branch follows:

“The duty of the board of supervisors to order the return of the tax exacted under an unconstitutional statute is none the less a duty because the tax was voluntarily paid.”

In the syllabus also appears the following:

“The ‘mistake’ of a taxpayer in supposing that the law under which a tax was exacted was legal lessens not the duty of the board of supervisors to return the illegal exaction to him.”

In Board v. Marion County; 207 Ind. 142, the following branches of the syllabus are here set forth:

“1. Statutory right of refund of taxes does not depend upon whether taxes were paid voluntarily or involuntarily.

2. Statutory remedy for refund of taxes wrongfully paid or assessed held exclusive.

3. One bringing action upon right created by statute must bring himself within terms of statute.

4. Legislature granting refund of taxes wrongfully paid or assessed could condition right to refund. \* \* \*

12. The statutory remedy for the recovery of taxes wrongfully assessed and paid is exclusive and one seeking the remedy must bring himself clearly within its terms.”

In *Culbertson v. Board*, 194 N. E. (Ind.) 638, the syllabus reads:

“1. In absence of statute there can be no recovery of taxes voluntarily paid.

2. Statutory right to refund of taxes does not depend on whether taxes were paid voluntarily or involuntarily.

3. Right to refund of taxes wrongfully assessed and wrongfully paid is statutory, and such remedy is exclusive.”

The decisions of the courts are voluminous in cases where there were no statutory provisions for the refunding of taxes illegally or erroneously paid or paid on illegal or erroneous assessments, and where voluntary payments of taxes were made and other payments were made under protest, mistake of fact and mistake of law. In practically all of these cases the refunds were denied.

However, where there is a statutory right of refund of taxes, the questions of whether the taxes were voluntarily or involuntarily paid or paid under a mistake of fact or law are not material.

The second part of your question numbered 1 is as follows: Is a vendor entitled to a refund under Section 5546-8, General Code, where a vendor did not make payment of the taxes under protest?

The above citations and authorities support the view that such vendor is entitled to a refund if he complies with the provisions of Section 5546-8, General Code.

Section 5546-8, General Code, provides the only method whereby a vendor may obtain a refund of the amount of taxes illegally or erroneously paid, or paid on any illegal or erroneous assessment.

Your second question is, from what date does the period of ninety days within which an application for refund may be filed, as provided in Section 5546-8, General Code, begin to run. The pertinent part of Section 5546-8, General Code, is as follows:

“In all cases an application shall be filed with the tax commission (tax commissioner) on the form prescribed by it and must be filed within a period of ninety days from the date \* \* \* it is ascertained that the assessment or payment was illegal or erroneous.”

The word "ascertain" is defined in Webster's New International Dictionary as: "To find out or learn for a certainty, by trial, examination, or experiment; to get to know."

It is my opinion that an application for a refund under Section 5546-8, General Code, must be filed with the Tax Commissioner within a period of ninety days from the date it is ascertained—learned for a certainty—that the taxes were illegally or erroneously paid or paid on an illegal or erroneous assessment. The subject of the date of ascertainment that the taxes were illegally or erroneously paid or paid on an illegal or erroneous assessment is a factual one.

The Supreme Court rendered its decision, journal entry entered, in the Winslow-Spacarb, Inc. case on February 21, 1945. On such date it was adjudged and determined that the sales tax assessment made by the Tax Commissioner against Winslow-Spacarb, Inc., was illegal.

In specific answer to your inquiry, it is my opinion that:

1. When taxes levied under Section 5546-2, General Code, have been illegally or erroneously paid or paid on an illegal or erroneous assessment, the vendor who has paid such taxes is, upon making application therefor in accordance with the terms of Section 5546-8, General Code, entitled to a refund thereof, regardless of whether payment of such taxes was made under protest and regardless of whether a petition for reassessment was filed pursuant to the terms of Section 5546-9a, General Code.

2. The period of ninety days within which such application for refund must be filed begins to run when it is learned for a certainty that such taxes were illegally or erroneously paid, or paid on an illegal or erroneous assessment.

3. In cases involving taxes paid by vendors engaged exclusively in making retail unit sales of less than nine cents per unit, such ninety day period began to run from the date of the decision of the Supreme Court of Ohio in the case of Winslow-Spacarb, Inc. v. Evatt, 144 O. S. 471. to-wit, February 21, 1945.

Respectfully,

HUGH S. JENKINS

Attorney General