

make a further requirement of the association along the lines suggested above, and it should still fail to comply with said order, I will be glad to have you refer the matter to me again.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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1724.

GASOLINE TAX—WHEN REFUNDER MAY BE MADE.

*SYLLABUS:*

*Refunders of the tax paid upon gasoline may not be made unless applications therefor be filed with the Tax Commission of Ohio within ninety days of the date of purchase or invoice.*

COLUMBUS, OHIO, February 17, 1928.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

“I am herewith making departmental request for an opinion relative to the refunder of gasoline tax such as is provided for in Section 5534 of the General Code. A number of requests are on file seeking payment where the date of invoice is more than ninety days old.

We desire to be advised as to whether the ninety day limit—as stated in above Section—is directory, or positively mandatory. It would greatly facilitate the administration of this feature of the law, both in the Tax Commission and especially in the Department of Auditor of State, if these claims be honored even once a year rather than at such short intervals, and it would seem that even if the man has delayed asking for his money longer than ninety days it ought not entirely invalidate his claim, provided there is no question as to the validity of the amount asked for.”

Section 5534 of the General Code is in the following language:

“Any person, firm, association, partnership or corporation who shall use any motor vehicle fuel, as defined in this act, on which the tax herein imposed has been paid, for the purpose of operating or propelling stationary gas engines, tractors not used on highways, motor boats or aircraft, or who shall use any such fuel upon which the tax herein provided for has been paid, for cleaning or dyeing, or any other purpose than the propulsion of motor vehicles operated or intended to be operated in whole or in part upon the highways of this state, shall be reimbursed to the extent of the amount of the tax so paid on such motor vehicle fuel in the following manner; provided however that such applications for refunds must be filed with the tax commission of Ohio within ninety days from the date of purchase or invoice.

Such person, firm, association, partnership or corporation shall file with the Tax Commission of Ohio a statement of the quantity of fuel used for purposes other than propulsion of motor vehicles, as set out in

this Section. Such statement shall be accompanied by the original invoice showing such purchase. On filing of such statement and invoice in form herein prescribed, the Tax Commission of Ohio shall determine the amount of refund due and within thirty days from the time of filing the same shall certify such amount to the auditor of state. The auditor of state shall thereupon draw a warrant on the treasurer of state in favor of the person claiming such refund. Such refund shall be paid by the treasurer of state from the rotary fund hereinafter provided for. The tax commission shall require the statement provided for herein to be supported by the affidavit of the claimant."

The Section clearly makes it mandatory that applications for refunds be filed with the Tax Commission within ninety days from the date of purchase or invoice. I know of no principle of statutory construction which would authorize me to hold that the language used is directory only.

I am inclined to follow the reasoning of the Supreme Court in the case of *Devine vs. State*, 105 O. S., page 288. There the court had under consideration the validity of a ballot which had been marked in ink. The statute provided that all marks upon the ballot must be made in black lead pencil. Commenting upon the mandatory language used, the court, speaking through Judge Wanamaker, said on page 291:

"It is not unlikely that there is abroad in the land today a disposition to regard many of our laws as merely directory, and that it is the right and privilege of the individual citizen to choose those laws that he will obey, and those laws that he will disobey, at his pleasure and without penalty; but the Blackstone idea followed by English and American courts is the only one that can give simplicity and stability to our law, and security to our institutions created and conserved by it.

It may be that in some cases, gathered from the entire context of the law, some provision may be clearly directory or discretionary, and when so it should be so interpreted and so applied; but this directory character, this optional character, must be clear and convincing.

The language of the statute first in question, 'must be made by *black lead pencil*,' is so plain and so imperative in its force, that it is clearly mandatory. To hold otherwise would be in effect to regard it as a mere plaything, a mere pleasure of the voter. If 'black lead pencil' is only directory, then the voter is at liberty to use blue pencil, red pencil, or any other kind of pencil, tool, or implement with which he could make a mark. The law then would indeed be only a scrap of paper.

If the statute be wrong, let the Legislature that made it amend it. That is neither within the right or the power of this court."

In the present instance the language is just as explicit and I therefore feel that, if the administrative methods provided by this Section are not convenient from the standpoint of the functioning of the Tax Commission and your office, the remedy lies in action by the Legislature and not in interpretation of the language used.

You are accordingly advised that refunders of the tax paid upon gasoline may not be made unless applications therefore be filed with the Tax Commission of Ohio within ninety days of the date of purchase or invoice.

Respectfully,  
 EDWARD C. TURNER,  
*Attorney General.*