

OPINION NO. 82-046**Syllabus:**

Excess taxes paid as the result of the use of cigarette excise stamps and meter impressions which were purchased at the tax rate in effect prior to November 15, 1981, but used on cigarettes sold on or after November 15, 1981, may be refunded as an erroneous payment in accordance with the provisions of R.C. 5743.05. An application for the refund of excess taxes so paid must have been filed, however, within ninety days of November 15, 1981.

To: Edgar L. Lindley, Commissioner, Department of Taxation, Columbus, Ohio
By: William J. Brown, Attorney General, July 2, 1982

I have before me your request for an opinion concerning the effect of the recent reduction of the cigarette excise tax by Am. Sub. H.B. 694, 114th Gen. A. (1981) (eff. November 15, 1981). As you have noted, that act reduced the tax by one-half cent on every ten cigarettes. Because stamps and meter impressions are purchased and affixed to packs of cigarettes prior to their sale, a problem has developed with respect to stamps which had been purchased and cigarettes which were already stamped, but unsold, at the time the tax reduction became effective. Against this background you have posed the following questions:

1. Are cigarette wholesalers legally entitled to a refund of any cigarette excise tax on account of tax indicia on hand, but obtained prior to November 15, 1981 at the prior rate of tax?
2. If the answer to the foregoing question is affirmative, should the refund be by way of refund claim, and if so pursuant to what section of the statute; or by certificate of abatement, per section 5703.05(B) R.C.?
3. If any such refund should be paid by means of a certificate of abatement, must the wholesaler apply for such certificate, or should such certificate be issued based upon information contained in the wholesaler's tax returns, without specific application?
4. If it is determined that refunds are payable per 5743.05(B), does the ninety-day statute of limitations in that section run from the date of the filing of the tax return that showed the number of indicia on hand as of November 15, 1981?

At the outset it may be noted that the cigarette excise tax is imposed either as a sales tax under R.C. 5743.02 or alternately as a use tax under R.C. 5743.32. These provisions have been treated as complementary, so that circumstances which would have warranted a refund of the sales tax on unsaleable cigarettes have been

held to preclude the assessment of use tax against the same party with respect to cigarettes which have become unsaleable. Knoke v. Lindley, 70 Ohio St. 2d 16, 434 N.E.2d 275 (1982). It is, therefore, appropriate to consider the availability of a refund or certificate of abatement for the sales tax as also dispositive of the issue as it relates to the cigarette use tax.

With respect to your first question the following language in R.C. 5743.05 is pertinent:

The treasurer of state shall redeem and pay for any destroyed, unused, or spoiled tax stamps and any unused meter impressions at their net value, and he shall refund to wholesale dealers the net amount of taxes paid erroneously or paid on cigarettes which have been sold in interstate or foreign commerce or which have become unsaleable. An application shall be filed with the tax commissioner, on the form prescribed by him for such purpose, within ninety days from the date the tax stamps are destroyed or spoiled, from the date it is ascertained that the payment was erroneous, or from the date that cigarettes on which taxes have been paid have been sold in interstate or foreign commerce or have become unsaleable; provided that in any event the application for refund of tax erroneously paid must be filed with the commissioner within two years from the date of such erroneous payment. On filing of such application the commissioner shall determine the amount of refund due and certify such amount to the auditor of state and treasurer of state. The auditor of state shall draw a warrant for such certified amount on the treasurer of state to the person claiming such refund. Such payment shall be made from the tax refund special account created by section 5703.052 of the Revised Code. (Emphasis added.)

By its terms this statute authorizes a refund of any cigarette tax erroneously paid by a wholesale dealer. The question presented is whether the use of stamps and meter impressions purchased at the old tax rate and affixed to cigarettes sold subsequent to the rate reduction results in an erroneous payment of tax within the scope of this statute.

In answering this question the incidence of the tax must be considered. Specifically, R.C. 5743.02 levies the tax on the sale of cigarettes. Although R.C. 5743.03 provides for the advance purchase and use of stamps and meter impressions on cigarettes being held for sale, and R.C. 5743.111 prohibits the holding of more than sixty dollars worth of unstamped cigarettes, these are merely provisions adopted by the General Assembly to ensure that no cigarettes are sold without tax being paid on them. It is still the sale of the cigarettes on which the tax is imposed. In this regard compare the last paragraph of R.C. 5743.02 in which the General Assembly provided for the collection of an additional tax on unsold cigarettes which wholesalers had on hand at the time of a tax rate increase. It follows that the General Assembly considers the rate applicable on the date of sale to be the correct rate, irrespective of whether cigarettes have been stamped at a different rate. Therefore, to the extent that stamps, previously purchased at a greater rate, have been used on cigarettes sold subsequent to the rate reduction, such difference in the rate constitutes an excessive and thus erroneous payment of tax. See Ohio Bell Telephone Co. v. Evatt, 142 Ohio St. 254, 51 N.E.2d 718 (1943). In answer to your first question, such excess tax payment is refundable pursuant to R.C. 5743.05.

The foregoing answer is dispositive of your second question. Specifically, the refund is authorized by R.C. 5743.05 and, therefore, must be requested in accordance with the provisions of that section. R.C. 5703.05(B) authorizes an application for a certificate of abatement based on an overpayment of tax only if the tax was payable under a law "which does not contain any provision for refund." Therefore, since R.C. 5743.05 makes provision for refunds, a wholesaler must comply with that section in attempting to recover excess tax payments.

Since I have concluded that a certificate of abatement would not be the appropriate remedy in this situation there is no need to address your third question.

The last issue you have posed concerns the period within which a refund must be requested pursuant to R.C. 5743.05. That section expressly requires that an application for refund be filed with the Tax Commissioner within ninety days "from the date it is ascertained that the payment was erroneous." In the instant case Am. Sub. H.B. 694 and the tax reduction provided therein, became effective on November 15, 1981. On that date wholesalers had before them the facts necessary to ascertain that an erroneous payment of taxes had been made. Specifically, they knew the number of stamps they had at the old rate and the amount by which the tax had been reduced. With that information at hand it was possible to compute the amount of excess tax payment which would result from the use of the stamps on cigarettes sold after the change in the rate. Therefore, in this situation an application filed pursuant to R.C. 5743.05 for a refund of excess cigarette taxes paid must have been filed within ninety days of November 15, 1981.

In specific answer to your questions, it is, therefore, my opinion, and you are advised, that excess taxes paid as the result of the use of cigarette excise stamps and meter impressions which were purchased at the tax rate in effect prior to November 15, 1981, but used on cigarettes sold on or after November 15, 1981, may be refunded as an erroneous payment in accordance with the provisions of R.C. 5743.05. An application for the refund of excess taxes so paid must have been filed, however, within ninety days of November 15, 1981.