

OPINION NO. 68-025

Syllabus:

1. The clerk of courts of each county must collect the sales tax on all sales of motor vehicles made by trustees in bankruptcy pursuant to Section 4505.06, Revised Code.

2. The clerk of courts shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the sales tax is paid in the manner prescribed in Section 4505.06, Revised Code, or not required under paragraphs (A) through (E) of Section 4505.06, Revised Code.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William B. Saxbe, Attorney General, January 30, 1968

Your request for my opinion reads as follows:

"1. Should the Clerk of Courts of each county collect sales or use tax on all sales of motor vehicles by trustees in bankruptcy?

"2. If the answer to No. 1 is in the affirmative, may the Clerk of Courts properly refuse to transfer title to a purchaser of an automobile from a trustee in bankruptcy unless the sales or use tax is paid?"

Section 5739.01, Revised Code, provides in pertinent part:

"As used in sections 5739.01 to 5739.31, inclusive, of the Revised Code:

"(A) 'Person' includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

"(B) 'Sale' and 'selling' include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred * * * for a consideration * * *

"(C) 'Vendor' means the person by whom the transfer effected or license given by a sale is or is to be made or given; * * *

"(D) 'Consumer' means the person to whom the transfer effected or license given by a sale is or is to be made or given, or to whom the admission is granted.

" * * * * *"

"(E) 'Retail sale' and 'sales at retail' include all sales except those in which the purpose of the consumer is: (none of which are herein relevant)

" * * * * *"

"(G) 'Engaging in business' means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds himself out to the public as conducting such business. Making a casual sale is not engaging in business.

" * * * * *"

"(M) 'Casual sale' means a sale of an item of tangible personal property which was obtained by the person making the sale, through purchase or otherwise, for his own use in this state."

(Parenthetical matter added)

Section 5739.02, Revised Code, provides in pertinent part:

"For the purpose of providing revenue with which to meet the needs of the state * * * an excise tax is hereby levied on each retail sale made in this state.

" * * * * *"

"(B) The tax does not apply to the following:

" * * * * *"

"(8) Casual sales by a person not engaged in the business of selling tangible personal property except as to such sales of motor vehicles and house trailers;

" * * * * *"

"For the purpose of the proper administration of sections 5739.01 to 5739.31, inclusive, of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established."

Giving effect to the above-quoted provisions of Sections

5739.01 and 5739.02, both supra, all sales of motor vehicles by trustees in bankruptcy are subject to the four percent state sales tax regardless of whether the said sales are made by the trustee while "engaging in business" or as "casual sales."

However, as a result of the decision of the referee in bankruptcy in the case of In re Payne Corporation, Bankrupt, United States District Court, Northern District, Eastern Division, decided November 13, 1953, and reported in 68 Ohio Law Abs. 545, 53 Ohio Opinions 467, there is some question as to the enforceability of the collection of the tax when the sale is a "casual sale" as defined in paragraph (M) of Section 5739.01, supra. There is no question about the taxability of sales of motor vehicles by trustees in bankruptcy in the conduct of the bankrupt's business. 28 U.S.C.A., Section 960, reads as follows:

"Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

In the Payne Corporation case, the referee held:

"For the reasons stated I conclude:

"1. That by reason of omission of a trustee in (liquidating) bankruptcy in the definition of 'persons' in the Ohio Sales Act, this act does not apply to sales by the trustee pursuant to the order of the Bankruptcy Court for the purpose of liquidation as distinguished from sales in the conduct of bankrupt's business.

"2. If, contrary to the above conclusion, it should be found that such sales are within the provision of the Sales Tax statute, I conclude that such statute, in this respect, is invalid for the reason that it interferes with the administration of the Bankruptcy Act by the Bankruptcy Court and is contrary to the purpose of Congress, as evidenced by 28 U.S.C.A. Sec. 960, to restrict the validity of states taxes, payable by trustee for their actions during the administration, to sales made by the trustee while conducting the bankrupt's business." (68 Ohio Law Abs. at 558)

In regard to the referee's first basis for concluding that liquidating sales of motor vehicles by trustees in bankruptcy were not taxable, it must be noted that the Ohio General Assembly amended paragraph (A) of Section 5739.01, supra, in Amended Substitute Senate Bill No. 376 (128 Ohio Laws 421, 423), effective July 1, 1959, so as to expressly

include trustees in bankruptcy within the definition of "person."

In regard to the referee's second basis for holding that liquidating sales of motor vehicles by trustees in bankruptcy were not taxable, the referee observed:

"* * * In fact, it is evident that the Commissioner looks chiefly to the vendor in the payment of the tax.

"A considerable number of sections rather clearly disclose that the vendor is liable, certainly as much liable as the consumer. The vendor is not secondarily liable, if by that is meant that the consumer must first be looked to for payment. The vendor is liable whether he collects the tax or not. In fact, the vendor is liable in some instances where the consumer is not."

(Emphasis by the court)
(68 Ohio Law Abs. at 556)

and further observed that the decisions cited therein held that no state could levy a tax upon the process of the Courts of the United States or impede the officers of the Courts in an essential judicial function, and concluded that the State could not enforce the tax upon the casual sale of a motor vehicle by a trustee in bankruptcy pursuant to Court order either directly or indirectly through the clerk of courts. However, in regard to the sales tax upon casual sales of motor vehicles by trustees in bankruptcy, it is my opinion that the decision of the Payne Corporation is no longer applicable in Ohio.

The tax levied under Section 5739.02, supra - which is not to be confused with the four percent excise tax upon the privilege of engaging in the business of making retail sales levied by Section 5739.10 Revised Code - is upon the consumer, and the vendor's liability, if any, is that of a collector and d trustee. See Section 5739.03, Revised Code amended by Amended Substitute Senate Bill No. 35C (132 v. S 350), effective December 1, 1967, which reads in part as follows:

"Except as provided in section 5739.05 of the Revised Code, the tax imposed by or pursuant to section 5739.02 or 5739.021 of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale, in the manner and at the times provided as follows:"

It has been recognized by the federal courts that sales taxes levied upon sales by trustees while liquidating the

bankrupt's estate are proper and valid if the tax is upon the purchaser or consumer. See In re Leavy et al. City of New York v. Jersawit, CCA 2d, 1936, 31 Am. Bankruptcy Reports (N.S.) 698, 85 F. 2d 25. At this point, it should be noted that one of the decisions relied on in the Payne Corporation case which the referee stated "comes closer to the realities" (68 Ohio Law Abs., at 553) is the case of In re West Coast Cabinet Works, Inc., 92 F. Supp. 636, aff'd. in California State Board of Equalization v. Goggin, 191 F. 2d 726. In this case, however, the district court distinguished the In re Leavy case, supra, on the ground that the tax in Leavy was upon the consumer and the California sales tax was upon the seller, a tax upon the privilege of making retail sales (92 F. Supp., at 646 and 649). Obviously, a sales tax upon a trustee in bankruptcy on the privilege of selling the bankrupt's property pursuant to a court order would constitute a tax upon the process of the Federal courts. But, as is shown unequivocally by the quoted portion of Section 5739.03, supra, the Ohio sales tax levied in Section 5739.02, supra, is upon the purchaser and in no way taxes the process of the Federal courts.

In addition to the fact that the trustee in bankruptcy is not subject to the burden of the tax, under section 4505.06, Revised Code, a trustee in bankruptcy making a casual sale of a motor vehicle is not even liable or responsible for the collection of the sales tax under the provisions of the statute which provide in pertinent part:

"In the case of the sale of a motor vehicle by a dealer to a general purchaser or user, the certificate of title shall be obtained in the name of the purchaser by the dealer upon application signed by the purchaser. In all other cases such certificates shall be obtained by the purchaser. In all cases of transfer of motor vehicles the application for certificate of title shall be filed within seven days after the delivery of such motor vehicle.

"The clerk, except as provided in this section, shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the dealer or the applicant, in cases in which the certificate shall be obtained by the purchaser, submits with the application, payment of the tax levied by or pursuant to section 5739.02 or 5739.021 5739.02.1 of the Revised Code by cash, certified check, draft, or money order payable to the clerk who shall issue a receipt in the form prescribed by the tax commissioner, or a receipt issued by the commissioner showing the payment of the tax."

(Emphasis added)

As can be seen from the emphasized language, the tax levied by Section 5739.02, supra, is to be collected by the clerk

of courts directly from the purchaser at the time the purchaser makes application for his certificate of title. In other words, the trustee in bankruptcy who makes a casual sale of a motor vehicle pursuant to an order of liquidation by the bankruptcy court is liable for neither the payment of the sales tax nor the collection of the sales tax. Therefore, for these reasons, the decision of the referee in bankruptcy in the case of In re Payne Corporation, Bankrupt, supra, is no longer applicable and, in answer to your first question, the clerk of courts of each county must collect the sales tax on all sales of motor vehicles made by trustees in bankruptcy pursuant to Section 4505.06, supra.

In answer to your second question relative to the refusal to accept an application for a certificate of title and to issue a certificate of title, Section 4505.06, supra provides in pertinent part:

"The clerk, except as provided in this section, shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the dealer or the applicant, in cases in which the certificate shall be obtained by the purchaser, submits with the application, payment of the tax levied by or pursuant to section 5739.02 or 5739.021 5739.02.1 of the Revised Code by cash, certified check, draft, or money order payable to the clerk who shall issue a receipt in the form prescribed by the tax commissioner, or a receipt issued by the commissioner showing the payment of the tax.

" * * * * * * * * *

"In the following cases the clerk shall accept for filing such application and shall issue certificate of title without requiring payment or evidence of payment of either tax:

"(A) When the purchaser is this state or any of its political subdivisions, a church, or an organization whose purchases are exempted by section 5739.02 of the Revised Code;

"(B) When the transaction in this state is not a retail sale as defined by section 5739.01 of the Revised Code;

"(C) When the purchase is outside this state or in interstate commerce and the purpose of the purchaser is not to use, store, or consume within the meaning of section 5741.01 of the Revised Code;

"(D) When the purchaser is the federal government;

"(E) When the motor vehicle was purchased outside this state for use outside this state."

Since I have concluded that the imposition of the sales tax levied by Section 5739.02, supra, is upon the consumer or purchaser and the trustee in bankruptcy either must collect it and remit it to the clerk if he is engaged in the business of making retail sales in light of 28 U.S.C.A., Section 960, or is not obligated to collect it if the sale is a casual sale, the sales tax levied upon sales of motor vehicles when made by trustees in bankruptcy in the course of business is permissible under the above quoted federal statute, and the sales tax levied upon casual sales of motor vehicles by trustees in bankruptcy does not constitute taxes upon the process of the Courts of the United States and does not impede the judicial functions of the officers of said courts and the clerk of courts shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the sales tax is paid in the manner prescribed in Section 4505.06, Revised Code, or not required under paragraphs (A) through (E) of Section 4505.06, Revised Code.