

with respect to the bottled beverage stamp taxes, for, although Section 6212-49c requires that such stamps be affixed to the bottles, the section relates to "the tax hereby imposed". Since Section 6212-49b, which imposed that tax has been repealed and enacted in amended form as part of the sales tax act, it might be contended that Section 6212-49c is no longer of force and effect. Be that as it may, no opinion is asked with respect to this particular point and no opinion is expressed thereon. All of these tax stamps nevertheless, whether heretofore purchased for bottled beverages or for cosmetics, may be turned in and a refund made thereon in accordance with the provisions of Section 24 of House Bill No. 134, supra, wherein it is provided that amendments or suspensions of the bottled beverage and cosmetic tax laws "shall not affect the right to refund for unused stamps purchased under any of said sections which right shall extend to refunds on account of stamps affixed to articles unsold at the end of business on December 31, 1935". The concluding clause of this section, in my judgment, clearly compels an affirmative answer to your inquiry, wherein it is provided that "the moneys appropriated to the Treasurer of State under section 22 of this act for the purpose of making refunds may be expended for the purpose of making refunds authorized by this section."

Respectfully,

JOHN W. BRICKER,
Attorney General.

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SALES TAX—DISCOUNT REQUIRED ALL SALES REGARDLESS OF SIZE ON
PREPAID TAX RECEIPTS—TAX COMMISSION TO FIX DISCOUNT
RATE.

SYLLABUS:

Section 8 of House Bill 134 of the 90th General Assembly, second special session, requires that all prepaid tax receipts sold by the Treasurer of State, his agents, and the several county treasurers, shall be sold and accounted for at a discount of not to exceed three percent of the face value thereof as fixed by the Tax Commission, regardless of the size of such sales.

COLUMBUS, OHIO, January 18, 1935.

HON. HARRY S. DAY, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"Under authority of Section 8, H. B. No. 134, enacted by the Ninetieth General Assembly at its second special session, the Tax Commission of the State of Ohio certified to this office the following regulation:

'December 19, 1934.

In the matter of the amount of discount which may be allowed to vendors under Amended House Bill No. 134.

This day the commission came on to fix the amount of discount which may be allowed to vendors under the provisions of section 8 of Amended House Bill No. 134.

The commission being fully advised in the premises finds that discount in the amount of three per cent of the face value of prepaid tax receipts shall

be allowed to all vendors purchasing quantities of twenty-four dollars or more in taxable value.

It is hereby ordered that a copy of this resolution be duly certified to the Treasurer of State.

I hereby certify the foregoing to be a true and correct copy of the order of the Tax Commission of Ohio, this day made, with respect to the above matter.

(Signed) W. J. SPROULL, *Secretary.*

We have received numerous complaints from vendors in the various parts of the state objecting to our enforcing this ruling, the complainants pointing out that this section of the State Tax Law provides that 'all such prepaid tax receipts shall be sold and accounted for at a discount of not to exceed three percentum of the face value, as a commission for handling and cancelling such prepaid tax receipts.' The section further gives the Commission the right, within the limitations prescribed, to fix the rate of discount applicable to the sale of prepaid tax receipts to certain classes of licensed vendors.

We believe this question a proper one for submission to you for your opinion, and accordingly we are requesting that we be furnished with your opinion as to the legality of this ruling of the Tax Commission." Section 8 of House Bill No. 134, referred to in your letter, reads as follows:

"The treasurer of state, his agents, and the several county treasurers, shall sell prepaid tax receipts only to licensed vendors. All such prepaid tax receipts shall be sold and accounted for at a discount of not to exceed three per centum of the face value thereof, as a commission for handling and cancelling such prepaid tax receipts. The commission shall by regulation, certified to the treasurer of state, fix within the limitations herein prescribed the rate of discount applicable to the sale of prepaid tax receipts to such classes of licensed vendors as it may establish. The treasurer of state shall redeem and pay for any unused or spoiled tax receipts at the net value thereof, on written verified request made by any licensed vendor, his administrators, executors, successors or assigns. Such payments shall be made from an appropriation of the treasurer of state for the purpose of defraying the expenses of administering this act."

The provision of the second sentence of the foregoing section that all prepaid tax receipts which are sold by the Treasurer of State, his agents, and the several county treasurers, shall be sold at a discount, is couched in mandatory language, the word "shall" being used. It is well established that this word is ordinarily to be given mandatory effect. *Lindsey vs. Public Utilities Commission*, 111 O. S. 6; *Luff vs. State*, 112 O. S. 102; *State, ex rel. vs. Commissioners*, 122 O. S. 456; *State, ex rel. vs. Commission*, 123 O. S. 70. This rule is, of course, subject to exceptions. Permissive words may be given a mandatory effect and mandatory words a permissive effect in cases where the evident intent of the legislature requires such construction. *State, ex rel. vs. Barnell*, 109 O. S. 246. In 36 Cyc. 1157, it is stated that whether a statute is mandatory or directory is to be ascertained from a consideration of the entire act, its nature, its object and the consequences which would result from construing it one way or another.

Considering Section 8, supra, in its entirety, there is nothing to indicate that the provision for a discount in the sale of "all such prepaid tax receipts" should be construed as other than mandatory,—there is obviously cost attached to the handling and

cancelling of small quantities of tax receipts as well as to large quantities thereof. Unless the word "shall" as used in the second sentence is mandatory, the Tax Commission would have discretionary power to fix a discount in excess of three per cent of the face value of the stamps sold,—this for the reason that the word obviously applies to the entire phrase "at a discount of not to exceed three per centum of the face value thereof". If the duty to sell "all such prepaid tax receipts at a discount" is directory, then it may well be argued that the maximum limitation of three per cent is likewise directory.

Throughout the section in each of the five sentences comprising it, the legislature has used the word "shall", thus clearly indicating the mandatory character of the section. It is said in 37 Ohio Jurisprudence 326, citing *Cleveland Co. vs. Brescia*, 100 O. S. 267:

"But even the use of the word 'shall' is usually interpreted to make the provision in which it is contained mandatory, especially if frequently repeated."

The language of the Supreme Court in the Brescia case at page 270 supports this text.

The duty imposed upon the Tax Commission to adopt a regulation to fix "the rate of discount applicable to the sale of prepaid tax receipts to such classes of licensed vendors as it may establish" is qualified by the phrase "within the limitations herein prescribed". The maximum limitation is three per cent, and the minimum, though not prescribed as to amount, must necessarily be some discount in order to effectuate the provision that all such prepaid tax receipts shall be sold at a discount. The situation is somewhat analogous to that under consideration in my Opinions Nos. 1384 and 2151, rendered August 11, 1933 and January 11, 1934, respectively, holding that the requirements of Sections 4295 and 7605, General Code, that municipalities and school districts deposit their funds in the bank or banks bidding the highest rate of interest, meant that some rate of interest was required, no matter how low.

The Tax Commission is authorized to classify licensed vendors as to discount rates. You do not specifically inquire as to the power of the Commission to classify licensed vendors as to discount rates upon a basis of the amount of their purchases. Your inquiry is, as I understand it, one of whether or not all such purchasers are entitled to some discount. It is my view that probably the sole purpose of the discount is to compensate the vendors for the trouble of handling and canceling these tax receipts, and under such circumstances, the only valid classification that might be made would be a classification of vendors as to the nature of their businesses rather than the size of their stamp purchases. Obviously, a merchant running a five and ten cent store will incur more cost in handling and canceling these stamps than will an automobile dealer. It would, therefore, appear that the present regulation, in the absence of provision covering all sales, is invalid and it is the duty of the Tax Commission to take prompt action in this matter.

It is accordingly my opinion that Section 8 of House Bill 134 of the 90th General Assembly, second special session, requires that all prepaid tax receipts sold by the Treasurer of State, his agents, and the several county treasurers, shall be sold and accounted for at a discount of not to exceed three per cent of the face value thereof as fixed by the Tax Commission, regardless of the size of such sales.

Respectfully,

JOHN W. BRICKER,

Attorney General.