

## OPINION NO. 71-087

**Syllabus:**

Where the vendee of a motor car has paid the full amount of the sales tax to the dealer, and where the dealer fails to apply to the clerk of the court of common pleas for issuance of a certificate of title, and fails to pay to the clerk the full amount of the sales tax, the clerk may not refuse, under Section 4505.06, Revised Code, to issue a certificate of title to the vendee on the sole ground that the vendee has not paid the full amount of the sales tax to the clerk.

---

**To: Robert E. Mohler, Summit County Pros. Atty., Akron, Ohio**  
**By: William J. Brown, Attorney General, November 6, 1971**

Your request for my opinion states the question and the facts from which it arises in the following manner:

"About September 1970 [an individual] purchased a new automobile paying sales tax in the sum of \$145.80 plus other fees and costs to the dealer according to the common practice. Later the dealer went out of business, apparently without paying the sales tax to the State of Ohio or delivering a certificate of title.

"A certificate of origin was obtained by the buyer, but the Clerk of Courts refuses to issue a title until another payment of sales tax is made, basing his refusal on Section 4505.06 of the Ohio Revised Code and Ohio Attorney General's Opinion #68-025.

"It appeared to us that the case of *Mannen and Roth vs. Peck* 161 OS 153 seems to indicate that the tax commissioner can assess the consumer only in cases where the consumer has refused to pay the tax or to supply exempt certificate. In our opinion the tax was already paid.

"Ohio Revised Code Section 5739.03 seems to state that the tax imposed should be paid by the consumer to the vendor and further that the vendor is trustee for the State of Ohio. It is therefore the contention that the consumer has complied with all state laws as they have paid the agent of the State of Ohio.

"We would appreciate your assistance in rendering an opinion as to the liability of the consumer in purchase of this new car for the sales tax hereinbefore paid to the vendor. Does the Clerk of Courts have the authority to refuse to take such application under these facts?"

Chapter 5739, Revised Code, which contains the statutory provisions covering the imposition of the sales tax, prescribes that, while in most instances the tax is to be paid by the vendee, it must be collected and transmitted to the State by the vendor. Section 5739.01, Revised Code, provides, in pertinent part, as follows:

"The tax collected by the vendor \* \* \* is not part of the price, but is a tax collection for the benefit of the state \* \* \*."

Section 5739.03, Revised Code, provides, in pertinent part, as follows:

"Except as provided in section 5739.05 \* \* \*, the tax \* \* \* shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale, \* \* \*

"\* \* \* \* \* \* \* \* \* \*"

The exception in Section 5739.05, Revised Code, provides that in certain instances the vendor may prepay the tax to the State and then charge it back to the vendee as part of the price. In pertinent part the Section reads as follows:

"The tax commissioner shall enforce and administer sections 5739.01 to 5739.31, inclusive, \* \* \*. The commissioner may adopt and promulgate, \* \* \* such rules and regulations as he deems necessary \* \* \* and the commissioner may authorize a vendor to prepay the tax \* \* \* and he may waive the collection of the tax from the consumer; but no such authority shall be granted \* \* \* unless the commissioner finds that the conditions of the \* \* \* [vendor's] business are such that the collection of the tax from the consumer \* \* \* would impose an unreasonable burden on the vendor; \* \* \*."

Sections 5739.11 and 5739.12, Revised Code, require the vendor to keep complete records of sales, which shall be open to inspection by the Tax Commissioner, and to file with the State Treasurer regular returns of the amount of taxes collected together with payment thereof. And Section 5739.13, Revised Code, prescribes the respective liabilities of the vendor and the vendee in the following terms:

"If any vendor collects the tax \* \* \*, and fails to remit the same to the state \* \* \* or if any motor vehicle dealer collects the tax on the sale of a motor vehicle and fails to remit payment to a clerk of a court of common pleas as provided in section 4505.06 of the Revised Code, he shall be personally liable for any amount collected which he failed to remit. The tax commissioner may make an assessment against such vendor based upon any information in his possession.

"If any vendor fails to collect the tax

or any consumer fails to pay the tax \* \* \*, such vendor or consumer shall be personally liable for the amount of the tax applicable to the transaction. The commissioner may make an assessment against either the vendor or consumer, as the facts may require, based upon any information in his possession.

\* \* \* \* \*

"The commissioner may make an assessment against any vendor who fails to file a return \* \* \* or fails to remit the proper amount of tax \* \* \*.

\* \* \* \* \*

"A penalty of fifteen per cent shall be added to the amount of every assessment made under this section. \* \* \*"

Criminal penalties for various violations of Chapter 5739, supra, are prescribed by Section 5739.99, Revised Code, one part of which reads as follows:

\* \* \* \* \*

"(E) Whoever violates section 5739.12 of the Revised Code by failing to remit to the state the tax collected \* \* \* may be imprisoned not more than thirty days or may be fined not less than twenty-five nor more than one hundred dollars, or both, and shall suffer the loss of his vendor's license \* \* \*."

In brief summary, Chapter 5739, supra, provides that, although the sales tax shall normally be paid by the vendee, it shall ordinarily be collected by the vendor; that the vendor collects the tax for the benefit of, and as a trustee for, the State of Ohio; that the vendor must keep records of the taxes collected, and must file returns accounting for such collections in order to facilitate administration of the Chapter by the Tax Commissioner; that if the vendor collects the tax and fails to remit it to the State Treasurer, or, in the case of an auto dealer, to the clerk of the court of common pleas, such vendor or auto dealer shall be personally liable for the tax collected, and the Tax Commissioner may assess the amount of the tax against him plus a penalty of fifteen per cent; that the vendee becomes liable for the tax only in the rare case in which he fails to pay the tax to the vendor; and that the State's remedies against the party actually liable for the tax include, in addition to assessment of the tax and fifteen per cent penalty, a possible criminal charge punishable by either imprisonment or fine, or both. For other remedies against the vendor, see Sections 5739.131, 5739.14, 5739.15, 5739.16, 5739.19, 5739.29, 5739.30, 5739.31, and 5739.33, Revised Code.

As will have been noted, there is a difference in the method of payment of the tax by automobile dealers. Instead of remitting collected taxes to the State Treasurer, as all other vendors are required to do, the automobile dealer must pay the tax to the clerk of the court of common pleas when he makes application for issuance of a certificate of title to his vendee. Section 4505.06, Revised Code, provides, in pertinent part, as follows:

"Application for a certificate of title \* \* \* shall be filed with the clerk of the court of common pleas \* \* \*.

"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. \* \* \*

"The clerk, \* \* \* 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 [sales] tax levied by \* \* \* section 5739.02 \* \* \*."

As your letter states, the Clerk of the Court of Common Pleas for Summit County takes the position that, under this Section, he must refuse to issue a certificate of title to the vendee in this case until the full amount of the tax on the sale is paid to his office, even though the vendee has already paid the tax to the vendor. At first glance, the last quoted paragraph of Section 4505.06, supra, seems to support the Clerk's position. However, upon careful examination, I think that such an interpretation places Section 4505.06, supra, in conflict with the provisions of Chapter 5739, supra, and, by permitting double taxation of the vendee, raises grave constitutional problems. It is clear that Chapter 5739, supra, provides that, in almost all sales, the tax shall be paid by the vendee to the vendor; that the vendor then holds the tax as the agent and trustee of the State, and the vendor alone has a liability to the State; and that the State has a variety of remedies against the vendor for collection of the tax. The Clerk's interpretation of Section 4505.06, supra, in effect, makes the vendee also liable to the State for the tax, despite the fact that he has paid it once, and by implication gives the State a remedy against the vendee in addition to the numerous remedies against the vendor already specifically provided by statute.

It is well settled that courts will interpret statutes so as to avoid ambiguity or conflict between provisions (50 O. Jur. 2d, Statutes, §§174, 176); that enactments of the General Assembly are to be interpreted so as to produce a reasonable and consistent whole (50 O. Jur. 2d, Statutes, §238; State ex rel. Haines v. Rhodes, 168 Ohio St. 165, 170-171 (1958)); that statutes must be construed in such a manner as to preserve their constitutionality, wherever possible (10 O. Jur. 2d, Constitutional Law, §§162-166); and that taxing statutes are to be construed strictly against the taxing power (51 O. Jur. 2d, Taxation, §32; Caldwell v. State, 115 Ohio St. 458, 461-462 (1926)).

It has also been held that taxation is subject to the "equal protection" clauses of the Constitutions of both Ohio and the United States. State, ex rel. Park Investment Co. v. Board of Tax Appeals, 26 Ohio st. 2d 161, 169 (1971); State, ex rel. Hostetter v. Hunt, 132 Ohio st. 568, 578 (1937); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526-528 (1959).

A more reasonable reading of Section 4505.06, supra, which avoids the difficulties of the Clerk's version and is in accord with the above principles of statutory construction, is suggested by the opinion to which your letter refers, Mannen & Roth Co. v. Peck, 161 Ohio St. 153, 155-159 (1954). In that case, a vendee had never paid the sales tax on a number of purchases because the vendor had neither requested nor demanded that the vendee pay the tax. The Tax Commissioner assessed the tax against the vendee. The Supreme Court set aside the assessment, holding (at pages 157-158), under Section 5546-9a, General Code (substantially the same as Section 5739.13, supra), that ordinarily the vendor alone is liable to the State for the sales tax; that the vendee becomes liable only when he refuses to pay the tax to the vendor; that only "in such cases" may the Tax Commissioner make an assessment against the vendee; and that, since the vendee had not refused to pay the tax, the case was not covered by Section 5546-9a, supra.

I think that Section 4505.06, Revised Code, likewise, upon careful analysis, does not cover the case presented by your letter. That Section provides that certificates of title to motor vehicles must be obtained from the clerk of the court of common pleas; that "[i]n the case of the sale of a motor vehicle by a dealer to a general purchaser \* \* \*, the certificate of title shall be obtained \* \* \* by the dealer \* \* \*; that "[i]n all other cases such certificates shall be obtained by the purchaser"; and that the clerk "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 \* \* \* payment of the tax \* \* \*." (Emphasis added.) The present case falls within the specified class of sales to a general purchaser in which the certificate shall be obtained from the clerk by the vendor. But the vendor did not perform his statutory duty, and the vendee, who has paid the tax and who has no further liability, seeks to have the clerk issue a certificate of title. The clerk could have refused if the dealer had asked for a certificate of title without paying the tax. He could also refuse if the vendee, in a sale of a car between two individuals, should request a certificate without paying the tax, for this would fall within the class of "all other cases" in which the certificate shall be obtained by the vendee. But this is not such a case. Here, no statutory obligation whatsoever rests upon the vendee. The vendee seeks issuance of the certificate because the vendor, who received payment of the tax, was obliged to pay the tax prior to issuance of the certificate, and against whom the State has many statutory remedies, has failed to perform his statutory duty. The clerk's right to refuse a certificate, without payment of the sales tax, is limited under Section 4505.06, supra, to those who are required under that Section to pay the tax together with an application for issuance of a certificate. The vendee in this case is under no such obligation and the Clerk has no right to refuse to issue a certificate of title simply because he has not received payment of the sales tax.

I am aware of Byers Sons, Inc. v. Metzger, 172 Ohio St. 345 (1961), and Opinion No. 68-025, Opinions of the Attorney General for 1968. Certain general statements in each of these might be construed as contrary to what has been said above, but neither was concerned with the problem considered here.

In specific answer to your question it is, therefore, my opinion, and you are so advised, that where the vendee of a motor car has paid the full amount of the sales tax to the dealer, and where the dealer fails to apply to the clerk of the court of common pleas for issuance of a certificate of title, and fails to pay to the clerk the full

amount of the sales tax, the clerk may not refuse, under Section 4505.06, Revised Code, to issue a certificate of title to the vendee on the sole ground that the vendee has not paid the full amount of the sales tax to the clerk.