

OPINION NO. 69-106

Syllabus:

1. The county sales and use taxes authorized to be levied by Sections 5739.021 and 5741.021, Revised Code, respectively, are in addition to the state sales and use taxes levied by Sections 5739.02 and 5741.02, Revised Code, respectively.

2. The county use tax authorized to be levied by Section

5741.021, Revised Code, may be levied only upon the storage, use or other consumption of tangible personal property which storage, use or other consumption of tangible personal property is also subject to the state use tax levied by Section 5741.02, Revised Code.

3. The county use tax authorized to be levied by Section 5741.021, Revised Code, may not be levied by a county upon the storage, use or other consumption of tangible personal property if the transaction by which the tangible personal property was acquired was subjected to the state sales tax levied by Section 5739.02, Revised Code.

4. The clerk of the court of common pleas of a county which has enacted a county use tax pursuant to Section 5741.021, Revised Code, has no authority to refuse to issue a certificate of title to a motor vehicle on the basis of nonpayment of the county use tax if the motor vehicle was purchased in the State of Ohio, and the state sales tax paid thereon irrespective of the county in which it was purchased.

To: Fred V. Skok, Lake County Pros. Atty., Painesville, Ohio
By: Paul W. Brown, Attorney General, August 26, 1969

Your request for my opinion in effect asks if residents of a county, which county has enacted the permissive sales and use taxes pursuant to resolution adopted under the authority of Sections 5739.021 and 5741.021 of the Revised Code, can escape liability for the permissive use tax (Section 5741.021, Revised Code) by purchasing automobiles and other items of tangible personal property outside the county, even though the automobile must be registered with the clerk of courts of the county.

Section 5739.021, Revised Code, provides in pertinent part:

"For the purpose of providing additional general revenues for the county and paying the expenses of administering such levy, any county may levy a tax at the rate of one-half of one per cent in addition to the tax imposed by section 5739.02 of the Revised Code upon every retail sale made in the county. The tax shall be levied pursuant to a resolution of the county commissioners and a certified copy thereof shall be delivered to the tax commissioner either personally or by certified mail not later than the sixtieth day prior to the date on which the tax is to become effective. * * *" (Emphasis added)

Section 5741.021, Revised Code, provides in pertinent part:

"For the purpose of providing additional general revenues for the county and paying the expenses of administering such levy, any county which levies a tax pursuant to section 5739.021 5739.02.1 of the Revised Code shall levy a tax at the same rate levied pursuant to section 5739.021 5739.02.1 of the Revised Code in addition to that imposed by section 5741.02 of the

Revised Code on the storage, use, or other consumption in the county of tangible personal property which is subject to the tax levied by this state as provided in section 5741.02 of the Revised Code. The tax shall be levied pursuant to a resolution of the board of county commissioners which shall be adopted after publication of notice and hearing in the same manner as provided in section 5739.021 ~~/5739.02.1/~~ of the Revised Code. Such resolution shall be adopted and shall become effective on the same day as the resolution adopted by the board of county commissioners levying a sales tax pursuant to section 5739.021 ~~/5739.02.1/~~ of the Revised Code and shall remain in effect until such sales tax is repealed.

"(A) The tax on the storage, use, or other consumption of tangible personal property levied pursuant to this section shall be in addition to the tax levied by section 5741.02 of the Revised Code." (Emphasis added)

The state-imposed sales and use taxes (Sections 5739.02 and 5741.02, Revised Code, respectively) are complementary taxes, The Celina Mutual Insurance Co. v. Bowers, Tax Commr., 5 Ohio St. 2d 12, at 15; and of a complementary sales and use tax, the Florida Supreme Court, in the case of United States Gypsum Co. v. Green, 110 So. 2d 409 (1959), at 412, 4 State Tax Cases, par. 250-033, at page 15,619, stated:

"The primary function of the use tax is to complement the sales tax so as to make uniform the taxation of property subject to tax, whether produced, purchased and used in this State or produced and purchased in another state or country, but used in this State."

However, as can be seen from the above-quoted portion of Sections 5739.021 and 5741.021, Revised Code, the county sales and use taxes are not complementary; rather, they are only in addition to the state sales and use taxes. In other words, a county use tax is only applicable to the storage, use or other consumption of tangible personal property within the county if the state use tax is applicable to that storage, use or other consumption of the tangible personal property.

Obviously, if a motor vehicle or any other item of tangible personal property is purchased in Ohio and the state sales tax paid thereon, the subsequent storage, use or other consumption of that motor vehicle or other item of tangible personal property by the purchaser in any of the other counties of Ohio would not give rise to the state use tax liability, because Section 5741.02, Revised Code, provides in pertinent part:

"(C) The (state use) tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

"(1) When the sale of property in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31, inclusive, of the Revised Code, provided said tax has been paid;"

(Matter in parentheses added)

Thus, if a motor vehicle or any other item of tangible personal property is purchased in Ohio, and the state sales tax is paid thereon, the subsequent storage, use or other consumption in any other county in Ohio would not be subject to state use taxation, and since the county use tax is in addition to the state use tax, it must follow that the subsequent storage, use or other consumption of the motor vehicle or other item of tangible personal property in a county, other than the county in which the purchase was made, even though such county has enacted the sales and use taxes, would not be subject to the county use tax.

This conclusion is fortified by the language of Section 5741.03, Revised Code, pertaining to the distribution of use tax revenues originating from counties having the permissive sales and use taxes. Section 5741.03, Revised Code, reads in pertinent part:

"The money collected under sections 5741.01 to 5741.22, inclusive, of the Revised Code, shall be credited as follows:

"(A) In any case where a county has levied a tax pursuant to section 5741.021 ~~5741.02.1~~ of the Revised Code, the tax commissioner shall within forty-five days after the end of each month certify to the auditor of the state the amount of such tax paid to the treasurer of the state during that month to be returned to the county levying the tax, which amount shall be one-ninth of the aggregate amount of money collected in such county if the county levies the additional tax at the rate of one-half of one per cent. The auditor of state shall then, on or before the twentieth day of the month, draw a voucher and warrant for such amount payable to the county treasurer of the county levying the tax. The remainder of the aggregate amount of money collected shall be paid into the general fund of the state." (Emphasis added)

Based on the above language, the General Assembly must have intended that the additional use tax apply only to the same incidents of use as does the state use tax. Otherwise, the general fund of the state would receive a windfall of eight-ninths of the additional use tax collected on intercounty sales.

In regard to the registration of motor vehicles and the collection of sales and use taxes thereon, Section 4505.06, Revised Code, provides in pertinent part:

"Application for a certificate of title shall be made upon a form prescribed by section 4505.07 of the Revised Code, and shall be sworn to before a notary public or other officer empowered to ad-

minister oaths. Such application shall be filed with the clerk of the court of common pleas of the county in which the applicant resides if the applicant is a resident of this state or, if not a resident, in the county in which the transaction is consummated. * * *

* * * * * * * *

"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.

* * * When the transfer to the applicant was made in some other state or in interstate commerce, the clerk, except as provided in this section, shall refuse to issue any certificate of title unless the tax imposed by or pursuant to section 5741.02 or 5741.021 5741.02.1 of the Revised Code has been paid as evidenced by a receipt issued by the commissioner, or unless the applicant submits with the application, payment of such tax by cash, certified check, draft, or money order payable to the clerk. * * *

(Emphasis added)

As can be seen from the above-quoted language, the clerk of the court of common pleas is only authorized to refuse to issue a certificate of title to a motor vehicle for nonpayment of use taxes if the transfer of the motor vehicle was made in some other state or in interstate commerce. There is no statutory authority for the clerk of the court of common pleas of a county having a county use tax to refuse to issue a certificate of title for a motor vehicle for nonpayment of the county use tax if the motor vehicle was purchased in any other county within the State of Ohio. In reaching this conclusion, I am not unaware of the recent amendment to Section 5739.021, Revised Code, contained in Substitute House Bill No. 531 enacted by the 108th General Assembly (133 Ohio Laws Sub. H.B. No. 531) and signed by the Governor on August 18, 1969, which added the following division to the permissive sales tax law, Section 5739.-021, Revised Code, to wit:

"(D) The county tax on the sale of titled merchandise shall be paid in the manner provided by chapters 4505. and 1548. of the Revised Code to the clerk of the court of common pleas of the county in which the titled merchandise is required by law to be licensed, for purposes of this division, 'titled merchandise' includes all

tangible personal property for which a certificate of title is required as evidence of ownership of the property."

As can be ascertained from an examination of this new division (D), it only applies to the place of payment of the permissive sales tax levied upon items of titled tangible personal property which are purchased in a county which has enacted the resolutions necessary to levy the permissive sales and use taxes. I find nothing in Substitute House Bill No. 531, supra, which would alter the conclusion herein expressed as to the residents' ability to escape liability for the permissive use tax (Section 5741.021, Revised Code) by purchasing automobiles and other items of tangible personal property outside the county, even though the automobiles must be registered with the clerk of courts of the county.

Therefore, it is my opinion and you are hereby advised:

1. The county sales and use taxes authorized to be levied by Sections 5739.021 and 5741.021, Revised Code, respectively, are in addition to the state sales and use taxes levied by Sections 5739.02 and 5741.02, Revised Code, respectively.

2. The county use tax authorized to be levied by Section 5741.021, Revised Code, may be levied only upon the storage, use or other consumption of tangible personal property which storage, use or other consumption of tangible personal property is also subject to the state use tax levied by Section 5741.02, Revised Code.

3. The county use tax authorized to be levied by Section 5741.021, Revised Code, may not be levied by a county upon the storage, use or other consumption of tangible personal property if the transaction by which the tangible personal property was acquired was subjected to the state sales tax levied by Section 5739.02, Revised Code.

4. The clerk of the court of common pleas of a county which has enacted a county use tax pursuant to Section 5741.021, Revised Code, has no authority to refuse to issue a certificate of title to a motor vehicle on the basis of nonpayment of the county use tax if the motor vehicle was purchased in the State of Ohio, and the state sales tax paid thereon irrespective of the county in which it was purchased.