

By the above grants there are conveyed to the State of Ohio, certain lands described therein, for the sole purpose of using said lands for public fishing grounds, and to that end to improve the waters or water courses passing through and over said lands.

Upon examination of the above instruments, I find that the same have been executed and acknowledged by the respective grantors in the manner provided by law and am accordingly approving the same as to legality and form, as is evidenced by my approval endorsed thereon, all of which are herewith returned.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

2322.

TAXES AND TAXATION—USE TAX—SALES TAX—CIGARETTES SOLD BY FOREIGN STATE VENDORS TO OHIO CONSUMERS—INTERSTATE COMMERCE—ENFORCEMENT LAW PROVISIONS AVAILABLE.

SYLLABUS:

1. *The exemption accorded to cigarettes under Section 5546-26(1), General Code (Use and Storage Tax), is not effective when the related exemption under Section 5546-2(4), General Code (Retail Sales Tax), is not operative and the taxing provisions of the Sales Tax itself are not applicable thereto.*

2. *The application of the Ohio Use Tax to cigarettes sold by out-of-state vendors to consumers in Ohio is not inhibited by the Commerce Clause of the Federal Constitution so long as the rate levied thereby on such out-of-state cigarettes is no higher than the rate levied on the sale of cigarettes in Ohio.*

3. *The enforcement provisions of the Ohio Use Tax Law are available to their full extent against consumers of cigarettes subject to the tax who fail to file returns according to the provisions of Section 5546-29, General Code.*

COLUMBUS, OHIO, April 18, 1938.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: You recently requested an opinion involving the following facts:

The X Tobacco Company in Kentucky is selling and delivering to consumers in Ohio cigarettes which are not subject to the Ohio Cigarette Tax Law which imposes on vendors within Ohio the duty of affixing excise tax stamps on all packages of cigarettes sold within the state.

In connection with these facts, you request my opinion on three questions, the first of which is as follows:

"Is it within the provisions of the statutes to impose the use tax on unstamped cigarettes delivered to buyers in the City of Cincinnati by vendors residing in the State of Kentucky, and who claim interstate commerce exemption?"

At the outset it is important to recognize the relation which exists between those sections of the Ohio General Code which are grouped under the specific headings of the Retail Sales Tax Act (Sections 5546-1, et seq., General Code), the Cigarette Tax Act (Sections 5894-1, et seq., General Code), and the Use and Storage Tax Act (Sections 5546-25, et seq., General Code). An examination of these several enactments reveals that they are integrated parts of the excise tax program which the legislature has designed with reference to the sales of tangible personal property. A comparison of the Sales Tax Law and the Cigarette Tax Law discloses that the latter simply imposes an excise tax on the sales of cigarettes exclusively and that the provisions imposing this tax differ from those of the more generally applicable sales tax only in the application of the excise stamps and in the rate imposed. In substance, both the sales tax and the cigarette tax are excise taxes imposed on the sales of tangible personal property. The unity between the Cigarette Tax Law and the Sales Tax Law is further substantiated by the integration of the two enactments in matters of application, namely, that the exemptions accorded under the Sales Tax Law are in contemplation of and are expressly conditioned on the applicability of the Cigarette Tax Law.

The Ohio Use Tax Law is complementary to the Retail Sales Tax Law. The only difference between these two acts is that the latter imposes a tax upon the sale of tangible personal property in Ohio, while the former imposes a tax at the same rate on the storage, use or consumption of tangible personal property in Ohio, exempting under its provisions property the sale of which is subject to the sales tax.

Generally, the operation of the Use Tax Law is the same as that of the Sales Tax Law. Under the Use Tax Law when the seller of

subject property has registered with the Tax Commission, the seller or vendor will obtain prepaid tax receipts and collect the tax from the consumers in the same manner as provided for by the Sales Tax Law. However, under the Use Tax Law if the vendor from whom the consumer purchases the subject property does not collect the tax for the state, it is the duty of the consumer to file a return with the Tax Commission and to pay the amount of the tax. Thus, under the Use Tax Law provision is made for collecting the tax not only from the vendor of the subject property, as is the case under the Sales Tax Law, but also from the consumer of the subject property. Thus, the clear purpose of the Use Tax Law is to supplement the Sales Tax Law by imposing an equal tax burden on consumers of goods not otherwise subject to a sales tax.

The obstacles in the way of the state taxing power to levy an excise tax on the cigarettes in question are found in (1) decisions of the United States Supreme Court prohibiting state taxation which directly burdens interstate commerce, and (2) limitations on the state's taxing power to impose levies beyond the boundaries of Ohio. Keeping these constitutional limitations in mind, the first question involves two issues: First, are the cigarettes in question subject to the intent of the provisions of the Use Tax Law? Secondly, assuming that the legislature intended to tax under the Use Tax Law such property as the cigarettes in question, is this application of the state taxing power constitutionally valid?

The provisions of the Use Tax Law as set forth in Section 5546-26, General Code, state that:

"The tax hereby levied does not apply to * * *

1. Property the sale of which in this state is subject to the excise tax imposed by Section 5546-1 and succeeding sections of the General Code; and property to the sale of which in this state said excise tax is expressly made inapplicable by the provisions of sub-paragraphs 1, 2, 2b, 3, 4, 5, 6, 9, 10 and 11 of Section 5546-2 of the General Code.

* * * * *

2. Property, the storage, use, or other consumption of which this state is prohibited from taxing under the constitution, or laws of the United States, or under the constitution of this state. This exemption shall not exempt from the application of the tax herein imposed the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state * * "

The exemption provided for in sub-paragraph 1 refers to exemptions enumerated in Section 5546-2, General Code, which is included under the nominal heading of "Retail Sales Act."

Turning to sub-paragraph 4 of Section 5546-2, General Code, we find that the levy does not apply to:

"Sales of cigarettes and of brewer's wort and malt, upon the sale of which a tax is imposed by law of this state, so long, respectively, as such law is in force." (Italics the writer's).

This exemption is granted only on the condition that the sale of such goods is otherwise taxed by the law of this state. Are the sales of the cigarettes in question otherwise taxed by the law of this state? For the answer, we turn to that enactment which imposes a tax on the sale of cigarettes and find in Section 5894-2, General Code, that cigarette tax stamps are to be affixed to the packages sold either by wholesalers or retailers thereof "at the rate of one cent on each ten or fractional part thereof." In this case, however, these provisions are not applicable because of the jurisdictional and constitutional limitations on the legislative power to impose such a tax on out-of-state vendors who are selling, by way of interstate commerce, cigarettes in Ohio.

Now taking the Use Tax Law as a starting point and tracing the application of these interrelated tax laws, we find that the exemptions provided for in the Use Tax Law depend upon exemptions accorded under the Sales Tax Law. In this case, the application of the sales tax is in turn conditioned on the applicability of the cigarette tax, and as we have just seen, the Cigarette Tax Law is not applicable to the cigarettes in question.

Thus, the exemption accorded under the Sales Tax Law is not effective because there is no tax imposed on the sale of the cigarettes in question under the provisions of the Cigarette Tax Law. The Sales Tax Law itself is not applicable because the sale is a subject of interstate commerce. Furthermore, enforcement is impossible because the vendors are beyond the jurisdiction of the taxing power of the state. Only the provisions of the Use Tax Law are available to impose an excise tax on these cigarettes unless the imposition of this tax is of itself halted by the constitutional inhibitions resulting from the presence of the Commerce Clause in the Federal Constitution.

The disposition of the first issue, namely, whether the legislature intended that the use tax should apply in such a case as this, requires no more than reference to the express provisions of Section

55-6-26(2), supra, in which it is clearly stated that the use tax is applicable to tangible personal property which was purchased in interstate commerce but which has come to rest in Ohio. Worthy of fuller consideration is the disposition of the issue whether the legislature has the power to effectuate this clear intent.

The courts have recognized that a tax may be imposed upon the use as well as upon the sale of a commodity. That such a tax does not amount to taking of property without due process was the decision of the Supreme Court in the case of *Bowman vs. Continental Oil Company* (1921), 256 U. S., 642. However, the case now before me presents the further question of whether the imposition of this tax has the effect of regulating or burdening interstate commerce to the extent that its application would be in conflict with the powers transmitted by the Commerce Clause to the federal government.

It is a fundamental principle of our constitutional law that the states cannot single out commodities which are the subject of interstate commerce and discriminate against such commodities in favor of goods which are the subject of intrastate commerce. The crux of the problem is whether there is any substantial economic discrimination as between the goods which are the subject of interstate commerce and similar goods which are the subject of commerce within the state.

Discrimination exists when a state seeks to tax goods produced or manufactured outside the state without imposing any tax on the sale of domestic goods or imposing a higher tax on goods of out-of-state origin than on the sale of domestic goods. Now, as a matter of application, the Use Tax Law does, by reason of exempting domestic goods which are already subject to the sales tax, levy an excise tax against only those goods which have reached Ohio consumers through interstate commerce. However, the intent and in most instances the substantial effect of these interrelated excise tax laws is to impose on out-of-state goods no greater tax burden than that imposed on similar domestic goods.

The Use Tax Law imposes a levy of one cent if the price of the cigarettes is forty cents or less, but not less than nine cents; two cents if the price is more than forty cents and not more than seventy cents; and three cents if the price is more than seventy cents and not more than one dollar. On the other hand, the cigarette sales tax is imposed on the sales of cigarettes within the state at the rate of one cent on each ten and every fraction thereof.

It is obvious that in the case of ordinary brands selling for less than forty cents a package the use tax will be levied at the rate of one cent, whereas, under the Cigarette Tax Law the ordinary package

containing twenty cigarettes would be subject to a two-cent levy. Even if the package were to contain less than ten cigarettes, it would be subject to a one-cent tax under the Cigarette Tax Law. It is possible to imagine a case in which the subject cigarettes would be of such high value that the use tax would impose a heavier burden than the cigarette tax imposes on the basis of quantity and not value. In such a case, the application of the use tax would be inhibited by the Commerce Clause, for such taxation would result in discrimination against the cigarettes as a subject of interstate commerce. Therefore, the application of the use tax is constitutional only so long as the rate levied thereby on such out-of-state cigarettes is no higher than the rate levied on the sale of cigarettes in Ohio.

Generally, the application of these taxing provisions will not result in discrimination against out-of-state cigarettes. In the ordinary case there will remain a competitive advantage on the part of those who sell cigarettes through interstate channels, because such cigarettes will be subject not to the Cigarette Tax Law but to the smaller levy which is imposed by the Use Tax Law. It is this substantive effect of the whole excise tax program with which the courts are concerned in their search for discrimination against interstate commerce and not the form which a particular section of the whole scheme of taxation may have in order to accomplish its part of the program.

This was the approach adopted by the United States Supreme Court in the case of *Gregg Dyeing Company vs. Query*, (1932) 286 U. S., 472, and followed in the case of *Vancouver Oil Company vs. Henneford*, (1935) 183 Wash., 467. In the former case, a South Carolina statute required every person who imported gasoline and kept it in storage for future use to pay an excise tax of six cents a gallon. The statute in question exempted from the application of the tax any gasoline which had been subjected to the payment of excise taxes imposed by other statutes of the state. It was contended that the tax was a burden on interstate commerce because it was discriminatory. The state court held that the act in question was not discriminatory for it was complementary to the other statutes of South Carolina under which a gallonage tax was assessed on the sale of gasoline and other petroleum products. The Supreme Court of the United States affirmed the decision of the state court on the grounds that the constitutionality of a state taxing program is to be determined by the substantive effect rather than by its form. Four years after establishing this proposition that the substantive effect of a taxing program is the significant factor in determining whether the provisions are discriminatory as against interstate commerce, the Supreme Court

had occasion to determine the constitutionality of the application of the use tax imposed by the State of Washington. In the case of *Henneford vs. Silas Mason Company*, (1936) 300 U. S., 577, the court held that a tax imposed on the use of out-of-state property at rest in the state levying the tax is not unconstitutional if it does not discriminate against such goods which have arrived by way of interstate commerce.

Therefore, it is my opinion that even though the Use Tax Act exempts articles which are purchased in such manner that the Ohio sales tax has been paid, this apparent discrimination is not such in substance as to inhibit its application because of the operation of the commerce clause. A fortiori in the case of the cigarettes in question there is no discrimination because the Use Tax Act imposes a smaller burden than the Cigarette Tax Act.

The second and third questions which you present are as follows:

"If cigarettes are specifically exempted from the use tax, does it imply that unstamped cigarettes are legally taxable under the proper sections?

Also, can maximum penalties be imposed for failure to report said transactions?"

As I have pointed out, the Use Tax Law is simply complementary to the Sales Tax Law and generally the Use Tax Law applies whenever the merchandise was the subject of interstate commerce and thus exempt under the Sales Tax Law. The exemption accorded to cigarettes under the Use Tax Law is conditioned on the fact that they are not otherwise taxable under the Cigarette Tax Law or the Sales Tax Law itself. Therefore, to this extent, exemption under the Use Tax Law implies that the sale of the subject matter is taxable under the proper sections.

Of course, my conclusion that the Use Tax Act as applied in this case is constitutional, does not solve the practical problems of how collection of the tax may be enforced. The chief obstacle in the administration of the Use Tax Law is the fact that in many cases collection must be made from consumers who are placed under the responsibility of paying the tax if it has not been prepaid. The act requires that those vendors who have agents or places of business within the State of Ohio must register with the Tax Commission and collect the tax on all sales to the consumer, even though the shipment may originate in another state. The proposition that a state has the power to require retailers maintaining places of business in the state

to collect an excise tax even though a portion of their sales may involve shipments from another state, was established in the case of *Monomotor Oil Company vs. Johnson*, (1934) 292 U. S., 86. However, in the present case, the vendors apparently do not maintain their places of business within the State of Ohio and therefore cannot be forced to collect the tax. Enforcement, then, must be directed against the consumers.

According to the provisions of Section 5546-29, General Code, it is the duty of consumers of subject goods on which the use tax has not been prepaid to file returns with the Tax Commission. Failure or refusal to make a return according to law entitles the Tax Commission to make an assessment based upon any information within its possession. The collection of this assessment, together with a penalty, is provided for in Sections 5546-37 and 5546-38, General Code. Such an assessment and penalty, when established in accordance with the provisions of this act, may be collected by a levy on the personal property of the violator.

In addition to these provisions enabling the Tax Commission to collect the tax by levying on the property of the violator, Section 5546-43, General Code, provides a penalty for failure to make a return to the Commission. Failure to file such a return constitutes a misdemeanor, and upon conviction thereof the violator may be fined not more than five hundred dollars for each offense. There is no apparent reason why the full effect of these enforcement provisions of the Use Tax Law cannot be brought to bear against the consumers who do not file returns and pay the tax on the cigarettes in question.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

2323.

APPROVAL.—BONDS, EUCLID VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, \$5,000.00, PART OF ISSUE DATED JANUARY 1, 1930.

COLUMBUS, OHIO, April 18, 1938.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of Euclid Village School Dist., Cuyahoga County, Ohio, \$5,000.00.