

2912

SALES TAX AGENT—APPOINTED BY TREASURER OF STATE — UNACCOUNTABLE SURPLUS OF PREPAID SALES TAX STAMP FORMS IN HIS POSSESSION — OVER AND ABOVE QUANTITY DELIVERED BY TREASURER OF STATE—LESS QUANTITY SOLD BY AGENT TO LICENSED VENDORS—TREASURER OF STATE AUTHORIZED TO CONFISCATE SUCH SURPLUS STAMPS—TREASURER OF STATE AND TAX COMMISSIONER MAY AGREE UPON METHOD OF DISPOSITION—SECTION 5546-7 GC—5739.06 RC.

SYLLABUS:

Where a sales tax agent, appointed by the Treasurer of State, pursuant to Section 5546-7, General Code, Section 5739.06, R. C., has in his possession an unaccountable surplus of prepaid sales tax stamp forms, over and above the quantity delivered to such agent by the Treasurer of State, less the quantity sold by the agent to licensed vendors, the Treasurer of State is authorized to confiscate such surplus stamps, to be disposed of in such manner as may be agreed upon between the Treasurer of State and the Tax Commissioner.

Columbus, Ohio, July 31, 1953

Hon. Roger W. Tracy, Treasurer of State
Columbus, Ohio

Dear Sir:

Your letter of request for my opinion refers to a 1941 request from the then Auditor of State for an opinion by the Attorney General concerning the right of the Auditor of State to formulate a system of accounting, authorizing examiners from that office to confiscate prepaid tax stamp forms in the custody of sales tax agents and county treasurers, which forms could not be identified as a portion of the prepaid tax stamp inventory which the records of the Treasurer of State indicated the particular agent was charged with possessing.

It was held in Opinion No. 4604, Opinions of the Attorney General for 1941, page 1008, that there is no provision of law authorizing the Auditor of State to confiscate prepaid tax stamps found in the possession of a sales tax agent, even though such prepaid tax stamps are determined to be illegally in the possession of such agent.

Your letter of request emphasizes the point that since 1941, the number of stamps so held has shown a marked increase so that at the present time almost every sales tax agent has in his possession more stamps than have been charged to his account. In order to protect the interest of the State you have requested a re-examination of the problem and advice as to what steps may be taken, if any, to authorize destruction of such surplus stamps or to return them to the Treasurer of State for cancellation.

I concur in the reasoning set forth in the 1941 opinion as to lack of power of the State Auditor to confiscate such stamps. At page 1014 my predecessor said :

“However, if it be assumed for the purposes of argument that the possession of the stamps by the agent is illegal, such fact alone would not give to the auditor of state the authority to confiscate the stamps so illegally possessed. It must be remembered that public officials have such authority and powers as have been given them by the statutes creating their offices.”

After examining the sections of the code dealing with the duties of the Auditor of State with reference to auditing accounts and transactions of the Treasurer of State, my predecessor found no express or implied authority to confiscate such surplus stamps.

It was remarked at the close of the opinion that when in the course of an examination of the accounts of an agent of the Treasurer of State it is determined that the agent had violated or is violating the provisions of statute, the Auditor of State should report such fact and the evidence thereof “not only to the Treasurer of State but to the county prosecuting attorney so that they may take such steps as may be required of them by law.”

Section 5546-7, General Code, Section 5739.06, R. C., defines the powers and duties of the Treasurer of State, the county treasurers, and sales tax agents with respect to prepaid retail sales tax stamps. This section provides that all prepaid tax stamps procured by the Department of Taxation shall be delivered to the Treasurer of State, who shall execute duplicate receipts therefor for the department and the Auditor of State.

Section 5546-7, General Code, further provides :

“* * * The treasurer of state shall be accountable for all prepaid tax receipts received and unsold by him. He may appoint

agents for the sale of prepaid tax receipts at such places in the state as he may deem expedient, and require of each such bond or other security as he may deem necessary * * *. The treasurer of state shall deliver to each county treasurer and to each agent, such number and denomination of prepaid tax receipts as in his judgment may be required for sale in each county * * * and *may prescribe such regulations and forms of receipts and reports as he may deem necessary and advisable for the transaction of the business of selling such prepaid tax receipts.* * * * Each county treasurer and each agent of the treasurer of state, shall pay on the first business day of each week to the treasurer of state all moneys arising from the sale of prepaid tax receipts by him during the preceding week, together with a report showing all sales, the names of the purchasers and the aggregate face value purchased by each, which the treasurer of state shall include in his monthly report * * *.” (Emphasis added.)

It will be noted that the Treasurer of State appoints agents whose function it is to sell prepaid tax stamps to licensed vendors. These agents act for and on behalf of the Treasurer of State in this regard. A sales tax agent receives only such number and denomination of tax stamps as the Treasurer of State decides to allot him. The Treasurer of State may prescribe “such regulations and forms of receipts and reports as he may deem necessary.” The sales tax agent has a duty to account weekly for the moneys received from vendors who purchased the tax stamps. Thus it is apparent that the Treasurer of State has the power to exercise a great deal of control over the conduct and activities of the sales tax agents.

Section 5546-7, General Code, places the Treasurer of State under a duty to account for all prepaid tax stamps received and unsold by him. Section 5546-5, General Code, Section 5739.05, R. C., provides that the Tax Commissioner has the duty of enforcing and administering the provisions of the Ohio Retail Sales Tax Act. Since the Treasurer of State must account in the manner aforesaid, he most certainly has the power to order his own agent to return to him the unaccountable surplus of prepaid sales tax stamps still in his possession.

An agent's possession of sales tax prepaid stamps in excess of the quantity delivered to such agent by the Treasurer of State, less the quantity sold by the agent to licensed vendors, is clearly an irregularity. As pointed out in the 1941 opinion, such a situation could arise through the neglect or failure of a licensed vendor, for some reason, to take the prepaid tax stamps purchased by him. Yet these sales tax stamps are not the agent's

to do with as he pleases. As agent, he occupies a position of trust, and accountability to his principal. It is my opinion that you, as the principal, are given ample authority by Section 5546-7, General Code, to require sales tax agents to return to you all of such surplus stamps.

Since the Tax Commissioner is charged by Section 5546-5, General Code, with the enforcement and administration of the Sales Tax Act, and since he has been given the power to adopt and promulgate rules and regulations necessary to carry out the provisions of the Sales Tax Act, and since such stamps are delivered to you by the Tax Commissioner, I would advise you to confer with him as to the particular method to be utilized in destroying, cancelling, or otherwise disposing of such tax stamps after they have been called in by your office.

Accordingly, it is my opinion that where a sales tax agent, appointed by the Treasurer of State, pursuant to Section 5546-7, General Code, Section 5739.06, R. C., has in his possession an unaccountable surplus of prepaid sales tax stamp forms, over and above the quantity delivered to such agent by the Treasurer of State, less the quantity sold by the agent to licensed vendors, the Treasurer of State is authorized to confiscate such surplus stamps, to be disposed of in such manner as may be agreed upon between the Treasurer of State and the Tax Commissioner.

Respectfully,

C. WILLIAM O'NEILL
Attorney General