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1. TAX RECEIPTS — AGENT OF TREASURER OF STATE, SECTION 5546-7 GENERAL CODE, REQUIRED TO ACCOUNT EACH WEEK FOR SALES, PREPAID TAX RECEIPTS, SOLD BY HIM — SHALL PAY INTO STATE TREASURY, FACE VALUE OF SUCH STAMPS, LESS DISCOUNTS TO WHOLESALE PURCHASERS, AND LESS AMOUNTS PAID TO LICENSED VENDORS FOR STATUTORY REDEMPTION.
2. WHERE AGENT IS DEFICIENT IN AMOUNT OF CASH IN POSSESSION HE MAY NOT ACCOUNT FOR SUCH SHORTAGE BY SUBSTITUTING UNCANCELED PREPAID TAX RECEIPTS.
3. NO LEGAL AUTHORITY FOR AUDITOR OF STATE TO CONFISCATE PREPAID TAX RECEIPTS ILLEGALLY HELD BY SALES TAX AGENT.

SYLLABUS:

1. *An agent of the treasurer of state, appointed under authority of Section 5546-7 of the General Code, is required by such section to account on the first business day of each week, in the manner therein specified, for the sales of prepaid tax receipts sold by him during the preceding week and to pay into the state treasury the face value of such stamps less the discounts allowed by statute to wholesale purchasers and less amounts paid to licensed vendors for redemption authorized by statute.*

2. *When, upon examination of the accounts of an agent of the treasurer of state by the auditor of state, the amount of cash in his possession from the sale of prepaid tax receipts is deficient, such agent may not account for such cash shortage by substituting uncanceled prepaid tax receipts.*

3. *There is no provision of law authorizing the auditor of state to confiscate prepaid tax receipts found in the possession of a sales tax agent, even though such prepaid tax receipts are determined by the auditor of state to be illegally in the possession of such agent.*

Columbus, Ohio, December 19, 1941.

Hon. Joseph T. Ferguson, Auditor of State,
Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion reading:

“During the course of examination of the accounts of various sales tax agents by examiners assigned from this office, the audits disclose that various agents have an ‘overage’ of prepaid tax receipt forms, that is, a physical surplus of tax receipt forms beyond the actual inventory the state treasurer’s records show are in the custody of the agents, or in substance, an unaccountable surplus of prepaid tax receipt forms.

In order to protect the interests of the state, and as a part of a system of accounting and reporting, it is deemed advisable that the unaccountable surplus of what is commonly identified as sales tax receipts should be confiscated. The disposition of these sales tax receipts would, of course, be properly accounted for as a part of the official records of the public officials and agents concerned in the administration of the sales tax law.

In view of the foregoing, we desire your opinion as to the right of this office to formulate a system of accounting, authorizing examiners from this office to confiscate prepaid tax receipt forms in the custody of sales tax agents and county treasurers, which cannot be identified as a portion of the prepaid tax receipts inventory which the records of the state treasurer show the agent is charged with possessing.”

The sales tax agents referred to in your inquiry are those appointed by the treasurer of state under authority of Section 5546-7 of the General Code which reads in part as follows:

“All prepaid tax receipts procured by the commission shall be immediately delivered to the treasurer of state, who shall execute duplicate receipts therefor, showing the number of and aggregate face value of each denomination received by him, and deliver such receipt to the commission and a duplicate thereof to the auditor of state. 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 pursuant to this act, and may prescribe such regula-

tions 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. On the fifth day of each month, the treasurer of state shall make a report in duplicate showing all sales of prepaid tax receipts made during the preceding month with the names of the purchasers, the aggregate face value purchased by each, and the office from which sold, and deliver one copy thereof to the commission and the other to the auditor of state. 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. * * * ”

Further regulations concerning the sale of and accounting for prepaid tax receipts are contained in Section 5546-8 of the General Code which reads in part:

“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. * * * ”

By reason of the provisions of the statutes above quoted, it is evident that upon the delivery of prepaid tax stamps of various denominations by the treasurer of state to one of his agents and subsequent sale thereof or of a portion thereof, the agent is required on the first business day of each week not only to deliver to the treasurer of state the moneys received by him during the preceding week, but also to report in detail concerning the sales from which such moneys were derived, specifying the name and address of the licensed vendor to whom sold, and a detailed statement of the denomination of stamps purchased by such vendor.

From the language above quoted, it is difficult to perceive how an agent legally may have an excess of sales tax stamps in his possession. He has received certain stamps from the treasurer of state for which he is accountable. Under authority of Section 5546-8 of the General Code, he may sell such stamps only to licensed dealers. When he makes a sale of stamps, he must report specifically the denominations of the stamps

sold, to whom sold, and pay the proceeds thereof to the treasurer of state weekly. Section 5546-7 of the General Code further provides that the treasurer of state "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."

In addition, Section 5546-12 of the General Code requires that each licensed vendor "shall keep all invoices, bills of lading, retained parts of cancelled prepaid tax receipts and such other pertinent information as the commission(er) may require" open to the inspection of the tax commissioner at any time for a period of three years. Sections 5546-5 and 1464-3 of the General Code provide that the tax commissioner "shall enforce and administer the provisions of this act." Section 5546-12a of the General Code imposes an additional excise tax on the licensed vendor equal to three per cent of his taxable retail sales less the amount of the tax imposed by Section 5546-2 of the General Code; in other words, less the tax collected from the purchaser by means of dispensing prepaid sales tax stamps or receipts, which tax is to be determined as follows:

"The tax imposed by this section shall be determined by deducting from the sum representing three per centum of the receipts from such retail sales the amount of tax paid to the state by means of cancelling prepaid tax receipts in accordance with the provisions of section 5546-3 of the General Code."

Section 5546-12b of the General Code requires each licensed vendor semiannually to file with the tax commissioner his return "showing the receipts from taxable sales, the amount of tax due from the vendor to the state for the period covered by such returns, the amount of tax collected by the vendor and such other information as the commission(er) may deem necessary for the proper administration of this act." Such section further provides that:

"The vendor shall deliver the return together with a remittance of the amount of the tax due under section 5546-12a of the General Code, if any, to the commission(er). Any vendor who fails or refuses to make and file a return under the provisions of this section and the rules and regulations of the commission(er) shall, for each day he so fails, neglects or refuses, forfeit and pay into the state treasury the sum of one dollar, as revenue arising from the tax imposed by this act, and such sum may be collected by assessment as under the provisions of section 5546-9a of the General Code. In case any vendor has collected in excess of three per cent of his receipts from sales

which are taxable under section 5546-2 of the General Code as tax from consumers and failed to cancel tax receipts in the proper amount, such excess shall be remitted along with the remittance of the amount of tax due under section 5546-12a of the General Code. The commission(er), if it deems it necessary in order to insure the payment of the tax imposed by this act, may require returns and payments to be made for other than semi-annual periods. The returns shall be signed by the vendor or his duly authorized agent and shall be verified by oath."

In view of the safeguards prescribed by the statutes above referred to, and especially in view of the fact that Section 5546-8 of the General Code expressly provides that "the treasurer of state, *his agents*, and the several county treasurers, shall sell prepaid tax receipts only to licensed vendors," it is difficult to perceive by what method or manner a state treasurer's sales tax agent could, as such agent, be legally in possession of a quantity of prepaid sales tax receipts in excess of the amount delivered to him by the treasurer of state less the amounts sold to licensed vendors.

Such a situation might arise through the neglect or failure of a licensed vendor to take the prepaid tax receipts purchased by him on a filled "vendor's purchase order," in the event that such vendor makes the purchase in order to use the receipted vendor's order in connection with his accounting on his return to the tax commissioner for the preceding semi-annual period. In such case, the "prepaid tax receipts" would be of no use to the vendor. His intent is to use the vendor's purchase order to account for uncollected tax with respect to past sales. In other words, it is conceivable that a licensed vendor, upon ascertaining that the amount of prepaid tax receipts canceled by him during such semi-annual period is less than three percent of his gross receipts from sales during such period, might make a purchase of the prepaid tax receipts necessary to equal such percentage of gross receipts and thereupon use the vendor's purchase order in his accounting or return to avoid payment of the tax levied by Section 5546-12a of the General Code. In such event, it is evident that he could not dispense the stamps without having an equal shortage for the following return. Having no use for the stamps, he might have permitted such "surplus" stamps to remain with the agent, which, of course, would be illegal as hereinafter pointed out.

From the language of Section 5546-12b of the General Code, it is patent that a vendor in his return must set forth, in addition to the gross amount of his taxable sales, *the amount of tax collected by him from purchasers*, which amount alone is deductible in computing the tax im-

posed on the vendor by Section 5546-12a of the General Code. I find no authority in the "Sales Tax Act" for the deduction of stamps purchased by the licensed vendor from the three percent of receipts from taxable sales in determining the tax due under such Section 5546-12a of the General Code, unless they have been canceled as provided in Section 5546-3 of the General Code. Such section, when construed in connection with Section 5546-3 of the General Code, referred to therein, permits the deduction only of the amount of tax collected by the vendor from the consumer-purchaser as evidenced by the *cancellation of prepaid tax receipts* by the delivery of one-half thereof to the consumer-purchaser. That is to say, the vendor may deduct therefrom only the amounts collected by himself from the purchaser for which he shall have canceled prepaid receipts, in the presence of the purchaser, by tearing them into two pieces, and deliver to the vendor the proper amount of the vendor's portion of such prepaid receipts. It would, therefore, follow that the licensed vendor is not entitled to a credit as against the tax levied by Section 5546-12a of the General Code of stamps bought by him, evidenced by a filled "vendor's purchase order," unless he can also show that he has canceled such stamps as provided in Section 5546-3 of the General Code and delivered one-half thereof to the purchaser-consumer in evidence of receipt of tax payments from him.

Such intimated circumstances should not exist, for, as I have above demonstrated, if the return were made in such manner by the licensed vendor, it would constitute a false or fraudulent report and make the licensed vendor susceptible to the penalty imposed by Section 5546-13b or 5546-16 of the General Code, which reads:

Section 5546-13b.

"Whoever fails to file any report required to be filed by the provisions of this act, or whoever files or causes to be filed any false or fraudulent report or statement, or whoever aids or abets another in the filing of any false or fraudulent report or statement shall be guilty of a misdemeanor and shall, upon conviction, be fined not less than one hundred dollars or more than one thousand dollars, or imprisoned in the county jail or a workhouse or other like penal or correctional institution not more than sixty days or both."

Section 5546-16.

"Whoever violates any provisions of sections 5546-1 to 5546-21, both inclusive, of the General Code, or any lawful rule

or regulation promulgated by the commission under authority of this act for the violation of which no penalty is provided by law, shall be fined not less than twenty-five dollars nor more than one hundred dollars.”

As you will note from the language of Section 5546-13b of the General Code, if the treasurer’s agent abets or aids the licensed vendor in the preparation or filing of such return, he also is susceptible to the penalty thereby imposed. Sufficient facts are not presented to me as to the alleged method of obtaining vendor’s purchase orders that I may express an opinion as to whether by such claimed method of operation the vendor and agent might not be susceptible to the penalty imposed by Section 5546-13b of the General Code.

As I have attempted to point out above, the possession, as an agent of the treasurer of state, of sales tax prepaid receipts 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 if not an illegal possession. If the possession be viewed as legal, then it would necessarily follow that the agent was possessed of such stamps as the agent of the purchaser and not as agent of the treasurer of state.

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.

The duties of the auditor of state with reference to auditing the state treasury are set forth in Section 263 of the General Code as follows:

“Once each year or oftener, in his discretion, the auditor of state shall without previous notice audit the accounts and transactions of the treasurer of state, and ascertain the condition of the state treasury, and make an inventory of the amount of money, bonds, securities, claims, deposits, assets, and other property, which are in the state treasury. He shall thereupon make and sign in duplicate a detailed statement of the audit and inventory, file one thereof in his office and transmit the other to the treasurer of state, and immediately notify the governor of the state thereof.”

Further powers are given the bureau of inspection and supervision of public offices in the department of the auditor of state in Section 274 of the General Code, which reads in part as follows:

“There shall be a bureau of inspection and supervision of public offices in the department of auditor of state which shall have power as hereinafter provided in sections two hundred seventy-five to two hundred eighty-nine, inclusive, to inspect and supervise the accounts and reports of all state offices,
* * *.”

Sections 277 and 278 of the General Code give to the auditor of state certain power to prescribe systems of accounting. Such sections read:

Section 277.

“The auditor of state, as chief inspector and supervisor, shall prescribe and require the installation of a system of accounting and reporting for the public offices, named in section two hundred seventy-four. Such system shall be uniform in its application to offices of the same grade and accounts of the same class, and shall prescribe the form of receipt, vouchers and documents, required to separate and verify each transaction, and forms of reports and statements required for the administration of such offices or for the information of the public.”

Section 278.

“The system shall provide forms of accounts showing the sources from which the public revenue is received, the amount collected from each source, the amount expended for each purpose, and the use and disposition of other public property. It shall also provide forms of accounts of every public service industry, showing cost of ownership and operation, amount collected from private users, amount received from taxation, and value of service rendered the public.”

Section 283 of the General Code provides the penalty for violation of the sections just above quoted, as follows:

“A public officer or employe who refuses or neglects to keep the accounts of his office in the form prescribed, or make the reports required by the bureau of inspection and supervision, shall be removed from office on hearing before the proper authority.”

However, you will have observed that Section 5546-7 of the Gen-

eral Code, which is a later enacted sections than Section 277 and 278 of the General Code, prescribes certain of the requirements of the accounting between the treasurer of state and his agents and gives to the treasurer of state only the right to impose or require additional matters to be stated in such accounting.

Section 285 of the General Code authorizes the bureau of inspection and supervision of public offices to conduct investigations and to subpoena witnesses and records in connection with its examinations and to make a report thereof. If such report shows malfeasance or gross neglect of duty on the part of a public employe, Section 286 of the General Code provides as follows:

“ * * * If a report sets forth any malfeasance or gross neglect of duty on the part of any officer or employe for which a criminal penalty is provided by law, a certified copy thereof shall be filed with the prosecuting attorney of the county in which the offense is committed, and such prosecuting attorney shall, within ninety days after receipt thereof, institute criminal proceedings against such officer or employe. * * * ”

If, in the course of such examination, it should be found that a treasurer's agent had sold prepaid sales tax stamp receipts which he had not received from the treasurer of state, or resold them after having once completed a sale and accounting therefor, the moneys received from such resale would come within the meaning of "public moneys" as defined in Section 286 of the General Code, and if not paid into the state treasury by such agent would constitute a misfeasance in office by such agent. Such definition of "public money" is as follows:

“The term 'public money' as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, shall be liable therefor. All money received under color of office and not otherwise paid out according to law, shall be due to the political subdivision or taxing district with which the officer is connected and shall be by him paid into the treasury thereof to the credit of a trust fund, there to be retained until claimed by the lawful owner; if not claimed within a period of five years after having been so credited to said special trust fund, such money shall revert to the general fund of the political subdivision where collected.”

However, I am unable to find any provision of statute authorizing the auditor of state or the bureau of inspection and supervision of public

offices to confiscate prepaid sales tax stamps or receipts found improperly in the possession of an agent of the treasurer of state.

By reason of the statutory provisions above quoted, it would seem to be the duty of the auditor of state, when in the course of an examination of the accounts of an agent of the treasurer of state it is determined that the agent has violated or is violating the provisions of statute, to 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.

Specifically answering your inquiries, it is my opinion that:

1. An agent of the treasurer of state, appointed under authority of Section 5546-7 of the General Code, is required by such section to account on the first business day of each week, in the manner therein specified, for the sales of prepaid tax receipts sold by him during the preceding week and to pay into the state treasury the face value of such stamps less the discounts allowed by statute to wholesale purchasers and less amounts paid to licensed vendors for redemption authorized by statute.

2. When, upon examination of the accounts of an agent of the treasurer of state by the auditor of state, the amount of cash in his possession from the sale of prepaid tax receipts is deficient, such agent may not account for such cash shortage by substituting uncanceled prepaid tax receipts.

3. There is no provision of law authorizing the auditor of state to confiscate prepaid tax receipts found in the possession of a sales tax agent, even though such prepaid tax receipts are determined by the auditor of state to be illegally in the possession of such agent.

Respectfully,

THOMAS J. HERBERT,

Attorney General.