

1180.

DISAPPROVAL, BONDS OF THE CITY OF TROY, MIAMI COUNTY, OHIO
—\$14,850.00.

COLUMBUS, OHIO, October 20, 1927.

Re: Bonds of the City of Troy, Miami County, \$14,850.00.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

GENTLEMEN:—Under date of September 30, 1927, I wrote a letter to the firm of brokers who have offered the above bonds to your board requesting six additional items of information which the transcript did not contain. In said communication I called attention to the fact that the transcript showed only one proof of publication of the bond sale advertisement and requested a proof of publication in another newspaper. I am today in receipt of a letter from said firm of brokers, in which it is stated that the city auditor of the City of Troy advises that through error said notice was published in but one newspaper and that proof of publication in another newspaper cannot be supplied. None of the other five items of information requested have been furnished.

Section 3924, General Code, which was in effect at the time the above bonds were issued, provides in part:

“Sales of bonds, other than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking fund of the city school district as herein authorized, by any municipal corporation, shall be to the highest and best bidder, after publishing notice thereof for four consecutive weeks in two newspapers printed and of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest and length of time the bonds have to run, with the time and place of sale. * * *”

Inasmuch as Section 3924, supra, has not been complied with, and inasmuch as the other five items of information requested in my letter of September 30, 1927, above referred to have not been furnished, I am compelled to advise you not to purchase the above issue of bonds:

Respectfully

EDWARD C. TURNER,
Attorney General.

1181

“DEALER”—WHEN SUBJECT TO PENALTY FOR FAILURE TO PAY GASOLINE TAX.

SYLLABUS:

1. A “dealer” who fails to pay the excise tax as provided in Section 5531 of the General Code is subject to a penalty of fifteen per cent as provided in Section 5533 of the General Code.

2. A "dealer" who fails to make the monthly report as required by Section 5529-1 of the General Code is required to pay the proper tax provided by law, together with a penalty of fifteen per cent due upon the tax computed upon said month's sales, but in no case shall this penalty be less than twenty-five dollars. This is an additional, separate, distinct and different penalty than that provided for in Section 5533 of the General Code.

COLUMBUS, OHIO, October 20, 1927.

HON. JOSEPH T. TRACY, Auditor of State, Columbus, Ohio.

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion, as follows:

"We respectfully request your opinion on the following case: A corporation, who is defined in Sec. 5526 General Code as a dealer in motor vehicle fuel does not file—by the 20th of the following month—the report showing the number of gallons handled during the preceding month, and we assess the penalty provided for in Section 5529-1. This tax and penalty is certified to the Treasurer of State who subsequently notifies us that said tax and penalty has not been paid. The question then is: Is the Auditor of State required to assess the additional penalty of 15 per cent for violation of the terms of the gasoline tax law, as provided in Sec. 5533 General Code?"

Section 5529-1, General Code, to which you refer in your letter was enacted by the 87th General Assembly and is found in 112 Ohio Laws, 191, 193. It reads as follows:

"The monthly report of dealers shall also, on forms prescribed by the tax commission of Ohio, include a record of all motor vehicle fuel received by them in Ohio during each month, the amounts compounded or refined by them in Ohio each month and in addition furnish any other information the tax commission of Ohio may require. If received by rail, each report shall show the date of receipt of each tank car, its initials, number and the number of gallons contained in each, as shown by the invoice, from whom purchased, point of shipment and point of delivery; if received in other ways, the manner in which received, the dates, the quantities in gallons as shown by invoices, from whom purchased, points of shipment and points of delivery; if produced, compounded or refined in Ohio, by the reporting dealer the amounts in gallons produced, compounded or refined by him. The monthly reports of dealers who purchase motor vehicle fuel in tank car lots and sell the same for delivery in Ohio shall give a record of all such purchases and sales, such record giving the date of shipment, initials and number and gallonage of each car delivered to a point within Ohio, as shown by invoices, from whom purchased, to whom sold, point of shipment and point of delivery. The monthly report of dealers who produce, refine or compound motor vehicle fuel in Ohio shall give a record of all tank car lot sales of the same which is delivered to a point within Ohio, such record to give the date of shipment, initials, number and gallons contained in each tank car which is delivered to a point within Ohio, to whom sold, point of shipment and point of delivery.

When such dealer fails to submit his monthly report to the tax commission of Ohio by the twentieth of the succeeding month for which said report is required, or when such dealer fails to submit the data outlined in the preceding section of this act in such monthly report, the auditor of state shall add a penalty of fifteen per cent to the amount of tax computed and due upon said month's sales; provided that in no case shall this penalty be

less than twenty-five dollars; said penalty shall be collected in connection with and in the same manner that is provided for collecting said tax."

Previous to the enactment of said section a dealer incurred no penalty if he did not file the monthly report as required by law. This section, among other things, provides that when the dealer fails to submit his monthly report by the twentieth of the succeeding month, as required by law, "the auditor of state shall add a penalty of fifteen per cent to the amount of tax computed and due upon said month's sales; provided that in no case shall this penalty be less than twenty-five dollars". This penalty is imposed upon dealers only in case the dealer fails to file the report required by law.

A "dealer" is defined in Section 5526 of the General Code as follows:

" * * * * *

'Dealer' shall include any person, firm, association, partnership or corporation who imports or causes to be imported into the State of Ohio, any motor vehicle fuel or fuels as herein defined, for use, distribution or sale and delivery in Ohio, and after the same reaches the State of Ohio, also any person, firm, association, partnership or corporation who produces, refines, prepares, distills, manufactures or compounds such motor vehicle fuel as herein defined in the State of Ohio for use, distribution or sale and delivery in Ohio. Provided, however, that when any such person, firm, association, partnership or corporation so importing such motor vehicle fuel into this state, shall sell such motor vehicle fuel in tank car lots or in its original containers to any purchasers for use, distribution or sale and delivery in this state, then such purchasers and not the seller shall be deemed the dealer as to the motor vehicle fuels contained in such tank car lots or original containers."

It will be noted that the report which the "dealer" is required to make contains, among other things, the amount of gasoline which has been sold or used by the dealer and which is subject to be taxed under the provisions of the gasoline tax law. After this report is received the tax is computed on the amount of gasoline so sold or used during that month. If the report be not filed on or before the twentieth of the next month a penalty of fifteen per cent, and not less than twenty-five dollars, shall be collected in addition to the regular tax.

Section 5533, General Code, to which you refer reads as follows:

"Any person, firm, association, partnership or corporation within this state who shall receive or accept any shipment in intra-state commerce of motor vehicle fuel from any dealer as defined in this act, or pay for the same or sell or offer the same for sale, unless the statement provided for by Section 7 of this act (G. C. Sec. 5532) shall appear upon the invoice covering such shipment or delivery, or any person, firm, association, partnership or corporation who shall receive, accept, pay for, sell or offer for sale, any quantity of motor vehicle fuel in violation of the terms of this act, shall be liable for the tax payable upon such quantity and in addition thereto a penalty of 15 per cent."

Section 7 of the act referred to in this section is Section 5532 of the General Code, which reads as follows:

"Each seller shall render to all purchasers of motor vehicle fuel, except in cases of retail sales where exemption is not claimed by the purchasers under

the terms of this act, and except in the case of sales of motor vehicle fuel upon which the excise tax is not levied by this act, a bill showing the quantity and price of the motor vehicle fuel so sold. Such bill shall have printed or written thereon, in a conspicuous place, a statement that the liability to the state for the excise tax herein imposed has been assumed by the dealer, and that he or they have paid or will pay such excise tax on or before the last day of the following calendar month."

It will be noted that Section 5533 *inter alia* provides that

"Any person, firm, association, partnership or corporation who shall receive, accept, pay for, sell or offer for sale, any quantity of motor vehicle fuel in violation of the terms of this act"

shall also be liable for the tax payable, plus the penalty of fifteen per cent. This does not refer to the same subject as is contained in Section 5529-1, *supra*. This last section refers, among other things, to the report of the amount of motor vehicle fuel sold. The tax is not required to be paid until after this report is filed. If a "dealer" sells a quantity of motor vehicle fuel contrary to the provisions of Section 5532, *supra*, he has then violated the provisions of the act, and the fifteen per cent penalty provided for in Section 5533, *supra*, should be added because he has made the shipment in violation of the act. If thereafter he fails to make the report in time, he has violated the provisions of Section 5529-1, *supra*, and the penalty prescribed therein should also be collected. The person or firm who accepts such a shipment would also be liable for the tax and the fifteen per cent penalty because he accepted the same.

Section 5531 of the General Code provides:

"On or before the last day of each calendar month each dealer shall pay to the treasurer of state the excise tax due on the sale or use of motor vehicle fuel sold or used by him in the preceding calendar month, together with any tax penalty on omitted amounts as certified to him during such calendar month. Such payment shall be accompanied by a copy of the statement filed with the tax commission of Ohio."

This statute requires the "dealer" to pay the tax provided by law on all gasoline sold or used by him, subject to such tax, on or before the last day of the month following the sale thereof. A "dealer" who sells gasoline or uses the same without so paying the tax, has sold the same "in violation of the terms of this act" and is therefore liable for the tax "and in addition thereto, a penalty of 15 per cent" as provided in Section 5533, *supra*.

From what has been said, it is my opinion that:

(1) A "dealer" who fails to pay the excise tax as provided in Section 5531 of the General Code is subject to a penalty of fifteen per cent as provided in Section 5533 of the General Code.

(2) A "dealer" who fails to make the monthly report as required by Section 5529-1 of the General Code is required to pay the proper tax provided by law, together with a penalty of fifteen per cent due upon the tax computed upon said month's sales, but in no case shall this penalty be less than twenty-five dollars. This is an additional, separate, distinct and different penalty than that provided for in Section 5533 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.