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TAX COMMISSIONERS DISCRETION TO DETERMINE PRACTICABILITY FOR DEPARTMENT OF LIQUOR CONTROL TO ISSUE PREPAID TAX RECEIPTS IN STATE LIQUOR STORES—A POSTED SIGN IS SUFFICIENT. §5739.05 (B) R. C.

SYLLABUS:

1. Pursuant to Section 5739.05 (B), Revised Code, it is entirely within the discretion of the tax commissioner to determine whether or not it is impracticable for the department of liquor control to issue prepaid tax receipts in state liquor stores.

2. Under the provisions of Section 5739.05 (B), Revised Code, the state, acting through its director of liquor control, if relieved from the obligation to issue prepaid tax stamps, would be required to give the bond required in such form and amount as may be determined by the tax commissioner, with surety to the satisfaction of the treasurer of state.

3. It is a sufficient compliance with Section 5739.05, Revised Code, as to notice, to post a sign in each liquor store noting that the tax had been prepaid.

Columbus, Ohio, September 18, 1959

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

Dear Sir:

Your request for my opinion raises three questions, as follows:

“1. Regarding collection of the prepaid sales tax and the issuing of sales tax stamps, the question arises as to whether the

State Liquor Stores should collect the tax and issue the stamps, as prescribed by statute, or is their business 'such as *to render impracticable* the collection of the tax in the manner provided.'

"It is my feeling that a taxpayer is entitled to his receipt under the law and that it is no more *impracticable* for the State Liquor Stores to comply with the law than it is for any other small or large retail establishment to comply. * * * I would like further to point out that an amendment was introduced in the House Taxation Committee to exempt State Liquor Stores from complying with the law requiring issuing prepaid tax receipts on each sale, and this amendment was defeated. It seems clear from this that the intent of the State Legislature was to have the State Liquor Stores issue prepaid tax receipts to the consumers.

"2. The question arises, if it is *impracticable* for the State Liquor Stores to issue sales tax stamps and they prepay the tax, is the Liquor Department and/or the stores required to file a bond with the State Treasurer as prescribed by statute, Section 5739.02 Revised Code of Ohio? Should it be a blanket bond covering all stores, or should it be an individual bond on each store based upon their anticipated gross sales for a reporting period?

"3. Should the authority be granted, the question arises, should the State Liquor Stores put a label noting the tax has been prepaid, upon each bottle? Should they give a written notice to each consumer that the tax has been prepaid? Would just a sign in each store noting that the tax had been prepaid suffice?"

I call your attention to Division (B) of Section 5739.05, Revised Code, as amended by Amended Substitute Senate Bill 376, effective July 1, 1959. It is there provided that the Tax Commissioner may :

"Authorize a vendor to prepay the tax levied by section 5739.02 of the Revised Code upon sales of things produced or distributed by such vendor, and waive the collection of the tax from the consumer *in the manner otherwise provided* in sections 5739.01 to 5739.31, inclusive, of the Revised Code; but no such authority shall be granted or exercised except upon application to the commissioner and unless the commissioner finds that the conditions of the applicant's business are such as to render *impracticable* the collection of the tax in the manner provided by such sections, and upon the applicant furnishing bond payable to the state in such amount as the commissioner determines to be sufficient to secure the prepayment of the taxes levied by section 5739.02 of the Revised Code in the manner desired, with surety to the satisfaction of the treasurer of state, with whom such bond shall be filed; nor shall the authority granted be exercised, nor the vendors actually selling such products be exempted, from the

other provisions of sections 5739.01 to 5739.31, inclusive, of the Revised Code, unless the person to whom such authority is granted prints plainly upon the product sold or offered for sale, a statement that the tax has been paid in advance, *or otherwise conveys said information to the consumer by written notice. * * **
(Emphasis added)

It is quite clear from a reading of the statute that the determination as to the "impracticability" of the issuance of the stamps and the collection of the tax at the time of sale is a matter that is entirely within the discretion of the tax commissioner.

Going on to your second question with respect to the requirement of a bond, as applying to the state liquor department, and as to the form and size of the bond, it is a well established principle of law that the state is not bound by the terms of a general statute unless it is so expressly enacted. *State, ex rel. Nixon v. Merrill*, 126 Ohio St., 239. In the amendment of Section 5739.01, Revised Code, the word "person" is defined as including "the state and its political subdivisions"; and "vendor" includes every person who makes a sale. Hence I must conclude that the state has all of the burdens that fall upon vendors generally, including the cancellation and delivery of the detached portion of the sales stamps, unless relieved by the tax commissioner as above noted.

Accordingly, it is my opinion that, however absurd it may appear for the state—through its liquor board—to give bond to itself as a condition to the grant of its application for relief from the requirement of issuing the stamps, the law requires that that course be followed, and that the bond should be executed by the director of liquor control.

As to the amount of the bond, it will be observed that Section 5739.02, *supra*, places that matter entirely in the discretion of the tax commissioner.

Since the whole matter of making the sale is in the hands of the state liquor department, although operating through a number of stores, it is my opinion that a blanket bond would be a sufficient compliance with the law.

With respect to the third question raised by your letter relative to the written notice to the consumer, it will be observed that Section 5739.02, *supra*, provides that a vendor granted the exemption in question may either give the consumer notice by printing the notice upon the product

offered for sale, "or otherwise convey said information to the consumer by written notice." Your letter asks, "Would just a sign in each store noting that the tax had been prepaid suffice?" In view of the language of the state, it is my opinion that such sign would be sufficient notice for compliance with the statute.

It is accordingly my opinion that:

1. Pursuant to Section 5739.05 (B), Revised Code, it is entirely within the discretion of the tax commissioner to determine whether or not it is impracticable for the department of liquor control to issue prepaid tax receipts in state liquor stores.

2. Under the provisions of Section 5739.05 (B), Revised Code, the state, acting through its director of liquor control, if relieved from the obligation to issue prepaid tax stamps, would be required to give the bond required in such form and amount as may be determined by the tax commissioner, with surety to the satisfaction of the treasurer of state.

3. It is a sufficient compliance with Section 5739.05, Revised Code, as to notice, to post a sign in each liquor store noting that the tax had been prepaid.

Respectfully,
MARK McELROY
Attorney General