

391

## SYLLABUS:

Certificates of abatement may be tendered by the payee or transferee thereof only as payment of the taxes enumerated in Sections 5703.05, 5725.08 and 5725.16, Revised Code, and consequently may not be accepted for purposes other than as payment of those taxes.

Columbus, Ohio, July 22, 1963

Hon. John D. Herbert  
Treasurer of State  
State of Ohio  
Columbus, Ohio

Dear Sir:

Your recent request for my opinion reads as follows:

"I hereby request your opinion concerning the extent to which the Treasurer of State can act as an agent in the transfer of certificates of abatement issued pursuant to Sec. 5703.05 of the Revised Code.

"Sec. 5703.05 authorizes the Tax Commissioner to issue a certificate of abatement to a tax payer, his assigns or legal representatives, showing the amount of the overpayment and the kind of tax overpaid. The section further provides that a tax payer who has been issued such a certificate, or his transferee, may tender the certificate to the Treasurer of State for the amount thereof in payment of a tax credited to the General Fund.

"The proper use of the abatement certificate has been difficult for many tax payers for several reasons. In some instances a tax payer will no longer be requested to pay a tax for which the abatement certificate was issued because of changes in the tax law or perhaps changes in the business or corporate structure of a tax payer. There are also foreign corporations holding abatement certificates which likewise cannot be used since that particular company may no longer be required to pay a particular tax.

"To be fair to the tax payers and in order to keep the volume of outstanding abatement certificates from climbing ever higher, the Treasurer's office in prior years would substitute the abatement certificate for other tax payers' payments.

"When a certificate of abatement for more than the tax required or for a different tax than the one for which the certificate was issued, was tendered to the Treasurer, the office would:

1.—Use the certificate to credit another tax payer's payment for the same tax for which the original certificate was issued.

2.—Deposit the checks from the tax payer whose tax was credited by the certificate in the Depository Trust Fund.

3.—Draw from the Depository Trust Fund

(a)—a check or checks in payment of the tax or taxes desired to be paid by the original abatement certificate owner or his transferee

(b)—a check for the balance of the tax due for which the certificate had been used, if any

(c)—a check for the balance over and above that needed to pay the tax of the original certificate holder or his transferee, which would be returned to the original certificate holder or his transferee.

"The Auditor of State objected to this manner of handling abatement certificates as not authorized under Sec. 5703.05.

"I would like your opinion on the following:

1.—May the Treasurer of State process abatement certificates in the manner outlined above?

2.—If the above procedure is considered not to be legal, then I would like your opinion as to whether or not the Treasurer of State, if specifically authorized by the owner or transferee of an abatement certificate, may act as his agent in making such a substitution."

The pertinent parts of Section 5703.05, Revised Code, read:

"\* \* \* the commissioner has the authority on written application of any person, firm, or corporation claiming to have overpaid to the treasurer of state at any time within five years prior to the making of such application any tax payable under any law which the department of taxation is required to administer, or on his own motion investigate the facts and make in triplicate a written statement of his findings, and, if he shall find that there has been an overpayment, issue in triplicate a certificate of abatement payable to the taxpayer, his assigns, or legal

representatives which shows the amount of the overpayment and the kind of tax overpaid. \* \* \* Except as provided in section 5725.08 and 5725.16 of the Revised Code the taxpayer's copy of any certificates of abatement may be tendered by the payee or transferee thereof to the treasurer of state as payment, to the extent of the amount thereof, of any tax payable to the treasurer of state to the credit of the general fund in the state treasury; \* \* \*

Two things are apparent from the foregoing quoted language. First, the right to receive a certificate of abatement is assignable because the statute provides that a certificate of abatement may be issued payable to the taxpayer, his *assigns* or legal representatives. Second, a certificate of abatement is transferable after it is issued because the statute provides that it may be tendered by the payee or *transferee* thereof.

Also noteworthy is the fact that the statute requires that a certificate show not only the amount of the tax overpaid but also the kind of tax overpaid. Prior to the enactment of Amended House Bill No. 105 by the Ninety-ninth General Assembly this statute provided:

“\* \* \* The taxpayer's copy may be tendered by the payee or transferee thereof to the treasurer of state as payment, to the extent of the amount thereof, of any tax of the same kind.” (123 Ohio Laws, 862, at page 930).

In Opinion No. 1881, Opinions of the Attorney General for 1950, concerning the use of certificates of abatement, it was concluded that the word “kind” implied class, nature or characteristic, whereas the fund into which the tax proceeds are to be paid implies purpose. In this opinion it was observed that, had the legislature intended the word “kind” to refer to the fund into which the tax was payable, it might have used more apt language. Thereafter, the amendment by the Ninety-ninth General Assembly in 1951 substituted the language presently in Section 5703.05, Revised Code. The designation on the certificate of the kind of tax overpaid is therefore no longer important, except when it is tendered as payment pursuant to the provisions of Sections 5725.08 and 5725.16, Revised Code, which still require an identification of the tax involved.

In the case of *Interstate Motor Freight System v. Bowers*, 164

Ohio St., 122, it was argued that the highway use tax law, Chapter 5728, Revised Code, as it then existed, made no provision for the type of refund sought. However, the Supreme Court quoted Section 5703.05, Revised Code, and ordered the Tax Commissioner to make refund in accordance therewith. In so doing, the court was without doubt aware of the provision that certificates of abatement "may be tendered \* \* \* as payment \* \* \* of any tax payable to the treasurer of state to the credit of the general fund in the state treasury." Obviously, it was also aware of the fact that the Ohio highway use tax was not a tax payable to the credit of the general fund in the state treasury.

In its most recent pronouncement relative to this subject the Supreme Court stated that at least under certain factual situations the remedy of abatement is in addition to the remedy of refund which may be otherwise available. Significantly the court noted that the two remedies are distinct and have different limitation periods. *California Chemical Co. v. Bowers*, 173 Ohio St., 391.

From all of the foregoing it is apparent that, in providing for the remedy of certificates of abatement, the legislature has established a remedy in addition to other refund provisions which is separate and distinct, not only in the period of limitation but in basic nature. It is obvious that the legislature could have provided, in Section 5703.05, Revised Code, that upon a finding by the Tax Commissioner that a tax has been overpaid such finding should be certified to the auditor for the purpose of having a warrant prepared by that officer drawing upon the state treasury for refund of the overpayment. This it did not do. Instead it provided for issuance of a certificate which could be used by the payee or transferee in abatement of the taxes specified in Sections 5703.05, 5725.08 and 5725.16, Revised Code. Obviously, such certificates were intended to be used in the abatement of future taxes as they become due.

Section 113.06, Revised Code, provides in part:

"No money shall be paid out of the state treasury or transferred from it to a county treasury or elsewhere except on the warrant of the auditor of state. \* \* \*"

Certificates of abatement represent overpayments previously credited to the state treasury. They are, however, not warrants of

the Auditor of State. A procedure whereby current receipts which would ordinarily be deposited in the state treasury are first placed in a depository trust fund and then used to redeem certificates of abatement prior to the transfer of the money in the depository trust fund to the state treasury would circumvent the purpose of the legislature in providing for the issuance of certificates of abatement as well as that expressed in Section 113.06, Revised Code.

I find no specific statutory authorization under which the treasurer of state may exchange cash for certificates of abatement, either in whole or in part, and from the foregoing I conclude that such authorization cannot be implied.

The stated purpose of the depository trust fund established by Section 131.04, Revised Code, is to provide a method to properly collect, deposit, and audit contingent receipts received by various state departments. Section 131.05, Revised Code, provides in part:

“Every state officer, state institution, department, board, commission, or college or university, receiving fees or advances of money, or which, under section 131.01 of the Revised Code, collects or receives fees, advances, or money, shall deposit all such receipts to the credit of the state depository trust fund, *when such receipts may be subject to refund or return to the sender, or when such receipts have not yet accrued to the state.* \* \* \*

(Emphasis added)

I am unable to conclude that certificates of abatement may constitute “receipts” when tendered by a payee or transferee. Likewise, I am unable to conclude that the checks referred to in step 2 of your description of past procedure would constitute “contingent receipts.” I do conclude that the purpose of the depository trust fund is not to serve as a rotary fund for redemption of certificates of abatement.

Sections 5703.05, 5725.08 and 5725.16, Revised Code, provide, respectively, that certificates of abatement may be tendered to the treasurer of state *as payment* of: any tax payable to the treasurer of state to the credit of the general fund in the state treasury; any taxes allocable to the county in which the claim for overpayment arose when the certificate of abatement was issued for overpayment of the deposits tax or taxes imposed on shares of, or ownership in-

terest in capital employed by, or on capital employed by financial institutions; and any taxes allocable to the county in which the claim for overpayment arose when the certificate of abatement was issued for overpayment of the tax on shares or property representing capital of a dealer in intangibles. The significant fact here is that in each of these sections it is provided that the certificates may be tendered by the payee or transferee *as payment*. There is no statutory indication that they may be tendered for "substitution," brokerage or any purpose other than as payment. In making certificates of abatement transferable it may reasonably be presumed that the legislature recognized that in some instances a holder might have no immediate use for his certificate. It also logically follows that in those instances a transfer may involve some inconvenience and possibly some expense. Yet I find no statutory indication of any intention that this inconvenience be assumed by public offices or that the possible expense be paid from public funds. Such obviously would be the results of the procedure outlined in your inquiry.

It may be appropriate to observe that much of the difficulty which gives rise to your inquiry seems to have been removed by the legislature when, in 1951, it changed the use of certificates of abatement from payment of "any tax of the same kind" to "any tax payable to the treasurer of state to the credit of the general fund in the state treasury." The other circumstances mentioned in your inquiry appear to be adequately covered by the fact that certificates of abatement are transferable.

In specific answer to your questions, it is my opinion and you are advised that certificates of abatement may be tendered by the payee or transferee thereof only as payment of the taxes enumerated in Sections 5703.05, 5725.08 and 5725.16, Revised Code, and consequently may not be accepted for purposes other than as payment of those taxes.

Respectfully,  
WILLIAM B. SAXBE  
Attorney General