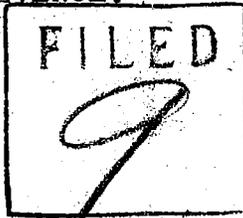


CIGARETTE TAX:
ACTION BY THE
DEPARTMENT OF
REVENUE:



Representatives of the cigarette tax division should make estimates of the tax and penalties due against a seller of unstamped cigarettes when the seller is known, and against the retailer when the seller is unknown.

March 16, 1956

Honorable Frank Blankenship
Supervisor of Cigarette Tax
Division of Collection
Department of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Blankenship:

You recently stated your request for an opinion of this office as follows:

"Senate Bill 351, 68th General Assembly, Section 6, paragraphs 1, 2 and 3, provides certain penalties for failure to properly stamp cigarette packages for sale.

"Please give me an opinion as to the procedure a representative of this department should use when he discovers cigarettes for sale in a retail establishment, if cigarette tax stamps have not been affixed to packages."

Section 8 of the Act, 149.080, 1955 Cumulative Supplement, Mo. R.S., requires that the retailer keep records showing the sales made and the commodities received.

Section 9, 149.090, 1955 Cumulative Supplement, requires him to permit the representative of your department to examine his records, papers, files and equipment.

It will be presumed, therefore, that your question is directed toward the situations when the retailers refuse such permission. Section 144.060 provides that a penalty, to be in the same amount as the tax, shall be "assessed and collected * * * as sales taxes are collected," when the person who is required to do so fails to affix the stamps.

Section 144.210, RSMo 1949, provides authority to estimate the amount of sales tax whenever a taxpayer fails or refuses to make the proper returns.

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We can find no authority, either specifically in the cigarette tax act or generally in other acts, that gives the representative of the tax department the authority to search the premises of the retailer in order to determine the number of unstamped cigarettes on hand, if the retailer refuses permission to examine his stock and records and equipment. It, therefore, seems necessary for the representative to make an estimate of such amounts so as to determine the amount of the tax and the penalty.

It appears from the wording of paragraph 1 of Section 149.060 of the cigarette tax act that it was contemplated that both the tax on the cigarettes and the penalty are to be collected "as sales taxes are collected." This, we think, is to be the practice when that tax has not been "paid by affixing stamps" at the time of the original sale in this state, as is provided by paragraph 2 of Section 2 of the Act, now 149.020, 1955 Cumulative Supplement.

The procedure we have suggested above would be applicable, of course, if the retailer had on hand cigarettes not purchased in this state and in the situations when he had purchased them within the state and refuses to give the representative the information as to how many and from whom purchased.

When the identification of the person who first sells the cigarettes can be determined, the tax and the penalty can be "assessed and collected" from him "as sales taxes are collected." You will note that paragraph 1 of Section 149.060 states that the penalty shall be assessed and collected against "Any person who fails to affix the stamps within the time and manner required of him by this act * * *." And, as mentioned above, the time that is set is the time of the original sale in this state.

CONCLUSION

It is, therefore, the conclusion of this department:
(1) that the representative of the division of collection, Department of Revenue, upon discovering upon the premises of a retailer cigarettes to which no stamps have been affixed, should attempt to determine the seller of such cigarettes and attempt to determine the amount the retailer has on hand. Following the acquisition of such information, the

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tax and penalty should be assessed against the seller as all estimated sales taxes are assessed; (2) that whenever the seller of the cigarettes cannot be determined, such estimated tax and penalty should be assessed and collected against and from the retailer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

RSN:lc