It is made applicable to meter tax collection by N.J.S.A. 54:40A-17:

> "* * * Any licensed distributor authorized * * * to affix evidence of tax payment to packages of cigarettes by means of a metering machine shall * * * make a prepayment, allowing for the discount * * * subject to the same conditions as in the case of the sale of [tangible] stamps * * *."

It is apparent from the generality of N.J.S.A. 54:40A-11, applicable alike to all distributors, big and small, without regard to the manner of their operation, that this is not an attempt to compensate the distributors for the exact amount of expense incurred by them in the collection of the cigarette tax but provides only an approximately equivalent recompense. Viewed in this light, the statute does not intend that to be entitled to the discount the distributor must both "affix and handle" the stamps. It is enough if the distributor performs some substantial service or incurs some expense in implementing the collection process. In the case of the metered cigarettes it is apparent that the distributors had to perform substantial services in determining the number of packages in their inventory which had been already metered and in bringing the meters to the Cigarette Tax Bureau at a time when they still contained credits and would not have had to have been brought to the Cigarette Tax Bureau were it not for the increase in the tax rate. It is our opinion that the statute intends that the discount be allowed for these services and that the action taken by the Cigarette Tax Bureau was lawful.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

SEPTEMBER 25, 1958

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-25

DEAR MR. KERVICK:

We have been asked whether proposed regulation CT 23, providing for the remission of tax liability on unstamped cigarettes stolen from a distributor is unlawful, and if so, whether the proposed regulation would be applied retroactively to entitle distributors to refunds who have paid a tax on stolen unstamped cigarettes under protest. Proposed regulation CT 23 reads as follows:

> "Excluding internal pilferage and subject to such restrictions of proof as may be demanded by the director, tax liability shall not accrue in situations where unstamped cigarettes are stolen from the place of business of a licensed distributor."

The tax on cigarettes imposed by N.J.S.A. 54:40A-8 is collected by the mechanism of requiring distributors to affix stamps (which they have purchased from the Director of the Division of Taxation, N.J.S.A. 54:40A-11, 17) to the packages of cigarettes either within 24 hours after receipt of the cigarettes and "prior to any and all deliveries" (with certain exceptions not here relevant), N.J.S.A. 54:40A-15. This mechanism is intended to implement the basic imposition of tax on "the sale, use or possession for sale or use" of cigarettes contained in N.J.S.A. 54:40A-8. "Sale" within the meaning of this section is expressly defined to include "theft." N.J.S.A. 54:40A-2(n).

Since the requirement in N.J.S.A. 54:40A-15 that cigarettes be stamped prior to delivery is intended to implement the more basic provision of section 54:40A-8 that a tax be imposed upon "sale," which includes theft, "delivery" in section 15 should be read to include theft. For this reason, the proposed regulation would conflict with the statutes.

While the collection of a tax on stolen unstamped cigarettes visits a burden on the distributor which he would not anticipate, since the law intends that ordinarily the ultimate burden of the tax shall fall upon the consumer, N.J.S.A. 54:40A-10.1, Rev. Rul. 13661, 1951-2 Cum. Bull. 24, this is not a justification for excusing the liability. The collection of a tax in respect of stolen cigarettes from any person earlier in the chain of distribution than the consumer visits the same sort of burden as that which is sought to be relieved by the proposed regulation. The effect of the statutory definition of "sale" to include theft, as discussed above, shows that the Legislature intends such burdens to be imposed. There is nothing in the statutory scheme to afford a basis for differentiating between particular instances of such burdens which result from the theft of cigarettes.

In light of the conclusion that the tax liability in question may not be excused, it is unnecessary to answer the second question presented, whether the proposed regulation may be applied retroactively.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

SEPTEMBER 25, 1958

WILLIAM F. PARKER, *Sheriff*
Burlington County
Mount Holly, New Jersey

MEMORANDUM OPINION—P-26

DEAR SHERIFF PARKER:

You have inquired whether you, as county sheriff, or the county board of freeholders, constitute the "appointing authority" for appointment of deputy sheriffs.

The governing statutes are R.S. 40:41-31 and R.S. 11:19-1.

The phrase "appointing authority" is defined in R.S. 11:19-1 and means the ". . . officer, commission, board or body having power of appointment or election to, or removal from, subordinate positions in an office, department, commission, board or institution of a county, municipality or school district operating under this title." R.S. 40:41-31 provides in part, "*The sheriff shall select and employ* the necessary deputies, chief clerks and other employees, who shall receive such compensation as shall be recommended by the sheriff and approved by the board of freeholders. . . ." (Emphasis added).

Read together, the quoted statutes make it clear that the county sheriff and not the Board of Chosen Freeholders is the "appointing authority" for his deputies, chief clerks and other employees. *Scancarella* v. *Dept. of Civil Service*, 24 N.J. Super. 65, 72 (App. Div. 1952).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID LANDAU
Deputy Attorney General

SEPTEMBER 25, 1958

MR. EDWIN L. DAVIS
Member, Burlington County
Board of Taxation
County Office Building
Mount Holly, New Jersey

MEMORANDUM OPINION—P-27

DEAR MR. DAVIS:

We have been asked whether the third of the three members of a county board of taxation (see N.J.S.A. 54:3-2) may act as the board on appeals by an individual taxpayer from the assessed valuation of his property pursuant to N.J.S.A. 54:3-21 when one member's position has been vacated by death and a second has disqualified himself because he is the owner of the property which is the subject of appeal.

N.J.S.A. 54:3-25 provides that:

> "A majority of the members of the board shall constitute a quorum for the transaction of business."

It is of no consequence whether the expression "members of the board" in this section intends the members presently serving, in this case two, or the total number when all vacancies are filled (N.J.S.A. 54:3-2, *supra*). It is clear that "majority" means "more than 50%." *Downing* v. *Rugar*, 21 Wend. 178, 34 Am. Dec. 223, 225 (N.Y. Sup. Ct. 1839); 42 *Am. Jur., Pub. Admin. Law*, sec. 72 (1942).

"More than 50%" of either two or three members signifies two. Therefore, in the situation presented the county board is impotent to act on the merits of the appeal.

However, the taxpayer-board member is not deprived of a right of appeal on the assessed valuation of his property. His disqualification only bars him from acting on the merits of his own appeal. He may join with the remaining member to form

a quorum of the county board to enter a judgment that the appeal must be dismissed without prejudice because of the lack of a quorum qualified to determine the merits. The taxpayer-county board member may then file an appeal to the Division of Tax Appeals in the Department of the Treasury pursuant to N.J.S.A. 54:2-39. This section permits an appeal to the Division by any taxpayer "who is dissatisfied with the judgment of the county board of taxation." It does not require that the Division must find that the county board committed a legal error in the strict sense before the Division may afford relief to the taxpayer. The Division is to use every lawful resource to do full justice to the parties. Cf. *Gibraltar Corrugated Paper Co.* v. *North Bergen Twp.*, 20 N.J. 213 (1955). The hearing before the Division will be as full as one before the county board since it is de novo. N.J.S.A. 54:29A-33; *Delaware, L. & W. R. R.* v. *Hoboken*, 10 N.J. 418, 425 (1952); *Central R. R.* v. *Neeld*, 26 N.J. 172, 181, 183 (1958), cert. denied 357 U.S. 928 (1958).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

SEPTEMBER 25, 1958

HONORABLE SALVATORE A. BONTEMPO
Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-28

DEAR COMMISSIONER BONTEMPO:

The Township of Green Brook in Somerset County, which at one time had asked for a grant of an estate in a small portion of Washington Rock Park on which it wishes to locate fire fighting equipment to protect the mountain areas of the township and which request had been refused because of the conclusions contained in a Memorandum Opinion which we furnished your immediate predecessor in office under date of January 8, 1957, now asks that we reconsider those conclusions. That opinion held that no greater right than a license could be granted because of the nature of the language in the deed by which the State took its title.

The township authorities have taken exception to the conclusions in that opinion and have renewed their plea for the conveyance on the ground that there is an ever increasing growth in population in the mountain areas which have no adequate fire protection available presently. They also note that there is considerable State property of historic value in the park itself, the safety of which is jeopardized by the lack of first class fire protection. The township proposes to construct, outfit and maintain on the tract sought to be acquired a building suitable for a fire company.

The deed to the State for Washington Rock Park was made by Charles W. McCutcheon on November 29, 1913 for 27 acres and the acceptance of the conveyance was authorized by L. 1913, c. 141. A portion of the preamble to the statute set forth that "Washington Rock was of historic importance and was to be acquired and