

OPINION 65-201

Syllabus:

Section 5715.39, Revised Code, establishes the procedure by which payment made in prior years for real estate taxes may be remitted and there is no statutory authority by which a county auditor may refund such taxes except as provided therein.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William B. Saxbe, Attorney General, November 15, 1965

Your request for my opinion is as follows:

"The Auditor of Cuyahoga County has requested my opinion as to his authority to refund real estate taxes for the current year 1964, and for the five prior years of 1959 to 1963, inclusive, where the taxpayer also paid personal property taxes for these years on the same property which the Ohio Department of Taxation had classified as personal property in 1957.

"The facts are these: In a letter dated August 20, 1964, the taxpayer requested the Ohio Department of Taxation, Franchise and Personal Property Audit Section, to certify to our county auditor that as a result of an audit made by the Department in 1957, the taxpayer was required to list its 'Power House' equipment and machinery as Personal Property which it did beginning with its 1957 Personal Property Tax Return. This request of the taxpayer was prompted by the fact that it had then for the first time discovered that this same machinery and equipment had also been assessed and taxed as real estate for the years 1957 through and including the year 1964, and that it had also been paying these taxes. The taxpayer, therefore requested a refund of the real estate taxes paid during the years 1957 to 1964, both inclusive.

"On May 17, 1965 the Ohio Department of Taxation complied with the above request of the taxpayer and notified our County Auditor that a recent recheck of the 'Power House Steam Product' showed that the primary usage was still to be for manufacturing purposes and accordingly this property should still remain classified as personal property. The Department also advised the Auditor that the

taxpayer was entitled to reimbursement for the real estate taxes paid 'for the period allowed by statute'.

"Upon receipt of the above communication from the Ohio Department of Taxation, our Auditor removed the property in question from the 1965 real estate duplicate. However, the Auditor, upon our advice, refused to make the refund in question as we could find no statute or court precedent authorizing the refunder under these circumstances. The taxpayer at no time filed a complaint with the County Board of Revision under Section 5715.-19 of the Revised Code as to the illegality of the real estate taxes assessed against its property in that it had already been assessed as personal property. The taxpayer never availed itself of the provisions of Section 2723.01 of the Revised Code, to institute an action to recover the real estate taxes paid, nor did it file a written protest as to the illegality of the real estate taxes on its property at the various times when it paid the real estate taxes as provided in Section 2723.03 of the Revised Code of Ohio. Finally, while the County Auditor under Section 319.36 of the Revised Code, may refund taxes 'erroneously' collected, the courts have interpreted this to mean taxes collected as a result of a 'clerical' error, and not as a result of a 'fundamental' error in assessing.

"Your opinion is, therefore, requested as to whether or not the County Auditor has the legal authority to refund real estate taxes voluntarily paid by a taxpayer on its property for the years 1957 to 1964, both inclusive, where during the same period of time the taxpayer also paid personal property taxes on the very same property which the Ohio Department of Taxation had classified as personal property in 1957.

"The taxpayer has advised our Auditor that within the last two years, the Auditors of several counties granted refunds of the real estate taxes for a five year period under exactly similar circumstances as hereinabove set forth. In view of the fact that it appears that this is a matter of statewide interest your formal opinion is respectfully requested."

Opinion No. 693, Opinions of the Attorney General for 1959, page 402, is germane to the question you present. The syllabus of that opinion is as follows:

"The auditor of a county, finding on

the tax lists of his county, real property taxes and penalties which he believes to be illegal, may apply to the State Board of Tax Appeals for an order remitting such taxes and penalties and authorizing him to strike them on the real property tax list in duplicate; and said Board, upon finding that such tax and the penalties are illegal, is authorized under the provisions of Section 5715.39, Revised Code, to make such order. In the event the items under consideration by the auditor pertain to any other taxes or assessments, the application to remit should be addressed to the Tax Commissioner."

The primary authority for the opinion is Section 5715.39, Revised Code, which is as follows:

"The board of tax appeals and the tax commissioner, in the manner provided by sections 5703.02 and 5703.05 of the Revised Code, respectively, may remit taxes and penalties thereon found by them to have been illegally assessed and penalties that have accrued because of the negligence or error of an officer required to perform a duty relating to the assessment of property for taxation or the levy or collection of taxes. The board or tax commissioner, as the case may be, may correct an error in an assessment of property for taxation or in the tax list or duplicate of taxes in a county.

"No such taxes, assessments, or penalties in excess of one hundred dollars, shall be remitted until after ten days' notice in writing of the application for remittance has been served upon the prosecuting attorney and the county auditor of the county where such taxes or assessments were levied and proof of such service has been filed with the board or tax commissioner, as the case may be. When any taxes or penalties have been remitted as provided in this section, the board or tax commissioner shall make a report thereof to the auditor of state.

"The provisions of this section shall not be construed as affording to the taxpayer a concurrent remedy with that provided for by section 5715.19 of the Revised Code, with respect to any matter which he may be authorized to complain of under the provisions of said section."

Opinion No. 693, Opinions of the Attorney General for 1959, was addressed to procedure available for a county aud-

itor to initiate to clear his records. The opinion discusses the use of the provisions of Section 5715.39, Revised Code, as follows, on pages 405 and 406:

"While the remedy afforded by Section 5715.39, supra, is more likely to be invoked by a property owner, I see no reason why the power there given to the board of tax appeals and the tax commissioner should not as freely be exercised on the application of a county auditor who desires to clear his records of taxes and penalties which he believes to be wholly illegal.

"Sections 5703.02 and 5703.05, Revised Code, referred to in said Section 5715.39 do not in any way limit or detract from the powers of either the board or the tax commissioner, given by said Section 5715.39.

"However, such Revised Code, Sections, in defining the respective powers and duties of the Board of Tax Appeals and the Tax Commissioner divide the authority between these two administrative agencies with respect to the remission of illegal taxes. Section 5703.02 of the Revised Code, in defining the powers and duties of the Board of Tax Appeals, insofar as pertinent provides:

"The board of tax appeals shall exercise the following powers and perform the following duties of the department of taxation;

"* * * * *

"(I) Exercise the authority provided by section 5715.39 of the Revised Code relative to remitting taxes and penalties against real property found to have been illegally assessed or to have been assessed in consequence of the negligence or error of an officer required to perform a duty related to the assessment of such property for taxation, or the levy or collection of such taxes;

"* * * * *

"Section 5703.05 of the Revised Code, in defining the powers, duties and functions of the Tax Commissioner, insofar as pertinent provides:

"All other powers, duties and functions of the department of taxation, except those mentioned in section 5703.02 and 5703.04 of the

Revised Code, are vested in and shall be performed by the tax commissioner, which powers, duties, and functions shall include, but shall not be limited to the following:

" * * * * *

"(B) Exercising the authority provided by law relative to remitting or refunding taxes or assessments, including penalties and interest thereon, illegally or erroneously assessed or collected, or by any reason overpaid, except as provided in Division (I) of Section 5703.02 of the Revised Code, * * *."

"Therefore, by specific statutory enactment, the Board of Tax Appeals has been granted authority to remit illegal real property taxes and assessments, and the Tax Commissioner has been granted similar authority with respect to all other taxes and assessments."

With this in mind, the letter from the Ohio Department of Taxation cannot be authority for refunding illegally assessed real estate taxes. It is, however, the "certification" requested by the taxpayer in his letter to the Ohio Department of Taxation, August 20, 1964. It also reflects the conclusion of the Ohio Department of Taxation that the property in question should properly remain classified as personal property for purposes of taxation.

It is my opinion and you are advised that Section 5715.39, Revised Code, establishes the procedure by which payment made in prior years for real estate taxes may be remitted and there is no statutory authority by which a county auditor may refund such taxes except as provided therein.