

Note from the Attorney General's Office:

1920 Op. Att'y Gen. No. 20-1776 was rendered
obsolete by 1974 Op. Att'y Gen. No. 74-068.

1776.

TAXES AND TAXATION—WHEN COMMISSIONERS MAY LAWFULLY EXTEND TIME FOR PAYMENT OF TAXES—WHEN PENALTY ON DELINQUENT REAL ESTATE TAXES DOES ATTACH—WHEN PENALTY FOR COLLECTION OF DELINQUENT TAXES BOTH REAL AND PERSONAL ATTACHES.

1. *The fifteen per cent penalty on delinquent real estate taxes does not attach as to the first half tax until after the February settlement.*

2. *The five per cent penalty for the collection of delinquent taxes, both real and personal, does not attach automatically as of a given date, but only when the time for the voluntary payment of taxes has expired and the process of collection commences.*

3. *The county treasurer himself is without authority to prescribe any time for the cessation of the receipt of the payment of taxes other than that prescribed in the statute; but the power of the county commissioners to extend the time for the payment of taxes is not limited on the dates mentioned in section 2657 G. C., and in case the latest date mentioned therein for the payment of the first half of the taxes will make it physically impossible for the treasurer to receive payment of such half taxes, having regard to the date of the delivery of the duplicate to the treasurer (but not under other circumstances), the commissioners may lawfully extend the time for the payment of taxes beyond such date to any date short of the February settlement, the time provisions of said section 2657 G. C. being regarded as in this sense directory.*

COLUMBUS, OHIO, December 31, 1920.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—You have requested the opinion of this department, as follows:

“The County Auditor of this county has been unable to get the tax duplicates into the hands of the County Treasurer in time to begin the collection of taxes on about November 1st as in former years, and the County Treasurer will be unable to have his books ready to receive taxes before January 3, 1921.

The time for the collection of taxes has been extended by the County Commissioners under section 2657 of the General Code, to January 20, 1921. This, however, will leave insufficient time for the collection of all of the taxes of the county, it being a physical impossibility for the County Treasurer to collect all of the county taxes in that time.

Is there any method by which we can get an extension of time, and if not, will the taxpayers who come to pay their taxes but who are unable to do so before the 20th of January, be chargeable with delinquency and be required to pay such delinquency when the books are opened in June?”

The sections which must be considered in order to arrive at an answer to your question are as follows:

“Sec. 2595. On or before the first day of October of each year, the county auditor shall deliver to the county treasurer a true copy or duplicate of the books containing the tax list required to be made by him for the year.”

“Sec. 2649. The office of the county treasurer shall be kept open for the collection of taxes from the time of delivery of the duplicate to the treas-

urer until the twenty-fifth day of January and from the first day of April until the twentieth day of July."

"*Sec. 2653.* Each person charged with taxes on a tax duplicate in the hands of a county treasurer may pay the full amount thereof on or before the twentieth day of December, or one-half thereof before such date, and the remaining half thereof on or before the twentieth day of June next ensuing, but all road taxes so charged shall be paid prior to the twentieth day of December."

"*Sec. 2656.* When one-half of the taxes charged against any entry on a tax duplicate in the hands of a county treasurer is not paid on or before the twentieth day of December next after being so charged, or when the remainder of such tax is not paid on or before the twentieth day of June next thereafter, the county treasurer shall proceed to collect it by distress or otherwise together with the penalty of five per cent on the amount of tax so delinquent, which penalty shall be paid into the treasurer's fee fund."

"*Sec. 2657.* The county commissioners of any county by resolution spread upon their journal may extend the time of payment of taxes from June twentieth to July twentieth of the same year and from December twentieth to January twentieth of the following year. In all cases where such half of a tax other than on real estate has not been paid on the twentieth day of December or on the twentieth day of the following January, if the time has been so extended, the whole amount of taxes other than on real estate for the current year so charged shall be due and delinquent, and shall be collected in the manner and with the penalty provided in the preceding section."

Sec. 2596. On or before the fifteenth day of February and on or before the tenth day of August of each year, the county auditor shall attend at his office to make settlement with the treasurer of the county and ascertain the amount of taxes with which such treasurer is to stand charged. * * *

"*Sec. 5678.* If one-half the taxes charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, or collected by distress or otherwise prior to the February settlement, a penalty of fifteen per cent thereon shall be added to such half of said taxes on the duplicate. If such taxes and penalty, including the remaining half thereof, are not paid on or before the twentieth of June next thereafter, or collected by distress or otherwise prior to the next August settlement, a like penalty shall be charged on the last half of such taxes. The total of such amounts shall constitute the delinquent taxes on such real estate to be collected in the manner prescribed by law."

So far as real property taxes are concerned, it is clear from section 5678 General Code that the fifteen per cent. penalty prescribed thereby is not chargeable until after the February settlement. The language of the section is:

"If one-half the taxes charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, or collected by distress or otherwise prior to the February settlement" the penalty shall be added.

The two parts of this clause are not alternatives. The theory of the section is that until "the twentieth day of December" the taxes are to be "paid"—that is, tendered to the treasurer by the taxpayer; and that between the twentieth day of December and the time of making the February settlement they are to be "collected by distress or otherwise," that is, through the efforts of the county treasurer acting

under such sections as section 2658 authorizing the distraint of goods and chattels for the payment of any tax, or sections 2667 et seq. authorizing the foreclosure of the lien for real property taxes due and unpaid. Of course, it is not meant to imply that the only action that the treasurer can take between these dates is action of the kind described. It is perfectly lawful for him to receive the money when tendered by the taxpayer, but in contemplation of law the tax is not being *paid* after the last day limited for the payment of taxes; it is rather being *collected* by the treasurer. As to real estate, however, the treasurer can not lawfully *collect* the fifteen per cent penalty on the tax between these dates. Section 5678 implies as much when it prescribes, in part, that "if one-half the taxes charged against an entry of real estate is not * * * collected by distress or otherwise prior to the February settlement," a penalty shall accrue. So that so far as the question of penalty on real estate is concerned your general question is answered by the statement that this penalty is not chargeable on account of such taxes paid to or collected by the county treasurer prior to the February settlement, though received after the time limited for the "payment" of taxes.

The five per cent. penalty applicable to delinquent personal property taxes stands on a different footing. This penalty is literally a *collection charge* and attaches at the point of time when the treasurer is authorized to *collect* the tax as distinguished from receiving payment of it. The distinction here is exactly the same distinction as has been drawn with respect to real property taxes, and is further enforced by the provisions of section 2658, already referred to. By looking at section 2656 of the General Code itself it will be observed that the distinction which has been drawn is apparent on the face thereof. It provides that:

"When one-half of the taxes charged against any entry on a tax duplicate * * * is not *paid* on or before the twentieth day of December next after being so charged, * * * the county treasurer shall proceed to *collect* it by distress or otherwise together with the penalty of five per cent on the amount *so delinquent, which penalty shall be paid into the treasurer's fund.*"

It is perfectly clear that what the treasurer does up to "the twentieth day of December" (made the twentieth day of January by action of the commissioners under authority of section 2657) is of a different character from what he does thereafter. The former is to be described by the phrase "receiving payment of taxes"; the latter by the phrase "collecting taxes." For receiving payment of taxes the treasurer is not entitled to add the charge designated as the five per cent. penalty; for performing the function known as "collection" he is entitled to and must make the charge.

The same remarks apply to section 2657, cited in your letter, in so far as that section prescribes the addition of the *five per cent penalty* on the real estate tax when the half tax "has not been *paid* on the twentieth day of December." The statute prescribes that the whole real estate tax shall thereupon become "due and delinquent, and shall be *collected* in the manner and with the penalty provided in the preceding section." This statement modifies the statement previously made with respect to real estate taxes, for it shows that the five per cent penalty may, under the circumstances described in section 2657 of the General Code, become chargeable prior to the settlement, and indeed does become chargeable as soon as the time for "payment" is passed and the function of "collection" begins with respect to the first half tax.

All these considerations leave unsettled the most difficult question involved in your inquiry, which is as to the duration of the time when the taxpayers may pay their taxes instead of having them collected with the five per cent penalty by the

county treasurer. A sequence of dates occurs in the statute. In the first place, the county auditor is to deliver to the county treasurer the tax duplicate for the collection of taxes "on or before the first day of October." This, you say, was not done. The fact that it was not done does not, of course, invalidate the tax collection. The date mentioned in section 2595 is directory merely, at least in the sense that if delivery is not actually made until after that date the substantial rights of the taxing districts and of the taxpayers can not be affected thereby.

The next section to be noticed is section 2649 General Code, above quoted. The dates here do not, it will be observed, correspond with the dates mentioned in section 2656 nor those mentioned in section 2657. Even without the action of the commissioners the office of the county treasurer is to be open for the *collection* of the second half of taxes until the twentieth day of July. In other words, the treasurer has a month, in the absence of action by the commissioners, between the time when he is directed to receive payment without penalty and the time when he is directed to close his office for the collection of taxes. This statement further illustrates the distinction above drawn. So also with the first half of the taxes; the date mentioned in section 2649 is the twenty-fifth day of January, whereas the last date to which the county commissioners even may extend the time of payment for the first half of taxes is the twentieth of January. This five day interval is not apparently available for the payment of taxes, but is for the collection of taxes through the open office of the treasurer. That the treasurer's authority to collect does not terminate with the date of closing his office for collection is clear from other sections which have been referred to, especially section 5678 of the General Code, which seems at least to infer that the authority to collect may continue until the February settlement. We have therefore still another distinction to draw, namely, that between such collection as the treasurer is authorized to make through his office—a process which probably differs from the payment of taxes merely because of the fact that the taxes are now delinquent, and collection otherwise than through the office of the treasurer, by which is meant collection by civil action or summary process.

The purpose of the fixing of these dates being thus defined, the question recurs as to whether they are mandatory or not. We are now considering all the dates mentioned, not only those in section 2649 but also those in sections 2653, 2656 and 2657. It would seem to be a strong reason for holding them directory that the date marking the commencement of the period within which taxes may be paid otherwise than as delinquent taxes is directory; yet, on the other hand, it is believed that the settlement period prescribed by section 2596 is mandatory—not in the sense that if settlement is not made at the times therein specified it can not be thereafter compelled, but in the sense that it marks the end of the life of a tax duplicate, and prescribes the dates as of which settlement should be made, whether settlement is actually consummated on those dates or not.

Thus we have it that at one end of the payment and collection period the date is directory and at the other end the date is fixed and mandatory—a fact which increases the difficulty of determining the exact meaning and application to questions of the kind you raise of sections 2656 and 2657 of the General Code, as well as section 2649 thereof.

In the opinion of this department, the dates now directly under consideration should be regarded as directory in so far as the imposition of the penalty is concerned. The word "penalty" itself connotes default in the person from whom it is exacted. The taxpayers can not be in default for payment of their taxes until they have had an opportunity to pay them. They are not entitled to the exact period of time represented by the difference in days between the first day of October and the twentieth day of December, or of January, but they and the treasurer are entitled to a reasonable time after the delivery of the duplicate for the transaction of the necessary mechanical process of paying taxes. Until such time has elapsed it is believed

that the treasurer is not warranted in law in proceeding to "collect" any tax; that is, he is not authorized to collect until there has been a failure to pay; and there can be no failure to pay when the treasurer himself is not ready to receive.

It is the opinion of this department, therefore, that such dates prescribed in these statutes, as the twentieth of December, the twentieth of January and the twenty-fifth of January, are merely directory, with the possible exception of the first of them, where the discretion for the extension of time seems to be reposed in the county commissioners rather than in the county treasurer. A question arises here which has not been considered in this opinion, namely, as to whether the treasurer, without authority from the commissioners, can extend the time for the payment of taxes beyond the twentieth of January, or whether section 2657 is directory to the commissioners rather than to the treasurer, so that in order to justify the payment of taxes without penalty after January 20th the commissioners must make the order. In the opinion of this department, the extension must be made by the commissioners, so that the true meaning of section 2657 is that the treasurer can not of his own motion hold open his books for the payment of taxes beyond January 20th under authority of a resolution of the commissioners extending the time until January 20th, but that the commissioners may extend the time to a date beyond January 20th, but not beyond the February settlement date, the former date in section 2657 being directory as to them. In other words, if the commissioners find that the taxpayers of the county will not be afforded a reasonable opportunity to pay their taxes without penalty prior to January 20th, it is believed that they may name a later date in their resolution. Such construction removes all uncertainty as to the time when the process of payment must cease and that of collection begin, with the consequence that the penalty is to attach. The taxpayers will know from that resolution of the commissioners just as fully as they would know from any extension resolution adopted under favor of section 2657 of the General Code what might be the last day for the payment of taxes without penalty. However mistaken in judgment the commissioners might be, their action would be controlling upon the treasurer with respect to his duty to undertake the process of collection and to charge the penalty; because the authority to extend is reposed in them and not in him.

You say in your letter that the commissioners have already extended the time. It is believed that the commissioners have authority to amend their resolution and extend the time further.

Until recently there were statutes in this state authorizing action by state officers in cases of this kind. See former sections 167 and 5617-4 of the General Code, both now repealed. The first of these gave to the auditor of state and the second of them to the tax commission authority to remit "such penalties as have accrued * * * in consequence 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." It may be that there has been no negligence or error in this case, though the auditor has been very late with the delivery of the duplicate, and for that reason there may not have been a remedy for such a case as this. The mere fact that state authorities were empowered to intervene in cases of this general character, however, does not, in the opinion of this department, militate against the view that the time provisions of the sections under consideration are merely directory in the sense referred to in this opinion. The general rule is that time provisions are directory merely, and though this is opposed as to section 2657 by another rule, namely, that grants of power are strictly construed, yet choice between the two opposing principles should be dictated by the general equitable principle that forfeitures are to be avoided where possible and penalties are not to be imposed upon persons who are not really in default.

It is the opinion of this department, therefore:

(1) That the fifteen per cent penalty on delinquent real estate taxes does not attach as to the first half tax until after the February settlement.

(2) The five per cent penalty for the collection of delinquent taxes, both real and personal, does not attach automatically as of a given date, but only when the time for the voluntary payment of taxes has expired and the process of collection commences.

(3) The county treasurer himself is without authority to prescribe any time for the cessation of the receipt of the payment of taxes other than that prescribed in the statute; but the power of the county commissioners to extend the time for the payment of taxes is not limited to the dates mentioned in section 2657 of the General Code, and in case the latest date mentioned therein for the payment of the first half of the taxes will make it physically impossible for the treasurer to receive payment of such half taxes, having regard to the date of the delivery of the duplicate to the treasurer (but not under other circumstances), the commissioners may lawfully extend the time for the payment of taxes beyond such date to any date short of the February settlement, the time provisions of said section 2657 of the General Code being regarded as in this sense directory.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1777.

ELECTION—WHERE RESOLUTION OF BOARD OF EDUCATION PROVIDED FOR THREE MILL LEVY FOR TWO YEARS TO BE SUBMITTED TO ELECTORS OF SCHOOL DISTRICT—BALLOTS READ THREE MILLS FOR FIVE YEARS—RESOLUTION OF BOARD CONTROLS IN ABSENCE OF FRAUD OR ATTEMPT TO DECEIVE OR MISLEAD.

1. *Where there is no showing that the result of the vote would have been in any way changed, the occurrence of mere irregularities that do not go to the foundation of an election, will not invalidate such election, although the provisions of the statute have been technically violated, if it appears that there has been a fair election and a comparatively full vote and no fraud or attempt to deceive or mislead.*

2. *Where the electors of a school district voted upon the question of a levy for taxes, under the provisions of section 5649-5 and 5649-5a, the amount to be three mills for two years, and a mistake was made in printing the ballots, providing for a levy of three mills for five years, the proceeding is not invalid and the board of education is authorized to levy three mills for school purposes during a period of two years, the period appearing in the resolution of the board of education.*

COLUMBUS, OHIO, December 31, 1920.

HON. VERNON M. RIEGEL, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the following statement of facts:

“The board of education of Union Township, Miami County, submitted the question of a school levy under the provisions of the new revenue law for *three mills for two years* as is shown by a resolution recorded in the minutes of the clerk of the school board.