

OPINION 65-183

Syllabus:

1. Section 5715.22, Revised Code, authorizes a county auditor to refund or credit penalties.

2. Where a redetermination of the value of real property by a county board of revision entitles a taxpayer to a refund or credit of a portion of the 10% penalty paid pursuant to Section 5719.17 or Section 5719.18, Revised Code, said refund or credit shall be based upon the difference between the valuation of property as finally determined and the valuation upon which the penalty was initially based.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William B. Saxbe, Attorney General, October 18, 1965

Your letter of request presents the following questions for my consideration:

"This office has received a communication from the County Auditor of Cuyahoga County in which the Auditor states that in a number of instances, he is confronted with a question con-

cerning the proper proportion of a penalty to abate or refund in conjunction with a tax credit or refund required by R.C. Sections 5715.19 or 5715.22 when the Board of Revision or a higher appeal body grants a reduction in a real estate tax valuation.

"Sec. 5715.19 states that:

"The determination of any complaint shall relate back to the date when the lien for taxes for the current year attached or the date as of which liability for such year was determined, and the liability for taxes and for any penalty for nonpayment thereof within the time required by law shall be based upon the valuation or assessment as finally determined. *** the treasurer may accept any amount tendered as taxes *** computed upon the claimed valuation as set forth in the complaint***."

"Refunds are provided for in R.C. Sec. 5715.22 in cases where no unpaid tax remains against which to credit the excessive charge.

"The difficulty comes because the complainant has the option of paying his taxes in two semi-annual installments. Thus, not once, but twice, he is faced with the necessity of deciding whether to pay his tax bill in full, tender part of the tax, or pay nothing at all.

* * * * *

"Therefore, the specific questions are:

"1. Can it be construed, in making refunds, that 'assessments' covers penalties on taxes, or that the word 'taxes' includes penalties, in this section, although it obviously does not as used in Sec. 5715.19?

"2. Can the taxpayer, despite his action taken in regard to paying his first half taxes in full, nullify the effect of such action by paying, in the last half year's collections, less than one-half of the tax on the undisputed part of the value? In other words, must the County Auditor credit or refund to him not only the excessive tax charge but an amount equal to a full ten percent penalty on the excess, just as if he had paid nothing in the First Half Collection, or had exercised his option then to pay only on the undisputed part of the value?

"Because of the large number of valuation complaints filed in this reappraisal year and the many irregular advance payments of taxes made

prior to December 31, 1964, for income tax purposes, it is anticipated that an unusual number of these situations arising after the Last Half 1964 Collection ends."

Your first question requires an examination of the development of the law regarding remission of penalties. In the case of State, ex rel., v. Zangerle, 133 Ohio St., 532, the Supreme Court of Ohio held unconstitutional a statute that provided for the remission and abrogation of "* * * any penalty, interest or other charge for nonpayment when due of any real estate tax and/or assessment" paid after June 20, 1930 and prior to January 1, 1937. Section 2590-1, G.C. The court held that said statute was retroactive in nature and discriminatory, and that it was therefore repugnant to Section 28 of Article II and Section 2, Article 1 of the Ohio Constitution.

In the course of its opinion at page 537 the Court made the following observation which bears significance to your question:

"* * * in certain jurisdictions a distinction has been drawn between taxes on one hand and interest and penalties on the other. But the controlling question here is whether they are so considered by the statutes of Ohio. Counsel agree that in this state the law requires that such interest and penalties be charged upon the tax duplicate, that they be collected as a part of the taxes, and that they be distributed as taxes. As illustrative of this view of the Legislature, Section 5678, General Code, provides that when taxes assessments and penalties are not paid 'the total of such amounts shall constitute the delinquent taxes and assessments on such real estate to be collected in the manner prescribed by law.' * * *"

This statement of Ohio law was reiterated in the case, State, ex rel., v. Guckenberger, 134 Ohio St., 457, wherein the Supreme Court of Ohio held unconstitutional the portion of the Whittemore Act which provided for the remission of penalties that had been paid before the enactment of said act.

A complimentary rule was applied in the case of State, ex rel., v. Gesell, 137 Ohio St., 255, when the Supreme Court held that penalties could be included in the computation of "delinquent taxes and assessments." The Court stated at page 257:

"The relator rightly contends that penalties may be included in computing the amount of delinquent taxes and assessments as contemplated by Section 2293-43, General Code. This position is sustained by Sections 5678 and 5679, General Code, providing that penalties shall be added to unpaid taxes and assessments and the whole regarded as delinquent taxes and assessments. * * *"
(Emphasis added.)

You will note that the provisions of Section 5678 and Section 5679, General Code, to which reference is made in the above-cited quotation, appear in Section 5719.17 and Section 5719.18, Revised Code. Section 5719.17, supra, provides:

"If one half the taxes and assessments charged against an entry of real estate is not paid on or before the twentieth day of December in that year, a penalty of ten per cent shall be added to such half of said taxes and assessments on the duplicate. If the total amount of such taxes, assessments, and penalty is not paid on or before the twentieth day of June, next thereafter, a like penalty shall be charged on the balance of the amount of such unpaid taxes and assessments. The total of such amounts shall constitute the delinquent taxes and assessments on such real estate, to be collected in the manner prescribed by law."
(Emphasis added)

Section 5719.18, supra, provides in pertinent part:

"If the total amount of delinquent taxes, assessments, and penalty, as provided in section 5719.17 of the Revised Code, together with one half of the taxes and assessments charged against such real estate for the current year is not paid on or before the twentieth day of December of the same year, the delinquent taxes, assessments, and penalty, and the whole of the taxes and assessments of the current year shall be due and be collected in the manner authorized by law. If the first half of the taxes and assessments charged upon any real estate is paid on or before the twentieth day of December, but the remaining half thereof is not paid on or before the twentieth day of June next thereafter, a like penalty shall be added to such unpaid taxes and assessments, and they shall be treated as delinquent taxes and assessments, and be collected in the manner provided by law together with the taxes and assessments of the current year."

It is clear to me that the General Assembly and the Supreme Court of Ohio have both recognized that the words "taxes" and "assessments" include penalties which have been imposed and paid. They have distinctly provided that liability for a penalty becomes tax revenue when said penalty is paid and thereby made available to the county auditor for distribution.

A second element in the consideration of your first question is the intent and purpose of Section 5715.19, Revised Code. Said section reads in pertinent part as follows:

"A complaint against any valuation or assessment which appears upon the tax duplicate of the then current year may be filed on or before the time limited for payment of taxes for the first half year, or at any time during which taxes are received by a county treasurer without

penalty for the first half year. Any taxpayer may file such a complaint as to the valuation or assessment of his own or another's real property and the board of county commissioners, the prosecuting attorney, or the treasurer of any county, any board of township trustees, any board of education, or the mayor or legislative authority of any municipal corporation in any county may file such a complaint. The county auditor shall present to the county board of revision all complaints filed with him, and each board shall notify any such complainant and also the property owner, if his address is known, when the complaint is filed by one other than the property owner, by registered or certified mail, not less than ten days prior to the hearing, of the time and place the same will be heard, and shall hear and render its decision on such complaint within ninety days after the filing thereof with the said board.

"The determination of any such complaint shall relate back to the date when the lien for taxes for the current year attached or the date as of which liability for such year was determined, and liability for taxes and for any penalty for nonpayment thereof within the time required by law shall be based upon the valuation or assessment as finally determined. * * *" (Emphasis added.)

The emphasized phrase of this statute indicates that the penalty for delinquent taxes is to be based upon the taxpayer's liability for taxes as finally determined by the county board of revision. I find nothing in the statute that suggests a distinction is intended between the person who pays a penalty for delinquent taxes before the determination of his complaint and the person who pays a penalty after the final determination of his complaint. Under Section 5715.19, supra, each is required to pay a penalty upon his tax liability as finally determined by the board of revision.

If the county auditor has authority to credit or refund penalties where the tax upon which they are based has been redetermined, said authority must be derived from Section 5715.22, Revised Code. Said section directs in pertinent part:

"If upon consideration of any complaint against the valuation or assessment of real property filed under section 5715.19 of the Revised Code, or any appeal from the determination on such complaint, it is found that the amount of taxes or assessments paid for the year to which the complaint relates was in excess of the amount due, then, whether or not the payment of said taxes or assessments was made under protest or duress, the county auditor shall, within thirty days after the certification to him of the final action upon such complaint or appeal, credit the amount of such overpayment upon the amount of any taxes or assessments then due from the person having made such overpayment of taxes or assess-

ments and at the next or any succeeding settlement the amount of any such credit shall be deducted from the amounts of any taxes or assessments distributable to the county or any taxing unit therein which has received the benefit of the taxes or assessments previously overpaid, in proportion to the benefits previously received,
* * *"

It is my opinion that the word "taxes" as it is used in Section 5715.22, supra, does include penalties for delinquent taxes. My conclusion is founded upon the rule established by the Supreme Court that penalties become taxes upon their payment to the county auditor and upon the provision of Section 5715.19, Revised Code, directing that a penalty for delinquent taxes shall be based upon the final determination of tax liability.

Your second question relates to the base to be used in computing the refund or credit of a penalty where the tax upon which said penalty was initially based is redetermined by the county board of revision. The Board of Tax Appeals, in the case of Tyroler Realty Co. v. Board of Revision, 26 O.O., 304, considered a problem similar in principle to the one posed by your question. The Board held that the county auditor could impose a 10% penalty on delinquent taxes where the taxpayer tendered and paid a tax based upon a lower valuation than finally determined by the Board of Tax Appeals. The auditor was directed by the Board of Tax Appeals to apply the penalty to the tax imposed upon the difference between the valuation of property as finally determined by the Board and the valuation upon which taxes were tendered and paid.

The Board of Tax Appeals in arriving at the formula to be used in computing a penalty refund referred to two opinions of this office in which such a problem was considered.

My predecessor in Opinion No. 905, Opinions of the Attorney General for 1929, page 1400, provided the following syllabus in answer to the questions presented:

"Where, during the pendency of successive proceedings filed by a taxpayer before the county board of revision and the tax commission and in the Common Pleas Court to secure a reduction in the assessed valuation of his property, such taxpayer tenders and pays to the county treasurer taxes on what the taxpayer contends is the correct valuation of such property, and thereafter the Common Pleas Court fixes and determines the valuation of such property at an amount of money in excess of that upon which taxes were tendered and paid, the county treasurer is authorized to collect the unpaid taxes upon such property based upon the difference between the determined valuation of the property and the valuation upon which taxes have been tendered and paid, and he is likewise authorized to col-

lect from said taxpayer the penalty provided by law for the non-payment of taxes at the time required by law upon the difference between the determined valuation of the property and the valuation upon which taxes were tendered and paid.

(Emphasis added)

This opinion was followed by Opinion No. 1411, Opinions of the Attorney General for 1939, page 2091, in which the following observation was made at page 2094:

"It seems apparent that the Legislature did not want to preclude complaining taxpayers from paying such taxes as could be conceded due and payable. If the taxpayer's estimate is too low, he must pay a penalty on the difference. If too high, a credit may be given on the second half of the taxes. In the case you have proposed, the taxpayer, having paid the first half, would be entitled to a credit on the second half if a deduction in valuation should be allowed. If his complaint is rejected, his first half of the taxes being paid, he incurs no penalty. * * *"

You will note that the statutes to which reference is made in the Tyroler Realty Co. case, supra, and the two opinions of the Attorney General are virtually identical to the statutes presently being considered. The opinions cited herein clearly indicate that the base to be used in determining what portion of a penalty should be refunded where said penalty was initially based upon a higher property valuation than the valuation finally determined by the board of revision, is the difference between the two valuations; that is, the penalty refund must be computed by first obtaining the difference between the original property valuation and the valuation as finally determined by the board of revision. The tax rate is applied to this figure to find the amount of tax to be refunded. The 10% penalty is then applied to this amount and the product represents the portion of the penalty to be refunded or credited. The answer to your specific question is that the county auditor must "credit or refund to the taxpayer a full ten per cent penalty on the excess."