

Note from the Attorney General's Office:

1959 Op. Att'y Gen. No. 59-0693 was clarified by 1983 Op. Att'y Gen. No. 83-045.

COUNTY AUDITOR—MAY APPLY TO STATE BOARD OF TAX APPEALS FOR ORDER REMITTING ILLEGAL REAL PROPERTY TAXES. SECTION 5715.39, R.C.

SYLLABUS:

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.

Columbus, Ohio, July 16, 1959

Hon. Everett Burton, Prosecuting Attorney
Scioto County, Portsmouth, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“The County Auditor of Scioto County, Ohio, has requested the opinion of this office concerning the following matter:

“The Scioto Sandusky Conservancy District levied a tax, which was subsequently held invalid, in the case of *The State ex rel Lewis, et al., versus Scioto Sandusky Conservancy District*, 160 Ohio State, page 155. Several taxpayers, pending the outcome of this suit, failed and refused to pay the assessment, and as a result thereof, penalties were added to their original assessment. These amounts, of course, still appear delinquent on the tax duplicates although declared invalid by the Supreme Court of Ohio, as set forth above.

“Can these remaining delinquency amounts be dropped, and if so, will it take an order from the Common Pleas Court to effect the dropping of such delinquencies?

“Section 319.36 of the Ohio Revised Code, authorizes the County Auditor to correct clerical errors, but we are unable to find any Statutory authority authorizing him to remove delinquencies from the duplicate, under the aforementioned conditions. Since this is a matter affecting several Counties, and therefore,

the action to be taken should be uniform, we request your office to render an opinion as to how the County Auditor can proceed to eliminate these matters from the tax duplicate, if that is the appropriate action to be taken.”

In the case of *State ex rel. Lewis v. Scioto-Sandusky Conservancy District*, 160 Ohio St., 155, to which you refer, the court had before it a consolidation of four actions, each growing out of an attempted levy by the directors of said district, of a tax or assessment of three-tenths of one mill upon all the taxable property in the district representing what was styled a “second preliminary tax.” The first of these actions, No. 33460, was an action in quo warranto brought by the prosecuting attorney of Delaware County to test the right of the trustees to levy such tax. In that case the court sustained a demurrer to the petition.

The fourth case, No. 33492, was an action brought by an individual property owner seeking a writ of mandamus to require the auditor of Franklin County to place all “public real property” on the tax list with respect to such tax. The court denied the writ.

The second and third cases, Nos. 33489 and 33490, were actions filed by the Conservancy District against the auditors of Delaware and Union Counties, respectively, praying for writs of mandamus to require them to place such tax on the tax list and duplicates in their respective counties.

In answer to the prayer in these last two cases, the court held (1) that the attempted levy was a tax, not an assessment, as contended by the directors, and (2) that it was invalid, as being in excess of the ten-mill limitation of Section 2, Article XIX of the Ohio Constitution and Section 5625-2, General Code (5705.02, Revised Code).

In its *per curiam* opinion, the court said:

“We therefore conclude that the ‘preliminary tax’ provided for in Section 6828-43, General Code, is a tax as contemplated by Section 2, Article XII of the Constitution, and comes within the scope of Section 5625-2, General Code, a part of the Uniform Tax Levy Act, which requires that ‘the aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit of the state shall not in any one year exceed ten mills of each dollar of tax valuation,’ etc.

“Admittedly, the ‘preliminary tax’ levied by the conservancy district under Section 6828-43, General Code, was not submitted to the budget commissions of the counties as a levy within the ten-mill limitatio nor was it submitted to a vote of the people for

approval or disapproval as a tax beyond the ten-mill limitation. "It follows that writs of mandamus are denied in cases Nos. 33489 and 33490."

Since neither Scioto County nor its auditor were parties in that case, they cannot, of course, take advantage of the judgment, since a judgment or decree, under the principle of *res judicata*, is only binding as to the parties or those in privity to them. See 32 Ohio Jurisprudence, page 75, and many cases cited. Accordingly, the auditor of your county, though well aware of the judgment of the court in that case, has no right to adopt the decision as specific authority for his action.

The statutes make provision for correction of errors in the listing of taxes. By Section 5713.19, Revised Code, the county auditor is authorized to correct any *clerical* errors which he discovers concerning the name of the owner, valuation, description, or quantity of any tract or lot contained in the list of real property in his county. Obviously, the tax here in question and the delinquencies now appearing on the tax list of the counties in the conservancy district cannot be charged to a clerical error.

Section 5721.22, Revised Code, authorizes the county auditor to correct the tax duplicate and issue an abatement for penalties and interest as to any land, when it is made to appear to him that the taxes and assessments had been regularly paid. It is clear that the situation with which we are confronted does not fall within this provision.

I have not been able to find any other statute which authorizes the county auditor, upon being satisfied that a tax or penalty appearing on the lists is illegal, to remove it from the tax list.

It would appear that property owners whose properties are charged on the tax duplicate with taxes, delinquent or otherwise, which have been held to be void by the decision of the court of last resort, might obtain a rescission of such taxes and penalties and an order for their removal from the tax list by bringing an action by way of injunction or to quiet title, but it seems highly unjust that they should be forced to such action under the circumstances here existing.

It might be suggested that the several county auditors might take notice of a decision by the Supreme Court declaring a certain tax invalid even though there has been no adjudication to which they or their counties were parties. I am informed that certain of the counties in the conservancy

district in question have taken this action, and have caused the tax and the delinquency in their counties to be stricken from the records, but I can find no legal sanction for such action.

The one recourse that appears to me to be open and practical would be an application by the county auditor to the state board of tax appeals, under the provisions of Section 5715.39, Revised Code. This section reads in part 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 the duty relating to the assessment of property for taxation or the levy or collection of taxes. * * *” (Emphasis added).

Prior to its amendment, effective October 6, 1955, this power to remit taxes and penalties found to have been illegally assessed, was confined to the board of tax appeals. Applying said Section 5715.39 in an action brought by the State of Ohio relative to taxes which had been assessed against property owned by the state, the Supreme Court, in *State of Ohio v. Carney, Auditor*, 166 Ohio St., 81, held, in a *per curiam*:

“Clearly under these sections the Board of Tax Appeals is not vested with jurisdiction to determine the validity of special assessments, as we held in the *Carney case*. It is, however, specifically vested with jurisdiction to determine the legality of taxes, on an application for remission of such taxes.”

The “*Carney case*” here referred to was *Carney, Auditor, v. State*, 158 Ohio St., 348, which, as the court said in the later case, involved only the legality of a special assessment.

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 ;

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“(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 ;

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* * *.”

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 :

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“(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.

Accordingly, in specific answer to your question, it is my opinion and you are advised that 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.

Respectfully,
MARK McELROY
Attorney General