

OPINION NO. 82-089**Syllabus:**

1. R.C. 5733.25, not R.C. 115.17, governs the procedure for the compromise or settlement of claims for delinquent taxes, or fees or penalties, related thereto. (1931 Op. Att'y Gen. No. 3038, p. 372, approved and followed.)
2. Intangible taxes may be refunded only if the Tax Commissioner finds that such taxes were paid illegally or erroneously, or paid on an illegal or erroneous assessment, and certifies to the Auditor and Treasurer of State the amount of the refund due to the taxpayer.

**To: Gertrude W. Donahey, Treasurer of State, Columbus, Ohio; Thomas E. Ferguson,
Auditor of State, Columbus, Ohio**
By: William J. Brown, Attorney General, October 26, 1982

I have before me your request for my opinion concerning your authority to refund, in part, intangible taxes, or the penalty paid thereon, to a taxpayer. Your letter sets forth the following pertinent facts:

In compliance with the dictates of O.R.C. 115.17, the Treasurer of State, Auditor of State, and Attorney General have agreed to negotiate a compromise of a claim due the State. The claim arose as a result of the late payment of the intangible tax by a financial institution under O.R.C. 5725.22. In accordance with that section, a 10% penalty was added to the tax. During the course of preliminary negotiations concerning the penalty, a representative of the financial institution made full payment of the tax and the penalty to the State.

The involved State Officers have now agreed to negotiate a compromise of this claim reducing the total amount that was due the State. Our question is this, what method, if any, may be used to provide a refund to the taxpayer? In addition, which office or department has the authority to order this refund?

An issue raised implicitly by your letter is the propriety of compromising a tax claim under R.C. 115.17. R.C. 115.10 generally requires any officer or agent of the State who comes into possession of a claim due and payable to the State to attempt to collect such claim and to certify any claims uncollected after thirty days to the Auditor of State. R.C. 115.17 then provides, in part, as follows:

The auditor of state shall keep an account of claims due the state reported to him by an officer or agent of the state. . . . Upon the receipt of such reports the auditor of state shall certify a copy to the attorney general. . . . The attorney general shall collect such

claim or secure judgment and execution thereon. . . . The attorney general and the chief officer of the agency reporting the claim may adjust any claim in such manner as is equitable. . . .

I note, however, that R.C. 5725.22 provides an alternative system for the certification of certain tax claims. R.C. 5725.22 provides, in pertinent part, that:

[i]f any company or person charged [with the payment of intangible taxes] fails to pay on or before the time prescribed herein the taxes assessed against him, or the taxes assessed against shares of stock or deposits or other taxes assessed at the source which he is required to pay, the treasurer of state shall certify the list of such delinquent domestic insurance companies and persons to the auditor of state, who shall add to the taxes due a penalty of ten per cent, or shall charge against such person the penalty prescribed by law for failure to pay taxes assessed against shares of stock or deposits or other taxes assessed at the source. The auditor of state shall forthwith prepare proper duplicates and reports of such taxes and penalties and certify them to the attorney general for collection. . . .

I also note that R.C. 5733.25 provides alternative authority for the compromise of claims for delinquent taxes. R.C. 5733.25 states that "[w]ith the advice and consent of the tax commissioner, the attorney general may, before or after any action for the recovery of fees, taxes, or penalties certified to him as delinquent, compromise or settle any claim for delinquent taxes, fees, or penalties so certified." See also R.C. 5703.05(C) (tax commissioner is to exercise the authority provided by law relative to consenting to the compromise and settlement of tax claims). The language employed in this statute quite plainly evidences a legislative intent that the compromise of any tax claim be consented to by the tax commissioner. This conclusion is also supported by the legislative history of the statute. See 1931 Op. Att'y Gen. No. 3038, p. 372 (claims, including penalties and interest, relating to gasoline taxes may be compromised only by the Attorney General with the consent of the tax commissioner in accordance with Gen. Code §5524 [now R.C. 5733.25]); R.C. 1.30(B)(1) (in enacting the Revised Code, the General Assembly did not intend to make substantive changes in the law in effect). It is a fundamental rule of statutory construction that special statutes governing a particular subject must be read as an exception to a statute governing the same subject in general terms. R.C. 1.51. Accordingly, R.C. 5733.25 must be read as an exception to R.C. 115.17, and no tax claim can be settled or compromised absent the consent of the tax commissioner.

As you recognize in your request, however, the inquiry at this time must look beyond the authority to compromise. Since the taxpayer has, in fact, tendered full payment of the tax and penalty, the inquiry must focus on your authority to refund taxes. R.C. 5725.22 sets out the authority to refund intangible taxes in the following manner:

The treasurer of state shall refund the amount of taxes levied by section 5725.18 of the Revised Code and taxes levied by section 5707.03 and assessed by section 5711.13 of the Revised Code paid illegally or erroneously, or paid on any illegal or erroneous assessment. The tax commissioner or the superintendent of insurance may, on written application of any taxpayer claiming to have overpaid such taxes to the treasurer of state at any time within five years prior to the making of such application, or on his own motion, investigate the facts and make a written statement of his findings. If he finds that there has been an overpayment, the tax commissioner or the superintendent of insurance shall determine the amount of refund due and certify such amount to the auditor of state and the treasurer of state. The auditor of state shall draw a warrant for such certified amount on the treasurer of state to the taxpayer claiming such refund and such amount shall be paid from the special account created by section 5703.052 [5703.05.2] of the Revised Code.

R.C. 5703.052 provides, in pertinent part, that "[u]pon certification by the tax commissioner to the treasurer of state of a tax refund or a tax credit due. . .the

treasurer of state may place the amount certified to the credit of the tax refund special account." From these statutes it is clear that there are two restrictions on the Treasurer of State's authority to refund intangible tax payments. First, the Treasurer may refund such tax payments only to the extent that the taxes were "paid illegally or erroneously, or paid on any illegal or erroneous assessment." Second, before any such refund may be made, the Tax Commissioner must conduct an investigation of the facts, make a written statement of his findings and certify the amount due to the Auditor of State and Treasurer of State.

Accordingly, in specific response to your questions, it is my opinion, and you are advised that:

1. R.C. 5733.25, not R.C. 115.17, governs the procedure for the compromise or settlement of claims for delinquent taxes, or fees or penalties related thereto. (1931 Op. Att'y Gen. No. 3038, p. 372, approved and followed.)
2. Intangible taxes may be refunded only if the Tax Commissioner finds that such taxes were paid illegally or erroneously, or paid on an illegal or erroneous assessment, and certifies to the Auditor and Treasurer of State the amount of the refund due to the taxpayer.