

Whatever might have been said as to the possible modification of these sections of the Code by the last amendment of Section 2, Article XII of the Constitution during the time that no provisions were made to supplant the loss of revenue available for the subdivisions for their general funds by virtue of this last constitutional amendment, it must be observed that the sales tax act, being House Bill No. 134 of the 90th General Assembly, second special session, now purports to supplant, to some extent at least, this loss of revenue. It should also be observed that since the adoption of the so-called constitutional ten-mill limitation by the electors, the 90th General Assembly was in session at its second and third special sessions, but did not see fit to amend the mandatory language of Section 5625-5, on which this 1930 opinion was predicated.

In view of the foregoing, it is my opinion that the position taken by this office in the 1930 opinion, *supra*, should be affirmed.

Respectfully,  
 JOHN W. BRICKER,  
*Attorney General.*

3898.

TAX AND TAXATION—REMISSION OF PENALTIES ON DELINQUENT PERSONAL AND CLASSIFIED TAXES UNDER AM. S. B. NO. 105, SECOND SPECIAL SESSION OF 90TH GENERAL ASSEMBLY.

*SYLLABUS:*

*The provisions of Amended Senate Bill No. 105, second special session of the 90th General Assembly, with respect to the remission of penalties on delinquent personal and classified taxes, refer to penalties assessed for failure to pay such taxes when due and do not include penalties assessed under the provisions of section 5390, General Code, for failure to make return and list therein, all items of taxable property.*

COLUMBUS, OHIO, February 2, 1935.

*The Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads as follows:

“Since the enactment of Amended Senate Bill No. 42 and Amended Senate Bill No. 23, considerable controversy has arisen as to the proper construction, operation and effect of these Acts. Up to the present time the construction of the said Acts has been left with the various county treasurers and county prosecutors with a resultant varied construction and application. Some county treasurers, upon the compliance of a particular taxpayer with the provisions of these bills, have remitted not only the 10 per cent penalty for failure to pay personal property taxes, but also the penalties assessed under Section 5390 et seq. of the General Code, for failure to list items of property in the personal property tax return or for failure to file a personal property tax return.

It has been our opinion that the two bills hereinabove referred to were only intended to provide for the remission of the 10 per cent penalty for failure to pay personal property taxes duly assessed and appearing on the delinquent duplicates and was not intended, and does not permit the remission of the

penalties assessed for failure to list items of personal property in the tax return or for failure to file the personal property tax return. This practice of remitting all penalties of whatsoever nature under the provisions of the above Acts has a tendency to cripple the administration of the personal property tax laws by the Tax Commission and the various county auditors. In other words, if the practice is followed of remitting all penalties of whatsoever nature the Tax Commission and the various county auditors are left without provision to enforce the filing of tax returns or complete tax returns within the time prescribed by law.

Since the provisions of those two bills were extended by Amended Senate Bill No. 105, enacted by the last special session of the 90th General Assembly, it becomes important, and immediately so, to secure an authoritative opinion construing the provisions of these Acts which may be distributed to the various county treasurers as a guide to them in applying the provisions of these acts to taxpayers who will subsequently take advantage of them. We respectfully request your formal opinion as to whether the provisions of Amended Senate Bills Nos. 42, 23 and 105 are limited in their effect to the remission of the 10 per cent penalty for failure to pay taxes duly assessed on a current duplicate, or whether the provisions of the said bills extend to the remission of all penalties of whatsoever nature including the 10 per cent penalty for failure to pay taxes duly assessed, as well as the penalties assessed under the provisions of Section 5390 et seq. of the General Code for failure to file a personal property tax return or for failure to list in a tax return duly filed all items of taxable property.

Many taxpayers will, no doubt, in the immediate future be taking advantage of the extension of these bills by Amended Senate Bill No. 105, and it is essential that your opinion on this question be received at a very early date so that it may be distributed to the various county treasurers and they may be guided in all future election by taxpayers under the said bills, and so that the operation and effect of these bills may be uniform throughout the state."

Amended Senate Bill No. 105, second special session of the 90th General Assembly, extends the provisions of Amended Senate Bill No. 42 of the 90th General Assembly. (115 Ohio Laws, 161). Amended Senate Bill No. 23 of the second special session of the 90th General Assembly, refers to the payment of delinquent taxes and assessments.

Amended Senate Bill No. 42 of the 90th General Assembly, 115 O. L., 161, as amended by Amended Senate Bill No. 105 of the second special session of the 90th General Assembly, reads in part as follows:

"Sec. 1. Any person, firm or corporation charged with or legally authorized or required by law or decree of court to pay real property taxes and assessments which have become delinquent at or prior to the August settlement in the year \* \* 1934, or any person, firm or corporation holding a lien upon such real property may at any time prior to the first day of September in the year \* \* \* 1935 elect to pay the principal sum of such delinquent taxes and assessments as provided in this act, anything in the permanent statutes of this state relating to the payment of real property taxes, assessments, penalties and interest thereon to the contrary notwithstanding. Provided, however, that no such person shall be entitled to make such election unless all taxes, assessments and penalties for the year \* \* \* 1934 then due and payable have been paid. Provided that in case a penalty and interest has been paid on account

of delinquent taxes and/or assessments, for the first or second half of the years 1932 and/or 1933, such penalty shall be refunded on order of the county auditor directed to the county treasurer provided the principal sum of such taxes and assessments is paid prior to the first day of September, 1935.

Sec. 2. If, within the time mentioned in section one of this act, such person tenders to the county treasurer a sum equal to one hundred per centum of the principal sum of such taxes and assessments, so delinquent, less penalties, interest and other charges, (including interest charges under a prior undertaking entered into pursuant to this act,) the county treasurer shall accept and receive such amount in full payment of all such taxes, assessments, penalties, interest and other charges. Upon receiving such amount the treasurer shall give to the person making such tender a receipt in full for all taxes, assessments, penalties, interest and other charges for the year \* \* \* 1933 and any year prior thereto, and shall give to the auditor a certificate in such form as may be prescribed by the bureau of inspection and supervision of public offices, which shall operate as a remitter of the difference between the sum so received and the aggregate amounts charged on the tax duplicate or on the delinquent land tax list, or both, and shall be so treated in the next succeeding settlement between the auditor and treasurer."

Amended Senate Bill 23 of the second special session of the 90th General Assembly, as amended by Amended Senate Bill No. 105 of the second special session of the 90th General Assembly, in so far as is pertinent to the question presented, reads as follows:

Sec. 3.

"Any person, firm or corporation, against whom or which taxes, other than those upon real estate specifically as such have been charged on the delinquent tax list and duplicates in the year \* \* \* 1934, or prior thereto, pursuant to section 5694 of the General Code, may at any time prior to the first day of September in the year \* \* \* 1935, elect to pay the principal sum of such delinquent personal and classified taxes, as provided in this act, anything in the permanent statutes of this state to the contrary notwithstanding. Provided, however, that no such person, firm or corporation shall be entitled to make such election unless all the personal and classified taxes for the year \* \* \* 1933 then due and payable, have been paid."

Sec. 4.

"If, within the time mentioned in section 3 of this act, such person tenders to the county treasurer a sum equal to one hundred per centum of the principal sum of such personal and classified property taxes, so delinquent, less penalties, the county treasurer is hereby authorized to receive such amount in full of all such taxes and penalties. Upon receiving such amount the treasurer shall give to the person making such tender a receipt in full for all taxes and penalties for the year \* \* \* 1934 and any year prior thereto, and shall give to the auditor a certificate, in such form as may be prescribed by the bureau of inspection and supervision of public offices, which shall operate as a remitter of the difference between the sum so received and the aggregate amounts charged on the delinquent personal tax list and duplicate and shall be so treated in the next succeeding settlement between the auditor and treasurer."

Section 5372 of the General Code, reads in part as follows:

"Each taxpayer shall make a return, annually, to the county auditor of

each county in which any taxable property which he is required to return is required by this chapter to be listed, excepting as otherwise provided in this chapter, and shall truly and correctly list therein all taxable property so required to be listed."

Section 5390 of the General Code, reads as follows:

"When a taxpayer fails to make return within the time prescribed by law or as extended, by the county auditor or the commission, pursuant to this chapter, or fails to list in a return any item or items of taxable property which he is required by this chapter to list therein, the assessor shall add to the assessment of each class or item of taxable property which the taxpayer so failed to return or list a penalty of fifty per centum thereof; but if such taxpayer shall within sixty days after the expiration of the time prescribed by this chapter, make a return or an amended or supplementary return and shall list therein all items of taxable property which he is required by this chapter so to list, and in all cases in which the taxpayer's only default is his failure to pay the amounts specified, in section 5671-1 of the General Code within the time therein specified, such penalty shall be five per centum of the assessment and, if the assessment certificate has been issued, an amended assessment certificate shall be issued and substituted therefor. The penalty assessment shall be entered on the proper tax list or lists and duplicate or duplicates and taxes shall be levied thereon the same as on the assessment itself. A fiduciary against whom a penalty assessment is made shall be personally liable for the amount of taxes levied in respect of such penalty assessment and, in case of fraud or intent to evade taxes, shall have no right of reimbursement therefor against the property held by him as such fiduciary nor against the person or persons for whose benefit the same is so held."

It is noted that section 5390, supra, provides that "when a taxpayer fails to make return or fails to list in a return all items of personal property, the assessor shall add to the assessment of each class or item of taxable property which the taxpayer so failed to return or list, a penalty of fifty per centum thereof." In other words, the penalty prescribed is not one computed upon assessable taxes but is a fifty percent increase in the assessment of the personal property which the taxpayer is required to return and list for taxation.

It must be observed that the terms of Amended Senate Bill No. 105 provide that a person may elect to pay the *principal sum* of such delinquent taxes and assessments, and that if such person within the time specified therein, tenders to the county treasurer one hundred percent of the *principal sum* of such delinquent taxes, less penalties, the county treasurer is authorized to receive such amount.

As stated, in a case where a taxpayer fails to return and list personal property, the penalty which the taxpayer incurs by reason of such failure to properly complete his tax return, takes the form of a fifty percent increase in the assessed value of the property and it is upon this increased value that the tax is then computed. Such being the case, the tax so computed would therefore be the principal sum of the tax due.

In connection herewith, it is pertinent to note that in section 2657 of the General Code, which provides for the payment of personal taxes and the penalty for delinquency, it is stated:

" \* \* \* In all cases where an installment of taxes other than taxes and assessments charged on real estate, has not been paid on the last day prescribed

by this chapter or within the time so prescribed as extended pursuant to this section a penalty of ten per cent of the amount due and unpaid shall be added by the county auditor, and the taxes and penalty forthwith collected by the county treasurer."

It is seen from the above section that when the taxpayer fails to pay the amount of taxes determined by computation from the assessed value of the property, that is, the principal sum of taxes, when due, a penalty of ten percent of such principal sum is added.

It would seem to follow therefore, that inasmuch as the fifty percent penalty provided for by section 5390, General Code, supra, is upon the assessment of the property and is not upon the tax computed from the assessed value of the property, said penalty is not embraced within the term "penalties" as the same is employed in Amended Senate Bill No. 105.

In specific answer to your question, it is therefore my opinion that the provisions of Amended Senate Bill No. 105, second special session of the 90th General Assembly, with respect to the remission of penalties on delinquent personal and classified taxes, refer to penalties assessed for failure to pay such taxes when due and do not include penalties assessed under the provisions of section 5390, General Code, for failure to make return and list therein, all items of taxable property.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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3899.

APPROVAL, BONDS OF SUGAR CREEK TOWNSHIP RURAL SCHOOL DISTRICT, GREENE COUNTY, OHIO, \$1,579.91.

COLUMBUS, OHIO, February 4, 1935.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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3900.

APPROVAL, BONDS OF HELENA RURAL SCHOOL DISTRICT, SANDUSKY COUNTY, OHIO, \$682.00.

COLUMBUS, OHIO, February 4, 1935.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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3901.

APPROVAL, BONDS OF BURLINGTON RURAL SCHOOL DISTRICT, LAWRENCE COUNTY, OHIO, \$2,209.79 (LIMITED).

COLUMBUS, OHIO, February 4, 1935.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*