

OPINION 65-3**Syllabus:**

Section 5711.31, Revised Code, must be construed as prohibiting the attachment or assessment of the penalty referred to until sixty days after the Commissioner's determination or, in the event of an appeal from said official's determination, until sixty days from the final determination of the matter on appeal.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William B. Saxbe, Attorney General, January 7, 1965

Your request for my opinion is as follows:

"I respectfully request your opinion as to the construction of the following provision of Revised Code 5711.31 governing the imposition of penalties:

"No penalty shall attach or be assessed with respect to the Assessment concerning which such application is pending until sixty days after final determination of the application.

"Wherein a taxpayer has made a timely application for review and redetermination pursuant to Revised Code 5711.31 and thereafter the Tax Commissioner rendered his certificate of determination, on the review and redetermination, and thereafter the taxpayer filed an appeal with the Board of Tax Appeals, I raise the following question:

"Where the Tax Commissioner's determination on review and redetermination is appealed, does Section 5711.31 prevent the imposition of all penalties until 60 days after final determination of the Board of Tax Appeals or the Supreme Court of Ohio, or does said section only prevent the imposition of penalties until 60 days after the Tax Commissioner's determination, even though said determination is appealed?

"I enclose herewith a copy of a letter from Mr. Donald J. Coffey setting forth in greater detail the particular question."

The rules of statutory construction apply to the problem presented by your letter of request. The first provides that when an amending statute is ambiguous in some respect, reference may be made to the statute in its previous form to resolve the ambiguity. The statute is considered in its historical context to derive the intended meaning. 2 Sutherland, Statutory Construction (3rd), Section 201. Section 323.17, Revised Code, provides that the county auditor may assess a taxpayer a ten percent penalty "where an installment of taxes, other than taxes and assessments charged on real estate, has not been paid on the last day prescribed" by statute or within the time so prescribed as extended by the board of county commissioners or the department of taxation. Prior to the 1963 amendment of Section 5711.31, Revised Code, the procedure generally followed by county auditors with respect to the Application of Section 323.17, Revised Code, was to impose the penalty only after the question of taxability had been resolved by the reviewing court if the order of the Tax Commissioner was appealed. The technical term "final determination" is no more qualified, no more clearly defined in the 1963 version of the statute than it was in the 1957 version. No legislative intent to change the meaning of the term is present in the amended statute. Nor does the statute itself denote such a change.

There is then, no change in the present statute which indicates that the penalty is to be imposed in a different manner than it was under the statute as it existed prior to the amendment of 1963.

The second rule of construction provides that statutes imposing penalties are to be strictly construed. Penalties must be confined to the limits set by the letter of the law. 3 Sutherland, Statutory Construction (3rd), Section 5604; 3 Cooley, Taxation (4th), Section 1363, Vol. 3, 4th Ed.; Caldwell v. State, 115 Ohio St., 458,

461. An application of this rule to Section 5711.31, Revised Code, requires that the statute be construed most favorably for the taxpayer and most strictly against the State of Ohio as the taxing authority. The ambiguity is thereby resolved by imposing the penalty 60 days after the last administrative or judicial disposition is made of the application for re-determination.

An additional factor to be considered is the definition of the term "final determination." It is defined by courts and by legal encyclopedies as a conclusive determination of a subject matter to the extent that nothing remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon. Black's Law Dictionary (4th Ed.), 1951; Souvler Law Dictionary, (Century Ed.), 1940; Guarture v. Alleg-heny County, 141 Pa. Super., 141 Pa. Super., 356, 14 A 2d, 575, 578.

It is recognized that the term may be defined within a statute to the effect that it is more limited and specific, e.g., paragraph 2 of Section 5711.31, Revised Code, provides that the decision of the Tax Commissioner on the application for review in his final order with respect to the assessments of the taxable property listed in the return. However, the final order of the Commissioner is appealable and to that extent is not the final determination of tax liability. But the unqualified use of the phrase in Section 5711.31, Revised Code, demands that the general definition be applied. Said application produces a result consistent with the application of the two rules of statutory construction stated herein, that is, that the final determination to which the language of Section 5711.31, Revised Code, applies is that determination from which no appeal may be or is in fact taken.

The portion of Section 5711.31, Revised Code, relevant to your inquiry provides:

"No penalty shall attach or be assessed with respect to the assessment concerning which such application is pending until sixty days after final determination of the application."

Therefore, it is my opinion and you are hereby advised that the foregoing quoted provision must be construed as prohibiting the attachment or assessment of the penalty referred to until sixty days after the Commissioner's determination or, in the event of an appeal from said official's determination, until sixty days from the final determination of the matter on appeal.