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TAX COMMISSIONER—NOT EMPOWERED BY SECTIONS 1464, 5624-10, G. C., TO REMIT TAXES ASSESSED UPON REAL PROPERTY WHERE APPLICANT CONTENDS PROPERTY ENTITLED TO EXEMPTION—WHERE NO DETERMINATION MADE TO DECLARE IT EXEMPT—SECTION 2588, G. C., REFERS TO CORRECTION CLERICAL ERRORS—COUNTY AUDITOR WITHOUT AUTHORITY TO DECLARE REAL PROPERTY EXEMPT BECAUSE OF USE AND OWNERSHIP—PRECLUDED BY SECTION 5570-1, G. C.—COUNTY AUDITOR, COMMISSIONERS AND TREASURER NOT AUTHORIZED BY SECTION 2589, G. C., TO REMIT TAXES PREVIOUSLY COLLECTED WHEN PROPERTY NOT DECLARED EXEMPT.

*SYLLABUS:*

1. *The Tax Commissioner is not empowered by sections 1464 and 5624-10, General Code, to remit taxes assessed upon real property where the sole ground for the remission, as set out in the application, is that at the time such taxes were assessed the property was entitled to be exempted from taxation but concerning which property it appears that no determination has been made declaring it to be exempt from taxation.*

2. *The provisions of section 2588, General Code, refer to the correction of clerical errors only, consequently, the county auditor is without authority thereunder to declare real property to be exempt from taxation because of its use and ownership, he being directly precluded from making such determination by section 5570-1, General Code.*

3. *Where property which is entitled to be exempted from taxation has not yet been declared exempt, the county auditor, commissioners and treasurer are not authorized by section 2589, General Code, to remit taxes previously collected.*

COLUMBUS, OHIO, December 30, 1939.

HON. WILLIAM S. EVATT, *Tax Commissioner, Department of Taxation, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication, which reads as follows:

“When the Tax Commission of Ohio was superseded by the Department of Taxation upon the appointment and qualification of the Tax Commissioner and the members of the Board of Tax Appeals, there were pending in the files of this office a number of applications for the remission of taxes and penalties on real property; and since that time other applications of this kind

have been filed with the Department of Taxation. All of these applications were filed under the assumed authority of Section 5624-10, General Code, and practically all of them are predicated on the stated ground that the tract or parcel of land described in the application was exempt from taxation under some applicable statutory provision at the time the taxes in question were extended for the year or years therein referred to against such tract or parcel of land on the real property tax list and duplicate of the county.

The authority conferred upon the Tax Commission of Ohio to remit taxes and penalties by the provisions of Section 5624-10, General Code, is now vested in the Tax Commissioner by Section 4 of Amended Substitute Senate Bill No. 159 enacted under date of May 15, 1939 (Sec. 1464-3, General Code). In the case of State, ex rel. Bassichis v. Zangerle, County Auditor, 126 O. S., 118, 120, the court in its opinion, speaking of Section 5624-10, General Code, above referred to, said:

‘Section 5624-10, General Code, provides a method of procuring the remission of taxes illegally assessed in consequence of the negligence or error of an officer in the performance of his duty.’

In view of this expression by the Supreme Court with respect to the purpose and effect of Section 5624-10, General Code, and of the provisions of Section 5570-1, General Code, enacted April 7, 1923, 110 O. L., 77, which now prohibits the county auditor from removing property from the tax list and duplicate and placing the same on the tax exempt list of the county ‘without the consent of the Tax Commission’, the question has occurred to me whether the assessment and extension of taxes on a tract or parcel of real property entitled to exemption on proper application therefor, can be said to be taxes illegally assessed in consequence of the negligence or error of an officer in the performance of his duty, prior to the time the Tax Commission of Ohio or its successor, the Board of Tax Appeals (Sec. 1464-1, General Code) on application therefor has consented to the exemption of such property from taxation under the authority conferred by Sections 5570-1 and 5616, General Code. Your opinion is, therefore, requested whether under the provisions of Sections 1464-3 and 5624-10, General Code, the tax commissioner is authorized to remit taxes assessed upon real property where the sole ground for the remission of such taxes, set out in the application, is that at the time such taxes were assessed the property was owned by the taxpayer and used for a purpose which entitled it to exemption, but where it further appears that

at the time of the assessment of the taxes no application had been made to the Tax Commission of Ohio (or the Board of Tax Appeals) for its consent to the exemption of the property and no such consent had been given.

In connection with the question above stated I desire to submit for your opinion the further question as to the authority of the county auditor, under the provisions of Sections 2588, 2589 and 2590, General Code, to abate or remit taxes assessed on real property where it appears that at the time such taxes were assessed the property, by reason of its ownership and use, was exempt from taxation under some statutory provision providing therefor. Sections 2588, 2589 and 2590, General Code, were formerly Section 1038 of the Revised Statutes. And in this connection it is noted that after the amendment of Section 1038, Revised Statutes, in and by the Act of 1874 (70 O. L., 10, 11), so as to include therein the words 'or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessments', the Supreme Court of Ohio in the case of *Butler v. Commissioners*, 39 O. S., 168, 169, expressed the view that this amendment of the statute was for the purpose of enabling the county commissioners to order the repayment of taxes erroneously collected upon property which was exempt from taxation. It would seem to follow from this view with respect to the refunder of taxes erroneously assessed and collected on exempt property, that where taxes on such exempt property had been erroneously assessed but not collected the county auditor under the provisions of this section of the Revised Statutes, now Sections 2588, 2589 and 2590, General Code, could have issued a certificate abating such taxes.

However, as above noted, Section 5570-1, General Code, herein referred to, was enacted long after the decision of the Supreme Court in the case of *Butler v. Commissioners*, *supra*; and it may be that the provisions of this section affect the independent authority which the county auditor might otherwise have with respect to the correction of the tax list and duplicate when property exempt from taxation appears thereon, and as to the abatement or remission of taxes theretofore assessed on property entitled to exemption. As hereinbefore indicated I would like to have your opinion upon this question as well as that on the question first herein above stated."

Article XII, section 2 of the Constitution of Ohio provides that "general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively

for any public purpose, but all such laws shall be subject to alteration or repeal." Under this authorization the Legislature has passed numerous sections for the exemption of real property from taxation. Two methods have been provided for the placing of real property on the exempt list. The first method is authorized by section 5616, General Code, as follows:

"Any person, board or officer authorized by this act to file complaints with the county board of revision may complain to the tax commission of Ohio at any time prior to the thirty-first day of December in any year, of the determination of a county auditor respecting the liability of any property to taxation in that year, or its exemption therefrom. The commission shall hear such complaint and determine whether the property complained of is subject to taxation and certify its findings to the county auditor, who shall correct the tax list and duplicate accordingly."

The persons, boards or officers so authorized to file complaints with the county board of revision are named in section 5609, General Code, which provides:

"Any taxpayer may file such complaint as to the valuation or assessment of his own or another's real property, and the county commissioners, the prosecuting attorney, county treasurer, or any board of township trustees, any board of education, mayor or council of any municipal corporation, in the county shall have the right to file such complaint."

Since the effective date of Amended Substitute Senate Bill No. 159 of the 93rd General Assembly, the powers and duties of the former Tax Commission with respect to the determination of exemptions from taxation have now been transferred to the Board of Tax Appeals. Provisions therefor are found in sections 1464 and 1464-1, General Code, which so far as pertinent are as follows:

*Section 1464.*

"\* \* \* All functions, powers and duties which are by law devolved upon, vested in and imposed upon said tax commission of Ohio, and said offices of commissioners and members and upon their employees, agents and representatives, thereupon shall be, and by virtue of the provisions of this act, thereupon will be, transferred to and devolved upon, vested in and imposed upon the department of taxation hereby created."

*Section 1464-1.*

“The board of tax appeals shall exercise the following powers and perform the following duties of the department of taxation:

1. To exercise the authority provided by law relative to consenting to the exempting of property from taxation, and revising the list of exempted property in any county.”

The second method of having property declared exempt is authorized by section 12075, General Code, which is as follows:

“Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.”

That these two methods are concurrent and optional was decided in *Conn v. Jones*, 115 O. S., 186, the syllabus stating:

“Under Section 12075, General Code, a property owner may apply for an injunction to restrain the levy or collection of a tax, upon the ground that the property to be taxed is exempt from taxation, without proceeding under Sections 5616, 5611-1 and 5611-2, General Code. In such case these sections provide a concurrent and not an exclusive remedy.”

When the status of property that has been exempted is changed, it may be returned to the taxable list on any subsequent list and duplicate by proceedings under section 5616, General Code, or it may be returned by the county auditor under authority of section 5570-1, General Code, which reads as follows:

“It shall be the duty of the county auditor to make a list of all the property, both real and personal, in his county, and including moneys, credits and investments in bonds, stocks, or otherwise, which is exempted from taxation under sections 3410-6, 4759, 5349, 5350, 5351, 5352, 5353, 5353-1, 5356, 5357, 5359, 5361, 5362, 5363, 7915-1, 10093, 10101, 10105 and 10192 of the General Code.

In each case in addition to the name of the owner, such list shall show the value of the property exempted and a statement in brief form of the reason for or ground on which such ex-

emption has been granted. It shall be corrected annually by adding thereto such items of property as may have been exempted during the year and by striking therefrom such items as shall have lost their right of exemption and which shall be re-entered on the taxable list.

After this act takes effect no additions shall be made to such exempt lists or additional items of property exempted under any of the sections enumerated herein without the consent of the tax commission, but when any personal property or endowment fund of an institution has once been held by the tax commission to be properly exempt from taxation, it shall not be necessary to obtain the commission's consent to the exemption of additional property or investments of the same kind belonging to the same institution; but such property shall appear on the abstract filed annually with the commission.

The tax commission shall, prior to January 1, 1925, revise the list in every county so that no property is improperly or illegally exempted from taxation; and shall have power to make further revision at any time thereafter. The county auditor shall follow the orders of the tax commission given under this section. An abstract of such list shall be filed annually with such commission on a form to be approved by it, and a copy thereof shall be kept on file in the office of each county auditor for public inspection."

In discussing the auditor's authority under section 5570-1, *supra*, in the case of *State, ex rel. v. Guckenberger*, 133 O. S., 27, it is said on page 30 in the opinion written by Judge Gorman:

"The language of these sections is clear and unambiguous. After July 9, 1923, the effective date of Section 5570-1, General Code, the Tax Commission of Ohio had the exclusive right to place property on the exempt list. On the other hand the county auditor, in revising the annual tax list, still has the power to strike from the exempt list or duplicate "such items as shall have lost their right of exemption" and place them on the taxable list.

In so doing, it is not necessary for the county auditor to conduct hearings. His duty in so acting is purely ministerial, and not *quasi-judicial*.

After the transfer is made, the relator may appeal to the Tax Commission of Ohio by virtue of the provisions of Section 5616, General Code, or if the county auditor is threatening to transfer items of property of the relator from the exempt list to

the taxable list, relator may proceed by way of injunction, under the provisions of Section 12075, General Code."

In your inquiry you state that numerous applications are pending in the Department of Taxation requesting that parcels of real estate described in the several applications be exempted from taxation under some applicable statutory provisions and requesting the remission of taxes and penalties thereon, these applications being "filed under the assumed authority of section 5624-10". Section 5624-10 reads as follows:

"The tax commission of Ohio may remit taxes and penalties thereon, found by it to have been illegally assessed, and such penalties as have accrued or may accrue, in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of property for taxation, or the levy or collection of taxes. It may correct an error in an assessment of property for taxation or in the tax list or duplicate of taxes in a county, but its power under this section shall not extend to taxes levied under the provisions of subdivision 2 of chapter 15 of title 2, part second of the General Code."

It seems clear that the above section refers to the remission of taxes and penalties that have been assessed in consequence of negligence or error and to the correction of errors in the tax list and duplicate. It is neither negligence nor error for the county auditor to include real property on the taxable list unless it has been exempted by the Tax Commission or Board of Tax Appeals, as provided in section 5570-1, *supra*, or by action of the court, under section 12075, *supra*. An application to have property declared exempt from taxation is not an application to have a clerical error corrected, nor is it a case concerning the valuation or amount of assessment, but as pointed out in *Conn v. Jones*, *supra*, it challenges the very power to lay the tax. In that opinion Allen, J., said on page 198:

"\* \* \* We cannot emphasize too strongly the fact that this contest is over the very right to tax. The claim here is not that the tax is illegal because of a failure to comply with any provision of the statute. The claim here is not that the proceeding was properly begun and properly carried on, and that the tax is excessive, but the claim is that the proceeding in its very inception is void."

If the tax has been assessed without any right to tax, such an assessment could not be construed as having been made "in consequence of the negligence or error of an officer required to perform a duty relating to

the assessment of property for taxation." Nor could it be construed as being "an error in assessment of property for taxation or in the tax list or duplicate of taxes".

Your request indicates that the applications in question are for the remission of taxes that have been paid, to be ordered by the Tax Commissioner under authority of section 1464-3, which section so far as pertinent is as follows:

"All other powers, duties and functions of the department of taxation, other than those mentioned in sections 2 and 3 of this act, are hereby vested in and assigned to, and shall be performed by the tax commissioner, which powers, duties and functions shall include, but shall not be limited to the following powers, duties and functions:

\* \* \* \* \*

3. To exercise 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 for any other reason overpaid; and, in addition to the authority so provided by law, the tax commissioner shall have authority as follows: on written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, \* \* \*."

You will note that the Tax Commissioner is limited to remitting or refunding taxes illegally or erroneously assessed or collected. The right to exempt property from taxation is the right of the Board of Tax Appeals, as provided in section 1464-1, supra. As I have heretofore pointed out, there is nothing illegal or erroneous about the taxing of such properties. It is the duty of the auditor to place on the taxable list all taxable property including "such items as shall have lost their right to exemption." If any of such properties should be exempt from taxation the taxpayer, as I have heretofore pointed out, has available the statutory methods for securing exemption. Instead of being illegal or erroneous, the procedure so far as your inquiry discloses, is both legal and regular. Hence there is no authority under section 1464-3, supra, for the Tax Commissioner to remit or refund taxes.

Your second question relates to the authority, if any, of the county auditor under the provisions of sections 2588, 2589 and 2590, General Code, to pay or remit taxes assessed against real property entitled to be exempt from taxation. These sections read:



*Section 2588.*

“From time to time the county auditor shall correct all clerical errors which he discovers in the tax lists and duplicates either in the name of the person charged with taxes or assessments, the description of lands or other property, the valuation or assessment thereof or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment, and shall correct the valuations or assessments on the tax lists and duplicates agreeably to amended, supplementary or final assessment certificates issued pursuant to law. If the correction is made after a duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other.”

*Section 2589.*

“After having delivered a duplicate to the county treasurer for collection, if the auditor is satisfied that any tax or assessment thereon or any part thereof has been erroneously charged, he may give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessment. If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from the general revenue fund of the county.”

*Section 2590.*

“At the next settlement with the auditor of state after the refunding of such taxes, the county auditor shall deduct from the amount of taxes due the state at such settlement the amount of such taxes that have been paid into the state treasury. No taxes or assessments shall be so charged or collected in the five years next prior to the discovery thereof by the auditor. No assessment shall be returned, except from the fund or funds created in whole or in part by the erroneous assessments.”

As you have noted in your inquiry, section 2588 was formerly section 1038, Revised Statutes, which section was considered in *Butler v. Commissioners*, 39 O. S., 168, the syllabus reading:

“Under Sec. 1038, R. S. the power granted to the auditor and commissioners in addition to that conferred by the act of January 16, 1873 (70 Ohio L. 10) as construed in *State v. Commissioners*, 31 Ohio St. 271, is limited to cases *where property exempt from taxation has been charged with taxes*, and does not extend to cases where taxes have been paid upon property subject to taxation, but returned in the wrong county.” (Italics the writer’s.)

The court there recognized the fact that the correction could only be made when property already exempted from taxation was thereafter charged with taxes. Section 1038, Revised Statutes, contained no authority, express or implied, for the auditor to determine what lands were entitled to be exempted from taxation. It was only after such determination had been made by proper authority that the auditor was permitted to make the correction, if such lands were thereafter taxed. This conclusion is supported by the amendment to section 2588 passed by the 89th General Assembly on June 11, 1931 (114 O. L. 714, 725), wherein the first part of the section was amended to read:

“From time to time the county auditor shall correct all *clerical errors* which he discovers in the tax lists and duplicates either in the name of the person charged with taxes or assessments, the description of lands or other property, the valuation or assessment thereof, or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment.” (Italics the writer’s.)

Thus it is evident that the Legislature sought to eliminate any doubt as to the type of errors the auditor might correct i.e., *clerical* errors. This construction receives further support from *State, ex rel. Commissioners*, 119 O. S. 50, the second branch of the syllabus reading:

“Under such circumstances, a petition in mandamus against the county commissioners, county auditor and treasurer, asking that they be required to correct the tax list and duplicate as provided in Sections 2588, 2588-1 and 2589, General Code, should not be granted, *such sections applying to errors clerical in character rather than those referring to the fundamental one of jurisdiction.*” (Italics the writer’s.)

See also *State, ex rel. Bassichis v. Zangerle*, 12 O. L. A., 597; *Christ v. Commissioners*, 13 N. P. (N. S.) 457, and *Brooks v. Lander*, 14 O. C. C. (N. S.) 481, 23 O. C. D. 44.

There appears to be no conflict between this construction of section 2588, General Code, and the construction of section 5570-1, General Code, as heretofore discussed. Section 2588 permits the county auditor to make corrections of clerical errors in the tax lists and duplicates, including the situation where property exempt from taxation has been charged with taxes. But it does not authorize the auditor to determine whether or not a property is exempt from taxation. Section 5570-1 says that the Tax Commission (now the Board of Tax Appeals, in so far as this power is concerned) has exclusive authority to declare property exempt, but that the auditor has authority in any year thereafter to strike property items from the exempt list and place them on the taxable list.

In conclusion, and in specific answer to your questions, I am of the opinion that:

1. The Tax Commissioner is not empowered by sections 1464 and 5624-10, General Code, to remit taxes assessed upon real property where the sole ground for the remission, as set out in the application, is that at the time such taxes were assessed the property was entitled to be exempted from taxation but concerning which property it appears that no determination had been made declaring it to be exempt from taxation.

2. The provisions of section 2588, General Code, refer to the correction of clerical errors only, consequently, the county auditor is without authority thereunder to declare real property to be exempt from taxation because of its use and ownership, he being directly precluded from making such determination by section 5570-1, General Code.

3. Where property which is entitled to be exempted from taxation has not yet been declared exempt, the county auditor, commissioners and treasurer are not authorized by section 2589, General Code, to remit taxes previously collected.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*