

1040.

TAX AND TAXATION—PERSONAL PROPERTY TAX—FIFTY PERCENT PENALTY ATTACHES TO WHOLE AMOUNT OF TAX AND NOT THAT PART DUE AND PAYABLE AT TIME OF RETURN, FOR FAILURE OF TAXPAYER TO MAKE ADVANCE PAYMENT PURSUANT TO SECTION 5671-1, G. C.

SYLLABUS:

Inasmuch as the fifty per cent penalty provided for by section 5390, General Code, for failure of a taxpayer to make the advance payment on his personal property taxes in the amount and within the time prescribed by section 5671-1, General Code, is one upon the assessment of the property included in the return, and is not one upon assessable taxes payable at the time such return is made, this penalty is in effect one on the whole amount of the tax and not only upon that part of such tax as is due and payable at the time the taxpayer may make his return or within ten days thereafter.

COLUMBUS, OHIO, July 18, 1933.

HON. VERNON L. MARCHAL, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication which reads as follows:

“I desire your opinion as to the construction of Section 5671-1 of the General Code of Ohio relative to the payment of personal property tax.

Now, the question on which I desire an opinion is where ‘A’ makes a tax return to the County Auditor of all his personal property, but does not within the ten day period prescribed by the statute pay the first half of such personal property tax. Now, in case ‘A’ desires to pay said personal property tax at a later date, and before the second payment would become delinquent, in that event would a penalty of 50% be placed against the whole amount of the tax, or just against the first payment?”

In the consideration of the question presented in your communication, I do not deem it necessary to set out herein all of the provisions of section 5671-1, General Code, to which you refer. It is noted that under the provisions of this section a person making a personal property tax return is required at the time of filing such return to pay the treasurer of the county one-half of the taxes assessable upon such return, whether the property so returned be tangible personal property carrying local tax rates, or whether the same be intangible property subject to the flat rates with respect to the different classes of such property prescribed by section 5638, General Code.

However, the following provisions of section 5671-1, General Code, which are, perhaps, more immediately pertinent to the consideration of the question presented by you, are here quoted:

“In each case, the county auditor, on presentation of the return, shall compute therefrom the amount of the advance payment of taxes required by this section and shall issue in duplicate a certificate for the payment of the amount so computed into the county treasury to the credit of the proper

undivided tax fund or funds, designating thereon, separately, the amount to be credited to each undivided tax fund. One copy of such certificate shall be retained by the auditor and the other shall be delivered to the person desiring to file return, who shall deliver the same to the county treasurer together with the payment hereby required. The county treasurer shall retain such copy and issue to the person making such payment a receipt in duplicate, one copy of which shall be for the use of the person making such payment and the other of which the treasurer shall deliver to the county auditor. Upon receiving such copy, the county auditor shall attach the same to his copy of the return which shall thereby be deemed filed and made as of the date of such receipt; but if the return is presented for filing within the time required by law or as extended under authority of law, the completion of the filing thereof as required by this section within ten days thereafter shall be considered to be within time, and the penalty prescribed by law for failure to file returns within time shall not attach."

It is seen from the above quoted provisions of this section of the General Code that a personal property tax return made by a taxpayer is not complete and is not deemed to be filed until the taxpayer pays one-half of the taxes assessable on such return and until the county auditor has received from the county treasurer the duplicate copy of the taxpayer's receipt and has attached the same to his copy of the return made by the taxpayer. It appears from your communication that the taxpayer therein referred to did not at the time he made his personal property tax return or within ten days thereafter pay one-half of the taxes assessable on such return, and that, by reason of this delinquency, he is subject to the penalty prescribed by law for failure on the part of a taxpayer to file a personal property return within the time required by law or as extended by the proper authorities pursuant to law. The penalty referred to in the above quoted provisions of 5671-1, General Code, is that prescribed by section 5390, General Code, which reads as follows:

"When a taxpayer fails to make return within the time prescribed by law or as extended by the county auditor 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, 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 the penalty prescribed by this section of the General Code is not one computed upon assessable taxes but is a fifty per cent increase in the assessment

of the personal property which the taxpayer is required to return for taxation. In the case referred to in your communication, the penalty which the taxpayer incurred by reason of his failure to complete his tax return and the filing thereof by paying one-half of the assessable taxes on the property included in such return, properly took the form of a fifty per cent increase in the assessment or assessed value of such property and would obviously effect a fifty per cent increase in the amount of taxes which he is required to pay for the whole year, unless he secured a reduction in the amount of such penalty by paying one-half of the assessable taxes on such return within the time prescribed by this section of the General Code and thereby completing such return and the filing thereof as required by the provisions of section 5671-1 General Code, before quoted, or unless he secured a reduction in such penalty by petition to the Tax Commission for a redetermination of such penalty in the manner provided by section 5391, General Code.

Nothing is said in your communication to show that this taxpayer availed himself of the privileges accorded to him by the provisions of sections 5390 and 5391 for the purpose of securing a reduction in the amount of the assessed penalty. And, by way of specific answer to your question, it must be said that, inasmuch as the fifty per cent penalty provided for by section 5390, General Code, is one upon the assessment of the property included in the return and is not one upon assessable taxes payable at the time such return was made, or otherwise, this penalty is in effect one on the whole amount of the tax and not only upon that part of such tax as was due and payable at the time this taxpayer made his return or within ten days thereafter.

In this connection, it may be proper, perhaps, to observe that the ten per cent penalty on delinquent personal property taxes provided for by section 2657, General Code, does not apply to the failure on the part of the taxpayer to make the initial payment of personal property taxes required by section 5671-1, General Code, but applies only to a failure to pay taxes charged on the personal property and classified property duplicates, that is, in general, those for the second half of the year.

It should be observed that although the taxpayer referred to in your communication incurred in effect a fifty per cent penalty on the whole of the personal property taxes assessable by reason of his failure to make an advance payment on such taxes in the amount and within the time prescribed by section 5671-1, General Code, such taxpayer, under the provisions of section 2649-1, General Code, may make such advance payment until the personal property duplicates are made up by the county auditor and delivered to the treasurer. Inasmuch as the penalty imposed upon the taxpayer is a fifty per cent increase in the assessment of his taxable property, it would seem to follow that the advance payment which the taxpayer may now make would be one-half of the taxes due upon the assessment as thus increased. In this way the taxpayer would be paying one-half of the effective penalty as a part of his advance payment and the other half of such penalty at the time and as a part of his second payment of taxes assessed on the duplicate. I am advised, however, that the Tax Commission of Ohio has adopted a construction of the statutory provisions above noted which, in the situation presented in your communication, permits the taxpayer now to make an advance payment of taxes at this time on the original assessment, and which would require him to pay the whole of the penalty as originally imposed or as reduced by the Tax Commission at the time of his second payment of such taxes which, as above noted, will then be on the duplicate. In view of the fact that by statutory provision (sec. 5623, G. C.) the Tax Commission of Ohio is required to decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy or collection of

taxes, in accordance with the advice and opinion of the Attorney General, I do not feel that I should depart from this construction which the Tax Commission has placed upon these sections of the General Code, unless it is done in a formal opinion to the Tax Commission of Ohio pursuant to a request for such opinion made by the Commission itself.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

1041.

BOARD OF EDUCATION—UNAUTHORIZED TO CONTRACT FOR PURCHASE OF SCHOOL BUSES UNLESS CLERK THEREOF HAS CERTIFIED THAT LAWFUL APPROPRIATION THEREFOR HAS BEEN MADE AND MONEY IS IN TREASURY OR IN PROCESS OF COLLECTION—AUTHORIZED TO PROCURE LIABILITY AND PROPERTY DAMAGE INSURANCE FOR SCHOOL BUSES AND PUPILS TRANSPORTED THEREIN.

SYLLABUS:

1. *A contract made by a board of education for the purchase of school busses may not be lawfully made unless the clerk of said board of education certifies at the time said contract is made, that the money to meet the expenditure has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund, free from any previous encumbrances.*

2. *After the effective date of House Bill 314, of the 90th Genral Assembly, to wit, September 25, 1933, boards of education may lawfully procure liability and property damage insurance covering each school bus or motor van and all pupils transported under the authority of such board of education.*

COLUMBUS, OHIO, July 18, 1933.

HON. JAMES M. HOWSARE, *Prosecuting Attorney, Preble County, Eaton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion in answer to two questions which may be stated as follows:

(1) May a board of education purchase school busses at a cost of \$6,000.00 or more, to be paid for on the installment plan? It is proposed to purchase these busses and arrange for the payment therefor, over a period of eighteen or twenty-four months.

(2) May a board of education purchase liability and property damage insurance covering school busses and pupils transported by means of those busses?

In the consideration of your first question it should be noted that a board of education may not make a contract for the expenditure of money unless its clerk first certifies that moneys to meet the expenditure have been lawfully