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1. TAX—PENALTY NOT REQUIRED TO BE ADDED BY SECTIONS 5377 OR 5394 G.C.—WHERE AMENDED PRELIMINARY ASSESSMENT CERTIFICATE IS ISSUED AND PAYMENT OF ADDITIONAL TAX IS REQUIRED BY AMENDED CERTIFICATE.
2. TAX COMMISSIONER—NO DUTY TO CONSIDER CORRECTION OF PENALTY ADDED BY COUNTY AUDITOR FOR NONPAYMENT OF TAX—REVIEW AND REDETERMINATION HEARING, SECTION 5394 G. C.—AFFIRMATION, INCREASED ASSESSMENTS MADE UNDER PRELIMINARY ASSESSMENT CERTIFICATE.
3. TAXPAYER—VOLUNTARY PAYMENT OF INCREASED TAX—PENALTY ASSESSED BY COUNTY AUDITOR—TIME LIMITATION—TAXPAYER NOT ENTITLED TO REFUND OF PENALTY.

SYLLABUS:

1. Penalty is not required to be added by Section 5377 or Section 5394, General Code, where an amended preliminary assessment certificate is issued and the payment of additional tax is required by such amended certificate.

2. Where the Tax Commissioner, at the conclusion of review and redetermination hearing under Section 5394, General Code, affirms an increased assessment made under an amended preliminary assessment certificate, he has no duty to consider correction of penalty added by county auditor for nonpayment of tax.

3. Where a taxpayer, prior to conclusion of review and redetermination hearing under Section 5394, General Code, voluntarily pays the increased tax resulting from an amended preliminary assessment certificate which is the subject of the review and redetermination proceeding, and also voluntarily pays the penalty added by the county auditor for nonpayment, within the proper time therefor, of such increased tax, the taxpayer is not entitled to refund of the penalty.

Columbus, Ohio, April 21, 1949

Hon. George M. Monahan, Prosecuting Attorney
Auglaize County, Wapakoneta, Ohio

Dear Sir:

You have requested my opinion on the following two questions:

“1. Does either Sec. 5377 or Sec. 5394 impose any positive application of penalty on an amended Preliminary Assessment

Certificate prior to the issuance of the Final Assessment Certificate pursuant to all applicable requirements of law?

"2. Since the (taxpayer) made application within the time prescribed by law for a review and redetermination of the Amended Preliminary Assessment Certificate issued by the Tax Commissioner of Ohio, on August 11, 1944, and the Final Assessment was not determined until Nov. 3, 1948, is the County Auditor by any applicable laws of Ohio permitted legally to issue a refunder of the penalty charged against said (taxpayer) for non-payment of the 1944 assessment and paid by (it) on October 11, 1945?"

These questions are premised upon the facts which you set out in your request to me and which are as follows:

"The (taxpayer) filed (its) 1942 personal property return for Auglaize County, Ohio, within the time prescribed by law.

"The Tax Commissioner thereafter issued a Preliminary Assessment Certificate.

"The Tax Bill was duly issued by the Treasurer and the remittance was received.

"On August 11, 1944, the Tax Commissioner issued an amended certificate increasing the amount of the 1942 assessment.

"Within the prescribed time required by law, the said (taxpayer) filed an application for review and redetermination.

"The said application was not considered and finalized until Nov. 3, 1948, by the Tax Commissioner.

"The amended certificate of 1944 was put on the Tangible Tax Duplicate of that year in compliance with the finding of the Tax Commissioner.

"The said (taxpayer) failed to pay this assessment or make a tender of payment, and a penalty of 10% was added by authority of Sec. 2657 G. C. of Ohio.

"Later, on October 11, 1945, according to the Treasurer's records, the amended Certificate of 1944, including the penalty under Sec. 2657 G. C. was paid by said (taxpayer).

"Now the (taxpayer) (asks) that the penalty on the 1944 assessment be refunded."

It appears from other papers submitted with your request that the final assessment reaffirmed the values as found in the amended preliminary assessment certificate and, further, that the final assessment, by its terms, did not mention a penalty assessment.

Since much of the reasoning on which my answer to your first question is based is included in my determination of your second question, I prefer to dispose of your questions in their inverse order.

The subject of penalties is covered in two separate provisions of Section 5394, General Code. These two provisions must be considered in any discussion of your second question. The first provision reads as follows:

“* * * Upon such hearing the commissioner may make such correction in the assessment, including any penalty, as he may deem lawful and proper or he may affirm the assessment.”

The second provision reads as follows:

“When an application for review and redetermination is filed pursuant to this section the tax commissioner shall notify the auditor and treasurer of state or the auditor and treasurer of each county on the tax list or lists, or duplicate or duplicates on which any part of such assessment is entered. After receipt of such notice the treasurer of state or the treasurer of any such county may accept any amount tendered as taxes with respect to the assessment concerning which such application is then pending, and if such tender is not accepted no penalty shall be assessed because of the non-payment thereof. The acceptance of such tender, however, shall be without prejudice to the claim for taxes upon the balance of such assessment. * * *”

I am inclined to the view that the first of the above quoted provisions pertains to the types of penalty assessed for failure to make a return or failure to list all property required to be listed and other types of penalty similar to those provided for in Sections 5390, 5392-1 and 5398 of the General Code and does not pertain to penalties for nonpayment of tax. I base this on the fact that the Tax Commissioner is primarily a tax assessing officer and not a tax collecting officer. It would not, therefore, ordinarily be within his province to administer penalties for nonpayment of taxes. However, it is not necessary at this time to determine his jurisdiction over penalties for nonpayment of taxes since in this instance he affirmed the assessment. It is apparent from the grammatical structure of the above quoted provision that his duty to correct penalties is limited to that type of situation where he corrects the assessment. Since he did not correct the assessment here he was not required to correct the penalty. For these reasons I am of the opinion that the first of the above quoted provisions does not require the remission of penalty in the situation you present.

With respect to the second statutory provision quoted above, it is noted that the facts you have presented here do not indicate that a tender was made. The mere payment of the tax and penalty is not a tender within the above language. In the case of *The Swetland Company v. Evatt*, 139 O. S. 6, wherein the court construed a similar statute, the third and fourth branches of the syllabus read as follows :

“3. Where a taxpayer filed with the county auditor a complaint against the assessed value of real property and, while such complaint was pending before the county board of revision, paid the taxes for the year complained of in the full amount assessed under the complained-of valuation without first tendering to the county treasurer as taxes an amount computed on the claimed valuation as set forth in the complaint (as provided in Section 5609, General Code), such payment was voluntary and justifies a dismissal of the complaint.

“4. Under Section 12077, General Code, to avoid the defect of voluntary payment of taxes or assessments, the taxpayer, at the time of paying the taxes or assessments, must file a written protest as to the portion sought to be recovered, which written protest must (a) specify the nature of the taxpayer’s claim as to the illegality thereof and (b) declare the taxpayer’s intention to sue under Part III, Title IV, Division VII, Chapter 7, General Code.”

In view of the holding in the *Swetland Company* case it is my opinion that the payment made under the facts which you present is at best a voluntary payment and cannot be recovered. For these reasons a detailed interpretation of the second provision is not necessary. However, it is observed that it appears that this provision, by implication, authorizes the addition of a penalty in a case where no tender is made and, on the other hand, it cannot be said that such provision, standing alone, requires the imposition of a penalty.

Further, I fail to find any other statutory provision which would authorize a refund of such penalty.

While I prefer to rely on the other grounds herein discussed as the basis for my conclusions, I wish to point out and direct your attention to Sections 2584, 2585-1, 2656 and 2657 of the General Code. From an examination of these sections I am inclined to the view that when they are construed together, they indicate that the penalty was properly added and paid by the taxpayer in any event, unless he had prevailed, with

respect to the tax assessment, on the review and redetermination hearing or upon subsequent appeal. I am aware, however, that both Sections 2592 and 5694, General Code, possibly could be separately construed so as to effect the opposite result.

I must accordingly answer your second question in the negative.

Coming now to your first question, since I have discussed Section 5394, General Code, and concluded that in my opinion it imposes no *positive* application of penalty under the facts which you present, the only remaining question is whether or not Section 5377, General Code, would impose any positive application of penalty. In reading this latter section I fail to find any references, either directly or by implication, to the question of penalties. A study of the section leads me to the conclusion that its purpose is to provide for the machinery of transmitting preliminary and amended assessment certificates to the county auditor by the Tax Commissioner; to provide for amendments to such preliminary certificates and to provide for such preliminary or amended certificates becoming final. I must, therefore, answer your first question also in the negative.

In conclusion, and in specific answer to your questions, it is my opinion that neither Section 5377 nor Section 5394, General Code, impose any positive application of penalty on an amended preliminary assessment certificate under the circumstances which you present and that the taxpayer, under the circumstances, has no right to a refund of the penalty paid.

Respectfully,

HERBERT S. DUFFY,
Attorney General.