

county. It has made express provision for the purchase of such machinery, tools and equipment and therefore the right to purchase under the implied power of the county is impliedly negated.

It must also be remembered that no moneys can be paid from the treasury of the county except there be provision of law therefor. Also, that in the limitation of tax rates, the legislature has provided for the maintenance of the county and its particular functions within certain limitations. To permit the purchase of such machinery and tools from the proceeds of the gasoline tax fund would be in disregard of the limitations so provided.

While the question is not free from doubt, it is the conclusion that since the legislature has (1) expressly limited the use of these moneys to "the sole purpose of maintaining and repairing the county system of public roads and highways," (2) has given the county express power to purchase machinery, equipment and tools under section 7200, which power excludes any reliance upon the implied power, and (3) has in other cases made express provision for the purchase of machinery, equipment and tools as, in section 1221, it did not intend to permit the purchase of such equipment, machinery and tools from the proceeds of the gasoline tax.

I am considering your question as to whether or not the proceeds of the gasoline tax fund, to which the county is entitled under section 5537, may be expended by the county for the purchase of road machinery and equipment, and I do not mean to hold that such funds may not be properly expended in proceeding with such improvement by contract rather than by force account.

Respectfully,

C. C. CRABBE,
Attorney General.

3093.

TAXES AND TAXATION—PAYMENT OF TAX DURING PENDENCY OF
APPEAL ON THE VALUATION OF PROPERTY ABATES THE AP-
PEAL—SECTION 5609 G. C. CONSTRUED.

SYLLABUS:

1. *Sections 5609, et seq., make definite provision for tender by a complaining tax payer of the amount he concedes due as tax upon the property complained of, whether as to personal property or real estate, and payment of the tax during the pendency of appeal on the valuations subject to such complaint abates the appeal.*
2. *In view of the provisions of sections 5609, et seq., protest, whether oral or written, has no effect whatsoever upon the rights of the complaining taxpayer, the procedure necessary to be followed being prescribed by said sections.*

COLUMBUS, OHIO, January 25, 1926.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your recent communication is as follows:

"I. X. filed a complaint with the board of revision of C. County against the assessment of his *personal* property and then appealed from the decision of said board to this commission. On the hearing before us it developed that pending his appeal he had paid his full tax for the year on the basis of the assessment as made.

"(1) What effect should the commission give to such payment? Does it work a discontinuance of the appeal? Or, should the commission proceed to the determination of the value as though no payment had been made?"

"(2) Would it make any difference if the payment of tax was made under *oral* protest?"

"(3) Or under *protest in writing*?"

"II. Z. filed a similar complaint and prosecuted a similar appeal with respect to the assessment of his *real estate* as it had been assessed for the year 1924. Z. also paid his tax in full pending the appeal.

"(1) What effect should the commission give to such payment? Does it work a discontinuance of the appeal? Should the commission proceed regularly to fix a value for the property to be applicable for the year 1924 as though no payment had been made, or, if payment works a discontinuance insofar as the 1924 valuation is concerned, should we proceed to fix a value for the real estate for 1925?"

"(2) Would it make any difference if the payment of tax had been made under *oral* protest?"

"(3) Or under *protest in writing*?"

Section 5609, General Code, provides in part as follows:

"Complaint against any valuation or assessment as the same appears upon the tax duplicate of the then current year, may be filed on or before the time limited for payment of taxes for the first half year, * * *. The county auditor shall lay before the county board of revision all complaints filed with him. The determination of any such complaint shall relate back to the date when the lien for taxes for the current year attached, or as of which liability for such year was determined, and liability for taxes, and for any penalty for non-payment thereof within the time required by law, shall be based upon the valuation or assessment as finally determined, * * * and the treasurer may accept any amount tendered as taxes upon property concerning which a complaint 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 the valuation or assessment. A like tender may be made, with like effect, in case of the pendency of any proceeding in court based upon an excessive or illegal valuation."

Sections 5610 to 5611-2 make provision for an appeal from the decision of the board of revision to the Tax Commission of Ohio and from its decision to the Common Pleas Court, the proceedings in which court are reviewable in error as other proceedings.

Section 5611-3 provides that where proceedings to reverse the determination of the Tax Commission have been filed,

"liability for taxes upon the property in question, and for non-payment of taxes within the time required by law, shall relate back to the date of the original valuation or determination, and liability for taxes and for any penalty for non-payment thereof within the time required by law, shall be based upon the valuation as finally determined."

The Supreme Court has held that the above proceedings have superseded the provisions of section 12075, General Code, which gave to the Common Pleas Court

jurisdiction to "enjoin the illegal levy of taxes and assessments, and entertain actions to recover them back when collected." *Hammond, Treasurer, vs. Winder Receiver*, 112 O. S., 166 (Ohio Law Bulletin, May 4, 1925.)

Jones, J., in the opinion, there said :

"Under the provisions of sections 5609 and 5610, General Code, (107 O. L., 43, 44), a tax payer is authorized to file his complaint before the time limited for payment of taxes for the first half year, which may be heard and determined by the board of revision, and an appeal taken to the state tax commission from the board's decision. These various sections of the General Code, to which we have alluded, furnish administrative remedies for the correction of any valuations placed upon the duplicate by the county auditor. * * *"

The court there held that, since there was a full and complete remedy provided by statute, the tax payer, having failed to take advantage thereof, proceedings in injunction were not maintainable under section 12075, General Code.

Likewise, if one has failed to avail himself of the remedy provided by sections 5609, et seq., General Code, he could not avail himself of that part of section 12075, General Code, which authorizes the Common Pleas Court to entertain actions to recover back taxes illegally collected; the obvious reason being that if the tax payer has failed to avail himself of the remedies provided by sections 5609, et seq., General Code, within the time therein provided, he has waived his right to question an incorrect or illegal valuation.

In the enactment of sections 5609, et seq., it was the apparent intent of the legislature to provide that if there be any reason for attack on the auditor's valuations for the current year, such reasons must be made known by means of the tax payers' complaint required to be filed with the auditor prior to the expiration of the time for the payment of taxes for the first half year; and this determination of the legislature respected "any valuation," thus including both the valuation of real and personal property and also included, by section 5616, the liability to tax, or exemption therefrom, as well as the valuation.

Section 5609 makes specific provision for the tender of taxes upon property which is the subject of complaint and if such tender is not accepted, no penalty may be assessed because of non-payment. On the contrary, the treasurer may accept the tender and then, after the complaint is disposed of, he may collect the difference between such payment and the amount ultimately determined due from the complaining tax payer. Such proceeding was designed for the protection of the tax payer and we are therefore of the opinion that if, without waiting the final determination of his complaint, he pays tax upon the valuation so assessed, he must be deemed to have waived his complaint and the proceedings would be abated. The commission, therefore, should dismiss the appeal.

This conclusion is supported by *Wilson vs. Pelton*, 40 O. S. 306, where it was claimed that a tax had been illegally assessed. An action was brought under section 5648, R. S. (now section 12075 G. C.), to recover back the taxes paid. The taxes were there paid without protest or objection and, although illegal, the court held that there could be no recovery. The court said (p. 312) :

"We think, therefore, that it was competent for the treasurer to make the defense, that the tax had been voluntarily paid, and that plaintiff in error by such payment waived all objection he might have urged against illegality of the tax in an action to enforce its collection."

Authority to make correction after delivery of the duplicate to the county treasurer is given the auditor by section 2589, but only in the event the tax is erroneously charged, but such limited authority is given only during the life of the current duplicate. There is no authority to make such correction after the annual settlement of the county treasurer in September, which is provided for in section 2684.

Provision is also made in section 2589, in the event that "erroneous taxes or assessments have been charged or collected in previous years," to call the attention of the county commissioners to such fact, in which event an order may be drawn upon the treasury for the amount so erroneously charged and collected, but which is payable only from "surplus or unexpended funds in the county treasury" and such authority is limited by section 2590 to a refunder for five years. However, such section has been construed to apply only where the taxes have been erroneously charged and collected and not where the taxes are illegally collected. Such error refers only to a mistake of the listing or collecting officers. *Opinions of the Attorney General for 1917*, page 279, 282.

Sections 12078 and 12078-1 make further provision with reference to tender of taxes admitted to be due and the reimbursement of the complaining tax payer from unexpended funds in the possession of the collecting officer, but, in view of the holding in *Hammond vs. Winder*, supra, and what has previously been said in this opinion, no consideration need be given them.

From the foregoing, it would appear that a protest against payment, either orally or in writing, would not be effective in view of the foregoing provisions of the statute. However, attention may be called to the holding of the Supreme Court that voluntary payment of taxes, even though illegally assessed, may not be recovered, even under section 12075 prior to the enactment of sections 5609, et seq. An examination of the authorities on the question of whether a payment was or was not voluntarily made, leads to the conclusion that to entitle one to relief, prior to the enactment of sections 5609, et seq., it must appear that the tax payer not only expressly made protest, but that he made the payment under immediate and urgent necessity of preserving his property; and that a payment, in order to avoid the attachment of the ordinary penalties, or the creation of a lien and cloud upon his title, is not sufficient; that, in order to constitute the same an involuntary payment, it must be shown that the payment and protest were made after the officer investigated with authority to make collection had threatened, and was about to disturb the owner in the possession and control of his property with intent to seize it for the satisfaction of the tax.

See

- City of Marietta vs. Slocomb*, 6 O. S., 471.
- Baker vs. City of Cincinnati*, 11 O. S., 534.
- Stephan, Treas., vs. Daniels*, 27 O. S., 527.
- Castor vs. Waterson*, 38 O. S., 319.
- Wilson vs. Pelton*, 40 O. S., 306.
- Whitbeck, Treas., vs. Minch*, 48 O. S., 210.
- Ratterman, Treas., vs. Express Co.*, 49 O. S., 608.
- Bebpler vs. City*, 23 W. L. B., 229.
- Steel Co. vs. Taylor, Secy. of State*, 3 N. P., 152.

In the case of *Whitbeck, Treasurer, vs. Minch*, supra, it was said:

"To constitute the payment an involuntary one, it must appear that the treasurer was about to levy a distress upon the property of the party charged with the assessment; a simple protest against the validity of the

assessment, with notice to the treasurer that the party intends to bring suit to recover it back, is not sufficient. In such case the general rule applies that, if litigation is intended, it must precede payment, where, as in such cases, the party has a plain remedy provided by statute, section 5848 Revised Statutes (now section 12075 General Code), and may resort to the same, and thereby avoid a distress of his property."

In *Steel Company vs. Taylor*, supra, the court said:

"The threat of the Secretary of State to sue for the penalties is not such duress as made the payment involuntary. If he had sued the plaintiff for the penalties, the plaintiff would have been accorded a day in court, when and where it could have plead, offered proof, and had a decision on the question of its liability. There could have been no immediate seizure of the plaintiff's property by any process, and it had no personality that could be seized.

"The petition fails to reveal a single element of an involuntary payment of the fee or tax. The protest is of no avail to make it an involuntary payment. The office of a protest is only to evidence the party's intention, at the time the payment was made; and when, independently of the protest, the circumstances in which a payment is made would not justify a recovery thereof, the fact that the payment was made under protest will not render such payment involuntary."

As this department has previously held, it is a question of fact to be determined in each case as to whether or not payment was involuntary. *Opinions of Attorney General for 1920*, p. 523. See also *Opinions of the Attorney General for 1917*, p. 279.

However, whether or not the proper protest was made against the payment of the tax, whether it be oral or in writing, the tax payers' remedy is prescribed by sections 5609, et seq., which is the exclusive remedy; and whether or not the tax was paid under protest, oral or written, is immaterial. The statute amply protects him, in permitting him to make a tender of the amount which he admits to be due and if such tender is made, no penalty can attach; and if the treasurer accept the amount tendered, he may then collect the difference between the amount tendered and the amount determined to be due. Whether interest may be collected on the difference need not be considered here.

In specific answer to your inquiry, I therefore advise you as follows:

1. Sections 5609, et seq., make definite provision for tender by a complaining tax payer of the amount he concedes due as tax upon the property complained of, whether as to personal property or real estate, and payment of the tax during the pendency of appeal on the valuations subject to such complaint abates the appeal.

2. In view of the provisions of sections 5609, et seq., protest, whether oral or written, has no effect whatsoever upon the rights of the complaining taxpayer, the procedure necessary to be followed being prescribed by said sections.

Respectfully,
C. C. CRABBE,
Attorney General.