to require the taxpayer to pay a penalty at the time the taxpayer tendered to the county treasurer the taxes on his real property in the manner and at the time stated in your communication, and that no penalty could be thereafter legally entered against such taxes as delinquent by reason of the fact that the taxpayer refused to pay a penalty on these taxes at the time he tendered the same to the county treasurer. If at the time of the settlement between the county auditor and the county treasurer, which I assume has since been made, a penalty was entered by the county auditor with respect to the taxes tendered by this taxpayer for the reasons above stated, I am of the opinion that such penalty should be abated by the county auditor under the authority conferred upon him by section 2588, General Code; and if such penalty is not abated by the county auditor the same can be remitted by the Tax Commission under section 5624-10, General Code. Although under the provisions of section 2588, General Code, the authority thereby given to the county auditor is to correct clerical errors on the tax list or duplicate, rather than those of a fundamental nature, it has been held that an error in a tax list which has been committed by a board or officer while acting without authority of law, or in excess thereof, cannot be said to be fundamental and beyond the power of the county auditor to correct. *State of Ohio, ex rel.,* vs. *Lewis, County Auditor,* 1 C. C. (N. S.), 56. See *State, ex rel. Poe,* vs. *Raine,* 49 O. S., 447. In an opinion of this office directed to the Auditor of State under date of July 27, 1932, Opinions of the Attorney General, 1932, Vol. II, pages 890, 893, it was held that where a county auditor had illegally abated unpaid penalties entered on the tax list and duplicate he not only had the authority under section 2588, General Code, to restore such penalties to the tax list and duplicate but that it was his duty to do so.

In any event, if such illegal penalty is not abated by the county auditor, the same may be remitted by the Tax Commission of Ohio under the authority of section 5624-10, General Code, which expressly provides, among other things, that the Tax Commission may remit penalties which have been illegally assessed.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4334.

INSURANCE—TAXABILITY OF WAR RISK INSURANCE POLICIES DISCUSSED.

SYLLABUS:

Various questions relating to the taxability of the proceeds of War Risk Insurance policies considered and discussed.

COLUMBUS, OHIO, June 11, 1935.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—By way of application of my Opinion No. 3631, directed to you under date of December 15, 1934, Opinions of Attorney General, 1934, Vol. III, page 1770, relating to the taxation of the proceeds of a policy of War Risk Insurance issued to a World War veteran in the particular situation there presented, my informal opinion is requested with respect to the taxation of the proceeds of a policy of this kind in the sev-

eral different situations noted in a memorandum which you have presented to me.

In my former opinion to you above referred to, it was held that the proceeds of a policy of War Risk Insurance issued to a World War veteran in his lifetime, and paid to the administrator of the estate of such World War veteran after his death, are subject to property taxation in this State. In the memorandum which you have submitted to me you have set out several different situations in which questions with respect to the taxation of moneys paid on War Risk Insurance policies are presented. The first situation here presented is that with respect to the proceeds of a War Risk Insurance policy which are paid to the administrator of the estate of a deceased World War veteran after his death and which, I assume, are to be distributed to those entitled thereto under the laws of descent and distribution of this State. This was the precise question considered in the former opinion of this office above referred to and is ruled by the conclusion reached in that opinion.

Your second question relates to the proceeds of a War Risk Insurance policy paid to the insured during his life presumably as disability insurance, which proceeds upon the death of the insured were paid to his administrator for distribution under the general laws of this State. No reason is seen for making any distinction on principle between this question and that first above presented. And I am of the opinion that in this situation the moneys in the hands of the administrator are taxable.

From your third question, it appears that the proceeds of the insurance policy have been paid to the administrator of the World War veteran after his death, but that the same are to be paid over by such administrator to some particular beneficiary named in the policy. In this situation, it appears that the moneys provided for by the policy have not yet reached the intended recipient, and, in this sense, the moneys are still "payable" as that term is used in section 22 of the World War Veterans Act (sec. 454, Title 38, U.S.C.), which section, in so far as the same is here pertinent, reads as follows:

> "The compensation, insurance and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the class of creditors of any person to whom an award is made under Parts II, III, or IV; and shall be exempt from all taxation."

It follows, therefore, by way of answer to your third question, that the moneys in the hands of the administrator of the insured for payment to the beneficiary named in the policy, are exempt from taxation.

Your fourth and fifth questions are with respect to the taxation of the proceeds of disability insurance under a policy of this kind paid to and in the hands of (a) the guardian of a World War veteran and/or (b) the veteran himself. These questions, like those before noted, are ruled by the provisions of section 22 of the World War Veterans Act, above quoted. In the case of *Department of Public Welfare, for Use and Benefit of Central State Hospital,* vs. *Allen,* 255 Ky., 301, the Court of Appeals of that State, construing these provisions of section 22 of the World War Veterans Act, held:

> "1. Under World War Veterans' Act providing that 'compensation, insurance, maintenance and support allowance payable' to veteran shall not be subject to claims of creditors, the quoted language means funds which veteran is entitled to receive from the United States under the act, and not funds which have come into his possession (World War Veterans' Act 1924, sec. 22 (38 USCA sec. 454)).
>
> 2. Possession of guardian or committee of World War veteran is regarded as possession of veteran as regards creditors' right to compensation received

from United States government (World War Veterans' Act 1924, sec. 22 (38 USCA sec. 454))."

Touching this question, and with respect to the contention that money in the hands of a beneficiary of a policy of War Risk Insurance issued to a World War veteran is not subject to the claims of creditors, the court in the case of *Duzan* vs. *Cantley,* 227 Mo. App., 670, said:

> "This contention is on the theory that the purpose and intent of the legislation in behalf of veterans is to protect the money from all claims, except the United States government, not only until it comes into the hands of the beneficiary, but also until the latter has himself spent it. We think this is not the correct construction or interpretation to be placed thereon. In our view, funds thus arising are not thus protected after they have once come into the hands of the beneficiary. They have then become his absolute property, and having once come into his hands are no longer an object of solicitude or care on the part of the government. The latter is careful to protect the fund until the beneficiary receives it, but no further. This seems to be clear from the use and subsequent reiteration of the word 'payable'. So long as a fund is 'payableable' to a person it has not yet reached his hands, but when it has, it can no longer be said to be payable to him."

In addition to other cases cited and discussed in the former opinion of this office above referred to, the conclusions reached in the Kentucky and Missouri cases here cited are clearly supported by the cases of *State, ex rel. Smith,* vs. *Board of County Commissioners of Shawnee County,* 132 Kan., 233; and *Arcese* vs. *Com.,* 160 Va., 116. No reason is seen for extending the tax exemption provision of section 22 of the World War Veterans Act beyond the provision therein contained which protects the insurance payable under a policy of this kind from the claims of creditors of the insured. I am of the opinion, therefore, by way of answer to your fourth and fifth questions, that the proceeds of disability insurance under a policy of this kind in the hands of the insured veteran or his guardian, are taxable. And as a corollary to this conclusion, it may be further added that if such moneys have been deposited in a bank or other financial institution, such moneys will be taxable as deposits.

The conclusion here reached with respect to the taxability of the proceeds of disability insurance under a policy of War Risk Insurance, in the hands of a guardian of a World War veteran is contrary to that reached in former opinions of this office which, following earlier decisions in the State courts, held with respect to this question that the guardian was but an agent or instrumentality of the Federal government with respect to the moneys in his hands and that in this situation such moneys were "payable" as this term is used in section 22 of the World War Veterans' Act above quoted. However, this view with respect to the relationship of the guardian and of a World War veteran with respect to the Federal government and to his ward as to moneys of this kind in his hands as such guardian, was distinctly rejected in the case of *Spicer* vs. *Smith* 288 U. S., 430, and in later cases both state and federal which followed this decision, some of which are referred to in my former opinion above noted. In this situation I do not feel that I have any discretion to do otherwise than to follow the decisions which the courts have lately rendered on this question.

Respectfully,
JOHN W. BRICKER,
Attorney General.