

Note from the Attorney General's Office:

1928 Op. Att'y Gen. No. 28-1679 was rendered
obsolete by 1974 Op. Att'y Gen. No. 74-068.

Answering your question specifically, it is my opinion that :

1. The provisions of Section 5625-36, General Code, (112 O. L. 391, 408), relative to certificates of fiscal officers in cases of contracts or leases running beyond the termination of the fiscal year in which they are made, have no application to contracts for the construction of improvements to be paid for out of bond issues.

2. A city council is not authorized under Section 2293-26, General Code, to issue bonds in installments as funds are needed to meet contractor's estimates as the same fall due.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1679.

TAX AND TAXATION—DELINQUENT TAXES—5% PENALTY UNDER SECTION 2656, GENERAL CODE, APPLIES TO BOTH PERSONAL AND REAL ESTATE TAXES—WHEN CHARGEABLE—ACCRUAL DATE OF 10% PENALTY UNDER SECTION 5678, GENERAL CODE.

SYLLABUS:

1. *The penalty of five per cent provided by Section 2656, General Code, applies to both personal and real estate taxes; but said penalty may not legally be charged in instances in which taxes are voluntarily paid between the twentieth day of January, to which date the collecting period has been extended by the county commissioners, and the time of the February settlement. In order legally to charge said five per cent penalty the county treasurer must proceed by distress or otherwise, as provided by statute, to collect said delinquent tax.*

2. *The penalty of ten per cent provided in Section 5678, General Code, may not legally be charged by the treasurer when payment of the tax on real estate is made before the time of the February settlement between the county auditor and county treasurer.*

COLUMBUS, OHIO, February 6, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication, which reads as follows :

“We are in receipt of the following inquiries from Mr. F. H. Doyle, our State Examiner located at Cincinnati, and we are respectfully requesting your written opinion upon the same :

Question 1. Does the penalty of 5% provided by Section 2656, G. C., apply to both personal and real tax, and may the penalty be legally charged in instances in which taxes are voluntarily paid between the 20th day of January, when the tax collecting period has been extended to this time by the county commissioners, and the time of the February settlement? If not, to what extent must the county treasurer exert himself in urging the collections in order that this penalty may be attached?

Question 2. May the penalty of 10% provided in Section 5678, G. C., be charged by the treasurer when payment of the tax on real estate was not made up to January 20th, to which time the collection had been extended, but paid prior to the February settlement?"

Section 2656, General Code, reads as follows :

"When one-half of the taxes charged against any entry on a tax duplicate in the hands of a county treasurer is not paid on or before the twentieth day of December next after being so charged, or when the remainder of such tax is not paid on or before the twentieth day of June next thereafter, the county treasurer shall proceed to collect it by distress or otherwise together with the penalty of five per cent on the amount of tax so delinquent, which penalty shall be paid into the treasurer's fee fund."

Section 2657, General Code, reads as follows :

"The county commissioners of any county by resolution spread upon their journal may extend the time of payment of taxes from June twentieth to July twentieth of the same year and from December twentieth to January twentieth of the following year. In all cases where such half of a tax other than on real estate has not been paid on the twentieth day of December or on the twentieth day of the following January, if the time has been so extended, the whole amount of taxes other than on real estate for the current year so charged shall be due and delinquent, and shall be collected in the manner and with the penalty provided in the preceding section."

It is noted that under the provisions of Section 2656, General Code, if one-half of the taxes charged against any entry on a tax duplicate in the hands of a county treasurer is not paid on or before the twentieth day of December, the county treasurer shall proceed to collect it by distress or otherwise together with the penalty of five per cent on the amount of tax so delinquent. This section refers to taxes generally, and does not limit its provisions to either personal or real estate taxes. However, before the five per cent penalty may be imposed the county treasurer must proceed to collect said delinquent tax by distress or otherwise.

In an opinion of this department, Opinions, Attorney General, 1920, Vol. II, page 1269, it is stated in the second paragraph of the syllabus that :

"The five per cent penalty for the collection of delinquent taxes, both real and personal, does not attach automatically as of a given date, but only when the time for the voluntary payment of taxes has expired and the process of collection commences."

The five per cent penalty does not accrue until after the time fixed by the county commissioners for the payment of taxes, and then only when the county treasurer has taken the procedure by distress or otherwise as provided by statute to collect the delinquent tax.

It is also stated in said 1920 opinion, *supra*, that :

"It is perfectly clear that what the treasurer does up to 'the twentieth day of December' (made the twentieth day of January by action of the commissioners under authority of Section 2657) is of a different character from

what he does thereafter. The former is to be described by the phrase 'receiving payment of taxes'; the latter by the phrase 'collecting taxes.' For receiving payment of taxes the treasurer is not entitled to add the charge designated as the five per cent penalty; for performing the function known as 'collection' he is entitled to and must make the charge."

The last statement, however, must be limited to cases where the collection is made by distress or otherwise as provided by statute.

Said opinion continues :

"The same remarks apply to Section 2657, cited in your letter, in so far as that section prescribes the addition of the five per cent penalty on the real estate tax when the half tax 'has not been paid on the twentieth day of December.' * * * the five per cent penalty may, under the circumstances described in Section 2657 of the General Code, become chargeable prior to the settlement, and indeed does become chargeable as soon as the time for 'payment' is passed and the function of 'collection' begins with respect to the first half tax."

This last statement must also be limited to the "collection" by distress or otherwise as provided by statute.

The limitations and corrections herein mentioned of the conclusions of the 1920 opinion were made in an opinion of this department, reported in Opinions, Attorney General, 1921, Vol. I, page 135.

It is my opinion that the penalty of five per cent provided by Section 2656, General Code, applies to both personal and real estate taxes.

You inquire if the five per cent penalty may be charged in instances where the taxes are voluntarily paid between the end of the collecting period as fixed by the county commissioners and the time of the February settlement.

It is assumed that your question refers to the voluntary payment of taxes during this period without any action, by distress or otherwise, on the part of a county treasurer to collect such taxes, and, if so, my answer is that the five per cent may not be charged, because the five per cent penalty is only to be charged in cases where the county treasurer proceeds under the statute to collect, and collects, *by distress or otherwise*, as provided by statute, the delinquent taxes. This was the holding in the case of *Hunter, Treasurer vs. Borck*, 51 O. S. 320, where the court in construing Section 1094, Revised Statutes, (now Section 5678, General Code) said :

"The five per centum penalty awarded to the treasurer by Section 1094, was designed to stimulate his activity in collecting the taxes unpaid on the 20th of December and the 20th of June, so that, in making his semi-annual settlement with the county auditor, he might be able to report such taxes as paid, and not liable to come again upon the duplicate as delinquent. But to entitle the treasurer to the compensation allowed under Section 1094, he must render the prescribed service. He must proceed to collect, *and collect* the delinquent taxes by distress or otherwise, together with the penalty of five per centum on the amount of taxes so delinquent.

It is conceded that the treasurer cannot earn his commission by merely standing behind the counter and receiving the tax the next day after the 20th of December. If he would proceed *to collect*, and collect the delinquent tax otherwise than by distress, he may collect by procuring a rule of court, as provided by Section 1097 of the Revised Statutes; or, by attachment

and garnishee process as described in Section 1102 of the Revised Statutes; or, by action as provided in Section 1104 of the Revised Statutes; or, by special effort in person or through agent, and not by simply holding himself out as ready to receive the taxes due, or making a formal request of the taxpayer, or giving notice to taxpayers generally to pay their delinquent taxes.

In the case at bar, the efforts made by the treasurer to collect the taxes and assessments were not such as would meet the requirement of the statute. No suit was begun; no attempt was made to collect by distress; and there was no resort to any other summary mode of procedure.

In June, 1892, and again in December, 1892, the plaintiff in error, as treasurer of Lucas County, handed to William Barrett a statement of the amount charged at those respective dates upon the duplicate against the land, and requested payment. And in November, 1892, he mailed to Mr. Barrett a copy of the printed notice, signed by him as treasurer, dated at Toledo, November 1, 1892, addressed to taxpayers generally, and stating that their December taxes must thereafter be paid by December 20, or five per cent penalty would be charged thereon. But such action on the part of the treasurer, was not, in our judgment, such a proceeding to collect the taxes and assessment by distress or otherwise, as is requisite to entitle the treasurer to the five per centum penalty under Section 1094."

You also inquire to what extent a county treasurer must exert himself in urging the collection in order that this penalty may be attached.

It is evident that he must take the procedure by distress or otherwise as provided in the statute. The procedure already outlined herein and the discussion by the Supreme Court in the foregoing quoted opinion sufficiently advises in this regard.

In your second question you inquire as to whether the penalty of ten per cent provided for in Section 5678, General Code, may be charged by the treasurer when payment of the tax on real estate was not made on or before the time to which collection had been extended by the county commissioners, but was made prior to the February settlement.

Section 5678 of the General Code reads as follows:

"If one-half the taxes charged against an entry of real estate is not paid on or before the twentieth of December, in that year, or collected by distress or otherwise prior to the February settlement, a penalty of ten per cent thereon shall be added to such half of said taxes on the duplicate. If such taxes and penalty, including the remaining half thereof, are not paid on or before the twentieth of June thereafter, or collected by distress or otherwise prior to the next August settlement, a like penalty shall be charged on the last half of such taxes. The total of such amounts shall constitute the delinquent taxes on such real estate to be collected in the manner prescribed by law."

This section provides that if one-half the taxes charged against an entry of real estate be not *paid* on or before the twentieth day of December, or *collected* by distress or otherwise prior to the February settlement, a penalty of ten per cent shall be added. Under the express provisions of this section the ten per cent may be added only after the February settlement. No penalty may be charged up to the time of payment as extended by the county commissioners. Then between that time and the February settlement the five per cent penalty may be charged when said

tax is collected by distress or otherwise as provided by statute; and the ten per cent may not be charged until after the February settlement.

In the 1920 opinion of this department, *supra*, it was stated that:

"So far as real property taxes are concerned, it is clear from Section 5678, General Code, that the fifteen per cent penalty prescribed thereby is not chargeable until after the February settlement. The language of the section is:

'If one-half the taxes charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, or collected by distress or otherwise prior to the February settlement' the penalty shall be added.

The two parts of this clause are not alternatives. The theory of the section is that until 'the twentieth day of December' the taxes are to be 'paid'—that is, tendered to the treasurer by the taxpayer; and that between the twentieth day of December and the time of making the February settlement they are to be 'collected by distress or otherwise,' that is, through the efforts of the county treasurer acting under such sections as Section 2658 authorizing the distraint of goods and chattels for the payment of any tax, or Sections 2667 et seq., authorizing the foreclosure of the lien for real property taxes due and unpaid. Of course, it is not meant to imply that the only action that the treasurer can take between these dates is action of the kind described. It is perfectly lawful for him to receive the money when tendered by the taxpayer, but in contemplation of law the tax is not being *paid* after the last day limited for the payment of taxes; it is rather being *collected* by the treasurer. As to real estate, however, the treasurer can not lawfully collect the fifteen per cent penalty on the tax between these dates. Section 5678 implies as much when it prescribes, in part, that 'if one-half the taxes charged against an entry of real estate is not * * * collected by distress or otherwise prior to the February settlement,' a penalty shall accrue. So that so far as the question of penalty on real estate is concerned your general question is answered by the statement that this penalty is not chargeable on account of such taxes paid to or collected by the county treasurer prior to the February settlement, though received after the time limited for the 'payment' of taxes."

The language of the above opinion to the effect that "in contemplation of law the tax is not *being paid after the last day* limited for the payment of taxes; it is rather being *collected* by the treasurer," was modified and corrected in the subsequent opinion of this department, viz., Opinion No. 1855, rendered February 11, 1921, to the Prosecuting Attorney, Ravenna, Ohio, reported in Opinions, Attorney General, 1921, Vol. 1, page 135. In this later opinion it was stated that:

"The thanks of this department are due to you for your courteous letter of February 1, quoting a letter from the tax commission of Ohio, which raises a question as to certain features of the holding in Opinion No. 1776 of this department, rendered December 31, 1920.

The commission refers to the case of *Hunter vs. Borck*, 51 O. S. 320, which was overlooked in consideration of Opinion No. 1776. The case holds, among other things, that a county treasurer is not entitled to collect the penalty of five per cent provided for by several of the sections referred to in said Opinion No. 1776 in case he merely receives delinquent taxes over

the counter after the last date limited for the payment of taxes. The case draws the general distinction that was pointed out in Opinion No. 1776 between the function known as 'receipt of payment of taxes' by the county treasurer and that known as 'collection'; but it forces a modification of some of the language in said Opinion No. 1776 by holding that some 'special effort in person or through agent' must be made by the county treasurer in order to constitute a 'collection' which may be used as the predicate of the penalty. The only direct statement on this point in Opinion No. 1776 which needs express modification is embodied in the following sentence:

'in contemplation of law the tax is not being *paid* after the last day limited for the payment of taxes; it is rather being *collected* by the treasurer.' This statement is incorrect."

The conclusion is therefore reached that the penalty of ten per cent provided in Section 5678, General Code, may not be charged by the treasurer when payment of the tax on real estate is made before the February settlement between the county auditor and county treasurer.

Summarizing, it is my opinion that:

1. The penalty of five per cent provided by Section 2656, General Code, applies to both personal and real estate taxes; but said penalty may not be legally charged in instances in which taxes are voluntarily paid between the twentieth day of January, to which date the collecting period has been extended by the county commissioners, and the time of the February settlement. In order legally to charge said five per cent penalty the county treasurer must proceed by distress or otherwise, as provided by statute, to collect said delinquent tax.

2. The penalty of ten per cent provided in Section 5678, General Code, may not legally be charged by the treasurer when payment of the tax on real estate is made before the time of the February settlement between the county auditor and county treasurer.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1680.

DOG—LICENSE—MUST BE LICENSED IN COUNTY WHERE KEPT OR
HARBORED.

SYLLABUS:

Section 5652, General Code, requires an application for registration of any dog, subject to the provisions thereof, to be filed in the office of the county auditor of the county in which such dog is kept or harbored. Any registration tag otherwise issued would not constitute a valid registration tag.

COLUMBUS, OHIO, February 6, 1928.

HON. HAROLD A. PREDMORE, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—This will acknowledge your letter dated February 1, 1928, which reads: