2752.

PUBLIC UTILITY—APPEALS FROM DETERMINATION OF TAX COMMISSION WITH RESPECT TO VALUATION OF ITS PROPERTY—TENDER MADE OF AMOUNT OF TAX ON BASIS WHICH IT CONSIDERS TRUE VALUE OF PROPERTY—WHEN SUCH PUBLIC UTILITY LIABLE FOR PENALTY.

If a public utility appeals from the determination of the tax commission with respect to the valuation of its property under section 5611-2 of the General Code, and the "proceeding in error" provided for thereby remains undisposed of until after the time for the payment of the tax thereon for the first half year has expired; and if before such time has expired the utility makes a tender of the amount of the tax on a basis which it considers to be the true value of the property; and if by the final determination of the proceedings in court the action of the tax commission is affirmed or the assessment is not reduced to the amount claimed by the utility, the utility will escape liability for any penalty for nonpayment of the tax when due in respect of the amount tendered; but as to the amount of the tax based upon the difference between the assessment as finally determined and that contended for by the utility, and on which the tender was based, the utility is liable for penalty based thereon.

COLUMBUS, OHIO, December 31, 1921.

GENTLEMEN:—The commission requests the opinion of this department upon the following questions:

"A public utility whose property has been assessed for taxation for 1921 has appealed from the determination of this commission to the court of common pleas as provided under section 5611-2 G. C. In all probability the case will not be heard before the time for the payment of the tax for the first half year has expired.

If, while this suit is pending and before the time for the payment of the tax has expired, the company makes a tender of the amount of tax upon the basis which it considers to be the true value of the property, will it be liable for any penalty for failure to pay the entire amount charged? If so, upon what basis should the penalty be computed?

The answer to this inquiry involves the interpretation of sections 5609 and 5611-3 G. C."

The sections referred to in the commission's letter are, in part, as follows:

"Sec. 5611-3. In case of the institution of such proceedings, liability for taxes upon the property in question, and for nonpayment 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 nonpayment thereof within the time required by law, shall be based upon the valuation as finally determined."

"Sec. 5609. * * * The determination of any such complaint (by a board of revision) 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 nonpayment thereof within the time required by law, shall be based upon the valuation or assessment as finally determined. Each com-

> plaint shall state the amount of overvaluation, undervaluation, or illegal valuation, complained of; 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 nonpayment 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 illegal excessive or illegal valuation.*"

It is apparent from an examination of the last sentence of section 5609 that its provisions qualify section 5611-3. It is true that the language referred to was found in section 5609 before the date of its last amendment in 108 Ohio Laws, part I, 557. The section, however, was enacted in 107 Ohio Laws, 29, by the same general assembly which enacted section 5611-3 (107 O. L. 550). Being *in pari materia,* it is believed that the two sections should be construed together, and that a taxpayer who has resorted to section 5611-1 and succeeding sections of the General Code is entitled to the benefit of the privilege of the tender provided for in section 5609.

To be sure, section 5611-3 expressly provides that "liability for taxes and for any penalty for nonpayment" shall be based upon the valuation as finally determined. This section would therefore operate if no tender were made, but the proceedings under section 5611-1 might continue until after the time at which the taxes would become delinquent. But if a tender is made, section 5609 would seem to govern and it becomes the section which ultimately has to be considered.

In considering this section it is worthy of notice that language like that just referred to as being found in section 5611-3 is likewise found in section 5609 (see the first sentence of the section as above quoted). One policy therefore runs through the two sections, namely, that the filing of a complaint shall not of itself prevent the ultimate accrual of a penalty for the nonpayment of the tax at the time when but for the filing of the complaint it should have been paid, but that the amount of the penalty shall be based upon the amount of the tax as determined by the final action on the complaint when taken; this is so whether the complaint is filed with the board of revision or in the form of a "petition in error" filed in the common pleas court under section 5611-2 of the General Code. The provision for the making of a tender and its effect is therefore to be regarded as an exception to or qualification of the rule based upon this policy. It is not to be considered separately from the general principle from which the policy is derived, but as a part of it.

The words immediately requiring consideration are as follows:

> "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 nonpayment thereof. The acceptance of such tender, however, shall be without prejudice to the claim for taxes upon the balance of the valuation or assessment."

The first clause above quoted expressly authorizes the treasurer to accept less than the amount charged on his duplicate, in cases in which a complaint or a proceeding in court is pending. The last sentence thereof saves the claim for taxes upon the balance of the valuation or assessment over and above the amount tendered and accepted. The second and vital clause provides that if

the tender is not accepted no penalty shall be assessed because of the nonpayment thereof. Of course, if the tender is accepted no penalty is to be assessed because of nonpayment because there has been a payment.

The precise question is as to whether the partial payment or tender is to have the effect of preventing the imposition of any penalty, no matter what will be the ultimate determination of the complaint or "petition in error." Of course, if the final determination of the complaint or "petition in error" is upon a basis which would produce no greater amount of taxes than that paid or tendered, no question can arise; for in that case the final determination will be to the effect that the tax had been properly paid or tendered. But if the complainant or plaintiff fails wholly or partially to secure a reduction of the assessment or valuation to such amount as will bring the tax down to the amount tendered or paid, the question which has been stated exists.

In the opinion of this department, the effect of a payment or tender is to destroy the basis of the penalty with respect only to the amount of taxes thus paid or tendered; so that if the amount of taxes based upon the ultimate determination of the complaint or "petition in error" proves to be greater than that so paid or tendered, the claim for the balance as originally charged or as modified by the ultimate determination of the complaint or "petition in error" remains as the predicate of a penalty.

The reasons for this conclusion will be briefly stated:

In the first place, it is clear that the tender or its acceptance does not prejudice the claim for taxes upon the balance This is expressly provided as to the payment and must be also the rule as to the tender.

In the second place, the claim for the taxes, being saved, relates back, under provisions common to sections 5609 and 5611-3 of the General Code, to the date of the original assessment. The provisions referred to expressly declare that liability for penalty for nonpayment shall also date back in like manner.

In the third place, it is expressly declared in these common provisions that the valuation or assessment as finally determined shall constitute the basis of the imposition of the assessment by relation back in the manner aforesaid.

In the fourth place, it is to be noted that the treasurer may accept "any amount" tendered as taxes, so that if we give to the tender or payment thereunder the effect of destroying all potential liability for penalty, the complainant or plaintiff might tender a mere nominal sum—much less than the amount based upon the valuation as he claims it should be in his complaint or "petition in error," and escape liability for the penalty, though it is morally certain that the final determination, whether he succeeds or not, will produce a much larger amount of taxes than that which he has tendered or paid. It is very unlikely that the legislature intended any such results.

Finally, the grammatical construction of the clause which has ultimately to be considered favors the view expressed. It will be noted that the clause provides that "no penalty shall be assessed because of the nonpayment *thereof.*" What is the antecedent of the relative word with which this clause concludes? Searching the preceding context, we find the phrases "any amount tendered as taxes" and "such tender," to one or both of which, and to them alone, it could apply. An exact paraphrase of the sentence by expanding the word "thereof" so as to express its meaning would be as follows:

> "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 nonpayment *of the amount so tendered as taxes.*"

In other words, the sentence does not declare that the making of a tender of "any amount" shall, in the event the tender is not accepted, preclude the assessment of a penalty because of the nonpayment of the correct amount; it merely declares that the making of a tender shall, even without acceptance, preclude the charging of a penalty on the amount covered by the tender.

Inasmuch as this is the limited effect of the clause prohibiting the attaching of the penalty, and inasmuch as the other clauses of the statute which have been examined authorize the imposition of the penalty on the basis of the final determination, *nunc pro tunc,* the conclusion is reached that in case the amount finally determined in the so-called "proceedings in error" under section 5611-2 et seq. of the General Code is greater than the amount on which the tender was based, the complainant must pay, not only the difference in principal sums, but also the penalty thereon, computed upon such difference.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2753.

BOARD OF EDUCATION—WHEN AUTHORIZED TO PROVIDE FOR PAYMENT OF AUTOMOBILE MILEAGE TO OFFICERS AND EMPLOYES USING PRIVATE AUTOMOBILES IN PERFORMANCE OF OFFICIAL DUTIES—WHETHER OR NOT TEN CENTS PER MILE FAIR, QUESTION OF FACT.

1. *Boards of education are impliedly authorized under the provisions of sections 7620 and 4750 G. C. to expend and provide for the payment of automobile mileage to officers and employes using their private automobiles in the performance of official duties, when such transportation services are required by said board, and deemed necessary for the best interests of the schools under their jurisdiction.*

2. *The question of whether or not ten cents per mile is a fair and reasonable remuneration to be paid for the use of such privately owned automobiles is one of fact, depending upon local conditions, and within the discretionary powers of the board of education to determine.*

COLUMBUS, OHIO, December 31, 1921.

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

GENTLEMEN:—Receipt is acknowledged of your letter of recent date reading as follows:

"We respectfully request your written opinion upon the following matters:

Statement of Facts

The board of education of the city of Cleveland, Ohio, owns and maintains about twenty automobiles for certain of their employes, besides this they pay automobile mileage at the rate of ten cents per mile, to forty-eight superintendents, assistant superintendents, principals, teachers, custodians, director of law to director of schools, director of schools, architects, truant officers, etc. This mileage is paid to the owners of their own cars, supposedly to include only the number of miles run in the performance of their duty. For the year ending