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SEMI-ANNUAL TAX SETTLEMENT, WHEN MADE—PROCEDURAL STEPS TO PLACE DELINQUENT LANDS ON FORECLOSURE LIST, MANDATORY—PRIOR DELINQUENCIES—UNDER SECTION 5710 AND 5715, GENERAL CODE—AUDITOR MAY NOT SELECT ONLY CERTAIN LANDS FROM DELINQUENT LIST—NOTICE BENEFICIAL AND NOT PREJUDICIAL—DUE PROCESS.

SYLLABUS:

1. *A semi-annual tax settlement is made when it is finally approved by the Auditor of State.*

2. *Section 5704, General Code, effective October 26th, 1936, is effective as to all mandatory procedural steps therein provided for, necessary to be taken to place delinquent lands on the foreclosure list, that had not been taken under the law existing prior thereto and which steps under such pre-existing law, were not mandatory.*

3. *An August 1936 semi-annual settlement having been made December 9th, 1936, the county auditor could, in June, 1937, advertise the delinquent land list, but in contemplation of law, the August, 1937, semi-annual settlement will be made September 15, 1937, and the 1937 delinquent list will have to be published immediately thereafter, it would seem not only feasible but advisable that the prior delinquencies should be carried forward as provided by Sections 5710 and 5715, General Code, and included in the list required to be made immediately after the August, 1937 semi-annual settlement as required by Section 5704, General Code.*

4. *The county auditor has no power to select and advertise certain parcels from the delinquent list as the law grants no such power and for a stronger reason, Section 5704, General Code, provides specifically that he shall make and certify a list and duplicate thereof of all the delinquent lands in his county.*

5. *If the county auditor indulged in the practice of selecting and advertising just such tracts of land as he saw fit to advertise a property owner whose lands were advertised could very properly object to such procedure as it is not in accord with the law.*

6. *Lands, concerning which everything has been done necessary to be done to bring about their forfeiture of lands, except the publication required by Section 5718-2, General Code, may be advertised at any reasonable time, such advertisement being beneficial and not prejudicial to the landowner's rights.*

7. *Section 5704, General Code, effective October 26, 1936, is declared by the General Assembly to be mandatory that prior thereto had*

*been interpreted as directory only and inasmuch as it provides certain specific requirements as to the duty of the officials having to do with the collection of delinquent taxes and the subsequent forfeiture of lands, the procedural steps therein set out should be followed so as to insure the landowner all the benefit of due process.*

8. *Lands certified as delinquent at the close of the August, 1932, settlement should be advertised according to law before foreclosure, and those certified in 1933, 1934 and 1935, need not be so advertised as they come within the provisions of amended Section 5718, General Code, which requires no advertisement.*

COLUMBUS, OHIO, June 24, 1937.

HON. FRANK T. CULLITAN, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR: I acknowledge receipt of your recent communication as follows:

"In the matter of delinquent real estate taxes local officials are confronted with continual changes in the laws pertaining to foreclosure and forfeiture of real property and with property which has been delinquent for several years. The law requiring the advertisement of delinquent parcels as well as the law requiring advertisement of parcels subject to foreclosure has undergone many changes during the past ten years. As a result of these changed provisions County Auditors are uncertain as to their duties and responsibilities.

Accordingly our County Auditor has submitted a list of eight questions which he has requested be forwarded to you for an opinion. Inasmuch as these questions affect the procedure throughout the State I am submitting these eight questions to you."

I will consider your questions seriatim.

"FIRST: Section 5704 G. C. provides for advertisement of the delinquent list immediately after the August settlement. The County Treasurer of Cuyahoga County publicly closed his books for the collection of the second-half 1935-1936 real estate and public utility taxes on the 11th day of September, 1936. Collections were posted until October 16th and the books turned over to the Auditor from time to time, so that all of them were in the Auditor's hands by

the 16th day of October. Section 2596 G. C. provides that the County Auditor shall attend at his office on or before the 15th day of September to make settlement with the County Treasurer. The settlement sheet was signed by the County Auditor and County Treasurer as of the 9th day of December, 1936. Under the above circumstances, on which date was the *August settlement* made?"

This question can be brought within a narrow compass, viz: When is a county auditor's semi-annual settlement made?

In contemplation of law such settlements are made on or before February 15th and September 15th of each year, as required by Section 2596, General Code.

As a matter of fact such settlement is made when the semi-annual tax collection is made by the treasurer, reported to the auditor, an abstract made thereof, duly signed and certified as required by the forms prescribed by the Auditor of State and approved and certified by him as correct. The Auditor of State has the last word as to the semi-annual settlement. Upon receipt of the abstract from the county auditor, he may upon examination, require corrections to be made and return the abstract to the county auditor for such purpose—hence the conclusion that the county auditor's settlement is not made in fact until it is approved by the Auditor of State. The settlement sheet in question was not signed by the auditor and treasurer of Cuyahoga County until the 9th day of December following the August settlement and naturally it was not approved until some time thereafter. Of one thing I am quite sure, a settlement that was not signed by the county auditor and county treasurer until December 9th could not have been made on September 15th or October 16th prior thereto.

I am aware that the evanescent legislation made necessary by the stress of the times during the past several years has made it difficult for county auditors and county treasurers to make their semi-annual settlements within the time required by law. Because of this condition, much liberality has been indulged along this line. The time within which an official act is required to be done under the law has never been taken seriously, unless it was manifest that the legislative intent required serious consideration.

My predecessor rendered an opinion, namely, Opinion No. 2276, which is to be found in Opinions of the Attorney General for 1934, dealing with the question as to the time of making the semi-annual settlement, in which I concur. Under the then Amended Senate Bill No. 42 one of the Whittemore Acts, it was provided that the taxpayer should

take advantage of the Act on or before the February settlement 1934. There seemed to be two prevailing views:

1. That the February settlement referred to, means the time of actual settlement.

2. That the February settlement means in fact February and that those persons who desire to take advantage of the Bill must act before the statutory time fixed for the February settlement.

Section 126, Black on Interpretation of Laws, was cited viz:

“When a statute specifies the time at or within which an act is to be done by a public officer or body, it is generally held to be directory only as to the time, and not mandatory, unless time is of the essence of the thing to be done, or the language of the statute contains negative words, or shows that the designation of the time was intended as a limitation of power, authority or right.”

The case of *In re Chagrin Falls*, 91 O. S. 308, was cited, wherein it was held in the first paragraph of the syllabus:

“The provisions of a statute fixing the time for opening and closing the polls at an election is directory and not mandatory.”

Black on Interpretation of Laws was further cited. Section 127 provides:

“Statutory provisions regulating official action in matters of form are to be regarded as merely directory where they are designed only to promote order and convenience in the discharge of public business and where the public interests or private rights do not depend upon their strict observance.”

Section 128 provides:

“In statutes regulating the assessment and collection of taxes, those provisions which are designed to secure equality of taxation and are intended for the benefit and protection of the taxpayer are to be construed as mandatory; such as are meant only for the guidance of officers and to secure uniformity, system and dispatch in the conduct of the proceedings may be considered as directory.”

It is well to bear in mind your ultimate question—is time of the essence of those statutes that point out the steps to be followed by the officials charged with the collection of taxes in order to perfect the states' tax lien? It is my opinion, flatly expressed, that your August, 1936, semiannual settlement was made on the 9th day of December, 1936, or shortly thereafter, as a matter of fact, and I know of no legal leger-de-main or fantastic theorizing that could call it back to September 15th, 1936.

Assuming that the August, 1936, settlement was made December 9th, 1936, the county auditor has not complied with Section 5704, General Code, effective as of September 15th, 1936, nor the amended section effective October 26th, 1936.

I take it from your letter, bearing date of June 4th, 1937, that the county auditor has not advertised the delinquent list returned at the August, 1936, settlement as yet. As a matter of fact, your county auditor and county treasurer are almost ready for another August settlement. The 1935 tax year is now a matter of history.

It is of course recognized that Section 5704, General Code, placed a mandatory duty upon the auditor to publish the delinquent list last December when it was ready and publication not having been made, as a matter of law that mandatory duty still exists. In view of the fact, however, that these delinquencies may be carried forward as provided by Sections 5710 and 5715, General Code, and in further view of the fact that the August, 1937, settlement is so near at hand after which another publication must be made, it would seem to now publish the 1936 delinquencies would result in a needless expenditure of public funds. It is my judgment that since the issuance of a writ in mandamus is always within the sound discretion of the court, that under these circumstances no court would compel the publishing of the 1936 delinquencies when these are so soon to be included in the 1937 publication.

Your second question is as follows:

“SECOND: Under the above circumstances, did Section 5704 as amended under Amended Senate Bill No. 466—passed July 16, 1936, and effective October 26, 1936—require advertisement of a delinquent list based on settlement of the 1935-1936 duplicate?”

The opinion rendered as to Question 1 makes this question moot. Your third question reads as follows:

“THIRD: Under these circumstances, the delinquent list, having been prepared and turned over to the Treasurer

on or about the 9th day of December, 1936, may the County Auditor now in the month of June or hereafter advertise the same under Section 5704, G. C.?"

The last sentence of this opinion under Question No. 1 answers No. 3.

Your fourth question is as follows:

"FOURTH: May the County Auditor under Section 5704 select and advertise particular delinquent parcels from the general list, such as improved parcels, or parcels where the delinquent taxes and assessments exceed a given amount, say \$100, or parcels unburdened with special assessments, or commercial property, or parcels which he thinks offer the best chance of realization on sale?"

I find no such delegation of power to the county auditor under Section 5704, General Code. The first sentence of the section which I quote, precludes such idea, viz:

"Immediately after each August settlement the county auditor shall make and certify a list and duplicate thereof of *all the delinquent lands in his county.* \* \* \* " (Italics ours.)

I find no provisos or exceptions to this rule in the section.

Your fifth question reads as follows:

"FIFTH: In case the Auditor makes such selection and advertises such select list, may a property owner whose property has been thus advertised object to the legality of such advertisement on the ground of non-compliance with the Statute requiring the advertisement of *all delinquent parcels*?"

Having held in answer to your fourth question to the effect that the county auditor had no power of selection, this question becomes moot. Should the county auditor indulge such practice, surely a landowner whose property was advertised could object.

Your sixth question is as follows:

"SIXTH: In March, 1935, the Auditor presented to a board composed of the president of the board of county

commissioners, the county treasurer and the county auditor a list of approximately 27,900 parcels, all of which had been certified delinquent at least three years prior thereto, which found, after due consideration, that 23,284 parcels would not sell, and therefore should be forfeited to the State of Ohio directly. However, Section 5718-2 also required that these parcels be advertised in order to complete the forfeiture, which was not done. Query may these parcels, after eliminating those upon which the taxes have since been paid, be now advertised?"

Those parcels that were not advertised as provided by Section 5718-2, General Code, in my opinion, may now be advertised so as to complete the forfeiture. As I take it, everything has been done under the law necessary to forfeit the lands, except the advertisement. This advertisement is for the landowner's benefit and the forfeiture is not complete until it is made. The section does not require that it be made within any stipulated time, hence, it follows that it can be made at any reasonable time unless the landowner's rights would be prejudiced by the delay. From all that I am able to see, the landowner is favored by the delay rather than prejudiced, and I can divine no reason why the purchaser at the forfeited sale would not take all the title the owner had, and after all, that is the important question.

Your seventh question reads as follows:

"SEVENTH: Having duly certified the delinquent land list annually prior to the August, 1936, settlement, is it the duty of the County Auditor now to advertise some 8,056 parcels representing new delinquencies for the 1936 tax year over and above those which were delinquent in prior years, or is it the duty of the County Auditor to advertise *all* parcels delinquent, including not only those newly appearing delinquent after the August, 1936, settlement, but in addition all those with accumulated delinquencies of prior years?"

Section 5704, General Code, either in its original form or as amended, has at no time been complied with to the letter. Section 5704, General Code, prior to its last amendment was not mandatory as to the publication by the county auditor of the delinquent list. It provides within its

own terms that "such publication shall be for the information of the public and the omission of such publication shall not in any respect affect the validity of the delinquent land list" and the Supreme Court of Ohio held that such provision was not mandatory in the case of *Miller vs. Lakewood Housing Co.*, 125 O. S. 152. Affirmed and followed in *State, ex rel. Selt vs. Mason, Auditor*, 127 O. S. 574. But when the General Assembly amended Section 5704, General Code, it settled all controversy as to the character of the section in the following language: "It shall be mandatory upon the county auditor to cause a list of the lands on such delinquent land list and duplicate to be published" as therein provided. When the General Assembly provides in an act that it is mandatory, that is the end of it.

Inquiry into the philosophy of the law with which we are dealing may shed some light upon the question being considered. Section 5705, General Code, defines delinquent lands as lands upon which taxes remain unpaid at two consecutive semi-annual settlement periods. Then the state proceeds to perfect its lien by first taking the procedural steps provided by Section 5704, General Code, the provisions of which are now declared to be mandatory.

By force of statute the lien of the State for taxes on real estate attaches, as a matter of law, on the day preceding the second Monday of April each year annually and shall continue until all taxes and penalty thereon are paid. See Section 5671, General Code.

It will be observed that the state has its lien, fully and completely, a perfected lien, under this section of the Code, but the state is not interested in the lien as such—but it is interested in the money it secures and its immediate concern is with collection. Then follows Section 5704, General Code, with the requirement that delinquent land lists be provided by the county auditor as hereinbefore detailed.

As a further declaration of lien, it is provided as follows by Section 5713, General Code:

"The state shall have a first and best lien on the lands and lots described in the delinquent land list, for the amount of taxes, assessments and penalty and accrued interest charged prior to the delivery of such list together with interest on the principal sum of such taxes and assessments at the rate of eight per centum per annum from the date of the August settlement next preceding the delivery of such list to the date of redemption thereof and the additional charge of twenty-five cents for making said list."

It would seem from this provision, that either the state abandoned



its general lien for taxes, as provided in Section 5671, General Code. in so far as the collection of delinquent land taxes was concerned, or seeking to enlarge its lien so as to include assessments, penalty, accrued interest, and twenty-five cents for making the list, out of an abundance of caution, made a new declaration of lien as to the lands contained in the auditor's delinquent list to take care of such enlargement. It will be noted that the interest provided for therein is to be calculated from the date of the August settlement next preceding the delivery of the delinquent land list by the county auditor to the county treasurer.

A tax lien is as much a creature of statute as any other statutory lien and text law applicable to other statutory liens, is likewise applicable to tax liens. It is stated in Sutherland's Statutory Construction, Vol. II, Section 690:

"A statute should be construed strictly as to the things to be done to obtain a lien and liberally as to the enforcement of the lien after it has attached." (Citing *Cary Hardware Company vs. McCarty, et al.*, 10 Colo. App. 200, 20 Pacific 744; *Nantz vs. Park Co.*, 103 Tenn. 299; 76 Am. Stat. 650.)

Likewise the same authority, Vol II, Section 691, states:

"Ordinarily the lien is enforced in accordance with the law in force when the proceedings are taken."

The difficulty arises in determining whether those statutes involved, are jurisdictional or procedural or both. As a matter of safety, in view of the law of Ohio to the general effect that tax laws are construed most favorably to the taxpayer, it is my opinion that not only the delinquencies as ascertained by the August, 1936, settlement should be advertised, but in addition all those with accumulated delinquencies of former years should be advertised as well, so as to come within the mandatory provisions of Section 5704, General Code, as amended.

As soon as lands are certified as delinquent, they are headed for the "forfeited list." When lands are regularly forfeited, Section 5744, General Code, provides:

"\* \* \* all the right, title, claim and interest of the former owner or owners (of the lands) shall be considered as transferred to and vested in the state to be disposed of as the General Assembly may direct." (Parentheses ours. )

By these procedural steps, a landowner may lose his lands as effectively and completely as by judicial mandate, hence it becomes necessary that the path blazed by the statutes be religiously followed,

and if new legislation favorable to the landowner springs into life between the time of the making of the delinquent list and forfeiture, although procedural in form and nature, it should be followed, otherwise the landowner might successfully assert the denial of due process.

Your eighth question is as follows:

“EIGHTH: The foreclosure list of those unredeemed parcels certified delinquent in 1932 required by the old law to be advertised after the August, 1935, settlement has not yet been published. The parcels certified delinquent in 1933, 1934 and 1935 did not become subject to foreclosure until the new amendment eliminating the publication of a foreclosure list became effective. Under these circumstances, if a cumulative delinquent list does not have to be prepared and published at the present time, may those parcels duly certified as delinquent after the close of the 1932, 1933, 1934 and 1935 August Settlements (not advertised as delinquent because it was not necessary in Cuyahoga County under the law at the respective dates since 1931) now be foreclosed at the proper time without *any* advertisement, since publication of a foreclosure list is no longer required?”

In my opinion, those parcels certified as delinquent at the close of the 1932 August settlement should be advertised according to law before foreclosure, and those certified in 1933, 1934 and 1935 need not be so advertised as they come within the provisions of Amended Section 5718, General Code, which requires no advertisement.

Respectfully,

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*Attorney General.*