

Note from the Attorney General's Office:

1935 Op. Att'y Gen. No. 35-4333 was rendered
obsolete by 1974 Op. Att'y Gen. No. 74-068.

"Sec. 1182. * * Each of said resident division deputy directors * * shall serve during the pleasure of the director. Each division deputy director shall give bond in the sum of five thousand dollars, conditioned for the faithful performance of his duties with sureties to the approval of the state highway director. * *"

"Sec. 1182-2. All bonds hereinbefore provided for shall be conditioned upon the faithful discharge of the duties of their respective positions and such bonds * * shall be approved as to sufficiency of the sureties by the director and as to legality and form by the attorney general, and be deposited with the secretary of state. * *"

Finding said bond to have been properly executed in accordance with the foregoing statutory provisions, I hereby approve same as to form, and have endorsed my approval thereon. Such bond is returned herewith.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

4333.

TAX AND TAXATION—AUTHORITY OF COUNTY TREASURER TO COLLECT PENALTY WHERE TAXPAYER TENDERS MONEY WITHOUT NOTICE OF DELINQUENCY DATE.

SYLLABUS:

Where a county treasurer keeps his books open for the receipt of real property taxes after the expiration date of the extended time affixed by the Tax Commission of Ohio for the payment of such taxes for the first half of the current year, and before the county treasurer has made his settlement with the county auditor with respect to taxes paid and collected during such tax collection period, such county treasurer may not legally require of a person who tenders to him the taxes then due and payable on real property owned by the taxpayer the payment of a penalty on such taxes. And if thereafter at the time the settlement is made between the county auditor and the county treasurer a penalty is entered with respect to such taxes by reason of the refusal of the taxpayer to pay the penalty at the time he tendered his taxes to the county treasurer and the refusal of the county treasurer to accept such taxes without the penalty, 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 so abated the same may be remitted by the Tax Commission of Ohio under the authority conferred upon it by section 5624-10, General Code.

COLUMBUS, OHIO, June 11, 1935.

HON. CARLOS M. RIECKER, *Prosecuting Attorney, McConnellsville, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication in which you request my opinion upon a question stated in your communication as follows:

"A owns real estate in this County, subject to taxation: He was ready to pay the taxes thereon December 20, 1934. The delivery of Duplicates not be-

ing ready, the time for payment of taxes was extended by the State Tax Commission to April 1, 1935.

A, without notice of the delinquency date, on April 11th tendered to the County Treasurer money for the full payment of his real estate tax, but he refused to pay the Penalty thereon.

The question is: Is the Penalty collectable?"

The question presented in your communication is one of some difficulty. Section 2657, General Code, which is referred to in your communication, has no application to penalties assessed on the non-payment of real estate and public utility taxes, but refers only to penalties assessed with respect to personal property taxes. The penalties assessed on account of the non-payment of taxes on real property are provided for by section 5678, General Code, which reads as follows:

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

With respect to the question presented in your communication, it will be noted that this section provides that if one-half the taxes and assessments charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, "or collected prior to the February settlement", a penalty of ten per cent thereon shall be added to such half of said taxes and assessments on the duplicate. The provisions of section 5678, General Code, should be read in connection with the provisions of sections 2649 and 2657, General Code, relating to the time for the payment of real property taxes. Section 2649, General Code, provides that the office of the county treasurer shall be kept open for the collection of real property taxes and assessments and public utility property taxes from the time of the delivery of the duplicate to the treasurer until the twenty-first day of December and from the first day of April until the twenty-first day of June. Section 2657, General Code, in so far as the same is pertinent in the consideration of the question presented in your communication, reads as follows:

"The county commissioners of any county by resolution spread upon their journal may extend the time of payment of taxes for not more than thirty days after the time fixed by law. The tax commission of Ohio may further extend the time of payment of taxes in any county in case of an emergency unavoidably delaying the delivery of duplicates for the collection of taxes. Such extension shall be for such time as the commission may fix in its order."

From your communication, it appears that the Tax Commission of Ohio, acting under the authority conferred upon it by section 2657, General Code, extended the time for the payment of real property taxes in Morgan County to April 1, 1935, and that upon April 11, 1935, the taxpayer referred to in your communication tendered to the coun-

ty treasurer the full amount of the taxes due and payable upon his property, but that he refused to pay the penalty on such taxes. I infer from this that although the time fixed by the Tax Commission of Ohio for the payment of the taxes for the first half of the year 1934 in this county had expired, the county treasurer on April 11, 1935, was still holding his books open for the payment of taxes, but that he was receiving such taxes only when the taxpayer paid in addition to his taxes the penalty provided for by section 5678, General Code. The question presented in your communication is whether any penalty was due and payable on the taxes of this taxpayer at the time he tendered the same to the county treasurer. It is quite apparent that although, as above noted, these taxes were tendered to the county treasurer after the expiration of the time affixed by the Tax Commission of Ohio for the payment of real property taxes in said county, the county treasurer had not at this time made his settlement with the county auditor with respect to the collection of taxes for the first half of the year 1934. This settlement is provided for by section 2596, General Code, which directs that on or before the fifteenth day of February and on or before the tenth day of August of each year, the county auditor shall attend at his office to make settlement with the treasurer of the county and ascertain the amount of real property taxes and assessments and public utility property taxes with which such treasurer is to stand charged. The provision in this section fixing the fifteenth day of February as the date on or before which such settlement shall be made by and between the county auditor and the county treasurer is, of course, directory; but the requirement with respect to such settlement after each semi-annual tax collection period is mandatory. And it was the duty of the county auditor and county treasurer to make their settlement with respect to taxes collected in this county for the first half of the year 1934, as soon as possible after the expiration of the time fixed by the Tax Commission for the payment of such taxes. As above noted, the taxes here in question were tendered to the county treasurer after the expiration of the time for the payment of the taxes in the county and before the county auditor and county treasurer had made the settlement which the statute requires. And as before noted, the question here presented is whether the taxes tendered by the taxpayer above referred to were at the time of such tender subject to the ten per cent penalty provided for by section 5678, General Code. In an opinion of this office under date of February 3, 1928, Opinions of the Attorney General, 1928, Vol. I, page 271, it was held that "Under the provisions of section 5678, General Code, the ten per cent penalty upon delinquent real estate taxes does not accrue until the February settlement between the county auditor and county treasurer." And in a later opinion directed to the Bureau of Inspection and Supervision of Public Offices, Opinions of Attorney General, 1928, Vol. 1, page 320, the then Attorney General held:

"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."

In the former opinions of this office here noted, the conclusions therein stated were reached on the consideration that although apparently the taxpayer had no right to pay his real property taxes after the expiration of the time limited for the payment of the taxes for the semiannual period in question, the county treasurer had a right to collect such taxes down to the time of his settlement with the county auditor; and that under the terms of this section the penalty could be assessed only in the event of a concurrence of both conditions, that is, that the taxpayer failed to pay his taxes before the expiration of the time limited for the payment of taxes at such taxpaying period, and the

treasurer was unable to collect such taxes before his settlement with the county auditor. However, at the time of the rendition of these opinions other statutory provisions then in force authorized the county treasurer to enforce the collection of real property taxes by distraint by civil action, garnishment and by other proceedings. All of these statutory provisions have been repealed with respect to the enforced collection of real property taxes and apparently the only method now provided for by law for the collection of delinquent real property taxes is by foreclosure proceedings on delinquent tax title certificates. In addition to the changes above noted in the statutes relating to the collection of real property taxes by the county treasurer, various statutory provisions as to the payment of real property taxes have been amended so as to enable the taxpayer more conveniently to pay such taxes. Aside from the amendment of section 2657, General Code, 114 O. L., 714, authorizing the Tax Commission of Ohio to extend the time of payment of taxes in any county beyond the time fixed by section 2649, General Code, and beyond the time to which the county commissioners were authorized to extend the payment of taxes, section 2653, General Code, has been so amended as to provide that the county treasurer, when authorized by resolution of the board of county commissioners, shall permit payment of the semiannual installments of taxes and assessments levied against real estate, in as many payments as are authorized in the resolution of the board of county commissioners. This section, as thus amended, 115 O. L., Pt. 2, 65, provides further as follows:

"But in no way shall such payment method conflict with an existing law with regard to the penalties to be assessed at the close of any certain collection period."

The recent statutory amendments above referred to suggest the question as to whether the legislature has thereby evinced an intention to impose a penalty for the non-payment of real property taxes for the first half of the current year prior to the February settlement, so-called, between the county auditor and the county treasurer provided for by section 2596, General Code. As to this, I am inclined to the view that these recent statutory enactments are required to be read in connection with the provisions of sections 5678 and 2596, General Code, with respect to the question here presented; and that now, as before the statutory amendments above referred to, penalties can be assessed only with respect to delinquent taxes, and that taxes are delinquent only when the same have not been paid or collected and the county treasurer under oath has reported to the county auditor a failure to collect such taxes together with his reasons for the non-collection of the same, all as provided for and required by section 2596, General Code. *Ratterman, Treasurer, vs. Ingalls*, 23 W.L.B., 260, 263.

It may be concluded, therefore, with respect to the question here presented, that although the County Treasurer of Morgan County was not required to keep his books open for the payment of real property taxes after April 1, 1935, the date fixed by the Tax Commission of Ohio on or before which taxes for the first half of the year 1934 were required to be paid, yet he was authorized to receive real property taxes after this date; and whether the receipt of such taxes be referred to as a payment thereof by the taxpayer or as a collection made by the county treasurer, the county treasurer was authorized to receive the taxes on the property only, and no penalty could accrue with respect to such taxes unless a delinquency in the payment or collection of such taxes appeared at the time of the settlement between the county auditor and the county treasurer, and until the county auditor entered such penalty against such delinquent taxes.

By way of specific answer to the question presented in your communication, I am of the opinion that the county treasurer on the facts here presented was not authorized

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-