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TAXATION—GENERAL TAXES—SPECIAL ASSESSMENTS—RIGHT OF COUNTY TREASURER TO ACCEPT REAL ESTATE TAXES, STREET ASSESSMENT TAXES OR DOW TAXES SEPARATELY—MAY COUNTY AUDITOR ELIMINATE PENALTY ASSESSED AGAINST PROPERTY?

SYLLABUS:

County treasurer may accept payment of general taxes independently of special assessment when tendered by tax payer.

County auditor has no authority to eliminate the penalty that has been assessed against delinquent property for non-payment of taxes.

COLUMBUS, OHIO, April 12, 1923.

HON. JOHN E. FOSTER, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting the opinion of this department as follows:

"A question has arisen in this county relative to the collection of the Dow-Aiken Tax. The facts are as follows:

In the year of 1920 a man was arrested in this county and convicted of the sale of intoxicating liquor and the Dow tax of \$1,000.00 was assessed against his property and placed on the 1921 tax duplicate. The treasurer of the county refused to receive the 1921 real estate tax on this property until the Dow tax was paid, and as the man refused to pay the Dow tax, his taxes for 1921 became delinquent. The taxes on the same property for 1922 are now delinquent and in addition thereto, an assessment for paving a street in the city of Jackson has been placed against the property. The man is willing to pay his real estate tax and the street assessment, if the penalties are taken off, as he claims that he was willing to pay the real estate tax in 1921 and 1922 and that the same was refused by the county treasurer. The following questions now arise, to-wit:

1. Can the county treasurer take the real estate tax and the street assessment without injuring his right to later collect the Dow tax as provided by law?
2. Can the county auditor take off or eliminate the penalty that has been assessed against the property for non-payment of 1921 and 1922 real estate taxes, in case the treasurer is authorized to receive these taxes without receiving the Dow tax? If so, from whom must this authority come?
3. If the county treasurer is authorized to take the real estate tax, can the street assessment also be taken without injuring the right to later recover the Dow tax?

According to the provisions of section 2653 G. C., taxes on a tax duplicate in the hands of the county treasurer may be paid, the full amount thereof, on or before the 20th day of December or one-half thereof before said date, and the remaining half thereof on or before the 20th day of June next ensuing, but all road taxes so charged shall be paid prior to the 20th day of December.

Section 2654 G. C. is as follows :

"When taxes charged against the property of a person are so paid by installments, each such payment, exclusive of road taxes, shall be apportioned among the several funds for which taxes have been assessed."

Section 2655 G. C. is as follows :

"If a person desires to pay only a portion of a tax charged on real estate otherwise than in such installments, such person shall pay a like proportion of all the taxes charged thereon for state, county, township or other purposes, exclusive of road taxes. No person shall be permitted to pay one or more of such taxes without paying the others in like proportion, except only when the collection of a particular tax is legally enjoined."

In the case of *Wheeling and Lake Erie Railway v. Robert Stewart*, Treasurer, reported in 13 C. C. R. at page 369, the court in construing the latter section above mentioned, said :

"We think that section applies only where a tax payer desires to pay a proportion of the taxes assessed and levied for all purposes, as where he is a part owner, and not where he admits that part is legal, and desires to pay the legal taxes assessed and desires not to pay the portion which he claims to be illegal; and that the only provision of the statute under which a person may select one levy—as, for instance, a levy made by the county commissioners, and refuse to pay a levy made by the township trustees, or vice versa, and claim that one is legal and the other illegal—is under the provisions of section 5851 of the Revised Statutes (section 12078 G. C.), which provides :

'If the plaintiff, in an action to enjoin the collection of taxes or assessments, admits a part thereof to have been legally levied, he must first pay or tender the sum admitted to be due; if an order of injunction be allowed, an undertaking must be given as in other cases; and the injunction shall be a justification of the officer charged with the collection of such taxes or assessments for not collecting the same.'

It is true, as stated in argument, that before the tax payer can enjoin, he must tender that which he admits to be legal and due. * * * "

The law will not require a vain thing and it would seem that a provision made for a tender would imply the authority to accept a tender when so made. It is apparent that the object of the tender and refusal would be to obviate the attachment of the tender for non-payment.

In a former opinion of this department found in *Opinions of Attorney General*, 1917, Volume III, at page 2380, the fifth paragraph of the syllabus construing the act of 1917 says :

"The act of 1917 in no wise changes the law respecting the authority of the county treasurer to accept payment of general taxes without payment of assessments charged against the land; nor does it affect the necessity on the part of the owner of the land charged with an assessment of enjoining the treasurer from collecting such assessment."

And again, on page 2393, this language is used:

"Assuming, but not deciding, that it is lawful for the treasurer to accept the general taxes without accepting an assessment charged against the same land, in the absence of an injunction against the latter. The law in this respect is not in any wise changed by the delinquent land act of 1917, for as I have pointed out lands can become delinquent under that act as formerly only through non-payment of taxes and penalties."

In a former ruling by this department, Opinions of Attorney General, 1910-1911, at page 1006, a question somewhat similar to the one involved in your inquiry was considered, when the following language was used:

"I have been unable to find any other section similar to section 2655 of the General Code, and applicable specifically to the collection of such assessment. It is elementary that such special assessments are not taxes. Certainly they are not taxes for general county or municipal purposes. In the absence of a statute like 2655 of the General Code, I know of no principle which would preclude the treasurer from accepting payment of all taxes otherwise on the general duplicate against property of the tax payer, together with all other property in the county or taxing district, without being tendered payment of the special assessment. A separate record of such special assessment collections is, of course, kept in both the county treasurer's office and that of the county auditor, for the fund produced thereby is separate and distinct and to be paid to the treasurer of the corporation; separate bills and receipts for such special assessments are also issued by the county treasurer, and quite properly, so that the mischief intended to be remedied by section 2655 of the General Code is not encountered in such a case as that of which you speak.

For all the foregoing reasons I am of the opinion that a tax payer may refuse to pay a special assessment levied against his property, and that the county treasurer is not authorized by such refusal to refuse tender of the general land tax due on such property at the same collection period."

In the third edition of Cooley on Taxation, at page 829, the author says of the methods of the collection of taxes:

"The method prescribed by statute is in general exclusive, and, unless a contrary intent can be gathered from the statute, it must be followed strictly, for the power which seeks to collect a tax must show clear authority to do so."

And again at page 806 the same author says:

"Unless directed by statute, the collector is not obliged to take payment of a given tax in installments."

Citing:

124 Mich., 256.

156 Ill., 88.

43 Kansas, 162.

It has been held by the supreme court of the state at page 465, 71 O. S., in considering the question of assessment upon the business of trafficking in intoxicating liquors, wherein it says:

“And the amount shall be collected as other taxes and assessments on said premises.”

In a former opinion by this department rendered April 18, 1922, Volume I, Opinions of Attorney General, page 296, it was held:

“Under the provisions of section 6212-33 G. C., such assessment is payable one-half in June and one-half in December, as other taxes are payable, excepting in those cases in which business is begun after June 20th and prior to December 20th, in which case all of said assessment is payable in December.”

Referring to your inquiry as to the right of the county auditor to eliminate the penalty, and if he has such right, from whom must the authority come, will say, section 2588 G. C. provides as follows:

“From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other.”

It will be noticed that the above section only authorizes the county auditor to correct errors on the tax duplicate, which evidently only contemplates clerical errors. It has been universally held that the above provision only authorizes such correction of the tax duplicate, and when paid, a refunder thereof only as to taxes assessed on exempt property or extended on the duplicate by reason of clerical errors, as distinguished from fundamental errors in the levy and assessment of taxes.

31 O. S. 271, 273.

38 O. S. 560, 574.

39 O. S. 168.

47 O. S. 447.

50 O. S. 103, 112.

In a former opinion of this department found in Opinions of Attorney General, 1917, Volume I, page 283, may be found the following language:

“It has been held in this state that county commissioners—and I apprehend the same is true of other officers of the county—represent the county in respect to its financial affairs only so far as authority is given to them by statute.”

It seems that there has been an intentional omission to clothe any official or officials with authority to eliminate the penalty for non-payment of taxes. One commentator upon this apparent lack of authority says:

"The legislature has, evidently, thoroughly comprehended the danger of clothing these (officials) with power to reduce or obliterate penalty, etc.—it knew the pressure that would be brought to bear upon them, and the temptations and opportunities they would be required to withstand. No specific reference need be made to them, as they will at once suggest themselves to any one having the slightest knowledge of public affairs."

Specifically referring to your question number two, I am of the opinion that the same must be answered in the negative.

Likewise referring to your questions numbers one and three, and adhering to the former ruling of this department, I am of the opinion that questions one and three should each be answered in the affirmative.

Respectfully,
C. C. CRABBE,
Attorney General.

233.

FISH AND GAME DIVISION—ASSISTANT CHIEF—GAME PROTECTORS
—IN CLASSIFIED SERVICE—TENURE FOR LIFE DURING GOOD
BEHAVIOR.

SYLLABUS:

Under existing laws the Assistant Chief of the Fish and Game Division in the Department of Agriculture and Game Protectors, are in the classified service as defined in section 486-8 of the Civil Service Laws and their tenure of office is for life during good behavior as provided in section 486-17a G. C.

COLUMBUS, OHIO, April 13, 1923.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested my opinion as follows:

"Section 486-8, sub-paragraph (a) specifies the positions in the state service which shall be in the unclassified service. Sub-paragraph (b) states that the classified service shall comprise all persons in the employ of the state not specifically included in the unclassified service. Section 1439 of the General Code, 108, Part 1, Ohio Laws, found on page 598 reads in part as follows:

"The Chief of the Division of Fish and Game, Assistant Chief, Lake Erie Supervising Protector and each Fish and Game Protector shall hold his office for a term of two years unless sooner removed by the Secretary of Agriculture."