

**OPINION
46-109**

February 5, 1946 (OPINION)

HAIL TAXES

RE: Delinquent - Penalties

Under date of January 28, 1946, I replied to your letter of January 24, in which you requested our opinion as to the statutory penalties and interest which delinquent hail taxes bear. Mr. Owen, assistant attorney general attached to your department, has called my attention to provisions in the hail tax law, chapter 26-22 of the 1943 Revised Code, which I overlooked and which necessitate a modification of conclusions contained in my letter to you. In view of the provisions of section 26-2240 of the Revised Code of 1943, the penalty and interest upon hail indemnity taxes for 1937 and prior years are canceled. This section provides:

The state hail insurance department shall cancel and discharge all penalty and interest upon hail indemnity taxes for the year 1937 and prior years. The amount thereof shall be deducted from the surplus in the state hail insurance fund, and no levy shall be made by the department to compensate for the amount so discharged and canceled."

In view of the provisions of section 26-2240, the only question to determine is: What are the statutory penalties and interest applicable to hail insurance taxes for 1938 and subsequent years?

Section 57-2001 of the 1943 Revised Code provides:

All real and personal property taxes, hail insurance taxes, and yearly installments of special assessments taxes shall become due on the first day of January following the year for which such taxes were levied. The first installment of real estate taxes, all personal property taxes, hail insurance taxes, and yearly installments of special taxes shall become delinquent on the first day of March following and, if not paid on or before said date, shall be subject to a penalty of one percent, and on May first following an additional penalty of one percent, and on July first following an additional penalty of one percent, and an additional penalty of two percent on October fifteenth following. The second installment of real estate taxes shall become delinquent on October fifteenth, and, if not paid on or before that date shall become subject to a penalty of two percent."

Section 6 of chapter 265 of the 1943 Session Laws, embodied in the Revised Code under section 57-2001, quoted above, amended chapter 246 of the 1937 Session Laws, which reads as follows:

All real estate taxes, including hail insurance taxes, both indemnity and yearly installments of special assessment taxes on real estate, shall become due on the 31st day of December of the year for which the taxes are levied, and the first

installment on real estate taxes, including hail insurance and yearly installment of special assessment taxes, shall become delinquent on March 1st following and if not paid on or before April 1st following they shall be subject to a penalty of 1%, and on June 1st following an additional penalty of 1%, on August 1st following an additional penalty of 1%, and an additional penalty of 2% on October 15th, . . ."

It will be noted that in the 1937 Act (chapter 2460, and in section 57-2001 of the Revised Code, the total penalty on the first installment of real estate taxes and hail insurance taxes as of October 15th in any year remained the same, namely five percent. In fact, the total penalty has remained the same since the enactment of chapter 257 of the Session Laws of 1933.

Chapter 233 of the Session Laws of 1939 provided:

There shall be an allowance of five (5) percent rebate to all payers of taxes on real property who shall pay the same in one payment and in full on or before the fifteenth (15th) day of February next prior to the date of delinquency. Such rebate shall apply to all general taxes including State, county, city, township, village and school taxes but shall not apply to special assessments or to hail indemnity taxes."

I have not found that any change was made with reference to payment of, or penalty on, hail insurance taxes by the special session of the legislature in 1944, or by the regular session of 1945. But this matter of tracing legislation over a period of years is really one that involves research and it is always possible to overlook some act or provision. I shall therefore depend on Mr. Owen, assistant attorney general attached to your department, to carefully check me on this.

Mr. Owen has also called my attention to an apparent conflict which exists between section 57-2411 of the Revised Code and section 26-2241 of said code. Section 57-2411 is a part of Title 57 relating to taxation; section 26-2241, chapter 22 of Title 26, relating to insurance.

Section 57-2411 reads as follows:

General taxes and hail indemnity taxes shall be advertised in the same notice and delinquent real estate tax list, but shall be separately stated, and sold separately."

Section 26-2241 provides:

When any land is advertised and sold for non-payment of taxes, the hail indemnity taxes which constitute a prior lien on the land shall be advertised and sold together with the general taxes, and all laws relating to the collection of penalty and interest on, and the sale of real property for, the nonpayment of general taxes shall apply to such hail indemnity taxes."

Section 57-2411 of the Revised Code was originally enacted in 1931 at the instance and request of the county auditors of this state. Its

enactment was recommended by the writer who was then state tax commissioner. County auditors wanted this law because the inclusion of the hail insurance tax with the real estate tax had, to a considerable degree, made tax sales a mere formality. Investors in tax sale certificates refused to buy taxes which included hail insurance taxes. It is needless for me to explain the situation to you, Mr. Krueger, for at that time you were county auditor of Wells County.

And notwithstanding the provisions of section 26-2241, it is my understanding that real estate taxes and hail insurance taxes have, as a matter of common practice, been sold separately since 1931. In the case of hail insurance taxes which are a lien prior to all mortgages and incumbrances, it makes little or no difference to the "tax sale" purchaser whether such taxes are sold separately or not. But in order that such investor may have the assurance that the hail tax is actually a prior lien, either he or the county auditor, or the county treasurer, would have to make a search of the records in the office of the register of deeds to ascertain that fact. A county auditor has no time to make such searches. In view of the provisions of sections 26-2234 and 26-2235 of the Revised Code, the question is probably largely academic anyway, except as to mortgages of the school land department.

In my opinion, subsection 4 of section 57-2412 of the Revised Code indicates that real estate taxes and hail taxes must be sold separately, regardless of the priority of the lien of hail taxes. Said subsection provides:

Such lands, lots, or parcels likewise shall be offered for sale and sold for the total amount of hail indemnity taxes, plus accrued penalties and cost of advertising, to the bidder who will pay such total amount and accept the lowest rate of interest on such total amount from the date of sale, such rate in no case to exceed six percent per annum; . . ."

And section 26-2237 of the Revised Code provides:

Hail indemnity taxes may be paid separately without the payment of the other general taxes."

Section 26-2242 of the Revised Code provides:

Land shall not be sold for the payment of hail indemnity taxes which do not constitute prior liens, but such taxes shall remain on the county records as a lien against such land until they are paid or until they are canceled under the provisions of this chapter. If the lien upon such land which is prior to such hail indemnity taxes is extinguished or satisfied by any process other than by the foreclosure of such prior lien, the hail indemnity tax shall be sold at the next real estate tax sale, and all laws relating to the sale of real estate for nonpayment of taxes shall apply to the sale of such hail indemnity taxes."

A county is only a technical or formal bidder at a tax sale. Under the provisions of section 57-2414 of the Revised Code, the county

treasurer is required to attend the tax sale and "when any tract of land or lot remains unsold for want of bidders . . . the treasurer shall bid for the same in the name of the county, . . ."

If there are no private bids, real estate taxes and hail insurance taxes are sold to the county at the maximum rate which is six percent. Section 1 of chapter 289 of the Session Laws of 1931 fixed the maximum rate at nine percent. It also specifically provided that, "A certificate . . . issued to the county shall bear interest at the rate of nine percent." The code commission (1943) changed the rate to six percent. In the Code Revision Report of the commission appears the following "revisor's note" to section 57-2412:

This portion of the section has been revised in form and placed in a separate section. The rate of interest has been reduced from 9% to 6% because of the provisions in S.L. 1933, c. 257. This 1933 Act does not purport to amend the 1931 Act, but is repugnant to a maximum of 9% interest, and as a later enactment governs."

Chapter 227 of the Session Laws of 1939 amended chapter 240 of the Session Laws of 1937. Section 1 of chapter 227 of the Session Laws of 1939 reads in part as follows:

All delinquent real and personal property taxes, . . . for 1937 and prior years, together with accrued interest land penalties thereon, shall be cancelled and discharged in full upon the payment of the full amount of the original tax; provided that all payments hereunder must be made on or before March 1, 1940; . . . This act shall not apply to any real estate taxes, the tax certificates for which have been sold or assigned to any purchaser other than the county, nor to special assessments levied for local improvements, nor special assessments levied by drainage or irrigation districts."

Chapter 273 of the Session Laws of 1941 amended chapter 227 of the 1939 Session Laws. Subsection 1 of section 1 of chapter 273 of the 1941 Session Laws provided:

All delinquent real and personal property taxes, except as hereinafter provided, for the year 1939 and prior years, together with accrued interest and penalties thereon, shall be cancelled and discharged in full upon the payment of the full amount of the original tax; provided that all payments hereunder must be made on or before December 1, 1941; and, provided further, that such taxes shall remain payable separately according to years, and any person, or corporation, having an interest in, or lien, or mortgage upon any property affected by this act shall be entitled to take advantage of the provisions hereof. This act shall not apply to any real estate taxes, the tax certificates for which have been sold or assigned to any purchaser other than the county, nor to special assessments . . ."

Chapter 273 of the Session Laws of 1941 was amended by chapter 250 of the Session Laws of 1943. Section 1 of chapter 250 provided:

All delinquent real and personal property taxes, except as hereinafter provided, for the year 1939 and prior years, together with accrued interest and penalties thereon, shall be cancelled and discharged in full upon the payment of the full amount of the original tax plus a penalty of 5 percent; provided that all payments hereunder must be made on or before November 1, 1943; . . . This Act shall not apply to any real estate taxes, the tax certificates for which have been sold or assigned to any purchasers other than the county, nor to special assessments levied for local improvements, nor special assessments levied for drainage or irrigation district."

No mention was made of hail insurance taxes in the foregoing sections of chapter 240 of the 1937 Session Laws, chapter 227 of the 1939 Session Laws, chapter 372 of the 1941 Session Laws, nor in chapter 250 of the 1943 Session Laws. Chapter 250 of the 1943 Session Laws is not incorporated in the 1943 Revised Code. It was effective only until March 1, 1943. And in view of the fact that mention of hail insurance taxes was omitted from the so-called tax adjustment statute in 1939, 1941, and 1943, it is my opinion that the omission was intentional and that the "real estate taxes" therein mentioned did not include delinquent hail insurance taxes - this notwithstanding the provision of section 26-2234 of the Revised Code, which provides that the hail indemnity tax "shall be subject to all the provisions of law relating to general taxes, except as otherwise provided by the laws of this state."

This is further clearly indicated by the fact that in 1941 the legislature enacted 277 of the Session Laws of that year, embodied in the Revised Code under section 26-2240, (an act pertaining to hail insurance taxes only), which provided for the cancellation of delinquent hail insurance taxes for 1937 and prior years.

In addition to the various acts mentioned above, the legislature has at various times enacted other so-called "adjustment statutes" which in my opinion relate only to real estate taxes - not hail indemnity taxes. For example:

Chapter 240 of the Session Laws of 1937 provided for contract settlements of delinquent taxes. Chapter 233 of the Session Laws of 1939 provided for a discount of five percent if real estate taxes are paid in full before February 15th. Chapter 233 of the Session Laws of 1939 was replaced by chapter 265 of the Session Laws of 1943. Section 7 of the latter chapter was incorporated in the Revised Code under section 57-2009. Section 57-2019 of the Revised Code provides:

Any owner of real property who has entered into an extension contract under the provisions of chapter 240 of the Session Laws of North Dakota for the year 1937, or under chapter 227 of the Session Laws of 1939, if such contract is in force, shall have the right to discharge the interest in full upon his obligation by paying interest at four percent from April 1, 1941. Any owner who has entered into such an extension contract, or his successor in interest, or any lien or mortgage holder, shall have the right to pay the full amount remaining unpaid upon such extension contract at any time while such contract is in force."

Section 57-2821 of the Revised Code provides:

After any real estate has been sold for cash or upon a contract for deed which has been fully performed and a deed has been issued and delivered to the purchaser thereof, the board of county commissioners, by general resolution, shall provide for the cancelation of all general taxes, hail indemnity taxes, and special assessments remaining of record against the premises sold at the date of such sale. It shall be the duty of the county auditor immediately to send a copy of the said resolution to the state hail insurance department and to notify the county treasurer of the cancelation of such taxes."

It is probable that some county auditors and county treasurers have assumed and understood that the various so-called tax adjustment statutes mentioned above applied to hail taxes as well as real estate taxes and have accepted payments accordingly. If such should be found to be the case, the only practicable course to follow is to regard the uncollected interest and penalties as "water over the dam." It may also be difficult for you to arrive at any definite conclusion as insurance commissioner from the foregoing discussion. I shall, therefore, endeavor to summarize my conclusions as briefly as I can. It is my opinion:

1. That for the year 1938 and subsequent years delinquent hail insurance taxes bear the same interest and penalty as the first installment of real estate taxes.
2. That under and by virtue of section 26-2240 of the Revised Code, all penalty and interest on hail indemnity taxes for the year 1937 and prior years have been canceled. Cancelation and discharge by your department is a mere administrative formality.
3. That the total penalty and interest on hail insurance taxes not paid on or before October 15th in any year is five percent.
4. That if hail insurance taxes are sold at tax sale to an individual bidder, the tax sale certificate bears the interest bid by him.
5. That when a tract of land is sold to the county for taxes, the amount bears interest at six percent. Likewise taxes which do not constitute a prior lien and therefore not sold.
6. That under and by virtue of section 57-2411 of the Revised Code, hail taxes and real estate taxes must be sold separately, but the sale of a tract of land for real estate taxes should be immediately followed by the sale of hail taxes assessed against it.
7. That in view of the provisions of section 26-2235 of the Revised Code, the lien of hail indemnity taxes is prior and superior to all mortgages, contracts for deed, liens, and

judgments, incurred, assumed, or imposed since March 7, 1933, except that trust funds of the school land department cannot be impaired thereby. Mortgages, liens, etc., incurred before said date are prior to hail taxes subsequently assessed.

8. That when a county has sold land acquired through tax sale proceedings, the hail taxes of record against such land prior to date of sale are canceled. Proceeds of sale are distributed proportionately to the state, local taxing districts, and to the hail insurance department, if any such tax is included.

If there are other questions not covered in this Opinion, we shall, in cooperation with Mr. Owen, try to answer them.

NELS G. JOHNSON

Attorney General