The answer to your second question is in conformity to the reasoning of the latter portion of the above question. That is, to entitle the city to lease its public property would necessitate a grant of legislative authority to the city to so lease. I find no such authorization to a fifth class city in the statutes. Since it is beyond the power of the city to make a gift of its public property by deed of conveyance, it is likewise beyond such city's power to accomplish the same result by the indirect method of resorting to a lease to accomplish the alienation.

Therefore, it is my opinion that your last question should be answered in the negative.

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**ACCOUNTS, STATE BOARD OF: Penalty for delinquent taxes, whether same may be included in claim against bankrupt's estate.**

September 13, 1937.

Hon. W. P. Cosgrove,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Mr. Cosgrove:

I have before me your request for an official opinion in answer to the following question:

> "Does the county treasurer have the authority to waive the penalty on delinquent taxes on property where the owner is in bankruptcy?"

Section 93, subdivision (j) of Title II of United States Code Annotated, provides as follows:

> "Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Title II, Section 93, Subdivision (j), U. S. C. A.

The application of the above provision has been before the courts upon numerous occasions. In the case of New York v. Jersawit, 263 U. S. 493, the court had before it the question of a claim filed by the State of New York against the estate of Ajax Dress Company which was being administered in the bankruptcy court. The claim was based upon a franchise tax which every domestic corporation of the state was required to pay, annually in advance, being based, however, upon the net income of the corporation for the calendar year preceding. The Act imposing the tax provided that the tax was to be paid on or before January 1 of each year and that if it was not paid the corporation was liable to pay "in addition to the amount of such tax * * * ten per centum of such amount, plus one per centum for each month the tax * * * remains unpaid." The federal courts below held that this latter liability was a penalty and therefore not to be allowed, but did allow 6 per cent upon the tax apportioned to the date of payment. The state on the other hand contended that it was entitled to the statutory interest or none. The Supreme Court called attention to the fact that the tax was not to be apportioned, but that the entire amount was due on January 1 of each year. On the question of the liability for the penalty, however, the court held as follows:

> "There can be no doubt that the additional ten per centum charged for failure to pay by January 1 is a penalty, disallowed by the Bankruptcy Act, section 57j, but it is urged that the one per centum for each month of default is statutory interest and that the state is entitled to that and otherwise would be entitled to none. As the one per centum is more than the value of the use of the money and is added by the statute to the ten to make a single sum, it must be treated as part of one corpus and must fall with that. We presume that in this event the state does not object to receiving the simple interest allowed. That part of the order will stand."

A more or less superficial consideration of the above language might lead to the conclusion that the court in that case was holding that the one per centum per month being more than the value of the use of the money was a penalty but

that apparently is not what is intended since the same court in the case of United States v. Childs, 266 U. S. 304, in considering its former opinion said on page 309:

> "There a statute of New York was passed on which required 'every domestic corporation' to 'annually pay in advance * * * an annual franchise tax' upon its net income for the year next preceding, and provided that, if the tax were not paid, the corporation should pay 'in addition to the amount of such tax * * * ten per centum of such amount, plus one per centum for each month the tax * * * remains unpaid.' This liability the lower federal courts pronounced a penalty and not to be allowed. In that conclusion this court concurred and decided that, being penalty, it was disallowed by the Bankruptcy Act, section 57j, and this not only because one per centum was 'more than the value of the use of the money' but because it was added by the statute to the 10 per cent to make a single sum and 'must be treated as part of one corpus and must fall with that.' "

The court continued on page 309 as follows:

> "The tax in this case is one on income; a burden imposed for the support of the government. Interest is put upon it and so denominated, distinguished from the 5 per cent as penalty, clearly intended to compensate the delay in the payment of the tax—the detriment of its non-payment, to be continued during the time of its non-payment—compensation, not punishment."

The judgment was accordingly reversed.

In the case of In re: Brown, 41 Fed. (2d) 228, the report of a referee authorizing the collection of taxes, plus interest to the date of payment, but without any penalty, was approved by the court upon the authority of People v. Jersawit, *supra.* In that case the report of the referee calls attention to the case of In re: Scheidt Bros., reported in 177 Fed. 599. The case of In re: Scheidt Bros. *supra,* was the case in which a provision of the Ohio statutes with respect to penalties was under consideration. The statute provided that immediately after the semi-annual settlement of taxes in August of each

year, the county auditor should add a penalty of 10 per cent to all taxes on personal property remaining unpaid as shown by the county treasurer's books, and provided further that if the officer charged with the collection of the tax thereafter proceeded to collect them by distress or action or rule of court or special effort, in person or through his agent, a further penalty of 5 per cent was added to them for his use as compensation. The referee held that under section 57j of the Bankruptcy Act the penalty was not allowable as a claim against the estate. The court reversed the referee, using the following language on page 600:

> "No question as to taxes accruing and penalties imposed subsequent to the institution of the bankruptcy proceedings is involved. Whatever may be the rule elsewhere, in Ohio the penalty takes the place of interest. Bridge Co. v. Mayer, 31 Ohio St. 317, 328. Its allowance is intended to cover interest until the delinquent taxes are put into judgment (Wheeling & Lake Erie Ry. Co. v. Wolfe, 13 Ohio Cir. Ct. R. 374), or are paid voluntarily, or are collected by special effort of the treasurer, in person or by his agent—in some manner other than by process of law. The penalty, being treated as interest, is collectible as a part of the tax itself."

The facts of this case are quite similar to the situation in Indiana with respect to delinquent taxes since the passage of the 1935 Act providing for a penalty of 8 per cent on account of the delinquency and of an additional 5 per cent for each year thereafter.

> Burns Indiana Statutes, Annotated (1933); Pocket Supplement, Sections 64-1542, 64-1544.

It seems to me that while in the act the 8 per cent and 5 per cent respectively are referred to as "penalty" and "additional penalty," upon the authority of the case last cited, it could very well be considered as in lieu of interest, which I think is the fact since there is no provision in the statute for the charging of interest other than the flat penalty.

Under the law as it previously existed there was both an interest charge and a penalty charge, and I think it has been the uniform practice to disallow the penalty upon the author-

ity of the federal statute referred to earlier in this opinion. It appears, however, from the above cases that the referee would be authorized to allow interest, and upon the authority of the case last cited a penalty of no greater amount than the penalty provided under the Indiana Act could be treated as in lieu of interest. While the question is perhaps not entirely free from doubt, in my opinion the county treasurer should include in any claim for delinquent taxes against a bankrupt's estate where the provisions of the 1935 Act apply, —that he should include the penalty provided by statute. This conclusion is upon the theory that the federal statute does not prohibit the allowance of interest and that these penalties should be treated in lieu of interest.

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**TAX COMMISSIONERS, STATE BOARD OF: Taxation—reduction of rate by increase of payment to teachers.**

September 20, 1937.

Honorable Philip Zoercher, Chairman,
State Board of Tax Commissioners,
231 State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your request of September 20, 1937, in which you submit the following question:

> "Section 5 of chapter 194, in reference to the tax rate for school purposes, make certain provisions in reference to the budget for the years 1937 and 1938. The first part of that section provides that the tax rate for the years 1937 and 1938 shall be reduced in an amount equal to the increased benefits which shall be paid to such school township, school town or school city by reason of the increased payment of $200.00 for each taxing unit. Then it further provides that the final budget of such school corporation adopted in 1937 and 1938 shall not exceed the amount of the budget adopted in 1936 without the approval of the County Tax Adjustment Board, and if such approval is reduced then such excess may be approved by the State Board of Tax Commissioners.