

interest for the payment of expenses of administration, an investigation should first be made to ascertain the percentage limit which actuarial experience shows may be safely used for expenses without disturbing the entire structure.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

273.

GASOLINE TAX—AN EXCISE TAX—DEFINITION OF EXCISE TAX—  
GASOLINE TAX CONSTITUTIONAL.

SYLLABUS:

1. *An excise tax is placed upon the enjoyment of some particular privilege. It must be measured according to the reasonable value of the enjoyment of that privilege.*
2. *Proposed gasoline excise tax bill to provide revenues for supplying state's share of cost of construction and reconstruction of highways and abolishing railway grade crossings thereon probably constitutional.*

COLUMBUS, OHIO, April 4, 1927.

HON. DALLAS SULLIVAN, *Chairman, Committee on Highways, Ohio House of Representatives, Columbus, Ohio.*

DEAR MR. SULLIVAN:—I beg to acknowledge receipt of your letter of March 28th, reading as follows:

"The Committee on Highways of the House of Representatives, in cooperation with other committees of the House, has found it necessary to prepare a bill imposing an additional cent of tax on motor vehicle fuel, for the purpose of providing the state's share of the cost of highway construction. I am aware that from the standpoint of a lawyer, the best way to accomplish this purpose would probably be to amend the present law by increasing the rate and changing the provisions with respect to purpose and distribution. Certain extrinsic facts and conditions, however, demand a different course.

In the first place, the members of the committees have been repeatedly advised by persons claiming to represent organized motorists that any effort to increase the tax on motor vehicle fuel will be fought in the courts. For this reason, our members desire to let the present law stand without amendment and superimpose the additional tax, so that it may be assured that the present tax will not be involved in litigation that might arise.

It is possible the above purpose might be served by careful attention to the form of an amendment to the present law increasing the rate, but there are reasons based on expediency, but nevertheless sound and compelling, for imposing the additional tax in a separate measure, and allowing the present law to stand without direct amendment. We have prepared a bill along the above line and I am attaching a copy of the same and respectfully request your opinion as to whether the same is in workable form and will, if enacted, accomplish the purpose indicated. The proposed bill is prepared with reference to the present law, and you will note that in case the bill should be enacted into law, the tax imposed will be computed upon the basis of reports from dealers filed under the present law. The last two sections of the bill are designed to take care of the probable fractional month following the taking effect of

the bill, and for which of course the dealers' reports made under the present law could not be used, since they would cover the entire month. Certain language accompanying the references to main market roads and inter-county highways, and to the director of highways and public works, seemed to be necessary by reason of certain provisions of House Bill No. 67 changing the terminology of our state highway law."

Because of its length, and because it is unnecessary for the purpose of this opinion so to do, the complete text of the bill submitted is not set out herein.

The bill is entitled:

#### "A BILL

To impose an additional excise tax on the sale and use of motor vehicle fuel, and to provide revenue for supplying the state's share of the cost of constructing and reconstructing highways and abolishing railway grade crossings thereon."

Section 1 provides that "motor vehicles" and "dealer" are defined as provided in Section 5526, General Code, and that motor vehicle fuels are defined as provided in Sections 5526 and 5526-1, General Code.

Section 2 provides that "for the purpose of providing revenue for supplying the state's share of the cost of constructing and reconstructing the main market roads and inter-county highways of this state, or any other state highway system that may be created by law, and also for supplying the state's share of the cost of abolishing railway grade crossings upon such roads and highways" there shall be levied and imposed, on the sale of each gallon of motor vehicle fuel sold and used by any dealer, an excise tax of one cent in addition to the tax of two cents now imposed by section 5527, General Code, subject to the specific exemptions set forth in such section. Section 2 also provides that after the excise tax provided therein has been paid by the dealer, the motor vehicle fuel may thereafter be sold or resold without further liability for such tax.

Section 3 makes provision for the computing, by the Auditor of State, of the additional tax provided for from the statements now required by Section 5530, General Code. Provision is made for a fifteen per cent penalty computed on the basis of items found by the Tax Commission to have been omitted from the reports of any dealer. This section also requires the Auditor of State to transmit to the Treasurer of State a separate copy of the statement showing the amounts due under the act from dealers, and to send to each dealer against whom findings have been made, a notice of the amounts due on such findings.

Section 4 requires each dealer on or before the last day of each calendar month to pay the Treasurer of State, in addition to the excise tax imposed by Section 5527, General Code, the additional excise tax imposed by the act due on the sale or use of motor vehicle fuel sold or used in the preceding calendar month, together with any penalty on omitted amounts, the payments to be accomplished by a duplicate copy of the statement filed with the Tax Commission under the provisions of Section 5529, General Code.

Section 5 provides that in addition to the statement required by Section 5532, General Code, there shall also be printed or written on the bill showing the quality and price of the motor vehicle fuel sold a statement that the liability to the state for the additional excise tax has been assumed by the dealer, who has or will pay the same on or before the last day of the following calendar month.

Section 6 makes any person receiving a shipment in intrastate commerce of motor vehicle fuel without the statement provided for in Section 5, or any person who shall receive the same in violation of the terms of the act, liable for the tax and in addition thereto a penalty of fifteen per cent.

Section 7 provides that a refund of the tax paid under the act shall be allowed and paid where such refunds are made and allowed under Section 5534, General Code, and prescribes that the procedure fixed in said sections shall govern refunds.

Sections 8 and 9 read as follows:

"Section 8. Upon receipt of taxes herein provided for, the treasurer of state shall place the first twenty-five thousand dollars collected in a special fund, which shall constitute a rotary fund; and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to twenty-five thousand dollars. The refunds provided for by this act shall be paid from such rotary fund. The balance of taxes collected under the provisions of this act, after the credits to said rotary fund, shall be credited to a fund to be known as the state highway construction fund and shall be used solely for the purposes enumerated in Section 2 of this act. No disbursements shall, however, be made from said state highway construction fund except in pursuance of specific appropriations made therefrom from time to time by the General Assembly of Ohio.

Section 9. When appropriated by the General Assembly such state highway construction fund shall be appropriated and expended in the following manner and subject to the following conditions:

Forty per cent. thereof shall be appropriated for use in and shall be used in the several counties of the state in proportion to the number of motor vehicles registered from each of said counties during the calendar year preceding the making of such appropriation.

Sixty per cent. thereof shall be appropriated for use in and shall be used in the several counties of the state according to such equitable plan or method of apportionment as shall be from time to time adopted and prescribed by the director of highways and public works or such other state official as may from time to time be the chief officer of any department of state having charge of the main market roads and inter-county highways of the state or other state highway system.

Provided, however, that not more than three hundred thousand dollars of said state highway construction fund may be appropriated for use in or used in any one calendar year for the purpose of paying the state's share of the cost of abolishing railway grade crossings."

The purpose of Sections 10 and 11, the last two sections of the bill, is set forth in your letter above quoted.

You ask whether the bill "is in workable form and will, if enacted, accomplish the purpose indicated."

An excise tax is placed upon the *enjoyment* of some particular privilege. It must be measured according to the reasonable value of the enjoyment of that privilege.

A very large proportion of the tax to be collected under the proposed law would come from the residents of cities.

Under the present laws and under the proposed bill there would be no possibility of any of the taxes raised under said proposed law being spent for the construction of any streets or highways in the cities of the state.

There are many commercial cars and some pleasure cars which never leave the streets of their respective cities. On their behalf it may be claimed that the excise charged does not bear a reasonable relation to the value of the enjoyment of the privilege taxed.

In the case of *Saviers vs. Smith*, 101 O. S. 132, in the course of the opinion (page 142) Judge Johnson said:

"The use of the entire proceeds in aid of the specific privilege enjoyed by those who pay the tax is an essential feature in determining its reasonableness."

In the case of Southern Gum Company vs. Laylin, 66 O. S. 578, the second branch of the syllabus reads as follows:

"While there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare."

In discussing The Southern Gum Company case, Judge Johnson in the Saviers case at page 136, said:

"It was held that in the absence of an express limitation on the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution which provide that private property shall be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote the common welfare; that by reason of these constitutional safeguards a tax on privileges and franchises can not exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. The determination of such values rests largely in the general assembly, but finally in the courts. So it may be said to be the settled law of this state that under our constitution, when property is taxed it must be taxed at its true value in money, by a uniform rule, and when a privilege is taxed it is required that it should be taxed at its reasonable value. It would be wholly impracticable, if not impossible, to prescribe any general rule for the valuation of a franchise or a privilege. Therefore, the reasonable value in each set of circumstances should be fixed."

There are some authorities throughout the country which do not look to the use of the proceeds of the tax but use other factors to measure the value of the use or enjoyment of the privilege.

While I am not prepared to say that the bill, as drawn, would be held unconstitutional if enacted into law (especially as a part of the three hundred thousand dollars annual maximum which may be appropriated for the state's share of abolishing railway grade crossings may, under favor of Section 6956-38, be spent within the limits of any city having a main market road or an inter-county highway), yet I do say that if the bill authorized the use of a part of the proceeds of this tax in the construction of main market roads and inter-county highways in the cities of the state, there would then be no question in my mind of its constitutionality.

Outside of the foregoing question of constitutionality, I am of the opinion that said bill is in workable form and will, if enacted, accomplish the purpose indicated.

Respectfully,

EDWARD C. TURNER,  
Attorney General.