

89.

FUNDS IN MUNICIPAL TREASURIES FROM AUTO LICENSE TAX AND GASOLINE TAX—CANNOT BE TRANSFERRED OR USED OTHERWISE THAN FOR MAINTENANCE AND REPAIR OF PUBLIC ROADS, HIGHWAYS AND STREETS.

*SYLLABUS:*

*The funds in municipal treasuries from auto license tax, and gasoline tax, cannot be legally transferred, or used otherwise, than for maintenance and repair of public roads, highways and streets.*

COLUMBUS, OHIO, February 18, 1927.

HON. H. E. CULBERTSON, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads as follows:

"We are building a road from Perrysville to Loudonville, Ohio, and in the village of Perrysville, the council have widened the pavement so as to make a regulation brick street. The water has never been extended down this street and the council of the village are anxious to have this done before the paving is laid. They are short of funds but have a surplus in the auto fund and in the gas tax fund over and above what they will need for the year.

Is there any possibility of their using this surplus to assist in putting down this water line and, if so, should it be done by asking the court to transfer a certain sum from these two funds to the water fund or can we, by some process of imagination, let this contract to the contractor that is putting down the street and pay it directly out of these two funds as part of the improvement or maintenance of this street?

The matter looked impossible to me, but I am very anxious to help these people out if it can be done, but would not so advise without your approval."

Your question is as to whether or not funds derived from the automobile license and the gasoline tax for the maintenance and repair of public roads, highways and streets may be transferred to other funds, for other purposes.

Section 6309-2, General Code, in regard to the distribution of revenue collected from automobile licenses, reads:

"The revenue collected under the provisions of this chapter shall be distributed as follows:

(1) Fifty per centum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district or (of) registration as provided in this chapter. The portion of such money due the municipal corporations shall be paid into the treasuries of such municipal corporations on the first business day of each month, and the remainder retained in the county treasury. In the treasuries of such municipal corporations and counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads, highways and streets and for no other purpose, and shall not be subject to transfer to any other fund. 'Maintenance and repair' as used in this section, includes all work done upon any public road or highway, or upon any street, in which the existing foundations thereof is (are) used as a sub-surface of the improvement thereof, in whole or in substantial part."

It is noted that this section limits the use of said fund to the maintenance and repair of public roads, highways and streets and for no other purpose; and also provides that said fund shall not be subject to transfer to any other fund. It necessarily follows that the automobile license fund in the treasury of the village of Perrysville may not be transferred or used for the purpose of extending the water line in a street, as this would not come within the meaning of maintenance or repair as provided in said section.

However, in a fairly recent case the Ohio Court of Appeals of the Seventh District answered this question. The case of *City of Kent vs. O. C. Clement*, which was filed in the Common Pleas Court of Portage county in September, 1925, involved the question as to whether or not said city of Kent had authority to transfer \$7,000.00 in the road maintenance fund to the city service and safety funds in order to meet a temporary shortage in the latter funds. The Common Pleas Court held that such transfer could be made. Error was prosecuted to the Court of Appeals. The Court of Appeals in its opinion sustaining the contention of the taxpayers that said transfer could not be legally made, stated in part as follows:

"The action below was one by the city of Kent, through its officials, to transfer funds arising from what is known as the Lipp Automobile License Tax Law, Section 6290, G. C., et seq., to certain other funds of the city. \* \* \*

The facts are, briefly as follows: On the first day of September, 1925, the council of the city of Kent, being in need of funds in the safety and service departments, passed a resolution authorizing the transfer of \$7,000.00 from the automobile license tax fund, which had in it at that time a sum slightly in excess of ten thousand dollars, and to secure the transfer of the same an application or petition was filed by the city in the Court of Common Pleas under favor of Section 2296, G. C., et seq. \* \* \*

Upon the hearing, as above stated, the order was made for the transfer of such funds, one thousand to the safety fund and six thousand dollars to the service fund.

\* \* \* \* \*

This fund was created by and under the authority of Section 6309-2 G. C., and related sections, which were held constitutional in *Saviers vs. Smith*, 101 O. S. 132, in which the tax is called a levy and in *State ex rel., Brewer*, 112 O. S., it is referred to as a tax levy, an excise tax.

It is urged here, however, that the provisions of certain other sections of the General Code, such as 2296, 2297, 3799, 5654, etc., are sufficient authority to authorize the transfer of these funds. However, without extended discussion of these sections or the numerous cases to which attention has been called, \* \* \* it is sufficient to say that the conclusion is that Section 6309-2, G. C., is determinative of the question involved here, \* \* \*.

The last revision of Section 2296, G. C., appears in 103 O. L. 522, while Section 6309-2, G. C., is found in 108 O. L. 1083, and contains a specific provision while Section 2296 is general in character; therefore, Section 6309-2 would be construed as an exception; *Electric Co. vs. Pomeroy*, 99 O. S. 75; *Doll vs. Barr*, 58 O. S. 113-120. And there can be no question about the legislative purpose in so doing, for the reason that it is clearly provided that the fund created under Section 6309-2 and other sections is for the specific purpose of the maintenance of streets and public highways and undoubtedly the purpose of the provision 'shall not be subject to transfer to any other fund' was written into the statute for the express purpose of avoiding just such situations as the instant case suggests, and it is in harmony with Article XII, Sec. 5 of the Ohio Constitution. In the light of the foregoing it matters

little whether the automobile license tax is a special levy or not; if indeed it be, then regardless of Section 6309-2 G. C., these transfers would be unauthorized. It is insisted, however, that this was merely a loan; that bond was given for the return of the money April, 1926. It must be recalled, however, that there is no provision of law or no statute in Ohio authorizing the loan of money from this fund to any other. \* \* \*

Therefore, the conclusion must be that the city was without authority to make these transfers to the two other funds in question, and for the reasons given the judgment is reversed, \* \* \*."

I have not found that this opinion is reported, but have secured what I consider an authentic copy of the same.

You also inquire as to the legality of transfers from the gasoline tax fund. The following paragraph of Section 5537 of the General Code, provides for apportionment to municipal corporations:

"Thirty per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be used by such municipal corporations for the sole purpose of maintaining and repairing the public streets and roads within such corporation."

It is noted that under the provisions of this section the funds derived from the gasoline tax, and apportioned to the municipality, shall be used for the sole purpose of maintaining and repairing the public streets and roads within such corporation. *State, ex rel. Janes vs. Brown, Secretary of State*, 112 Ohio St. 590. It, therefore, follows that under the provisions of this section the city of Perrysville is precluded from making transfers from the gasoline tax fund to other funds. This conclusion is supported by the recent case of *State, ex rel., Crabbe, Attorney General, vs. City of Columbus, et al.*, decided in the Court of Appeals of Franklin county, Ohio, May 28, 1926, and reported in 153 N. E. at page 174. The original action was brought by the State to enjoin the city of Columbus and its officers from expending funds apportioned to it under the gasoline excise tax law, for the purchase of a machine called a sand dryer, to be placed in the asphalt plant owned by the city. The city of Columbus contended that said sand dryer was to become a part of its asphalt repair plant, and that said repair plant was used exclusively for maintenance and repair work, and that, therefore, the expenditure for said sand dryer was in reality an expenditure for maintenance and repair. The Court of Appeals sustained the city of Columbus in this contention, on the grounds stated, but in the opinion the following language was used:

"It is clear from the provisions of the entire gasoline excise tax act that the General Assembly intended to confine the expenditures from said fund exclusively and solely to highway maintenance and repair. In the apportionment made to the cities and municipalities the limitation in the use of the fund was again repeated. It will be observed, however, that no limitation was placed upon the officials of the city, other than that the fund be used exclusively for highway maintenance and repairs. \* \* \* As long as no diversion or misappropriation of the funds is shown, and where it appears as an admitted fact that the uses contemplated are strictly for maintenance

and repair purposes, we are of opinion that the courts are not called upon to interfere."

In concluding, the court said:

"The answer of the city showing that the purchase of the sand dryer is necessary to the equipment of the asphalt repair plant, and showing further that such asphalt plant is used exclusively for maintenance and repair work, we are of opinion that the city may in its discretion use the funds for the purpose of equipping said asphalt plant, and that the court has no authority to interfere therewith in the absence of some showing that the plant is to be used for some other purpose than that stated."

The construction of a water line beneath the surface of the street cannot be classed as maintenance or repair of the street or highway. Section 6309-2 of the General Code, provides that:

"'Maintenance and repair' as used in this section, includes all work done upon any public road, or highway, or upon any street, in which the existing foundations thereof is (are) used as a sub-surface of the improvement thereof in whole or in substantial part."

You are, therefore, advised that in the opinion of this department the funds in municipal treasuries from auto license tax and gasoline tax cannot be legally transferred, or used otherwise than for maintenance and repair of public roads, highways and streets.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

90.

DIRECTOR OF HIGHWAYS—NEED NOT HAVE FEE SIMPLE TITLE FOR ROADWAY RIGHT OF WAY—PERPETUAL EASEMENT SUFFICIENT—DEEDS MUST BE DESCRIPTIVE ENOUGH TO ENABLE COUNTY AUDITOR TO IDENTIFY BY COUNTY MAP—SECTION 12 OF APPROPRIATION ACT 1925-26 APPLIES ONLY TO MONIES APPROPRIATED FOR PURCHASE OF REAL ESTATE DESIGNATED THEREIN—ANY EVIDENCE OF TITLE ACQUIRED BY DEPARTMENT OF HIGHWAYS MUST BE DEPOSITED WITH AUDITOR OF STATE.

*SYLLABUS:*

1. *When the Department of Highways and Public Works purchases lands for the purpose of locating or relocating a highway, it is not necessary for the department to acquire a fee simple title thereto; a perpetual easement in the public for a right of way for road and highway purposes is sufficient.*
2. *When the Department of Highways and Public Works acquires the fee of any real estate for highway purposes, the deed should contain a description of sufficient definiteness to enable the county auditor to locate the same upon the county map.*
3. *Section 12 of the appropriation act for 1925-26, requiring the consent and approval of the controlling board to the expenditure of monies therein appropriated*