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GASOLINE TAX—MUNICIPALITY'S SHARE—ADDITIONAL TWO CENT TAX APPLICABLE FOR PURCHASING RIGHT OF WAY IN STREET WIDENING—USE FOR SUPPLYING ROAD SLAG QUESTION OF FACT.

SYLLABUS:

1. *The municipality's share of the additional two cent gasoline tax distributed under the provisions of Section 5541-8, General Code, as amended by the 88th General Assembly, 113 O. L., page 70, may be used for the purpose of purchasing additional right of way necessary in connection with the widening of any street.*

2. *It is a question of fact whether or not a sufficient quantity of slag or other materials placed upon a given street amounts to construction of a street, under the terms of Section 5541-8 of the General Code.*

3. *Inasmuch as the gasoline tax distributed under Section 5537 of the General Code expressly authorizes municipalities to use the same for maintenance and repair of streets as well as construction, etc., it follows that said tax may properly be used for placing slag and other materials upon said streets even though such operation constitutes "maintenance" as contradistinguished from construction.*

COLUMBUS, OHIO, December 9, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my opinion, which reads as follows:

"In Opinion No. 1024 dated October 14, 1929, you advised the Bureau that the original two cent gasoline tax provided for in Section 5527 G. C., and the motor vehicle license tax, may be used by municipalities for the purpose of widening streets, but not for the purpose of purchasing additional right of way needed in connection with such street widening.

Question 1. May the municipality's share of the additional two cent gasoline tax provided for in House Bill No. 335, 113 O. L., page 70, be used for the purpose of purchasing additional right of way needed in connection with the widening of any street?

Question 2. May the municipality's share of the original two cent gasoline tax and the additional two cent tax be used for the purpose of placing slag or cinders on unimproved streets and roadways?"

In Opinion No. 1024 of this office, to which you refer, it was pointed out that Section 5527, General Code, in its amendment by the 88th General Assembly, extended the power of municipalities to use the funds arising under said act. It was pointed out that this section authorized the use of such funds for the purpose of constructing and repaving, as well as maintaining and repairing the streets. Inasmuch as said Sections 5527 et seq. authorized the construction of streets, it was concluded in my former opinion that "the widening of a street must, of necessity, be by means of construction or maintenance and repair." Said sections as amended, provide that the tax may be used for both purposes.

With reference to the use of this tax in connection with the purchase of right of way, the opinion above referred to concluded that the language of the section does not authorize the use of the fund for the purpose or "laying out any street or part thereof." Said opinion further concluded that the streets must therefore be laid out and in existence before the money can be used for the purpose designated in the

statute. The opinion further indicated that buying an additional right of way has to do with laying out or establishing the street rather than with maintaining or constructing the street. However, your specific question now arises by reason of Section 5541-1 et seq., as amended by the 88th General Assembly in House Bill No. 335. Section 5541-1, General Code, as amended, and which states the purpose of the tax, in part, provides:

“For the purpose of providing revenue for supplying the state’s share of the cost of constructing, widening and re-constructing the * * * state highways of this state, * * * and also for supplying the state’s share of the cost of * * * eliminating railway grade crossings upon such * * * highways, and also for enabling the several counties, townships and municipal corporations of the state to properly construct, widen, reconstruct and maintain their public highways, roads and streets, and supplementing revenue already available for such purposes, there is hereby levied and imposed on the sale and use of each gallon of motor vehicle fuel sold or used by any dealer, as herein defined, within the State of Ohio, an excise tax of * * * two cents, which tax shall be in addition to the tax imposed by Section 5527 of the General Code; * * *”

Section 5541-8, General Code, in part, provides:

“* * * Five per cent of said highway construction 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 expended by each municipal corporation for the sole purpose of constructing, maintaining, widening and reconstructing the public streets and roads within such corporation * * *”

From the sections above quoted, it will be observed that the amended sections expressly use the term “widening”, in connection with the authority granted to use said funds for the purpose of constructing, maintaining and reconstructing the public roads and streets within the municipal corporation.

In view of the conclusion that I heretofore reached, to the effect that the taxes arising under Section 5537, General Code, could be used for the purpose of widening the surface of existing streets, it would seem that it would be unnecessary to use the term “widening” unless something more was to be included within the powers of the municipality by the use of said term. If I am correct in my conclusion that the surface of an existing street could be widened by the process of construction or reconstruction, then in so far as the widening of a given pavement is concerned, it would have been unnecessary for the Legislature to have used the term “widening” in connection with said amendment.

It is a well known fact that in many instances it becomes necessary to purchase a right of way in order to widen a street to the extent necessary for general utility in view of traffic conditions. When such situation arises, the acquiring of additional right of way is the basic requirement in order to accomplish the purpose. It is probable that the Legislature had this in mind in using the term “widening”, and it is believed a fair assumption to state that in the use of the term it was intended to include the purchase of the right of way. Such a conclusion would not be in conflict with my former opinion hereinbefore considered, for the reason that said opinion held that the construction of a street included the power to extend the width of the paved portion of an established street.

In the language used in Section 5548-1, *supra*, there are not only included the terms "construction" and "reconstruction" but said section goes farther, and uses the term "widening." It follows therefore that in view of my former construction it would have been unnecessary to use such term unless it was for the purpose of including additional right of way.

It must be borne in mind that a street is not simply the portion of the public property which is devoted to vehicular traffic, but the term includes all of the property from lot line to lot line. Literally speaking, therefore, the widening of a street, as distinguished from a widening of the paved surface alone, would necessarily comprehend acquisition of right of way. It would therefore seem that the funds in question may be used for such purpose.

In considering your second inquiry as to whether the municipality's share of the original two cent gasoline tax and the additional two cent tax may be used for the purpose of placing slag and cinders on unimproved streets and roadways, your attention is directed to my opinion No. 1130 issued to Hon. Howard M. Nazor, Prosecuting Attorney, under date of October 30, 1929, copy of which I am enclosing herewith. That opinion had under consideration what constituted an improved road within the meaning of that part of Section 5541-8, General Code, which relates to the distribution of the gasoline tax to townships. Said section requires "that such funds shall be used by the township trustees for the purpose of constructing, widening and reconstructing unimproved dirt roads", etc. The second branch of the syllabus of said opinion reads:

"It is a question of fact whether or not a road upon which cinders have been used should be regarded as an unimproved dirt road. The determination of the question depends upon the extent of the improvement by the use of cinders and this question must be determined by the township trustees, whose judgment would not, in the absence of its abuse, be disturbed."

It would seem possible to construct a street by placing any materials upon the street which would give it a substantial bearing surface. Of course it is a question of fact as to whether or not a given undertaking is a construction, within the meaning of said section. If the project contemplated simply amounts to maintaining and repairing the street, of course the funds arising under Section 5537 of the General Code could be used because the statutes authorize said fund to be used for the purpose of maintenance and repair, as well as for construction and repaving streets.

Based upon the foregoing, and in specific answer to your inquiry, it is my opinion that:

1. The municipality's share of the additional two cent gasoline tax distributed under the provisions of Section 5541-8, General Code, as amended by the 88th General Assembly, 113 O. L., page 70, may be used for the purpose of purchasing additional right of way necessary in connection with the widening of any street.

2. It is a question of fact whether or not a sufficient quantity of slag or other materials placed upon a given street amounts to construction of a street, under the terms of Section 5541-8, of the General Code.

3. Inasmuch as the gasoline tax distributed under Section 5537 of the General Code expressly authorizes municipalities to use the same for maintenance and repair of streets, as well as construction, etc., it follows that said tax may properly be used for placing slag and other materials upon said streets even though such operation constitutes "maintenance" as contradistinguished from construction.

Respectfully,

GILBERT BETTMAN,
Attorney General.