

310

GASOLINE TAX—WHERE PORTION PAID OVER TO TREASURER OF COUNTY, TO CREDIT OF TOWNSHIP IN COUNTY, AND PRIOR TO APPORTIONMENT AND PAYMENT, COUNTY CEASED TO EXIST, AMOUNT CREDITED SHOULD BE REFUNDED TO STATE TREASURY—CREDIT—TOWNSHIP'S SHARE OF HIGHWAY CONSTRUCTION FUND—SUPPLEMENTARY DISTRIBUTION SHOULD GO TO TOWNSHIP SO ENTITLED—SECTIONS 5541 TO 5541-8 G. C.

SYLLABUS:

Where a portion of the gasoline tax arising under Sections 5541 to 5541-8, inclusive, of the General Code, is paid over to the treasurer of a county to the credit of a township in such county which, prior to such apportionment and payment has ceased to exist, such amount credited to such township should be refunded to the state treasury to the credit of the township's share of the highway construction fund, for supplementary distribution to the townships entitled thereto.

Columbus, Ohio, June 15, 1945

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio

Dear Sir:

I am in receipt of your letter requesting my opinion relative to gasoline tax distribution to Millcreek Township, a former, but now non-exist-

ent political subdivision of Hamilton County. You have attached a letter from one of your state examiners, from which I quote the following :

“In reply to your inquiry of the 13th instant, relative to gasoline tax distribution to Millcreek Township, a non-existent political subdivision of Hamilton County, I have to offer the following :

The records here agree with your statements as to total gas tax distributions to townships, except that the last distribution of \$6500.00, or \$500.00 to each of thirteen townships in 1942, is taken up here in 1943.

Millcreek Township, as noted in our report of examination of townships, filed January 22, 1943, was absorbed by two municipalities, and passed out of existence as a political subdivision as of July 29, 1942.

After said date, there have been four distributions of gasoline tax for townships to Hamilton County, of which distributions there have been credited to the account of ‘Millcreek Township’ in the county auditor’s ledger as follows :

August 11, 1942	\$ 400.00
October 14, 1942	400.00
January 6, 1943	500.00
March 11, 1943	400.00
	Total
	\$1700.00”

The gasoline tax, to which you refer, arises under Sections 5541 to 5541-8 inclusive, of the General Code, commonly known as the “additional gasoline tax.” By the provisions of Section 5541-7 General Code, the treasurer of state is required to maintain a rotary fund of \$75,000 out of the receipts of such taxes, to cover refunds to persons who have paid the tax upon gasoline which is not used for travel on the highways. Said receipts are further subject to appropriation for the expenses of the administration of the motor vehicle fuel laws. The balance of such tax is to be credited to a fund known as the highway construction fund.

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

“When appropriated by the General Assembly such highway construction fund shall be appropriated and expended in the following manner and subject to the following conditions: * * *

Seventeen and one-half per cent of said highway construction fund shall be appropriated for and divided in equal propor-

tions among the several townships within the state, and shall be paid on vouchers and warrants drawn by the auditor of state to the county treasurer of each county for the total amount payable to the townships within each of the several counties. Upon receipt of said vouchers and warrants each county treasurer shall pay to each township within the county its equal proportional share of said funds which shall be expended by each township for the sole purpose of constructing, maintaining, widening and reconstructing the public roads and highways within such township. * * *.”

In the general appropriation act for the biennium of 1941-1942, which was passed May 16, 1941, we find the following item:

“(Appropriated from Highway Construction Fund.)

All revenues accruing to the gasoline tax excise fund which are by law distributable to the several counties, municipal corporations and townships, are hereby appropriated for that purpose to be distributed to, and expended by those subdivisions in accordance with law.”

It will be observed that there is no specific amount appropriated to any particular township and no amount is named for the total appropriation. This, of course, is because the appropriation amounts merely to a designation of the use to which taxes thereafter to be collected shall be apportioned. I do not consider that such appropriation created any immediate title to any particular sum in any of the townships of the state. It was merely authority to the state officers and to the county officers to distribute the tax when and as received, in accordance with the provisions of the statutes, including Section 5541-8 supra.

It appears from your communication that four distributions of gasoline tax were made in 1942, to Hamilton County, of which there were credited to the account of Millcreek Township in the county auditor’s ledger the following:

“August 11, 1942.....	\$400.00
October 14, 1942.....	400.00
January 6, 1943.....	500.00
March 11, 1943.....	400.00
Total	<u>\$1700.00”</u>

I find from an examination of the roster of township officers published by the Secretary of State that Millcreek Township was “abolished

by the county commissioners in 1942." It is stated in your communication that it passed out of existence as a political subdivision as of July 29, 1942. I know of no legal process by which a township can be abolished except by being attached to and becoming part of some other township or townships. There changes may arise under the provisions of Section 3245, General Code, which authorizes the county commissioners to alter or change the boundaries of any civil township or partition any township among other townships by attaching a part of one to another. Section 3249, General Code, also provides for the erection of new townships on application of a municipal corporation located therein and Section 3250, General Code, provides for such action on petition of free-hold electors in a portion of a township outside of city limits.

Your communication gives me no information as to how Millcreek Township was disposed of, but from other information gathered from your department I find that at some time prior to July 29, 1942, when you say the township passed out of existence, a portion of it had been taken into the City of Cincinnati, another portion incorporated into the City of St. Bernard, and the remainder into the Village of Elmwood Place. My information is that the portion of Millcreek Township which became a part of the City of Cincinnati, was taken in a number of years prior to the period when the gasoline tax distribution in question was made. As to when that portion of Millcreek Township lost its identity and became part of another township, I am not definitely informed, but from an examination of the act which created the Municipal Court of Cincinnati, I observe that Section 1558-43, General Code, being part of that act, provides for the abolishment of the offices of justice of the peace and constable in Cincinnati Township, no other township being mentioned. From this, there would seem to be a fair inference that at the time of the passage of that act, to wit, April 17, 1913, the City of Cincinnati was co-extensive with Cincinnati Township, and that if part of Millcreek Township had been taken into the city prior thereto, it had been annexed to Cincinnati Township. As to the portions incorporated into St. Bernard and Elmwood Place, I am informed that new townships were erected, co-extensive with those municipalities.

One of my predecessors had before him the question as to a municipality which had become identical with the boundaries of the township, and as to the rights of such municipality to the township's share of the

gasoline taxes, and it was held in an opinion found in 1930 Opinions Attorney General, page 624, as follows:

“When the corporate limits of a city or village become identical with those of a township, such city or village is not entitled to such township’s share of the motor vehicle fuel tax except such sum which may be due and payable out of the gasoline tax fund to the township at the time when the corporate limits became identical.”

In that opinion the Attorney General discussed the effect of Section 3512, General Code, which provides that when the boundaries of a city or village become identical with those of a township, all township offices should be abolished, excepting those of justice of the peace and constable. He called attention also to the case of *McGill v. State*, 34 O. S., 228, in which the Supreme Court held that the corporate existence of the township was preserved for a limited purpose. Notwithstanding the continued existence of the corporation in such case, the Attorney General held as above stated, pointing out that when the limits of the municipality became identical with those of the township, the municipality must assume the burden of caring for the streets and highways out of the share of the gasoline tax fund which is allotted to it as a municipal corporation under Section 5541-8, *supra*.

In my opinion, when a portion of the gasoline tax comes into the hands of the county treasurer and is placed to the credit of a township which has been dismembered and has entirely ceased to exist, such sum could not be said to belong to any of the municipal corporations whose territory then embraced what was once a part of the defunct township. The most that could be said for the right of such municipality to receive any part of such allotment would be as pointed out by the Attorney General in the syllabus above quoted, that the municipalities might be entitled to that part which became *due and payable prior to the time* when the township was abolished. In that view of the case neither of the municipalities here concerned would have any claim on any portion of this fund because, by the terms of your statement, the township had passed out of existence before the first of the distributions was made.

If it be claimed that any one of these four items of distribution was “due and payable” to the township or a remnant thereof prior to July 29, 1942, I can find nothing either in the law or in the facts submitted, to

substantiate that claim. The law does not make these distributions due and payable to any of the subdivisions at the time of the appropriation because, as already pointed out, the appropriation is made long before the taxes accrue and are collected. The statute is entirely silent as to the time when the distribution is to be made with respect to the time of collection. The distribution is not made direct by the state treasurer to the townships but is paid in a lump sum to the county treasurer, who has the duty then of apportioning it to the townships. The earliest date, therefore, at which it appears that the township might claim title to the fund was August 11, 1942, at which time, as you have stated, the township of Millcreek had wholly passed out of existence.

It is my opinion, therefore, that the sum of \$1700 arising from gasoline tax, apportioned to Millcreek Township by the distributions dated August 11, 1942 and thereafter, should be refunded to the state treasury to the credit of the township's share of the highway construction fund for supplementary distribution to the townships entitled thereto.

Respectfully,

HUGH S. JENKINS

Attorney General