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TAXES, EXCISE, LEVIED ON THE SALE OF GASOLINE—MOTOR VEHICLE TAX — FUNDS DERIVED FROM SUCH TAXES, WHEN DISTRIBUTED TO MUNICIPALITIES MAY BE EXPENDED TO CONSTRUCT CURBS AND GUTTERS ON STREETS — SECTIONS 5527, 5541, 5541-8, 5537, 6309-2 G.C.

SYLLABUS:

Funds derived from taxes levied upon the operation of motor vehicles and the excise taxes levied on the sale of gasoline under Sections 5527 and 5541 General Code, when distributed to municipalities pursuant to Sections 6309-2, 5537 and 5541-8 General Code, may lawfully be expended for the purpose of constructing curbs and gutters on streets.

Columbus, Ohio, September 26, 1942.

Hon. Richard E. Hole, Prosecuting Attorney,
Greenville, Ohio.

Dear Sir:

This will acknowledge receipt of your communication, which reads:

“The Village of Castine, Darke County, Ohio, has ample funds both in its General Fund and in its Road and Street Fund to construct curbs and gutters in the Village.

I respectfully request your opinion as to the legality of the Village constructing such curbs and gutters out of either the General Fund or the Road and Street fund, which, of course, is derived from the motor vehicle tax and gasoline excise tax.”

Your inquiry requires a consideration of Sections 6309-2, 5537 and 5541-8 of the General Code.

Section 6309-2, after providing for a certain percentage of distribution of the funds arising from the registration of motor vehicles to municipalities, further provides:

“ * * * and in the treasuries of such municipal corporations such moneys shall constitute a fund which shall be used for the maintenance, repair, construction and repaving of public streets, and maintaining and repairing bridges and viaducts, and for no other purpose, excepting as provided in this paragraph and shall

not be subject to transfer to any other fund excepting to the extent temporarily authorized by paragraph (3a) hereof; * * * "

The section also provides some limitations with reference to expenditures in excess of 50 per cent of the amount available to municipalities by contract, after the taking of competitive bids, which is unimportant in view of the question propounded.

Section 5537, which relates to the so-called first gasoline tax, after providing for a certain percentage of distribution to municipalities, provides that such funds:

" * * * shall be used by such municipal corporations for the sole purpose of maintaining, repairing, constructing and repaving the public streets and roads within such corporation. * * * "

Section 5541-8, which relates to the distribution of the so-called second gasoline tax, after providing for the distribution to municipalities, provides that said funds:

" * * * shall be expended by each municipal corporation for the sole purpose of constructing, maintaining, widening, reconstructing, cleaning and clearing the public streets and roads within such corporation, and for the purchase and maintenance of traffic lights. * * * "

In an opinion rendered by the then Attorney General on September 20, 1920 (Opinions of the Attorney General, 1920, Vol. II, P. 992) it was held:

"The funds mentioned in Section 6309-2 G.C. (108 O.L. Part II, P. 1083) may be used in the improvement of curbs and gutters, provided that their existing foundation is used in whole or in substantial part as the sub-surface of the improvement."

In the body of the opinion it is pointed out that the term "street" embraces the area between property line and property line. It is further stated in the opinion that:

" * * * The improvement of curb and gutter is as a rule included in street improvement rather than in sidewalk improvement. * * * "

An examination of Section 6309-2 as it then existed, will disclose

that the use of funds derived from the tax on the operation of motor vehicles was therein limited to maintenance and repair of public roads, highways and streets.

“Maintenance and repair” was defined in said section as follows:

“‘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 foundation thereof is used as the sub-surface of the improvement thereof, in whole or in substantial part.”

Under the existing statute the use of such funds distributed to municipalities is not limited to maintenance and repair but may be used for “maintenance, repair, construction and repaving.” It would therefore follow that if curbs and gutters are included within a road or highway, the funds derived from motor vehicle registration could properly be used for the construction thereof, since the statute in its present form does not contain the limitation on the use of such funds as was prescribed therein in 1920.

It will be observed from a reading of Sections 5537 and 5541-8 that funds distributed to a municipality, in so far as the question under consideration is concerned, may be used for practically the same purposes as the funds distributed under Section 6309-2. In other words, if the reasoning which impelled the conclusion reached in the 1920 opinion, is applied to the provisions of Sections 5537 and 5541-8, it would follow that the funds in question may be likewise utilized. It is a matter of common knowledge that the function of a curb and gutter is to provide drainage of a street or highway. It may be argued that it is a function of a curb and gutter to drain a sidewalk and that inasmuch as it has been held that sidewalks may not be constructed from such funds, it is improper to use the funds in question for such purposes. While it may be conceded that such a construction does have the effect in many instances of draining a sidewalk, this fact in nowise prevents the use of the funds for the purpose of draining a street.

It frequently happens in modern methods of constructing streets and highways, that a curb and gutter is utilized in areas where there are no sidewalks. In fact, this method of construction is often used in the country. It is self evident that any construction in or upon a street that facilitates drainage, serves a useful purpose for the street proper and

the fact that incidentally a sidewalk would be benefited, would be no legal objection to the improvement of the street.

The Attorney General in an opinion found in Opinions of the Attorney General, 1929, Vol. I, Page 737, held that funds arising under Sections 6309-2 and 5537, could properly be used "for the purpose of constructing local storm water drains which are installed as a part of the street construction for the purpose of draining such street." In the body of the opinion, reference is made to a statement by Judge Hough in his Opinion in the case of Roebing vs. Cincinnati, 102 O.S., 461, as follows:

"A drain is an incident to street building. No engineer would think of constructing a street without providing for the drainage of that street. It is an essential element of good workmanship and substantial construction, and it is highly important that drains be provided to prevent the accumulation of water upon the surface of the street and adjacent territory, for the purpose of preventing early decay and deterioration of the street. By reason of its construction a street may receive surface water, and frequently does, from territory outside of its own compass, from the terraces of abutting property and from the roofs of houses thereon."

In view of what has been said, it seems to be clear that the construction of curbs and gutters in connection with a street or highway improvement, is clearly within the purposes of the sections under consideration in their existing form.

Based upon the foregoing citations and discussion, you are specifically advised that funds derived from taxes levied upon the operation of motor vehicles and the excise taxes levied on the sale of gasoline under Sections 5527 and 5541 General Code, when distributed to municipalities, pursuant to Sections 6309-2, 5537 and 5541-8 General Code, may lawfully be expended for the purpose of constructing curbs and gutters on streets.

Respectfully,

THOMAS J. HERBERT
Attorney General.