

1677.

APPROVAL, BONDS OF CITY OF HAMILTON IN AMOUNT OF \$75,000
FOR WATERWORKS IMPROVEMENT.

COLUMBUS, OHIO, December 3, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1678.

AUTOMOBILE LICENSE TAX—SECTION 6290 G. C. CONSTRUED—MONEYS COMING INTO COUNTY TREASURY ARE TO BE DISTRIBUTED ONLY AT REGULAR SEMI-ANNUAL TAX DISTRIBUTION PERIODS—EXCEPTION, ADVANCE DRAFTS POSSIBLE UNDER SECTION 2692 G. C.—MONEYS MAY BE EXPENDED ONLY AFTER APPROPRIATION BY COUNCILS AND COUNTY COMMISSIONERS IN ACCORDANCE WITH SECTIONS 3797 AND 5649-3D G. C.

Moneys coming into the county treasury by virtue of sections 6290, et seq., G. C., as amended 108 O. L. Part II, page 1078 (automobile license tax law), are to be distributed only at the regular semi-annual tax distribution periods, subject to the privilege to interested municipalities of making an advance draft in accordance with section 2692 G. C. Such moneys may be expended only after appropriation by municipal councils and county commissioners in accordance with sections 3797 and 5649-3d G. C.

COLUMBUS, OHIO, December 4, 1920.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—You have recently written to me as follows:

“The auditor of Miami county has in his hands several thousand dollars from the collection of automobile license fees, which money was received after the last distribution. This money is drawing interest at only two per cent while the county is paying six per cent for money it has been compelled to borrow. The auditor takes the position that under section 6309-2 of 108 O. L. p. 1083 he can not distribute these taxes to the several municipalities or to the road fund at any other time than a regular distribution date since such section provides,

‘Such moneys shall be paid into the treasury of the proper county as provided herein and distributed as are other taxes.’

The further question arises as to whether any appropriation is necessary by the commissioners in case this money can be paid at this time by the auditor to the municipalities and turned into the proper fund of the county. It is my opinion that under the law no appropriation would be necessary since the law specifically appropriates it to a particular purpose. However, the auditor wishes to be fully protected in making payments and I write to ask as to his authority in this matter. I presume there are **several counties** in the state where the same question has arisen and I will say frankly that my advice to the auditor was to pay the money to the municipalities and to transfer the portion due the county to the road fund.”

The situation which you describe arises in connection with an act "providing for the levy and collection of a tax upon the operation of motor vehicles on the public roads and highways of this state" found in 108 O. L. Pt. II, p. 1078.

The opening sections of the act set forth definitions and rates of tax. Section 6294 provides in substance that each owner of a motor vehicle shall file application for registration on a blank, showing, among other things, the district of registration of such owner which shall be determined as follows:

"(a) In case the motor vehicle to be registered is used for hire or principally in connection with any established business or branch business, conducted at a particular place, the district of registration shall be the municipal corporation in which such place is located; and if not located in any municipal corporation, the county in which such place is located.

(b) In case such vehicle is not so used, the district of registration shall be the municipal corporation or county in which the owner resides at the time of making application."

Section 6309 reads:

"The secretary of state shall open an account with each municipal corporation and county district of registration in this state. All registration and duplicate registration fees he shall pay weekly into the state treasury with other receipts of his office. The tax collections he shall apportion between the state and the several districts of registration, and pay the state's portion thereof weekly into the state treasury with other receipts of his office. He shall deposit the proceeds of tax collections due districts of registration in a bank or trust company offering to pay the highest rate of interest on average daily balances, after collection of checks and drafts, on competitive bids received after advertising in two newspapers of opposite politics of general circulation in the city of Columbus and secured by sufficient surety or the deposit of securities of value equal to the amount to be deposited, as determined by the secretary of state."

Section 6309-1 reads:

"On the first business day of each month the secretary of state shall transmit to the auditor of each county a check for the amount of the tax collections apportioned to districts of registration located wholly or in part in his county, accompanying the same with a statement showing the distribution of the amount represented thereby to each such district of registration. The county auditor shall certify the amount so transmitted into the county treasury to the credit of the undivided tax funds therein."

Section 6309-2 reads in part:

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

(2) 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 of registration as provided in this chapter. Such moneys shall be paid into the treasury of the proper county as provided herein and distributed as are other taxes. In the treasuries of such

municipal corporations and counties, such moneys shall continue (constitute) a fund which shall be used for the maintenance and repair of public roads and 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 foundation thereof is used as the sub-surface of the improvement thereof, in whole or in substantial part.

(3) Fifty per centum of all taxes collected under the provisions of this chapter, shall be paid by the secretary of state into the state treasury to the credit of the 'state maintenance and repair fund.' * * *

The inquiry which you submit relates to the fifty per centum of the taxes which are for the use of the municipal corporation or county which constitutes the district of registration.

When sections 6309-1 and 6309-2 are read together, we find that the amounts transmitted to the county by the secretary of state finally reach the status of being in the county treasury to the credit of the undivided tax funds therein, subject to be thereafter "distributed as are other taxes."

Undoubtedly, the view which you express finds strong support when certain points of the act in question are noted, among which points may be mentioned

(a) The secretary of state is to keep an account, not with the county alone, but "with each municipal corporation and county district of registration."

(b) The secretary of state apportions the tax collections, not as between state and county, but as between state and registration district.

(c) With his remittance to the county auditor each month, the secretary of state forwards a statement showing distribution to each district of registration.

(d) The shares of the county and municipality are strictly limited to use for maintenance and repair of roads and streets.

In view of these several points, the conclusion might well be claimed to arise that the spirit of the law will be observed if the county treasurer as soon as possible after the receipt each month of the funds in question releases the same for immediate use by the interested county and municipality,—in other words, that nothing is left to the discretion of local officers and that the expression "distributed as are other taxes" is intended to describe merely the act of distribution, leaving the time of distribution to be understood as occurring monthly and not semi-annually.

However, we are bound to presume that the general assembly in enacting a law, intends it to be construed with reference to other laws already in existence; and with that rule in mind we are reverted to the two following statutes which were in force upon the enactment of the law now in question,—the first of these statutes relating particularly to municipal corporations and the second embracing both municipal corporations and counties:

"Sec. 3797. At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made from and within such appropriations and balances thereof."

"Sec. 5649-3d. At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations

for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Your letter indicates that you have considered the effect of these sections and that you believe that the making of appropriations in accordance with their terms by municipal councils and boards of county commissioners would as to the funds now in question be an idle ceremony, since the law itself has devoted those funds to a specific and limited purpose.

It is believed, however, that such a view cannot be sustained. It must be borne in mind that the tax now in question forms only a part of the sources of revenue for maintenance and repair of highways and streets. As a practical proposition, then, it may occur in some cases that the municipal council or county commissioners may not desire to expend within a given six months' period the proceeds of the tax in question available for expenditure during that period. It will be observed that both sections 3797 and 5649-3d are mandatory in form; hence the only manner in which executive officers of a municipality can ascertain what they are at liberty to expend during a given six months' appropriation period, is to look to the total amount appropriated for that period by the legislative authority of the municipality. The same general principle applies to the county surveyor in the exercise of such authority as is conferred on him by section 7198 G. C. Again, sections 3797 and 5649-3d are general in their terms and make no distinction as between funds arising from different modes of taxation; for which reason the only way in which substantial effect can be given those sections in their purpose of providing a check upon executive officers and a foundation for a well-defined financial program is to have the appropriating legislative authority in full control of the appropriation of all revenues arising from taxation. It will also be observed that while section 6309-2 directs that the moneys now in question shall constitute a fund

"which shall be used for the maintenance and repair of public roads and highways and streets and for no other purpose,"

yet there is no accompanying mandate that the use shall be made at a given time,—there is nothing which forbids the municipal council or the county commissioners from allowing the funds to accumulate. Hence it is to be concluded that moneys arising from the tax which you mention become subject to expenditure only after appropriation as provided in said sections 3797 and 5649-3d.

The condition which you describe as resulting from retaining the funds for semi-annual distribution,—namely, that only two per cent interest is being earned on the funds in the treasury, while six per cent is being paid for money borrowed for use in highway maintenance and repair,—is but a temporary condition. The fiscal year of the county for appropriation purposes begins on March 1st. (See Opinions of Attorney-General, 1912, Vol. II, page 1127); so that when the commissioners are making their March and September appropriations in accordance with section 5649-3d, the county's share of the proceeds of the tax in question will already have become available through the medium of the February and August distributions. Municipal councils, on the other hand, when making their January

and July appropriations, may include within them the municipality's share of the proceeds of the automobile license tax which will come into the municipal treasury at the immediately subsequent February and August distributions (section 3797). The municipality may also if it forces itself in need of cash for expenditure between the time of passing the semi-annual appropriating ordinance and the time of semi-annual tax distribution, make an advance draft on the county treasury as early as the preceding December 20th or June 20th, to the extent of two-thirds of its share of the taxes now in question. (See section 2692, G. C.). It thus becomes plain that a semi-annual distribution of the taxes referred to in your letter will prove of as much service to municipalities and counties as would a monthly distribution, when account is taken of the fact that municipalities and counties are charged with the observance of the provisions of said sections 3797 and 5649-3d.

Hence, in specific answer to your questions you are advised that moneys coming into the county treasury by virtue of the law to which you refer are to be distributed at the regular semi-annual tax distribution periods, subject to advance draft by municipalities as mentioned in section 2692 G. C., and that such moneys may be expended only after appropriation in accordance with sections 3797 and 5649-3d.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1679.

LORAIN CRIMINAL COURT—CITY COUNCIL NOT AUTHORIZED TO
CREATE OR ESTABLISH POSITION OF CLERK IN SAID COURT.

The city council of Lorain is not authorized to create or establish the position or employment of clerk in the criminal court of Lorain, Ohio.

COLUMBUS, OHIO, December 4, 1920.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

“Under date of August 16th, we are in receipt of a letter from the city solicitor of Lorain, Ohio, as follows:

‘Mr. C. L. P., city auditor of this city, has called my attention to the status of the clerk in the office of the judge of the criminal court of this city, the matter having been brought to his attention by one G. E. H. of this city, who was active in the establishment of the criminal court here, the question being as to whether or not the city of Lorain had authority outside of the action of the state legislature in providing a stenographer, clerk or employe in the criminal court. My office has frequently held that the city council had no authority to establish an official clerk of the criminal court who could by virtue of his office be in a position to accept bonds, sign transcript or perform any other official duty, but the work in the office of the criminal judge on recommendation of the judge, had become such as to make it necessary to employ someone to do a part of the clerical work in the office, and the council, acting on this request, by ordinance established the position as follows: