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MOTOR VEHICLE LICENSE AND GASOLINE TAXES—FORMER APPLICABLE TO PAY COUNTY'S SHARE IN REPAIRING BRIDGE ON STATE HIGHWAY, PARTLY WITHIN AND PARTLY WITHOUT A MUNICIPALITY—LATTER INAPPLICABLE.

SYLLABUS:

1. Funds in the county treasury representing the county's share of motor vehicle registration fees arising under the provisions of Section 6309-2 of the General Code, may be used by the county to pay its share when co-operating with the state in the maintenance and repair of a bridge located upon a state highway, a part of which extends within the boundaries of a municipal corporation, and which said bridge within the municipality carries the highway over a railroad track.

2. Under such circumstances, funds in the county treasury arising from the gasoline tax under the provisions of Section 5537 of the General Code, may not be used for the purpose of maintenance and repair of such a bridge, for the reason that the use of such funds, by the express provisions of the statute, is restricted to the county system of highways.

COLUMBUS, OHIO, April 13, 1929.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication which reads:

"The Board of County Commissioners of Athens County under date possibly of November 1, 1928, agreed with the State Highway Director to defray a portion of the cost of the construction of a new bridge to replace an old one commonly known as 'south bridge,' which said south bridge spans not only the Hocking river, the B. & O. S. W. right of way, but the corporation line between the city of Athens and the County of Athens as well. This bridge likewise is on and constitutes a part of inter-county highways numbered 159 and 160 or state routes numbered 31 and 50. Since this attempted and purported agreement our county auditor has advised the county commissioners that there is no money available under Section 1222, General Code, out of which this expense can be paid, and that the county has bonded itself to the limit under this section, and that any additional indebtedness would exceed the extreme limitation provided for in this section.

QUERY: Is it legally proper for the county commissioners to pay the county's share of the reconstruction of this bridge out of the so-called county road and bridge fund, which fund is, as I understand it, made up out of the revenue derived from the provisions of Sections 5537, 6309-2 and kindred sections of the General Code?"

The status of the bridge to which you refer in your communication was under consideration by the Attorney General in Opinion No. 2834, rendered to you under date of November 3, 1928. From the facts stated in that opinion it appears that part of said bridge is located partly within and partly without the city of Athens. It further appears that the portion located within the municipality served as an overhead crossing over the B. & O. railroad tracks. In said opinion it was pointed out that the county may co-operate with the state in the reconstruction of that portion of said bridge which lies outside of the municipality, or the state may co-operate with the county as to the portion located within the municipality. The agreement to which you refer evidently was made pursuant to said opinion.

Section 1222 of the General Code, as amended in 112 O. L. 470, authorizes the levying of a tax, not exceeding one and one-half mills, to cover the cost of the county's proportion of the expense of co-operating with the Department of Highways in the projects referred to in the section and other related sections. However, such levy to the extent of one-half mill is within the fifteen mill limitation. You state in your communication that there is no money available, levied under the provisions of said section, and inquire whether the county commissioners may pay the share of such construction out of the so-called county road and bridge fund arising from Section 5537, General Code (gasoline tax), Section 6309-2, General Code (motor vehicle license tax) and kindred sections of the General Code.

Section 5537, General Code, provides, among other things, that the funds arising from the gasoline tax and allotted to the county "shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such county."

Section 6309-2, General Code, in part, provides:

" * * *
 * * * 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.
 * * * "

The sections above mentioned were under consideration in an opinion of the Attorney General, No. 2143, issued under date of May 21, 1928, to the Bureau of Inspection and Supervision of Public Offices. In that opinion it was held, as disclosed by the syllabus:

"Those portions of the two cent gasoline tax and the motor vehicle license tax, apportioned to the counties of the state, in accordance with the provisions of Sections 5537 and 6309-2, General Code, may be expended by the county commissioners in the maintenance and repair of bridges on public roads and highways in the county system of highways."

The sections above mentioned were also under consideration by me in Opinion No. 101, issued under date of February 16, 1929, to the Bureau of Inspection and Supervision of Public Offices, in which also there was considered an opinion of the Attorney General, reported in Opinions of the Attorney General for the year 1924, at page 335, which held, in substance, that the municipality's receipts from motor vehicle licenses and gasoline tax could not be used in the maintenance or repair of bridges and viaducts.

In my opinion above mentioned, it was held that in view of Opinion No. 2143, there was no valid reason why the same rule would not apply to municipalities, which necessitated the overruling of the 1924 opinion. In my said opinion it was held, as disclosed by the syllabus:

"1. The moneys allotted to a municipality under the provisions of Sections 5537 and 6309-2 of the General Code, may legally be expended for the purpose of maintaining and repairing bridges and viaducts upon streets within the municipality. (Opinion, Attorney General, 1924, page 335, overruled.)

2. County commissioners may legally expend the county's portion of the motor vehicle license and gasoline tax receipts for the purpose of maintaining and repairing bridges on public roads and highways in the county system of highways."

In considering your question it will be observed, as was pointed out in some of the former opinions mentioned, that by the terms of Section 5537 the use of the funds derived thereunder by a county is expressly limited to the maintenance and repair of roads which constitute a part of the county highway system under Sections 6965 et seq. of the General Code. The project which you mention constituting a part of a state road and apparently not being any part of the county system of highways, the funds derived by reason of the gasoline tax may not be expended in the maintenance and repair thereof. However, it is believed that the moneys derived from the registration of motor vehicles under Section 6309-2 is to be distinguished in some respects from the funds derived under Section 5537, supra.

As above indicated, there is no express limitation as to it being used upon roads constituting a part of the county highway system. On the other hand, the section provides that it shall be used for the maintenance and repair of public roads, highways and streets. In view of the holding in my former opinion to the effect that, within the meaning of this section, a bridge is a part of the highway, it would seem that there is no prohibition of the use of the same for such maintenance and repair.

This then brings us to the question as to whether the language used is broad enough to include the reconstruction of a bridge. In Opinion No. 2834, rendered to you by my immediate predecessor, and heretofore referred to, the word "maintenance" was given consideration as used in Section 1229-19 of the General Code, which relates to the liabilities of a railroad company to "maintain and keep in good repair, good, adequate and sufficient crossings," and the then Attorney General made the following comment:

"It is believed that in the use of the language in connection with maintenance of a bridge, maintain relates to the furnishing of the means for keeping such bridge in repair and preserving the same in good condition so as adequately and safely to provide for the traffic of the public over the same. It follows that if it is the duty of the railroad to maintain said bridge and the bridge is in such condition that the only manner in which it may be continued is by rebuilding the same, that duty would be imposed upon the railroad by virtue of the section."

From the foregoing, it would appear that to the extent that there are unnumbered moneys in the county treasury which represent receipts from the automobile registration law under Section 6309-2, they may properly be used in connection with a project such as you mention.

From the wording of your inquiry it would appear that the county funds are not being handled at the present time in the manner required by the budget law enacted by the last Legislature. I reach this conclusion from the fact that you state that there is being maintained a so-called "county road and bridge fund," which you state to be made up from the revenue derived under the provisions of Sections 5537, 6309-2 and kindred sections of the General Code.

While the uses to which the proceeds of the motor vehicle license fees and the gasoline tax receipts of the county may be put are, in the main, the same, yet there is, as has been indicated, a distinction between the two. Section 5625-9 of the Code requires each subdivision of the State to establish certain funds, among which is that described in paragraph (f) as follows:

"A special fund for each class of revenue derived from a source other than the general property tax, which the law requires to be used for a particular purpose."

In addition to this requirement, paragraph (d) of the section requires a subdivision to establish "A special fund for each special levy."

From your communication, it would appear that several funds have been grouped into one. Manifestly, the provisions of paragraph (f) would require a separate fund for the proceeds of the motor vehicle license tax and also a separate fund for the proceeds of the gasoline tax. Furthermore, there is no authority for the commingling of the proceeds of a special levy with revenue derived from a source other than a general property tax where the law requires the latter class of revenue to be used for a particular purpose. This comment is made in order that proper book-keeping methods may be adopted which will tend to make more easy of application the conclusions reached in this opinion.

In view of the foregoing, and in specific answer to your communication, it is my opinion that:

1. Funds in the county treasury representing the county's share of motor vehicle registration fees arising under the provisions of Section 6309-2 of the General Code, may be used by the county to pay its share when co-operating with the State in the maintenance and repair of a bridge located upon a state highway, a part of which extends within the boundaries of a municipal corporation, and which said bridge within the municipality carries the highway over a railroad track.

2. Under such circumstances, funds in the county treasury arising from the gasoline tax under the provisions of Section 5537 of the General Code, may not be used for the purpose of maintenance and repair of such a bridge, for the reason that the use of such funds, by the express provisions of the statute, is restricted to the county system of highways.

Respectfully,
GILBERT BETTMAN,
Attorney General.

303.

FOREIGN CORPORATION—ENGAGED IN CATCHING FISH IN OHIO—
LIABLE FOR NON-RESIDENT LICENSE FEE.

SYLLABUS:

A corporation organized outside of the State of Ohio and authorized to engage in the business of catching fish in the State of Ohio must pay a non-resident license fee as provided in Section 1423, General Code of Ohio.

COLUMBUS, OHIO, April 13, 1929.

HON. PERRY L. GREEN, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 29, 1929, which is as follows:

"We have had for several years, in connection with the licensing of nets and boats for Lake Erie fishery activities, the question arising whether or, not a fish company incorporated under the laws of another state, and maintaining a branch fish house in Ohio, is entitled to a resident license for their nets and boats.