

Note from the Attorney General's Office:

1920 Op. Att'y Gen. No. 20-1460 was overruled
by 2013 Op. Att'y Gen. No. 2013-035.

Question: On above village contract, are such interest payments legal?"

It is to be assumed from the tenor of your statement that the original construction contract was in all respects legal; and your inquiry will be considered upon that assumption. It should perhaps be mentioned in this connection that it was not a prerequisite to a valid contract that prior to the signing thereof funds be in the treasury representing the entire share of cost that was to be borne by property owners; for the so-called Burns law (Sections 3806 G. C. et seq.) has been held by the supreme court to be inapplicable to the assessment share. (Comstock vs. Nelsonville, 61 O. S. 288.)

Section 3915 G. C. authorizing municipal corporations to borrow money and issue interest bearing notes in anticipation of collection of special assessments, marks the limit of authority in municipalities to bind themselves for interest in connection with assessments, other than by issue of bonds. Hence, the substitute arrangement whereby the contractor was to receive interest on past due estimates was without legal warrant and void, affording the contractor no ground of recovery against the municipality, even though there may have been a consideration on the contractor's part in that he waived prompt payment of his estimates (Bridge Co. vs. Campbell, 60 O. S. 406).

But since the municipality did receive a consideration in that it was not held to contract terms in payment of estimates and therefore was relieved of paying interest on certificates of indebtedness, and since the interest has actually been paid to the contractor, the situation comes within the rule in State ex rel. Hunt vs. Fronizer, 77 O. S. 7, with the result that the municipality may not recover back the interest.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1460.

MOTOR VEHICLES—LICENSE TAX FUNDS MAY NOT BE USED BY POLITICAL SUB-DIVISIONS FOR PURCHASE OF ROAD REPAIR EQUIPMENT SUCH AS TRUCKS, ROLLERS, ETC.

Political subdivisions constituting districts of registration may not use funds coming into their hands by reason of the motor vehicle license tax for the purpose of purchasing road repair equipment, such as trucks, rollers, etc.

COLUMBUS, OHIO, July 24, 1920.

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

GENTLEMEN:—In your communication of recent date you request a written opinion upon the following question:

"Can political subdivisions use moneys received under motor vehicle license laws for the purpose of purchasing road repair equipment, such as trucks, rollers, etc.?"

Section 6309-2, 108 O. L. (Pt. 2), page 1083, which is material in connection with the consideration of your inquiry, provides:

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

(1) All fees collected under this chapter shall be paid into the state treasury to the credit of a fund to be designated as the 'state maintenance and repair fund.'

(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 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 'state maintenance and repair fund' provided for herein shall be available for the use of the secretary of state in defraying the expenses incident to carrying out and enforcing the provisions of this chapter and for the use of the state highway commissioner in the manner provided by law. The general assembly shall make appropriations therefrom for such purpose."

A careful analysis of this statute discloses a definite purpose in the mind of the legislature in the provisions therein made to distinguish the "maintenance and repair fund" from all other funds of a county or municipal corporation. The section defines what is meant by the term "maintenance and repair" and it is clear that funds derived from the motor vehicle license tax in the hands of the district of registration must be expended upon a highway, the foundation of which is in existence, and cannot be used in a new construction. It will be observed that provision had already been made at the time of this enactment whereby a county could purchase trucks and equipment, and it is fair to assume that the legislature had this in mind which accounts for the definite limitations provided therein with reference to the expenditure of said funds and the failure to provide therein for the purchase of road equipment.

Section 7200, 107 O. L., provides in part as follows:

"The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highway, bridges and culverts under their jurisdiction as they may deem necessary, which shall be paid for out of the road funds of the county.

* * *

It is believed that the only provision authorizing the county to purchase equipment of the character you mention specifies the purposes for which it is to be used, among other things, "construction" of highways. It will be observed that under the provisions of section 6309-2, supra, maintenance and repair funds cannot be expended for new constructions. This fact strengthens the position that it was the intent of the legislature to limit the expenditure of this fund for materials and labor in the maintenance and repair of roads and streets, the foundation of which are already in existence.

It will be further observed that at the time of the recent enactment of section

6309-2 municipalities were empowered to purchase equipment to be used in connection with the construction, maintenance and repair of streets, and it is believed that the same limitations will apply in reference to expenditures of the fund derived from the motor vehicle license tax. That is to say, it was the intendment of this enactment that the county or municipality should use the means provided for the purchase of equipment and that the fund derived from the license tax should be used only in the purchase of labor and material.

In an opinion of this department found in Opinions of the Attorney-General, 1918, Vol. 2, and being No. 1513, the question presented was as follows:

"Under authority of sections 3839 et seq. of the General Code, can a municipal corporation, through its officers, purchase a street flusher for cleaning its streets, and include the initial cost of flusher as part of the entire cost and expense connected with cleaning streets, the entire cost to be assessed against properties abutting on streets so cleaned?"

The opinion furnishes a negative answer to the inquiry, mainly upon the ground that assessments made against property owners are to be based upon the cost and expense connected with the work of sprinkling streets in "any year," and that inasmuch as a sprinkler would perhaps be serviceable for many years the initial cost of such an equipment could not properly be charged as a part of the expense to be assessed in connection with such work. It is believed that by analogy the reasoning in said opinion is applicable to the situation at hand.

From a practical standpoint, it seems inconceivable that a county or municipality would use such equipment as you describe exclusively in connection with the maintenance or repair of highways. Undoubtedly, such equipment would be used for construction of new highways and other purposes. Therefore, it will be seen that if by the most liberal construction the position were taken that by implication such equipment could be purchased, its use would necessarily be limited strictly to the maintenance and repair of highways. Such a construction does not seem tenable.

In specific answer to your inquiry, you are advised that it is the opinion of this department that maintenance and repair funds of a county or municipal corporation derived from the motor vehicle license tax may not legally be expended in purchasing road repair equipment, such as trucks, rollers, etc.

Respectfully,

JOHN G. PRICE,
Attorney-General