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## GASOLINE TAX LAW—EFFECTIVE DATE OF HOUSE BILL NO. 44.

## SYLLABUS:

*House Bill No. 44, passed by the Eighty-sixth General Assembly, is a law providing for a tax levy and appropriations for current expenses of the state government; and went into immediate effect upon its repassage by three-fifths of the members elected to each branch of the General Assembly, notwithstanding the objections of the Governor.*

COLUMBUS, OHIO, April 21, 1925.

*The Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—Your request of recent date for an opinion is as follows:

“The General Assembly, we are informed, has enacted House Bill No. 44, providing for a tax on the sale or use of gasoline in this state. You are kindly requested to advise the Commission whether this act takes effect immediately or whether it must be held in suspension for a period of ninety days as provided by the Constitution for laws subject to referendum. As this Commission has important functions to perform under this law, we request your answer to the above inquiry at the earliest moment.”

House Bill No. 44 is entitled

## “AN ACT

To provide for the adequate maintenance of the public highways and streets of the state, to supplement existing revenues available for road and street maintenance and repair by the levy of an excise tax upon the sale of motor vehicle fuel, and the appropriation of the proceeds thereof, and to transfer to the state the duty of maintaining the entire main market road and inter-county highway systems thereof and to amend sections 6292 and 6293 of the General Code.”

Section 2 of the act provides in part:

“For the purpose of providing revenue \*\*\* there is hereby levied and imposed on the sale or use of each gallon of motor vehicle fuel sold or used by any dealer, as herein defined, within the state of Ohio, an excise tax of two cents. \*\*\*\*”

Section 12 provides in part:

“Upon receipt of taxes herein provided for the treasurer of state shall place the first \$50,000.00 collected in a special fund to be known as the gasoline tax rotary fund. Thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to \$50,000.00. The balance of taxes collected under the provisions of this act, after the credits to said rotary fund, shall be credited to a fund to be known as the gasoline tax excise fund.”

The following three paragraphs of section 12 make provision for the distribu-

tion of the amount received to the credit of "the gasoline tax excise fund", thirty per cent of which is payable to certain municipal corporations and twenty-five per cent. payable to the county treasurers of the several counties of the state; the balance of forty-five per cent. to be expended by the Department of Highways and Public Works. By the provisions of said three paragraphs of section 12, said funds are to be used generally in the maintenance and repair of public streets and roads.

The concluding paragraph of section 12 requires not less than \$1,000,000 of the fund to be expended in the fiscal year 1925 and 1926 and not less than \$1,500,000 in the fiscal year 1926 and 1927, by the Director of Highways and Public Works in the maintenance of certain systems of main market and inter-county highways outside of municipal corporations which are to be taken over for maintenance purposes by the Director of Highways and Public Works.

Section 14 of the act makes appropriations from the effective date of the act until the 30th day of June, 1927, from each of the two funds designated in the act. The remaining sections of the act, with the exception of section 16, deal with the *modus operandi* of collecting the tax providing the machinery whereby the tax may be collected, refunds to those entitled thereto and prescribing penalties for violation of the act.

Article 2, Section 1, of the Ohio Constitution reserves to the people "the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, *except as hereinafter provided.*" The exception referred to is found in Article 2, Section 14, and is as follows:

"Laws providing for *tax levies*, appropriations for the current expenses of the state government and state institutions and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect, \* \* \* The laws mentioned in this section shall not be subject to the referendum."

The bill was not passed as an emergency law and the sole question is whether it as a whole—or if not as a whole, certain sections—goes into immediate effect as a law "providing for tax levies", and providing "appropriations for the current expense of the state government."

It has been settled by numerous decisions that an excise tax is constitutional.

*Southern Gum Company vs. Laylin*, 66 O. S., 578.

*Saviers vs. Smith*, 101 O. S., 132.

*Fisher Bros. Company vs. Brown*, 111 O. S., 540.

Assuming, without further discussion, the constitutionality of the act, is the levy and impost of two cents per gallon on the sale or use of each gallon of motor vehicle fuel so sold or used by any dealer within the state of Ohio, a law providing for tax levies within the meaning of Section 1d, Article 2, of the Constitution, above quoted?

In the case of *Air-Way Electric Appliance Corporation vs. Day*, 270 Fed., 878, since reversed on the ground that the statute imposing the tax was unconstitutional, it was conceded that if the act went into immediate effect, the corporation was subject to the tax, and the question before the court was whether or not the act did go into immediate effect, or was postponed in its operation for a period of ninety days after its filing with the secretary of state. In discussing whether or not the company was subject to the tax imposed by the act of May 14, 1921, since known as section 8728-11, General Code, the court said:

"A tax may be levied for the double purpose of regulation and revenue.

\*\*\* It may also be exacted for the privilege of exercising corporate franchises in the state and for general revenue \*\*\*; the enactment of laws providing for excise and franchise taxes being authorized by section 10, Art. 12, of the state constitution. If the statute of 1921 was enacted as a revenue measure as well as to fix the charge against foreign corporations for the privilege of exercising their franchises in the state, it then falls within the terms of sec. 1d, Art. 2, and became effective on May 17. Section 8728-11 and Secs. 5503 and 5516, which are a part of the Ohio Tax Commission act mention the sum to be charged as a fee. Other sections of such act characterize such sum as a fee or tax. \*\*\* The terms 'fee' and 'tax' were, in legislative mind, convertible and equivalents. It is immaterial whether the sum charged is characterized as a fee, a tax, or an assessment, if on the whole it is clear that it is a tax. \* \* \* In view of the provisions of Sec. 181a R. S. (now Sec. 270 G. C.), that all money paid into the state treasury, the disposition of which is not otherwise provided by law, shall be credited by the auditor of the state to the general revenue fund it was held, in *Ashley vs. Ryan* (94 O. S.) p. 526, that it is not necessary that the object of a given statute should be stated to be the imposition of a tax for revenue purposes in order to constitute it a statute of that character. The tax or fee charged against a foreign corporation under the statute here considered is expressly required to be paid to the state treasurer, Secs. 5503, 5504; and Sec. 5491 further provides that all taxes received by the state treasurer under the provisions of the Tax Commission act shall be credited to the general revenue fund. But any exaction which is made a means of supplying money for the public treasury to defray the expenses of government, and any sum demanded as a franchise fee or excise tax which goes into the state treasury and constitutes a part of its general fund is a tax (*Mays vs. Cincinnati*, 1. O. S., 268, 273, 274), and the law providing for the same is a revenue law (*Peyton vs. Bliss*, F. C. No. 11055.)

In *Saviers vs. Smith*, Secretary of State, 101 O. S., 132, the legislature passed an act providing for the levy and collection of a tax on the operation of motor vehicles on the public highways of the state. Johnson, J., at page 135 of the opinion, says:

"It is perfectly apparent that this statute is a tax or revenue measure. The taxes are raised for a specific object, namely, the maintenance and repair of the public roads. The tax is levied on the privilege of operating a motor vehicle on the public highways."

In *State ex rel vs. Roose*, 90 O. S., 346, the legislature, by act of April 8, 1913, levied a road tax of one-half of one mill on all taxable property of the state. The county auditor refused to place the levy on the tax duplicate, claiming that the referendum period of ninety days did not expire until the 13th day of August, 1913, and therefore the levy did not attach as a lien on real and personal property in the state of Ohio for the year 1913. Donahue, J., at page 349, says:

"While perhaps some of the sections of this act may have been subject to the referendum provisions of Section 1c of Article II of the Constitution, yet Section 1d of Article II expressly exempts laws providing for tax levies from the operation of the preceding provisions of the Constitution. Therefore section 1 of this act, providing for a tax levy of one-half of one mill on all taxable property within the state, went into immediate operation when approved and signed by the governor."

In *State ex rel vs. Forney*, 108 O. S., 463, it was held that the constitutional provision, "laws providing for tax levies," was limited to an actual self-executing levy of taxes, Wanamaker, J., at page 470 of the opinion, saying:

"You cannot have a law 'providing for tax levies,' except its public purpose be stated; but, in addition thereto, such law must state the property subject to the tax, the rate of tax, the time when such tax is payable, and other elementary essentials of a taxation law."

It is apparent, under the foregoing definitions of the constitutional provision, that section 2 of the act in question does provide for a tax levy. The public purpose is stated. The property subject to the tax is specified. The rate of tax is fixed. The time when the tax is payable is definitely provided for. The act specifically provides that the same is "levied and imposed." It is by the terms of the act designated "an excise tax."

I am therefore of the opinion that section 2 of the act is a law "providing for tax levies" within the meaning of section 1d of Article 2 of the Constitution, and by the express provisions of said section goes "into immediate effect." Therefore, the act as a whole is not subject to the referendum.

The question then presents itself, whether any of the sections of the act are not "laws providing for tax levies", and do not go into force and effect until the expiration of ninety days from the filing of the act with the secretary of state. After careful consideration of the entire act, I am of the opinion that the remaining sections carry into effect and operation section 2 of the act and therefore partake of the nature of said section, that is, they are laws providing for tax levies. The main purpose of the act is to provide for the adequate maintenance of the public highways and streets of the state and the tax provided for is the means whereby that purpose is carried out. This is especially so of section 12, wherein it is provided that the taxes collected shall be paid into the state fund and be placed to the credit, respectively, of "the gasoline tax rotary fund" and "the gasoline tax excise fund."

Supplementing the foregoing reasoning, there is an additional reason why the act goes into immediate effect. Article 2, section 1 and Article 2 section 1d were parts of the constitutional amendments adopted September 3, 1912. They must be read in *pari materia*. Section 1 of Article 2 reserved the power "to reject any law, section of any law, or any item in any law appropriating money, passed by the General Assembly, except as hereinafter provided."

"Laws providing for tax levies, appropriations for the current expenses of the state government \* \* \* shall go into immediate effect. \* \* \*  
The laws mentioned in this section shall not be subject to the referendum."

We are of the opinion that the use of the word "laws" in section 1d excluded the idea incorporated in Section 1, that any section of a law providing for tax levies should be subject to the referendum. It was apparently in the mind of the framers of the constitutional amendments that to permit any "section" of a law providing for tax levies to be subject to a referendum, would produce more harm than good. It seems, therefore that the omission of the word "section" in section 1d was intentional.

In this connection we may refer to the provisions of section 16 of Article 2 of the Constitution, providing that "no bill shall contain more than one subject, which shall be clearly expressed in its title." While this provision has been held by the courts to be directory merely, it may be certainly said that its provisions have not been violated in the enactment of House Bill No. 44. All that appears in House Bill No. 44 is clearly germane to the main purpose of the act.

It may further be said that under the provisions of our constitution the appropriation of moneys raised by a tax levy is a part and parcel of the provision for the levy of the tax.

Section 22 of Article 2 provides:

"No money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law; and no appropriation shall be made for a longer period than two years."

Section 4 of Article 12 provides:

"The General Assembly shall provide for raising revenue sufficient to defray the expenses of the state." \*\*\*\*

Section 5 provides:

"No tax shall be levied except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only it shall be applied."

These sections must also be made *in pari materia* with section 1d of Article 2 of the Constitution, and when so read, it clearly appears that no law would be complete without an appropriation and application of the tax so raised to the objects designated in the act.

Section 14 providing for the appropriation of the amounts collected, may also be said to be an appropriation for the current expense of the state government, at least in so far as the appropriation affects the expenditure of forty-five per cent of the amount collected, to be expended by the Department of Highways and Public Works in the maintenance and repair of highways of the state. An appropriation for maintenance and repair of the public highways of the state is clearly a current expense of the state government.

The appropriation provided for in section 14 is obviously for a period of time of more than two years, but is not to be regarded as invalid because of that fact. The excess only will be regarded as invalid and it is obvious that by the expiration of two years from the effective date of the act the legislature will have reconvened and will be in position to make the further appropriation required by the constitution.

Section 16 of article 2 of the constitution provides that in the event the governor approves a bill, he shall sign it and thereupon it shall become a law and be filed with the secretary of state. If he does not approve it, he must return it with his objections in writing to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to each branch of the legislature then vote to repass it, the constitution provides that the bill "shall become a law, notwithstanding the objections of the governor." The constitution makes no further provision with reference to the effective date of such an act. It became a law, in full force and effect immediately upon its passage. *City of Evansville vs. Blend*, 118 Ind., 426; *State vs. Denny*, 118 Ind., 449.

I am therefore of the opinion that House Bill No. 44 became effective immediately upon its repassage by a three-fifths vote of the members elected to both houses of the legislature, notwithstanding the objections of the Governor.

Respectfully,

C. C. CRABBE,

*Attorney General.*