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MUNICIPALITY—CANNOT USE MOTOR VEHICLE OR GASOLINE TAX FUND TO PURCHASE STORAGE YARD FOR STREET REPAIR DEPARTMENT—FURTHER RESTRICTIONS ON GASOLINE TAX FUND.

SYLLABUS:

1. *A municipality can not purchase land to be used as a storage yard for the street repair department with its share of the registration fees for registering motor vehicles or out of its share of the gasoline excise tax receipts.*

2. *The portion of the gasoline excise tax funds paid under the provisions of Section 5537, General Code, to a municipality on the line of an inter-county highway or main market road, for the purpose of maintaining and repairing such streets and roads as may be designated by the director of highways and public works as extensions or continuances of inter-county highways or main market roads, cannot be used by it for the maintenance and repair of any street or roads other than those so designated, even though such municipality may receive more money than is necessary for the purpose named in such section.*

COLUMBUS, OHIO, March 7, 1927.

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

GENTLEMEN:—I am in receipt of your communication of recent date as follows:

“May a city legally purchase land to be used as a storage yard, for the street repair department, out of its share of the motor vehicle license or gasoline tax receipts?

If the one-sixth part of said tax set aside for the specific purpose stipulated in Section 5537 G. C. is in excess of the amount needed for said purpose may the excess be used for the repair of other streets?”

Concerning the distribution and application of revenues collected from the issuing of motor vehicle licenses, the legislature by Section 6309-2, General Code, has provided as follows:

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

(1) Fifty percentum 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 or (of) registration as provided in this chapter. The portion of such money due the municipal corporations shall be paid into the treasuries of such municipal corporations on the first business day of each month, and the remainder retained in the county treasury. 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. * * *

With reference to the gasoline excise tax, it is provided by Section 5527 of the General Code that:

"For the purpose of providing revenue for maintaining the main market roads and inter-county highways of this state in passable condition for travel, for repairing the damage caused to such highway system by motor vehicles used on the same, for widening existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon, for resurfacing such highways where existing surfaces have become worn or rutted, for enabling the several counties and municipal corporations of the state to properly maintain and repair their roads and streets, and supplementing revenue already available for such purposes and arising from direct taxation and from registration fees of motor vehicles, and for distributing equitably upon those persons using the privilege of driving such motor vehicles upon such highways and streets a fair share of the cost of maintaining and repairing the same, there is hereby levied and imposed on the sale and 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; subject, however, to the following specific exemptions.

The sale of motor vehicle fuel shall not be subject to said tax. * * *

Section 5537, General Code, reads in part as follows:

"Thirty percent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be used by such municipal corporations for the sole purpose of maintaining and repairing the public streets and roads within such corporation.

Wherever a municipal corporation is on the line of an inter-county highway or main market road, one-sixth of the amount so paid to any municipal corporation shall be used by such municipal corporation for the sole purpose of maintaining and repairing such streets and roads within such municipal corporation, as may be designated by the director of highways and public works as extensions or continuances of inter-county highways or main market roads."

It will be noted that Section 6309-2 of the General Code in providing for the distribution and application of revenues collected for the registration of motor vehicles, provides that the portion of the registration fees which shall be allotted to the registration districts shall be used for the purpose of *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.

The latter part of the section defines what is meant by *maintenance and repair*.

While Sections 5527 and 5537, supra, limit the use of the funds derived from the gasoline excise tax to the same use as does Section 6309-2 of the General Code limit motor vehicle registration fees, to-wit, maintenance and repair of highways and streets, neither of the sections sets forth just what is meant by such maintenance and repair.

It is reasonable to conclude, however, that it was not the intention of the legislature to broaden the meaning of these terms, at least. Laws authorizing and directing the expenditure of public moneys should be strictly construed, and powers therein granted cannot be extended beyond the limits of the express terms of the law.

The purpose of these acts of the legislature, one of which provides for an

annual license tax for the operation of motor vehicles on the public highway and the other for an excise tax on the sale and use of motor vehicle fuel, are exactly the same as evidenced by their terms. Each was enacted for the purpose of raising revenue for the same purpose, to-wit, maintenance and repair of streets and highways. Section 6291 of the General Code, which is a part of the license tax law, says:

“An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways of this state, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of such vehicles and of maintaining and repairing public roads and highways and streets. * * * ”;

while as aboye quoted Section 5527 specifically states “for the purpose of providing revenue for maintaining the main market roads and inter-county highways of this state in passable condition for travel.”

The motor vehicle license tax law was passed December 16, 1919. It was amended March 27, 1925, but the definition of “maintenance and repair” as contained in Section 6309-2, supra, was a part of the original act and was not changed in the amendment.

The “Gasoline Excise Tax” law was passed March 18, 1925.

It seems clear that when enacting the later act, the legislature must have intended that the terms used therein when used in the same sense and for the same purpose should be taken to mean the same as in the former act, and that when definitions of certain words and expressions were specifically given in the former act such definitions were adopted in the latter act, without again specifically setting them forth.

This rule of construction is especially applicable where two acts relate to exactly the same subject matter. In volume 2, Section 358 of Sutherland on Statutory Construction the author says:

“The legislature in passing an act may declare its meaning and construction and such declaration will be binding on the courts.”

and he further cites a long line of authorities in support of this proposition. In the same section is to be found this language:

“The meaning of particular words in a recent statute will have weight and their meaning may be inferred from earlier statutes in which the same words or language has been used where the intent was more obvious or had been judicially established, * * * and if a contemporaneous construction by the legislature of the same words can be discovered it is high evidence of the sense intended.”

Having determined that the words maintenance and repair have the same significance in both the law with reference to registering motor vehicles and the “Gasoline Excise Tax” law and that so far as the use of the funds derived from each of these sources is concerned, what applies to one applies as well to the other, our next inquiry is whether or not any judicial construction has ever been made of either one of the laws with reference to the meaning of maintenance and repair as used in the two acts.

In the case of State ex rel Crabbe v. City of Columbus, decided by the court of appeals of Ohio, May 28, 1926 and reported in 153 N. E., 174, the court says with reference to the gasoline excise tax law:

"As a general proposition, it may be stated that the entire revenue from the gasoline tax law is to be applied solely and exclusively to the maintenance and repair of the highways of the state including those of cities and their sub-divisions."

This case was brought by the state to enjoin the city of Columbus and its officers from expending funds appropriated to it under the "Gasoline Excise Tax" law for the purchase of a sand dryer to be placed in the asphalt plant of the city. The court refused the injunction. The syllabus of the case reads as follows:

"City held empowered to expend funds allotted under gasoline excise tax law to buy sand dryer to be used in city asphalt plant, operated exclusively to prepare materials for maintaining and repairing streets, since city officials have latitude of discretion in use of such funds so long as money is spent to maintain and repair highways, in view of General Code 5537."

The court in its opinion after making the observation set out in the quotation above continues with this language:

"It is clear from the provisions of the entire gasoline excise tax act that the General Assembly intended to confine the expenditures from said fund exclusively and solely to highway maintenance and repair. In the apportionment made to the cities and municipalities the limitation in the use of the fund was again repeated. It will be observed, however, that no limitation was placed upon the officials of the city, other than that the fund be used exclusively for highway maintenance and repairs."

The court in this case decided that if the officials in their discretion found it was necessary, and in the interests of economy and efficiency to purchase tools and equipment such as a sand dryer for road repair purposes they might lawfully do so.

The court comments that the present methods of repairing streets replace "the old method of putting a man and a kettle or container of asphalt to be used for patch-work." They inferentially make it a substitute for labor.

In the case of *Village of Milford v. C. M. & L. Traction Co.*, 4 O. C. C. (N. S.) 191, the court lays down the following rule in the second branch of the syllabus:

" 'Repair' of a turnpike means a filling up of the holes and an evening up of the surface in such manner that the ordinary and expected travel of the locality may pass with reasonable ease and in safety."

The court in its opinion quotes with approval from 75 New York, 223, as follows:

"To keep a street in repair is to have it in such state so that the ordinary and expected travel of the locality may pass with reasonable ease and safety."

The "Gasoline Excise Tax" law has broadened the scope of this somewhat by adding thereto the right to widen

"existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon, for resurfacing such highways where existing surfaces have become worn and rutted."

This additional authority refers to inter-county highways and main market roads.

Therefore, in view of the case of City of Columbus, *supra*, we can infer that this maintenance and repair may be done by procuring labor and buying the reasonably necessary material and equipment to do the same.

I believe, however, that there is a distinction between purchasing machinery and supplies, which is an incident to the maintenance, and the purchasing of real estate, which is an incident to the purchasing of the material and machinery, to-wit, a storage yard. I believe that the legislative intent as found in the highway laws of the state discloses such a distinction.

In Section 1190-1 of the General Code, the legislature has specifically authorized the director of highways to use such money for the purpose of purchasing real estate, as follows:

"The expense incurred by the state highway commissioner in providing such buildings and storing, housing, caring for, and repairing such automobiles, trucks, machinery and equipment, shall be paid from any appropriation made to the state highway department and available for expenditure for policing, patrolling and maintaining highways."

The legislature has not at any place authorized a city or county to so use said money. It cannot be denied that a sand dryer, which was the particular machine in question in the case of City of Columbus, *supra*, is incidental equipment to repairing streets. Equipment, however, does not usually include real estate. The Standard Dictionary refers to "equipment" as

"Rolling stock and the rest of the apparatus necessary for operating a railway, as distinguished from stations and trackage."

The money received by the city and county from the gasoline tax and motor vehicle registration fees is used in the same manner as is that portion of said funds which may be used by the state, with the exception of the purchase of real estate above mentioned.

The use of this money has been construed by our supreme court as a "current expense". In the case of State ex rel Janes v. Brown, 112 Ohio St., 590, the "Gasoline Excise Tax" law was construed. Said law, among other things, appropriated money for the purposes hereinabove set forth. In construing the law in the above mentioned case it was necessary to determine whether or not this appropriation was subject to the referendum, and the court decided that such expenditure was "current expenses". The fourth branch of the syllabus reads:

"The phrase 'current expenses,' as used in Section 1d of Article II of the Constitution, in addition to including the expenses incident to the officering and maintaining of the state government, includes the expense of keeping in repair and maintaining the property of the state government, and, as applied to roads, includes the maintaining and repairing thereof as distinguished from new construction."

In the opinion of the case the court refers to a California case, to-wit, Babcock v. Goodrich, 47 Cal., 488, wherein it was held that the current expenses of the year included all of the expenses of the current year, and held that this was too broad a construction to place upon such term. The court, however, cited the case of State ex rel Reed v. Commissioners of Marion county, 21 Kan., 419, in which it was held that the erection of county buildings is not "current expenses" of a county but is an extraordinary and exceptional expense, and say:

"When permanent county buildings are once erected and completed, the benefits to the county are permanent and continuous."

In the last paragraph the court say :

"We therefore are of opinion that the department of highways and public works, the counties and the municipalities of the state, are limited in the expenditure of the respective appropriations made to them in this act to maintenance and repair, and that the power of such department or subdivisions, to use this particular fund for the purpose of widening the surfaces of the highways, must be measured by whether such widening constitutes maintenance or repair or, on the other hand, is of such a character as to amount to new construction; that the expense of maintenance, repair and keeping the system of public roads and highways in passable condition for travel is current expense, * * * ."

In a former opinion of this department (Opinions of Attorney General, 1919, Vol. I, 520) I find the following:

"Whatever the term 'current expense' may mean as applied to the various items of expense, it is clear that its meaning excludes expenditures in the way of permanent investments."

Also to the same effect I refer to

Sheldon v. Purdy, 17 Wash., 135; Helena Water Works Co. v. Helena, 31 Mont., 243.

I do not believe it could be said that purchasing of real estate for a permanent storage yard for material and equipment used in maintenance and repair is a "current expense", because it is a "permanent investment".

I am therefore of the opinion that a municipality cannot legally use its share of the registration fees for registering motor vehicles or its share of the gasoline excise tax receipts for the purpose of purchasing land to be used as a storage yard for the street repair department.

Coming now to your second question, Section 5536, General Code, provides that whenever a municipal corporation is on the line of an inter-county highway or main market road one-sixth of the municipal corporation's share of the "Gasoline Excise Tax" fund shall be used for the sole purpose of maintenance and repair of the inter-county highways and main market roads designated by the state director of highways. It seems to me that the plain terms of this statute in the use of the word *sole* need no construction, and that the use of these funds is limited as the use of the word indicates. The meaning of the word *sole* is "only, alone, solitary, single."

In answer to your second question, I am of the opinion that no part of the one-sixth part of the gasoline excise tax receipts apportioned for the use of a municipality on the line of an inter-county highway or main market road for the specific purpose provided in Section 5537 of the General Code can be used for any purpose other than that prescribed in the statute, and if there is any money in the fund in excess of the amount needed for the specific purpose provided for in the statute, such funds should accumulate until some legislative action is taken providing for using them for some other purpose.

Respectfully,
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Attorney General.