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1. MUNICIPALITY—EXPENSE, INSPECTION AND AUDITING PUBLIC ACCOUNTS—BY BUREAU OF INSEPECTION AND SUPERVISION OF PUBLIC OFFICES—CHARGEABLE TO MUNICIPALITY—SECTION 274 ET SEQ., G. C. AND SECTION 288 G. C.—MUNICIPALLY OWNED PUBLIC UTILITIES AND OTHER PUBLIC SERVICE ENTERPRISES OF A PROPRIETARY NATURE—SUCH EXPENSE MAY BE PAID OUT OF REVENUES ARISING FROM SUCH UTILITIES OR OTHER ENTERPRISES.
2. EXPENSE OF SUCH INSPECTION AND AUDITING AS TO
  - a. FUNDS ARISING FROM TAX LEVIES FOR DEBT RETIREMENT;
  - b. FUNDS PROVIDED FOR MAINTENANCE OF POLICE AND FIRE RELIEF AND PENSIONS;
  - c. FUNDS PROVIDED AND EARMARKED FOR POOR RELIEF PURPOSES;
  - d. FUNDS ARISING FROM DISTRIBUTION OF GASOLINE TAXES AND MOTOR VEHICLE LICENSE FEES MAY NOT BE PAID FROM SUCH FUNDS, BUT MUST BE PAID FROM GENERAL FUND OF MUNICIPALITY.

## SYLLABUS:

1. The expense pertaining to the inspection and auditing of the public accounts of a municipality by the bureau of inspection and supervision of public offices, pursuant to Section 274 et seq. of the General Code, is by the express provision of Section 288, General Code, chargeable to the municipality, but in so far as such inspection and audit relates to the conduct of municipally owned public utilities and other public service enterprises of a proprietary nature, such expense may be paid out of the revenues arising from such utilities or other enterprises.

2. The expense of such inspection and auditing, in so far as it relates to (a) funds arising from tax levies for debt retirement, (b) funds provided for maintenance of police and fire relief and pensions, (c) funds provided and earmarked for poor relief purposes, and (d) funds arising from distribution of gasoline taxes and motor vehicle license fees may not be paid from such funds, but must be paid from the general fund of the municipality.

Columbus, Ohio, May 15, 1945

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"We are attaching hereto a letter from our City of Cleveland examiner in which he makes inquiry concerning the legality of distributing that part of the cost of our state examinations that is a direct charge to the taxing district to special funds, in proportion to the amount of the state examiner's time consumed by the examination of specific departments, such as the publicly owned utility plants, cemeteries, sinking or debt retirement funds, special funds financed from the gasoline tax, motor vehicle license fees and others.

Search of our files fails to disclose any official ruling by which we could definitely answer the examiner's question, although this Bureau has never questioned the legality of action by the cities in reimbursing their general funds from their public utility funds to the extent of the costs of examinations of those particular utility plants.

Now, that at least some of the cities seem to have broadened the base for reimbursing the general fund beyond the distribution of such charges to those functions exercised in a proprietary capacity, it is essential that we seek advice as to the legality of such action.

Accordingly, may we request that you examine the inclosure and give us your opinion concerning the legality of charging a portion of the direct cost of our state examination of city and village accounts to funds classified as follows:

A. Funds arising from the revenues of municipally owned utilities.

B. Funds arising from other public service enterprises.

C. Funds arising from tax levies for debt retirement.

D. Funds provided for maintenance of police and fire relief and pensions.

E. Funds provided and earmarked for poor relief purposes.

F. Funds arising from the distribution of gasoline taxes and motor vehicle license fees?"

The powers and duties of the bureau of inspection and supervision of public offices and the duties of political subdivisions in relation thereto, are defined in Sections 274 to 291, inclusive, of the General Code. Section 274 gives the bureau the power to inspect and supervise the accounts and reports of all state offices and institutions "and the office of each taxing district or public institution in the state of Ohio."

Section 288 reads as follows:

"All expenses pertaining to the inspection and auditing of the public accounts and reports of a taxing district *shall be borne by the district*, subject to the following limitations: for the services of each state examiner, assigned to examine a township, school district or village, such district shall pay eight dollars per day; for the services of each assistant state examiner so assigned such district shall pay five dollars per day, all other taxing districts shall pay ten dollars per day for the services of each state examiner assigned to examine such district and shall pay six and one-quarter dollars per day for the services of each assistant state examiner so assigned. The auditor of state shall certify the amount of such expenses, including the charges for services herein provided for, to the auditor of the county in which the district is situated. The county auditor shall forthwith issue his warrant in favor of the auditor of state on the county treasurer, who shall pay it from the general fund of the county, and the county auditor shall *charge the amount so paid to the taxing district* at the next semi-annual settlement. Moneys so received by the auditor of state shall be paid into the state treasury to the credit of the public audit expense funds." (Emphasis added.)

It would appear from the statute last quoted that the procedure there outlined would result in a deduction from the general fund of a city or other political subdivision in the amount of the cost of inspection and auditing of its accounts and reports, and that if the several special funds mentioned in your letter are to be charged with this cost it would have to be done by reimbursing the general fund out of such special funds.

Coming to a discussion of the question raised by your inquiry as applying to the several funds referred to in your letter my conclusions are as follows:

A. *Funds arising from the revenues of municipally owned utilities.*

In the operation of its utilities a municipal corporation is recognized

as acting in a proprietary capacity. As such, it is conceded the right to deal with the property of the utility and with the revenues arising therefrom very much as a private owner might do. It was said in the case of *Travelers Insurance Company v. Wadsworth*, 109 O. S. 440:

“The power to establish, maintain, and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may exercise its powers as would an individual or private corporation.”

In that case the question involved was as to the right of the board of trustees of public affairs of a village having an electric light and power plant, to take out liability insurance. The court in applying the rule above stated said in the course of the opinion, at page 449:

“Would a private business man take out liability insurance upon such a business as this Wadsworth utility? Such insurance is often written upon business operated by individuals and by private corporations, and making contracts therefor is generally considered to be the act of a prudent business man.”

Accordingly, it would seem clear that a municipality in the operation of its public utility would have the right to procure an audit of its accounts and pay for the same out of the revenues arising from such operation, and where the audit has been furnished by the state through its bureau of inspection and supervision of public offices it would seem equally clear that the expense of such audit might properly be paid out of the revenues of the utility, and if the general fund of the municipality has been charged therewith it would be a proper business procedure to reimburse the general fund.

It was so held in an opinion of this department found in 1937 Opinions Attorney General, page 2146. The same principle was elaborated at some length and applied to a variety of expenditures incident to the operation of a municipally owned public utility, in an opinion of my immediate predecessor, found in 1943 Opinions Attorney General, page 737.

*B. Funds arising from other public service enterprises.*

Your letter does not indicate what enterprises are comprised in this heading but I assume that it would include any other business enterprises which a city may conduct for the special benefit or convenience of its citi-

zens, which are of a proprietary and not a governmental nature, such, for instance, as a cemetery or sewage disposal operated on a rental basis. As to funds arising from such enterprises it seems to me that the rule above stated would be of equal application. The statement quoted from the case of Travelers Insurance Company v. Wadsworth, *supra*, seems to be broad enough to include any enterprise in which the city is acting in a proprietary capacity.

*C. Funds arising from tax levies for debt retirement.*

Underlying this and each of the remaining funds mentioned in your letter, we should note the constitutional provision found in Article XII, Section 5, which reads:

“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.”

Here, it will be noted that not only must every law imposing a tax state distinctly the object of the same but such tax must be applied exclusively to that object. Therefore, in determining what application may lawfully be made of the proceeds of any tax levy, whether general or excise, we must look to the purpose stated in the legislation providing for it.

As bearing on debt levies the provisions of Section 11 of Article XII of the Constitution appear to be relevant. That section reads as follows:

“No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.”

It seems to follow, therefore, that where a statute is enacted authorizing the incurring of a debt by the issuance of bonds or otherwise, and in connection with that authorization provision is made for a tax levy to pay such debt, the taxes realized from such levy should be applied to and used for no other purpose whatsoever unless there is an express provision in the law authorizing them to be used for some other purpose.

The uniform tax levy law comprised in Section 5625-1 et seq., General Code, authorizes levies for debt charges.

Section 5625-4, General Code, provides as follows:

“The taxing authority of each subdivision shall divide the taxes levied into the following separate and distinct levies:

1. The general levy for debt charges within the ten mill limitation.
2. The general levy for current expense within the ten mill limitation.
3. Special levies authorized by the provisions of this act within the ten mill limitation.
4. The general levy for debt charges authorized by law or by vote of the people outside of the ten mill limitation.
5. Other special or general levies authorized by law or by vote of the people outside of the ten mill limitation.”

Section 5625-9 General Code provides as follows:

“Each subdivision shall establish the following funds:

- (a) General fund.
- (b) Sinking fund whenever the subdivision has outstanding bonds other than serial bonds.
- (c) Bond retirement fund, for the retirement of serial bonds, or of notes or certificates of indebtedness.
- (d) A special fund for each special levy.
- (e) A special bond fund for each bond issue.
- (f) 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. \* \* \*

Section 5625-10 specifically provides that “money paid into any fund shall be used only for the purpose for which said fund is established.”

It appears to me from the wording of the above statutes that it was the intent of the legislature to provide, at least in so far as general taxes are concerned, that the levies for payment of debt charges and the funds created in connection therewith were to be used for those purposes exclusively. I am strengthened in my conclusion in this matter by the provisions of Sections 5625-13 and 5625-13a, General Code, et seq., relating to the transfer of funds. Section 5625-13, General Code, in authorizing certain transfers provides that the unexpended balances in the sinking

fund or bond retirement fund of a subdivision may be transferred within certain limitations, but only after all indebtedness for the payment of which such fund exists, has been paid.

Section 5625-13a et seq. authorizes certain additional transfers with the approval of the court. It reads as follows:

“In addition to the transfers authorized in Section 5625-13, the taxing authority of any political subdivision may, in the manner hereinafter provided, transfer from one fund to another any public funds under its supervision except the proceeds or balances of loans, bond issues, or special levies for the payment thereof, and except the proceeds or balances of funds derived from any excise tax levied by law for a specified purpose or purposes and except the proceeds or balances of any license fees imposed by law for a specified purpose or purposes.”

From a consideration of these statutes it appears to me there is abundant reason for the conclusion that funds arising from tax levies for debt retirement could not be expended by a municipality to pay the costs incurred in an audit, but such expense should be paid from the general fund.

*D. Funds provided for maintenance of police and fire relief and pensions.*

As bearing on this and also on your propositions marked E and F, it is worth while to note that a former attorney general, considering contributions by the several subdivisions to the state insurance fund, held in 1924 Opinions Attorney General, page 478:

“The contribution of the several subdivisions to the state insurance fund is a charge against the subdivision as a whole. There is no provision in the statute for apportioning this contribution among the several funds for which taxes are raised. The general funds of the county may not legally be reimbursed from the waterworks fund for its proportion of the contribution to the state insurance fund.”

In the course of the opinion it was said:

- “The language of these sections indicates the intention that the contribution to the State Insurance Fund should in itself constitute a charge against the political subdivision as a whole without reference to the several funds for which levies are made within the subdivision. Some of these funds are not such as

could be charged with a contribution, and in the case of the sinking fund no part of it could be used for that purpose. The amount necessary for payment of this contribution from the political subdivision should be considered in determining the levy for general governmental purposes for that subdivision."

This opinion may possibly have influenced the enactment in 1931 of Section 1465-66a, General Code, being a part of the industrial commission law. It provides:

"The legislative body of any county or taxing district may reimburse the fund from which such contribution is made by transferring to such fund from any other fund or funds of such county or taxing district, the proportionate amount of such contribution that should be chargeable to such fund or funds whether such fund or funds be derived from taxation or otherwise."

Since that time several of the laws imposing excise taxes have contained a like provision authorizing payment from the proceeds of such tax collection of premiums to the state insurance fund.

Again, it was held by my immediate predecessor that the contributions to the public employes retirement system required by Section 486-33g, General Code, to be paid by the several employing subdivisions, must be paid from general funds and could not, in the absence of express authorization by the legislature, be allocated to special funds. See 1942 Opinions Attorney General, page 897. This opinion was followed very shortly by the amendment of said section, adding thereto a provision authorizing any such subdivision to pay such contributions "out of any funds, whether derived from taxation or otherwise, from which the salaries or compensation of employes, on account of whom such payments are to be made, are payable."

Police and fire pension and relief funds are maintained under statutes which authorize and require the levy of certain taxes. Every municipality having a fire department supported in whole or in part at public expense and employing two or more full time regular employes is required by Section 4600, General Code, to establish and maintain a firemen's relief and pension fund, and is required by Section 4605, General Code, to levy a tax for that purpose, not exceeding three-tenths of a mill but sufficient in amount within that limit to provide funds for the payment of all relief and pensions that may be granted during the ensuing year.

By similar provision found in Section 4616, General Code, every municipal corporation having a police department supported in whole or in part at public expense, is authorized to provide for the establishment and maintenance of a police relief and pension fund, and by the terms of Section 4621, General Code, a tax not to exceed three-tenths of a mill but sufficient to provide for the payment of all pensions, is required to be levied. None of the statutes above referred to authorizes any portion of such funds to be paid for the expense of the services provided by your bureau.

Applying the provisions of Article XII, Section 2 of the Constitution, above quoted, I am of the opinion there is no authority to use the taxes raised for the specific purpose named, for any other purpose, and therefore they could not be used to pay the expenses of examination and audit by your bureau.

E. *Funds provided and earmarked for poor relief purposes.*

These funds come from a variety of taxes, both general and excise. Included in the latter class, I note taxes on bottled beer, Section 6212-49a, General Code; brewers' wort and malt tax, Section 5545-12, General Code; public utility excise taxes, Section 5474 et seq. An examination of all the statutes providing for excise taxes applicable to poor relief discloses no provision authorizing the use of any of such funds to pay the expense of the services of your bureau, and I must therefore conclude that such diversion would be unlawful.

It should be noted, as strongly reflecting the policy of the legislature in Section 5625-13 supra, that proceeds of excise taxes and license fees levied for specified purposes cannot be transferred even by the authorization of the court.

F. *Funds arising from the distribution of gasoline taxes and motor vehicle license fees.*

What has been said as to funds arising from excise taxes for poor relief, applies equally to the gasoline taxes provided by Sections 5526 et seq. and 5541 et seq. of the General Code, and to the vehicle license tax provided by Section 6291 et seq., General Code. They are levied for specific purposes named and no provision is found in the statutes imposing such taxes for payment of the expenses incidental to the services of your

bureau. It is not necessary to consider the liquid fuel tax levied pursuant to Section 5542-1 et seq., General Code, inasmuch as it is specifically levied for the benefit of the general funds of the state.

Specifically answering your questions it is my opinion :

1. The expense pertaining to the inspection and auditing of the public accounts of a municipality by the bureau of inspection and supervision of public offices, pursuant to Section 274 et seq. of the General Code, is by the express provision of Section 288, General Code, chargeable to the municipality, but in so far as such inspection and audit relates to the conduct of municipally owned public utilities and other public service enterprises of a proprietary nature, such expense may be paid out of the revenues arising from such utilities or other enterprises.

2. The expense of such inspection and auditing, in so far as it relates to (a) funds arising from tax levies for debt retirement, (b) funds provided for maintenance of police and fire relief and pensions, (c) funds provided and earmarked for poor relief purposes, and (d) funds arising from distribution of gasoline taxes and motor vehicle license fees may not be paid from such funds, but must be paid from the general fund of the municipality.

Respectfully,

HUGH S. JENKINS

Attorney General