

920.

GASOLINE TAX FUNDS—DISTRIBUTED TO TOWNSHIP UNDER SECTIONS 5541-8 ET SEQ., G. C.—MAY ONLY BE USED FOR PURPOSES SPECIFIED THOUGH THERE BE NO TOWNSHIP ROADS IN TOWNSHIP.

SYLLABUS:

Gasoline tax funds appropriated and distributed to a township under authority of Section 5541-8 and related sections of the General Code may only be used by such township for the purposes specified in such section, even though there are no township roads in such township.

COLUMBUS, OHIO, July 22, 1939.

HON. CARL W. RICH, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR: Your letter of recent date requesting my opinion, with which you enclose a copy of the opinion of your office on the question presented, duly recieved. Your letter reads:

“The following situation presents itself in Millcreek Township, Hamilton County, Ohio, and we are writing to ask your opinion as to the proper course to follow.

At the present time Millcreek Township has a balance of approximately \$11,500.00 in the so-called Gasoline Tax Fund. There are no township roads in Millcreek Township and this office has advised the Trustees that this fund can only be used for road purposes. The Trustees are now anxious to dispose of this money in some lawful manner and their question is what to do with this fund. We would therefore appreciate your opinion as to what disposition should be made of this fund.

We might add that the general fund of the Township is practically depleted and likewise the poor relief fund.

We are enclosing herewith a copy of the opinion rendered by this office relative to this particular fund.

Inasmuch as the Clerk must submit his budget by July 20th, we would appreciate it very much if we could receive your opinion prior to said date.”

In the enclosed opinion, after quoting Section 5, Article XII, of the Constitution of Ohio and a portion of Section 5537, General Code, your office refers to the conclusion reached by one of my predecessors in office in Opinion No. 4015, O. A. G., 1932, Vol. 1, Page 138, to the effect “that the proceeds of the gasoline tax may not be exempted except for the purposes for which they are levied.” The opinion of your office

concludes that you must respectfully decline to file in the Common Pleas Court a petition for authority to transfer the funds mentioned in your letter, for the reason "that the relief sought is not authorized by law."

I concur with your conclusion that a transfer of the funds here under consideration is not authorized under the law.

In Section 5, Article XII, of the Constitution of Ohio, the people have ordained:

"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."

While doubt may have been sometimes entertained as to whether the above quoted section had application to an excise tax levied under authority of Section 10, Article II of the Constitution, which provides that laws "may be passed providing for excise and franchise taxes", adopted September 3, 1912, any such doubt was dispelled by the Supreme Court of Ohio in the case of *Rogers, et al., etc. v. The State, ex rel., etc.*, 129 O. S., 108 (1934). In this case two sections of an act of the General Assembly providing for a diversion of gasoline fund tax moneys were not expressly repealed by a later act dealing with the same subject. In determining whether or not the two sections in question were repealed by the later act, the Court held, as stated in the third branch of the syllabus:

"To give effect to the provisions of Section 1 and 2 of Amended Senate Bill No. 61, contrary to the provisions of Sections 5527 and 5541, General Code, as amended by Amended Senate Bill No. 62, would violate Section 5 of Article XII of the Constitution of Ohio."

In the opinion by Judge Wilkins, concurred in by all the members of the court, it was said in part at pages 115, et seq.:

"The petition in error raises the legal questions:

* * *

(2) If the provisions of Amended Senate Bill No. 61 granting authority to use gasoline tax funds for poor relief purposes are not repealed, are such provisions constitutional?

* * *

To give effect to the provisions of Sections 1 and 2 of Bill No. 61 regarding the distribution of the taxes contrary to the express statement of the purpose of the taxes in Bill No. 62, would violate Section 5 of Article XII of the Constitution of Ohio, which states that:

'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.'

In view of the holding of the Supreme Court in this case, it is clear that the provisions of Section 5, Article XII of the Constitution apply with equal force to excise taxes as well as to all other taxes.

It is noted that in the opinion of your office, Section 5527, General Code, is quoted in part. This section was first passed as Section 11 of what might aptly be called the first or the "Original Gasoline Tax Act." In its present form (114 v. 236; Eff., 8/2/31), after providing for "the gasoline tax rotary fund", the balances of taxes collected under the act were required to be divided among the municipalities, the counties and the state department of highways, in the respective proportions of thirty, twenty-five and forty-five per centum, to be respectively used for the purpose of "maintaining, repairing, constructing and repaving the public streets and roads within" the corporation, of "maintaining and repairing the county system of public roads and highways within such counties," and of "maintaining, repairing, and keeping in passable condition for travel the roads and highways of the state". Since I have no information as to in what year or years the gasoline tax fund referred to by you was appropriated and distributed to Millcreek Township, an examination of the history of Section 5527 would be fruitless. However, since I cannot but believe that the fund to which you refer was derived from what is commonly called the "Additional Gasoline Tax Act", the distribution of the funds derived from this tax and, of what is of more importance in the consideration of your question, the use or purpose to which these funds may be put, is provided for in Section 5541-8, General Code, which amended by the 93rd General Assembly (H. B. No. 17, Eff., 7/18/39). This section as amended reads, the amendments (indicated by the asterisks and the words italicized) not being pertinent to your inquiry:

"Sec. 5541-8. When appropriated by the general assembly such highway construction fund shall be appropriated and expended in the following manner and subject to the following conditions:

* * *

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* * *

Seventeen and one-half per cent of said highway construction fund shall be appropriated for and divided in equal proportions among the several townships within the state, and shall be paid on vouchers and warrants drawn by the auditor of state to the county treasurer of each county for the total amount payable to the townships within each of the several counties. Upon receipt of said vouchers and warrants each county treasurer shall pay to each township within the county its equal proportional

share of said funds which shall be expended by each township for the sole purpose of constructing, maintaining, widening and reconstructing the public roads and highways within such townships.

Provided, however, that no part of said funds shall be used for any purpose except to pay in whole or part the contract price of any such work done by contract or to pay the cost of labor in constructing, widening and reconstructing such roads and highways and the cost of materials forming a part of said improvement; provided, further that * * * such funds * * * *may* be used for the purchase of road machinery or equipment; and, provided further that all such improvement of roads shall be under the supervision and direction of the county *engineer* as provided in section 3298-15k of the General Code; and provided further that no obligation against such funds shall be incurred unless and until plans and specifications for such improvement, approved by the county *engineer*, shall be on file in the office of the township clerk; and provided further that all contracts for material and for work done by contract shall be approved by the county *engineer* before being signed by the township trustees and all disbursements of such funds shall be upon vouchers of the township trustees approved by the county *engineer*. The trustees of any township are hereby authorized at their discretion to pass a resolution permitting the county commissioners to expend such township's share of said funds, or any portion thereof, for the improvement of such roads within said townships as may be designated in said resolution."

It will be observed that the above section (which must be read in connection with and as a part of Section 5541 levying the tax from which the fund is derived) specifically and expressly provides that the township's proportional share shall be expended "for the sole purpose of constructing, maintaining, widening and reconstructing the public roads and highways within such township." Manifestly, in enacting Sections 5541, 5541-8 and related sections, the Legislature has distinctly stated the object of the tax imposed, to which *only*, by the terms of Section 5, Article XII, it may be applied. I do not hesitate to say, therefore, that in my opinion the funds which we are here concerned with may only be used for the purposes specified in Section 5541-8, General Code.

In your letter it is pointed out that, *notwithstanding the fact that there are no township roads in Millcreek Township*, your office has advised that the funds in question may only be used for road purposes. This prompts me to observe that the fact of the existence or non-existence of township roads is not determinative of the question as to whether or not township trustees may properly use the funds in question for other than road purposes. In this connection, and while the sections cited are in no

wise to be regarded as exclusive, your attention is directed to Section 1203, General Code, which permits cooperation among the state highway department, county commissioners and township trustees in certain highway improvements, and to Section 7467, General Code, authorizing the expenditure of funds available therefor, for the construction, improvement or repair of roads inside a village by the state, county or township, or any two or more of them. Nor should the last sentence of Section 5541-8, *supra*, be ignored, to the effect that township trustees may, at their discretion, permit the county commissioners "to expend such township's share of said funds, or any portion thereof, for the improvement of such roads within said townships as may be designated in said resolution." Obviously, under the law as it now exists, including the sections just mentioned, the funds in question may still be expended for the purpose to which they were dedicated by the Legislature, which imposed the tax from which such funds were derived.

For these reasons, I am in accord with the reasoning contained in the opinion of my predecessor, referred to by you, and I am constrained to say that the funds to which you refer may not legally be transferred and expended for any purpose other than that described by Section 5541-8 of the General Code. And in view of the constitutional provision upon which this opinion is based, it is unnecessary to discuss the sections of the General Code relating to the transfer of public funds, including Sections 5625-9, 5625-13 and 5625-13a.

In specific answer to your inquiry, it is my opinion that:

Gasoline tax funds appropriated and distributed to a township under authority of Section 5541-8 and related sections of the General Code may only be used by such township for the purposes specified in such section, even though there are no township roads in such township.

Respectfully

THOMAS J. HERBERT,
Attorney General.

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LEASE—OFFICE SPACE, STATE WITH THE DUTTENHOFER BUILDING, DESIGNATED PORTION FOURTH FLOOR, DUTTENHOFER BUILDING, CINCINNATI, USE, INDUSTRIAL COMMISSION OF OHIO.

COLUMBUS, OHIO, July 24, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain lease executed by The Duttenhofer Building, of Cincinnati, Ohio,