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VILLAGE COUNCIL—AUTHORIZED TO CONTRACT FOR PURCHASE OF TRUCK TO BE PAID FOR AT ANY TIME DURING THE THEN FISCAL YEAR IN INSTALLMENTS FROM ANTICIPATED MOTOR VEHICLE LICENSE AND GAS TAX RECEIPTS—CONDITIONS NOTED.

SYLLABUS:

1. *A village council may lawfully make a contract for the purchase of a truck to be paid for at any time during the fiscal year in which the contract is made, in installments or otherwise, from anticipated receipts from the motor vehicle and gasoline taxes, if made at competitive bidding, in compliance with Section 4221, General Code, and in pursuance of a proper appropriation from which such obligation is required to be paid, not otherwise obligated to pay precedent obligations.*

2. *Appropriations made by the taxing authority of a subdivision or other taxing unit, may lawfully be made during any fiscal year, in amounts corresponding to the official estimate of receipts from sources other than the general property tax during the said fiscal year, as made by the county budget commission by authority of section 5625-21, General Code.*

3. *When an official estimate of receipts from sources other than the general property tax during any fiscal year is made by a county budget commission for a subdivision or other taxing unit, in accordance with section 5625-21, Subdivision 2, Clause (a) of the General Code, and an appropriation in pursuance of such estimate is made by the taxing authority of the subdivision or taxing unit, the fiscal officer thereof may lawfully certify, when making an official certification of funds, as provided for in section 5625-33, General Code, that funds to the extent of the appropriation are in "process of collection."*

COLUMBUS, OHIO, June 29, 1931.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"Section 4221, G. C., reads:

'All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock, noon, on the last day for filing them, by the clerk of the village and publicly read by him.'

Question: May a village council award a contract at competitive bidding for the purchase of a truck, payment to be made in twelve monthly installments beginning in January, out of the municipality's portion of the Motor Vehicle License and Gasoline Tax receipts, the village clerk certifying that funds are estimated to come into the treasury during the fiscal year to meet the contract, and council having made a proper appropriation for the purpose?"

By force of Sections 6290 et seq. of the General Code of Ohio, there is levied an annual tax upon the operation of motor vehicles on the public roads and highways in 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, repairing, constructing and repaving streets and highways. This tax is frequently referred to as the "motor vehicle license tax."

For a very similar purpose, there was levied in 1925 a tax of 2c per gallon on motor vehicle fuel (Section 5526 et seq. General Code). In 1927, there was levied an additional tax of 2c per gallon on motor vehicle fuel for the same purposes (Section 5540 et seq. General Code). These levies on motor vehicle fuels are sometimes referred to as "gasoline excise taxes."

Of the proceeds of each of the aforesaid levies of taxes municipalities receive a share; other portions of the taxes are allotted to the State for highway construction and repair purposes to be administered by the Director of Highways, and to the several counties to be expended by the respective boards of county commissioners on roads in the several county highway systems. With reference to the share of motor vehicle license taxes accruing to municipalities, it is provided in Section 6309-2, General Code, as follows:

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

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. 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. * * * and in the treasuries of such municipal corporations, such moneys shall constitute a fund which shall be used for the maintenance, repair, construction and repaving of public streets, and for no other purpose and shall not be subject to transfer to any other fund, * * *

As to the 1925 gasoline excise tax, provision is made by Section 5527, General Code, for the distribution of 30% of such tax, after the demands of a rotary fund of \$50,000 are met, to municipal corporations within the State. Section 5527, General Code, provides with respect thereto:

"* * * Thirty per cent 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, repairing, constructing and repaving the public streets and roads within such corporation, * * *

Among the provisions for the distribution of the 1927 motor fuel excise tax referred to above, are those contained in Sections 5541-7 and 5541-8, General Code, where, after making provision in Section 5541-7, General Code, for the establishment and maintenance of a rotary fund from the proceeds of said tax in the sum of \$25,000.00 further provision is made as follows:

"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:

* * * * *

Five per cent of said highway construction 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 expended by each municipal corporation for the sole purpose of constructing, maintaining, widening and reconstructing the public streets and roads within such corporation. * * *

It is well settled that the proceeds of the several taxes spoken of above, may be expended by municipalities or counties as the case may be, for the purchase of machinery, tools and equipment to be used exclusively for the purpose of maintaining, repairing, constructing and repaving streets and highways.

In an opinion of my predecessor, reported in Opinions of the Attorney General for 1927, at page 154, it is held:

"Counties may expend funds apportioned to them under Section 5537 of the General Code, to purchase road drags which are to be used exclusively in maintaining and repairing roads which are a part of the county road system."

I am of the opinion that the same authority extends to municipalities as to counties with respect to the purchase of tools and machinery with the proceeds of the several tax levies spoken of for road construction and repair purposes. The above opinion is predicated, to some extent, on the holding of the Court of Appeals, in the case of *State ex rel. Crabbe v. City of Columbus*, 153 N. E., page 174. In that case the court held:

"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, Section 5537."

I assume, of course, that the truck, the purchase of which is the subject of your inquiry, is to be used exclusively for the purpose for which motor vehicle license taxes and gasoline excise taxes may be used, that is, for the maintenance, repair, construction, reconstruction, widening and repaving of streets and highways, as the case may be. If the use of the truck is confined solely to these purposes, it seems clear, from the authorities, that funds derived from the proceeds of the taxes spoken of may lawfully be used for its purchase.

Having determined that the truck in question may lawfully be purchased with funds derived from the proceeds of motor vehicle license and gasoline tax levies, your inquiry resolves itself into the question of whether or not a proper appropriation of these funds may be made by the council of a municipality before the actual receipt of the funds, and, if a proper appropriation may be made of those funds under those circumstances a certificate of the fiscal officer of the municipality may lawfully be made at that time in compliance with Section 5625-33, General Code, inasmuch as it is admitted that the terms of Section 4221, General Code,

quoted by you in your letter with reference to competitive bidding, have been complied with.

Said Section 5625-33, General Code, provides in part, as follows:

"No subdivision or taxing unit shall:

* * * *

(b) Make any expenditure of money unless it has been appropriated as provided in this act.

* * * *

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrance. * * * *

While I do not have before me the terms of the appropriation made by the council of the municipality referred to, of anticipated receipts from the proceeds of the motor vehicle license tax and the gasoline tax, I assume, for the purposes of this opinion, that the appropriation was properly made inasmuch as you state in your inquiry that a *proper* appropriation was made for the purpose. Such an appropriation, if a proper appropriation, must necessarily be based on the "official certificate of estimated resources", made by the county budget commission for the subdivision. Sections 5625-29 and 5625-30, General Code, provide in part, as follows:

Sec. 5625-29. "On or about the first day of each year, the taxing authority of each subdivision or other taxing unit shall pass an annual appropriation measure and thereafter during the year may pass such supplemental appropriation measures as it finds necessary, based on the revised tax budget and the official certificate of estimated resources or amendments thereof. * * *"

Sec. 5625-30. "The total amount of appropriations from each fund shall not exceed the total of the estimated revenue available for expenditure therefrom as certified by the budget commission or in case of appeal by the tax commission of Ohio. No appropriation measure shall become effective until there be filed with the appropriating authority by the county auditor a certificate that the total appropriations from each fund taken together with all other outstanding appropriations, do not exceed such official estimate, and if amended the last amended official estimate, and in every case in which the appropriation does not exceed such official estimate, the county auditor shall give such certificate forthwith upon receiving from the appropriating authority a certified copy of the appropriation measure. * * * *"

The official estimate of resources spoken of in the sections of law quoted above is the estimate made by the county budget commission as directed by Section 5625-21, General Code. After providing for the creation of a county budget commission by Section 5625-19, General Code, and directing in Sections 5625-19 and 5625-20, General Code, that the said budget commission shall prepare a budget for

each subdivision and taxing unit within the county, said Section 5625-21, General Code, provides with reference to said budget as follows:

"Such budget shall present the following information which shall be presented in such detail as may be prescribed by the bureau:

1. (a) A statement of the necessary current operating expenses for the ensuing fiscal year for each department and division of the subdivision, classified as to personal services and other expense, and the fund or funds from which such expenditures are to be made. This estimate may include a contingent expense not designated for any particular purpose, and not to exceed three per cent of the total amount of appropriations for current expense.

* * * *

2. (a) Estimate of receipts from other sources than the general property tax during the ensuing fiscal year, which shall include an estimate of unencumbered balances at the end of the current year, and the funds to which such estimated receipts are credited.

* * * *

This "estimate" made by the budget commission is, as the term implies merely an estimate. That is to say, the funds are not actually in existence, but means are provided by law for the accumulation of said funds and there is good reason to believe from past experience and existing conditions that sufficient funds will accrue from the sources considered to equal the estimate. It is presumed that the budget commission makes its estimate advisedly, and in good faith, after proper consideration of the circumstances. In the case of the gasoline tax and motor vehicle license tax, past experience and business conditions generally would seem to be a fairly accurate guide for making an estimate of the possible and probable revenues to be derived from this source, and an estimate based on these considerations may safely be regarded as an accurate measure of the proceeds of these taxes that will be collected and covered into the treasury during the period which the estimate covers, as nearly so in my opinion as is the general tax duplicate a measure of the amount of general property taxes that will be collected. Neither can be said to be an exact measure.

The fact that these estimated revenues from the gasoline tax and the motor vehicle tax are not actually in the treasury does not prevent village authorities from making a proper appropriation of these revenues if the appropriation does not exceed the estimate of revenues from these funds made by the budget commission.

A somewhat more difficult question, however, is encountered with respect to the power of the fiscal officer of a village to make a valid and binding certificate, in compliance with Section 5625-33, supra, to the effect that the money to meet a contract or obligation "has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances", when the facts are that the money is not actually in the treasury but is merely estimated to come into the treasury during the fiscal period covered by the budget commission's official estimate of resources.

If, in fact, the money is in the treasury, no difficulty arises, and the council of a village, without doubt, may lawfully contract to pay for a truck in twelve monthly installments if the deferred payment period does not extend over into

a succeeding fiscal year. I assume, however, that in the case about which you inquire the money was not actually in the treasury else the question would not arise. I assume that the reason it was desired to provide for payment for the truck in twelve monthly installments was because the money was not then available and the authorities anticipated that it would become available during the year in accordance with the official estimate and enable them to make payments in monthly installments.

If the terms of Section 5625-33, General Code, with reference to an appropriation and the fiscal officer's certificate may be complied with, thus enabling the village authorities to lawfully enter into a contract for the purchase of a truck, the fact that it is to be paid for on deferred payments is immaterial in my opinion, if the seller is satisfied, especially since the agreement is such that the deferred payments do not extend into a succeeding fiscal year. The only difficult question is whether or not the fiscal officer of the village may lawfully certify that the funds to meet the obligation are in "process of collection" if in fact they are not in the treasury but have been appropriated in accordance with the estimate of the budget commission.

After considerable search I have been unable to find that any court has ever considered the import of the expression "in process of collection", as used in this statute, in so far as it may apply to the collection of excise taxes such as the motor vehicle license and gasoline taxes; nor has the matter been considered in any published opinion of this office.

Inasmuch as the legislature has provided that the budget commission shall include in its budget for a subdivision an official estimate of the probable amount of money that will come into the treasury of the subdivision during the fiscal period for which the budget is made, from such sources as excise taxes, and has further provided that this estimate so made shall be the basis for appropriations to be made during the fiscal period by the proper authorities of the subdivision or taxing unit, I am of the opinion that the making and certification of this official estimate places those taxes "in process of collection" within the meaning of the term as used in Section 5625-33, General Code, and that when the budget commission so certifies and the taxing authority of the subdivision or taxing unit appropriates funds in accordance with such official estimate, the fiscal officer of the subdivision may, within the limits of said appropriation, certify that said funds are "in process of collection."

I am therefore of the opinion, in specific answer to your question, that a village council may lawfully make a contract for the purchase of a truck to be paid for at any time during the fiscal year in which the contract is made, in installments or otherwise, from anticipated receipts from the motor vehicle and gasoline taxes, if made at competitive bidding, in compliance with Section 4221, General Code, and in pursuance of a proper appropriation from which such obligation is required to be paid, not otherwise obligated to pay precedent obligations.

Respectfully,

GILBERT BETTMAN,
Attorney General.