

new shop or new school of cosmetology was in proper sanitary condition. Consequently, in my opinion, by virtue of Section 1082-3, supra, giving the State Board of Cosmetology the power "to adopt rules for carrying out the provisions of this act", the board may require by rule that its consent be obtained for such transfer.

In specific answer to your second question it is my opinion that if a person operating a licensed beauty shop or licensed school of cosmetology moves during the licensing year to a new location, he is not required to obtain a new license, but such person may by rule of the State Board of Cosmetology, be required to obtain the consent of the board to such transfer before operating the beauty shop or school of cosmetology at the new location.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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4417.

APPROVAL, BONDS OF TOLEDO CITY SCHOOL DISTRICT,  
LUCAS COUNTY, OHIO, \$9,000.00.

COLUMBUS, OHIO, July 13, 1935.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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4418.

TAX AND TAXATION—PROCEEDS OF MOTOR VEHICLE  
FUEL TAX MAY BE CONSIDERED "IN PROCESS OF COL-  
LECTION" BY COUNTY AUDITOR WHEN (O. A. G. 1931,  
VOL. II, P. 871 OVERRULED).

**SYLLABUS:**

*After the twentieth of each calendar month which is the last day for the filing of dealers' reports required by Sections 5529 and 5529-1, General Code, a county's share of the proceeds of taxes levied upon the use, distribution or sale of motor vehicle fuel for the next preceding month may lawfully be considered by the auditor of such county as being "in process of collection" as that term is used in Section 5625-33, General Code. (Opinions of Attorney General for 1931, Vol. II, page 871, overruled).*

COLUMBUS, OHIO, July 13, 1935.

HON. MELTON BOYD, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—This acknowledges receipt of your communication which reads as follows:

“I shall appreciate your opinion at your earliest convenience on the following question:

Over what period of time, if any, can the county auditor anticipate receipt of gas tax moneys (G. C. Sections 5537 to 5541-8), and thereupon (pursuant to G. C. Section 5625-33) certify that the estimated amount is money ‘in process of collection?’”

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

“No subdivision or taxing unit shall:

\* \* \*

\* \* \*

\* \* \*

(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 encumbrances. \* \* \*

Taxes and other revenue in process of collection, or the proceeds to be derived from lawfully authorized bonds, notes or certificates of indebtedness sold and in process of delivery, shall for the purpose of this section be deemed in the treasury or in process of collection and in the appropriate fund. \* \* \*.”

You raise the question as to when a county’s share of the proceeds of the motor vehicle fuel tax levied by virtue of Sections 5527 and 5541, General Code, and not actually received in the county treasury may be considered as being “in process of collection” as that term is used in the above statute. This tax is levied upon the use, distribution or sale within this state of motor vehicle fuel by dealers who come within the definition of the word “dealer” in Section 5526, General Code, and, of course, the levy does not become effective until such use, distribution or sale is made. The amount to be realized from such a tax depends upon the quantity of motor vehicle fuel that is used, distributed or sold within the state. As to taxes of this nature, it is impos-

sible to estimate in advance of such sale, use or distribution the amount which will be realized therefrom as accurately as in the case of property taxes.

Sections 5529 and 5529-1, General Code, provide that each dealer shall file not later than the twentieth of each month with the Tax Commission and State Treasurer a report for the next preceding calendar month with the required information for the purpose of determining the amount of tax due for said month, and Section 5529-1 further provides that not later than the last day of the month next succeeding the month for which the report is made, each dealer shall pay to the State Treasurer the full amount due for the next preceding calendar month. Section 5529-4, General Code, gives the Tax Commission the right to determine the amount due whenever any dealer makes no report or an incorrect or fraudulent report.

Section 5530 provides that on the 27th of each month the Tax Commission shall transmit to the State Auditor a statement showing, among other things, the number of gallons of motor vehicle fuel which is subject to the tax as shown by the dealers' reports or as determined by the Commission and that the Auditor shall compute the amount due from each dealer and certify the same to the State Treasurer between the 27th and the last day of said month.

In view of the above statutes, when can the proceeds of a county's share of these taxes be certified by the county auditor to be in process of collection? Certainly, it is not necessary that the money be actually received in the county treasury as Section 5625-33 provides that the fiscal officer shall certify the amount required to meet a contract or an order involving the expenditure of money is "in the treasury or in process of collection". On the other hand, I am of the view that such revenue may be considered in the process of collection when the same is payable by the taxpayer and the State Treasurer has the authority to receive it, provided that at such time the amount thereof can be ascertained with substantial definiteness.

In the case of *Rice vs. Milwaukee, et al.*, 100 Wis. 516, it was held that estimated revenues to be derived from liquor licenses, from a street railway tax or license based upon earnings, and from other like sources, being indefinite in amount, are not in process of collection.

In the case of *Balch vs. Beach*, 119 Wis. 77, it was held that revenues from taxation are not in process of collection until the tax roll shall have been placed in the hands of the proper collecting officer with authority to receive and with the right of the taxpayer to pay the tax. The first branch of the syllabus of this case reads:

"The rule that municipal revenues in process of collection should be counted against indebtedness in determining whether the constitutional limit in that regard has been exceeded, does not authorize offsetting taxes voted or levied till the same shall have

been duly spread upon the tax roll and that placed in the hands of the proper municipal officer with authority to collect the tax."

In an opinion appearing in Opinions of the Attorney General for 1931, Vol. II, page 1209, the question was discussed as to when a school district's share of the state educational equalization fund could lawfully be considered by the fiscal officer thereof as being in process of collection. In this opinion the following is said:

"No complete and satisfactory definition has ever been given of the expression 'in process of collection' as used in section 5625-33, supra. It seems clear, however, that upon the mere application of a school district to participate in the State educational equalization fund it cannot be said that the district's participation in the fund is then in process of collection. Until the director of education determines that the district is entitled to participate in the fund and the amount of such participation that may be granted to the district, it is not known by the district officials or any one else whether or not any funds will be made available by reason of the participation.

After the application is granted and the amount fixed by the director of education, it may properly be said, in my opinion, that those funds are then in process of collection and it is proper for the fiscal officer of the district to so consider them when making certifications as provided by said section 5625-33, General Code."

A dealer has the right to pay the tax computed from his report provided for by Sections 5529 and 5529-1 any time between the date he files the same and the last day of the month next succeeding the month for which such report is made and the State Treasurer has the authority to receive it. When such dealers' reports, which are required to be filed with the Tax Commission and State Treasurer not later than the twentieth of each month, are filed, it is possible to compute therefrom the amount of taxes due for the use, distribution and sale of motor vehicle fuel for the next preceding month as represented by said reports. It is also possible to determine with substantial accuracy the share of a county thereof. In making this computation, consideration, of course, should be given to the amount that may be required to replenish the rotary fund and to the amount of refunds which have been allowed by the Tax Commission under Sections 5531, 5532, 5534 and 5534-1 and which are payable from the proceeds of said taxes. It is true that the amount which is so computed from said dealers' reports may be increased by the Tax Commission by its determination of the quantity of motor vehicle fuel which is subject to the tax in cases of incorrect or fraudulent reports

and in cases of failure to file reports, but I am of the view that the minimum amount can be determined with sufficient definiteness to satisfy the object of Section 5625-33 that no contract or order for the expenditure of money shall be made unless the money shall be available to meet it.

I realize that this conclusion is in conflict with an opinion found in Opinions of the Attorney General for 1931, Vol. II, page 871. With respect to the question here involved, that opinion says:

"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.”

The third branch of the syllabus reads as follows:

“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’.”

That opinion in effect holds that where there is an appropriation for an item, the fiscal officer may certify that funds are in process of collection to the extent of such appropriation, no matter how erroneous the estimate of receipts upon which such appropriation is based may be, and even though the money represented by such estimate may never become due or collectible. I do not so construe Section 5625-33. I do not see how the proceeds of taxes which are not yet levied, which the taxpayer is not obliged to pay until after the use, distribution or sale of motor vehicle fuel, and the amount of which depends on the varying amounts of such fuel used, sold or distributed, can be considered in process of collection as much as almost a year in advance of the effective date of the levy.

The official estimate of receipts referred to in the above opinion is the estimate contained in the budget of a subdivision or taxing unit which is required to be made by July 1. The official certificate of estimated resources required to be made by the budget commission by Section 5625-26 should be made prior to October 1, as Section 5625-25 provides that the levies must be certified by the subdivision to the county auditor before that date. The appropriation measure which is adopted on or about the first of the next year must be within the amount of said estimate of the budget commission. This is the best measure available at that time to keep the expenditures of a subdivision within its income. Of course, that estimate which is made so far in advance may be erroneous and the Legislature has wisely provided that when a contract

or order for the expenditure of money is to be made, money therefor must not only be appropriated but it must also either be in the treasury or in process of collection. Section 5625-33 provides that no expenditure of money can be made unless it has been appropriated as provided in the budget act. If the above opinion is correct, then no further statutory requirement would be necessary, but said statute goes further and provides that the fiscal officer shall certify not only that the money required for an expenditure has been lawfully appropriated for that purpose but also that such amount is either in the treasury or in process of collection.

The opinion first above mentioned, written later in the same year, puts a more limited meaning upon the term "in process of collection", but makes no reference to the earlier opinion with which, for the above reasons, I am unable to agree.

Therefore, I am of the opinion that after the twentieth of each calendar month which is the last day for the filing of dealers' reports required by Sections 5529 and 5529-1, General Code, a county's share of the proceeds of taxes levied upon the use, distribution or sale of motor vehicle fuel for the next preceding month may lawfully be considered by the auditor of such county as being "in process of collection" as that term is used in Section 5625-33, General Code.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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4419.

APPROVAL, BONDS OF TOLEDO CITY SCHOOL DISTRICT,  
LUCAS COUNTY, OHIO, \$9,000.00 (LIMITED).

COLUMBUS, OHIO, July 15, 1935.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*