

**Note from the Attorney General's Office:**

1927 Op. Att'y Gen. No. 27-0274 was overruled in part by 2013 Op. Att'y Gen. No. 2013-035.

274.

## GASOLINE TAX—HOW IT MAY BE USED—SECTION 5537, GENERAL CODE, CONSTRUED.

## SYLLABUS:

1. Gasoline excise tax funds apportioned to the county by virtue of the provisions of Section 5537, General Code, may be used for the sole and only purpose of maintaining and repairing roads in the county system of roads and highways provided for in Section 6966 and related sections of the General Code.

2. The county's portion of gasoline tax excise funds may be expended for the purchase of automobile trucks or other machinery, tools or equipment to be used solely in the maintenance and repair of roads in the county system of roads and highways designated under the provisions of Section 6966 and related sections of the General Code.

3. No part of the gasoline tax funds apportioned to a county by virtue of Section 5537, General Code, may be expended by the county commissioners for the purpose of purchasing machinery, tools or other equipment to be used in the construction of roads in the county, or to be used in the maintenance and repair of roads, other than roads in the county system of roads and highways designated in accordance with the provisions of Section 6966 and related sections of the General Code.

COLUMBUS, OHIO, April 4, 1927.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date reading as follows:

"Our county auditor and county commissioners have requested me to advise them whether or not they can use money in the county treasury received from the gasoline tax excise fund under Section 5537 of the General Code for the purpose of purchasing machinery under the provisions of Section 7200 which provides that all expenditures authorized by the provisions of said section shall be paid out of any available road funds of the county. In other words, is the fund derived from the gasoline tax an 'available road fund' as such term is used in Section 7200?"

There is considerable difference of opinion about it and I would therefore appreciate the ruling from you as soon as possible. My opinion is that they can not use the gasoline tax fund for that purpose."

In a subsequent letter you state that

"the county commissioners contemplate buying an automobile truck to be used for hauling materials and working on the roads."

Section 7200, General Code, provides in part as follows:

"The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highway, bridges and culverts under their jurisdiction as they may deem necessary. The county commissioners may also at their discretion purchase, hire or lease automobiles, motorcycles or other conveyance and maintain the same for the use of the county surveyor and his assistants when on official business. \* \* \* \*

The county commissioners shall provide a suitable place or places for

housing and storing machinery, tools, equipment, materials and conveyances owned by the county, and may purchase the necessary material and construct, or enter into an agreement with a railroad company to construct, one switch or spur track from the right of way of such railroad company to land or storage house owned by the county. All expenditures authorized by the provisions of this section shall be paid out of any available road funds of the county."

This section was enacted and became effective in 1915 (106 v. 574, 617), and was amended in 1917 (107 v. 69, 115).

Section 5537, General Code, was enacted in 1925 as a part of the "Gasoline Excise Tax Law" (111 v. 294, 299). This section makes provision for the distribution and purpose for which funds derived from the imposition of the tax on motor vehicle fuel may be expended. In so far as counties are concerned the section provides:

"\* \* \* \* \*

Twenty-five per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state, and shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such counties.

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It will be observed that section 7200 provides specifically for the purchase of machinery, tools or other equipment for the construction, improvement, maintenance or repair of a highway, while the funds allotted to counties from the gasoline tax excise fund are to be used "for the sole purpose of *maintaining and repairing the county system of public roads and highways.*" That is, the county's portion of the gasoline tax revenue may be expended for the *sole purpose of maintenance and repair and only on the county system of roads, provided for in section 6966* and related sections of the General Code.

In Opinion Number 179, Opinions of the Attorney General for 1927, rendered to the Bureau of Inspection and Supervision of Public Offices, under date of March 12, 1927, this department said as follows:

"In the construction and interpretation of statutes it is a cardinal rule that the legislature is presumed to know existing statutes, and the state of the law relating to subjects with which they deal. It must be presumed, therefore, that in the enactment of Section 5537, the legislature knew of the existence of the 'system of county highways' created under the provisions of Sections 6965 to 6972, *supra*, and had such system in mind when it used the term 'county system of public roads and highways' in section 5537. There is of course a slight variation in the words used in the two sections, but the terms employed in the two sections in question are substantially identical.

Moreover, when it is remembered that the county system provided for in Sections 6965 to 6972, *supra*, is a secondary system, composed of the roads of the greatest relative importance and value in traffic in the county, connecting with the inter-county highway and main market road all the villages, hamlets and centers of population within the county, the intent of the legislature to limit the use of the county's apportionment of the gasoline tax funds to the maintaining and repairing of roads in the county system of roads becomes apparent."

It has been held that gasoline tax funds may be expended for the purchase of

machinery and equipment to be used solely in the maintenance and repair of streets. See *State ex rel, Crabbe, Attorney General, vs. City of Columbus, et al.*, 21 O. A. 119; 153 N. E. 174 (reported in the Ohio Law Bulletin and Reporter for October 4, 1926).

The headnote in that case reads:

"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."

In the opinion the court said:

"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 the fund be used exclusively for highway maintenance and repairs. It would necessarily follow that a reasonable discretion must be allowed the officials of the cities in determining the method or manner of making these repairs. In a large city like Columbus there are many miles of streets bearing constant and heavy traffic to be maintained and kept in repair. The old method of putting a man with kettle or container of asphalt to be used for patchwork here and there might or might not be the most economical and efficient way of keeping up the very extensive program of street repair in the city of Columbus. We also know from general and common observation that a more elaborate system and a more scientific method might be adopted with greater economy and efficiency in a large city like Columbus. The state did not reserve to itself the right to dictate to the cities as to the method. Consequently we must leave open to the city officials a latitude of discretion. It will be noted that the averments of the answer of the city as to this plant are clear as to the exclusive use of the plant for maintenance and repair purposes. These averments are admitted by the demurrer. There is nothing in the record which would tend in any degree to impugn the motives or good faith of the city in expending these funds for the purposes stated. The state contends that, if any portion of the funds are allowed to be taken for a purpose of this kind, it will tend to break down the limitations imposed by the gasoline excise tax act, and give a pretext to cities to divert the revenues of this fund to illegal and unwarranted uses. It is sufficient in this respect to say that a reasonable latitude must be allowed the city officials under this act. As long as no diversion or misappropriation of the funds is shown, and where it appears as an admitted fact that the uses contemplated are strictly for maintenance and repair purposes, we are of opinion that the courts are not called upon to interfere."

From what has been said it is clear that the gasoline excise tax funds apportioned to the county by virtue of the provisions of Section 5537, General Code, may be used for the sole and only purpose of maintaining and repairing roads in the county system of roads and highways provided for in Section 6966 and related sections of the General Code. It is also clear that these funds may be expended for the purchase of automobile trucks or other machinery, tools or equipment to be used *solely* in the maintenance and repair of roads in the county system of roads and highways designated under the provisions of Section 6966 and related sections of the General Code.

You ask, however, if the county's portion of the gasoline tax funds may be used to purchase machinery, tools or other equipment authorized to be purchased by Section 7200, *supra*.

You will observe that this section authorized the county commissioners to "purchase such machinery, tools or other equipment for the *construction, improvement, maintenance or repair of the highway, bridges and culverts* under their jurisdiction as they may deem necessary." The section contains a general grant of power to purchase equipment for both the *construction and maintenance of any and all highways, bridges and culverts* under the jurisdiction of the county commissioners.

This department has occasion to construe this section in connection with the use of motor vehicle license law funds, in an opinion dated July 24, 1920, directed to the Bureau of Inspection and Supervision of Public Offices, and reported in Opinions of Attorney General for 1920, Vol. 1, p. 802. In this opinion it was held:

"Political subdivisions constituting districts of registration may not use funds coming into their hands by reason of the motor vehicle license tax for the purpose of purchasing road repair equipment, such as trucks, rollers, etc."

In the opinion Section 6309-2, General Code, was quoted, this section reading in part as follows:

"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 of registration as provided in this chapter. \* \* \* 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 and highways and streets and for no other purpose, and shall not to 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 foundation thereof is used as the subsurface of the improvement thereof, in whole or in substantial part."

Concerning this section this department said:

"A careful analysis of this statute discloses a definite purpose in the mind of the legislature in the provisions therein made to distinguish the 'maintenance and repair fund' from all other funds of a county or municipal corporation. The section defines what is meant by the term 'maintenance and repair' and it is clear that funds derived from the motor vehicle license tax in the hands of the district of registration must be expended upon a highway, the foundation of which is in existence, and cannot be used in a new construction. It will be observed that provision had already been made at the time of this enactment whereby a county could purchase trucks and equipment, and it is fair to assume that the legislature had this in mind which accounts for the definite limitations provided therein with reference to the expenditure of said funds and the failure to provide therein for the purchase of road equipment."

The opinion then quotes Section 7200 in part and continues:

"It is believed that the only provision authorizing the county to purchase equipment of the character you mention specifies the purposes for which it is to be used, among other things, 'construction' of highways. It will be observed that under the provisions of Section 6309-2, *supra*, maintenance and

repair funds cannot be expended for new constructions. This fact strengthens the position that it was the intent of the legislature to limit the expenditure of this fund for materials and labor in the maintenance and repair of roads and streets, the foundation of which are already in existence.

\* \* \* \* \*

From a practical standpoint, it seems inconceivable that a county or municipality would use such equipment as you describe exclusively in connection with the maintenance or repair of highways. Undoubtedly, such equipment would be used for construction of new highways and other purposes. Therefore, it will be seen that if by the most liberal construction the position were taken that by implication such equipment could be purchased, its use would necessarily be limited strictly to the maintenance and repair of highways. Such a construction does not seem tenable."

It is my opinion that in view of the holding of the court in the case of *State ex rel. Crabbe, Atty. Gen., vs. City of Columbus, et al.*, supra, the above quoted opinion of this department dated July 24, 1920, and reported at page 820 of Vol. 1 of the Opinions of the Attorney General of that year, must be modified to the extent of saying that by virtue of the general authority contained in Section 7200, supra, county commissioners may lawfully expend that portion of the gasoline tax funds allotted to the county by virtue of the provisions of Section 5537, supra, for the purpose of purchasing machinery, tools or the other equipment to be used *solely* for the purpose of maintaining and repairing the county system of roads and highways provided for in Section 6966 and related sections of the General Code.

I am further of the opinion, however, that no part of the gasoline tax funds apportioned to a county by virtue of Section 5537, General Code, may be expended by the county commissioners for the purpose of purchasing machinery, tools or other equipment to be used in the construction of roads in the county, or to be used in the maintenance and repair of roads, other than the roads in the county system of roads and highways designated in accordance with the provisions of Section 6966 and related sections of the General Code.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*

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STATE TREASURY—MONEY PAID INTO TREASURY BY MISTAKE.

SYLLABUS:

*Money paid into the state treasury by mistake cannot be refunded to the person entitled thereto until the legislature has made a specific appropriation therefor.*

COLUMBUS, OHIO, April 4, 1927.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication in which you request my opinion in answer to the following question:

"In the event that fines are deposited in the State Treasury through