

"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 clear, therefore, that if the proceedings for the issuance of bonds under Section 1223 have progressed to the point where the resolution authorizing such bonds has been passed prior to January 1, 1931, a tax levy to meet their interest and principal requirements will be unaffected by the constitutional amendment here under consideration insofar as it may be outside of the fifteen mill limitation. If, however, such resolution is not passed prior to January 1, 1931, there will no longer be any authority for levying a tax to meet the interest and principal requirements of such bonds outside of the fifteen mill limitation by virtue of Section 1222.

In view of the foregoing and in specific answer to your questions, I am of the opinion that after January 1, 1931, the effective date of the amendment of Section 2, Article XII of the Constitution of Ohio, a levy may not be made under the provisions of Section 1222, General Code, outside of the fifteen mill limitation provided in such constitutional amendment; provided that, in the event bonds are authorized or issued under the provisions of Section 1223, General Code, in anticipation of the collection of taxes levied under Section 1222, General Code, outside the fifteen mill limitation prior to January 1, 1931, such levy should continue to be made outside the fifteen mill limitation as long as any such bonds remain outstanding.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1933.

CONTRACTORS—WHEN DENIED GAS REFUND ON FUEL USED IN CONSTRUCTION WORK ON A HIGHWAY—WHEN ALLOWED REFUND ON FUEL USED IN TRACTORS.

SYLLABUS:

1. *Contractors are not entitled to refund of the tax paid on motor vehicle fuel which is used in construction work upon a highway regardless of whether the work is being done upon a new or old road, if the motor vehicle using such fuel was intended to be operated in whole or in part upon the highway.*

2. *Contractors are entitled to a refund of the tax paid on motor vehicle fuel used in tractors if such tractors are used in the construction of a new highway.*

COLUMBUS, OHIO, June 2, 1930.

The Tax Commission of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter which reads as follows:

"Recently the question has been raised in our Gasoline Tax Refund Department as to whether a road would lose its identity during the process of repairing the road bed by digging deeper, but at the same time staying within the boundary lines of the original road. This question is especially

raised in the case of contractors seeking refund on gasoline used in the grading, resurfacing or construction of subways.

As we understand the law, contractors are entitled to refund on gasoline used in construction of a new right of way, but not on an old road. Some contend that when the grade is lowered as in the case of a subway, it would constitute a new road.

An opinion is desired on this question."

Your inquiry involves the construction of the Section in the Gasoline Tax Law dealing with "refunds." Section 5534, relates to such refunds and is as follows:

"Any person, firm, association, partnership or corporation who shall use any motor vehicle fuel, as defined in this act, on which the tax herein imposed has been paid, for the purpose of operating or propelling stationary gas engines, tractors not used on highways, motor boats or aircraft, or who shall use any such fuel upon which the tax herein provided for has been paid, for cleaning or dyeing, or any other purpose than the propulsion of motor vehicles operated or intended to be operated in whole or in part upon the highways of this state, shall be reimbursed to the extent of the amount of the tax so paid on such motor vehicle fuel in the following manner: provided, however, that such applications for refunds must be filed with the tax commission of Ohio within ninety days from the date of purchase or invoice.

* * *."

It will be observed that the term "motor vehicle" as defined in the Gasoline Tax Law includes more than the passenger or commercial automobile. Section 5526 reads, in part, as follows:

"The following words, terms, and phrases, as used in Sections 5526 to 5541-12, inclusive, of the General Code, are hereby defined as follows: 'Motor vehicles' shall include all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion of motor vehicle fuels, as herein defined. 'Motor vehicle fuels' shall mean and include any volatile and inflammable liquid commonly or commercially used or usable for the purpose of generating power for the propulsion of motor vehicles upon the public highways, by whatever name such fuels may be known or sold. The term 'motor vehicle fuels,' however, shall not include the product commonly known as kerosene oil, except when mixed or compounded with a motor vehicle fuel or except when used in operating motor vehicles on the public highways."

It is important in discussing this question to arrive at some definition of the term "highway". The term "highway" has been judicially interpreted in many jurisdictions and invariably the Courts speak of highway as a generic term for all kinds of public ways. This interpretation is in contra-distinction to a mere space laid out between lots which sometime may become a street.

The Supreme Court of South Dakota in the case of *Allen vs. Jones*, 47 S. D. 603, stated that the term highway means a roadway or a driveway that can be used for a public drive and not a mere right of way upon which a road can be or may be constructed. Apparently an old road upon which construction work is being done or where the grade is lowered as in the case of a subway, would nevertheless be held to be a public highway.

An almost identical problem as that stated in your communication confronted the Court in the case of *Allen vs. Jones*, quoted supra. The facts were briefly as

follows: During the year 1923 the plaintiff was a contractor engaged in the construction and repair of certain public highways in the state under contract let by the Highway Commission. In the doing of the work under the said contract, plaintiff made use of a tractor engine in which he used gasoline as fuel. When purchasing said gasoline plaintiff paid to the dealer from whom he purchased the same, a tax of two cents on each gallon of gasoline so purchased as required by the Gasoline Tax Law of South Dakota. The plaintiff claimed to be entitled to refund of said tax and brought an original proceeding in mandamus against the State Auditor to compel him to return the money. The language of the South Dakota Law relating to refunds is substantially the same as the Ohio section on refunds, namely, Section 3534, *supra*. The Court held as disclosed by the syllabus of the case—

"1. Tractor engine used in construction of a highway is not 'operated upon a highway' within the laws providing for refund of tax on gasoline not used in motor vehicles operated on a highway. 'Highway' as therein used means roadway or driveway that can be used for public travel and not a mere right of way upon which a road can be or is being constructed.

2. Owners of tractors or trucks used for hauling gravel for surfacing or repairing highways or driving to and from filling station held not entitled to a refund under the gasoline tax paid to dealers pursuant to the law, if such tractor or truck is operated on a highway within the gasoline tax law."

The provisions of the Ohio Law in reference to refunds which are contained in Section 5534 of the General Code, are substantially the same as those contained in the law of South Dakota. It is significant that in Section 5534, General Code, the Legislature has exempted from taxation the motor vehicle fuel used in tractors which are not operated on the highways. It is therefore clear that gasoline used in any motor vehicle which comes within the meaning of the word "tractor" and which is not operated on the highway, would be subject to a refund. On the other hand the gasoline used in any other motor vehicle operated or intended to be operated in whole or in part upon the highways of the state, would not be exempt even though such motor vehicle is used a portion of the time in the construction and repair of highways.

A careful reading of the refund provisions, especially the phrase "or any other purpose than the propulsion of motor vehicles operated or intended to be operated in whole or in part upon the highways of this state", compels the conclusion that the Legislature intended to tax fuel used to propel any truck or motor car which in fact is operated in part upon the highways and not permit apportionment of the fuel which propels the motor vehicle at places other than on the highways. If apportionment were permitted it would not only result in tremendous difficulty in administering the provisions of the Gasoline Tax Law, but it would open a fertile field for fraud. Certain motor vehicles may be designed not to operate upon the highways. Such would be, for instance, gasoline railway cars operated on tracks and small trucks used in railway stations in connection with the movement of freight but which never go upon the highway. The motor fuel used in such vehicles may properly be subject to refund.

In view of the above considerations and in specific answer to your inquiry, I am of the opinion that:

1. Contractors are not entitled to refund of the tax paid on motor vehicle fuel which is used in construction work upon a highway regardless of whether the work is being done upon a new or old road, if the motor vehicle using such fuel was intended to be operated in whole or in part upon the highway.

2. Contractors are entitled to a refund of the tax paid on motor vehicle fuel used in tractors if such tractors are used in the construction of a new highway.

Respectfully,

GILBERT BETTMAN,

Attorney General.