

2090.

TAX AND TAXATION—MOTOR VEHICLE LICENSE AND GAS TAX RECEIPTS—MUNICIPALITY'S PORTION APPLICABLE FOR PARK DRIVEWAYS—CONDITIONS NOTED.

SYLLABUS:

The municipality's portion of the motor vehicle license tax and the gasoline tax may lawfully be used in connection with the construction, reconstruction, maintenance and repair of driveways in public parks under the reservations contained in the sections governing the expenditure of such funds, provided such driveways are intended for use in substantially the same manner as a public street and are open to vehicular traffic.

COLUMBUS, OHIO, July 15, 1930.

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

GENTLEMEN:—In your recent communication you request my opinion as follows:

“Section 5527, G. C., as amended in 113 O. L., page 278, determines the purpose of the levy of a two cent gasoline tax, and contains the following pertinent language:

‘for enabling the several municipal corporations of the state properly to maintain, repair, construct and repave their streets.’

Section 5537, G. C., refers to public streets and roads within the corporation. Section 5541-1, G. C., as amended in 113 O. L., page 70, determines the purpose of the levy of an additional two cent gasoline tax, and with respect to municipalities, provides that such purpose shall be constructing, widening, reconstructing and maintaining public highways, roads and streets.

Section 5541-8, G. C., as amended in 113 O. L., page 71, provides that the municipality's portion of this tax shall be expended for the sole purpose of constructing, maintaining, widening and reconstructing the public streets and roads within such corporation.

Section 6309-2, G. C., provides in part that the municipality's portion of the motor vehicle license tax receipts shall be used for the maintenance, repair, construction and repaving of public streets and for no other purpose.

In the case of *Nichols vs. Cleveland*, 104 O. S., page 19, at page 26, Johnson, J., says:

‘A driveway in a park is a different thing from a public street or a public highway. The former may be moved or relocated at the will of the park authorities and the land included in it may be devoted to playground, recreation or other park purposes.’

In view of all of the above and the statutes relating to the powers and duties of park commissioners, Section 3760, G. C., and Sections 4053 to 4065, G. C., inclusive, it would seem that the municipality's portion of the motor vehicle license and gasoline tax receipts may not be expended in connection with the maintenance, repair, etc., of park driveways, unless such driveways are in fact public streets and roadways dedicated for such purpose and passing through public parks.

Question 1. May a municipality's portion of the motor vehicle license and gasoline tax receipts be legally used for the purpose of maintaining, repairing or constructing driveways in municipal parks, which have not been dedicated as public streets or roadways?”

Your communication sets forth the language of the sections of the General Code providing for the distribution of the motor vehicle license tax and the gasoline tax sufficiently so as to make it unnecessary to quote from said sections herein. Suffice it to say that the motor vehicle license tax may be used for the purposes mentioned in Section 6309-2, General Code, in connection with "public streets". The gasoline tax distributed under Section 5537, General Code, may be used for the purposes mentioned therein in connection with the improvement of "public highways, roads and streets". The tax distributed under Section 5541-8, General Code, may be used for the purposes therein described in connection with "public streets and roads".

I am not prepared to say that the use of different terminology in these statutes is of any significance. From a reading of the sections, it is clear that the Legislature intended the proceeds of the taxes to be devoted to the construction, reconstruction, maintenance and repair of the public highways of the municipality. In my view, the various terms are used generically and mean the ways maintained by the corporation for the passage and repassage of vehicular traffic.

With this in mind, it is necessary to give consideration to the Nichols case to which you refer. It is true that that case states that a driveway in a park is a different thing from a public street or highway. It is important, however, to bear in mind just what question was there involved. That case dealt with the rights of owners of property abutting upon public streets and is authority for the principle that these rights are essentially different from those of owners of property abutting upon parkways.

It does not follow from the Nichols case that a driveway in a park is so essentially different from an ordinary street as to prevent the use of the proceeds of the motor vehicle license tax and the gasoline tax in connection therewith. The fundamental purpose for the imposition of these taxes was to create funds to provide for the cost of constructing and maintaining proper public facilities for vehicular traffic. This need may be accomplished as fully in many instances by parkways as by the improvement of what are technically regarded as public streets.

It is a fact which cannot be overlooked that many of our park driveways are of more importance from the standpoint of traffic than is the ordinary street. To hold that a deadend street, serving substantially no convenience except that of owners of property abutting directly thereon, may be improved by the use of these tax funds, while denying the right to use these funds in the improvement of an important driveway in a public park, would in my opinion be absurd.

I am accordingly of the opinion that the municipality's portion of the motor vehicle license tax and the gasoline tax may lawfully be used in connection with the construction, reconstruction, maintenance and repair of driveways in public parks under the reservations contained in the sections governing the expenditure of such funds, provided such driveways are intended for use in substantially the same manner as a public street and are open to vehicular traffic.

Bearing in mind the source of these funds, it would seem improper to hold that they may be expended for the construction of driveways or bridle paths from which motor traffic is prohibited, and these types of improvements are often included within the park plan. A common restriction in parks is the exclusion of heavy commercial vehicles. This would not, in my opinion, preclude the use of these funds on driveways so restricted for this is a police measure frequently adopted with relation to certain streets or boulevards and yet I believe that the use of such funds for the improvement of streets of this character would not be improper.

Respectfully,
GILBERT BETTMAN,
Attorney General.