

1563.

GASOLINE EXCISE TAX FUNDS—MOTOR VEHICLE LICENSE TAX—
MAY NOT BE USED FOR SWEEPING OR CLEANING STREETS BY
MUNICIPALITY.

SYLLABUS:

Monies allotted to municipal corporations from the "motor vehicle license tax" or the "gasoline excise tax funds" may not be lawfully expended for the purpose of sweeping or cleaning streets since the sweeping and cleaning of streets is not included in the term, "maintenance and repair," as that term is defined in Section 6309-2, General Code, and used in Section 5537, General Code.

COLUMBUS, OHIO, January 11, 1928.

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

GENTLEMEN :—Receipt is acknowledged of your communication of recent date requesting my opinion as follows :

"May a city's share of the motor vehicle license or gasoline tax receipts be used for the purpose of cleaning and sweeping paved streets in such corporation?"

In both the laws relating to the expenditure of funds received by a municipality from registration fees for motor vehicles and in those relating to the expenditure of funds from the gasoline excise tax receipts, such expenditure is limited to the "maintenance and repair" of streets and highways situated within such municipalities.

That the expenditure of such funds can not be made for a purpose other than maintenance or repair, including the purchase of the necessary machinery and equipment to carry on such maintenance and repair, is well settled, and this department has so held on several former occasions.

The language of Sections 6309-2 and 5537, General Code, which provide for the distribution to and the expenditure by a municipality of funds received from the motor vehicle license tax and the gasoline excise tax is so definite and explicit that there can be no question of the legislative intent specifically to limit the expenditure of these funds for the purposes therein set forth, these sections expressly providing that such monies be not diverted by a municipality for purposes other than the repair and maintenance of the streets and roadways located in such municipalities.

Section 6309-2, General Code, provides :

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

(1) 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 or 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. In the treasuries of such municipal corporations and counties, such monies shall constitute a fund which shall be used for the maintenance and repair of public roads, highways and streets *and for no other purpose* and shall not 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 foundations thereof is (are) used as the subsurface of the improvement thereof, in whole or in substantial part.

* * * "

Section 5537, General Code, reads in part, as follows :

" * * * 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 and repairing the public streets and roads within such corporation.* * * * " (Italics the writer's.)

It will be seen from the provisions of the foregoing sections that the use of the monies derived from the motor vehicle license tax and the gasoline excise tax, and paid to municipalities, is limited to the *maintenance and repair* of the public streets and roads within such corporations.

The answer to your question therefore, depends upon whether "cleaning and sweeping" paved streets may be considered "maintenance and repair" within the meaning of our statutes. In determining this question consideration will first be given to such meaning as the same is defined in the statute and second, to the meaning of such term as the same has been construed by the courts.

Section 6309-2, supra, defines "maintenance and repair" as follows :

"'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 foundations thereof is (are) used as the subsurface of the improvement thereof, in whole or in substantial part.*"

The question as to whether the definition of "maintenance and repair" as used in Section 6309-2, supra, may be applied to the use of funds obtained under the provisions of Section 5537, supra, has heretofore been passed upon by this department. I refer to Opinion No. 374, Opinions of the Attorney General for 1927, rendered to your Bureau on April 23, 1927. On page 6 of said opinion it was said :

"Since the gasoline excise tax law is a later enactment than the law with reference to the registration of motor vehicles, it is apparent that, when reference is made in the gasoline tax law to the motor vehicle registration law and the gasoline tax law provides that the monies derived from the tax created thereby are for the purpose of supplementing the monies arising under the motor vehicle registration law, and directs that these monies shall be used for the same purpose of those arising under the former law, the definition of the expression 'maintenance and repair' as contained in the former law is adopted in the later one."

With reference to the judicial construction of the terms maintenance and repair, on page 3, of said opinion, it is said :

"The word 'maintain' is practically synonymous with repair." In the case of *Fergus vs. Rochford*, 84 Conn. 202 the court in the course of its opinion said:

"The word "maintain" within general statutes 1902, Section 338 requiring widows to maintain and keep in repair the property set apart to them as dower does not mean "to provide" or construct; but means to "keep up" not to suffer to fall or decline, "keep in repair" and maintain as used in the statute being synonymous."

In the case of *Missouri K. & T. R. R. Co. of Texas vs. Bryan*, 107 S. W. 572, 576 it is said:

"The word "maintain" is practically the same thing as repair, which means to restore to a sound or good state after decay, injury, dilapidation or partial construction and when used in reference to railroad right of way includes the idea of keeping the right of way in such a condition that it can be used for the purpose for which it was intended."

It seems quite clear that in view of the foregoing discussion, and the authorities, that "cleaning and sweeping" streets is not "maintenance and repair" within the meaning of these terms as the same are used in Sections 6309-2 and 5537, *supra*. The terms as used in said statute contemplate some definite repair or improvement of a street or road such as a resurfacing, or repairing of holes and other depressions, where the existing foundations are used in whole or substantial part as a subsurface for the repair or improvement. That this is true, is quite clear from the language that maintenance and repair includes "all *work* done upon any public road" where part of the existing foundation of a street is used as a *subsurface*. In other words, cleaning, sweeping and sprinkling can not be said to be a repair or improvement requiring the use of some part of the existing foundation of a street as a subsurface. In this connection, it should be pointed out that the sweeping and sprinkling of streets are done to conserve the health and insure the well-being of the inhabitants of a municipality and not to enable the streets to be used for the purpose intended. In other words, street cleaning and sprinkling are carried on as sanitary, and not road repair projects.

Of course it is understood that this discussion is limited to the use of the maintenance and repair funds received from the "motor vehicle license tax" and the "gasoline excise tax fund" and not to revenues provided in municipalities by local taxation.

Answering your question specifically, it is my opinion that the monies allotted to municipal corporations from the "motor vehicle license tax" or the "gasoline excise tax funds" may not be lawfully expended by such municipalities for the purpose of sweeping or cleaning streets or roadways, since such sweeping and cleaning of streets is not "maintenance and repair" as that term is defined in Section 6309-2, General Code, and used in Section 5537, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1564.

BID—ON AIRPLANE HANGAR—INFORMAL PROPOSAL OUTSIDE OF SPECIFICATIONS WHICH MAY BE ELIMINATED DOES NOT INVALIDATE BID.

SYLLABUS:

A proposal or bid submitted by a contractor for the erection or construction of a building or structure for the use of the state which contains an additional or informa-