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GASOLINE EXCISE TAX RECEIPTS—MAINTENANCE OF TRAFFIC LIGHTS—LOCAL GOVERNMENT AUTHORITIES—EXPENDITURE—SECTIONS 5537, 5541-8 G. C.—PROVISIONS SUFFICIENT TO AUTHORIZE USE OF RECEIPTS TO MEET COST OF ELECTRIC CURRENT CONSUMED IN OPERATION OF TRAFFIC LIGHTS.

SYLLABUS:

The express provisions in Sections 5537 and 5541-8, General Code, authorizing local government authorities to expend gasoline excise tax receipts for the "maintenance of traffic lights" are sufficient to authorize expenditures of such receipts in meeting the cost of electric current consumed in the operation of such traffic lights.

Columbus, Ohio, July 25, 1951

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have your recent request for my opinion in which you present the following question:

> "In view of the limitation placed on the use of gasoline excise tax revenue by municipal corporations for the 'purchase and maintenance' of traffic lights, is it legal for a municipality to pay the cost of electric current consumed in the operation of traffic lights out of the gasoline tax fund?"

This question requires an interpretation of certain of the provisions of Sections 5537 and 5541-8, General Code, which sections read in part as follows:

Section 5537, General Code:

> "* * * The amount received by each municipal corporation shall be used only for maintaining, repairing, constructing and repaving the public streets and roads and erecting and maintaining street and traffic signs and markers within such corporation, provided, however, that not more than one-fourth of such receipts may be used for cleaning and clearing the public streets and roads and for the purchase and maintenance of traffic lights. * * *"

"When appropriated by the General Assembly such highway

construction fund shall be appropriated and expended in the following manner and subject to the following conditions:

"* * * Seven and one-half per cent of said highway construction 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 expended by each municipal corporation for the sole purpose of constructing, maintaining, widening, reconstructing, cleaning and clearing the public streets and roads within such corporation, and for the purchase and maintenance of traffic lights. * * *"

The first matter to be considered here is the meaning of the word "maintenance" as used in these two sections. The word "maintain" is variously defined in Webster's New International Dictionary. In one sense it is held to mean:

"To hold or keep in any particular state or condition, esp., in a state of efficiency or validity; to support, sustain or uphold * * *."

In another sense the word is defined by this same work as:

"To bear the expense of; to support; to keep up; to supply with what is needed; as to maintain one's life."

It is a matter of interest in passing that the General Assembly in these sections used the term "traffic lights" rather than the broader term "traffic control devices," as used in Section 6307-11, General Code, the statutory authority under which local authorities are permitted to use traffic control signals upon highways under their jurisdiction. It is evident, of course, that a "traffic light" is included within the broader category of "traffic control devices."

Accordingly, if we should consider only the literal and technical meaning of the term "traffic light," we might well conclude that since a *light,* as a matter of basic physical law, cannot be "maintained" without the exertion of energy of some sort, then a provision which authorizes the maintenance of a traffic light must be considered to authorize the provision of the energy (in this case electrical energy) to keep it in operation.

I do not consider it necessary, however, to resolve the question here presented on such a technical ground. It is to be observed that the ex-

penditure of funds by a local authority, a municipality in this case, for maintenance of traffic lights is provided for in one enactment and that the general authority of such local units to maintain traffic control devices is provided in another. It is clear, therefore, that these two enactments are in pari materia and must be interpreted each in relation to the other. The pertinent portions of Sections 5537 and 5541-8, General Code, have been quoted above. The other pertinent statutory provisoin is Section 6307-11, General Code, which reads as follows:

> "Local authorities in their respective jurisdictions are hereby authorized to place and maintain such traffic-control devices upon highways under their jurisdictions as they may deem necessary to indicate and to carry out the provisions of this act or local traffic ordinances or to regulate, warn, or guide traffic, except that no village shall place or maintain any traffic-control signal upon an extension of the state highway system within such village without first obtaining the permission of the director. The director may revoke such permission at any time and may remove or require to be removed any traffic-control signal which has been erected on an extension of a state highway within a village without his permission, or which, if erected under a permit granted by the director, does not conform to the state manual and specifications, or which is not operated in accordance with the terms of the permit. All such traffic-control devices hereafter erected shall conform to the state manual and specifications."

By this language local authorities are permitted to "place and maintain * * * traffic-control devices upon highways * * *." No express reference is found in this language to the *operation* of such devices.

Now the state, in the exercise of its police power in the interest of public safety, can hardly be supposed to have any interest in the mere placement of traffic lights and their maintenance in good repair and operable condition unless such lights are actually *operated in the control of traffic.* I must conclude, therefore, that the General Assembly, in Section 6307-11, intended to and did, by the use of the word "maintain," extend to such local authorities permission to *operate* such traffic-control devices, including electrically operated traffic lights. In other words, the word "maintain" as here used carries authorization not merely to keep traffic lights in a state of repair but also to keep them in the position where they have initially been placed and there to operate them in the control of highway traffic.

It is an accepted rule of statutory construction that unless the context otherwise indicates, words in a statute should be construed in the same sense as that in which they are used in a prior enactment pertaining to the same subject matter. See Horack's Sutherland on Statutory Construction, 3rd Edition, §5201.

In the case under consideration, we have an earlier enactment, Section 6307-11, General Code, in which the word "maintain" is clearly used in such a sense as would comprehend the function of operation. We have also two later enactments, Sections 5537 and 5541-8, General Code, which relate to the same subject matter as that in the earlier enactment. It would appear to follow, therefore, that the word "maintain" should be deemed to be used in the same sense in the later enactments as it was in the former.

In a situation of this sort, it is entirely logical to consider the context in which the word "maintain" is used and the ultimate objective sought to be attained by its use. Thus in Insurance Company v. Wayne, 75 O. S. 451, pp. 472, 473, 80 N. E., 13, the following statement is found:

> "* * * We have not yet been told by counsel why Wayne may be held for half the expenses of keeping up the coal bins, water closets, etc., and not liable for the expenses of keeping up or maintaining the elevator. The nearest approach to furnishing the distinction is found on same page of counsel's brief, where counsel say: 'It is contended on the part of plaintiff in error, that the word "maintain" (in the contract) is broad enough to cover the expense of running the elevator. The word "maintain" does not mean to operate.' And counsel then proceed to experiment with various lexicons where that word is defined, and seem unable to discover in any of them a definition or synonym broad enough to meet plaintiff's claim. But the parties who executed the contract, perhaps did not examine the lexicons to ascertain the literal meaning of the word 'maintain' when standing alone. They knew what they intended and we think that the valuation placed on the word by learned counsel is entirely too cheap. Why not search for its meaning in the context and other parts of the contract—the subject-matter and the necessities sought to be provided for when they were contracting for a convenient means of lifting their tenants from the lower to the upper stories of their buildings? Why not consider the meaning ascribed by the subsequent conduct of the parties, including the conduct of Wayne himself after he became one of the owners of these common improvements, before we conclude, that to 'maintain' the elevator simply means to put it in and have it stand idle at the behest of one of the parties?"

A definition of the word "maintenance" sufficiently broad to comprehend the function of operation was recognized in Flying Service vs. City of Concordia, 289 P. 955, 131 Kan. 247, in which case the following statement is made:

> "* * * While the body of the act uses the word 'operation' and the title of the act uses the word 'maintenance,' the two words designate the same thing. * * * To operate an airport is to maintain it in a manner to effect accomplishment of results appropriate to the nature of the enterprise. * * *"

A similarly broad definition is to be found in Roberts vs. City of Los Angeles, 61 P. (2d), 323, 7 Col. (2d), 477. The first headnote in that case reads in part as follows:

> "Provision of statute authorizing municipalities to furnish electric current and assess costs and expenses thereof against benefited property HELD not beyond scope of title conferring power on municipalities to maintain lighting works and assess costs and expenses thereof against the property benefited. * * *"

In the opinion in the Roberts case the following statement is found:

> "The construction of an electric power works with no purpose or means of furnishing light would be as void of rationality as would the building of a reservoir storage system without providing any means of supplying it with water, or a locomotive without providing any means of generating steam. Reading the words 'acquisition,' 'installation,' 'construction,' 'extension,' 'repair,' and 'maintenance,' with the context of the title itself, it would seem that there can be no doubt but that the title of the act contemplated the operation of lighting works and the furnishing of electric current by that means. If this is not so, there would be no occasion to repair anything and there would be nothing of a useful character to maintain."

In view of the foregoing decisions, and having in mind the primary interest of the state in the *operation* of traffic control devices, I think it can fairly be said that where a mechanical device or installation is of such a nature as to be useful only when it is operated in the active sense rather than merely used in the passive sense (as in the case of a road or bridge), the authority to maintain such mechanical device or installation includes the authority to operate it in a manner calculated to attain the "results appropriate to the nature of the enterprise."

In your inquiry you have mentioned the possible applicability of the rule stated by one of my predecessors in office in Opinion No. 3191, Opinions of the Attorney General for 1948, the syllabus of which reads as follows:

> "Sections 5537 and 5541-8, General Code, authorizing municipalities to use gasoline tax funds for the purchase and maintenance of traffic lights, do not authorize the use of any portion of such funds for the erection of such traffic lights or the construction of power lines leading thereto."

I do not conceive that the rule expressed in this opinion can have any relation to the facts here under consideration. I reach this conclusion for the reason that the rule stated in the 1948 opinion had reference only to activities which must necessarily have been completed prior to the point in time at which maintenance, in any sense of the word, can properly begin. In this connection the following statement is found in the body of the opinion, p. 252:

> " 'Maintenance' presupposes that a building, road or other improvement has already been erected or constructed and is thereafter to be maintained in such condition as will continue its usefulness."

I concur fully in this statement and in the rule stated in the syllabus of this opinion, but it does not follow, and such opinion does not hold, that maintenance may not include activities and functions, other than mere repair, which are to be carried on after the erection or construction of the particular device or installation has been completed.

Accordingly, in specific answer to your inquiry, it is my opinion that the express provisions in Sections 5537 and 5541-8, General Code, authorizing local government authorities to expend gasoline excise tax receipts for the "maintenance of traffic lights" are sufficient to authorize expenditures of such receipts in meeting the cost of electric current consumed in the operation of such traffic lights.

Respectfully,

C. WILLIAM O'NEILL
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