

Warrants — Registration — Gasoline Refunds — Highway Funds—Collections.

Warrants for expenses of collection and enforcement of gasoline dealers license tax and for gasoline refunds may be registered.

Warrants issued for the purposes mentioned in house bills 301 and 302, laws of 1927, may not be registered but may only be issued when there are moneys in the highway fund available for their immediate payment.

State Highway Commission,
Helena, Montana.

January 23, 1929.

Gentlemen:

You have submitted the following inquiry:

"May warrants for gasoline tax refunds as provided for by Section 1, Chapter 17, Laws of 1927 be issued and registered when there are no funds in the highway fund?"

Section 1 of Chapter 17, Laws of 1927, relating to said refunds, reads as follows:

"That any person who shall purchase and use any gasoline, with reference to which there has been paid, under the laws of this state licensing dealers in gasoline, a tax at the rate of three cents (3c) per gallon, for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes other than on the public highways or streets of this state, motor boats, aeroplanes or air craft, or for cleaning or dyeing, or for any commercial use other than propelling vehicles upon any of the public highways or streets of this state, shall be allowed and paid as a refund or drawback an amount of money equal to three cents (3c) multiplied by the number of gallons of gasoline so purchased and used, upon presenting to the state board of equalization within the time allowed by law, a sworn statement, accompanied by the original invoices showing such purchase and use, which statement shall set forth the total amount of such gasoline so purchased and used by such consumer other than for propelling vehicles operated upon any of the public highways or streets of this state, and which statement shall contain such additional information as may be required by the state board of equalization on forms to be furnished by said board. All such applications for refunds or drawbacks shall be filed with the state board of equalization within ninety (90) days after the date on which such gasoline was purchased as shown by such invoices. The state board of equalization shall have sixty (60) days thereafter within which to make such investigation as it may desire, to ascertain the truths of the statements made. If

the statement is found to be correct by said state board of equalization, said refund or drawback shall be paid out of the state highway fund in the same manner as other claims against said fund. Should the state board of equalization, after investigation, find that the statement so made by said consumer is false and erroneous in any part, it shall so report to the state treasurer, and shall at the same time make and file with the state treasurer a correct statement of the amount of gasoline so used by such purchaser, and the state treasurer shall then so pay to such purchaser the amount found by the state board of equalization to be due him."

All monies collected from the gasoline dealers' license tax are credited to the state highway fund.

Section 2 of Chapter 18, Laws of 1927 prescribes the use of the moneys in said highway fund as follows:

"All moneys of the state highway fund, including moneys arising from the license tax upon dealers in gasoline and motor fuels, but excluding moneys being held in such fund for refund or drawback purposes and expense of collection and enforcement, shall be used and expended by the state highway commission in the construction, reconstruction, betterment, maintenance, administration and engineering on the federal highway system of highways in this state selected and designated under the provisions of the federal aid act, approved July 11, 1916, and the federal highway act approved November 9, 1921, and all amendments thereto, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of highways leading from each county seat in the state to said federal highway system of federal aid roads where such county seat is not on said system, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of such other roads as have been or may be authorized by the laws of Montana. * * *

It will be observed that only the moneys remaining in said fund after excluding the moneys held in such fund for refund or drawback purposes and expense of collection and enforcement are available under this act for construction, betterment and maintenance of highways and for engineering and administration purposes. It was evidently the intention of the legislature enacting the law that the refunds provided for by Section 1 of Chapter 17, Laws of 1927, and expenses of collection and enforcement should have preference in payment out of said highway fund, and that only what was left in said fund, after provision had been made for the payment of these refunds and expenses of enforcement and collection should be available for use for the other purposes mentioned in said Section 2 of Chapter 18, Laws of 1927.

The act evidently contemplated that sufficient funds should be "held" in the highway fund for payment of these refunds and expenses of collection and enforcement, and that in determining what part, if any, of

said fund is available from time to time for other purposes, the money so "held" should be excluded in the computation. It would therefore appear that the intention was that a sum of money should at all times be held in said fund for the payment of these preference items and that said highway fund should not be drawn upon for other purposes so heavily and at such times as to leave nothing in it for the payment of these preference items.

The same legislature that enacted Section 2 of Chapter 18, Laws of 1927, and Section 1 of Chapter 27, Laws of 1927, made certain appropriations out of this highway fund as follows: House bill No. 317 appropriated out of said fund "a sum of money equal to the amount of all claims of refund or drawback allowed and approved during the year ending June 30, 1928, by the state board of equalization * * * for the purpose of paying such refunds or drawbacks." A similar appropriation is likewise made for the year ending June 30, 1929. House bill No. 318 made similar appropriations for the fraction of the year beginning January 1, 1927, and ending June 30, 1927.

House bill No. 315 appropriated out of said fund certain sums "for the use of the state board of equalization to be paid out of any moneys which have been, or may be credited to the state highway fund in carrying out the provisions of House bills No. 117 and 119 of the Twentieth Legislative Assembly relative to gasoline taxes and rebates thereof," for the operation and maintenance of the office of the state board of equalization for the periods beginning March 1, 1927 and ending June 30, 1927; beginning July 1, 1927 and ending June 30, 1928, and beginning July 1, 1928 and ending June 30, 1929.

House bill No. 301 appropriated "all moneys deposited by law with the state treasurer to the credit of the state highway fund during the period from July 1, 1927 to June 30, 1929, including the unexpended balance in that fund on June 30, 1927, but excluding moneys being held in that fund for refund or drawback purposes, and excluding moneys specifically appropriated from that fund for the expense of collection and enforcement of the gasoline tax collection act, for the administration of the refund or drawback act, and for the gasoline laboratory testing act," for the use of the state highway commission in carrying out the provisions of initiative measure No. 31, and acts supplemental thereto, and for other purposes mentioned in said house bill.

House bill No. 302 makes a similar appropriation for the period beginning January 1, 1927 and ending June 30, 1927.

These various appropriations out of the highway fund are in accord with the provisions of Section 2 of Chapter 18, Laws of 1927, supra, in that the appropriation bills, like the said section, provide for the use of the moneys in the highway fund in the following manner: That the moneys constituting said fund are first applicable to the payment of refunds and expenses of collection and enforcement, and the remainder, if any, is to be used by the highway commission for the other purposes mentioned in said bills and said Section 2 of Chapter 18, Laws of 1927. "Expense of collection and enforcement," as used in said Section 2 of

Chapter 18, Laws of 1927, evidently means expense of collecting the gasoline taxes and enforcement of the gasoline tax act and this is apparently the legislature's interpretation of its own act, as it appears from House bills Nos. 301 and 302, which refer to the appropriations made for the expense of collection and enforcement "of the gasoline tax collection act" and "for the administration of the refund or drawback act and for the gasoline laboratory testing act," evidently referring to House bill No. 315, supra. I have no doubt that the administration of the refund act is an item of expense in the enforcement of the gas tax collection clause.

A slight defection from the provisions of Section 2 of Chapter 18, Laws of 1927 appears in the wording of House bills Nos. 301 and 302 in that the said Section 2 contemplates that money shall be held in the highway fund "for refund or drawback purposes and expenses of collection and enforcement," whereas, in the appropriation bills numbers 301 and 302 there is excluded from the appropriation moneys "being held in that (highway) fund for refund or drawback purposes," from which might be inferred that no money was to be held in the fund for the payment of expenses of collection and enforcement. However, said bills do also exclude from the appropriation "moneys specifically appropriated from that (highway) fund for the expense of collection and enforcement of the gasoline tax collection act" and other appropriations. In order to reconcile this apparent discrepancy so that effect can be given to both expressions it must be held that in said house bills the words "moneys being held in that fund for refund or drawback purposes" are not descriptive of the entire moneys being held in the fund, but are descriptive of a part of them only as distinguished from that part being held for the payment of expenses of collection and enforcement.

By House bill No. 315 the legislature, in making appropriations for expenses of collection and enforcement, defined to some extent these expenses and made specific appropriations therefor; hence, a special and specific reference to them in House bills No. 301 and 302. It was evidently the intention that moneys should be held in said fund for the payment of refunds and only such "expenses of collection and enforcement" as were provided for in House bill No. 315, making specific appropriations therefor, and not that the bills should receive a construction that would limit the moneys "being held" to refund purposes only, contrary to Section 2 of Chapter 18, Laws of 1927.

It would therefore appear that as to refunds mentioned in House bills Nos. 317 and 318 and expenses of collection and enforcement as they are provided for in House bill No. 315, they stand on an equal footing and are payable out of moneys held in the highway fund for that purpose and that no part of the moneys so reserved should be used, and they are not appropriated for any other purpose. For other purposes there is only appropriated the remainder of "all moneys deposited by law" to the credit of the highway fund up to and including June 30, 1929, after excluding the items mentioned in House bills Nos. 301 and 302.

Section 1 of Chapter 17, Laws of 1927 provides that claims of refund

are to be investigated by the board of equalization, and if found correct shall be paid out of the highway fund in the "same manner as other claims against said fund." Other claims against said fund are paid out on warrants drawn by the state auditor. I am advised that it is the practice to have these refund claims also approved by the board of examiners before warrants issue as is required by Section 1800 R.C.M. 1921 in the case of other claims payable from said fund.

Section 34 of Article V of the Constitution of Montana reads as follows:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt."

Section 193 R.C.M. 1921 provides:

" * * * the state auditor shall not issue his warrant upon the state treasurer save by virtue of unexhausted appropriation therefor made by the legislative assembly, and after the presentation to him of a claim duly approved by the state board of examiners, save and except for salaries and compensation of officers fixed by law * * * ."

Subdivision 17 of Section 151 R.C.M. 1921 makes it the duty of the state auditor:

"To draw warrants on the state treasurer for the payment of moneys directed by law to be paid out of the treasury; but no warrant must be drawn unless authorized by law, and upon an unexhausted specific appropriation provided by law to meet the same. Every warrant must be drawn upon the fund out of which it is payable, and specify the service for which it is drawn, when the liability accrued, and the specific appropriation applicable to the payment thereof."

While the highway fund is a part of the moneys in the state treasury it is no part of the general fund of the state, but is a special and limited one created and segregated for special and specific purposes. Appropriations may be made in anticipation of revenues to be received and in estimating the amount that will be received the legislature may include in the estimate revenues from all sources including license taxes. (State ex rel. Toomey vs. Board of Examiners, 74 Mont. 1).

Appropriations from a limited or special fund need not be specific in amount.

Opinion of the Judges (S.D.), 203 N.W. 462;

State ex rel. Longstaff vs. Anderson (S.D.), 146 N.W. 703;

People vs. Miner, 46 Ill. 385;

State ex rel. Toomey vs. Board of Examiners, *supra*.

When the legislature, by House bills Nos. 317, 318 and 315, made appropriations for refunds and expenses of collection and enforcement

they must have estimated that the revenues that would be paid into the highway fund out of which the appropriations were made would be more than sufficient to meet the appropriations made by these bills as there are specific amounts named in House bill No. 315 and a sufficient amount to pay all refunds approved by the board of equalization is appropriated by House bills Nos. 317 and 318.

That this estimate was made is further evidenced by House bills Nos. 301 and 302 which appropriated the remainder of the highway fund, for the purposes mentioned in said bills, which clearly shows that the legislature had determined when the appropriations were made that the revenues accruing to the highway fund would be more than sufficient to meet appropriations made in House bills Nos. 317, 318 and 315, and that there would be a balance remaining for expenditures for the purposes mentioned in House bills Nos. 301 and 302, the amount of which balance was left undetermined.

I am of the opinion that House bills Nos. 317, 318 and 315 are valid appropriations against which warrants may issue so long as they are unexhausted.

A warrant may be drawn against a fund so long as the appropriation has not been exhausted through the funds are not immediately in the treasury for the payment of the same. The test is not whether there are funds in hand to pay but whether there has been an appropriation made for the purpose of paying the claim for which the warrant is drawn, and if so, whether it (the appropriation) has been exhausted by the issuance of warrants aggregating in amount the amount of the appropriation.

In the case of the appropriations for refunds the presentation of an approved claim within the time specified in the appropriation bills is proof that the appropriation has not been exhausted, the amount of the appropriation being equal to the amount of the approved claims presented during the period.

In the case of the appropriation in House bills Nos. 301 and 302 the legislature did not estimate the amount that would be available for the purposes mentioned therein and appropriated the estimated amount, but only appropriated whatever was left of the moneys deposited to the credit of the highway fund within the periods therein mentioned after deducting the preference appropriations mentioned therein. Moneys not so deposited within the specified time or moneys so deposited but needed for the preference appropriations are not appropriated for the uses mentioned in said bills. Whether they are appropriated depends upon (1) their deposit within the time prescribed by law, and (2) that they are not required for the preference appropriations.

To issue warrants against this sort of appropriation before the money was actually on hand and available to pay the warrants would be to issue them at a time when it was impossible to determine whether an appropriation had in fact been made for their payment. If warrants were issued and the funds were not deposited in the time prescribed, or

if deposited and were needed for the preference appropriation, then the auditor would be in a position of having issued them without an appropriation. Estimation of funds that will be available to meet an appropriation is a legislative function.

As to the appropriations in House bills Nos. 301 and 302, I am of the opinion that warrants cannot issue except when there are moneys in the highway fund available for their immediate payment.

The situation exists that for refunds and expenses of collection and enforcement, as set forth in House bill No. 315, warrants may be issued when the moneys are not on hand for immediate payment, but for the purposes mentioned in House bills Nos. 301 and 302, they may not be issued except when the money is in the highway fund and available for the payment of said warrants.

Section 154 R.C.M. 1921 provides that all warrants for claims which have been audited by the board of examiners and filed in his office must be drawn by the auditor in the order of the numbers placed upon them by that board. The auditor would have no trouble following this section so far as issuing warrants against the highway fund is concerned could warrants be drawn against the highway fund for all purposes when the money was not on hand for their immediate payment, or if the money was on hand to pay all warrants when issued. However, if he is presented with claims approved by the board, some of which he may draw warrants for and others for which he may not, it is obvious that he cannot follow the above statute. It would appear that the proper procedure would be for the board to withhold presenting to the auditor claims against the highway fund for the purposes mentioned in House bills Nos. 301 and 302 (unless the money is in the fund and available for the payment of warrants when issued) until such time as the money is available for their payment when issued.

Section 241 R.C.M. 1921 provides that if an appropriation has been exhausted the board must audit the claim, and if it approves it must transmit it to the legislature with a statement of its approval. The appropriations mentioned in House bills Nos. 301 and 302 are always exhausted except when moneys are on hand available to pay warrants when issued upon them. The legislature did not attempt to estimate the amount that would be paid into the fund for the purposes mentioned in said house bills and make an appropriation of said estimated amount but appropriated only whatever sums, if any, are from time to time deposited within a specified time and which are not needed for the other purposes mentioned in said bills. Here appropriation is concurrent with deposit and availability of the funds.

In my opinion, the board, when presented with a claim payable out of the appropriations in House bills Nos. 301 and 302, if there are no funds available for its immediate payment, should treat the appropriation as exhausted and withhold presenting it to the auditor until such times as funds are available for its payment, and if none are available within the time prescribed in the bills, should transmit it with others in the same status to the legislature.

Chapter 2, Laws of 1927, provides for the registration of state warrants regularly issued. Under this statute I am of the opinion that warrants issued against the highway fund for refund purposes and for expenses of collection and enforcement, as defined in House bill No. 315, making appropriations therefor, may be registered.

The law, in my opinion, does not contemplate that all moneys deposited to the credit of the highway fund shall be held there until all refunds and expenses are paid before any part of it may be used for construction and other purposes. It does plainly appear, however, that a reasonable sum should be held in said fund for payment of refunds and expenses from time to time as the claims therefor are presented, and that said highway fund should not be used for other purposes so long as the moneys in it are no more than are reasonably sufficient to pay the refunds and expenses as they are currently payable. There may be times when the sum so reserved and thought to be reasonably sufficient will be inadequate because of unexpectedly heavy claims presented against it at a particular time, in which event, in my opinion, warrants may issue and be registered. Of course, the first moneys coming into the fund must always be applied to the payment of the registered warrants.

Very truly yours,
L. A. FOOT,
Attorney General.
By L. V. Ketter, First Assistant.