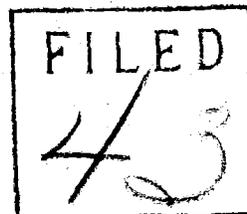


APPROPRIATION: Balance of appropriation must be transferred to the ordinary revenue fund to the credit of the state treasurer at the end of each biennium.

July 31, 1941

Mr. Dyas B. Hulse
Chief Clerk
State Treasurer's Office
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of July 28, 1941, which reads as follows:

"By Section 13051, R. S. Mo. 1939, the State Treasurer is authorized to transfer certain funds to the ordinary revenue fund.

"On our books we find deposited by the State Auditor \$40,000.00 in the Tax-Token Fund, which was created for the redemption of tax tokens when and as the same are presented to the State Auditor for redemption.

"Inasmuch as this fund has been created by the sale of tax tokens we are asking your opinion as to whether or not we may leave this fund intact and used for the specific purpose for which same was created."

Article X, Section 19 of the Constitution of Missouri reads as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every

such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

In view of the above constitutional provisions, the Legislature, in 1933, enacted what is now Section 13051, R. S. Missouri 1939. As to the construction of Article X, Section 19 of the Constitution of Missouri the Supreme Court, in the case of State ex rel. Missouri State Board, etc. v. Holladay, 64 Mo. 526, l. c. 528, said:

"Whether, then, we consider the plain language of the fundamental law or, resorting to a very familiar rule of construction, reflect on 'the old law, the mischief and the remedy,' it seems plain, beyond question, that the auditor did but obey the constitutional mandate when refusing to issue his warrant. And if any doubt should still linger in the mind on this subject, that doubt will be quickly resolved in favor of the position we have assumed by examination of the debates in the convention which framed the constitution. When speaking of section 19, supra, Mr. Letcher observed: 'In regard to the section, I desire to say that if I understand the object to it, it is to keep the matter of appropriations close up together. An appropriation made at one time, made we will say to-day, by law, and no warrant, for instance, issued for that appropriation until two years hence, we find that the State finances would be in such a condition that, unless we put some limit upon this thing, it will be almost impossible to know how the treasury does

stand.'

"And commenting on the same section, Mr. Mudd said: 'Now, the object of the committee was to restore to the general revenue the balances of the appropriations not applied at the end of every two years, so that each session of the General Assembly should make appropriations for the term during which they were elected, and not leave those appropriations open to be drawn upon at any time, which have been made by preceding General Assemblies. It was to close up the books at least once every two years, and then if any appropriation be made, let it be made by the General Assembly then in session.'

Also, in the case of State ex rel. v. Gordon, 236 Mo. 142, l. c. 157, the court said:

"It is contended by relator that: 'Article II of Chapter 49, Revised Statutes 1909, contains the law of this State in reference to the preservation of fish and game, specifies the salary of the game warden, and provides that it shall be paid out of the game protection fund by warrant drawn by the State Auditor on said fund in the hands of the State Treasurer. When the above act became effective, August 16, 1909, it required no further appropriation by the Legislature, or any other body, to pay the salary and expenses incurred by the State Game and Fish Commissioner.'

"In support of the foregoing proposition relator maintains that the provisions of the game law referred to constitute a continuing appropriation, under which respondent was authorized and it was his

duty to issue warrants for such salary and expenses as were properly chargeable to the game protection fund, without any further appropriation for that purpose by the General Assembly as made in section 62 of said House Bill No. 1200.

"We cannot agree to that contention. It is provided by section 43, article 4 of the Constitution of this State that: 'All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit any money to be drawn from the treasury, except in pursuance of regular appropriations made by law.' And by section 19, article 10, that: 'No moneys shall ever be paid out of the treasury of this State, or of any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such sum or object.'

"The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence

of an appropriation made by the General Assembly for that purpose no funds could be lawfully paid out of the State treasury for the support and maintenance of the game department, nor would re-lator be entitled to the audit and allowance of his accounts for salary and expenses. (See Secs. 11828 and 11836, R. S. 1909; State v. Holladay, 65 Mo. 77; State ex rel. v. Holladay, 66 Mo. l. c. 389; Fusz v. Spaunhorst, 67 Mo. l. c. 268; State ex rel. v. Henderson, 160 Mo. l. c. 213, 214.) In addition to the foregoing citations it should be added that the General Assembly which enacted the game and fish law appropriated out of the State treasury the sum of two hundred thousand dollars, or so much thereof as should be necessary, from the game protection fund, to meet the expenses of the department for the biennial period therein named, and by so doing gave a legislative construction to the law and the Constitution as to the necessity of a biennial appropriation."

Also, in the case of *Nacy v. Le Page*, 111 S. W. (2d) 25, l. c. 26, said:

"* * * The state treasurer, in his official capacity and in the funds of the state treasury, has no goods, moneys, or effects of any private citizen in his custody, nor does he owe a debt from the treasury to any one. He is a custodian of public funds, raised by taxation, which belong to the state. His duty is to pay out these funds only 'in pursuance of an appropriation by law' which 'shall distinctly specify the sum appropriated, and the object to which it is to be applied.' Section 19, article 10, Constitution. * * "

Also, in the case of State v. Hackmann, 282 S. W. 1007, par. 10, the court said:

"It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid. And since under the provisions of section 19, article 10, of the Constitution, no money may be paid out of the state treasury, except in pursuance of an appropriation by law, the respondent was and is without authority to issue a warrant in payment of relator's claim. * * * * *"

The appropriation act of 1939, as set out in Laws of 1939, page 173, Section 132, reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Twenty-five Thousand Dollars (\$25,000.00) or such part thereof as may be necessary, to enable the State Auditor to put into effect the provisions of Section 35 of the Sales Tax Act of 1939, providing for refunds required by this Act or by final judgment of Court, of taxes collected under this Act, the Missouri Retailers Occupation Tax Act of 1933, the Emergency Revenue Act of 1935, or the Sales Tax Act of 1937."

It will be noticed that this appropriation is for the purpose of enabling the state auditor to put into effect the provisions of Section 35, the Sales Tax Act of 1939 and other tax acts. Section 35, Laws of 1939, page 869, reads as follows:

"It shall be the duty of the General Assembly to appropriate and set aside funds sufficient for the use of the State Auditor to make any refund of taxes required by this Act or by final judgment of Court."

Mr. Dyas B. Hulse

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Under the above section it does not state specifically that the appropriation should be for the refund of tax tokens but the appropriation is set aside to make any refund of taxes required under the Sales Tax Act.

CONCLUSION

In view of the above authorities it is the opinion of this department that the Forty Thousand Dollars in the Tax Token Fund deposited by the state auditor, which was created for the redemption of tax tokens when the same are presented to the state auditor for redemption, should be, at the end of the biennium after all warrants on the same have been discharged, transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer.

It is further the opinion of this department that refunds under the Sales Tax Act can only be made out of funds created by an appropriation by the Legislature of 1941.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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