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ATTORNEY GENERAL OPINION NO. 83- 35

The Honorable Joan Finney
State Treasurer
535 Kansas Avenue
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John B. Kemp, P.E.
Secretary of Transportation
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Topeka, Kansas 66612

Re: Taxation -- Motor-Fuel Taxes -- Distribution of
Proceeds of Taxes

Roads and Bridges -- Express Highways and Freeways --
Transfer of Moneys to and from State Freeway Fund

State Funds -- State Freeway Fund -- Moneys Deposited
in, Credited to and Transferred to and from Fund

Synopsis: Pursuant to K.S.A. 1982 Supp. 79-3425, there is a daily transfer to the highway fund of 69.23% of certain revenues accruing to the state freeway fund. The legislature clearly intends that proceeds of the various motor fuel taxes credited to said fund be subject to such transfer, but it is difficult to discern from the pertinent statutory provisions whether the legislature intends that a similar transfer be made of moneys representing interest on the highway fund that are credited to the state freeway fund pursuant to K.S.A. 1982 Supp. 68-2313. However, because the state officers charged with the administration and implementation of the relevant statutory provisions have consistently construed such provisions as precluding the daily transfer of highway fund interest moneys from the freeway fund to the highway fund, such interpretation is not only entitled to great weight, but

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is controlling, in light of the legislature's continued acquiescence in such interpretation. Cited herein: K.S.A. 68-2301, K.S.A. 1982 Supp. 68-2304, K.S.A. 68-2306, K.S.A. 1982 Supp. 68-2313, 79-3401, 79-3425, K.S.A. 79-3474, K.S.A. 1982 Supp. 79-3487, K.S.A. 79-3490, K.S.A. 1982 Supp. 79-34,104, L. 1979, ch. 323, §3.

* * *

Dear Treasurer Finney and Secretary Kemp:

Jointly you have requested our opinion regarding a question raised by the Legislative Division of Post Audit. The complexity of the question raised is reflected by your eight-page letter of request, in which you identify the problem, as follows:

"The Legislative Division of Post Audit has recently questioned the current practice of the Kansas Department of Transportation of transferring to the State Highway Fund certain motor fuel tax revenue initially deposited to the State Freeway Fund while not transferring to the State Highway Fund any of the money certified to be equivalent to the interest on the State Highway Fund which is deposited to the State Freeway Fund."

There are numerous statutory provisions having relevance to this matter. However, two of the principal statutes requiring consideration are K.S.A. 68-2301 and K.S.A. 1982 Supp. 79-3425. The former is the first of a series of statutes originally enacted in 1969 (L. 1969, ch. 462) establishing a state system of modern express highways and freeways. Subsection (a) of K.S.A. 68-2301 authorizes the secretary of transportation to establish the freeway system within the various "corridors" specified therein. Subsection (b) provides for the allocation and programming of funds available for the system, and also prescribes the general criteria applicable to the highways within the system. In addition, this subsection states in pertinent part:

"All of the moneys deposited in the state freeway fund created in K.S.A. 1979 Supp. 79-3425, and any amendments thereto, except moneys accruing to said fund as a result of the interest or earnings from the investment of moneys in the state freeway fund or in the state freeway construction fund, as provided in subsection (d) of K.S.A. 68-2311, shall be subject to transfer to the state highway fund,

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as provided by said K.S.A. 1979 Supp. 79-3425, and amendments thereto." (Emphasis added.)

As indicated by the above-quoted provisions, the state freeway fund is created by K.S.A. 1982 Supp. 79-3425, which states:

"All of the tax collected under the provisions of this act shall be paid into the state treasury by the director, and the state treasurer shall credit one and seventy-five hundredths percent (1.75%) of all taxes so collected in the state freeway fund and shall credit such amount thereof as the director shall order in the motor-vehicle fuel tax refund fund to be used for the purpose of paying motor-vehicle fuel tax refunds as provided by law. On July 1, October 1, January 1 and April 1 of each year, beginning in the year 1970, or as soon thereafter as the money is available, the state treasurer shall credit six hundred twenty-five thousand dollars (\$625,000) of the remaining tax moneys collected under the provisions of this act to the county equalization and adjustment fund, which fund is hereby created, to be apportioned and distributed in the manner provided in K.S.A. 1982 Supp. 79-3425c, and amendments thereto. Eighty-seven and fifty hundredths percent (87.50%) of the remainder of said tax moneys so collected shall be credited as follows: On and after July 1, 1974, sixty-five percent (65%) thereof to the state freeway fund which is hereby created, to be expended in the manner provided in K.S.A. 68-2301, and amendments thereto, and thirty-five percent (35%) thereof to a special city and county highway fund which is hereby created, to be apportioned and distributed in the manner provided in K.S.A. 1982 Supp. 79-3425c, and amendments thereto. The remaining twelve and fifty hundredths percent (12.50%) of the tax moneys so collected shall be credited to the state highway fund.

"On July 2, 1974, and on each day thereafter, after the state treasurer has received certification from the secretary of transportation that provisions have been made for the payment of the pro rata share of the amount required to be paid on the next ensuing payment date of either the principal of or the interest on the outstanding highway bonds issued pursuant to K.S.A. 68-2304, the state treasurer shall transfer from the state freeway fund to the

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state highway fund an amount equal to sixty-nine and twenty-three hundredths percent (69.23%) of the moneys credited to the state freeway fund on the preceding day." (Emphasis added.)

These statutes have been the subjects of prior opinions of this office. Of pertinence here is Attorney General Opinion No. 76-238, which considered the effect of the last paragraph of 79-3425, added by amendment in 1974 (L. 1974, ch. 441, §1). As indicated by the language emphasized in quoting this statute above, the legislature has provided that a transfer be made each day from the freeway fund to the highway fund of 69.23% of the "moneys credited to the state freeway fund on the preceding day." The question considered in Opinion No. 76-238 was whether all moneys deposited in the freeway fund were subject to such transfer, or only the proceeds of the motor-vehicle fuels tax deposited in the fund.

The question was prompted by the fact that 79-3425 was originally enacted as part of the Motor-Fuel Tax Law in 1933 (L. 1933, ch. 317, §25). However, in the same 1969 enactment which established the state system of modern express highways and freeways (K.S.A. 68-2301 et seq.), 79-3425 also was amended so as to establish the state freeway fund (L. 1969, ch. 462, §3). The consequence of this amendment and the subsequent amendment in 1974 were explained in Opinion No. 76-238, as follows:

"In that year [1969], although prior to that time it had related only to distribution of the proceeds of the motor-vehicle fuel tax, K.S.A. 79-3425 was amended to create the state freeway fund, and to direct that a portion of the proceeds from the motor-vehicle fuel tax be credited to that fund. In the same 1969 act, a portion of the proceeds from a separate motor fuels tax, the special fuel tax, was also directed to be credited to the state freeway fund. And in 1970, a portion of the proceeds of yet another motor fuels tax, the LP gas tax, was assigned to the state freeway fund. The 1974 amendment to K.S.A. 1973 Supp. 79-3425 must be considered in light of this history. The language of the second paragraph which was added to that provision in 1974 is not all ambiguous, considered in and of itself, for it clearly directs a transfer of 69.23% of 'the moneys deposited in the state freeway fund on the preceding day' without distinguishing among the three motor fuel taxes which contributed to that fund, i.e., the motor-vehicle

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fuel tax, the special fuels tax, and the LP gas tax. If the 1974 amendment is deemed to be ambiguous as to the moneys in the state freeway fund subject to transfer, it is not because of any language in the amendment itself, but because the amendment was added to K.S.A. 1973 Supp. 79-3425, which historically dealt only with motor-vehicle fuel taxes. Any ambiguity on this score must be resolved by resort to contemporaneous legislation, i.e., the 1974 amendment to K.S.A. 68-2301, respecting precisely the same funds, described above, which again provided that '[a]ll of the moneys deposited in the state freeway fund . . . [with exceptions not pertinent here] shall be subject to transfer to the state highway fund, as provided by said K.S.A. 1973 Supp. 79-3425.' [Emphasis supplied.]"

Thus, this opinion concluded that, even though 79-3425 is a part of the Motor-Fuel Tax Law (K.S.A. 1982 Supp. 79-3401 et seq.), the moneys in the state freeway fund which were subject to transfer to the state highway fund pursuant to the 1974 amendment included moneys in the state freeway fund derived from the special fuels tax (K.S.A. 79-3474 et seq.) and the liquefied petroleum gas tax (K.S.A. 79-3490 et seq.), as well as moneys in the state freeway fund derived from the motor-vehicle fuels tax.

At this point, it is appropriate to consider the circumstances attending the 1974 amendment to 79-3425 discussed in the above-quoted excerpt from Opinion No. 76-238. Following legislative changes in 1970 (L. 1970, ch. 397), the proceeds of all three motor fuel taxes were distributed in substantially the same manner. In each instance, two percent of all taxes collected were placed in the state general fund. Additionally, specified portions of the proceeds of the motor-vehicle fuels tax were placed in the motor-vehicle fuel tax refund fund and the county equalization and adjustment fund. Once these initial distributions were made, the remainder of the proceeds of all three motor fuel tax proceeds was then apportioned, as follows: 51% to the highway fund; 14% to the freeway fund; and 35% to the special city and county highway fund.

In 1972, concurrent with legislative authorization to issue highway bonds to assist in financing the state system of modern express highways and freeways established in K.S.A. 68-2301, the formula for apportioning the motor-vehicle fuels tax proceeds was again changed (L. 1972, ch. 252, §13), but corresponding changes were not made in the apportionment of the special fuels tax or LP gas tax proceeds. As a result

of the 1972 amendment of 79-3425, the percentages for apportioning the remainder of motor-vehicle fuels tax proceeds were as follows: 45% to the highway fund; 20% to the freeway fund; and 35% to the special city and county highway fund. The change in the apportionment of the moneys between the highway fund and freeway fund is reflective of the fact that, in addition to the freeway fund's original purpose of providing funds for construction of the state system of modern express highways and freeways, K.S.A. 1971 Supp. 68-2301 was amended (L. 1972, ch. 252, §12) so as to obligate the freeway fund for the retirement of the highway bonds. (For an analysis of the freeway fund's obligation to provide the funds necessary to make principal and interest payments on these bonds, see Attorney General Opinion No. 83-31.)

In apparent recognition that the principal and interest payments on the highway bonds constitute "a first lien and claim on the state freeway fund" (K.S.A. 68-2306), a further amendment of 79-3425 was made in 1974. By that amendment, the legislature eliminated the direct distribution of 45% of the motor-vehicle fuels tax proceeds to the highway fund. Instead, the legislature provided that the remainder of these proceeds (after general fund, refund fund and county equalization and adjustment fund distributions) were to be apportioned 65% to the freeway fund and 35% to the special city and county highway fund. The effect of this change was to combine the previous distributions to the highway fund and freeway fund into a single distribution to the freeway fund. In addition, the following language was added:

"On July 2, 1974, and on each day thereafter, after the state treasurer has received certification from the state highway commission that provisions have been made for the payment of the pro rata share of the amount required to be paid on the next ensuing payment date of either the principal of or the interest on the outstanding highway bonds issued pursuant to K.S.A. 68-2304, the state treasurer shall transfer from the state freeway fund to the state highway fund an amount equal to sixty-nine and twenty-three hundredths percent (69.23%) of the moneys deposited in the state freeway fund on the preceding day."

The apparent objective of this amendment was to ensure that sufficient moneys are available in the freeway fund, so as to prevent impairment of the state's contractual obligation to the holders of the issued and outstanding highway bonds, which are payable solely from the freeway fund. Arguably,

however, a further legislative purpose was to maintain approximately the same percentages of motor fuel tax proceeds accruing to the freeway and highway funds. In this regard, it is to be noted that 69.23% of the 65% of the motor-vehicle fuels tax proceeds placed in the freeway fund equals 45% (.6923 times .65 equals .45). This is the same percentage of motor-vehicle fuels tax proceeds credited to the highway fund prior to the 1974 amendment. Thus, when 69.23% of the balance of the proceeds of the motor-vehicle fuels tax is transferred daily to the highway fund (after certification that the debt service requirements of the outstanding highway bonds have been satisfied), the relative parity of the proceeds of the three motor fuel taxes accruing to the highway and freeway funds is maintained. However, when proceeds of the special fuels tax and LP gas tax deposited in the freeway fund are included in the amount subject to transfer, the highway fund receives a greater percentage of the proceeds from the three motor fuel taxes than it did prior to the 1974 amendment.

Opinion No. 76-238 did not analyze the problem from this perspective. Rather, it considered only the literal language of the 1974 amendment, which provided for the transfer to the highway fund of 69.23% of the "moneys deposited in the state freeway fund on the preceding day." (Emphasis added.) The prior opinion reasoned that this language was not limited to motor-vehicle fuels tax proceeds, but encompassed all moneys deposited in the freeway fund, which would include portions of the proceeds from the special fuels and LP gas taxes, as well. Such literal interpretation was reinforced by reference to the 1974 amendment to K.S.A. 1971 Supp. 68-2301 (L. 1974, ch. 276, §8), which, inter alia, provided that all moneys in the freeway fund, "except moneys accruing to said fund as a result of the interest or earnings from the investment of moneys in said freeway fund or in the state freeway construction fund" (emphasis added), are subject to transfer to the highway fund as provided in 79-3425.

Although we think it possible a different conclusion might have been reached if Opinion No. 76-238 had considered the legislative history and the apparent legislative purpose underlying the 1974 amendment to 79-3425, we believe the conclusion reached in the prior opinion is premised on a viable rationale. Thus, we would not presume to disturb the conclusion reached in that opinion, particularly when it is recognized that it has been relied upon by various executive officers and agencies for nearly seven years and, during this period of time, the legislature has proceeded to consider the affected statutes with full knowledge as to the manner in which they were being administered. As will be discussed later, the pertinent statutes have been amended on several occasions subsequent to 1974, providing more than sufficient

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opportunity for the legislature to clarify its intent, if they were being administered in a manner contrary to their intended purpose, but the relevant language of the 1974 amendment to 79-3425 has remained unchanged. Thus, we find pertinent the following statement of the Court in Rogers v. Shanahan, 221 Kan. 221 (1977):

"It is presumed the legislature had and acted with full knowledge and information as to the subject matter of the statute, as to prior and existing law and legislation on the subject of the statute and as to the judicial decisions with respect to such prior and existing law and legislation." Id. at 225.

However, we think several observations having relevance to your inquiries should be made with respect to the actions of the 1974 Legislature as construed by Opinion No. 76-238. First, at the time that opinion was written, the only moneys accruing to the freeway fund were specified portions of the proceeds of the three motor fuel taxes and the interest earned on moneys in the freeway fund and freeway construction fund. Second, with its 1974 amendment to 68-2301, the legislature manifested an obvious intent that only the motor fuel tax proceeds accruing to the fund were subject to being transferred to the highway fund. Third, the essential purpose of Opinion No. 76-238 was to consider whether only the motor-vehicle fuels tax proceeds accruing to the freeway fund were subject to the transfer provisions of 79-3425, or whether the proceeds from all the motor fuel taxes which were credited to the freeway fund were subject to these transfer provisions. Because that opinion could not contemplate the subsequent legislation on these matters, we believe the opinion should not be extended beyond its response to the specific question considered, i.e., the proceeds from each of the motor fuel taxes accruing to the freeway fund are subject to these transfer requirements.

With this in mind, we turn to the 1979 amendments to the pertinent sections (see L. 1979, chs. 323, 324, 325). Prior to 1979, K.S.A. 79-3425, 79-3487 and 79-34,104 provided that specified percentages of the proceeds of the motor fuel taxes covered by these respective statutes were placed in the state general fund. The net effect of the 1979 amendments was to eliminate these transfers to the general fund and provide that the same percentages of the respective fuel tax proceeds be placed in the state freeway fund. Hence, each of these statutes now provides that an additional portion of the respective tax proceeds is placed in the state freeway fund, prior to any other distribution of these proceeds, including in each instance the additional distribution to the state freeway fund. The respective percentages of these proceeds

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initially credited to the state freeway fund are as follows: Motor-vehicle fuels tax (K.S.A. 1982 Supp. 79-3425) -- 1.75%; special fuels tax (K.S.A. 1982 Supp. 79-3487) -- 1.60%; and LP gas tax (K.S.A. 1982 Supp. 79-34,104) -- 1.40%.

You advise that, subsequent to these 1979 amendments, the state treasurer, in reliance upon Attorney General Opinion No. 76-238, has considered these additional motor fuel tax moneys credited to the state freeway fund as being subject to transfer to the state highway fund in accordance with the last paragraph of K.S.A. 1982 Supp. 79-3425 quoted above. We concur with this determination, since we find nothing in the legislative histories of the pertinent statutes which would alter the conclusion reached in Opinion No. 76-238 that 69.23% of the proceeds from all of the motor fuel taxes credited to the state freeway fund are to be transferred daily to the state highway fund.

Moreover, it is our understanding that the Legislative Division of Post Audit does not necessarily take issue with this practice. Rather, Post Audit questions why certain other moneys, which are now credited to the state freeway fund as a result of legislative changes also made in the 1979 enactments, have not likewise been subject to transfer to the state highway fund. The moneys in question represent interest earned on moneys in the state highway fund and are transferred monthly into the state freeway fund pursuant to K.S.A. 1982 Supp. 68-2313. However, with respect to these moneys, the state treasurer has concluded they are not subject to the daily transfer of moneys from the freeway fund to the highway fund pursuant to the last paragraph of K.S.A. 1982 Supp. 79-3425. The validity of such determination is not easily determined. We have discerned cogent arguments on either side of this issue.

On the one hand, K.S.A. 68-2301(b) provides that "[a]ll of the moneys deposited in the state freeway fund . . . shall be subject to transfer to the state highway fund" as provided in K.S.A. 1982 Supp. 79-3425. Exception is made for moneys accruing to the freeway fund "as a result of the interest or earnings from the investment of moneys in the state freeway fund or in the state freeway construction fund." However, no such exception is made for highway fund interest moneys transferred to the freeway fund pursuant to K.S.A. 1982 Supp. 68-2313, although ample opportunity existed for providing such an exception, since K.S.A. 68-2301 was amended in the same 1979 enactment (L. 1979, ch. 323) which finally enacted K.S.A. 1982 Supp. 68-2313.

Similarly, as we stated above, the last paragraph of K.S.A. 1982 Supp. 79-3425 provides that 69.23% of the "moneys credited to the state freeway fund on the preceding day" shall

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be transferred to the state highway fund, and no exception is made for moneys transferred to the freeway fund pursuant to K.S.A. 1982 Supp. 68-2313. Again, it may be noted that the legislature had opportunity to provide for a specific exception for the highway fund interest moneys, since 79-3425 also was amended in the same 1979 enactment which included 68-2301 and 68-2313.

Thus, in light of the literal language of K.S.A. 68-2301 and K.S.A. 1982 Supp. 79-3425, it may be reasoned that interest on moneys in the highway fund, transferred to the freeway fund pursuant to K.S.A. 1982 Supp. 68-2313, is subject to the provisions of K.S.A. 1982 Supp. 79-3425 which effect a daily transfer of 69.23% of the moneys in the freeway fund to the highway fund.

On the other hand, we think a compelling argument may be developed to indicate that the legislature did not intend to subject these moneys to such transfer. Particularly relevant to this argument is the following statement of the Kansas Supreme Court in Brown v. Keill, 224 Kan. 195 (1978):

"The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute, even though words, phrases or clauses at some place in the statute must be omitted or inserted. (Farm & City Ins. Co. v. American Standard Ins. Co., 220 Kan. 325, Syl. ¶3, 552 P.2d 1363 [1976].) In determining legislative intent, courts are not limited to a mere consideration of the language used, but look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under the various constructions suggested. (State, ex rel., v. City of Overland Park, 215 Kan. 700, Syl. ¶10, 527 P.2d 1340 [1974].) In order to ascertain the legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof in pari materia. When the interpretation of some one section of an act according to the exact and literal import of its words would contravene the manifest purpose of the legislature, the entire act should be construed according to its spirit and reason, disregarding so far as may be necessary

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the literal import of words or phrases which conflict with the manifest purpose of the legislature. (Kansas Commission on Civil Rights v. Howard, 218 Kan. 248, Syl. ¶2, 544 P.2d 791 [1975].)" (Emphasis added.) Id. at 199, 200.

As suggested by the foregoing rules of construction, legislative intent is to be discerned from the language of the statute; yet, it is not to be determined in a vacuum. The historical background of the legislation must be considered. Thus, it is appropriate to consider the circumstances surrounding the enactment of K.S.A. 1982 Supp. 68-2313.

This statute was first enacted as section 3 of 1979 Senate Bill No. 280 (L. 1979, ch. 325, §3), and it became effective upon its publication in the official state paper on April 25, 1979. As first enacted, this statute read as follows:

"On or before the tenth day of July, 1979, and on or before the tenth day of each month thereafter, the director of accounts and reports shall transfer from the state general fund to the state highway fund the amount of money certified by the pooled money investment board in accordance with this section. Prior to the tenth day of July, 1979, and prior to the tenth day of each month thereafter, the pooled money investment board shall certify to the director of accounts and reports an amount of money equal to the proportionate amount of all the interest credited to the state general fund for the preceding month pursuant to K.S.A. 75-4210a, that is attributable to moneys in the state highway fund. Such amount of money shall be determined by the pooled money investment board based on: (a) The average daily balance of moneys in the state highway fund during the preceding month as certified to the board by the secretary of transportation, and (b) the average interest rate on time deposit, open accounts which is attributable to interest actually received during the preceding month under K.S.A. 75-4201 to 75-4229, inclusive, and amendments thereto. On or before the fifth day of July, 1979, and on or before the fifth day of each month thereafter, the secretary of transportation shall certify to the pooled money investment board the average daily balance of moneys in

the state highway fund during the preceding month. No transfer under this section shall be considered to be an expenditure or demand transfer for the purposes of sections 1 to 5, inclusive, of 1979 Substitute for House Bill No. 2623." (Emphasis added.)

The foregoing section was part of an act which evidenced a legislative scheme to provide highway fund moneys to the special city and county highway fund and to correspondingly provide additional moneys to the highway fund at the expense of the state general fund. As indicated by the emphasized language in the above-quoted provisions, section 3 of the act promotes this objective by providing for the monthly transfer from the state general fund to the state highway fund an amount equivalent to the interest earned on highway fund moneys in the preceding month.

However, this scheme was subsequently altered in the same session of the legislature with the passage of 1979 House Bill No. 2324 (L. 1979, ch. 323). Section 3 thereof provided for the transfer of \$35,000,000 from the state freeway fund to the state highway fund, and section 4 further amended section 3 of Senate Bill No. 280 (68-2313). The pertinent change effected in 68-2313 was the provision for making the state freeway fund the ultimate recipient of highway fund interest moneys, rather than the state highway fund, as had been provided in Senate Bill No. 280. Similarly, amendments were made to 79-3425, 79-3487 and 79-34,104, as they had been amended by Senate Bill No. 280, to reduce the amount of moneys distributed under these statutes to the state highway fund to the respective amounts provided in these statutes prior to their amendment in Senate Bill No. 280. Of more significance, however, these sections also were amended to provide additional distributions of motor fuel tax proceeds to the state freeway fund. The amounts of these distributions were equivalent to the amounts which had been placed in the state general fund under these statutes, prior to their amendment by Senate Bill No. 280.

Arguably, therefore, the changes effected in these sections of Senate Bill No. 280, when considered within the context of the \$35,000,000 transfer from the freeway fund to the highway fund, evidence an intent to reimburse the freeway fund for such transfer. Assuming this was the legislature's intent, it is difficult to reconcile such intent with the argument that, based on the literal language of K.S.A. 1982 Supp. 79-3425, the legislature also intended to transfer 69.23% of such reimbursement to the highway fund. The legislature specifically amended 68-2313 to provide that the interest on the highway fund would not be placed in the highway fund, but

would be credited to the freeway fund instead, and "any changes and additions made in existing legislation raise a presumption that a change in meaning and effect is intended." (Emphasis added.) Shapiro v. Kansas Public Employees Retirement System, 211 Kan. 452, 456 (1973), quoting Curless v. Board of County Commissioners, 197 Kan. 580 (1966). Thus, it seems inconsistent to argue that the legislature also intended that on the day after highway fund interest moneys are transferred to the freeway fund, 69.23% thereof is to be transferred to the highway fund. If this is the ultimate consequence, it is difficult to discern a legislative purpose for such confusing machinations. If the legislature intended to transfer all the highway fund interest to the freeway fund as reimbursement for the transfer of \$35,000,000 from the freeway fund to the highway fund, the subsequent transfer of nearly 70% of the highway fund interest to the highway fund mitigates against such intent.

As an extension of the foregoing discussion of the apparent legislative intent underlying K.S.A. 1982 Supp. 68-2313, we also are aware that an argument may be made that the literal language of the last paragraph of K.S.A. 1982 Supp. 79-3425 does not accurately reflect legislative intent, and that, in accordance with Brown v. Keill, *supra*, such literal language should be disregarded to the extent necessary to construe the statute consistent with its spirit and reason. The legislative history and the circumstances surrounding the addition of this paragraph in 1974 provide the basis for this argument.

As we previously noted, at the time this paragraph was added in 1974, it had application only to proceeds of the various motor fuel taxes deposited in the freeway fund. The only other revenues accruing to the freeway fund at that time, *i.e.*, interest on moneys in the freeway fund and the freeway construction fund, were expressly excluded from being transferred by provisions added to K.S.A. 68-2301(b) in 1974 (L. 1974, ch. 276, §8). Accordingly, it is apparent that the language effecting the daily transfer of 69.23% of the freeway fund's receipts was expressly tailored for motor fuel tax revenues credited to the freeway fund.

On each day after the state treasurer has received certification from the secretary of transportation that there are sufficient moneys in the freeway fund to satisfy the debt service requirements of the highway bonds issued pursuant to K.S.A. 1982 Supp. 68-2304, the treasurer transfers to the highway fund 69.23% of the preceding day's freeway fund receipts. Accordingly, since the transactions contemplated by this paragraph occur daily, it is pertinent that receipts from the several motor fuel taxes are deposited at least daily

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with the state treasurer. This is a fact that was obviously apparent to the legislature in 1974 when it amended 79-3425 by the addition of this paragraph.

Hence, it may be argued that, notwithstanding the literal language of 79-3425 which seemingly requires the daily transfer of 69.23% of all moneys accruing to the freeway fund, the legislature intended that only proceeds of the motor fuel taxes which are deposited in the freeway fund be subject to transfer.

Therefore, as we suggested earlier, there are two cogent but contradictory arguments which may be made as to whether highway fund interest moneys deposited in the freeway fund are subject to being transferred to the highway fund. On the one hand, it may be argued that the literal language of K.S.A. 1982 Supp. 79-3425 compels the transfer of these moneys. In support of this argument is the following statement of the Kansas Supreme Court in City of Kiowa v. Central Telephone & Utilities Corporation, 213 Kan. 169 (1973):

"A primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to the obvious purpose the court should follow the intent as expressed by the words used and is not warranted in looking beyond them in search of some other legislative purpose or extending the meaning beyond the plain terms of the Act. (Alter v. Johnson, 127 Kan. 443, 273 Pac. 474; Hand v. Board of Education, 198 Kan. 460, 426 P.2d 124; City of Overland Park v. Nikias, 209 Kan. 643, 498 P.2d 56; Hunter v. Haun, 210 Kan. 11, 499 P.2d 1087." Id. at 176.

The contrary argument, that the legislature did not intend any portion of the highway fund interest moneys deposited in the freeway fund to be transferred to the highway fund, and that it intended only the proceeds from motor fuel taxes accruing to the freeway fund to be subject to such transfer, also is predicated on legislative intent. However, such intent is determined by a consideration of the historical background of the pertinent statutes and the circumstances attending their passage. Brown v. Keill, supra.

It is difficult to establish the legislative intent necessary to select between these arguments; each has merit. However, we are persuaded to the latter argument for several reasons.

First, when K.S.A. 1982 Supp. 68-2313 and 79-3425 are construed as statutes in pari materia so as to harmonize their respective provisions [Callaway v. City of Overland Park, 211 Kan. 646, 650 (1973)], we believe that sufficient ambiguity exists to warrant a determination of legislative intent with reference to more than the literal language of the statutes. Legislative intent must be determined with reference to the situation and existing conditions at the time of enactment. State, ex rel., v. Murphy, 183 Kan. 698, 702 (1958). And as noted in Callaway v. City of Overland Park, supra, "[t]he historical background and changes made in a statute are to be considered by the court in determining legislative intent for the purpose of statutory construction."

Second, the officers charged under the pertinent statutes with the administration and implementation thereof have consistently construed these statutes as precluding the transfer of 69.23% of the highway fund interest from the freeway fund to the highway fund. In this regard, it is well established that "an interpretation of state law by a state agency delegated the responsibility for enforcing that law is entitled to great weight." Lincoln American Corp. v. Victory Life Insurance Co., 375 F.Supp. 112, 118 (D. Kan. 1974). Further, "[t]he administrative interpretation of a statute is entitled to great weight in determining [the] meaning of [a] statute unless clearly wrong." (Emphasis added.) Sharp v. U.S., 108 F.Supp. 745, Syl. ¶2 (D. Kan. 1952). See, also, Save Our Invaluable Land (SOIL), Inc. v. Needham, 542 F.2d 539, 542 (10th C.C.A. 1976). Here, of course, we are unable to find that the administrative interpretation of the pertinent statutes is clearly wrong. Accordingly, we believe considerable weight should be attached to such interpretation.

Finally, it is apparent that the legislature has acquiesced in such interpretation. Subsequent to the enactment of K.S.A. 1982 Supp. 68-2313 in 1979, the legislature has had an opportunity to review this matter on numerous occasions. For example, in each of the three subsequent sessions of the legislature, there has been a "no limit" appropriation of moneys in the state freeway fund. (See L. 1980, ch. 11, §2, L. 1981 ch. 12, §2; L. 1982, ch. 21, §2.) Also, in 1981, the legislature once again shifted funds between the freeway fund and highway fund. In this instance, it transferred \$20,000,000 from the freeway fund to the highway fund and provided for its repayment with interest within six months. (L. 1981, ch. 260, §1.) Finally, we note that in 1982 the legislature further amended 68-2313 (L. 1982, ch. 281, §1) by changing the method of calculating the amount of interest on the moneys in the highway fund, which is to be transferred to the freeway fund.

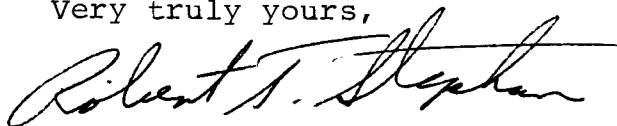
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In light of the foregoing legislative actions, and being mindful of the legislature's constitutional and statutory control over the state's financial affairs, we believe it appropriate to presume that the legislature is fully apprised of the resources of the state freeway fund and the manner in which it is being administered. Here, we reiterate our reliance upon Rogers v. Shanahan, supra, indicating that, in construing statutory provisions, "[i]t is presumed the legislature had and acted with full knowledge and information as to the subject matter of the statute" 221 Kan. at 225.

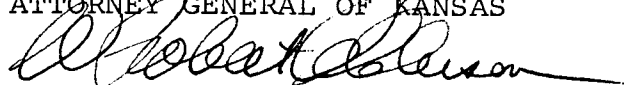
Even though the legislature presumptively has full knowledge of the administrative interpretation placed upon the pertinent provisions of K.S.A. 1982 Supp. 68-2313 and 79-3425, the legislature has taken no action to obviate or modify such interpretation. Hence, we believe the legislature has acquiesced in the administration of the freeway fund in accordance with such interpretation. Accordingly, not only is the administrative interpretation of the pertinent provisions of K.S.A. 1982 Supp. 68-2313 and 79-3425 entitled to great weight, we believe it is controlling in light of the legislature's sanction thereof.

In summary, pursuant to K.S.A. 1982 Supp. 79-3425, there is a daily transfer to the highway fund of 69.23% of certain revenues accruing to the state freeway fund. In our opinion the legislature clearly intends that proceeds of the various motor fuel taxes credited to said fund be subject to such transfer, but it is difficult to discern from the pertinent statutory provisions whether the legislature intends that a similar transfer be made of moneys representing interest on the highway fund that are credited to the state freeway fund pursuant to K.S.A. 1982 Supp. 68-2313. However, because the state officers charged with the administration and implementation of the relevant statutory provisions have consistently construed such provisions as precluding the daily transfer of highway fund interest moneys from the freeway fund to the highway fund, it also is our opinion that such interpretation is not only entitled to great weight, but is controlling, in light of the legislature's continued acquiescence in such interpretation.

Very truly yours,



ROBERT T. STEPHAN
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