

March 29, 2013

The Honorable Carol Hamilton O'Brien
Delaware County Prosecuting Attorney
140 North Sandusky Street
P.O. Box 8006
Delaware, Ohio 43015

SYLLABUS:

2013-010

When the legislative authority of a municipal corporation levies a hotel lodging excise tax pursuant to R.C. 5739.09(B)(1) and later a board of county commissioners levies a hotel lodging excise tax pursuant to R.C. 5739.09(A)(1) in those areas of the county not subject to the municipal corporation hotel lodging excise tax, if that municipal corporation later annexes territory of that county, that newly annexed territory will be subject to the municipal corporation hotel lodging excise tax and not the county hotel lodging excise tax.



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OPINION NO. 2013-010

The Honorable Carol Hamilton O'Brien
Delaware County Prosecuting Attorney
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P.O. Box 8006
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Dear Prosecutor O'Brien:

You have requested an opinion concerning the effect annexation of new territory to a municipal corporation¹ under R.C. Chapter 709 has on hotel lodging excise taxes imposed under R.C. 5739.09. Specifically, you ask: when the legislative authority of a municipal corporation levies a hotel lodging excise tax pursuant to R.C. 5739.09(B)(1) and later a board of county commissioners levies a hotel lodging excise tax pursuant to R.C. 5739.09(A)(1) in those areas of the county not subject to the municipal hotel lodging excise tax, if that municipal corporation later annexes territory of that county, will that newly annexed territory be subject to the municipal hotel lodging excise tax or the county hotel lodging excise tax?²

Your letter concerns a portion of Delaware County annexed by the City of Columbus (Columbus). Your letter states that Columbus enacted a hotel lodging excise tax pursuant to R.C. 5739.09(B)(1) (at the time, R.C. 5739.024(B)) at some point prior to 1996. Delaware County enacted a hotel lodging excise tax pursuant to R.C. 5739.09(A)(1) (at the time, R.C. 5739.024(A)) that took effect January 1, 1996. In 2000, Columbus annexed portions of Delaware County under the authority of R.C. Chapter 709. You have asked us to determine whether that portion of Delaware County annexed to Columbus in 2000 is subject to the Delaware County hotel lodging excise tax or the Columbus hotel lodging excise tax.

This office is not able by means of this opinion to resolve questions of fact regarding the lawfulness of actions taken in the past or the rights or liabilities of particular individuals or governmental entities. *See* 2005 Op. Att'y Gen. No. 2005-043, at 2-472. A resolution of all the

¹ The Ohio Constitution classifies a municipal corporation as a city or a village, depending upon the size of its population. Ohio Const. art. XVIII, § 1; *see also* R.C. 703.01.

² Although your letter submitted two questions for us to answer, for efficiency we combined these two questions into one.

issues that may surround the taxation situation in your county thus exceeds the scope of this opinion. We are able, however, to discuss general principles of law applicable to the question you have raised. *Id.* We begin with the language of the relevant statute.

Hotel Lodging Excise Taxes

The Ohio Revised Code, in R.C. 351.021, R.C. 505.56, R.C. 5739.08, and R.C. 5739.09, authorizes townships, municipal corporations, or counties to levy taxes on transactions by which lodging by a hotel is or is to be furnished to transient guests. The section relevant to your request is R.C. 5739.09, divisions (A)(1) and (B)(1). R.C. 5739.09(A)(1) states in relevant part:

(A)(1) A board of county commissioners may, by resolution adopted by a majority of the members of the board, levy an excise tax not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests. The board shall establish all regulations necessary to provide for the administration and allocation of the tax.... Except as provided in divisions (A)(2), (3), (4), (5), (6), and (7) of this section, the regulations shall provide, after deducting the real and actual costs of administering the tax, for the return to each municipal corporation or township that does not levy an excise tax on the transactions, a uniform percentage of the tax collected in the municipal corporation or in the unincorporated portion of the township from each transaction, not to exceed thirty-three and one-third per cent. The remainder of the revenue arising from the tax shall be deposited in a separate fund and shall be spent solely to make contributions to the convention and visitors' bureau operating within the county.... Except as provided in division (A)(2), (3), (4), (5), (6), or (7) or (H) of this section, on and after May 10, 1994, a board of county commissioners may not levy an excise tax pursuant to this division in any municipal corporation or township located wholly or partly within the county that has in effect an ordinance or resolution levying an excise tax pursuant to division (B) of this section.

This means that a board of county commissioners may, by resolution, levy a hotel lodging excise tax pursuant to division (A)(1) and establish regulations for the administration of that tax. With certain exceptions not applicable here, the regulations shall provide for the return to each municipal corporation or township that does not levy a hotel lodging excise tax, a percentage of the tax collected in the municipal corporation or in the unincorporated portion of the township from each lodging transaction and the remainder will be deposited in a separate fund for the convention and visitors' bureau operating within the county. With certain exceptions not applicable here, a board of county commissioners may not levy an excise tax pursuant to division (A)(1) in any municipal corporation or township located wholly or partly within the county that has in effect an ordinance or resolution levying an excise tax pursuant to R.C. 5739.09(B), which we will discuss next.

R.C. 5739.09(B)(1) states in relevant part:

(B)(1) The legislative authority of a municipal corporation or the board of trustees of a township that is not wholly or partly located in a county that has in effect a resolution levying an excise tax pursuant to division (A)(1) of this section may, by ordinance or resolution, levy an excise tax not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests. The legislative authority of the municipal corporation or the board of trustees of the township shall deposit at least fifty per cent of the revenue from the tax levied pursuant to this division into a separate fund, which shall be spent solely to make contributions to convention and visitors' bureaus operating within the county in which the municipal corporation or township is wholly or partly located, and the balance of that revenue shall be deposited in the general fund. The municipal corporation or township shall establish all regulations necessary to provide for the administration and allocation of the tax.

This means that the legislative authority of a municipal corporation or the board of trustees of a township that is not wholly or partly located in a county that has in effect a resolution levying a hotel lodging excise tax pursuant to R.C. 5739.09(A)(1) may, by ordinance or resolution, levy a hotel lodging excise tax pursuant to R.C. 5739.09(B)(1). At least fifty percent of the revenue from the tax levied pursuant to division (B)(1) must be deposited into a fund spent solely to make contributions to the convention and visitors' bureaus operating within the county in which the municipal corporation or township is wholly or partly located and the remaining balance must be deposited into the general fund.

To answer your question, we must start with the plain language of R.C. 5739.09.³ The language in division (A)(1) permits a board of county commissioners to levy by resolution a

³ We review statutory language to determine legislative intent and accord the words used "their usual, normal, or customary meaning." *Gutmann v. Feldman*, 97 Ohio St. 3d 473, 2002-Ohio-6721, 780 N.E.2d 562, at ¶14 (quoting *State ex rel. Wolfe v. Delaware Cnty. Bd. of Elections*, 88 Ohio St.3d 182, 184, 724 N.E.2d 771 (2000)). "Where the wording of a statute is clear and unambiguous, [the] only task is to give effect to the words used." *State v. Elam*, 68 Ohio St. 3d 585, 587, 629 N.E.2d 442 (1994). These words, however, must be read in context and no words should be ignored or construed as redundant. *Commerce & Indus. Ins. Co. v. City of Toledo*, 45 Ohio St. 3d 96, 102, 543 N.E.2d 1188 (1989) ("words and phrases in a statute must be read in context of the whole statute"); *East Ohio Gas Co. v. Pub. Util. Comm'n*, 39 Ohio St. 3d 295, 299, 530 N.E.2d 875 (1988) ("words in statutes should not be construed to be redundant, nor should any words be ignored"). "In enacting a statute, it is presumed that ... [t]he entire statute is intended to be effective." R.C. 1.47(B). "The different sections and parts of sections of the same legislative enactment should if possible be so interpreted as to harmonize and give effect to each and all." *State ex rel. Myers v. Indus. Comm'n*, 105 Ohio St. 103, 136 N.E. 896 (1922) (syllabus, paragraph 1).

hotel lodging excise tax. This tax, however, may not be levied by resolution “in any municipal corporation or township located *wholly or partly within the county* that has in effect an ordinance or resolution levying an excise tax pursuant to division (B) of this section.” R.C. 5739.09(A)(1) (emphasis added). This means that a board of county commissioners may levy the hotel lodging excise tax pursuant to division (A)(1) in only those *parts* of the county where a municipal corporation or township has not already passed a resolution levying a hotel lodging excise tax pursuant to division (B).

Division (B)(1), on the other hand, works differently. The language in R.C. 5739.09(B)(1) permits the legislative authority of a municipal corporation or township to levy by ordinance or resolution a hotel lodging excise tax. This tax, however, may not be levied by ordinance or resolution if the municipal corporation or township is “*wholly or partly located in a county* that has in effect a resolution levying an excise tax pursuant to division (A)(1).” R.C. 5739.09(B)(1) (emphasis added). This means that if any portion of the municipal corporation or township is located within a county that already has levied a hotel lodging excise tax under division (A)(1), then the municipal corporation or township is not permitted to levy a hotel lodging excise tax pursuant to division (B)(1) anywhere in the municipal corporation or township, even in those portions of the municipal corporation or township that are located in other counties that have not levied hotel lodging excise taxes under R.C. 5739.09(A)(1). In other words, a municipal corporation or township is not permitted to levy a hotel lodging excise tax pursuant to division (B)(1) in *parts* of the municipal corporation or township; rather the hotel lodging excise tax levied pursuant to division (B)(1) must apply in the same manner to all hotel lodging transactions that occur anywhere within the boundaries of the municipal corporation.

Reading both division (A)(1) and (B)(1) together, the intent of the General Assembly becomes clear. First, the General Assembly intended to avoid double taxation. That is, each transaction by which lodging is furnished to a transient guest is to be taxed no more than once under R.C. 5739.09(A)(1) and (B)(1). If a county acts first under division (A)(1), then a municipal corporation or township situated within that county is precluded from enacting a hotel lodging excise tax pursuant to division (B)(1). Conversely, if a municipal corporation or township acts first under division (B)(1), then the county in which the municipal corporation or township is located is precluded from applying its hotel lodging excise tax pursuant to division (A)(1) within the boundaries of that municipal corporation or township. Thus, at no time will a person in a municipal corporation or township be subject to a hotel lodging excise tax under both divisions (A)(1) and (B)(1). Second, the General Assembly intended that the municipal corporation or township will always apply the same hotel lodging excise tax pursuant to division (B)(1) within its boundaries. Unlike counties, that, pursuant to (A)(1) can enact a hotel lodging excise tax in only certain parts of the county, municipal corporations or townships are not

permitted to enact a hotel lodging excise tax pursuant to division (B)(1) in only some parts of the municipal corporation or township.⁴

You explain that Columbus levied a hotel lodging excise tax pursuant to R.C. 5739.09(B)(1) (at the time, R.C. 5739.024(B)) at some point prior to 1996. We assume for purposes of this opinion that at the time of that levy Columbus was not situated wholly or partly within a county that already had in effect a resolution levying an excise tax pursuant to R.C. 5739.09(A)(1), such that Columbus' levy complied with the directive in R.C. 5739.09(B)(1). Delaware County enacted a hotel lodging excise tax, pursuant to R.C. 5739.09(A)(1) (at the time, R.C. 5739.024(A)), that took effect January 1, 1996 in those portions of Delaware County not subject to the Columbus tax. Delaware County likewise complied with the directive in R.C.

⁴ The legislative history of R.C. 5739.09 bolsters this reading of the statute. Prior to 1994, pursuant to R.C. 5739.024, the predecessor to R.C. 5739.09, a county could not enact a hotel lodging excise tax pursuant to R.C. 5739.024(A) if any portion of a municipal corporation or township within the county's borders already had imposed a hotel lodging excise tax pursuant to R.C. 5739.024(B). 1979-1980 Ohio Laws, Part II, 2612, 2618-19 (Am. Sub. H.B. 355, eff. Jan. 1, 1980). Thus, if a county wanted to enact the hotel lodging excise tax authorized by the 1980 version of R.C. 5739.024(A), it could not do so "anywhere in the county" if "even a small part of a municipal corporation or township" had previously levied the tax and was within the county's boundaries. Ohio Legislative Service Comm'n, *Summary of Enactments, Feb. 1995, Part II*, 1048, 120th Gen. A. (Am. H.B. 163). In 1994 the General Assembly amended R.C. 5739.024(A) for the purpose of authorizing a board of county commissioners to levy a three percent hotel lodging excise tax in those parts of the county where a hotel lodging excise tax had not been levied by a municipal corporation or township, even if there were other parts of the county where municipal corporations or townships had already enacted a hotel lodging excise tax pursuant to R.C. 5739.024(B). 1993-1994 Ohio Laws, Part III, 4806, 4813 (Am. Sub. H.B. 163, eff. May 10, 1994). See Ohio Legislative Budget Office, *Fiscal Note*, 120th Gen. A. (Jan. 11, 1994) (Am. H.B. 163, eff. May 10, 1994). Importantly, the General Assembly chose not to change the language of division (B) relating to a hotel lodging excise tax levied by municipal corporations or townships. 1993-1994 Ohio Laws, Part III, 4806, 4814 (Am. Sub. H.B. 163, eff. May 10, 1994). Under division (B), it remained the law that if part of a municipal corporation or township was located in a county that had in place a hotel lodging excise tax under division (A), the municipal corporation or township was prohibited from enacting the hotel lodging excise tax pursuant to division (B) anywhere within its boundaries. *Id.* This change in the language in division (A), but not in division (B), evidences a clear intent by the General Assembly to give a county authority to levy a hotel lodging excise tax in only parts of the county, while a municipal corporation or township does not have the authority to levy the hotel lodging excise tax in only parts of the municipal corporation or township. Instead, municipal corporations or townships that act pursuant to R.C. 5739.09(B)(1) must levy the hotel lodging excise tax throughout the entire municipal corporation or township, or not levy the tax at all.

5739.09(A)(1) because it levied its tax in only those parts of Delaware County that were not subject to the Columbus hotel lodging excise tax pursuant to R.C. 5739.09(B)(1). Accordingly, based on the facts as laid out in your letter, both the county and the city acted lawfully when they levied their hotel lodging excise taxes pursuant to R.C. 5739.09 based on the division of land at the time they passed their ordinances or resolutions levying their respective taxes.

Your question, however, relates to a portion of Delaware County that was annexed to Columbus in 2000, after the Columbus and the Delaware County hotel lodging excise taxes were levied. You would like to know whether the taxing authority of R.C. 5739.09(A)(1) and (B)(1) is tied to the parcel of land itself as of the effective date of the tax, or whether that taxing authority changes based on annexation activity. In order to answer this question, we must discuss basic principles of annexation.

Principles of Annexation

Annexation is the process by which a municipal corporation increases its size by adding additional land to its territory. The State of Ohio generally encourages annexation. *Smith v. Granville Twp. Bd. of Trs.*, 81 Ohio St. 3d 608, 613, 693 N.E.2d 219 (1998); *Kunkel v. Bd. of Comm'rs*, 177 Ohio App. 3d 718, 2008-Ohio-4017, 895 N.E.2d 905, at ¶19 (Champaign County). Annexation is governed by R.C. Chapter 709. *See generally* R.C. 709.01 (“[t]erritory may be annexed to, merged with, or detached from, municipal corporations, in the manner provided in this chapter”). R.C. Chapter 709 provides for a variety of procedures through which annexation can occur. Annexation of territory to a municipal corporation upon the application of landowners is governed by R.C. 709.02-.11. Annexation of territory to a municipal corporation upon the application of that municipal corporation is governed by R.C. 709.13-.16. Annexation of territory from one municipal corporation to a contiguous one is governed by R.C. 709.22-.34. *See generally* 2011 Op. Att’y Gen. No. 2011-002, at 2-9. Merger of territory is governed by R.C. 709.43-.48. *See generally* 2005 Op. Att’y Gen. No. 2005-024, at 2-240 to 2-241.

R.C. 709.10, applicable to annexation requested by landowners, states in relevant part that “[t]he territory annexed is a part of the municipal corporation, and the inhabitants residing therein shall have all the rights and privileges, and shall be subject to the powers, of the municipal corporation as are the inhabitants within the original limits of such municipal corporation.” *See* 1928 Op. Att’y Gen. No. 2358, vol. III, p. 1745. Similarly, R.C. 709.20, the provision applicable to annexation requested by municipal corporations, states “such territory is a part of the annexing municipal corporation, and the inhabitants residing in the territory shall have all the rights and privileges of the inhabitants residing within the original limits of such municipal corporation.” Finally, R.C. 709.34, the provision applicable to annexation of territory from one municipal corporation to a contiguous one, states “the two former municipal corporations shall be governed as one, embracing the territory of both, and the inhabitants of all such territory shall have equal rights and privileges, subject to the conditions of annexation.” The language in these sections illustrates that territory annexed into a municipal corporation is to be treated as part of that municipal corporation and is subject to the same governance as the original municipal corporation. *See State ex rel. Vill. of S. Brooklyn v. Craig*, 1900 Ohio Misc. LEXIS 326 (Cuyahoga

County 1900) (where territory is annexed, that territory becomes part of the village even if the transcript, map, and other papers were not filed until a later date); 1928 Op. Att'y Gen. No. 2358, vol. III, p. 1746.

Generally when township territory is annexed to a municipal corporation, that annexed area becomes part of the municipal corporation and also remains part of the township, unless formal action is taken to redraw the boundaries of the township.⁵ 2011 Op. Att'y Gen. No. 2011-002, at 2-11; 2005 Op. Att'y Gen. No. 2005-024, at 2-244; 2003 Op. Att'y Gen. No. 2003-023, at 2-178; 1990 Op. Att'y Gen. No. 90-048 (syllabus, paragraph 1). Persons residing in the annexed township territory are subject to taxation by both the municipal corporation and the township. 2005 Op. Att'y Gen. No. 2005-024, at 2-244. In other words, the taxes of the municipality extend over the newly annexed portion of the township and the taxes of the township also remain.

Simply applying these principles to your situation, however, does not resolve your particular inquiry because as noted above, the General Assembly has specifically indicated that there is to be no double taxation in the case of hotel lodging excise taxes that are levied pursuant to R.C. 5739.09(A)(1) and (B)(1). Thus, we are left with deciding whether it is the Columbus tax that should apply to the territory of Delaware County annexed in 2000 or the Delaware County tax that should apply to that territory.

As discussed above, R.C. 5739.09(B)(1) evidences an intent that a municipal corporation or township must apply its hotel lodging excise tax in the same manner throughout its boundaries. In other words, a municipal corporation is not permitted to apply its tax to only some parts of the municipal corporation and not to others. Allowing Delaware County to continue to impose its tax in the portion of Delaware County that was annexed to Columbus in 2000 would be contrary to the intent of R.C. 5739.09(B)(1) because it would result in one part of Columbus being subject to a hotel lodging excise tax while the part of Columbus that was annexed in 2000 would not be. Therefore, in order to comply with the intent of the statute, the Columbus tax is to be applied throughout Columbus, including the newly annexed territory in Delaware County. This outcome comports with the general principles of annexation discussed above. It encourages annexation because the municipal corporation will benefit from extending its hotel lodging excise taxes and the municipal corporation will be subject to the same governance for taxes levied pursuant to division (B)(1) in all parts of the municipal corporation.⁶

⁵ This general rule is not without exceptions. For example, when a merger is approved and takes effect in accordance with R.C. 709.43-48, the boundaries of previously unincorporated township territory that is merged with a municipal corporation automatically conform to the boundaries of the municipal corporation. 2005 Op. Att'y Gen. No. 2005-024 (syllabus, paragraph 6).

⁶ Although Delaware County is precluded from applying its hotel lodging excise tax in that territory of the county annexed to Columbus in 2000, Delaware County will still be entitled to

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised as follows. When the legislative authority of a municipal corporation levies a hotel lodging excise tax pursuant to R.C. 5739.09(B)(1) and later a board of county commissioners levies a hotel lodging excise tax pursuant to R.C. 5739.09(A)(1) in those areas of the county not subject to the municipal corporation hotel lodging excise tax, if that municipal corporation later annexes territory of that county, that newly annexed territory will be subject to the municipal corporation hotel lodging excise tax and not the county hotel lodging excise tax.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is fluid and cursive, with the first name "Michael" and last name "Dewine" clearly legible.

MICHAEL DEWINE
Ohio Attorney General

receive a portion of the revenue from that tax under the revenue sharing provisions of division (B)(1). See 1981 Op. Att'y Gen. No. 81-032, at 2-121; 1981 Op Att'y Gen. No. 81-022, at 2-83.