

OPINION NO. 94-002**Syllabus:**

When municipal income taxes have not been withheld from the wages or salaries of county employees as required by R.C. 9.42, the county is not liable for payment of the tax due nor for any penalties or interest that result from the failure to withhold.

To: David A. Sams, Madison County Prosecuting Attorney, London, Ohio
By: Lee Fisher, Attorney General, March 7, 1994

You have requested an opinion whether a county is liable for payment of income tax due a municipal corporation in the event that, in the case of a county employee subject to the tax, payroll withholding has not occurred. If so, you also ask whether this liability extends to penalties and interest that accrue with respect to the amount of tax that should have been withheld and paid to the municipality.

R.C. 9.42 Imposes Duty on County to Withhold Municipal Income Taxes From the Wages or Salaries of County Employees

R.C. 9.42 provides as follows:

Notwithstanding section 1321.32 of the Revised Code,¹ the state and any of its political subdivisions or instrumentalities shall deduct from the wages or salaries of public employees, as defined in section 9.40 of the Revised Code, and employees of school districts, the amount of municipal income tax levied upon the income of the employee. The director of administrative services shall establish by rule procedures for the deduction of municipal income taxes from the wages or salaries of employees of the state or its instrumentalities.

Counties have long been recognized as political subdivisions of the state, *Board of Comm'rs v. Mighels*, 7 Ohio St. 109, 118 (1857), and, pursuant to R.C. 9.40, persons "employed and paid in whole or in part" by a county are public employees. Thus, R.C. 9.42 requires the county to withhold municipal income taxes from the wages and salaries of county employees who are subject to such taxes.

¹ R.C. 1321.32 governs the assignment of wages generally.

Prior to the enactment of R.C. 9.42, payroll officers of the state and its political subdivisions could not withhold municipal income taxes, even if the relevant municipal ordinance required employers to withhold, "[s]ince there was no state law authorizing the payroll officer involved to make such a deduction ... and no law granting municipalities the power to require officials of the state or of its political subdivisions or instrumentalities to do any act for which no provision was made in law." 1981 Op. Att'y Gen. No. 81-006 at 2-20. Although a municipality has the authority to require by ordinance that employers withhold municipal income taxes from the wages of employees, *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950) (syllabus, paragraph three), a municipality may not impose a duty on other political subdivisions to collect and remit a municipal tax, *Village of Willoughby Hills v. Board of Park Comm'rs*, 3 Ohio St. 2d 49, 209 N.E.2d 162 (1965) (holding that village could not require park district to collect and remit excise tax levied on golfers by village). Accordingly, as noted in Op. No. 81-006, a municipal ordinance cannot impose a duty to withhold municipal income taxes on a governmental employer whose duties are set by statute. *Id.* at 2-20.² The duty of the county to withhold municipal income taxes is imposed solely by R.C. 9.42, not by any provision of a municipal ordinance that requires such withholding by employers generally.

No Statute Imposes Express Liability on a County for Failure to Withhold Municipal Income Taxes

The nature of an employer's liability for failure to withhold income taxes from the wages of an employee³ usually is defined by the applicable tax legislation. *See generally Peacock v. Micro Electronics, Inc.*, 83 Ohio App. 3d 142, 145, 614 N.E.2d 790, 792 (Franklin County 1992) (noting that federal, state, and city income tax provisions impose duties on employers to withhold taxes and failure to do so, where required, "potentially renders the employer subject to taxes and penalties"). Liability for failure to withhold may include, in varying combinations, liability for the tax itself, interest that accrues from the date payment was due, fixed or proportionate civil monetary penalties, and criminal fines or imprisonment. *See, e.g.*, 2 Payroll Guide (Research Institute of America) ¶¶ 8720-8755 (Dec. 3, 1993) (summarizing income tax withholding ordinances of major Ohio cities). Such liability must be imposed by express legislation. *See, e.g., City of Strongsville v. Brookfield Homes, Inc.*, 14 Ohio App. 3d 194, 470 N.E.2d 473 (Cuyahoga County 1984) (fiscal officers not jointly liable with corporate employer for failure to withhold payroll taxes in the absence of specific legislation imposing personal liability). As discussed above, however, the duty of a county to withhold municipal income taxes arises solely by statute. It follows that liability for failure to comply with that duty also must be imposed expressly by statute. Any municipal ordinance imposing liability on employers generally for failure to withhold is ineffective with respect to the county as an employer.

R.C. 9.42 contains no provision holding any political subdivision of the state that fails to withhold a municipal income tax liable for the amount of the tax itself, any interest that may accrue, or any civil or criminal penalties. This omission can be contrasted with the provisions of R.C. 5747.06 and R.C. 5747.07 governing the withholding of state and school district income taxes. R.C. 5747.06 imposes an obligation on "every employer, including the state and its

² Similarly, because a state cannot impose duties on federal officers, the duty of a federal employer to withhold state income taxes arises from 5 U.S.C. §5517 (1988), not from any state statute. *Lung v. O'Cheskey*, 358 F. Supp. 928, 931 (D.N.M. 1973), *aff'd*, 414 U.S. 802 (1973).

³ You have not asked about, and this opinion does not discuss, liability for failure to pay to a municipality any taxes that have actually been withheld.

political subdivisions," to withhold state and school district income taxes. R.C. 5747.07(E)(2) provides that "[e]ach employer required to deduct and withhold any tax⁴ is liable for the payment of that amount required to be deducted and withheld, whether or not the tax has in fact been withheld," unless the failure to withhold resulted from good faith reliance on the employee's representations as to liability for the tax. The employer also is not liable for any school district income tax not withheld or for penalties and interest otherwise applicable, if, upon request, the employee fails to provide the employer with sufficient and correct information to enable the school district tax to be withheld. R.C. 5747.06(E)(3). R.C. 5747.06(C)-(D) further provide that primary liability for payment of the tax remains with the employee and if the tax is paid, the amount that was not withheld cannot be collected from the employer, although the employer remains liable for applicable penalties and interest. By including the state and its political subdivisions in the definition of employer, *see* R.C. 5747.06(A), the General Assembly has expressly imposed liability on those governmental employers for their failure to withhold state income tax and any applicable school district income tax and also has expressly defined the parameters of that liability. The absence of similar provisions in R.C. 9.42 indicates that the General Assembly has chosen not to impose liability on the state or its political subdivisions for failure to withhold municipal income taxes from their employees' wages or salaries.

County Is Not Liable for Damages Resulting from Failure to Withhold Municipal Income Taxes

Further, a political subdivision, which includes a county, R.C. 2744.01(F), is not liable in damages in a civil action that arises in connection with a governmental function, *see* R.C. 2744.02(A)(1), except in the situations described in R.C. 2744.02(B). Pursuant to R.C. 2744.01(C)(2)(w), a governmental function includes "[a] function that the general assembly mandates a political subdivision to perform." Thus, the withholding of municipal income taxes by the county pursuant to R.C. 9.42 is a governmental function. Since failure to withhold is not included in any of the exceptions described in R.C. 2744.02(B), a county cannot be held liable for damages in a civil action for its failure to withhold such taxes from the wages or salaries of its employees. *See also* R.C. 2744.02(B)(5) ("a political subdivision is liable...when liability is expressly imposed upon the political subdivision by a section of the Revised Code Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision"). Thus, pursuant to R.C. Chapter 2744, a county is immune from any liability for damages that may result from the county's failure to withhold municipal income taxes.

Conclusion

It is, therefore, my opinion, and you are hereby advised that when municipal income taxes have not been withheld from the wages or salaries of county employees as required by R.C. 9.42, the county is not liable for payment of the tax due nor for any penalties or interest that result from the failure to withhold.

⁴ It is clear from the language and context of the entire statute that the phrase "any tax" refers to any tax that an employer is required to deduct and withhold pursuant to R.C. 5747.06. Thus, this provision of R.C. 5747.07 applies only to state and school district income taxes and does not apply to municipal income taxes that a public employer is required to withhold pursuant to R.C. 9.42.