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1. CONSTITUTION, STATE OF OHIO—NO EXPRESS PROHIBITION AGAINST LEVY OF EXCISE TAXES SIMULTANEOUSLY ON SAME SUBJECT MATTER BY STATE AND LOCAL TAXING UNITS—IMPLIED PROHIBITION WHICH ARISES WHEN STATE HAS INVADED PARTICULAR FIELD OF TAXATION MAY BE REMOVED BY GENERAL ASSEMBLY IN EXERCISE OF LEGISLATIVE POWER BY USE OF APPROPRIATE LANGUAGE, O. A. G. 1938, No. 2777, PAGE 1475 APPROVED AND FOLLOWED.
2. LEVY OF EXCISE TAX IS EXERCISE OF POWER TO TAX—ENACTMENT OF LICENSING REGULATIONS IS EXERCISE OF POLICE POWER—EXERCISE OF EITHER BY STATE DOES NOT GIVE RISE TO AN EXPRESS OR IMPLIED PROHIBITION AGAINST EXERCISE OF THE OTHER BY A LOCAL SUBDIVISION AUTHORIZED AND EMPOWERED TO TAKE SUCH ACTION.

SYLLABUS:

1. The Constitution of the State of Ohio does not contain any express prohibition against the levy of excise taxes simultaneously on the same subject matter by the state and local taxing units, and the implied prohibition which arises when the state has invaded a particular field of taxation, may, if the General Assembly of Ohio desires, be removed by the use of appropriate language in the exercise of its legislative power. (1938 O.A.G. No. 2777, approved and followed.)

2. The levy of an excise tax is an exercise of the power to tax, while the enactment of licensing regulations is an exercise of the police power, and the exercise of either by the state does not give rise either to an express or implied prohibition against the exercise of the other by a local subdivision which is authorized and empowered to take such action.

Columbus, Ohio, May 9, 1949

Hon. Frank J. Lausche, Governor of Ohio
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your recent letter asking for my opinion, which is as follows:

> "There has been considerable discussion about the Constitutional right of the legislature to enter certain fields of taxation

and licensing while at the same time by legislation granting the power of taxation and licensing in the same fields to local governments. I wish that you would give me your opinion respecting the Constitutional right of the powers of the legislature in respect to the following situations:

"Do both the State of Ohio and the local governments by a legislative enactment have the authority to tax and license in the same fields?

"In other words, would it be constitutional for the legislature to grant authority to local governments to collect a sales tax beginning at a point where the State's right has ended. The State of Ohio now collects a 3% sales tax, could the legislature grant the authority to collect from a point beyond the 3 cents up to 4 cents.

"A further illustration would exist in regard to restaurants. The State of Ohio now collects a license fee ranking from $3.00 to $5.00 per restaurant, would the legislature have the authority to grant local governments the right to collect a further license fee beginning at the point where the State had ended.

"Another illustration would apply to liquor licenses.

"I am familiar with a recent decision in which either Columbus or Youngstown tried to collect a utility excise tax, the Supreme Court held that the local government did not have the right to collect that excise tax because the State of Ohio had already pre-empted the field. In respect to that decision it must, however, be kept in mind that there was no legislative authority granted to the local governments to exercise the taxing power in the particular field."

We will give consideration first to the questions involved so far as they relate to taxes levied simultaneously by the state and local subdivisions.

You will, of course, recognize that it is not possible to envisage all situations which may arise as a result of a particular tax measure and what is said here must, of necessity, be limited to general principles involved.

Some aspects of this question have been heretofore considered by me in an opinion given to the Clerk of the House of Representatives on August 1, 1938, being Opinion No. 2777, 1938 Opinions of the Attorney General, Volume II, page 1475. The second branch of the syllabus thereof provides as follows:

"The Constitution does not prohibit the General Assembly from authorizing municipalities to levy excise taxes or personal property taxes upon property not taxed by uniform rule according to value when the state has invaded the field, but municipalities would be limited in the exercise of power so conferred in that such local taxes when added to any such state levies must have some reasonable relation to the value of the right, privilege, franchise or property so taxed."

In that opinion I held, and it is still my opinion, that so far as the power of municipalities to levy excise taxes is concerned, no distinction need be drawn between municipalities operating under the various forms of government, whether under a charter or otherwise.

After referring to the case of State, ex rel. v. Carrell, 99 O. S. 220, sustaining the Cincinnati occupational tax, I wrote at page 1477:

"The foregoing case involved the power of a city which had adopted a charter under the so-called home rule provisions of the Constitution, but in the case of Foundry Co. v. Landes, 112 O. S. 166, the court was concerned with the power of the City of Marion to levy an occupational tax imposed by ordinance enacted on the 10th of March, 1924, at which time such city was operating under general laws rather than under charter adopted pursuant to Article XVIII of the Constitution. In this case the court applied and followed the principles laid down in the Carrell case, supra, thereby putting at rest any question as to differentiation between charter cities and non-charter cities. See also Firestone v. Cambridge, 113 O. S. 57.

"In view of the foregoing, it is my opinion that municipalities, whether operating under a charter adopted pursuant to Article XVIII of the Constitution of Ohio or otherwise, have authority to levy excise taxes to the extent that the state has not occupied the field by the imposition of a tax upon the subject, right or privilege sought to be so taxed locally."

After discussing the authority of municipalities to tax real estate and tangible personal property, I wrote at page 1478 as follows:

"I shall consider next the matter of the power of the General Assembly under the Constitution to authorize municipalities to levy excise taxes upon rights or privileges notwithstanding the fact that the state may have invaded the field by the levy of such taxes and provided for the distribution of the proceeds thereof in whole or in part among the various municipalities of the state.

"The constitutional provisions which expressly recognize municipal power of taxation in general are Section 6 of Article

XIII and Section 13 of Article XVIII. Section 6 of Article XIII provides as follows:

> 'The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.'

"This provision was, in substantially the same form, carried into the Constitution by amendment in 1912 in Section 13, Article XVIII, which reads:

> 'Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.'

"In addition to the foregoing constitutional provisions, the courts have construed Section 3 of Article XVIII, authorizing municipalities 'to exercise all powers of local self-government,' as conferring the taxing power. This constitutional provision, however, as conferring the general power of taxation has been narrowly construed. In State, ex rel. v. Cooper, 97 O. S. 86, the first three branches of the syllabus read as follows:

> '1. Municipalities that have adopted charters under Section 7, Article XVIII of the Amendments to the Constitution, adopted September 3, 1912, have not the absolute and unrestricted power to levy taxes for local purposes.
>
> '2. The power of all municipalities to levy taxes may be limited or restricted by general laws. Such limitations or restrictions are warranted by Section 6, Article XIII, adopted in 1851, and by Section 13, Article XVIII of the Amendments adopted September 3, 1912.
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> '3. Taxation is a sovereign function. The rule of liberal construction will not apply in cases where it is claimed a part of the state sovereignty is yielded to a community therein. It must appear that the people of the state have parted therewith by the adoption of a constitutional provision that is clear and unambiguous.'

"There is little question in my mind but that there is much force to the contention that the courts will scrutinize closely any assumption of the power of taxation generally by municipal corporations in the absence of express legislative authority therefor, notwithstanding the fact that there was an absence of such author-

ity for the levy of occupational taxes considered and upheld in the Carrell case, supra, as well as in subsequent decisions of the Supreme Court upon this point.

"It becomes necessary, however, to give careful consideration to the basis for the limitation laid down by the Supreme Court in the Carrell case as to municipal power to levy excise taxes, to wit, that the state has not invaded the field. This point was discussed in the case of Cincinnati v. A. T. and T. Co., 112 O. S. 493, which affirmed and followed the Carrell case. The syllabus is as follows:

> '1. Sections 5483, 5485 and 5486, respectively, lay an occupational tax upon telephone companies, telegraph companies, and railroad companies.
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> '2. The power granted to the municipality by Section 3, Article XVIII, of the Constitution of the State of Ohio, to lay an occupational tax in the exercise of its powers of local self-government, does not extend to fields within such municipality which have already been occupied by the state.'

"On pages 497, 498 and 499, the court speculated upon the bases for the decision of the Carrell case, but did not determine the same. The language is as follows:

> 'Whether the court reached the decision that the levying of an excise tax upon an occupation by the state operated as a limitation upon the right of the municipality to levy an excise tax on the same subject, by analogy to the rule declared by the United States Supreme Court upon the interstate commerce clause of the federal Constitution, to the effect that, with reference to the subjects that are intrastate as well as interstate, a state may enact laws only so long as Congress fails to act, but that when Congress has legislated upon the subject the sovereignty of the state is superseded by the superior sovereignty of the United States, or whether the decision was arrived at upon the theory that the limitation exists because of the fact that Section 3, Article XVIII, grants to municipalities only such "powers of local self-government * * * as are not in conflict with general laws," and that when the state has enacted general laws, such as Sections 5483, 5485, and 5486, General Code, an ordinance attempting to tax an occupation for the privilege of doing a thing for which the state has already taxed it is for that reason in conflict with general laws, or whether the court reached the conclusion that the enactment of Sections 5483, 5485, and 5486, General Code, operates as a restriction on the power of taxation by the municipality, under the provision of Section 6, Article XIII, of the Constitution, the opinion does not disclose.

> 'It is sufficient to say that the decision in the Carrell case, supra, declaring the right of the municipality to levy an excise tax at all, was arrived at by an interpretation of the Constitution rather than by apt words therein found, and was then and since has been a subject of some doubt. That doubt having been resolved in favor of the power to the extent defined in that case, and that decision having been since approved and followed by this court in the case of Globe Security & Loan Co. v. Carrell, Aud., 106 Ohio St., 43, 138 N. E., 364, and the cases of Marion Foundry Co. v. Landes and Clawson v. Landes, 112 Ohio St., 166, 147 N. E., 302, it should now be regarded as the settled law of the state. The majority of this court are neither disposed to unsettle the law by overruling that case, nor to extend the power of municipalities in that respect by a further interpretation removing the limitation therein expressed.'

"Whatever view may be taken as the basis for the rule laid down in the Carrell case, which has been since followed and adhered to by the Supreme Court, the case is in no wise dispositive of the question of constitutional power vested in the legislature to authorize municipalities to levy taxes where the state has invaded the field. If, for instance, the Carrell case were to rest upon the theory that the state levy operates as an implied restriction upon municipalities so to do, it is perfectly apparent that the General Assembly could remove such implication by apt language. If the Carrell case were said to rest upon the theory that a state levy upon a certain privilege, for instance, would serve to render a local levy upon such privilege 'in conflict with general laws' and hence beyond the home rule power, it is equally apparent that the General Assembly could by apt language dispel such conflict. Finally, if it were contended that municipalities are precluded from invading the field of excise taxes or taxes upon personal property not taxed according to value in cases where the state has preempted the field on the federal theory that the superior sovereignty supersedes the inferior, a consideration of federal authorities upon this point discloses no indication of lack of power in the General Assembly to authorize an invasion of the field by the inferior sovereignty in the absence of constitutional restriction. I find no such restriction in the Ohio Constitution and in the absence of constitutional restriction prohibiting double taxation of rights and privileges, as well as of property not required to be taxed by uniform rule according to value, it seems to be well established that double taxation by different authorities is not violative of any rights guaranteed by the Constitution, state or federal. In the case of Carley and Hamilton v. Snook, 281 U. S. 66, 74 L. Ed. 704, the court considered the constitutionality of an act of the State of California imposing a

tax on the operation of motor vehicles in that state wherein municipalities imposed so-called registration fees upon motor vehicles varying from five to forty-two dollars per motor vehicle which the court held to be in fact excise taxes on the privilege of operating motor vehicles. In the course of the opinion, speaking through Mr. Justice Stone, the court said:

> 'The objection that the appellants should not be required to pay the challenged fees because they are already paying the city license tax is but the familiar one, often rejected, that a state may not, by different statutes, impose two taxes upon the same subject-matter, although, concededly, the total tax, if imposed by a single taxing statute, would not transgress the due process clause. See Swiss Corp. v. Shanks, 273 U. S. 407, 413, 71 L. ed. 709, 713, 47 Sup. Ct. Rep. 393; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 367, 368, 59 L. ed. 265, 273, 35 Sup. Ct. Rep. 99; Shaffer v. Carter, 252 U. S. 37, 58, 64 L. ed. 445, 459, 40 Sup. Ct. Rep. 221; Ft. Smith Lumber Co. v. Arkansas, 251 U. S. 532, 533, 64 L. ed. 396, 398, 40 Sup. Ct. Rep. 304.'

"There are other instances in which the Supreme Court of the United States has recognized double taxation not only by one and the same state but by two states upon identical property interests falling within the jurisdiction of both. In Citizens National Bank v. Durr, 257 U. S. 99, 66 L. ed. 149, the court said:

> 'Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio. (See Rogers v. Hennepin County, 240 U. S. 184, 191, 60 L. ed. 594, 599, 36 Sup. Ct. Rep. 265). Exemption from double taxation by one and the same state is not guaranteed by the 14th Amendment. (St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 367, 368, 59 L. ed. 265, 273, 274, 35 Sup. Ct. Rep. 99); much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both forbidden (Kidd v. Alabama, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; Hawley v. Malden, 232 U. S. 1, 13, 58 L. ed. 477, 483, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; Fidelity & C. Trust Co., v. Louisville, 245, U. S. 54, 58, 62 L. ed. 145, 148, L.R.A. 1918C, 124, 38 Sup. Ct. Rep. 40).'

"An examination of Ohio authorities discloses no judicial pronouncements to the effect that the Ohio Constitution precludes double taxation except as to property required to be taxed by uniform rule, in which event the same taxing authorities appear to be precluded from exercising such power, but this principle is

clearly not applicable under the present provisions of Section 2 of Article XII of the State Constitution to other taxation than that levied by uniform rule according to value upon land and improvements thereon or perhaps upon other property taxation based upon value. The text in 38 O. Jur. 895 and 896, is as follows:

> 'Double taxation which, in a legal sense, does not exist unless a double tax is levied upon the same property within the same jurisdiction, is not permissible under a Constitution which requires equality and uniformity, and the Ohio Constitution requires both equality and uniformity. And in construing a tax law it will be assumed, at least until it is controverted, that the legislature did not intend to impose double taxation. Moreover, in a system like that in Ohio, where intangible as well as tangible property is taxed, "some forms of double taxation are unavoidable; but the object should be—and such seems to have been the general aim of all our late legislation upon the subject—to avoid double taxation whenever it is practicable, and, as nearly as may be, to tax all according to their actual wealth." '

"In support of the statement contained in the footnote to the above text that there is no prohibition in the Ohio Constitution against double taxation as such, the case of Braden v. Senior, 16 O. L. Abs. 193, 48 O. App. 255, affirmed 128 O. S. 597, is cited. While this case was reversed by the Supreme Court of the United States, 295 U. S. 422, 79 L. ed. 1520, the reversal was upon other grounds.

"Concluding as I do, in view of the foregoing, that the General Assembly of Ohio has constitutional power should it, in the exercise of its discretion, see fit to authorize municipalities to levy excise taxes, as well as personal property taxes upon such personality as is not taxed according to value, notwithstanding the fact that the state has invaded the field of such taxation, comment should be made upon the fact that such power could not be exercised by municipalities after having been so conferred by the General Assembly without regard or restriction as to the value of the privilege or franchise taxed in the case of excise taxes, nor could such power be exercised without regard to the value of the personal property taxed even though such property is not taxed by a rule according to value. A hard and fast rule as to the extent to which municipalities could exercise such powers under appropriate legislative authorization could not be laid down. It is sufficient here to direct attention to the language of the Su-

preme Court in the case of Saviers v. Smith, 101 O. S. 132, wherein the court said at pages 136 and 137:

> 'It is well settled that the provisions of Section 2, Article XII, are limitations upon the general power granted by Section 1, Article II, so that when it comes to taxing property it is required to be taxed by a uniform rule at its true value in money. But upon the power to tax privileges and franchises there is no express limitation in the constitution. However, in Southern Gum Co. v. Laylin, supra, it was held that in the absence of an express limitation on the power of the general assembly to tax privileges and franchises such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote the common welfare; that by reason of these constitutional safeguards a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. The determination of such values rests largely in the general assembly, but finally in the courts. So that it may be said to be the settled law of this state that under our constitution when property is taxed it must be taxed at its true value in money, by a uniform rule, and when a privilege is taxed it is required that it should be taxed at its reasonable value. It would be wholly impracticable, if not impossible, to prescribe any general rule for the valuation of a franchise or a privilege. Therefore, the reasonable value in each set of circumstances should be fixed.' "

Were the proposed legislation to include all taxing units, you should bear in mind the distinction between municipalities and other taxing units as to their powers of taxation. It has been held in an opinion of one of my predecessors, 1941 Opinions of the Attorney General, No. 3712, page 322, that "the right of municipalities to levy taxes flows directly from the Constitution without the necessity of any enabling legislation", but that "taxing units, other than municipalities, have only such rights of taxation as may be specifically granted to them by the General Assembly."

The opinion just above referred to was given to the Senate Taxation Committee in answer to the question of whether cities or political subdivisions have authority to levy income taxes without additional legislation and also whether Senate Bill No. 85, by Mr. Baertschi, then pending be-

fore the General Assembly, would confer such authority. At page 326 of this opinion it is said:

> "Since the General Assembly, as I have already pointed out, cannot confer taxing powers upon municipalities, Senate Bill No. 85 now being considered by your committee, if enacted in its present form, must be regarded as a restriction or limitation of the taxing power now enjoyed by municipalities. Municipalities would be restricted in that if they wished to levy an income tax, they would first have to submit the question to the electors and, if a favorable vote was cast, the maximum rate of tax is fixed at one per cent of the amount earned and the taxes collected could be used only for current expenses and funded debt reduction.
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> "The Baertschi bill is not restricted to municipalities, but includes 'political subdivisions or taxing authority' which has been defined in the bill to include 'any county, township, municipality, school district, any assessment district, or any other authority which has the power to levy taxes for its own use.' Taxing units, other than municipalities, must look to the General Assembly rather than the Constitution for their authority to levy taxes. In 38 O. Jur., 746, section 25, it is said:
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> > 'There seems to be no doubt that the legislature may delegate the power to tax to political subdivisions or taxing districts or units, with such limitation as it sees fit as to rates, purposes, and subjects, provided such power is limited to taxation for purely local purposes, and does not exceed the power which the state, itself, possesses or violate the restrictions of the organic law. For purposes of state taxation, the taxing authorities of each taxing district or unit of the state are authorized to tax annually both the real and personal property within the respective taxing units.'
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> "In the case of State, ex rel, Fritz, v. Gongwer, 114 O. S., 642, Judge Robinson said at page 649:
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> > 'That the Legislature in the exercise of its police power has the authority for special purposes to create taxing districts other than the political subdivisions, or to create taxing districts overlapping the political subdivisions recognized and provided for in the Constitution, has been directly or impliedly held in many cases, such as Bowles v. State, 37 O. S., 35; Chesbrough v. Commissioners, 37 O. S., 508; County of Miami v. City of Dayton, 92 O. S. 215.
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> > 'That the Legislature has power to authorize the commissioners of a county to pledge the faith and credit of the entire county for the payment of bonds issued and sold in anticipation of the collection of assessments upon property

specially benefited was held in the case of State v. Commissioners, 37 O. S., 526, and has been consistently adhered to ever since.'

"It may therefore be said that taxing units, other than municipalities, have only such rights of taxation as may be specifically granted to them by the General Assembly. See also State, ex rel. Toledo, v. Cooper, supra.

"As to taxing units, other than municipalities, the bill, if enacted without amendment, would operate as a grant of power, permitting such units to levy income taxes in the manner and to the extent provided in the bill."

Since the writing of the two opinions of this office above cited, the Supreme Court of Ohio, in Haefner v. City of Youngstown, 147 O. S. 58, decided in 1946, invalidated a local tax on utility bills and thereby indirectly voided local taxes of similar nature enacted in Columbus, Zanesville and Portsmouth. It is this decision, no doubt, to which you refer in your letter and the holding of the court, as disclosed by the syllabus, was as follows:

"1. Taxation is an attribute and function of sovereignty.

"2. The taxing power of the state is made specific as to excise taxes by Section 10, Article XII of the Constitution, which expressly authorizes the General Assembly to enact legislation providing for them.

"3. Municipalities have power to levy excise taxes to raise revenue for purely local purposes; but under Section 13, Article XVIII of the Constitution, such power may be limited by express statutory provision or by implication flowing from state legislation which pre-empts the field by levying the same or a similar excise tax.

"4. By virtue of Section 5546-2, General Code, which has levied a retail sales tax, and Section 5483, General Code, which (supplemented by House Bill 196, 120 Ohio Laws, 123) has provided for a tax on the gross receipts of utility companies, the state has pre-empted that field of taxation which includes, *inter alia,* receipts by utility companies from natural gas, electricity and water sold to consumers and local service and equipment furnished to telephone subscribers."

This decision was in keeping with other decisions hereinabove referred to, namely, that the state having entered upon a field of taxation, local subdivisions are, by implication, forbidden to enter upon such field.

This and the other decisions do not expressly hold that such implied limitation could not be overcome by the use of apt and appropriate language by the General Assembly.

It is clear that the sales tax is an excise tax and that the liquor permit fees, even though denominated "permit fees," are also excise taxes and the opinions hereinabove set forth are applicable to both of them.

With reference to the restaurant licenses provided for under Section 843-3, et seq. of the General Code, an entirely different question is presented for the reason that authority already has been delegated to local district boards of health to license such businesses and in the case of the City of Columbus, such local license fees range from $2.00 to $50.00 per year for the various classes of the business to which they are applicable. It is, therefore, my opinion that this field is now occupied, both at a local and at a state level. This, however, would not be applicable if the local authority related to the imposition of a tax.

Respectfully,

HERBERT S. DUFFY,
Attorney General.