

**OPINION NO. 86-090****Syllabus:**

A permit holder who qualifies for the major capital improvement allowance provided for in R.C. 3769.20 may, pursuant to that section, reduce his daily tax liability by one and one-half percent of the total amount wagered during that day, for a period of ten years or, until the total tax reduction equals the cost of the major capital improvement plus debt service applicable to the project, whichever occurs first. If, after the ten-year period has elapsed, but before the total tax reduction equals the cost of the

improvement plus debt service, a portion of the allowable abatement remains unused, the permit holder may continue to apply the unused portion of the abatement against his future tax liability until such time as the unused portion is exhausted. (1985 Op. Att'y Gen. No. 85-068, modified.)

To: Robert S. Ginsberg, Chairman, Ohio State Racing Commission, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, December 10, 1986

I have before me your request for my opinion concerning interpretation of R.C. 3769.20, with regard to the allowable tax abatement provided thereunder. Division (A) of R.C. 3769.20 reads, in part:

To encourage the renovation of existing racing facilities for the benefit of the public, breeders, and horse owners, and to increase the revenue to the state from the increase in pari-mutuel wagering resulting from such improvement, the taxes paid by a permit holder to the state, in excess of the amount to be paid into the Ohio fairs fund and into the Ohio thoroughbred race fund where appropriate, as provided for in section 3769.08 of the Revised Code shall be reduced by one and one-half per cent of the total amount wagered for those permit holders who carry out a "major capital improvement project," as defined in this section. If the amount of allowable abatement exceeds the amount of taxes derived from a permit holder, the amount of the allowable abatement not used may be carried forward and applied against future tax liability....Such reduction shall start from the day racing is first conducted following the date on which the major capital improvement project is completed and the construction cost has been certified by the state racing commission, except as otherwise provided in division (B) of this section, and shall continue for a period of ten years or until the total tax reduction equals the cost of the major capital improvement project plus debt service applicable to the project, whichever occurs first. The total tax reduction because of the major capital improvement project shall not during any one year exceed for all permit holders using any one track, one and one-half per cent of the total amount wagered. The commission shall notify the tax commissioner when the diminution of tax begins and when it ends. The tax reduction granted pursuant to this section shall be in addition to any tax reductions for capital improvements and new tracks provided for in section 3769.08 of the Revised Code. (Emphasis added.)

See R.C. 3769.08 (permit holder must remit the appropriate amount of tax to the Tax Commissioner at the close of each racing day). See generally 1985 Op. Att'y Gen. No. 85-069 (summarizing the law governing the state horse racing tax).

Your question involves a situation where the allowable abatement exceeds, over the ten-year period during which the tax reduction may be taken, the tax liability of the permit holder. As you note, where the amount of the daily allowable abatement exceeds the daily tax liability, R.C. 3769.20 permits the amount of excess abatement to be carried forward and

applied against the permit holder's future tax liability. Where, however, there is consistently an insufficient tax liability against which to apply the allowable abatement, the excess abatement continues to increase and the permit holder is unable to use the entire amount of the allowable abatement over the ten-year period. You wish to know whether a permit holder may, after the expiration of ten years, but before the cost of the improvement plus debt service is recouped, continue to apply against his future tax liability that unused amount of allowable abatement, which had accumulated during the ten-year period, until such unused amount is exhausted.<sup>1</sup>

As you note in your request, 1985 Op. Att'y Gen. No. 85-068 addressed the provisions of R.C. 3769.20, and concluded as follows:

Pursuant to R.C. 3769.20, a permit holder who qualifies for the major capital improvement allowance provided for by that section may take his tax reduction for a period of ten years or until the total tax reduction equals the cost of the major capital improvement project plus debt service applicable to the project, whichever occurs first. A permit holder who qualifies for the major capital improvement allowance and who, on the last day of the ten year carry forward period, has an unused amount of the capital improvement allowance may not carry forward such amount as a credit against the permit holder's tax liability of the subsequent racing day.

(Syllabus.) While I find the proposition of law stated in the first sentence of the syllabus to be sound, I am compelled, upon reconsideration, to reach a conclusion contrary to that reached in the second sentence of the syllabus.

In construing R.C. 3769.20, it is essential to distinguish between the "allowable abatement" and the "tax reduction" provided for therein. See generally Metropolitan Securities Co. v. Warren State Bank, 117 Ohio St. 69, 76, 158 N.E. 81, 83 (1927) (if the legislature uses "certain language in the one instance and wholly different language in the other, it will...be presumed that different results were intended"). R.C. 3769.20 does limit the time during which a permit holder may take a tax reduction to ten years. If a permit holder qualifies under R.C. 3769.20, he may compute, on a daily basis, one and one-half percent of the total amount wagered for that day, and reduce his daily tax liability (as calculated in R.C. 3769.20) by that computation. The permit holder may reduce his daily tax liability in this manner for a period of ten years.

There is, however, no corresponding limitation on the time during which the allowable abatement must be used. A permit

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<sup>1</sup> R.C. 3769.20 allows a permit holder to take a tax reduction for ten years or until the total tax reduction equals the cost of the capital improvement plus debt service, whichever occurs first. Because you have specifically asked about the situation where ten years elapse prior to the time that the total tax reduction equals the cost of the capital improvement project plus debt service, I will assume, throughout the opinion, that the tax reduction would not equal the amount of the improvement plus debt service prior to the expiration of ten years.

holder is entitled to a daily allowable abatement which is equal to one and one-half percent of the total amount wagered that day. Further, a permit holder is entitled to calculate that abatement for a period of ten years. In the situation you present, the amount of the allowable abatement exceeds, on a daily basis, the amount of the permit holder's tax liability. In such a situation, R.C. 3769.20 specifically provides that the amount of the abatement which exceeds the tax liability may be carried forward and applied against future tax liability. There is no limitation on the time during which the abatement may be carried forward. If, at the end of ten years, an unused portion of the tax abatement still exists, there is nothing in R.C. 3769.20 which prohibits the permit holder from continuing to apply that amount against future liability until it is exhausted. At the end of ten years the permit holder may no longer continue to calculate daily an allowable abatement to be used against tax liability. He may, however, take whatever portion of the allowable abatement which was calculated during the ten-year period and which remains unused, and apply that amount against future tax liability. R.C. 3769.20 entitles the permit holder to use the entire allowable abatement which is calculated for a period of ten years, even though more than ten years may elapse before the entire amount of the abatement is exhausted.

In conclusion, it is my opinion, and you are advised, that a permit holder who qualifies for the major capital improvement allowance provided for in R.C. 3769.20 may, pursuant to that section, reduce his daily tax liability by one and one-half percent of the total amount wagered during that day, for a period of ten years or, until the total tax reduction equals the cost of the major capital improvement plus debt service applicable to the project, whichever occurs first. If, after the ten-year period has elapsed, but before the total tax reduction equals the cost of the improvement plus debt service, a portion of the allowable abatement remains unused, the permit holder may continue to apply the unused portion of the abatement against his future tax liability until such time as the unused portion is exhausted. (1985 Op. Att'y Gen. No. 85-068, modified.)