

OPINION NO. 85-069**Syllabus:**

A harness or quarter horse racing permit holder who qualifies for the major capital improvement allowance provided for by R.C. 3769.20 may use such allowance to reduce the amount he must pay as a tax into the Ohio standardbred development fund or the Ohio quarter horse development fund.

To: Joanne Limbach, Tax Commissioner, Department of Taxation, Columbus, Ohio; Edward A. Babst, Executive Director, Ohio State Racing Commission, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, October 29, 1985

I have before me your request for my opinion concerning the state horse racing tax law. Specifically, you ask whether a harness or quarter horse permit holder who qualifies for the major capital improvement allowance provided for by R.C. 3769.20 may use such allowance to reduce the amount the permit holder must pay as a tax into the Ohio standardbred development fund or the Ohio quarter horse development fund. Before I answer your question, it is necessary to examine briefly the law governing the state horse racing tax.

R.C. Chapter 3769 regulates horse racing in this state. Any meeting at which horse racing is permitted for any stake, purse, or award is prohibited unless a permit to conduct a horse racing meeting is obtained and the provisions of R.C. Chapter 3769 are observed. R.C. 3769.01. R.C. 3769.08 authorizes such a permit holder "to conduct and supervise the pari-mutuel system of wagering by patrons of legal age on the horse races conducted by such permit holder."

A permit holder may retain as commission an amount not to exceed eighteen percent of the total of all moneys wagered, and such permit holder must pay to the Tax Commissioner a statutorily established sum out of the amount retained by the permit holder on each racing day. R.C. 3769.08. R.C. 3769.08 establishes the basic tax structure for pari-mutuel wagering and classifies taxpaying permit holders into three categories: permit holders authorized to conduct thoroughbred racing, see R.C. 3769.08(B), harness racing, see R.C. 3769.08(C), and quarter horse racing, see R.C. 3769.08(C).

With regard to permit holders authorized to conduct thoroughbred racing, R.C. 3769.08(B) provides that, at the close of each racing day, such permit holder "shall pay by check, draft, or money order to the tax commissicner, as a tax," a

sum equal to a percentage of the total of all moneys wagered on that day according to a graduated tax schedule. See R.C. 3769.08(B)(1)-(4). From the moneys paid to the Tax Commissioner by thoroughbred racing permit holders, a statutorily specified percentage of the total of all moneys wagered on a racing day shall be paid into the "Ohio fairs fund," see R.C. 3769.082, and a percentage, based upon the amount harness racing permit holders are required to pay into the Ohio fairs fund, see R.C. 3769.082 and into the Ohio standardbred development fund, see R.C. 3769.085, "shall be paid into the Ohio thoroughbred race fund created by [R.C.] 3769.083." R.C. 3769.08(B). Pursuant to R.C. 3769.08(B), the Tax Commissioner "shall pay the remaining percentage of all moneys wagered on a racing day into the general revenue fund." Under R.C. 3769.08(B), the remaining moneys may be retained by the permit holder except as otherwise provided in R.C. 3769.08.

With regard to permit holders authorized to conduct harness or quarter horse racing, R.C. 3769.08(C) provides that, at the close of each racing day, such permit holders shall pay by check, draft, or money order, to the Tax Commissioner, as a tax, a percentage of all moneys wagered on that racing day to be paid into the Ohio fairs fund, see R.C. 3769.082. In addition, harness racing permit holders must pay to the Tax Commissioner, as a tax, a percentage of all moneys wagered on that racing day to be paid into the Ohio standardbred development fund created by R.C. 3769.085 and quarter horse racing permit holders must pay to the Tax Commissioner, as a tax, a percentage of all moneys wagered on that racing day to be paid into the Ohio quarter horse development fund created by R.C. 3769.086. R.C. 3769.08(C). From the balance of the amount retained on that day as a commission the harness or quarter horse racing permit holder shall pay as a tax a sum equal to a percentage of the moneys wagered according to a graduated tax schedule. R.C. 3769.08(C). R.C. 3769.08(H) provides that, from the tax paid by harness track permit holders under R.C. 3769.08, the Tax Commissioner must pay into the Ohio thoroughbred race fund created by R.C. 3769.083 a sum equal to a percentage, determined from a statutory formula, of the amount wagered upon which such tax is paid.

R.C. 3769.087 requires each permit holder to retain an amount from, and to pay an additional tax upon, certain wagering, commonly known as exotic wagering. Thus, R.C. 3769.087 provides that, in addition to the eighteen percent commission retained by each permit holder as provided in R.C. 3769.08, "each permit holder shall retain an additional amount equal to three and one-half percent of the total of all moneys wagered on each racing day on all wagering pools other than win, place, and show," of which amount retained an amount equal to two and one-half percent of the total of all moneys wagered on each racing day on such pools must be paid to the Tax Commissioner, as a tax. The Tax Commissioner must allocate in varying percentages such moneys into various funds, including the general revenue fund of the state, the Ohio fairs fund, see R.C. 3769.082, the Ohio thoroughbred race fund with regard to moneys paid by thoroughbred racing permit holders, see R.C. 3769.083, the Ohio standardbred development fund with regard to moneys paid by harness horse racing permit holders, see R.C. 3769.085, and the Ohio quarter horse development fund with regard to moneys paid by quarter horse racing permit holders, see R.C. 3769.086. R.C. 3769.087(A)-(E). R.C. 3769.087 further provides that the remaining one percent that is retained of the total moneys wagered on each racing day on all pools other than win, place, and show, "shall be retained by racing permit holders, and thoroughbred racing permit holders shall use one-half for purse money and retain one-half."

With this general discussion in mind, I turn now to your specific question whether a harness or quarter horse racing permit holder who qualifies for the major capital improvement allowance provided for by R.C. 3769.20 may use such allowance to reduce the amount the permit holder must pay as a tax into the Ohio standardbred development fund or the Ohio quarter horse development fund. R.C. 3769.20(A) provides a tax reduction for permit holders who carry out a major capital improvement program as defined in R.C. 3769.20(B). The purpose of such allowance is, "[t]o 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. . . ." R.C. 3769.20(A). Your question involves a construction of that portion of R.C. 3769.20(A) which authorizes the tax reduction and reads as follows:

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 percent 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.

Thus, R.C. 3769.20(A) provides that for permit holders who carry out a major capital improvement project as defined in R.C. 3769.20(B), the taxes paid by such 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 in R.C. 3769.08, shall be reduced by a percentage of the total amount wagered.

It is well settled that when the language used in a statute is clear and unambiguous, such language is to be accorded its plain, common meaning. Crowl v. DeLuca, 29 Ohio St. 2d 53, 58-59, 278 N.E.2d 352, 356-57 (1972); Slingluff v. Weaver, 66 Ohio St. 621, 64 N.E. 574 (1902). See Dougherty v. Torrence, 2 Ohio St. 3d 69, 70, 442 N.E.2d 1295, 1296 (1982) (the court has a duty to give effect to the words used in a statute and must neither delete words used nor insert words not used) (citations omitted). See also R.C. 1.42. Cf. R.C. 1.49 (if a statute is ambiguous, the court, in determining legislative intent may consider various extrinsic sources).

As I have previously noted, R.C. 3769.20(A) authorizes a tax reduction for any permit holder who qualifies for such a reduction. Under R.C. 3769.20(A), any permit holder includes a harness racing permit holder, see R.C. 3769.08(C), or quarter horse racing permit holder, R.C. 3769.08(C). R.C. 3769.20(A), under its plain terms, provides for a reduction of the tax imposed upon a permit holder in excess of the amount paid into the Ohio thoroughbred race fund, as well as the Ohio fairs fund. While R.C. 3769.20(A) clearly restricts permit holders from taking a reduction on amounts paid into the Ohio thoroughbred race fund and the Ohio fairs fund, it does not similarly restrict permit holders from taking a reduction on amounts paid into the Ohio standardbred and quarter horse development funds. Thus, taxes paid into the Ohio standardbred or quarter horse development funds are subject to reduction under R.C. 3769.20(A).

In support of this conclusion, I cite the maxim expressio unius est exclusio alterius, which means expression of one thing implies exclusion of another. See Saunders v. Choi, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984); Jackson v. Claxton, 61 Ohio St. 2d 283, 400 N.E.2d 1356 (1980). In the instant situation, the General Assembly has specifically provided for several distinct funds, see R.C. 3769.082 (Ohio fairs fund); R.C. 3769.083 (Ohio thoroughbred race fund); R.C. 3769.085 (Ohio standardbred development fund); R.C. 3769.086 (Ohio quarter horse development fund), and for payments into such funds, see R.C. 3769.08; R.C. 3769.087. As noted above, R.C. 3769.20(A) provides for a reduction of the tax imposed upon permit holders in excess of the amounts paid into the Ohio thoroughbred race fund and Ohio fairs fund and specifically makes no mention of the standardbred or quarter horse development funds. Under the principle expressio unius est exclusio alterius, the fact that R.C. 3769.20(A) specifies, in essence, that those taxes paid into the Ohio thoroughbred race fund and the Ohio fairs fund may not be reduced implies that the General Assembly intended to allow permit holders to reduce those taxes paid into the Ohio standardbred and quarter horse development funds. Thus, the taxes paid into the Ohio standardbred or quarter horse development funds are subject to reduction under R.C. 3769.20(A).

¹ I note that a portion of the amount of what harness track permit holders pay as a tax under R.C. 3769.08 must be paid by the Tax Commissioner into the Ohio thoroughbred race fund, see R.C. 3769.08(H). Thus, under R.C. 3769.20(A), such portion would not be subject to reduction.

Accordingly, it is my opinion, and you are hereby advised, that a harness or quarter horse racing permit holder who qualifies for the major capital improvement allowance provided for by R.C. 3769.20 may use such allowance to reduce the amount he must pay as a tax into the Ohio standardbred development fund or the Ohio quarter horse development fund.