

**OPINION NO. 90-095****Syllabus:**

1. There are no statutory exemptions to an excise tax on the lodging of transient guests levied by a county pursuant to R.C. 5739.024.
2. The exemptions set forth in R.C. 5739.02(B) are exemptions from the state sales tax; those statutory exemptions are not applicable to R.C. 5739.024. (1984 Op. Att'y Gen. No. 84-012, syllabus, paragraph 1, approved and expanded.)
3. Transactions that do not come within the statutory definitions that are applicable to R.C. 5739.024 are not subject to taxation under R.C. 5739.024. In particular, the federal government and governmental entities outside the State of Ohio are not "persons" for purposes of R.C. 5739.01(A) and cannot be "transient guests" for purposes of R.C. 5739.01(N) and R.C. 5739.024.
4. Transactions by which lodging is furnished to, and paid for by, the federal government or a governmental entity outside the State of Ohio are not subject to taxation pursuant to R.C. 5739.024.
5. Transactions by which lodging is furnished to, and paid for by, a representative or employee of the federal government or a governmental entity outside the State of Ohio are subject to taxation pursuant to R.C. 5739.024, even if the representative or employee is reimbursed by the governmental entity for the cost of the lodging.
6. Transactions by which lodging is furnished to, and paid for by, a religious or charitable organization or a representative or employee thereof are subject to taxation under R.C. 5739.024.

---

**To: William F. Schenck, Greene County Prosecuting Attorney, Xenia, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, December 28, 1990**

I have before me your request for an opinion concerning an excise tax on the lodging of transient guests and exemptions from that tax. Your question relates to a tax levied by a county pursuant to R.C. 5739.024, which states in part:

(A) 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.

R.C. 5739.024(B) authorizes a municipal corporation or township that is not located in a county that has levied a tax pursuant to R.C. 5739.024(A) to levy such a tax. R.C. 5739.024(C) contains authority for a county to levy an additional excise tax on the lodging of transient guests to pay certain expenses related to a convention center; that authority could be exercised only within ninety days after the effective date of the act adding division (C) to R.C. 5739.024. See R.C. 307.695; 1985-1986 Ohio Laws, Part III, 5016 (Am. H.B. 560, eff. July 15, 1985).

You have asked whether there are any specific exemptions from an excise tax levied by a county pursuant to R.C. 5739.024 and, if so, what those exemptions are. While I am considering specifically the question of exemptions from a tax levied by a county pursuant to R.C. 5739.024, the analysis set forth in this opinion appears to apply to any tax levied pursuant to R.C. 5739.024.

In 1984 Op. Att'y Gen. No. 84-012, I considered whether the county government or other political subdivisions were exempt from a county hotel lodging tax levied pursuant to R.C. 5739.024(A). Op. No. 84-012 concluded, on the basis of the relevant statutory provisions, that no exemptions applied to such entities. R.C. 5739.01 contains the following definitions, applicable to R.C. Chapter 5739:

(M) "Hotel" means every establishment kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether such rooms are in one or several structures.

(N) "Transient guests" means persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days.

Pursuant to R.C. 5739.01(A), the term "person," as used in the definition of "transient guests," includes the state and its political subdivisions. R.C. 5739.01(A) states:

"Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

R.C. 5739.024 authorizes the adoption of an excise tax on all "transactions by which lodging by a hotel is or is to be furnished to transient guests." In light of the definitions discussed above, "transient guests" may include counties or other political subdivisions of the State of Ohio. Thus, unless a statutory exemption applies, transactions involving such entities are subject to taxation pursuant to R.C. 5739.024.

In Op. No. 84-012, I considered whether the exemption provided under R.C. 5739.02(B)(1) - exempting sales to the state, or any of its political subdivisions, from the state sales tax<sup>1</sup> - applied to transactions under R.C. 5739.024, and I concluded that the exemption did not apply. See Op. No. 84-012 (syllabus, paragraph 1). I affirm that conclusion at this time, and I find that the same conclusion applies also to the other exemptions to the state sales tax set forth in R.C. 5739.02(B). There is nothing in the language of R.C. 5739.02 or R.C. 5739.024 that clearly and unambiguously indicates that the exemptions set forth in R.C. 5739.02 are applicable to transactions under R.C. 5739.024. See, e.g., *State ex rel. Stanton v. Andrews*, 105 Ohio St. 489, 138 N.E. 873 (1922) (syllabus, paragraph 2) ("[a] statute in order to be held an exception to the general provisions of another conferring power and limitation of power on an administrative board, must be couched in language so clear and unambiguous as to be free from doubt as to the intent of the legislature in declaring it to be an exception"), *overruled on other grounds*, 41 Ohio St. 2d 157, 324 N.E. 2d 285 (1975). Compare R.C. 5739.024 with R.C. 5739.023 (authorizing transit authorities to levy additional sales taxes and stating expressly: "Any tax levied pursuant to this section is subject to the exemptions provided in [R.C. 5739.02] and in addition shall not be applicable to sales not within the taxing power of a transit authority under the constitution of the United States or the constitution of this state"). It follows that the exemptions set forth in R.C. 5739.02 are not applicable to R.C. 5739.024.

I am aware of no other statutory provisions that provide exemptions to a tax levied by a county pursuant to R.C. 5739.024. I conclude, accordingly, that there are

---

<sup>1</sup> R.C. 5739.02 levies an excise tax upon retail sales made within Ohio. R.C. 5739.01(B)(2) defines the terms "sale" and "selling" to include "transactions by which lodging by a hotel is or is to be furnished to transient guests." Transactions that are subject to a tax levied under R.C. 5739.024 are thus also subject to the state sales tax under R.C. 5739.02, unless they come within the exemptions set forth in R.C. 5739.02(B) or are otherwise exempted or excluded.

no statutory exemptions to the application of R.C. 5739.024. Rather, all entities that come within the applicable definition of "person" are subject to taxation under R.C. 5739.024 when they are transient guests furnished with lodging at a hotel.

It should, however, be noted that the authority to tax under R.C. 5739.024 extends only to transactions that come within the statutory language – that is, to "transactions by which lodging by a hotel is or is to be furnished to transient guests." Excluded from this category, by virtue of the definitions appearing in R.C. 5739.01(M) and (N), are transactions involving establishments in which fewer than five rooms are used for the accommodation of guests and transactions in which persons occupy rooms for sleeping accommodations for thirty or more consecutive days. Also excluded are any entities that do not come within the definition of "person" appearing in R.C. 5739.01(A), for such entities cannot be "transient guests" within the meaning of R.C. 5739.01(N). See 1988 Op. Att'y Gen. No. 88-065.

In Op. No. 88-065 I considered the meaning of "transient guests," as used in R.C. 5739.01(N). In reliance upon *Parkbrook, Inc. v. Bowers*, No. 47106 (Board of Tax Appeals February 23, 1962) (unreported), I concluded that the "person" occupying a room for purposes of the statutory definition of "transient guests" is the entity that controls or uses the room. Therefore, when a corporation rents lodging that is used by one or more employees, it is the corporation – rather than an employee – that is the guest (and, if the rental is for less than thirty consecutive days, is a "transient guest"). See *City of Rocky River v. Center Ridge Hotel Associates*, No. 54781 (Ct. App. Cuyahoga County Feb. 16, 1989) (1989 Ohio App. LEXIS 538) (citing *Parkbrook, Inc. v. Bowers* and adopting its analysis on this point). It follows from this understanding of the use of "person" that, even if an individual sleeps in a hotel room, if the room is rented and paid for directly by an entity that is not a "person" for purposes of R.C. 5739.01(A), the transaction does not constitute the provision of lodging to transient guests and is not subject to taxation under R.C. 5739.024.

The attachments to your letter indicate that you are concerned, in particular, with the question whether transactions involving religious, charitable, and governmental organizations and their employees are subject to taxation under R.C. 5739.024. I consider, first, the applicability of R.C. 5739.024 to governmental entities. The word "person," as defined in R.C. 5739.01(A), expressly includes "the state and its political subdivisions." This language clearly refers to the State of Ohio and political subdivisions of this state. The definition of "person" does not include other governmental entities. Hence, it does not appear that transactions to furnish lodging to the federal government or to governmental entities outside the State of Ohio are subject to taxation under R.C. 5739.024. Under Ohio law, lodging is deemed to be furnished to a governmental entity when that entity directly pays the provider for the lodging and controls the use of the room or rooms provided. See *City of Rocky River v. Center Ridge Hotel Associates*; Op. No. 88-065. If the lodging is paid for by an individual, the lodging is considered to be furnished to that individual and comes within the definitions set forth in R.C. 5739.01(A), (M), and (N) even if the individual is a representative or employee of a governmental entity and is reimbursed by that governmental entity. See Op. No. 88-065. See generally *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985). I conclude, accordingly, that although no statutory language exempts any governmental entity from the application of R.C. 5739.024, governmental entities other than the State of Ohio and its political subdivisions are not subject to the provisions of R.C. 5739.024 because they do not come within the definition of "person" appearing in R.C. 5739.01(A) and, thus, cannot be "transient guests" for purposes of R.C. 5739.01(N) and R.C. 5739.024.

I turn now to the question of applicability of R.C. 5739.024 to religious and charitable organizations. The word "person," as defined in R.C. 5739.01(A), clearly includes religious and charitable organizations, even though those organizations may be exempt from various types of taxation. See, e.g., R.C. 5739.02(B)(12). I am aware of no statutory or constitutional provision that exempts such organizations from taxation under R.C. 5739.024. It follows that transactions involving religious or charitable organizations, or their employees or representatives, are subject to taxation under R.C. 5739.024.

It is important to note that a county's authority to levy an excise tax pursuant to R.C. 5739.024 cannot extend to transactions that are not within the taxing power of a county under the constitution of the United States or the constitution of this state. *See, e.g.*, Ohio Const. art. XII, §3(C) ("no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold"). Exemptions for sales that may not constitutionally be taxed are expressly set forth in R.C. 5739.02(B)(10)<sup>2</sup> and R.C. 5739.023. Even though no such express statutory exemption is contained in R.C. 5739.024, it is clear that a county may not tax a transaction if the imposition of the tax would be unconstitutional. The supremacy clause of the United States Constitution prohibits a state from imposing a tax directly upon the United States. *See* U.S. Const. art. VI, cl. 2; *United States v. New Mexico*, 455 U.S. 720 (1982). With respect to a lodging tax, it has been generally established that it is unconstitutional for a local governmental entity to tax the federal government when the federal government or one of its agencies pays for the lodging directly; the tax appears to be permissible if it is charged to a federal employee, even if the employee is reimbursed by the government. *See, e.g., United States v. Montgomery County*, 761 F.2d at 1001 ("a constitutional obstacle of controlling importance would exist if the Montgomery County [Maryland] local statute had...imposed the [lodging] tax directly on the United States as the entity which booked the rooms..."). *See generally, e.g., United States v. New Mexico; United States v. County of Fresno*, 429 U.S. 452 (1977); *State of Alabama v. King & Boozer*, 314 U.S. 1 (1941). Thus, even if the provisions authorizing a county to impose a tax pursuant to R.C. 5739.024 were so construed as to permit a county to tax transactions with the federal government, this principle of constitutional law would operate to prevent such taxation.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. There are no statutory exemptions to an excise tax on the lodging of transient guests levied by a county pursuant to R.C. 5739.024.
2. The exemptions set forth in R.C. 5739.02(B) are exemptions from the state sales tax; those statutory exemptions are not applicable to R.C. 5739.024. (1984 Op. Att'y Gen. No. 84-012, syllabus, paragraph 1, approved and expanded.)
3. Transactions that do not come within the statutory definitions that are applicable to R.C. 5739.024 are not subject to taxation under R.C. 5739.024. In particular, the federal government and governmental entities outside the State of Ohio are not "persons" for purposes of R.C. 5739.01(A) and cannot be "transient guests" for purposes of R.C. 5739.01(N) and R.C. 5739.024.
4. Transactions by which lodging is furnished to, and paid for by, the federal government or a governmental entity outside the State of Ohio are not subject to taxation pursuant to R.C. 5739.024.
5. Transactions by which lodging is furnished to, and paid for by, a representative or employee of the federal government or a governmental entity outside the State of Ohio are subject to taxation pursuant to R.C. 5739.024, even if the representative or employee is reimbursed by the governmental entity for the cost of the lodging.
6. Transactions by which lodging is furnished to, and paid for by, a religious or charitable organization or a representative or employee thereof are subject to taxation under R.C. 5739.024.

---

<sup>2</sup> R.C. 5739.02 states, in part:

(B) The tax does not apply to the following:

...

(10) Sales not within the taxing power of this state under the constitution of the United States....