

**OPINION NO. 2004-041****Syllabus:**

R.C. 3769.08(L) does not require the amount of money paid by all racing permit holders into the Ohio thoroughbred race fund to substantially equal the amount of money paid by all racing permit holders into the Ohio fairs fund.

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**To: Sam Zonak, Executive Director, Ohio State Racing Commission, Columbus, Ohio**  
**By: Jim Petro, Attorney General, November 10, 2004**

You have requested an opinion concerning the allocation of taxes levied and collected on pari-mutuel wagering. Specifically, you wish to know whether R.C. 3769.08(L) requires the amount of money paid by all racing permit holders into the Ohio thoroughbred race fund<sup>1</sup> to substantially equal the amount of money paid by these permit holders into the Ohio fairs fund.<sup>2</sup> As stated below, it is our opinion that R.C. 3769.08(L) does not compel this result.

**Collection and Allocation of Moneys under R.C. 3769.08 into the Ohio Thoroughbred Race Fund and the Ohio Fairs Fund**

Before addressing your specific question, we must first briefly examine the collection and allocation of taxes levied on pari-mutuel wagering into the Ohio thoroughbred race fund and the Ohio fairs fund under R.C. 3769.08. R.C. 3769.01 states that a person, association, corporation, or trust may not hold or conduct any meeting "at which horse racing is permitted for any stake, purse, or award unless such person, association, corporation, or trust secures a permit to conduct a horse-racing meeting and complies with [R.C. 3769.01-.14]." See R.C. 3769.04; 8 Ohio Admin. Code 3769-2-08(A); 8 Ohio Admin. Code 3769-12-08(A). R.C. 3769.08(A) authorizes a permit holder to "conduct and supervise the pari-mutuel system of wagering by patrons of legal age on the live racing programs and simulcast racing programs conducted by the permit holder."

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<sup>1</sup>Pursuant to R.C. 3769.083(B), "[t]here is hereby created in the state treasury the Ohio thoroughbred race fund, to consist of moneys paid into it pursuant to [R.C. 3769.08] and [R.C. 3769.087]."

<sup>2</sup>The Ohio fairs fund is created in the state treasury by R.C. 3769.082(A).

R.C. 3769.08 allows racing permit holders to retain as commission an amount not to exceed eighteen percent of the total of all moneys wagered.<sup>3</sup> See R.C. 3769.089(E)(1). Pursuant to R.C. 3769.08, at the close of each racing day, each permit holder, out of the amount retained on that day by him, is required to pay to the Tax Commissioner, as a tax, a percentage<sup>4</sup> of the total amount of all moneys wagered on live racing programs and simulcast racing programs on that day.<sup>5</sup> See R.C. 3769.089(E)(1); R.C. 3769.26(F); 16 Ohio Admin. Code 5703-23-01; see also R.C. 3769.08(I) (a permit holder authorized to conduct quarter horse racing is "allowed to retain the odd cents of all redistribution to be made on all mutuel contributions exceeding a sum equal to the next lowest multiple of ten, subject to a tax of twenty-five per cent on that portion of the total sum of such odd cents that is in excess of two thousand dollars during a calendar year" and is required to pay the tax to the Tax Commissioner or his agent in the county seat of the county within which he operates race meetings).

The tax paid to the state is allocated by the Tax Commissioner into the Ohio thoroughbred race fund and the Ohio fairs fund in the following manner:

[B] Subject to division (M) of this section,<sup>6</sup> from the *moneys paid to the tax commissioner by thoroughbred racing permit holders, one-half of one per cent of the total of all moneys so wagered on a racing day shall be paid into the Ohio fairs fund created by [R.C. 3769.082], one and one-eighth per cent of the total of all moneys so wagered on a racing day shall be paid into the Ohio thoroughbred racing fund created by [R.C. 3769.083]....*

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[C] Except as otherwise provided in division (B) and subject to division (M) of this section, from the *moneys paid to the tax commissioner by permit holders authorized to conduct harness or quarter horse racing, one-half of one per cent of all moneys wagered on that racing day shall be paid into the*

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<sup>3</sup>For tax purposes, racing permit holders are classified as thoroughbred racing permit holders, harness racing permit holders, and quarter horse racing permit holders. 1985 Op. Att'y Gen. No. 85-069 at 2-269.

<sup>4</sup>The percentage of the total amount of all moneys wagered on live racing programs and simulcast racing programs due as a tax from a permit holder is determined according to a statutorily established graduated tax schedule. R.C. 3769.08; R.C. 3769.26(F). However, the tax liability of a permit holder may be reduced if he makes capital improvements to an existing race track, R.C. 3769.08(J), constructs a new race track, *id.*, carries out a major capital improvement project, R.C. 3769.20, or needs to cover the cost of any cleanup, repair, or improvement required as a result of damage caused by the 1997 Ohio river flood to a racing facility, R.C. 3769.201.

<sup>5</sup>The daily tax due on all moneys wagered on live racing programs is computed separately from the daily tax due on all moneys wagered on simulcast racing programs. R.C. 3769.08; see R.C. 3769.089(E)(1); R.C. 3769.26(F). *But see generally Grandview Raceway/NorthField Park Assoc. v. Limbach*, 47 Ohio St. 3d 57, 547 N.E.2d 971 (1989) (R.C. 3769.08 requires combining the moneys wagered on all forms of horse racing when calculating the tax due).

<sup>6</sup>R.C. 3769.08(M) requires the first twenty-five percent of the taxes levied on thoroughbred racing permit holders, harness racing permit holders, and quarter horse racing permit holders under R.C. 3769.08, R.C. 3769.087(A), and R.C. 3769.26(F)(2) to be paid into the PASSPORT fund.

*Ohio fairs fund*; from the moneys paid to the tax commissioner by permit holders authorized to conduct harness racing, five-eighths of one per cent of all moneys wagered on that racing day shall be paid into the Ohio standard-bred development fund; and from the moneys paid to the tax commissioner by permit holders authorized to conduct quarter horse racing, five-eighths of one per cent of all moneys wagered on that racing day shall be paid into the Ohio quarter horse development fund. (Emphasis and footnote added.)

R.C. 3769.08; *see also* R.C. 3769.10 (requiring the Tax Commissioner to deposit moneys paid to the state under R.C. 3769.08, R.C. 3769.087, and R.C. 3769.26 into the proper funds).

Accordingly, pursuant to R.C. 3769.08(B) and (C), after the required payment to the PASSPORT fund, *see* R.C. 3769.08(M); note six, *supra*, and any applicable reductions, *see* R.C. 3769.08(J); R.C. 3769.20; R.C. 3769.201; note four, *supra*, one half of one percent of the total amount of all moneys wagered on live racing programs and simulcast racing programs is paid by thoroughbred racing permit holders, harness racing permit holders, and quarter horse racing permit holders to the Tax Commissioner for deposit by him into the Ohio fairs fund. *See also* R.C. 3769.089(E)(1); R.C. 3769.26(F). R.C. 3769.08(B) also provides that, after the required payment to the PASSPORT fund and any applicable reductions, one and one-eighth of a percent of the total amount of all moneys wagered on live racing programs and simulcast racing programs is paid by thoroughbred racing permit holders to the Tax Commissioner for deposit by him into the Ohio thoroughbred race fund. *See also* R.C. 3769.089(E)(1); R.C. 3769.26(F).

**The Amount of Money to be Paid by Racing Permit Holders into the Ohio Fairs Fund and the Ohio Thoroughbred Race Fund under R.C. 3769.08 Is Computed Differently**

In light of the language of R.C. 3769.08, it is clear that the method used for determining the amount of money to be paid into the Ohio fairs fund is not the same as the method used for determining the amount to be paid into the Ohio thoroughbred race fund. Specifically, R.C. 3769.08 requires thoroughbred racing permit holders, harness racing permit holders, and quarter horse racing permit holders to pay a specified portion of the moneys wagered on racing programs into the Ohio fairs fund. However, except as provided in R.C. 3769.08(L), which is discussed *infra*, the statute requires only thoroughbred racing permit holders to pay a specified portion of the moneys wagered on racing programs into the Ohio thoroughbred race fund.

Moreover, under R.C. 3769.08(B), thoroughbred racing permit holders are required to pay more money into the Ohio thoroughbred race fund than into the Ohio fairs fund. As explained above, R.C. 3769.08(B) provides that, after the required payment to the PASSPORT fund and any applicable reductions, one and one-eighth percent of the total amount of all moneys wagered on live racing programs and simulcast racing programs is paid by thoroughbred racing permit holders into the Ohio thoroughbred race fund, whereas only one half of one percent of the total amount of all moneys wagered on such programs is paid by these permit holders into the Ohio fairs fund. Accordingly, since different methods are used for determining the amount of money to be deposited into the Ohio fairs fund and the Ohio thoroughbred race fund, it follows that the amount of money required to be paid into each fund under R.C. 3769.08 will be different.

**The Amount of Money Paid by Racing Permit Holders into the Ohio Thoroughbred Race Fund Is Not Required to Substantially Equal the Amount of Money Paid by These Permit Holders into the Ohio Fairs Fund**

With this background in mind, let us turn now to your question, which is whether R.C. 3769.08(L) requires the amount of money paid by all racing permit holders into the Ohio thoroughbred race fund to substantially equal the amount of money paid by these permit holders into the Ohio fairs fund. It is readily apparent that the plain language of R.C. 3769.08(L) does not require the amount of money paid by all racing permit holders into the Ohio fairs fund and the Ohio thoroughbred race fund to be equal.

R.C. 3769.08(L), which requires harness racing permit holders to pay a percentage of the total amount of all moneys wagered on live racing programs and simulcast racing programs into the Ohio thoroughbred race fund, provides:

*From the tax paid under this section by harness track permit holders, the tax commissioner shall pay into the Ohio thoroughbred race fund a sum equal to a percentage of the amount wagered upon which the tax is paid. The percentage shall be determined by the tax commissioner and shall be rounded to the nearest one-hundredth. The percentage shall be such that, when multiplied by the amount wagered upon which tax was paid by the harness track permit holders in the most recent year for which final figures are available, it results in a sum that substantially equals the same amount of tax paid by the tax commissioner during that year into the Ohio fairs fund from taxes paid by thoroughbred permit holders. This division does not apply to county and independent fairs and agricultural societies. (Emphasis added.)*

R.C. 3769.08(L) does not state or imply that thoroughbred racing permit holders, harness racing permit holders, and quarter horse racing permit holders are required to pay substantially the same amount of money into the Ohio thoroughbred race fund as they do into the Ohio fairs fund. Rather, the sole purpose of this statute is to require harness racing permit holders to pay substantially the same amount of money into the Ohio thoroughbred race fund as thoroughbred racing permit holders pay into the Ohio fairs fund.

As indicated above, unlike thoroughbred racing permit holders, neither harness racing permit holders nor quarter horse racing permit holders are required under any other division of R.C. 3769.08 to pay a percentage of the total amount of all moneys wagered on live racing programs and simulcast racing programs into the Ohio thoroughbred race fund. R.C. 3769.08(L) thus explicitly evinces a legislative intent to require harness racing permit holders to pay a percentage of the total amount of all moneys wagered on live racing programs and simulcast racing programs into the Ohio thoroughbred race fund. In other words, R.C. 3769.08(L) provides an additional source of revenue for the Ohio thoroughbred race fund.

In sum, R.C. 3769.08(L) does not require the Tax Commissioner to allocate a substantially equal amount of money to the Ohio thoroughbred race fund and the Ohio fairs fund. Instead, it requires the Tax Commissioner to allocate a specified portion of the money paid by harness permit holders to the Ohio thoroughbred race fund. This portion must substantially equal the amount of money paid by thoroughbred racing permit holders into the Ohio fairs fund. R.C. 3769.08(L), therefore, does not require the amount of money paid by all racing permit holders into the Ohio thoroughbred race fund to substantially equal the amount of money paid by all racing permit holders into the Ohio fairs fund.

**Conclusion**

Based on the foregoing, it is my opinion, and you are hereby advised that R.C. 3769.08(L) does not require the amount of money paid by all racing permit holders into the Ohio thoroughbred race fund to substantially equal the amount of money paid by all racing permit holders into the Ohio fairs fund.