

OPINION NO. 88-019**Syllabus:**

Absent specific statutory authority, a municipality may not impose an excise tax upon the sale of state lottery tickets.

**To: Ronald L. Nabakowski, Executive Director, Ohio State Lottery Commission,
Cleveland, Ohio**
By: Anthony J. Celebrezze, Jr., Attorney General, March 30, 1988

You have requested my opinion regarding the authority of a municipality with respect to the taxation of sales of state lottery tickets. Specifically, you wish to know whether a municipality may impose an excise tax on the purchaser of a state lottery ticket, and require state lottery sales agents to collect such tax.

Resolution of your question requires that I consider the extent to which a municipality may levy a tax upon the state or any of the state's agencies or instrumentalities. Article XVIII, §3 of the Ohio Constitution provides that, "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Among the powers of local self-government conferred upon municipalities by Ohio Const. art. XVIII, §3 is the power of taxation. In *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 227, 124 N.E. 134, 136 (1919), for example, the Ohio Supreme Court, having reiterated

that the power to impose taxes is bestowed upon the legislative branch of state government by Ohio Const. art. II, §1,¹ declared as follows:

[W]e find in Section 3, Article XVIII, as complete a grant of power as the general assembly has received in Section 1, Article II. There can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation, for without this power local government in cities could not exist for a day. It is a known fact that the necessary expense incident to the maintenance of the government of a modern city transcends all other forms of governmental expense.

The constitution recognizing the necessity of this grant of power conferred it on municipalities, subjecting them only to the staying hand of the general assembly in respect to its limitation.

Accord, Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946); *Marion Foundry Co. v. Landes*, 112 Ohio St. 166, 147 N.E. 302 (1925). See also 1970 Op. Att'y Gen. No. 70-148 at 2-288; 1958 Op. Att'y Gen. No. 1697, p. 76, at 77.

As acknowledged in *State ex rel. Zielonka v. Carrel*, however, a municipality's exercise of the power of taxation pursuant to Ohio Const. art. XVIII, §3 is by no means absolute and without limitation. For example, article XIII, §6 of the Ohio Constitution states that 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." Article XVIII, §13 of the Ohio Constitution further provides, in part, that, "[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes." See also Ohio Const. art. XII, §2 (tax rate limitations applicable to property that is taxed for "all state and local purposes"). Thus, under the foregoing constitutional provisions, the state retains the right to limit, by appropriate legislation, the power of municipalities to levy taxes pursuant to Ohio Const. art. XVIII, §3. See, e.g., *State ex rel. City of Dayton v. Bish*, 104 Ohio St. 206, 135 N.E. 816 (1922); *State ex rel. City of Toledo v. Cooper*, 97 Ohio St. 86, 119 N.E. 253 (1917).

In addition to limitations the General Assembly may place upon a municipality's power to tax pursuant to the foregoing constitutional provisions, there exists, at common law, a further restriction upon a municipality's exercise of that power with respect to the state and its agencies. In *Village of Willoughby Hills v. Board of Park Commissioners*, 3 Ohio St. 2d 49, 209 N.E.2d 162 (1965), the Ohio Supreme Court was asked to consider the propriety of an excise tax levied by a municipal ordinance upon admission fees charged at a golf course owned and maintained by a park district organized pursuant to R.C. Chapter 1545. The ordinance required the park district's governing board, see R.C. 1545.05 (appointment of park commissioners), to collect such excise tax and remit it to the

¹ Article II, §1 of the Ohio Constitution reads as follows:

The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

municipality in question. Noting that a park district organized pursuant to R.C. Chapter 1545 is a "political subdivision of the state of Ohio which performs a function of the state that is governmental in character," the court declared imposition of the excise tax with respect to the park district invalid, stating as follows:

We do not find any statutory provision that authorizes a municipality to impose a collection and remittance of an excise tax upon a governmental agency. The authority of the municipality to levy an admission tax is derived from the state Constitution (Section 3, Article XVIII) but it cannot interfere with a political [sic] subdivision of the state. To permit this would be tantamount to permitting a municipality to levy an excise tax against the state.

This court can conclude only that the action of the municipality in imposing the duty of collecting and remitting an excise tax on the park board is an unwarranted interference with a political subdivision of the state not authorized by statute.

Village of Willoughby Hills v. Board of Park Commissioners, 3 Ohio St. 2d at 51, 209 N.E.2d at 163-64. Thus, absent specific statutory authority, a municipality may not impose an excise tax upon the state, its agencies, or any activities thereof.² See, e.g., Op. No. 70-148 at 2-290 (concluding, in reliance upon *Village of Willoughby Hills v. Board of Park Commissioners*, that a village may not levy an admissions tax upon a state university in connection with university sponsored events, "since it would be a tax against the state").

Pursuant to Ohio Const. art. XV, §6 ("the General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided the entire net proceeds of such lottery are paid into the general revenue fund of the state"), the General Assembly has, in R.C. Chapter 3770, created the Ohio State Lottery Commission as the state agency responsible for administering and supervising the state lottery. R.C. 3770.01 ("[t]here is hereby created the state lottery commission consisting of nine members appointed by the governor with the advice and consent of the senate"); R.C. 3770.03 ("[t]he state lottery commission shall promulgate rules under which a statewide lottery may be conducted"). See also 5 Ohio Admin. Code Chapters 3770-1 through 3770-5 (regulations of the Director of the Ohio State Lottery Commission); 3770:1-1 through 3770:1-8 (rules of the Ohio State Lottery Commission); 1988 Op. Att'y Gen. No. 88-002; 1986 Op. Att'y Gen. No. 86-086. In this regard, the Ohio State Lottery Commission is authorized to sell lottery tickets, R.C. 3770.03(D), through persons licensed by the Director as lottery sales agents, R.C. 3770.02; R.C. 3770.03(G); R.C. 3770.05. R.C. 3770.06 further provides that all revenues received from the sales of such lottery tickets shall be deposited, as directed, in the several funds enumerated therein, which shall be in the custody of the Treasurer of State.

It is apparent, therefore, that an excise tax imposed by a municipality upon the sale of state lottery tickets, whereby state lottery sales agents are required to collect such tax for the benefit of the municipality, is a tax against the State of Ohio. The General Assembly has not, however, enacted legislation specifically authorizing municipalities to levy an excise tax upon the sale of state lottery tickets. Accordingly, in the absence of such legislation, a municipality may not levy such a tax. *Village of Willoughby Hills v. Board of Park Commissioners*.

² As one authority has commented, the holding in *Village of Willoughby Hills v. Board of Park Commissioners*, 3 Ohio St. 2d 49, 209 N.E.2d 162 (1965), is simply an explicit recognition of what has always been "implicit in Ohio legal theory," namely, that "[a]s the superior authority, the state is immune from municipal taxation," and such immunity prevails notwithstanding the grant of home rule powers to municipalities in Ohio Const. art. XVIII, §3. G. Vaubel, *Municipal Home Rule in Ohio* 1500 (1st ed. 1978). See, e.g., 1985 Op. Att'y Gen. No. 85-082 at 2-330.

It is, therefore, my opinion, and you are advised that absent specific statutory authority, a municipality may not impose an excise tax upon the sale of state lottery tickets.