

**OPINION NO. 88-065****Syllabus:**

The excise tax levied by R.C. 5739.024(A) on transactions by which lodging by a hotel is or is to be furnished to transient guests, as defined in R.C. 5739.01(N), does not apply to those transactions in which a corporation rents lodging for its employees in a hotel for thirty or more consecutive days at a time, notwithstanding that individual employees of the corporation may use the room thereby rented for lodging for a period of time that is less than thirty consecutive days in length.

**To: Robert D. Horowitz, Stark County Prosecuting Attorney, Canton, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, September 12, 1988**

You have requested my opinion regarding the proper interpretation and application of R.C. 5739.024 with respect to lodging transactions in which a corporation reserves hotel rooms for its employees who require overnight sleeping accommodations. R.C. 5739.024 authorizes a board of county commissioners, *inter alia*, to levy an excise tax on certain hotel lodging transactions, providing, in pertinent part, as follows:

(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. The regulations shall provide, after deducting the real and actual costs of administering the tax, for the return to each municipal corporation or township that does not levy an excise tax on such transactions, a uniform percentage of the tax collected in the municipal corporation or in the unincorporated portion of the township from each such transaction, not to exceed thirty-three and one-third per cent. The remainder of the revenue arising from the tax shall be deposited in a separate fund and shall be spent solely to make contributions to the convention and visitors' bureau operating within the county, including a pledge and contribution of any portion of such remainder pursuant to an agreement authorized by section 307.695 of the Revised Code. (Emphasis added.)*

A similar excise tax is also levied by the State of Ohio, pursuant to R.C. 5739.01(B)(2) and R.C. 5739.02, upon all transactions whereby hotel lodging is or is to be furnished to transient guests.<sup>1</sup> See R.C. 5739.02(C)(3) (the levy of an excise tax on transactions by which lodging by a hotel is or is to be furnished to transient guests pursuant to R.C. 5739.01(B)(2) and R.C. 5739.02 does not prevent a county from levying an excise tax not to exceed three per cent on such transactions pursuant to R.C. 5739.024(A)). See also R.C. 5739.02(C)(1) (authorizing a municipal corporation or township to levy an excise tax for any lawful purpose not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests); R.C. 5739.02(C)(2) and R.C. 5739.024(B) (authorizing a

<sup>1</sup> R.C. 5739.02 levies an excise tax, with certain exceptions, upon each retail sale made within Ohio. R.C. 5739.01 defines the terms "[s]ale" and "selling," in part, as follows:

(B) "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

.....  
(2) All transactions by which lodging by a hotel is or is to be furnished to transient guests.

municipal corporation or township to levy an excise tax not to exceed three per cent, in addition to that imposed under R.C. 5739.02(C)(1), on transactions by which lodging by a hotel is or is to be furnished to transient guests); R.C. 5739.02(C)(4) and R.C. 5739.024(C) (authorizing a county to levy an excise tax not to exceed three per cent, in addition to that imposed under R.C. 5739.02(C)(3), on transactions by which lodging by a hotel is or is to be furnished to transient guests). R.C. 5739.01 defines the terms "[p]erson," "[h]otel," and "[t]ransient guests," as used in R.C. 5739.01-.31, as follows:

(A) "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.

....  
(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.

Thus, an excise tax levied by a board of county commissioners under R.C. 5739.024(A) applies to those transactions by which lodging by a hotel is or is to be furnished to persons who occupy a room or rooms for sleeping accommodations for less than thirty consecutive days, R.C. 5739.01(N). See generally 1984 Op. Att'y Gen. No. 84-012; 1981 Op. Att'y Gen. No. 81-093.

In your letter you request guidance on how the foregoing provisions of R.C. 5739.01 and R.C. 5739.024 should be interpreted and applied in those situations in which a corporation, or other employer, reserves and rents lodging for its employees in a hotel for thirty or more consecutive days at a time, even though the individual employees may use the rooms thereby rented for a period of time that is less than thirty consecutive days in length. Specifically, you wish to know whether the corporation, or the individual employees, should be considered "[t]ransient guests," as defined in R.C. 5739.01(N), for purposes of imposing and collecting the excise tax levied by a board of county commissioners under R.C. 5739.024(A).

My research has not disclosed any decision by an Ohio court of law addressed to your particular question. I am aware, however, of an opinion rendered by the Ohio Board of Tax Appeals on this question in the context of the hotel lodging excise tax levied by the State of Ohio under former R.C. 5739.01(B) (the pertinent provisions of which now appear in R.C. 5739.01(B)(2)) and R.C. 5739.02 that suggests an answer to your question. In *Parkbrook, Inc. v. Bowers*, No. 47106 (Board of Tax Appeals February 23, 1962) (slip opinion) an appeal was taken to the Board by the owner of a hotel from a final order and determination by the Tax Commissioner confirming a sales tax assessment against the hotel under R.C. 5739.01(B) and R.C. 5739.02. The evidence presented to the Board established that the hotel had entered into contracts with two airline corporations wherein it was agreed that, upon receiving notification from the airlines, the hotel would reserve a certain number of rooms to be used for overnight accommodations by pilots and flight attendants of the two airlines. The contracts provided for the rental of the reserved rooms to the airlines at a reduced monthly rate, and the airlines were, accordingly, billed monthly for the rooms that they had reserved. Occasionally, airline personnel did not actually use a room after it had been reserved, but because the hotel had kept the room available for the airlines' use, that room was, in fact, charged to, and paid for by, the airlines. By the terms of the contracts the airlines were the parties that rented, and paid the rental charge for, the rooms used by their personnel. Most of the rooms reserved by the hotel were rented by the airlines for a period of time exceeding twenty-nine consecutive days, although in some instances the airlines would rent a room for less than thirty consecutive days.

On appeal, the question presented to the Board of Tax Appeals for its consideration was whether the airlines, rather than their employees, should be considered "[t]ransient guests," as defined in R.C. 5739.01(O) (now R.C. 5739.01(N)), for purposes of assessing the tax levied on lodging transactions by R.C. 5739.01(B)

and R.C. 5739.02 in those situations in which rooms were rented and paid for by the airline corporations for the use of their employees. In light of the specific definitions in R.C. 5739.01, the Board noted that the inquiry should focus, in fact, upon the airlines themselves, and not their employees. In particular, the Board first determined that the word "occupying," as used in R.C. 5739.01(O)'s definition of "[t]ransient guests," should be interpreted to mean either "control" or "use" of sleeping accommodations. Further, such "control" or "use" might be exercised by a corporation, insofar as R.C. 5739.01(A) defines the term "[p]erson" as including a corporation. Finally, whether the airlines qualified as "[t]ransient guests," as defined in R.C. 5739.01(O), for purposes of assessing the lodging excise tax would depend upon the length of time for which the airline corporations rented rooms from the hotel. The opinion by the Board elaborates upon these several points as follows:

Keeping in mind the general intent expressed in Section 5739.01 and the above-noted definitions, this Board is of the opinion that the word "occupying," as used in the definition of "transient guests" (Section 5739.01(O)), means the control or use of a sleeping room or rooms by a person who rents or leases said room or rooms from a hotel. Thus, this Board interprets the definition of "transient guests" to mean persons (including corporations) who control or use sleeping rooms (rented from hotels) for less than thirty consecutive days. This Board is further of the opinion that pursuant to the above interpretation, a person may be a transient guest of a hotel even though that person does not, at any time, physically enter the sleeping room or rooms which that person rents or leases from the hotel.

The statute, Section 5739.01, supra, provides, inter alia, that a "sale" includes the furnishing of sleeping accommodations by a hotel to transient guests for a consideration. The facts in this matter are clear beyond question. Airline personnel actually sleep in the rooms which the airlines lease from the appellant, however, the employee who sleeps in the room does not pay appellant a consideration therefor, nor does the appellant furnish the room to the airline employee. The appellant furnishes the rooms to the airlines, who, in turn, as lessees of the appellant, use the rooms to house their employees.

Section 5739.01(A), supra, specifically provides that, as used in that section, a "person" includes a corporation. Section 5739.01(O), as interpreted by this board, provides that a transient guest is a person exercising control over or use of sleeping accommodations for less than thirty consecutive days. Therefore, it appears that the appellant corporation would be a transient guest for all rentals which are less than thirty consecutive days in duration, and it also appears to be an equally well founded conclusion that appellant corporation would not be a transient guest for the rental of rooms which are rented by it, for its use, for periods in excess of twenty-nine consecutive days in duration.

*Parkbrook, Inc. v. Bowers*, slip op. at 5 (emphasis in original).

Although addressed to the lodging excise tax levied by the State of Ohio under former R.C. 5739.01(B) and R.C. 5739.02, it is clear that the reasoning and conclusions set forth in *Parkbrook, Inc. v. Bowers* also apply to the lodging excise tax levied by a board of county commissioners pursuant to R.C. 5739.024. In this regard, the definitions of "[p]erson" and "[t]ransient guests" in R.C. 5739.01 that were considered by the Board in *Parkbrook, Inc. v. Bowers* have been neither amended nor changed in any material respect since that decision was rendered. Further, R.C. 5739.01 states unambiguously that those definitions apply to those terms as used, inter alia, in R.C. 5739.024. R.C. 5739.024 provides, in pertinent part, that a board of county commissioners may "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." R.C. 5739.024(A). R.C. 5739.01(N) defines "[t]ransient guests" as "persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days" (emphasis added), and R.C. 5739.01(A) states that the term "[p]erson," includes "corporations." Thus, in accordance with the decision in *Parkbrook, Inc. v. Bowers*, a corporation qualifies as a "transient guest" for

purposes of R.C. 5739.024(A) if the corporation's rental of a hotel room gives it control or use of that room for less than thirty consecutive days. In that case, the lodging excise tax levied pursuant to R.C. 5739.024(A) may be assessed with respect to such rental transaction. Conversely, a corporation does not qualify as a "transient guest" for purposes of R.C. 5739.024(A) if the corporation's rental of a hotel room gives it control or use of that room for thirty or more consecutive days. In that situation, therefore, the lodging excise tax levied pursuant to R.C. 5739.024(A) does not apply to such rental transaction.

The decision in *Parkbrook, Inc. v. Bowers* is the only Ohio authority of which I am aware that addresses this particular question. The Board of Tax Appeals has been created by R.C. 5703.02, and is empowered to perform all the duties and responsibilities specified therein. In particular, R.C. 5703.02(A) provides that the Board shall "[e]xercise the authority provided by law to hear and determine all appeals of questions of law and fact arising under the tax laws of [Ohio] in appeals from decisions, orders, determinations, or actions of any tax administrative agency established by the law of [Ohio]," including "[f]inal determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made [thereby]." R.C. 5703.02(A)(4). R.C. 5717.04 in turn provides that an appeal from a decision by the Board of Tax Appeals for the purpose of obtaining a reversal, vacation, or modification thereof shall be made to the Ohio Supreme Court or the court of appeals for the county in which the property taxed is situated or in which the taxpayer resides, with certain variations where the taxpayer is a corporation. R.C. 5717.04 further states that if the court, upon hearing and consideration of the record and evidence presented to the Board, decides that the Board's decision "is reasonable and lawful it shall affirm the same, but if the court decides that such decision...is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification." See generally *Operation Evangelize-Youth Mission, Inc. v. Kinney*, 69 Ohio St. 2d 346, 347, 432 N.E.2d 200, 201 (1982) ("[i]n reviewing decisions of the board, this court has repeatedly stated that it is not a trier of fact *de novo*, but that it is confined to its statutorily delineated duties (R.C. 5717.04) of determining whether the board's decision is 'reasonable and lawful,'" quoting from *Episcopal Parish v. Kinney*, 58 Ohio St. 2d 199, 201, 389 N.E.2d 847, 848 (1979); *Buckeye Power, Inc. v. Kosydar*, 35 Ohio St. 2d 137, 298 N.E.2d 610 (1973) (same). Certainly, a court of law, if asked to consider this same question, might disagree with the analysis and conclusions set forth by the Board of Tax Appeals in *Parkbrook, Inc. v. Bowers*. Cf., e.g., *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985) (finding that a lodging excise tax imposed by a county on each and every transient who rents hotel and motel sleeping accommodations, with "transient" defined as a person "who...obtains sleeping accommodations" for seven consecutive days or less, applies to the individual occupant of the accommodations in question, notwithstanding that such rooms are actually reserved, rented, and paid for by a governmental entity). Nonetheless, absent more specific guidance from a court in this matter, I am not inclined to conclude that the Board's decision therein reflects an incorrect interpretation and application of the statutory law in this area and is thereby unreasonable and unlawful.

Based upon the foregoing, therefore, it is my opinion, and you are advised that the excise tax levied by R.C. 5739.024(A) on transactions by which lodging by a hotel is or is to be furnished to transient guests, as defined in R.C. 5739.01(N), does not apply to those transactions in which a corporation rents lodging for its employees in a hotel for thirty or more consecutive days at a time, notwithstanding that individual employees of the corporation may use the room thereby rented for lodging for a period of time that is less than thirty consecutive days in length.