

**Note from the Attorney General's Office:**

1946 Op. Att'y Gen. No. 46-835 was overruled by 1981 Op. Att'y Gen. No. 1981-006.

835

TAXATION STATE OF OHIO—ANY DEPARTMENTS, OFFICERS, INSTITUTIONS, BOARDS OR COMMISSIONS—UNDER NO LEGAL DUTY OR OBLIGATION TO MAKE ANY DEDUCTIONS FROM PAYROLLS, FILE ANY RETURNS OR PAY ANY MONEY TO COMMISSIONER OF TAXATION, CITY OF TOLEDO—ORDINANCE 18-46—TO LEVY A TAX ON RESIDENTS OF CITY OR PERSONS WHO EARNED COMPENSATION FOR SERVICES RENDERED CITY.

SYLLABUS:

Neither the state of Ohio nor any of its departments, officers, institutions, boards or commissions are under any legal duty or obligation to make any deductions from payrolls, file any returns or pay any money to the Commissioner of Taxation of the city of Toledo under the terms of Ordinance No. 18-46 of the city of Toledo providing for the levying of a tax on residents of such city or persons who have earned compensation for services rendered in said city.

Columbus, Ohio, March 27, 1946

Hon. Frazier Reams, Director Department of Public Welfare  
Columbus, Ohio

Dear Sir :

Your request for my opinion reads :

"Attached hereto is a proof sheet of a payroll tax ordinance which will go into effect in the City of Toledo within a short time. The Toledo State Hospital is within the city limits of Toledo. Two questions have been raised :

1. Must the Toledo State Hospital report and deduct 1% of their payroll for this tax?

2. Will individual workers living in the State Hospital, or working there, be subject to this tax? Would it make any difference whether their actual residence were outside the city limits or not?

3. A large number of people living in the State Hospital receive maintenance. It has been considered by the Internal Revenue Department that where they are on call for emergency purposes and live on the hospital grounds, this maintenance is not a part of their compensation. Will it be necessary to place any value on this maintenance and pay this City of Toledo tax on this amount?

Your opinion will be greatly appreciated."

Reference is made therein to a proof sheet of the ordinance in question. However, since the receipt of your letter I have had occasion to come into possession of a certified copy thereof on which this heading appears, to-wit: "Income Tax Ordinance Enacted By The Council Of The City of Toledo, January 28, 1946."

It is believed that the general purposes for which the ordinance was enacted can best be understood by setting forth herein the title thereof which reads :

"AN ORDINANCE No. 18-46

Levying a tax to provide funds for the purposes of the retirement of certain debt, general municipal operations, deferred maintenance and capital improvements, on all salaries, wages, commissions and other compensation earned by residents of the City of Toledo; on all salaries, wages, commissions and other

compensation earned by non-residents of the City of Toledo for work done or services performed or rendered in the City of Toledo; on the net profits earned on all businesses, professions or other activities conducted by residents of the City of Toledo; on the net profits earned on all businesses, professions or other activities conducted in the City of Toledo, by non-residents, and on the net profits earned by all corporations having an office or place of business in the City of Toledo as the result of work done or services performed or rendered in the City of Toledo; requiring the filing of returns and furnishing of information by employers and all those subject to said tax; imposing on employers the duty of collecting the tax at the source and paying the same to the City of Toledo; providing for the administration, collection and enforcement of said tax; declaring violation thereof to be a misdemeanor and imposing penalties therefor, and declaring an emergency."

Attention is now directed to section 2 of the ordinance under consideration which provides in part as follows:

"Section 2. As used in this ordinance the following words shall have the meaning ascribed to them in this section, except as and if the context clearly indicates or requires a different meaning."

Then follows various words that are defined including "Employer" which means:

"An individual, co-partnership, association, corporation, *governmental body or unit or agency*, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis." (Emphasis added.)

By virtue of section 6 of said ordinance the tax imposed thereby is to be collected at source. Said section provides inter alia:

"Each employer *within the City of Toledo* who employs one or more persons on a salary, wage, commission or other compensation basis shall deduct monthly, or more often than monthly, and at the time of the payment of such salary, wage, commission or other compensation, the tax of one per cent of salaries, wages, commissions or other compensation due by the said employer to the said employee and shall, on or before the fifteenth day of the month next following the said deduction, make a return and pay to the Commissioner of Taxation the amount of taxes so deducted." (Emphasis added.)

Standing alone the word "Employer" as above defined would probably include the state of Ohio or any of its agencies, departments, etc. However, in providing for the collection of the tax at source it is pertinent to observe that reference is made in said section 6 to each employer "within the city of Toledo." Precisely what those words may mean in the light of varying factual situations could give rise to speculation. Possibly it could be urged that, if any state owned institution is located within the corporate boundaries of the city of Toledo, the state of Ohio is included in the above quoted term. However, I am strongly inclined to the view that it was not the intent of council, in the enactment of the ordinance in question, to attempt to make the State amenable to the provisions thereof. And I am further of the opinion that irrespective of what was intended by council the State of Ohio is not subject to the provisions of said ordinance.

A matter of striking similarity to that presented by your inquiry was heretofore the subject of consideration by the Attorney General of Pennsylvania. In an opinion on the subject found in 37 Pa. D. & C. Rep. 257 (1940) it was held, as disclosed by the syllabus thereof, that:

"1. A municipal corporation cannot impose upon the Commonwealth, or any of its political subdivisions, administrative departments, boards, or commissions, any duties or obligations whatever, without its consent thereto.

2. The Commonwealth is under no legal duty or obligation to deduct, or approve the deduction, of any moneys due from its employes, who are residents of Philadelphia, to the City of Philadelphia, for or on account of the income tax levied upon such employes by the Philadelphia city ordinance of December 13, 1939, or to submit any data with respect to such employes' salaries; and this is equally true as to expenditures by the Treasurer of the City of Philadelphia, and by the Register of Wills of Philadelphia County for salaries of Commonwealth employes, appointed by the Commonwealth or whose number and compensation are fixed by the Commonwealth, connected with their respective offices."

Attention is called to this statement appearing in said opinion:

"It is thus quite clear that a municipal corporation cannot impose upon the sovereign, the Commonwealth, any duties or obligations unless the Commonwealth consents thereto. The creature of the State cannot dictate to its creator. The City of

Philadelphia cannot compel the Commonwealth, or any of its political subdivisions, administrative departments, boards, or commissions, to submit any data to the city relating to the names and salaries of their employes; or to deduct from such employes' pay any tax levied by Philadelphia."

It is interesting to note that in *Marson v. Philadelphia, et al.*, 342 Pa. 369 (1941) the views above expressed by the Attorney General of Pennsylvania with respect to the Philadelphia ordinance are supported by this statement of the court appearing on page 375 of the opinion, to-wit:

"It must be conceded that when any power issues a 'command' to a superior power, that 'command' has only the force of a request. The State of Pennsylvania can, if it chooses, ignore the command of this ordinance that it collect from its employees residing in Philadelphia, this tax. The State can also refuse, if it chooses to do so, the demand for a list of its employees residing in Philadelphia."

It was held, as disclosed by paragraph 3 of the syllabus in *Marson v. Philadelphia, et al.*, *supra*, that:

"3. The fact that the state refuses to deduct any tax on its employees at the source and refuses to furnish a list of state employees does not render the ordinance unconstitutional."

The conclusion can be drawn therefrom that, while not directly so deciding, it was inferentially held the Commonwealth of Pennsylvania was not subject to said Philadelphia ordinance.

Further bearing on the matter is this general statement found in *McQuillan on Municipal Corporations (Second Ed.) Revised Volume 1*, page 380, to-wit:

"But while a municipal corporation may be a public agency of the state in some of its activities, it is possessed of local franchises and rights which pertain to it as a legal personality or entity for its quasi-private (as distinguished from) corporate advantage. *Municipal corporations are not established to confer arbitrary power upon the legislature or any department of the state government*, or their own officers, but to conserve the rights and interests of the local inhabitants through governments which operate by means of official acts limited and regulated by law."

(Emphasis added.)

I also find this statement in 37 Am. Jur., Municipal Corporations Section 194, viz :

“A municipal ordinance does not apply to the state, nor can it be enforced against officers of the state in the performance of their public duties.”

In support of said statement see Kentucky Inst. v. Louisville (1906) 123 Ky. 767, 8 L. R. A. (N. S.) 553, 97 S. W. 402, wherein the court held that a city ordinance requiring all buildings of a certain class to have fire escapes was not applicable to an eleemosynary institution for the blind, which was established and maintained, and was completed, under the control of the state, direct control of said institution being in the hands of a board of visitors appointed by the governor with the advice and consent of the senate, the ultimate control by statute being vested in the state. The court says :

“ \* \* \* An act, granting a charter for a municipal government, will not be deemed a cession of the Legislature’s prerogative to govern for itself the institutions of the State which may be located within such municipality unless it may be clearly gathered from the latter act that such was the legislative intent.

\* \* \* the state will not be presumed to have waived its right to regulate its own property, by ceding to the city the right generally to pass ordinances of a police nature regulating property within its bounds.”

Before concluding I desire to make this observation. In your first question you ask as to the duty of the Toledo State Hospital to make certain payroll deductions and reports. In your second question you advert to the liability of individuals living in or working at said institution for the payment of the tax in question. It is patent that an affirmative answer to your first question would compel me to express my views as to such individual liability in order that said institution would be in a position to make proper payroll deductions. However, since I have concluded that the Toledo State Hospital is not amenable to those provisions of said ordinance which require payroll reports and deductions from salaries to be made by employers, it is unnecessary for me to consider your second and third questions and consequently I am expressing no opinion thereon.

Accordingly, and in specific answer to your first question, it is my opinion as follows :

The Toledo State Hospital, being an institution owned and operated by the state of Ohio, is under no legal duty or obligation to make any deductions from its payroll, file a return and pay any money to the Commissioner of Taxation of the city of Toledo by reason of the fact that certain employees may be residents of or have earned compensation for services rendered in said city.

Respectfully,

HUGH S. JENKINS,  
Attorney General