

Syllabus:

A board of county commissioners that levies an excise tax under R.C. 5739.024(A) on transactions by which lodging by a hotel is or is to be furnished to transient guests must 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.

To: Brent A. Saunders, Gallia County Prosecuting Attorney, Gallipolis, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 25, 1988

You have requested my opinion regarding the distribution of tax revenues collected pursuant to R.C. 5739.024, which authorizes the levy of an excise tax by a board of county commissioners on certain hotel lodging transactions. Your specific questions are as follows:

1. Is the Board of County Commissioners required to return some portion of the excise tax collected pursuant to Ohio Revised Code Section 5739.024 to the municipal corporation or township or does the Board of County Commissioners have the discretion not to return any of the funds collected to the municipal corporation or township?
2. If the Board of County Commissioners is required to return a portion of the excise tax collected, does it go to each township in the county uniformly or is it returned to only townships that have hotels from which the tax was collected?

R.C. 5739.024 authorizes a board of county commissioners, *inter alia*, to levy an excise tax on certain hotel lodging transactions, and specifies the manner in which the resulting tax revenues are to be allocated and distributed. Thus, R.C. 5739.024 states, 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.¹ 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 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.

¹ 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.

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. Further, the revenues collected thereby are to be allocated and distributed to the municipal corporations and townships within the county as provided in the regulations promulgated by the board of county commissioners, in accordance with the directives set forth in R.C. 5739.024(A).

I now direct my attention to your specific questions. In your first question you ask whether a board of county commissioners is required to distribute a portion of the hotel lodging excise tax revenues collected under R.C. 5739.024 to a municipal corporation or township, or whether the board may, in its discretion, elect to withhold distribution of such tax revenues to the municipal corporation or township. R.C. 5739.024(A) states clearly and unambiguously that the board of county commissioners "shall establish all regulations necessary to provide for the administration and allocation" of the excise tax on transactions by which lodging by a hotel is or is to be furnished to transient guests, and that such regulations "shall provide...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." (Emphasis added.) It is a well-established principle of statutory construction that, absent clear evidence to the contrary, the use of the word, "shall," within a statutory provision is to be interpreted as imposing a mandatory duty with respect to the activity or conduct described therein. *State ex rel. City of Niles v. Bernard*, 53 Ohio St. 2d 31, 34, 372 N.E.2d 339, 341 (1978) ("[t]he term 'shall' usually is interpreted to render mandatory the provision containing it"); *Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage"); *Dennison v. Dennison*, 165 Ohio St. 146, 149, 134 N.E.2d 574, 576 (1956) (same); 1988 Op. Att'y Gen. No. 88-013 at 2-51; 1987 Op. Att'y Gen. No. 87-093 at 2-607. In this instance, I discern nothing in R.C. 5739.024(A) to indicate that the word "shall," as used therein, is to be interpreted in a permissive sense. It follows, therefore, that the duty imposed upon a board of county commissioners by R.C. 5739.024(A) with respect to the allocation and distribution of hotel lodging excise tax revenues collected thereunder is mandatory, and not discretionary. Accordingly, a board of county commissioners that levies an excise tax under R.C. 5739.024(A) on transactions by which lodging by a hotel is or is to be furnished to transient guests must 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.

You have also asked whether a board of county commissioners is to distribute hotel lodging excise tax revenues collected under R.C. 5739.024 to each township in the county uniformly, or to only those townships that have hotels from which the tax was collected. The answer to this question is again apparent from the express language of R.C. 5739.024(A). With respect to such tax, R.C. 5739.024(A) states that the board of county commissioners shall return to each municipal corporation or township that does not levy such a tax "a uniform percentage of the tax collected in the municipal corporation or in the unincorporated portion of the township" from each hotel lodging transaction. (Emphasis added.) In other words, under R.C. 5739.024(A), the board of county commissioners is to distribute a uniform percentage of the hotel lodging excise tax revenues to each municipal corporation or township from which such revenues are collected, and such revenues can be collected from only those municipal corporations or townships that have hotels, as defined in R.C. 5739.01(M), in which there occur lodging transactions to which the tax levied by R.C. 5739.024(A) otherwise applies.

It is, therefore, my opinion, and you are advised that a board of county commissioners that levies an excise tax under R.C. 5739.024(A) on transactions by which lodging by a hotel is or is to be furnished to transient guests must 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.