

OPINION NO. 81-006**Syllabus:**

1. A board of township trustees is required, pursuant to R.C. 9.42, to deduct from the compensation paid to its public employees the amount of any municipal income tax levied on the income of such employees. (1960 Op. Att'y Gen. No. 1244, p. 224; 1948 Op. Att'y Gen. No. 2592, p. 12; 1946 Op. Att'y Gen. No. 835, p. 234 overruled.)
2. The employee address and payroll records maintained by a board of township trustees are public records that must be made available for inspection at all reasonable times pursuant to R.C. 149.43. A municipal official charged with enforcing the income tax provisions of a municipality does not, therefore, need a subpoena duces tecum in order to gain access to such records.

To: William F. Schenck, Greene County Pros. Atty., Xenia, Ohio

By: William J. Brown, Attorney General, March 13, 1981

I am in receipt of the request of your predecessor for an opinion regarding the duty of a board of township trustees to withhold the amount of income tax levied by a municipality on the income of township employees residing in the municipality. Specifically, the questions asked are:

1. Is a board of township trustees obligated under R.C. 9.42 to furnish to a municipal corporation having enacted an income tax the names and addresses of township employees residing in the municipal corporation?
2. Is a board of township trustees obligated under R.C. 9.42 to withhold from the wages or salaries of its township employees municipal income taxes of said employees who are residents of the municipality?
3. When the income tax ordinance of a municipality imposes a tax on all salaries, wages, commissions and other compensation received by the residents of the city and when the income tax ordinance defines an employer as one who has a place of business or does business in the city, is the board of township trustees obligated to honor a subpoena duces tecum to provide the superintendent of the division of taxation of the municipality with the township payroll records?

Your questions relate solely to matters concerning the income tax levied by the city on wages, salaries or other compensation paid by the township trustees to employees who reside within the city. It is my understanding that the township neither maintains a place of business nor does any business within the municipality.

Addressing your second question first, I note that Section 140.03 of the City Code of the City of Xenia imposes an income tax on all salaries, wages, commissions and other compensation received by residents of the city, and on all salaries, wages, commissions and other compensation received by nonresidents for work performed or services rendered in the city.

R.C. 9.42 requires that the state and its political subdivisions or instrumentalities withhold municipal income taxes which are levied upon the salaries of public employees and provides as follows:

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Notwithstanding section 1321.32 of the Revised Code, the state and any of its political subdivisions or instrumentalities shall deduct from the wages or salaries of public employees, as defined in section 9.40 of the Revised Code, and employees of school districts, the amount of municipal income tax levied upon the income of the employee. The director of finance shall establish by administrative rules procedures for the deduction of municipal income taxes from the wages or salaries of employees of the state or its instrumentalities. (Emphasis added.)

Prior to the enactment of R.C. 9.42, 1965 Ohio Laws 5 (Am. Sub. H.B. 56, eff. June 2, 1965), no analogous law was in effect in Ohio. The absence of such a statute was the basis of three opinions issued by this office to the effect that a municipality had no authority to require the state or one of its political subdivisions or instrumentalities to withhold municipal income taxes from the compensation of employees either working or residing in such municipality. 1960 Op. Att'y Gen. No. 1244, p. 224; 1948 Op. Att'y Gen. No. 2592, p. 12; 1946 Op. Att'y Gen. No. 835, p. 234. These opinions recognized that the authority of an official charged with keeping payroll records of the state, one of its political subdivisions, or one of its instrumentalities is limited to that conferred by statute and found no statute which conferred the authority to deduct municipal income taxes. In addition, it was noted that a municipality was subordinate to the state, and, thus, could not impose duties upon the sovereign without its consent. Since there was no state law authorizing the payroll officer involved to make such a deduction from the compensation paid to its employees, and no law granting municipalities the power to require officials of the state or of its political subdivisions or instrumentalities to do any act for which no provision was made by law, it was concluded that the official involved in each case was not required to withhold the tax, notwithstanding any provision of the relevant municipal code to the contrary.

The enactment of R.C. 9.42 requires a change in the position taken in those three earlier opinions. R.C. 9.42 clearly applies to townships as they are political subdivisions of the State of Ohio. State ex rel. Leipsie v. Moneter, 99 Ohio St. 110, 124 N.E.2d 70 (1919). In addition, R.C. 9.40, to which reference is made in R.C. 9.42, refers to public employees of the state or any of its political subdivisions and defines "public employees" so as to include the employees of a township.

As evidenced by the use of the word "shall," R.C. 9.42 imposes a mandatory duty on the state and any political subdivision or instrumentality to deduct from the compensation paid to a public employee the amount of municipal income tax levied on the income of the employee. See Cleveland v. Brescia, 100 Ohio St. 267, 126 N.E. 51 (1919). The statute provides for no exceptions to this duty. Nor is the duty imposed by the statute conditioned on whether the state, political subdivision, or instrumentality maintains a place of business or does any business in the municipality. If the compensation paid to an employee is subject to the income tax of a municipality, whether because the income is earned within the municipality or because the employee is a resident of the municipality, R.C. 9.42 requires the state, political subdivision, or instrumentality to deduct the appropriate amount of tax. You have stated in your request that the ordinances of the municipality in question require only that employers who have a place of business or do business in the city deduct municipal income taxes levied on the compensation of their employees. You have concluded, therefore, that the township trustees are not required by the city ordinances to make such deductions. The fact that the board of township trustees is not required by the municipal code itself to make such deductions, however, does not excuse such board from complying with the mandatory, state-wide provisions of R.C. 9.42. Therefore, I conclude that a board of township trustees must, pursuant to R.C. 9.42, deduct from the compensation paid to its public employees the amount of municipal income tax levied upon such compensation.

Your first and third questions relate to the degree of cooperation required between township trustees and the division of taxation of a municipality. The

availability to a municipality of records of a township compiled in connection with the execution of duties imposed by R.C. 9.42 appears to be controlled by the Ohio public records law. R.C. 149.43, which provides that public records are to be made available to any member of the general public, provides in part:

(A) As used in this section:

(1) "Public record" means any record that is required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.

. . . .

(B) All public records shall be promptly prepared and made available to any member of the general public at all reasonable times for inspection. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, governmental units shall maintain public records in such a manner that they can be made available for inspection in accordance with this division. (Emphasis added.)

Pursuant to R.C. 149.43, the general public is entitled to access to all records in the possession of governmental agencies where such records are "required to be kept" and are not designated as confidential by law. Thus, if the payroll records of the township are required to be kept and are not made confidential by law, the general public is entitled to access to such records.

I have recently opined that, as set forth in Dayton Newspapers, Inc. v. Dayton Daily News, 45 Ohio St. 2d 107, 108-09, 341 N.E.2d 576, 577 (1976), "a record is required to be kept by a governmental unit, within the meaning of R.C. 149.43, where the unit's keeping of such record is necessary to the execution of its duties and responsibilities." 1980 Op. Att'y Gen. No. 80-103; 1980 Op. Att'y Gen. No. 80-096. Since the addresses of employees are necessary in order for a township payroll officer to deduct the proper amount of municipal income tax levied upon the compensation of such employees pursuant to R.C. 9.42, records of such addresses are "required to be kept" within the meaning of R.C. 149.43. These records are not medical records, records pertaining to adoption, probation, and parole proceedings, trial preparation records, or confidential law enforcement investigatory records. Moreover, I am not aware of any provision of law restricting or prohibiting the release of these records. I, therefore, conclude in answer to your first question that, pursuant to R.C. 149.43, a board of township trustees must make records of employee addresses available at all reasonable times to members of the general public, including officials of a municipality which has levied an income tax upon the compensation received by township employees.

While R.C. 149.43 clearly requires that these records are to be open to inspection, it does not require the township to provide specific information in any particular form. 1973 Op. Att'y Gen. No. 73-034. Therefore, R.C. 149.43 does not require that the township payroll officer segregate the names and addresses of employees who reside in particular municipalities. If, however, the township segregates them as a matter of course, the records in that form should be made available to the general public.

Your third question asks whether the township payroll records must be provided to the superintendent of the division of taxation of a municipality which has levied an income tax on the compensation of township employees. Since such records are clearly necessary in order for a township to execute its responsibilities in connection with compensating its employees, 1973 Op. No. 73-034 (maintenance

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of payroll records by state university is necessary to the execution of its duties and responsibilities), these records, like employee address records, are "required to be kept" within the meaning of R.C. 149.43. Township payroll records do not fall within any of the exceptions set forth in R.C. 149.43 and I am not aware of any provision of law making them confidential. Therefore, I conclude that township payroll records must be made available to any member of the general public at all reasonable times for inspection. Since the superintendent of the division of taxation of a municipality, like every other citizen in Ohio, has a statutory right of access to township payroll records pursuant to R.C. 149.43, a subpoena duces tecum is not required.

In response to your questions, it is my opinion, and you are hereby advised, that:

1. A board of township trustees is required, pursuant to R.C. 9.42, to deduct from the compensation paid to its public employees the amount of any municipal income tax levied on the income of such employees. (1960 Op. Att'y Gen. No. 1244, p. 224; 1948 Op. Att'y Gen. No. 2592, p. 12; 1946 Op. Att'y Gen. No. 835, p. 234 overruled.)
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