

OPINION NO. 84-012**Syllabus:**

1. Political subdivisions are not statutorily exempt from a county hotel lodging tax levied pursuant to R.C. 5739.024(A).
2. A board of county commissioners may not exempt, by regulation, persons otherwise within the scope of a county hotel lodging tax pursuant to R.C. 5739.01(A), (M), and (N) and R.C. 5739.024(A).

To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 26, 1984

I have before me your request for my opinion in response to the following questions:

1. Is a county government or any political subdivision exempt from the hotel lodging excise tax provided for in R.C. Chapter 5739?
2. If the county governments and other political subdivisions are not exempt by law from the hotel lodging excise tax, may a county's Code of Regulations for such tax specifically exempt counties and other political subdivisions from such tax?

The authority to impose an excise tax on hotel lodging is conferred upon counties under R.C. 5739.024(A) which provides, in pertinent part:

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. (Emphasis added.)

The terms "hotel" and "transient guest" are defined under R.C. 5739.01 as follows:

As used in sections 5739.01 to 5739.31 of the Revised Code:

. . . .

(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.

The term "person" as used in the definition of "transient guests" is broadly defined under R.C. 5739.01(A) as follows:

As used in sections 5739.01 to 5739.31 of the Revised Code:

(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. (Emphasis added.)

Thus, political subdivisions are expressly included among those individuals and entities to which an excise tax on hotel lodging transactions is to apply. R.C. 5739.024(A) exempts only those transactions involving lodging in an establishment with fewer than five rooms, or guests occupying sleeping accommodations for a stay in excess of thirty consecutive days.

Your letter, however, asks whether the exemption provided under R.C. 5739.02(B) may be extended to hotel lodging tax levies adopted pursuant to R.C. 5739.024(A). R.C. 5739.02 establishes a general excise tax to provide revenues for, inter alia, the general revenue fund of the state, schools, and the support of local governmental functions. Pursuant to R.C. 5739.02(B)(1), "[t]he tax does not apply to . . .[s]ales to the state, or any of its political subdivisions." It is well understood that "[e]xceptions to the operation of laws . . . should receive strict, but reasonable, construction." State ex rel. Keller v. Forney, 108 Ohio St. 463, 141 N.E. 16 (1923) (syllabus, paragraph 1). Moreover, the Supreme Court of Ohio has enunciated the following principle concerning statutory interpretation:

A statute in order to be held an exception to the general provisions of another conferring power and limitation of power on an administrative board, must be couched in language so clear and unambiguous as to be free from doubt as to the intent of the legislature in declaring it to be an exception.

State ex rel. Stanton v. Andrews, 105 Ohio St. 489, 138 N.E. 873 (1922) (syllabus, paragraph 2), overruled on other grounds, 41 Ohio St. 2d 157, 324 N.E.2d 285 (1975). Thus, the exemption set forth under R.C. 5739.02(B)(1) may be applied to taxes levied pursuant to R.C. 5739.024(A) only if the pertinent statutes clearly and unambiguously establish that the legislature intends the exemption to be construed in this manner. Neither R.C. 5739.02 nor R.C. 5739.024 expressly provides that a hotel lodging tax levied pursuant to R.C. 5739.024 be subject to the exemptions created under R.C. 5739.02(B). This situation is in direct contrast to R.C. 5739.01 and R.C. 5739.023 which authorize, respectively, counties to levy a one-half percent "piggyback" sales tax and transit authorities to levy additional excise taxes. The latter statutes contain the following provision:

Any tax levied pursuant to this section is subject to the exemptions provided in section 5739.02 of the Revised Code and in addition shall not be applicable to sales not within the taxing power of a county under the constitution of the United States or the constitution of this state.

Had the legislature intended that the county hotel lodging tax be subject to the exemption established under R.C. 5739.02(B)(1), it could have expressed such an intent in similarly clear terms. See In re Hesse, 93 Ohio St. 230, 235, 112 N.E. 511 (1915) (It must be assumed that the body which drafted a statutory provision was cognizant of the surrounding circumstances and other provisions of law relating to the same subject, and had it intended a particular effect "it would have been easy, in unequivocal language, to make that provision plain"). Furthermore, I note that no other statute exempts political subdivisions from a hotel lodging tax levied by a county in accordance with R.C. 5739.024(A). I, therefore, conclude that a county hotel lodging tax levied pursuant to R.C. 5739.024(A) is not subject to a statutory exemption for political subdivisions.

Your second question asks whether a board of county commissioners may, by regulation, exempt political subdivisions from the application of a hotel lodging tax levied under authority of R.C. 5739.024(A). It is necessary to note that a board of county commissioners, as a creature of statute, may act only when statutorily authorized to do so. State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 94 N.E.2d 248 (1947) (syllabus, paragraphs 1 and 2).

R.C. 5739.024(A) provides two grants of authority to a board of county commissioners. The statute confers upon a board the authority to levy a tax on certain lodging transactions, and the authority to adopt regulations necessary for the administration and allocation of the tax. Thus, 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). (Emphasis added.) As discussed earlier, the emphasized terms are defined under R.C. 5739.01(A), (M) and (N). The statutory definitions expressly subject transactions involving political subdivisions to taxes levied pursuant to R.C. 5739.024(A). Furthermore, the statutory definitions expressly exempt certain transactions from the application of a county hotel lodging tax, i.e., lodging for a stay in excess of thirty consecutive days, or in an establishment with fewer than five rooms.

The power to create exemptions from taxation is a legislative function. See generally Toledo Business & Professional Women's Retirement Living, Inc. v. Board of Tax Appeals, 27 Ohio St. 2d 255, 258, 272 N.E.2d 359, 361 (1971) ("Necessarily, that power is lodged exclusively in the General Assembly, and once it has chosen a specific subject for tax exemption, and defined the criteria, the function of the executive and judicial branches is limited to applying those criteria to a particular case, or to interpreting them if necessary."). See also City of Cleveland v. Board of Tax Appeals, 153 Ohio St. 97, 91 N.E.2d 480 (1950) (syllabus, paragraph 1), rev'd on other grounds, 2 Ohio St. 2d 17, 205 N.E.2d 896 (1965) ("An exemption from taxation must be clearly and expressly stated in the statute. . . ."). Thus, while a board of county commissioners is authorized to adopt regulations to facilitate administration of a tax levied pursuant to R.C. 5739.024(A), such a board may not, by rule, enlarge or restrict statutory exemptions. See Ransom & Randolph Co. v. Evatt, 142 Ohio St. 398, 52 N.E.2d 738 (1944) (syllabus, paragraph 4).

In summary, it is my opinion, and you are advised, that:

1. Political subdivisions are not statutorily exempt from a county hotel lodging tax levied pursuant to R.C. 5739.024(A).
2. A board of county commissioners may not exempt, by regulation, persons otherwise within the scope of a county hotel lodging levy pursuant to R.C. 5739.01(A), (M), and (N) and R.C. 5739.024(A).