

Note from the Attorney General's Office:

1948 Op. Att'y Gen. No. 48-2592 was overruled by
1981 Op. Att'y Gen. No. 81-006.

2592

TAX ORDINANCE, INCOME—NO. 658-47, CITY OF COLUMBUS—EMPLOYERS IMPOSED WITH DUTY TO COLLECT AT SOURCE A TAX—TO PAY TAX TO CITY—WITHOUT OPERATIVE EFFECT AS TO STATE OF OHIO OR AUDITOR OF STATE—STATE AUDITOR UNDER NO LEGAL DUTY TO MAKE DEDUCTIONS FROM SALARIES OF STATE EMPLOYEES—RESIDENTS, CITY OF COLUMBUS—EARNED COMPENSATION, SERVICES, TO CITY OF COLUMBUS.

SYLLABUS:

The provisions of income tax ordinance No. 658-47 of the city of Columbus which impose on "employers" as therein defined the duty of collecting at the source the tax therein provided for and paying the same to the city of Columbus are without operative effect so far as concerns the state of Ohio or the auditor of state. Said auditor of state is, therefore, under no legal duty to make any deductions from the salaries of state employees by reason of the fact that they may be residents of the city of Columbus or have earned compensation for services rendered in the city of Columbus. Opinion No. 835, Opinions of the Attorney General for 1946, page 234, approved and followed.

Columbus, Ohio, January 13, 1948

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio

Dear Sir :

I am in receipt of your request for my opinion to which is attached a copy of income tax Ordinance No. 658-47 of the city of Columbus. In connection therewith you have asked the following question :

“I respectfully seek your opinion as to the legal duty of the Auditor of State to make any deductions from the salaries of state employees by reason of the fact that they may be residents of the City of Columbus or have earned compensation for services rendered in the City of Columbus.”

It might be noted at the outset that said Columbus ordinance is similar in many respects to an income tax ordinance of the city of Toledo with respect to which I heretofore rendered an opinion. See opinion No. 835, Opinions of the Attorney General for 1946, page 234.

Since a different ordinance is here under consideration I shall set forth the purpose clause of said Columbus ordinance which provides :

“ORDINANCE NO. 658-47

“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 personal service compensation earned by residents of the City of Columbus; on all salaries, wages, commissions and other personal service compensation earned by non-residents of the City of Columbus for work done or services performed or rendered in the City of Columbus; on the net profits earned on all businesses, professions or other activities conducted by residents of the City of Columbus; on the net profits earned on all businesses, professions or other activities conducted in the City of Columbus by non-residents, and on the net profits earned by all corporations having an office or place of business in the City of Columbus as the result of work done or services performed or rendered in the City of Columbus; 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 Columbus; providing for the administration, collection and enforcement of said tax; declaring violation thereof to be a mis-

demeanor and imposing penalties therefor, and declaring an emergency.” (Emphasis added.)

It will be noted that reference is made in this purpose clause to collecting the tax at the source and imposing that duty on “employers.” The definition of the word “Employer” is set forth in said ordinance, which states:

“Section 1. 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.

DEFINITIONS

* * * “‘Employer’—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 personal service compensation basis.” (Emphasis added.)

There will next be set forth the following portion of Section 5 of said Columbus ordinance, to-wit:

“Section 5. Each employer *within the City of Columbus* who employs one or more persons on salary, wage, commission or other personal service compensation basis shall deduct at the time of the payment of such salary, wage or other personal service compensation, the tax of one half ($\frac{1}{2}$) of one (1) per centum of the salaries, wages or other personal service compensation due by the said employer to the said employee and shall quarterly make a return to the City Auditor and pay into the City Treasury the amount of taxes so deducted, and said employers shall, on or before April 30th, July 31st, October 31st and January 31st of each year, make a return to the City Auditor and pay into the City Treasury the amount of taxes deducted and withheld from employees’ salaries, wages and other personal service compensation for the quarterly periods ending March 31st, July 30th, September 30th and December 31st of each year. * * *” (Emphasis added.)

The state of Ohio is not, in express terms, sought to be brought within the definition of an “Employer.” The only language which could conceivably be regarded as attempting to accomplish that purpose must be found in the phrase “*governmental body or unit or agency.*” For reasons hereinafter stated the conclusion must follow that even if the ordinance were expressly so to provide, the state of Ohio would nevertheless not

be amenable thereto. Doing by indirection that which could not otherwise be accomplished would, of course, be without legal effect.

As an officer of this state you are charged with the performance of certain legal duties. It is a well established principle of law that, as a public officer, you have only such powers as are expressly delegated by statute and such as are necessarily implied from those so delegated. 32 C. J., Public Officers, Sec. 74. Precisely how the city of Columbus, by action of its council, could increase or enlarge your duties is not immediately apparent.

The city of Columbus is a creature, if that term may be used, whose existence, authority and power emanates from the state of Ohio as a body politic. The city's power is clearly subordinate to that of the state. And, as a municipal corporation said city is without any legal authority whatsoever to command the state as a superior power to perform the duty of collecting at the source the tax which is levied by the said ordinance.

The relationship of a municipal corporation to the state as its creator is discussed somewhat extensively in my opinion dealing with the Toledo income tax ordinance. I do not deem it necessary to set forth herein the principles of law, text citations and cases that compelled the conclusion expressed therein and wherein it was held in the syllabus as follows:

“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.”

For your convenience and guidance a copy of said opinion is attached hereto.

It should be distinctly understood that no view is here expressed as to whether any employee of the state of Ohio or any of its governmental agencies may be personally liable for the payment of the tax provided for in said Columbus income tax ordinance.

In specific answer to the question presented by your inquiry, it is my opinion, and you are so advised, that there is no legal duty on your part

to make any deductions from the salaries of state employees by reason of the fact that they may be residents of the city of Columbus or have earned compensation for services rendered in the city of Columbus.

Respectfully,

HUGH S. JENKINS,
Attorney General.