ITALO S. CAPPABIANCA
STATE REPRESENTATIVE

ROOM 30, EAST WING
HOUSE BOX 202020
HARRISBURG, PENNSYLVANIA 17120-2020
PHONE: (717) 787-4358
FAX: (717) 783-0681

DISTRICT OFFICE:
1216 WEST 26TH STREET
ERIE, PENNSYLVANIA 16508-1520
PHONE: (814) 453-7639
FAX: (814) 871-4713
E-MAIL: ITALO@MOOSE.ERIE.NET
HOME PAGE: MOOSE.ERIE.NET/~ITALO

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES

AGRICULTURE AND RURAL AFFAIRS,
DEMOCRATIC CHAIRMAN

CAUCUSES

NORTHWEST CAUCUS

STAFF

STEVEN CRAWFORD
SENIOR ADVISOR TO THE CAUCUS/COMMITTEE
LYNN SLABICKI
RESEARCH ANALYST

January 26, 1998

Vincent C. DeLiberato
Legislative Reference Bureau
641 Main Capitol Building
Harrisburg, PA

Vince:

Following are telephone conversation, I would appreciate a legal opinion in regards to the amusement tax:

Question 1 If the school district of the City of Erie were to impose a 4% amusement tax, could the municipality (City of Erie) request one half of the 4% which would be 2% of the tax similar to what the municipality and school district presently are doing with the wage tax?

Question 2 It is my understanding that some municipalities and school districts impose an amusement tax on vending machines and in reality the tax is a flat tax. Is it possible that such a flat tax on vending machines or mechanical devices violates the uniformity clause of the state constitution?

Thank you for your kind attention to this request.

Sincerely,

Italo S. Cappabianca

Pennsylvania General Assembly

Senate Box 203078
Main Capitol Building
Harrisburg, PA 17120-3078
(717) 787-7680
Fax (717) 772-4524

LOCAL GOVERNMENT COMMISSION
Created in 1935

EXECUTIVE DIRECTOR
Virgil F. Puskarich

ASSISTANT DIRECTOR
Michael P. Gasbarre

MEMORANDUM

to: Representative Italo S. Cappabianca

from: Virgil F. Puskarich, Executive Director
Local Government Commission

subject: Tax splitting -- two coterminous political subdivisions levying an amusement tax on the same transaction

date: 20 January 1998

We are pleased to provide you with our findings regarding the question you discussed with Patrick Kielty, Esquire, and Philip Bear of the Local Government Commission staff relative to the above-referenced matter. As customary, nothing herein should be construed as a legal opinion, since we are prohibited from rendering legal advice or consultation. The following information is not a substitute for legal advice and does not constitute a binding determination of the rights or remedies of any political subdivision or any individual. Our comments should be corroborated by the appropriate solicitors or private legal counsel, as circumstances warrant.

The relevant portion of Section 8 of the Local Tax Enabling Act (53 P.S. § 6908, relating to limitations on rates of specific taxes) applicable to your inquiry is attached hereto.

We found no appellate case law addressing the question which you posed, but our reading of the statutory language leads us to draw the following conclusions:

1. A single political subdivision can levy the amusement tax up to ten (10%) percent.

2. If a second political subdivision levies the amusement tax on the same subject, this will reduce the tax levied by the first political subdivision to five (5%) percent, but only if the tax imposed by the first political subdivision was six (6%) percent or greater.

3. The effect of a second political subdivision imposing the tax would be to implement the "halving" provisions of Section 8, so that each of the two political subdivisions levying the tax shall, during the time such duplication of the tax exists, be limited to five (5%) percent or one-half of the total authorized rate of ten (10%) percent.

4. Either of the two political subdivisions levying the amusement tax, of course, could impose a tax of less than five (5%) percent, but neither could impose a tax of more than five (5%) percent without the agreement of the other; and, in no event, could the total tax imposed by both exceed the allowable ten (10%) percent total.

One additional note involves your separate inquiry concerning a fixed annual tax on mechanical devices. This kind of tax is a type of amusement tax but considered distinct from a tax on admission to events. As indicated in the attached discussion from the Taxation Manual, published by the Center for Local Government Services in the Department of Community and Economic Development, the tax ostensibly is based on gross receipts and cannot exceed ten (10%) percent of each individual price of activating the machine. Presumably, ordinances imposing a fixed annual rate per machine are financially acceptable to the owners and have not been challenged. Such a fixed-amount tax, however, if applied to other amusement and athletic events, could give rise to a "uniformity" challenge due to the fact that varying amusements have differing prices of admissions. If a fixed rate of, for example, 25 cents per event were imposed, there would be a marked difference between events with an admission price of $5.00 and those with an admission price of $50.00. It is possible that a fixed rate tax on mechanical devices also violates uniformity, but we are unaware of any court challenge having been taken to determine this issue.

We hope that this response will prove useful to you. We reiterate that this correspondence should not be considered legal advice or consultation.

VFP:pfk

CARL L. MEASE
DIRECTOR

ROBERT W. ZECH, JR.
ASSISTANT DIRECTOR

LEGISLATIVE REFERENCE BUREAU
ROOM 641 MAIN CAPITOL BUILDING
HARRISBURG, PENNSYLVANIA 17120-0033

February 4, 1998

The Honorable Italo S. Cappabianca
House of Representatives
Room 30, East Wing
Harrisburg, PA 17120

Dear Representative Cappabianca:

In response to your letter dated January 26, 1998, enclosed is the Bureau's opinion in relation to the questions you raised regarding the amusement tax.

As you are no doubt aware, employees and officers of the Bureau are strictly prohibited from issuing legal opinions to private citizens under section 9 of the Act of May 7, 1923 (P.L. 158, No. 119), 46 P. S. §459 (1969). The enclosed opinion is issued to you and your staff for your own use.

Please contact me if I can be of further assistance to you in this matter.

Sincerely,

Carl L. Mease

Director

CLM/erd

Enclosure

Commonwealth of Pennsylvania
Legislative Reference Bureau
January 29, 1998

SUBJECT: Municipal Tax Sharing; Uniformity of Flat Municipal Tax on Vending Machines

To: Honorable Italo S. Cappabianca
House of Representatives

FROM: Vincent C. DeLiberato, Jr. *Vinie*
Drafting Attorney

QUESTIONS PRESENTED

I. If the [S]chool [D]istrict of the City of Erie were to impose a 4% amusement tax, could the municipality (City of Erie) request one half of the 4% which would be 2% of the tax similar to what the municipality and school district presently are doing with the wage tax?

II. Is it possible that such a flat [amusement] tax on vending machines or mechanical devices violates the uniformity clause of the [S]tate [C]onstitution?

BRIEF ANSWERS

I. No. The City of Erie and the School District of the City of Erie are each entitled to impose a tax of up to 5% on admissions to places of amusement; there is no statutory entitlement for revenue sharing. To effect the desired revenue sharing, each taxing entity would have to impose a tax of 2%.

II. Yes. A flat tax on vending machines raises a

uniformity problem. Although there is a division of authority, the safer course is to avoid a flat tax on vending machines.

STATEMENT OF FACTS

You are concerned with the City of Erie [hereinafter referred to as the City] and the School District of the City of Erie [hereinafter referred to as the School District]. You had discussed the subject questions with Patrick Kielty, Esq., and Philip Bear, of the Local Government Commission [hereinafter referred to as the Commission]. By memorandum dated January 20, 1998, Virgil F. Puskarich, Executive Director of the Commission, explained and analyzed the statutory framework on Question I and noted possible constitutional problems with Question II.

By letter to me dated January 26, 1998, enclosing Mr. Puskarich's memorandum, you requested the legal opinion of the Legislative Reference Bureau on the subject questions.

With the authorization of Lynn Slabicki of your office, we are providing a copy of this memorandum to the Commission.

DISCUSSION

I. Whether a city is entitled to half of the proceeds from a 4% amusement tax levied by the school district of the city?

A political subdivision may not levy a tax in excess of 10% on admission to places of amusement. Section 8(6) of the Local Tax Enabling Act, as amended October 11, 1984 (P.L.885, 890, No.172), 53 P.S. § 6908(6) (1997). If two political subdivisions impose a tax authorized by one of the clauses of section 8 of the Local Tax Enabling Act on the same taxable event during the same taxable year: the maximum rate[1] under the applicable clause for each political subdivision shall be reduced by 50%. Second undesignated paragraph, *id.*, 53 P.S. § 6908, 2d undesignated par.

The cited provisions of the Local Tax Enabling Act use the term "political subdivision." In statutory language, a political subdivision includes a city and a school district. Definition of "political subdivision" in 1 Pa.C.S. (1975 Ed.) § 1991, def. "political subdivision" in 1 Pa.C.S.A. § 1991 (1995). The cited provisions of the Local Tax Enabling Act apply to the City and the School District.

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[1] There is an exception for income tax in a city of the second class A. Fourth undesignated paragraph of section 8 of the Local Tax Enabling Act, as amended October 11, 1984 (P.L.885, 891, No.172), 53 P.S. § 6908, 4th undesignated par. (1997). The exception is not material to the subject question.

We are dealing with a municipal tax-sharing provision: "It is the intent ... to limit the rates of taxes referred to in this section so that the entire burden of one tax on a person, subject, business, transaction or privilege shall not exceed the limitations prescribed in this section ...." Third undesignated paragraph of section 8 of the Local Tax Enabling Act, *id.*, 1984 (P.L.891), 53 P.S. § 6908, 3d undesignated par. The various clauses of section 8 limit the maximum tax rate to be imposed on the same taxable event.

If the School District is the only political subdivision to levy a tax on admission to places of amusement, the School District can levy a tax of up to 10%. If the City is the only political subdivision to levy a tax on admission to places of amusement, the City can levy a tax of up to 10%. If both the School District and the City levy a tax on admission to places of amusement during the same taxable year: the School District can levy a tax of up to 5%, and the City can levy a tax of up to 5%. If the School District is already levying a tax of 4% on admission to places of amusement, the City can levy a tax of up to 5% on admission to places of amusement in the same taxable year.

There is no statutory authority for one political subdivision to take half of the proceeds of a tax imposed by another political subdivision on the same taxable event. *See* second and third undesignated paragraphs of section 8 of the Local Tax Enabling Act, 1984 (P.L.890 and 891), 53 P.S. § 6908, 2d and 3d undesignated pars. The legislative intent of section 8 is to limit the rate of taxation on the specified subjects. *Coney Island, II, Inc., v. Pottsville Area School District*, 72 Pa. Commonwealth Ct. 461, 467, 457 A.2d 580, 583 (1983). The City is not entitled to 2% of a 4% tax on admission to places of amusement imposed by the School District.

II. Whether a flat tax on vending machines violates the uniformity clause of the Pennsylvania Constitution?

All taxes must be uniform on the same class of subjects within the territorial jurisdiction of the taxing authority. Pa. Const. (1984 Ed.) Art. VIII, § 1, *Purdon's Statutes* Const. Art. 8, § 1 (1994). A flat tax on vending machines, in essence, taxes a method of doing business. There is no Statewide judicial decision on the uniformity aspects of such a tax. Lower Pennsylvania courts are divided.

There is one decision upholding a flat tax on vending machines against a uniformity challenge. Making a tax classification on the basis of the method of transacting business does not violate the uniformity clause. *Shultz v. O'Neill*, 21 D.&C.2d 255, 264 (Pa. C.P. 1959). The case involved an attack on

an annual tax on the privilege of using vending machines in a township. The court held that the differences in the manner of transacting business are a legitimate basis for tax classification. *Id.* at 263.

The premise of *Shultz*, that a different method of doing business justifies a different tax burden, has been accepted to a degree in sales tax on vending machines. A different method of merchandizing and a different consumer base justify a different tax burden. *CRH Catering Co. v. Commonwealth*, 104 Pa. Commonwealth Ct. 91, 99, 521 A.2d 497, 501 (1987), *aff'd on rehearing*, 114 Pa. Commonwealth Ct. 514, 518, 539 A.2d 38, 40 (1988). There, a sales tax classification subjected vending machines to sales tax applicable to restaurants and denied vending machines the sales tax exclusion applicable to grocery stores. In sustaining the classification against a uniformity challenge, the court reasoned that vending machines are more like restaurants than grocery stores. *Id.*, 104 Pa. Commonwealth Ct. at 100, 521 A.2d at 501-02.

The tax upheld in *CRH* was not, it must be pointed out, a flat tax. It was a tax on gross receipts. *CRH*, 104 Pa. Commonwealth Ct. at 101, 521 A.2d at 502, 114 Pa. Commonwealth Ct. at 519, n.2, 539 A.2d at 41, n.2. *CRH*, thus, does not indicate Statewide acceptance of *Shultz* on uniformity of a flat tax on vending machines. In validating a municipal license fee on coin-operated musical devices as a valid exercise of the police power, the Supreme Court did not decide the validity of a

license fee, in the same ordinance, on all vending machines: "[T]he question as to the validity of the section of the ordinance which requires a license for possession of 'any vending machines of whatsoever nature' operated by the insertion ... of a coin or disk, is not before us for consideration in these proceedings...." *Adams v. New Kensington*, 357 Pa. 557, 567, 55 A.2d 392, 397 (1947).

Other lower courts have taken an approach opposite to that of *Shultz*. A flat license tax on vending machines is discriminatory because it imposes a tax rated differently upon persons engaged in the same business. *Automatic Vending Sales Company v. City of Johnstown*, 19 D.&C. 474 (Pa. C.P. 1933). The constitutional requirement of uniformity is violated by a tax imposed on a method of doing business. *Commonwealth ex rel. v. Bradley*, 40 D.&C. 584, 599 (Pa. C.P. 1940). The case involved a prosecution for violation of a city ordinance requiring a license fee for vending machines. After being convicted, the defendant successfully challenged the validity of the ordinance. The court first held that the measure was a flat tax. *Id.* at 592. As a flat tax, the court found it to be in violation of uniformity: "[T]he tax is discriminatory and lacking in uniformity ...." *Id.* at 600. The holding of *Bradley* has been adopted in Crawford County. *Cambridge Springs Borough v. Kineston*, 84 D.&C. 110, 114-16 (Pa. Qtr. Sess. 1952).

A flat tax on vending machines should be avoided. A tax on vending machines should be at a rate based upon gross receipts.

CONCLUSION

A political subdivision may not levy a tax in excess of 10% on admission to places of amusement. If two political subdivisions levy a tax on admission to places of amusement in the same taxable year, the maximum rate for each political subdivision is 5%. There is no statutory authority for one political subdivision to take half of the proceeds of a tax imposed by another political subdivision on the same taxable event.

If both the School District and the City levy a tax on admission to places of amusement during the same taxable year: the School District can levy a tax of up to 5%, and the City can levy a tax of up to 5%. If the School District is already levying a tax of 4% on admission to places of amusement: the City can levy a tax of up to 5% on admission to places of amusement during the same taxable year, but the City is not entitled to share 2% of the 4% imposed by the School District.

All taxes must be uniform on the same class of subjects within the territorial jurisdiction of the taxing authority. A flat tax on vending machines, in essence, taxes a method of doing business.

There is lower court authority in Pennsylvania for the proposition that differences in the manner of transacting business are a legitimate basis for tax classification, which (basis) justifies, for uniformity purposes, a flat tax on vending

machines. This proposition has not been accepted on a Statewide basis. The contrary lower court authority in the State holds that a flat tax on vending machines is lacking in uniformity because it taxes, in a discriminatory manner, persons engaged in the same business.

The safest course is to avoid a flat tax on vending machines and to base a tax on vending machines upon gross receipts.

VDL/alg
cc: Local Government Commission