

Opinion No. 2013-103

December 18, 2013

The Honorable Eddie Joe Williams
State Senator
401 Cobblestone Drive
Cabot, Arkansas 72023

Dear Senator Williams:

This is my opinion on your questions about uses of revenues from a tax levied under the Advertising and Promotion Commission Act (the “Act”).¹ The Act authorizes a municipal tax, sometimes referred to as the “hamburger tax,” on hotel and restaurant sales (the “A&P tax”).² Tax revenues are deposited in a municipal advertising and promotion fund (the “A&P fund”).³ A city levying the A&P tax must create a municipal advertising and promotion commission (the “A&P commission”).⁴

Your questions are:

1. Can Advertising and Promotion taxes be used to compensate referees during a basketball tournament sponsored by the local school district?
2. Can Advertising and Promotion taxes be used to fund athletic equipment for a local school district?

¹ A.C.A. §§ 26-75-601 to -619 (Repl. 2008, Supp. 2013).

² See A.C.A. § 26-75-602 (Supp. 2013).

³ See A.C.A. § 26-75-604 (Repl. 2008).

⁴ See A.C.A. § 26-75-605 (Repl. 2008).

RESPONSE

Answers to your questions will depend on the facts and circumstances of individual cases as they arise. Thus I cannot render an opinion applicable in all instances. Additionally, governing law does not provide unequivocal answers to your questions even if one assumes favorable facts. Legislative clarification is warranted. In my opinion, however, absent extraordinary facts, it is more likely than not that a court would defer to an A&P commission's determinations to use A&P tax revenues to (i) pay referees at a school district-sponsored basketball tournament held at a school district-owned sports facility in the city, or (ii) fund athletic equipment that is part of such a facility. An A&P commission's authority to fund athletic equipment that is not part of a "public recreation facility" is even less clear.

Law Applicable to Both Your Questions

A statute both authorizes and limits uses of A&P tax revenues.⁵

⁵ A.C.A. § 26-75-606(a), (b) (permissible uses) and (c) (limits) (Repl. 2008); *see generally* Op. Att'y Gen. 2011-005 (A&P commission may spend amounts in A&P fund only as authorized in A.C.A. § 26-75-606(a) or (b), and only if not barred by A.C.A. § 26-75-606(c)). The statute provides:

26-75-606. Use of funds collected.

(a)(1)(A) In the manner as shall be determined by the municipal advertising and promotion commission, all funds credited to the city advertising and promotion fund pursuant to this subchapter shall be used for the:

- (i) Advertising and promoting of the city and its environs;
- (ii) Construction, reconstruction, extension, equipment, improvement, maintenance, repair, and operation of a convention center;
- (iii) Operation of tourist promotion facilities in the city or the county where the city is located if the city owns an interest in the convention center or facility, and facilities necessary for, supporting, or otherwise pertaining to, a convention center; or
- (iv) Payment of the principal of, interest on, and fees and expenses in connection with bonds as provided in this subchapter.

(B) The commission may engage such personnel and agencies and incur such administrative costs as it deems necessary to conduct its business.

(2)(A) The commission is the body that determines the use of the city advertising and promotion fund.

(B) Pursuant to this section, if the commission determines that funding of the arts is necessary for or supporting of its city's advertising and promotion endeavors, the commission may use its funds derived from the hotel and restaurant tax.

Whether A&P tax revenues may be used for a proposed purpose is a question that turns on the facts and circumstances of the case.⁶ The statute provides that the A&P commission “is the body that determines the use of the city [A&P] fund.”⁷ An A&P commission has wide discretion to determine whether the statute permits

(3)(A) The commission may purchase, own, operate, sell, lease, contract, or otherwise deal in or dispose of real property, buildings, improvements, or facilities of any nature in accordance with this subchapter.

(B) If the commission is dissolved, the city shall assume the authority under subdivision (a)(3)(A) of this section.

(b)(1)(A) Any city of the first class that may levy and does levy a tax pursuant to this subchapter may use or pledge all or any part of the revenues derived from the tax for the purposes prescribed in this subchapter or for the operation of tourist-oriented facilities, including, but not limited to, theme parks and other family entertainment facilities or for the retirement of bonds issued for the establishment and operation of other tourist-oriented facilities, including, but not limited to, theme parks and other family entertainment facilities.

(B) These revenues shall be used or pledged for the purposes authorized in this subsection only upon approval of the commission created pursuant to this subchapter.

(2) Funds credited to the city advertising and promotion fund pursuant to this subchapter may be used, spent, or pledged by the commission, in addition to all other purposes prescribed in this subchapter, on and for the construction, reconstruction, repair, maintenance, improvement, equipping, and operation of public recreation facilities in the city or the county where the city is located if the city owns an interest in the center or facility, including, but not limited to, facilities constituting city parks and also for the payment of the principal of, interest on, and fees and expenses in connection with bonds as provided in this subchapter in the manner as shall be determined by the commission for the purpose of such payment.

(c)(1) All local taxes levied as authorized in § 26-75-602(a) shall be credited to the city advertising and promotion fund and shall be used for the purposes described in subsections (a) and (b) of this section.

(2) The taxes shall not be used:

(A) For general capital improvements within the city or county;

(B) For the costs associated with the general operation of the city or county; or

(C) For general subsidy of any civic group or the chamber of commerce.

(3) However, the commission may contract with such groups to provide to the commission actual services that are connected with tourism events or conventions.

(4) The authorization and limitations contained in this subsection shall be reasonably construed so as to provide funds for promoting and encouraging tourism and conventions while not allowing such special revenues to be utilized for expenditures that are normally paid from general revenues of the city.

⁶ See, e.g., Op. Att’y Gen. 2008-121.

⁷ A.C.A. § 26-75-606(a)(2)(A).

a proposed use.⁸ And an administrative body’s interpretation of a controlling statute is given considerable deference and will not be overturned unless clearly wrong.⁹

Question 1 – Can Advertising and Promotion taxes be used to compensate referees during a basketball tournament sponsored by the local school district?

The part of the statute I deem most likely to be interpreted as authorizing this use is the provision that allows A&P tax proceeds to be used for “operation of public recreation facilities in the city. . . .”¹⁰ The relevant inquiries are thus (a) whether providing referees for a tournament held in a facility is part of “operating” the facility, (b) whether a school district-owned¹¹ sports facility such as a high school basketball gymnasium – where I assume for purposes of this opinion the tournament will be held – is a “public recreation facilit[y]” within the Act’s meaning, and (c) whether the facility is in the city.

I believe providing referees for a tournament held in a facility is part of “operating” the facility. Certainly conducting a tournament in a facility is part of operating it, and providing referees is an integral part of conducting a tournament.

I know of no authority squarely addressing the question of whether a school district-owned sports facility such as a high school basketball gymnasium is a

⁸ See, e.g., Op. Att’y Gen. 2002-101 and 2008-121, and opinions cited in the latter.

⁹ See, e.g., *Brookshire v. Adcock*, 2009 Ark. 207 at 4, 307 S.W.3d 22 (“administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies”).

¹⁰ A.C.A. § 26-75-606(b)(2).

¹¹ The law allows an A&P commission to spend A&P tax revenues on “public recreation facilities in the city or the county where the city is located if the city owns an interest in the . . . facility” A.C.A. § 26-75-606(b)(2); see also A.C.A. § 26-75-606(a)(1)(A)(iii) (identical restriction on using money A&P tax revenues for “[o]peration of tourist promotion facilities”). I recently opined that the statute’s ownership requirement applies only when the facility is located outside the city. Op. Att’y Gen. 2012-101. Hence the statute permits an A&P commission to support an in-city public recreation facility owned by a third party that is a public body. *But see infra* note 16 regarding private recipients.

“public recreation facilit[y]” within the Act’s meaning.¹² But words in statutes are construed just as they read, giving them their ordinary and usually accepted meanings, and legislative intent is gathered from the plain meaning of the language used.¹³

Is a sports facility such as a high school basketball gymnasium a “public” facility? I have assumed that the facility is owned by the school district, a public body. And I further assume that events scheduled at the facility, including the contemplated tournament, are open to the public.¹⁴ I therefore conclude that, absent extraordinary facts, such a facility is likely “public.”

Is a school district-owned sports facility such as a high school basketball gymnasium a “recreational” facility? I stated on another occasion that

visiting a museum would appear to be consistent with the following definitions of the term “recreation”:

¹² My predecessors and I have rendered opinions on spending A&P tax revenues to renovate and repair a high school’s bleachers and concession stand area (Op. Att’y Gen. 2007-221) and “on . . . athletic facilities” in general (Op. Att’y Gen. 2005-176). These opinions were expressly (with respect to the former) or impliedly (with respect to the latter) to the effect that the “public recreation facilities” part of the statute did not authorize the expenditure because the city had no ownership interest in the school facilities. As discussed above, however, I now deem the ownership requirement not to apply to public recreation facilities located in the city. *See supra* note 11. The opinions were further to the effect that, depending on the facts and circumstances, the expenditures might nonetheless be permissible under A.C.A. § 26-75-606(c)(4), which provides that subsection (c) “shall be reasonably construed so as to provide funds for promoting and encouraging tourism and conventions,” notwithstanding that the proposed use was not one clearly and expressly authorized in A.C.A. § 26-75-606(a) or (b). More recently, however, I have rejected the interpretation of A.C.A. § 26-75-606(c)(4) underlying those opinions and have opined that A&P tax revenues may be used only as expressly authorized in A.C.A. § 26-75-606(a) or (b), and only if not barred by A.C.A. § 26-75-606(c). Op. Att’y Gen. 2011-005; *accord* Op. Att’y Gen. 2012-101. I reaffirm the more recent opinions here and restate my conclusion that A.C.A. § 26-75-606(c)(4) does not in and of itself authorize any expenditure of A&P tax revenues.

¹³ *E.g., Magness v. State*, 2012 Ark. 16, *3-*4, 386 S.W. 3d 390.

¹⁴ *See* Op. Att’y Gen. 2012-101 (a state university-owned performing arts facility with performances generally open to the public is likely “public” for purposes of this provision of the Act).

1. refreshment by means of some pastime, agreeable exercise, or the like. 2. a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.

Random House Webster's Unabridged Dictionary (2d ed. 1999).^[15]

Attending or participating in games and other activities likely to be held in a school district-owned sports facility such as a high school basketball gymnasium is likewise probably "recreational" within those definitions.

I therefore conclude that, absent extraordinary facts, a school district-owned sports facility such as a high school basketball gymnasium likely is a "public recreation facilit[y]," as that term is used in the Act.

Whether such a facility is "in the city" is self-evident and I assume for purposes of this opinion that it is.

It is accordingly my view that, absent extraordinary facts, it is more likely than not that a court would defer to an A&P commission's determination that using A&P tax revenues to pay referees at a school district-sponsored¹⁶ basketball tournament held at a school district-owned sports facility in the city is within the meaning of

¹⁵ Op. Att'y Gen. 2007-276.

¹⁶ School district sponsorship of the tournament is an important fact underlying your question. The statute prohibits using A&P tax revenues for the "general subsidy of any civic group or the chamber of commerce." A.C.A. § 26-75-606(c)(2)(C). Any significant involvement in the tournament by any civic group or chamber of commerce might compel a different conclusion. With respect to the possible involvement in the tournament of any private party, you should also be aware of a potential constitutional issue. Because the third-party prospective recipient of A&P tax revenues in your question – a school district – is a public body, a constitutional prohibition on donating public money to private entities likely does not come into play. *See* Ark. Const. art. 12, § 5 (prohibiting cities from "obtain[ing] or appropriat[ing] money for . . . any corporation, association, institution or individual"); *compare, e.g.,* Op. Att'y Gen. 2007-276 (A&P commission probably may not donate to private entity operating city history museum), *with, e.g.,* Op. Att'y Gen. 2012-066 (county probably may donate to city). The constitutional prohibition also does not apply to payments that are consideration under a valid contract. *See, e.g., City of Ft. Smith v. Bates*, 260 Ark. 777, 544 S.W.2d 525 (1976) (Ark. Const. art. 12, § 5, does not limit city's power to give consideration under contract); *see also* A.C.A. § 26-75-606(c)(3) (permitting A&P commission to contract with civic group or chamber of commerce for certain services).

the phrase “operation of [a] public recreation facilit[y] in the city” and thus is a permissible use of A&P tax revenues.

Question 2 – Can Advertising and Promotion taxes be used to fund athletic equipment for a local school district?

You have provided no factual context for this question. The facts that might be present in a given case are so varied and uncertain that I cannot answer your question in a way that would apply across the board. I will, however, discuss in general how an A&P commission and its counsel might consider proposals to fund athletic equipment for a school district.

I reiterate that any use of A&P tax revenues must be authorized by A.C.A. § 26-75-606(a) or (b), and that nothing in A.C.A. § 26-75-606(c), particularly subsection (c)(4), authorizes any use of A&P tax revenues independently of A.C.A. § 26-75-606(a) or (b).¹⁷

Which provisions of A.C.A. § 26-75-606(a) or (b) might authorize the proposed use? In my view, the most likely is the one discussed in my response to your first question, which allows use of A&P tax revenues not only for operation but also for “equipping” of public recreation facilities within the city.¹⁸

As the statute expressly permits equipping of a public recreation facility,¹⁹ it is my view that, absent extraordinary facts, it is more likely than not that a court would defer to an A&P commission’s determination that using A&P tax revenues for items that equip a school district-owned sports facility in the city comes within the meaning of the phrase “equipping . . . of [a] public recreation facilit[y] in the city” and thus is a permissible use of A&P tax revenues.

¹⁷ See *supra* note 12.

¹⁸ A.C.A. § 26-75-606(b)(2).

¹⁹ I discuss in my answer to your first question the determination of whether a facility is a “public recreation facility” and my assumption that the facility is located in the city.

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The statute does not, on the other hand, clearly authorize using A&P tax revenues to buy athletic equipment that does not equip a public recreation facility.²⁰ The statute does permit the use of A&P tax revenues for “[a]dvertising and promoting of the city and its environs. . . .”²¹ One might conceive of extraordinary facts under which it could be permissible to fund athletic equipment under this authorization but the possibility is remote in my estimation.

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JMB:cyh

²⁰ A predecessor in this office opined that, depending on the facts and circumstances, A.C.A. § 26-75-606(c)(4) might authorize an A&P commission to use A&P tax revenues to purchase football uniforms for a public school team. Op. Att’y Gen. 2002-310. As discussed above, I have rejected that interpretation of A.C.A. § 26-75-606(c)(4). *See supra* note 12.

²¹ A.C.A. § 26-75-606(a)(1)(A)(i).