



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

(304) 558-2021
Fax (304) 558-0140

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Robert S. Kiss
Cabinet Secretary, West Virginia Department of Revenue
Chair, West Virginia Municipal Home Rule Board
State Capitol Complex
1900 Kanawha Blvd. E, Building 6, Room 553
Charleston, WV 25305

Dear Secretary Kiss:

You have asked for an Opinion of the Attorney General about whether a municipality participating in the West Virginia Home Rule Pilot Program may collect municipal sales tax on certain goods and services before a reduction or elimination in the municipal business or occupation tax goes into place. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General “shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . [a] state officer, board or commission.” To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

Your letter concerns the proposed imposition of a sales tax in the City of Parkersburg (the “City”) while the City continues to collect a business and occupation tax for six months. According to your letter, the City has passed an ordinance that would provide for the collection of a sales tax beginning on July 1, 2015. *See* Ordinance to Amend the Ordinances for the City of Parkersburg, West Virginia, by Enacting a New Chapter, “Article 778: Consumer Sales and Use Tax,” to Impose a One Percent Consumer Sales and Use Tax. The City also intends to eliminate and reduce business and occupation taxes, but only after one full cycle of collections of the sales and use tax. *See* Ordinance Amending and Re[e]nacting Portions of Article 779: Business and Occupation Taxes in the City of Parkersburg. Thus, you explain, the City’s separate ordinance to eliminate or reduce business and occupation taxes is not scheduled to take effect until January 1, 2016, six months after the implementation of the new sales tax.

Your letter raises the following legal question:

Under West Virginia Code § 8-1-5a, can a municipality impose a sales tax before a reduction in the business or occupation tax goes into effect?

We begin with the ordinary meaning of the words of the statute, which we believe require the business and occupation tax reductions to occur prior to or simultaneous with the imposition of the sales and use tax. West Virginia Code § 8-1-5a(i)(14) provides that a municipality participating in the Municipal Home Rule Pilot Program “may enact a municipal sales tax up to one percent if it reduces or eliminates its municipal business or occupation tax.”* Giving these “[u]ndefined words and terms . . . their common, ordinary and accepted meaning,” Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 527, 336 S.E.2d 171, 173 (1984), we read the conditional language to mandate that reduction or elimination in the business or occupation tax precede or coincide with the implementation of a new sales tax. For example, if a parent tells a child that he may play outside “if you finish your homework,” the ordinary and accepted meaning of this instruction is that the child must finish his homework before playing outside. An ordinary person would not understand the instruction to mean that the child may play outside so long as he commits to completing his homework within a reasonable time after playing outside.

Other parts of the statute support this ordinary reading of the text. It is well established that courts “review [an] act or statute in its entirety to ascertain legislative intent properly.” Syl. Pt. 2, in part, *In re Donald M.*, 233 W. Va. 416, ___, 758 S.E.2d 769, 771 (2014) (quoting Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 14, 217 S.E.2d 907, 908 (1975)). West Virginia Code § 8-1-5a(i)(14) provides that “if a municipality subsequently reinstates or raises the municipal business and occupation tax it previously reduced or eliminated under the Municipal Home Rule Pilot Program, it shall eliminate the municipal sales tax enacted under the Municipal Home Rule Pilot Program.” This requirement—which prohibits backsliding by a municipality—is further proof that the Legislature did not intend to allow a new municipal sales tax to coexist with the previous business and occupation tax regime.

To the extent there is any ambiguity in the statute, our reading is compelled by several long-standing rules of construction that require municipal taxing power to be read narrowly. As the West Virginia Supreme Court of Appeals has explained, “[a] municipality has no inherent power to levy taxes,” and “it can do so only by virtue of the authority delegated to it by the legislature.” Syl. Pt. 1, in part, *Hukle v. City of Huntington*, 134 W. Va. 249, 249, 58 S.E.2d 780, 781 (1950) (quoting *City of Fairmont v. Bishop*, 68 W. Va. 308, 313, 69 S.E. 802, 803 (1910)). Because of this limited taxing authority possessed by municipalities, a statute that vests a municipality with authority to impose a tax “must be strictly construed” and “all doubts should be resolved against the city and in favor of the taxpayer.” *Id.* A municipality that seeks to impose a tax “must show that all conditions essential to the lawful exercise of power delegated to

* Your letter cited West Virginia Code § 8-1-5a(k)(6) for this language. Since the date of your letter, Senate Bill 323, which amended and reenacted West Virginia Code § 8-1-5a, has gone into effect. Acts 2015, S.B. 323, effective June 12, 2015. Under the amended text, the provision governing taxation issues is codified at West Virginia Code § 8-1-5a(i)(14).

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it have been complied with.” *Hukle*, 134 W. Va. at 255, 58 S.E.2d at 783 (quoting *Bishop*, 68 W. Va. at 313, 69 S.E. at 803). Under these rules of construction, any ambiguity must be construed to limit the taxing power and, thus, to require that the reduction or elimination of the business or occupational tax be effective prior to or concurrent with the collection of the new sales tax.

Accordingly, we do not believe that the City’s proposed course of action comports with the law. By delaying the effective date of the ordinance reducing or eliminating the business and occupation taxes, the City will not have actually changed those taxes until well after the sales tax goes into effect. See *State ex rel. Richey v. Hill*, 216 W. Va. 155, 166 n.16, 603 S.E.2d 177, 188 n.16 (2004) (noting that a statute applied only after its effective date). Indeed, because an ordinance may usually “be repealed . . . by another ordinance or an instrument of equal dignity,” the City may never reduce or eliminate business or occupation taxes. Syl. Pt. 3, in part, *State ex rel. Brown v. Corporation of Bolivar*, 209 W. Va. 138, 140, 544 S.E.2d 65, 67 (2000) (quoting Syl. Pt. 3, *Bittinger v. Corporation of Bolivar*, 183 W. Va. 310, 311, 395 S.E.2d 554, 555 (1990)). For all the reasons explained above, we do not believe this is consistent with the Legislature’s intent.

Sincerely,



Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

Gilbert C. Dickey
Assistant Attorney General