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OFFICIAL OPINION 2004-10

The Honorable Tim Berry
Treasurer of State
Indianapolis, Indiana 46204

Re: **Distribution of wagering tax under Indiana Code section 4-33-13-5**

Dear Treasurer Berry:

This letter responds to your request for an advisory opinion on the appropriate interpretation of Indiana Code section 4-33-13-5 relating to the distribution of riverboat wagering taxes. That statute directs your office to pay certain expenses and gives detailed instructions for the distribution of the money in the state gaming fund. Your office is also required to certify a "base year revenue" figure that puts a cap or upper limit on the total amount of wagering taxes annually distributed to a city or county having a riverboat.

We have also received correspondence from a number of legislators representing districts in which riverboats are located suggesting that the legislative intent was that base year revenue be calculated before making deductions for the Commission's expenses, and that the statute is ambiguous in this regard.

It is our opinion that the statute is not ambiguous, and that base year revenue is calculated after deducting from the state gaming fund the amount necessary to cover the Gaming Commission's expenses of administering riverboat gambling.

ANALYSIS

Money from riverboat gambling authorized by Indiana Code, title 4, article 33 flows to the state, its agencies, or its local units of government from two sources: the riverboat admissions tax and the riverboat wagering taxes.

The riverboat admissions tax, authorized and described at Indiana Code section 4-33-12-6, is distributed primarily to the local units of government where the riverboat is located, with additional allocations also made to the State Fair Commission, to the Division of Mental Health and Addiction, and to the Horse Racing Commission. This guarantees the designated entities an annual, stable, recurring amount of revenue generated by admissions taxes. If the amount of

admissions taxes available for distribution falls below the base amount, the entity receives a supplemental distribution pursuant to Indiana Code section 4-33-13-5(g).

The tax on adjusted gross receipts from riverboat gambling (the "wagering tax") is authorized by Indiana Code section 4-33-13-1. Indiana Code section 4-33-13-2 establishes the state gaming fund, and Indiana Code section 4-33-13-3 requires the department of revenue "to deposit tax revenue collected under this chapter in the state gaming fund." It is from this fund that the State's costs of administering riverboat gambling are paid:

Sufficient funds are annually appropriated to the [Indiana gaming] commission from the state gaming fund to administer this article [Indiana Code article 4-33, Riverboat Gambling].

Ind. Code § 4-33-13-4.

The General Assembly has enacted a very detailed statute covering how these wagering taxes are to be distributed. For purposes of our analysis the relevant sections of Indiana Code section 4-33-13-5, as amended by Public Law Number 192-2003, provides (emphasis added):¹

(a) This subsection does not apply to tax revenue remitted by an operating agent operating a riverboat in a historic hotel district. After funds are appropriated under section 4 of this chapter, each month the treasurer of state shall distribute the tax revenue deposited in the state gaming fund under this chapter to the following:

(1) The first thirty-three million dollars (\$33,000,000) of tax revenues collected under this chapter shall be set aside for revenue sharing under subsection (e).

(2) Subject to subsection (c), twenty-five percent (25%) of the remaining tax revenue remitted by each licensed owner shall be paid:

(A) to the city that is designated as the home dock of the riverboat from which the tax revenue was collected, in the case of:

(i) a city described in IC 4-33-12-6(b)(1)(A) [Michigan City]; or

(ii) a city located in a county having a population of more than four hundred thousand (400,000) but less than seven hundred thousand (700,000) [Lake County]; or

(B) to the county that is designated as the home dock of the riverboat from which the tax revenue was collected, in the case of a riverboat whose home dock is not in a city described in clause (A) [counties adjoining the Ohio River].

(3) Subject to subsection (d), the remainder of the tax revenue remitted by each licensed owner shall be paid to the property tax replacement fund.

(b) This subsection applies only to tax revenue remitted by an operating agent operating a riverboat in a historic hotel district [West Baden Springs] . . .

(c) For each city and county receiving money under subsection (a)(2)(A) or (a)(2)(C), the treasurer of state shall determine the total amount of money paid by the treasurer of state to the city or county during the state fiscal year 2002. The amount determined is the base year revenue for the city or county. The treasurer of state shall certify the base year revenue determined under this

¹ The full text of the statute is contained in the Appendix to this letter.

subsection to the city or county. The total amount of money distributed to a city or county under this section during a state fiscal year may not exceed the entity's base year revenue. For each state fiscal year beginning after June 30, 2002, the treasurer of state shall pay that part of the riverboat wagering taxes that:

- (1) exceeds a particular city or county's base year revenue; and
- (2) would otherwise be due to the city or county under this section;

to the property tax replacement fund instead of to the city or county.

Although it is long and exceptionally detailed, we find no ambiguity in the distribution instructions of the foregoing statute, which we summarize as follows:

1. All revenues from the wagering tax are deposited in the State Gaming Fund. Ind. Code § 4-33-13-3.
2. Sufficient funds are annually appropriated from the Fund to the Commission to administer the whole of Title 4, Article 33. Ind. Code § 4-33-13-4.
3. After funds are appropriated under section 4-33-13-4, the Treasurer is required by Indiana Code section 4-33-13-5(a)(1) to distribute \$33,000,000 to non-riverboat cities and counties.
4. After funds are appropriated under section 4-33-13-4, and subject to subsection 4-33-13-5(c), the Treasurer is required by Indiana Code section 4-33-13-5(a)(2)(A) and (B) to distribute "25% of the remaining tax revenue remitted" to the city or county that "is designated as the home dock of the riverboat from which the tax revenue was collected."
5. Indiana Code section 4-33-13-5(c) explicitly states that for each city and county receiving money under subsection (a)(2)(A) or (a)(2)(C)², the treasurer shall determine the total amount of money paid by the treasurer to the city or county, and that amount "is the base year revenue for the city or county."

Courts will construe and interpret a statute only if it is unclear and ambiguous, *Enterprise Leasing Company of Chicago v. Indiana Department of Revenue*, 779 N.E.2d 1284, 1293 (Ind. Tax Ct. 2003), but a statute whose language is clear and unambiguous is not subject to judicial interpretation. *Romine v. Gagle*, 782 N.E.2d 369, 379 (Ind. App. 2003). "If a statute is unambiguous, that is, susceptible to but one meaning, [the court] must give the statute its clear and plain meaning." *Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002). When construing a statute, the court's function is to give effect to the intent of the legislature in enacting the statutory provision, and generally the best evidence of that intent is found in the language of the statute itself. *Enterprise Leasing*, 779 N.E.2d at 1294 (citing *Mynseberge v. Ind. Dep't of Revenue*, 716 N.E.2d 629, 632 (Ind. Tax Ct. 1999)).

It is our opinion that Indiana Code section 4-33-13-5(c) is clear and unambiguous. The initial distribution of the wagering tax is to be made after the funds necessary to cover

² Public Law Number 92-2003 amended Indiana Code section 4-33-13-5 by deleting clause (a)(2)(B) relating to Patoka Lake; clause (a)(2)(C) [which authorizes distributions to certain riverboat counties] was then re-numbered (a)(2)(B). However, the corresponding change was not made in Indiana Code section 4-33-13-5(c). We view this as a purely technical error, and clause (a)(2)(C) no longer exists, but was renumbered as (a)(2)(B).

administrative costs are appropriated. The base year revenue is determined by the amount paid by the treasurer. While Indiana Code section 4-33-12-6 relating to the admissions tax specifically provides for a supplement if an entity will receive a lower distribution than the base year revenue under that section, there is no language contemplating such a supplement for a lower distribution under the wagering tax.

The General Assembly can, of course, amend Indiana Code section 4-33-13-5 to provide that base year revenue is determined by adding the amount paid to the city or county plus that entity's pro-rata share of the funds appropriated under section 4-33-13-4. Perhaps this was what was intended. But the statute, as it was passed and signed into law, can only be interpreted one way, and that is that base year revenue is determined by the total amount of money paid.

CONCLUSION

It is our opinion that Indiana Code section 4-33-13-5 is not ambiguous, and that base year revenue is calculated after deducting from the state gaming fund the amount necessary to cover the Gaming Commission's expenses of administering riverboat gambling.

Sincerely,



Stephen Carter
Attorney General

Gregory F. Zoeller
Deputy Attorney General

cc: Representative Becker
Representative Duncan
Representative Lytle
Representative Pelath
Senator Nugent
Senator Server

Appendix A
Full Text of IC 4-33-13-5.

(a) This subsection does not apply to tax revenue remitted by an operating agent operating a riverboat in a historic hotel district. After funds are appropriated under section 4 of this chapter, each month the treasurer of state shall distribute the tax revenue deposited in the state gaming fund under this chapter to the following:

(1) The first thirty-three million dollars (\$33,000,000) of tax revenues collected under this chapter shall be set aside for revenue sharing under subsection (e).

(2) Subject to subsection (c), twenty-five percent (25%) of the remaining tax revenue remitted by each licensed owner shall be paid:

(A) to the city that is designated as the home dock of the riverboat from which the tax revenue was collected, in the case of:

(i) a city described in IC 4-33-12-6(b)(1)(A); or

(ii) a city located in a county having a population of more than four hundred thousand (400,000) but less than seven hundred thousand (700,000); or

(B) to the county that is designated as the home dock of the riverboat from which the tax revenue was collected, in the case of a riverboat whose home dock is not in a city described in clause (A).

(3) Subject to subsection (d), the remainder of the tax revenue remitted by each licensed owner shall be paid to the property tax replacement fund.

(b) This subsection applies only to tax revenue remitted by an operating agent operating a riverboat in a historic hotel district. After funds are appropriated under section 4 of this chapter, each month the treasurer of state shall distribute the tax revenue deposited in the state gaming fund under this chapter as follows:

(1) Thirty-seven and one half percent (37.5%) shall be paid to the property tax replacement fund established under IC 6-1.1-21.

(2) Thirty-seven and one half percent (37.5%) shall be paid to the West Baden Springs historic hotel preservation and maintenance fund established by IC 36-7-11.5-11(b). However, at any time the balance in that fund exceeds twenty million dollars (\$20,000,000), the amount described in this subdivision shall be paid to the property tax replacement fund established under IC 6-1.1-21.

(3) Five percent (5%) shall be paid to the historic hotel preservation commission established under IC 36-7-11.5.

(4) Ten percent (10%) shall be paid in equal amounts to each town that:

(A) is located in the county in which the riverboat docks; and

(B) contains a historic hotel.

The town council shall appropriate a part of the money received by the town under this subdivision to the budget of the town's tourism commission.

(5) Ten percent (10%) shall be paid to the county treasurer of the county in which the riverboat is docked. The county treasurer shall distribute the money received under this subdivision as follows:

(A) Twenty percent (20%) shall be quarterly distributed to the county treasurer of a county having a population of more than thirty-nine thousand six hundred (39,600) but less than forty thousand (40,000) for appropriation by the county fiscal body after receiving a recommendation from the county executive. The county fiscal body for the receiving county shall provide for the distribution of the money received under this clause to one (1) or more taxing units (as defined in IC 6-1.1-21) in the county under a formula established by the county fiscal body after receiving a recommendation from the county executive.

(B) Twenty percent (20%) shall be quarterly distributed to the county treasurer of a

county having a population of more than ten thousand seven hundred (10,700) but less than twelve thousand (12,000) for appropriation by the county fiscal body after receiving a recommendation from the county executive. The county fiscal body for the receiving county shall provide for the distribution of the money received under this clause to one (1) or more taxing units (as defined in IC 6-1.1-1-21) in the county under a formula established by the county fiscal body after

receiving a recommendation from the county executive.

(C) Sixty percent (60%) shall be retained by the county where the riverboat is docked for appropriation by the county fiscal body after receiving a recommendation from the county executive. The county fiscal body shall provide for the distribution of part or all of the money received under this clause to the following under a formula established by the county fiscal body:

(i) A town having a population of more than two thousand two hundred (2,200) but less than three thousand five hundred (3,500) located in a county having a population of more than nineteen thousand three hundred (19,300) but less than twenty thousand (20,000).

(ii) A town having a population of more than three thousand five hundred (3,500) located in a county having a population of more than nineteen thousand three hundred (19,300) but less than twenty thousand (20,000).

(c) For each city and county receiving money under subsection (a)(2)(A) or (a)(2)(C), the treasurer of state shall determine the total amount of money paid by the treasurer of state to the city or county during the state fiscal year 2002. The amount determined is the base year revenue for the city or county. The treasurer of state shall certify the base year revenue determined under this subsection to the city or county. The total amount of money distributed to a city or county under this section during a state fiscal year may not exceed the entity's base year revenue. For each state fiscal year beginning after June 30, 2002, the treasurer of state shall pay that part of the riverboat wagering taxes that:

(1) exceeds a particular city or county's base year revenue; and

(2) would otherwise be due to the city or county under this section;

to the property tax replacement fund instead of to the city or county.

(d) Each state fiscal year the treasurer of state shall transfer from the tax revenue remitted to the property tax replacement fund under subsection (a)(3) to the build Indiana fund an amount that when added to the following may not exceed two hundred fifty million dollars (\$250,000,000):

(1) Surplus lottery revenues under IC 4-30-17-3.

(2) Surplus revenue from the charity gaming enforcement fund under IC 4-32-10-6.

(3) Tax revenue from pari-mutuel wagering under IC 4-31-9-3.

The treasurer of state shall make transfers on a monthly basis as needed to meet the obligations of the build Indiana fund. If in any state fiscal year insufficient money is transferred to the property tax replacement fund under subsection (a)(3) to comply with this subsection, the treasurer of state shall reduce the amount transferred to the build Indiana fund to the amount available in the property tax replacement fund from the transfers under subsection (a)(3) for the state fiscal year.

(e) Before August 15 of 2003 and each year thereafter, the treasurer of state shall distribute the wagering taxes set aside for revenue sharing under subsection (a)(1) to the county treasurer of each county that does not have a riverboat according to the ratio that the county's population bears to the total population of the counties that do not have a riverboat. The county treasurer shall distribute the money received by the county under this subsection as follows:

(1) To each city located in the county according to the ratio the city's population bears to the total population of the county.

(2) To each town located in the county according to the ratio the town's population bears to the total population of the county.

(3) After the distributions required in subdivisions (1) and (2) are made, the remainder shall be retained by the county.

(f) Money received by a city, town, or county under subsection (e) may be used only:

(1) to reduce the property tax levy of the city, town, or county for a particular year (a property tax reduction under this subdivision does not reduce the maximum levy of the city, town, or county under IC 6-1.1-18.5);

(2) for deposit in a special fund or allocation fund created under IC 8-22-3.5, IC 36-7-14, IC 36-7-14.5, IC 36-7-15.1, and IC 36-7-30 to provide funding for additional credits for property tax replacement in property tax increment allocation areas;

(3) to fund sewer and water projects, including storm water management projects; or

(4) for police and fire pensions.

However, not more than twenty percent (20%) of the money received under subsection (e) may be used for the purpose described in subdivision (4).

(g) This subsection does not apply to an entity receiving money under IC 4-33-12-6(c). Before September 15 of 2003 and each year thereafter, the treasurer of state shall determine the total amount of money distributed to an entity under IC 4-33-12-6 during the preceding state fiscal year. If the treasurer of state determines that the total amount of money distributed to an entity under IC 4-33-12-6 during the preceding state fiscal year was less than the entity's base year revenue (as determined under IC 4-33-12-6), the treasurer of state shall make a supplemental distribution to the entity from taxes collected under this chapter and deposited into the property tax replacement fund. The amount of the supplemental distribution is equal to the difference between the entity's base year revenue (as determined under IC 4-33-12-6) and the total amount of money distributed to the entity during the preceding state fiscal year under IC 4-33-12-6.

(h) This subsection applies only to a county containing a consolidated city. The county auditor shall distribute the money received by the county under subsection (d) as follows;

(1) To each city, other than a consolidated city, located in the county according to the ratio that the city's population bears to the total population of the county.

(2) To each town located in the county according to the ratio that the town's population bears to the total population of the county.

(3) After the distributions required in subdivisions (1) and (2) are made, the remainder shall be paid in equal amounts to the consolidated city and the county.