

burial benefits provided by the Acts of 1915, Burns' 59-1009, *supra*, by reason of the fact that such service is not service in the Armed Forces of the United States but rather service in a reserve force.

2. Members of the National Guard attending service schools are not afforded burial benefits under Burns' 59-1009, *supra*, by reason of such service as they are not members of the Armed Forces but rather attend service schools operated by the regular establishment in their status as members of the Indiana National Guard.
3. The same reasoning as set out in number two above would apply to time spent in summer encampments.
4. Persons on active duty for a period of two years and those engaged in six months training are entitled to the burial benefits afforded by Burns' 59-1009, *supra*, as they are members of the Armed Forces and not members of the Indiana National Guard. Further, upon completion of their duty they are separated from service in the Armed Forces and returned to their status as members of the Indiana National Guard.

OFFICIAL OPINION NO. 35

June 12, 1958

Mr. Robert J. Pitchell
Resident Director
Commission on State Tax and Financing Policy
4A-8 State House
Indianapolis, Indiana

Dear Mr. Pitchell:

You have requested my Official Opinion concerning proposed tax legislation now under study by the Commission on State Tax and Financing Policy. Your letter making that request is as follows:

"The General Assembly in 1957 directed this Commission to study the net income tax as a possible re-

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placement for the gross income tax and a major portion of the state and local property taxes (Chapter 325, Acts 1957).

"In pursuing this study several questions have been raised as to the constitutionality of certain aspects of the net income and property taxes. I am, therefore, requesting your official opinion on the three following questions:

"1. Would a net income tax be constitutional?

"2. Would a net income tax with graduated rates be constitutional?

"3. Does the constitution require that a tax must be imposed upon property, or is the Legislature given permissive powers in this field?

"I shall be looking forward to your reply."

Your first question concerning the constitutionality of a net income tax must be answered "Yes." Such a tax would be constitutional in Indiana. The Indiana Constitution, Art. 10, Sec. 8, provides as follows:

"The general assembly may levy and collect a tax upon income, from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed by law."

You will note that the above constitutional provision is couched in terminology about as broad as conceivable and would be sufficient authority for any kind of an income tax, so long as other applicable constitutional provisions were not violated. Thus, it would be possible to draft a net income tax bill for Indiana, which, if enacted by our General Assembly, would be constitutional. Stated negatively, a net income tax law in Indiana would not be unconstitutional solely because the tax base was net rather than gross income.

Your second question must also be answered in the affirmative. It is doubtless occasioned by reason of the provision in the Indiana Constitution, Art. 10, Sec. 1, providing "for a uniform and equal rate of assessment and taxation * * *." However, said constitutional provision has long and consis-

tently been construed by our courts as being applicable only to *ad valorem* or property taxation. In other words, the "uniform and equal rate of assessment" provision of our State Constitution has no applicability to an excise tax.

Examples of this are to be found in the Indiana Gross Income Tax Act, which for many years has applied different rates to different types of gross income, the rate being dependent upon the nature of the activity from which each item of the taxpayer's gross income is derived. The varying rates of the Gross Income Tax Law, so based, have been held not to violate the "uniform and equal" provision of our State Constitution in *Miles v. Department of Treasury* (1935), 209 Ind. 172, 177, 199 N. E. 372, appeal dismissed by the United States Supreme Court (1936), 298 U. S. 640, 80 L. Ed. 1372, 56 S. Ct. 750.

Another example in the excise tax field is the Indiana Chain Store License Act which imposes license fees upon store owners, which fees are graduated upwards, depending upon the number of stores owned by the licensee. This Act has likewise been held to be constitutional and not violative of the "uniform and equal" provision of our State Constitution in *State Board of Tax Comrs. v. Jackson* (1931), 283 U. S. 527, 542, 75 L. Ed. 1248, 51 S. Ct. 540, on the basis that the act is a license tax rather than an *ad valorem* tax.

The same is true also of our Indiana Inheritance Tax Law, the constitutionality of which has been upheld, notwithstanding that it provides for graduated rates. In other words, the mere fact that graduated rates were adopted in a net income tax as an excise would not of itself be unconstitutional.

My answer to your third question which is: "Does the constitution require that a tax must be imposed upon property, or is the Legislature given permissive powers in this field?" is that the Constitution does not make this requirement and the Legislature is given permissive powers in this field.

This question should not be confused with the problem considered in 1954 O. A. G., No. 18, page 58 issued March 8, 1954. In that opinion, the second question was whether household furnishings and equipment could be eliminated from the application of property tax laws. Respecting that question, the opinion

held that household furnishings and equipment could not be exempted from liability for personal property taxation, without constitutional amendment, for the reason that Art. 10, Sec. 1, of the Indiana Constitution limits that property which may be *exempted* to include "such *only* for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law." (Our emphasis) In other words, when an existing law imposes a tax upon property, a special tax-free status cannot be created for any particular property except as to such as is used for the purposes mentioned in the Constitution, as to which special exemption statutes may be enacted. However, your third question is substantially distinguishable from the problem considered in the 1954 Opinion, in that the present question is not concerned with what may be exempted from an existing property tax law, but rather as to whether the Constitution mandates that a tax be imposed upon property. There is a positive difference between the type of query which relates to whether certain property may be constitutionally *exempted* from an *existing* tax and a query as to whether the Constitution requires that a particular type of tax be imposed,—your question herein being of the latter character. The question of exemption from a property tax presupposes that such a tax is imposed. By contrast, your question basically is whether the Constitution requires any particular system of taxation.

Article 10, Sec. 1 of the Constitution provides as follows:

"The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

The above provision is as contained in the Indiana Constitution of 1852 at a time when the basic, if not the only, tax system used was that of property taxation. To my knowledge, it is the only constitutional provision which might be conceivably construed as requiring the retention of a state property tax system. However, in speaking of this constitutional provision in *Lutz v. Arnold* (1935), 208 Ind. 480, 503, 193 N. E. 840, the Indiana Supreme Court stated:

“It must be remembered that this section has no application to an excise tax, and that neither the federal, nor the Indiana Constitution limits the General Assembly to any particular form of taxation, nor prevents the imposition of any form of excise tax.”

Further, in discussing this provision of the Constitution in *State Board of Tax Comrs. v. Holliday* (1898), 150 Ind. 216, 220, 49 N. E. 14, the Court said:

“This constitutional provision does not confer the power of taxation, because that power being sovereign, it is inherent in the legislature. But the provision is rather a limitation upon the power to tax.”

Thus, although the framers of our Constitution may have contemplated that there would always be property taxation, the purpose of Art. 10, Sec. 1, was apparently not that of mandating the taxation of property, but rather that of limiting and requiring of the Legislature that such property taxes as it might enact should always satisfy the constitutional requirements of “just valuation,” “uniform and equal rate of assessment” and that any exemptions provided must be limited to those classes of property therein stated. Moreover, I know of no case which holds that the above or any other constitutional provision requires the retention of the property tax system; apparently, the precise question has not been before our courts.

Generally speaking, the only limitations imposed on the Legislature are those imposed by our Constitution, the Federal Constitution, and Acts of Congress which are paramount in certain fields.

Kirtley v. State (1949), 227 Ind. 175, 84 N. E. (2d) 712;

Townsend v. State (1897), 147 Ind. 624, 47 N. E. 19.

The Legislature has its power subject only to such limitations as are contained in the Constitution. I do not find any provision of the Indiana Constitution which limits the Legislature to imposing taxes on property only or which expressly or by necessary implication requires the retention of any form of property taxation.