

vehicle or animal on any sidewalk therein except in the necessary act of crossing.”

It is seen that the Indiana General Assembly has provided speed regulations in towns and cities, and has also provided a penalty in the event of violation thereof. As such Burns' Indiana Statutes Annotated, Section 9-2402, *supra*, is controlling, and any ordinance in regard to state highways in contravention thereof is null and void. It is to be noted, however, that this has no effect on streets and roads which are not a part of the state highway system or the routes or extension thereof in any city or town. See Acts of 1939, Chapter 48, same being Burns' Indiana Statutes Annotated (1952 Repl.), Section 47-2005.

In 1951 the General Assembly of Indiana enacted a law which would have permitted cities and towns to enact ordinances in regard to speed regulations on streets and highways within the corporate limits by House Enrolled Act No. 31. This, however, was vetoed by the Honorable Henry F. Schrickler, Governor.

It is therefore my opinion that cities and towns have no authority to enact a traffic ordinance which sets forth the same speed regulations as the State Code and that all violations of the speed regulations must be prosecuted as a violation of a state law rather than a city or town ordinance.

OFFICIAL OPINION NO. 61

July 24, 1953.

Mr. G. W. Starr, Director,
Gross Income Tax Division,
141 S. Meridian Street,
Indianapolis, Indiana.

Dear Sir:

This is in reply to your letter of May 15, 1953 in which you ask the following questions dealing with exemptions from Indiana gross income tax:

1. Exemption of the tolls which are to be collected from persons using the bridge.

OPINION 61

2. Exemption of proceeds from sale of such bonds.
3. Exemption of proceeds of bonds upon maturity or call.
4. Exemption of interest paid to the bondholders.

The Acts of the General Assembly of 1939, Chapter 79 as found in Burns' Indiana Statutes Annotated (1949 Repl.), Section 36-3010 provides in part:

"The commission is hereby authorized to provide funds * * * by the issuance of bridge revenue bonds * * *. The said bonds shall be exempt from taxation by the state of Indiana and by municipalities and political subdivisions thereof. The commission may provide for the registration of such bonds in the name of the owner as to principal alone or as to both principal and interest. * * * and the proceeds of such bonds shall be used solely for the payment of the bridge and its approaches, and for expenses incident thereto and authorized by this act, * * *. If the proceeds of the sale of such bonds, shall exceed such cost, any surplus remaining therefrom shall be paid into the fund hereinafter provided for payment of the principal and interest of said bonds."

The Acts of the General Assembly of 1933, Chapter 50, as amended, as found in Burns' Indiana Statutes Annotated (1951 Repl.), Section 64-2601 provides in part as follows:

"(a) When used in this act, the term 'person' or the term 'company', herein used interchangeably, means and includes any * * * municipal corporation or any other political subdivision of the state engaged in private or proprietary activities or business, * * *

"* * * Provided, however, That the term 'gross income' shall not include * * * the receipt of borrowed money, nor the receipt of the repayment thereof, including the receipts from the issuance of bonds or from the redemption thereof; * * *."

Article 10, Section 1 of the Indiana 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.”

In order for the exemption in Burns' Indiana Statutes Annotated, Section 36-3010, *supra*, to be constitutional it must be determined if the Toll Bridge Commission is a political subdivision of the state, and further determination must be made in relation to the collecting of gross income tax on the tolls collected by the bridge as to whether it is a proprietary or a sovereign function of the state. If it is proprietary, then the tolls are taxable. If sovereign, not taxable.

Dept. of Treasury v. Linton (1944), 223 Ind. 363, 60 N. E. (2d) 948 (Public utilities);

Dept. of Treasury v. Tipton (1945), 223 Ind. 373, 60 N. E. (2d) 957 (Swimming pool);

Dept. of Treasury v. Michigan City (1945), 223 Ind. 432, 60 N. E. (2d) 947 (Tennis courts—Also fire department);

Dept. of Treasury v. Evansville (1945), 223 Ind. 435, 60 N. E. (2d) 952 (Golf courts—airport—cemeteries).

The Supreme Court of the United States in the case of Flint v. Stone Tracy Company (1911), 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, held that a test which is properly used is when a city engages in a business which although it is a common governmental function and beneficial to the public, it is also frequently conducted by private persons (especially when the city makes a charge for the service for which it earns a profit). For example, it is no more a duty of sovereignty to supply gas to its inhabitants than the supply of water. This doctrine is sometimes summed up as where the business of the state is private and commercial or public and sovereign. It may appear that the true distinction is between the attempted taxation of these operations of the state *essential to the exer-*

cise of its governmental functions, and which the state can only do itself and those activities which are of a private character.

In the case of *Boomer v. Glenn, Collector of Internal Revenue* (1938), 21 Fed. Supp. 766, 767 the Court held that the construction and maintenance of a bridge by a municipality was a necessary *governmental function* notwithstanding the fact it being a toll bridge and provided as follows:

“* * * The question here for decision turns solely on whether the operation of a bridge by a municipality is a necessary governmental function.

“The construction and maintenance of highways and bridges as a governmental function is one of the most ancient known to the law, having had its beginning prior to the civil or common law. The Romans celebrated every victory by building a highway or bridge. Under the common law, every parish was bound of common right to keep the high roads in it in good and sufficient repair, and no class of men of whatever rank or dignity was exempt from work in the construction and repair of ways and bridges. All of the inhabitants and occupiers of lands, tenements, and hereditaments, within the parish were required six days out of every year to labor in bringing materials or repairing the highways, and every cartway leading to any market town was by the labor of its inhabitants to be made at least twenty feet wide, if the fences permitted. In case the labor of the inhabitants was not sufficient to maintain the roads and bridges, the surveyors, with the consent of the quarter sessions, were authorized to levy a tax on the property in the parish for the maintenance of highways and bridges. Cooley’s *Blackstone*, Fourth Edition, Book 1, 304.

“The obligation fixed by the English law became firmly entrenched in that of the Colonies and found its way into the statutory laws of every one of the States. No city could discharge its governmental obligations to its inhabitants without streets, and no state or county without highways. If the governmental obligation to provide roads and passways ended at the water’s edge,

many communities and states would be deprived of one of the essential functions of government. Bridges are an integral part of highways and roads, and, when it is once determined that the construction and maintenance of highways and streets is a governmental function, the construction and maintenance of bridges, *a fortiori*, is a like function.

“(3) Construction and repair of highways and streets for public travel are among the usual purposes of the creation of municipal corporations, and the expense of such functions is one of the ordinary burdens of local governments. *Rogers v. Burlington*, 3 Wall. 654, 672, 18 L. Ed. 79.”

The Toll Road Commission Act, of 1951, as found in Chapter 281 of the Acts of the General Assembly of 1951 was held constitutional in the case of *Samuel Ennis v. State Highway Commission of Indiana* (1952), — Ind. —, 108 N. E. (2d) 687, the court saying:

“The purposes enumerated * * * tend to further the public welfare, alleviate congestion on highways, and promote agricultural and industrial development, among others. Nowhere in the act is there any provision for the assessment of taxes. The payment of a tax is compulsory and not optional, and it entitles the taxpayer to receive nothing in return, other than the rights of government which are enjoyed by all citizens alike. *Yourison v. State* (1927), 33 Del. 577, 140 A. 691; *Northern Counties Trust v. Sears* (1895), 30 Ore. 388, 41 P. 931, 35 L. R. A. 188.

“Under this statute, the tolls to be charged are to be paid only by those using the toll roads. A person can use the toll roads or not at his option. If he does not use them, he need not pay toll. A person using the toll roads receives in return the privilege of using roads not bisected by crossings, and roads that are of the most modern design and embodying the latest safety devices.

“Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another’s property

OPINION 61

or improvements made, and their amount is determined by the cost of the property or improvements. People *ex rel.* Curren v. Schommer (1945), 392 Ill. 17, 63 N. E. (2d) 744, 167 A. L. R. 1347.

* * *

“The * * * commission is created for a public purpose. From a reading of the act in its entirety, it is apparent that it provides for the construction, operation, and maintenance of toll roads anywhere in the State of Indiana. The law applies to the entire state. It is neither local nor special. It is a general law under Sections 22 and 23, Article 4, of our Constitution. Bennett v. Spencer County Bridge Comm. (1938), 213 Ind. 520, 13 N. E. (2d) 547, *supra*.

“The toll road commission here created is a commission of the state created for a public purpose. Application of Oklahoma Turnpike Authority (1950), 203 Okla. 335, 221 P. (2d) 795. It could not embark on an enterprise of a private character. State *ex rel.* Allen v. Ferguson (1951), 155 Ohio St. 26, 97 N. E. (2d) 660. Despite the fact that the commission is given the characteristics of a corporation, it is still a commission of the State of Indiana. Section 36-3205, Burns' 1949 Replacement (1951 Supp.).

“The commission is not a corporation within the meaning of Section 13, Article 11, of the Constitution of Indiana.”

From the foregoing authorities it is self-evident that the building of a toll bridge which is to become an integral part of our state highway system is clearly an exercise of the sovereign function of the State of Indiana.

It is therefore my opinion :

1. That the tolls collected from persons using a bridge are exempt from gross income tax by virtue of the fact that they are collected by a political subdivision of the state acting in a strictly sovereign function rather than in a proprietary capacity.

2. The proceeds from the sale of such bonds are specifically exempted by Burns' Indiana Statutes Annotated, Section 62-2601, *supra*.

3. The proceeds from the bonds upon maturity are also specifically exempted by Burns' Indiana Statutes Annotated, Section 64-2601, *supra*.

4. The interest paid to the bondholders is specifically exempted from taxation by the gross income tax law by virtue of Burns' Indiana Statutes Annotated, Section 36-3010, *supra*.

OFFICIAL OPINION NO. 62

July 28, 1953.

Mr. R. B. Cooley, Secretary,
Indiana Stallion Enrollment Board,
West Lafayette, Indiana.

Dear Mr. Cooley:

I have your letter of June 15, 1953 in which you ask for an official opinion concerning the following questions:

"1. In view of the fact that the Indiana Stallion Enrollment Board has no funds on which to operate and faces a deficit of \$289.08 and with no provision made to meet this condition, are we legally required to process the applications for enrollments or licenses sent to our office this spring for the current year?

"2. Might the Enrollment Board be held liable for neglect of responsibility of duty if these applications for enrollments or licenses are not processed before the Acts of 1953 are promulgated, which I understand will be this summer.

"3. In case the enrollments or licenses are issued before the Acts are promulgated, could stallion owners with their stallions enrolled or licensed legally claim a refund of fees for the balance of 1953 following promulgation?

"4. Does the repeal of the Indiana Stallion Enrollment Law automatically dissolve the Indiana Enrollment Board without further action?"