Dear Sir:

Your request of September 20, 1950, for an official opinion, reads as follows:

"The State Board of Accounts in their examination of our office have raised the following question on which we request an official opinion:

"Is a company incorporated under the laws of the State of Indiana liable for tonnage tax on vessels owned by it, but registered as having Detroit, Michigan as the home port or port of hail?"

Chapter 59, Acts of 1919, Burns Statutes, Section 64-741 to Section 64-744 reads as follows:

"Navigation companies shall pay into the state treasury annually, on or before the first day of July, a sum equal to three cents (3¢) per net ton of the registered tonnage of all vessels owned by such companies; such payment to be received in lieu of all other taxes except as hereinafter provided, and no further assessment shall be made by any officer upon any vessel, barge, boat or other watercraft belonging to such companies."

"The method of taxation upon the net tonnage of vessels being in lieu of other taxation, the capital stock of such companies shall not be assessed or taxed, but such companies shall return for taxation at their home officers (offices) all personal property of every kind and description owned by said companies, excepting vessels and other actual tangible property outside the state of Indiana; which property shall be assessed to such companies as other personal property (is) taxed."

"All ships and other vessels engaged in commerce, and owned and registered under the navigation laws
of the United States at any port in the state of Indiana, shall be taxed as hereinbefore provided, at the rate of three cents (3¢) per net ton of the registered tonnage of the vessel, and all owners of such ships shall make returns as in this act provided.”

“Every navigation company incorporated under the laws of this state, and all owners of ships and other vessels registered in Indiana under the laws of the United States, shall annually, on or before the first day of July, file with the auditor of state a verified statement, in writing, containing the name, port of hail, and tonnage of every barge, boat or other water-craft owned by such company, individual or partnership on the first day of May immediately preceding, and shall thereupon pay into the state treasury a sum equal to three cents (3¢) per net ton of the registered tonnage of such vessel, and the treasurer shall thereupon issue his receipt therefor; which receipt shall show that such payment is in full for all taxes assessed against such vessel or vessels, and no other returns for taxation shall be required from navigation companies organized under this act than as are hereinbefore provided for.”

The term tonnage means the capacity of a vessel to carry cargo. See State Tonnage Tax Cases, 79 U. S. (12 Wall) 205, 225; also Way v. N. J. Steamboat Company, 133 Fed. 188, 192.

Clyde Mallony Lines v. State ex rel. Docks Commission, 296 U. S. 261 reads as follows:

“At the time of the adoption of the Constitution ‘tonnage’ was a well understood commercial term signifying in America the internal cubic capacity of a vessel. See Inman Steamship Co. v. Tinker, 94 U. S. 238, 243; 24 L. Ed. 118. And duties of tonnage and duties on imports were known to commerce as levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state and were distinct from fees or charges by authority of a state for services facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage, and the like. See Cooley v. Board of Wardens,
12 How. 299, 314; 13 L. E. 996; Inman Steamship Co. v. Tinker, supra, 94 U. S. 238, 243; 24 L. Ed. 118."

"(3) Hence the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port."

It appears that the Legislature sought to use the net tonnage of vessels as the basis or "yard stick" for all property taxes on such vessels. It is noted that the Legislature, instead of levying a tax of three (3¢) cents per net ton, used the language, "a sum equal to three (3¢) cents per net ton" thereby indicating a purpose to avoid Article 1, Section 10, of the United States Constitution, which provides:

"(3) No State shall, without consent of Congress lay any duty of tonnage * * *.""

We assume Congress had not given such consent prior to the foregoing action of the Legislature. We know of no such consent since that time.

It would seem that the first main question is, whether the tax sought to be imposed by the Legislature, is in fact, a tonnage tax, that would fall within the prohibition of the U. S. Constitution.

We note the general discussion of the matter in 48 American Jurisprudence on the subject of "shipping" at section 651, in part as follows:

"By virtue of an express provision of the Federal Constitution, no state may, without the consent of Congress 'levy any duty of tonnage'. The prohibition extends to all ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different states, or between ports in the same states, and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state. It embraces all taxes and duties regardless of their name or form, even though not measured by the ton-
nage of the vessel, which operate to impose a charge for the privilege of entering, trading in, lying in, or departing from a port, or plying in navigable waters. It does not, however, extend to charges made by a state or other local authority, even though graduated according to tonnage, for services rendered to and enjoyed by vessels, or for the use of facilities locally provided, or for the purpose of meeting the expense incident to to the general supervision of the port and the execution of rules and regulations for the proper accommodation and safety or vessels at the port. But if the charge attempted to be imposed is one which, by the terms of the statute or ordinance imposing it, may become due from the vessel, without any services being rendered to it, or without the enjoyment of any special benefits, and from the mere fact that it has arrived in a port of the state, it is a charge on tonnage, and therefore not collectible. * * *"

But the specific question seems to be whether or not a property tax may be levied in the guise of a tonnage tax. The U. S. Supreme Court discussed the matter in the State Tonnage Tax Cases (Cox v. Lott), 12 Wall. U. S. 204 (1870). The statute involved provided a tonnage tax at the rate of one dollar per ton. The court stated as follows:

"On the twenty-second of February, 1866, the legislature of Alabama passed a revenue act, and therein, among other things, levied a tax 'on all steamboats, vessels, and other water-craft plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof,' to 'be assessed and collected at the port where such vessels are registered, if practicable, otherwise at any other port or landing within the State where such vessel may be.'"

The court, in holding the state law void, among other things stated:

"If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the legislature
in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats 'as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties.'

"Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as by the very terms of the act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the act of Congress.

"By the terms of the law the taxation prescribed is 'at the rate of one dollar per ton of the registered tonnage thereof,' and the ninetieth section of the act provides that the tax collector must, each year, demand of the person in charge of the steamboat whether the taxes have been paid, and if the person in charge fails to produce a receipt therefor by a tax collector, authorized to collect such taxes, the collector having the list must at once proceed to assess the same, and if the tax is not paid on demand he must seize such steamboat, etc. and after twenty days' notice, as therein prescribed, shall sell the same, or so much thereof, as will pay the taxes and expenses for keeping and costs.

"Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning. Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the
steamboat as property. On the contrary the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are 'plying in the navigable waters of the State,' showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the State.”

Upon the authority of the foregoing case it would seem that the tax provided by the Indiana Statute, amounts to a tonnage tax within the prohibition of the U. S. Constitution.

Therefore, there is serious question as to the validity of the Indiana Statute which purports to levy such tax.

However, assuming that the Indiana law is valid and that such tax may lawfully be imposed, we will consider your question as to where such tax may be levied and collected. From an examination of the authorities, the question might properly turn upon a question of fact that is not included in your question. This question of fact is whether or not the vessels in question have acquired a sufficient actual business situs at Detroit, Michigan, that they may be taxed at that situs rather than taxed at the domicile of the owner in the State of Indiana. This matter is discussed in 51 American Jurisprudence Taxation, Section 913, as follows:

“The general rule is that the situs of a ship for purposes of taxation is, unless it has acquired an actual situs elsewhere, the domicil of the owner, which, in the case of a corporate owner is the state under the laws of which the corporation was created. This is true even though the ship is constantly being taken on voyages outside the limits of that state. The principle is also applicable in the case of vessels which have never been in the state of the owner’s domicile and which may be unable by reason of the depth of water to go to any place in such state, and may be registered or enrolled in a different State.

“Under the earlier statutes, when the port of registry was required to be the port nearest to which the owner resided, it was considered that the statute created what might be called the home port of the vessel, which con-
trolled the place of taxation, in the absence of an actual situs elsewhere. Under more recent statutes, the choice of port of registry is practically optional with the owner and has little or no bearing on the place of taxation; and in fact it has always been the law that when the port of registry is not the domicil of the owner, the vessel is taxable at the latter place.

“The general rule is that a ship or vessel can be taxed only at her legal situs—her home port and the domicil of her owner—and is not taxable by a state other than that in which her owner resides, to which he plies and at which she is temporarily staying while loading or unloading her cargo or even when she is laid up for the winter when through the rigor of the climate navigation is closed. The owner has no power to give his vessel a taxable situs by the arbitrary selection of a home port which is neither his domicil nor the domicil of actual situs. When, however, a vessel is kept and used wholly within the limits of a state other than that in which her owner resides, she acquires a situs in such state for the purposes of taxation which controls the situs of the owner’s domicil irrespective of her port of registry, and this is so even if the vessel is employed in interstate commerce, if she is so employed wholly within the limits of a state. A local situs for purposes of taxation may be acquired by a seagoing steam dredge engaged for a long period of time on a dredging contract in a state other than that in which the owner resides. An ocean-going vessel which has been rammed and sunk and is, at the time taxes are assessed against it, lying partially, submerged within the limits of a state other than that of the owner’s domicil, is subject to taxation by such state. It is, of course clear that vessels may not be taxed in a state in which neither the owner resides nor the ships have required a local situs.”

Attention is called to the language of the Court in American Barge Line Company v. Cang (1936), Fed. Dist. Ct. La. 68 Fed. Supp. 30 at page 43, as follows:

“Since, as has been repeatedly held by the United State Supreme Court, the State of its origin remains
the permanent situs of a corporation's movables, no matter whether they successively move across the State's boundaries for varying periods of time, provided they ever return to the State and never become permanently jointed to and intermingled with movables having a tax situs in another state, it is clear that none of Union's tugboats and barges did ever acquire a taxation suits in Louisiana. They were never permanently situated therein as 'permanently' is defined in the State case of Northwest Air Lines, Inc. v. State of Minnesota (1944), 322 U. S. 292, 295, 64 S. Ct. 950, 88 L. Ed. 1283, 1286, 153 A. L. R. 245, rehearing denied, 323 U. S. 809, 65 S. Ct. 26, 89 L. Ed. 645."

The Indiana Supreme Court has discussed this proposition of a fixed situs for tax purposes. Reference is made to the case of Miami Coal Co. v. Fox, Treas. (1932), 203 Ind. 99, at pages 109, 110 and 114, 115 which read in part as follows:

"A very definite ground upon which the judgment in this case might be affirmed is based upon the common-law rule made concrete by ancient definition *mobilia sequuntur personam*, which, as stated in judicial opinions, became the law from custom in the Middle Ages. This rule which concerns personal property had quite an universal judicial following both in England and the United States until through the progress of civilization personal property became much more varied in both use and legal contemplation until, as stated by Justice Gray: 'In modern times, since the great increase of amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used.' Pullman's Palace Car Co. v. Pennsylvania (1891), 141 U. S. 18, 22; 11 Sup. Ct. 876; 35 L. Ed. 613.

"Admitting that the property has a business situs in Illinois and a taxable situs in Indiana, the only foundation for the property being subject to taxation is the ancient maxim *mobilia sequuntur personam*. The seed of this maxim was not begotten by taxation. The rule
is but a legal fiction to the effect that for legal purposes the situs or home of personal property is always at the domicile of its owner. But this maxim may not be a premise or used in reasoning to the determination of the situs of the property for the purpose of taxation. This is exemplified by the holding of the United States Supreme Court that the taxation of tangible personal property in the jurisdiction of the domicile of its owner, when it has an established legal situs in another jurisdiction, offends the Fourteenth Amendment to the United States Constitution. Safe Deposit, etc. Co. v. Virginia (1929), 280 U. S. 83, 92; 50 Sup. Ct. 59, 74 L. Ed. 180, 67 A. L. R. 386."

"Appellee's contention that the property was within the jurisdiction of Indiana subject to taxation even though it gained a business situs in Illinois must be held as not well founded."

Therefore, it appears to be a question of fact as to whether or not the vessels in question have acquired a tax situs in the State of Michigan. If not, then the tax may be imposed in the State of Indiana.

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OFFICIAL OPINION NO. 67

October 30, 1950.

Mr. Robert B. Hougham,
Executive Secretary,
Indiana State Teachers' Retirement Fund,
336 State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of September 11, 1950, has been received requesting an Official Opinion on the following question:

"Please give us your opinion as to whether the board may give such service credit retroactively for prior years when disability pension was paid, when they do not come within the period between 27½ and 30 years of service."