GROSS INCOME TAX: In the application of the Gross Income Tax Act sub-contractors are required to pay at the rate of 1%. As applied to receipts from rentals and sub-rentals, the rate of 1% applies.

December 31, 1941.

Hon. Fred C. McClurg,
Chief Counsel, Gross Income Tax Div.,
Department of Treasury,
Indianapolis, Indiana.

Dear Mr. McClurg:

I have before me your request that an official opinion issue in response to the following inquiry:

"This Department has, in its administration of the Gross Income Tax Act, assessed the rate of 1/4 of 1% upon sub-contractors which were defined as those contractors who performed either the whole of a general contract under a re-letting, or a lesser part of the whole contract by sub-contracting. A Regulation (2501) was promulgated to this effect.

"The question now arises as to the legality of this classification and the consequent awarding of the lower rate to such sub-contractors and sub-lessees.

"We therefore request your official opinion on the correct interpretation of Chap. 50, Acts of the Indiana General Assembly of 1933 and subsequent amendments thereto with relation to the rate properly applicable to the gross receipts of sub-contractors or sub-lessees."

Section 3 of Chapter 50 of the Indiana Acts of 1933 as amended, provides for the rates at which the tax is to be imposed, and reads:

"Sec. 3. The tax upon the receipt of gross income hereby provided for shall be measured by the amount or volume of such gross income and shall be imposed at the following rates:

"(a) With respect to that part of the gross income of every person which is received from wholesale sales, except as hereinafter provided in sub-section (e) of this section, the tax shall be equal to one-fourth of one
percent of such part of the gross income. The term 'wholesale sales' means and includes only the following: (1) Sales of any tangible personal property (except capital assets of the seller) to a purchaser who purchases the same for the purpose of reselling it in the form in which it is sold to him; (2) sales of any tangible personal property as a material which is to be directly consumed in direct production by the purchaser in the business of producing tangible personal property by manufacturing, processing, refining, repairing, mining, agriculture, or horticulture; (3) sales of any tangible personal property which is to be incorporated by the purchaser as a material or an integral part into tangible property produced by such purchaser in the business of manufacturing, assembling, constructing, refining or processing; (4) receipts received from the business of industrial processing, enameling, plating or servicing of any tangible personal property which is to be sold by the person for whom such processing, enameling, plating or servicing is done, either as a complete article or incorporated as a material, or as an integral or component part of tangible property produced for sale by such person in the business of manufacturing, assembling, constructing, refining or processing; (5) sales of drugs, medical and dental preparations, and similar materials to be directly consumed in professional use by doctors, hospitals, embalmers, and tonsorial parlors; (6) sales of tangible personal property to be directly consumed by the purchaser in the business of industrial cleaning; and/or (7) sales of any tangible personal property to be directly consumed by the purchaser directly in the business of rendering public utility service; Provided, however, That no sale to a division, sub-division, agency, instrumentality, unit or department of government shall be deemed to be included within this definition; Provided, further, That price or quantity shall not be considered in the application of this definition; Provided, further, That it shall be immaterial in the application of this definition whether sales are made from stock or upon order; Provided, further, That in the application of this defi-
nition it shall be immaterial whether or not the seller is the manufacturer or producer of the property sold; *Provided, further,* That the term 'consumed' as used herein shall refer only to the immediate dissipation or expenditure by combustion, use, or application, and shall not mean or include the obsolescence, discarding, disuse, depreciation, damage, wear, or breakage, of tools, dies, equipment, rolling stock or its accessories, machinery, or furnishings.

"(b) With respect to that part of the gross income of every person which is received from display advertising, the tax shall be equal to one-fourth of one percent of such part of the gross income. The term 'display advertising' as used herein shall not be construed to include any sale or rental of tangible property nor any personal or professional services in connection with such advertising; *Provided, however,* That the term 'display advertising' shall include outdoor poster and painted display advertising.

"(c) With respect to that part of the gross income of every person who is a retail merchant as defined in this act which is received from selling at retail, the tax shall be equal to one-half of one percent of such part of the gross income.

"(d) With respect to that part of the gross income of every person which is received from the business of dry cleaning and laundering, the tax shall be equal to one-half of one percent of such part of the gross income.

(e) With respect to that part of the gross income of every person received from producing, transmitting, furnishing, wholesaling, and/or retailing electrical energy; or producing, transporting, furnishing, wholesaling, and/or retailing artificial gas, natural gas, or mixtures of artificial and natural gas, operating a steam and/or electric railway, street car line, motor vehicle, steam or motor boat, or any other vehicle for the transportation of freight, express, and/or passengers for hire; operating a pipe line for the transportation of any commodity for hire; operating any telephone and/or telegraph line; operating any
water or sewerage system; or operating any other utility not expressly provided for in this section, the tax shall be equal to one per cent of such part of the gross income.

“(f) With respect to that part of the gross income of every person received from operating any bank, trust company, building and loan association, insurance and/or casualty company, finance company, small loan company, or any other business of a similar nature, including all others mentioned in subsection (n) of Section 1, the tax shall be equal to one percent of such part of the gross income.

“(g) With respect to that part of the gross income of every person which is received from any source not enumerated in subsections (a) to (f) inclusive, of this section, including, but not in limitation of the foregoing, gross income from professional services, personal services, or services of any character whatsoever, sales of real estate, rentals, all funds received for the performance of contracts, all funds received from the investment of capital, all receipts from rental sales and all receipts received from any source whatsoever, the tax shall be equal to one percent of such part of the gross income. The term ‘retail sales’ shall mean any sale of any property not included within the definition of ‘wholesale sales’ and ‘selling at retail.’” (Our italics.)

Sec. 3 as amended by Chapter 140, Indiana Acts of 1941, p. 418 at 425 to 428;
11 Burns’ Indiana Statutes, June 1941 Supplmt., 64-2603.

Obviously one who derives income from the performance of a contract with a principal contractor and is therefore designated as a sub-contractor, still has income comprehended by the phrase “funds received from the performance of contracts” used in section 3(g) of the taxing act.

Therefore I am of the opinion that the rate of one percent applies to gross income received from rentals and sub-rentals or sub-leasing; and that the rate of one percent applies to gross income received from the performance of contracts and the performance of sub-contracts.