RICHMOND STATE HOSPITAL: Whether state institutions are exempt from Federal Processing Tax.

July 20, 1933.

Hon. L. F. Ross, M. D.,
Medical Superintendent,
Richmond State Hospital,
Richmond, Indiana.

Dear Sir:

I have before me your letter raising the question of the liability of a state institution to pay prices for supplies which reflect the payment of the federal "processing tax" levied under the provisions of the Agricultural Adjustment Act recently enacted by Congress.

Section 9 (a) of said act provides as follows:

"To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the secretary of agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. (Our italics.)

An examination of the act reveals that it contains no express exemption applicable to products sold to the State of Indiana or to its various instrumentalities.

It is well settled, however, quoting from Indian Motorcycle Company v. United States, 283 U. S. 570, at page 575, "that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States." The question, therefore, is whether the "processing tax" as above provided when so applied is a tax upon the "instrumentalities, means and op-
erations” whereby the state exerts its governmental powers.

The above case of Indian Motocycle Company v. United States is a case in which it was held that a sales tax levied and paid upon certain described articles sold or leased by the manufacturer, producer, or importer (among which articles being motorcycles), as applied to sales of motorcycles to governmental units for governmental purposes, is a tax upon a state instrumentality whereby it exerts its governmental powers and that such sales were exempt from the tax. Throughout the opinion, the court places considerable emphasis upon the character of the tax as a tax laid upon the sale rather than upon the manufacture of the article, and, I think, therein lies the distinction between the tax there under consideration and the “processing tax” provided for in the Agricultural Adjustment Act, supra.

The “processing tax,” supra, is not a sales tax by name and, in my opinion, it can not be so construed. Literally, it is provided that “the processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity * * * and shall be paid by the processor.” (Our italics.) The tax will doubtless be reflected to some extent, at least, in the sale price to the consumer, but it is not a tax upon the sale and there is no authority in the act which authorizes the collection of the tax as such from the consumer.

In the Indian Motocycle Company case, supra, the majority opinion of the court followed the decision in the case of Panhandle Oil Company v. Knox, 277 U. S. 218, which held that a state excise laid on the sale of gasoline and collected only from the dealer making the sale, could not be applied to sales to the United States consistently with the constitutional principle already referred to. Two Justices dissented from the decision in the Indian Motocycle case, holding that the rule laid down in Wheeler Lumber Company v. United States, 281 U. S. 572, should control.

I quote the following from the dissenting opinion of Justice Stone (page 582) to show the narrow line of distinction between the two opinions:

“The rule of the Panhandle Oil case has been limited in Wheeler Lumber Co. v. United States, supra, holding that a tax on transportation, which in that case was necessary to effect delivery by the seller, was valid
because not in terms a tax on the sale, as it was in the former. Even if verbal distinction, unfounded in economic realities, must be made between the two cases so that both may stand as authoritative expositions of the Constitution, considerations of substance rather than of form should lead us to choose that one which would restrict the doctrine of the Panhandle Oil case to the tax imposed in unqualified terms on sales to which it was applied in that case. The present tax is not levied in such terms, exclusively on sales, but is effective only when the seller both manufactures or imports and sells. With respect to the incidence of its burden on the buyer, so far as we can know, it does not differ from a tax on the manufacture of goods, payable when sold.” (Our italics.)

The above suffices to show the point of divergence in the majority and dissenting opinions and what a small difference sometimes exists between what constitutes a tax on a governmental agency and what does not constitute such a tax; and although the line of difference between the case under consideration and the case of Indian Motocycle Company v. United States, supra, is not great, there is a sufficient difference, I think, to require the holding that the "processing tax" authorized by the Agricultural Adjustment Act as applied to products bought by a state institution is not a tax upon a governmental agency of the state.

As already indicated, however, there is no provision which authorizes the addition of the "processing tax" as such to the purchase price. The tax is payable by the processor and not by the purchaser of the processed article.

It follows from the foregoing that, in my opinion, there is no authority by which a state institution may require a deduction from the price of articles sold to it of a sum equal to the "processing tax." It is my further opinion, that the law specifically requires the processor to pay the tax and that there is no authority for his billing it to a purchaser on the theory that the processor is simply acting as agent for the government in the collection of the tax.

Section 15 (c) of the act provides, however, that:

“Any person delivering any product to any organization for charitable distribution or use shall, if such
product or the commodity from which processed, is under this title subject to tax, be entitled to a refund of the amount of any tax paid under this title with respect to such product so delivered."

Whether the above provision for refund can be held to apply to an institution such as the Richmond State Hospital and the appropriate procedure for a refund, if held to apply, is not entirely clear, and I am reserving my opinion on that subject pending further information from the secretary of agriculture as to any applicable regulations which may have been issued.

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INSURANCE COMMISSIONER: Form of insurance contract.

July 20, 1933.

Hon. Harry E. McClain,
Commissioner of Insurance,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an opinion as to whether a certain form of contract attached thereto constitutes an insurance contract. The contract form is as follows:

**CONTRACT NUMBER**

A ........ Professional Liability Defense.

**THIS CONTRACT ISSUED TO..............**, who is this day accepted as a contract holder of the UNITED PROTECTIVE BUREAU, thereafter, called the bureau.

In consideration of $........and of the statements and warranties contained in the application of which is made a part hereof and which statements and warranties are made by the holder named and described herein and represented by him to be true: by the acceptance of this contract the UNITED PROTECTIVE BUREAU hereby agrees as follows:

1. To employ competent legal services, and to defend holder in good standing against any civil suit or action imposed by law upon the holder for damages by reason of bodily injuries suffered by any person or persons in