GROSS INCOME TAX: Delivery of goods across state line essential to constitute interstate commerce; "approval" of sale in another state of sale of goods located in Indiana not enough to make transaction one of interstate commerce; applicability of original package rule.

September 26, 1933.

Department of the Treasury,  
State of Indiana,  
Indianapolis, Indiana.

Att: Hon. Leroy Sanders,  
Gross Income Tax Division.

Dear Sir:

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

"I am enclosing herewith a copy of a letter which is self-explanatory, and would request an opinion as to whom it is determinable that a corporation, organized under the laws of the State of Indiana or one authorized to do business within the State of Indiana comes under the Gross Income Tax Law.

"It appears that unless a corporation is organized or authorized to do business under the laws of the State of Indiana, that no tax can be imposed upon its transactions within the state, unless, of course, it was operated within the state in violation of the law.

"Is then the incorporation under the Indiana laws or the authority to do business within the state any measure for assessing a tax upon gross receipts under the Indiana Gross Income Tax Law?"

The letter, to which reference is made above, contains the following statement of facts that is pertinent to the discussion of the instant problem:

"General Foods Sales Company, Inc., sells to jobbers and wholesale dealers throughout the United States merchandise consisting exclusively of packaged foods and food products manufactured by corporations with which the company is affiliated through stock ownership. Such merchandise is in all cases sold and delivered by the company in the original packages or containers in which shipped from the various manufac-
turing plants. The company's selling operations in Indiana and neighboring states are supervised and controlled by its office located in Cincinnati, Ohio, no office being maintained by it in Indiana. In connection with its Indiana operations, however, the company keeps in public storage in an Indianapolis warehouse a stock of merchandise from which deliveries are made to Indiana customers (jobbers and wholesale dealers) under orders taken and accepted by the company in accordance with two different methods, as follows:

"First method: The usual procedure is for our salesmen and for our customers to refer orders, except as indicated below, to the Cincinnati office for approval and acceptance. Upon acceptance of any such order, that office instructs the warehouse to make delivery of specified merchandise to the particular customer. Upon receipt of a warehouse report that such delivery has been made, the Cincinnati office renders an invoice by mail direct to the customer, who makes payment to the company at its head office in New York.

"Second method: To provide immediate deliveries; when necessary the company furnishes to the warehouse an approved list of customers who may transmit orders direct to the warehouse. In each case, the warehouse makes delivery of the merchandise ordered and reports the order and delivery to the company's Cincinnati office. Upon receipt of this report, that office renders an invoice by mail direct to the particular customer who makes payment to the company at its head office.

"Under both methods, the merchandise sold and delivered is in storage in the Indianapolis warehouse at the time the sale is made, and all merchandise so sold and delivered to Indiana customers is sold and delivered in the original packages or containers in which it was shipped into and stored in Indiana."

Portions of the Indiana Gross Income Tax Act, being Chapter 50 of the Acts of 1933, pertinent to this problem are as follows:

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the
amount to be determined by the application of rates on such gross income as hereinafter provided. *Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided.”* (Our italics.)

Section 3 provides:

“*The tax hereby provided for shall be imposed at the following rates:*

“(b) Upon the entire gross income of every person engaged in the business of wholesaling and/or jobbing tangible commodities not specifically mentioned in subsection (d) of this section, one-fourth of one per cent.”

Section 6 provides:

“*There shall be excepted from the gross income taxable under this act:*

“(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America or any of its agencies, and interests or other earnings paid upon bonds or other securities issued by the United States of America or its agencies, to the extent that the State of Indiana is prohibited from imposing a tax upon such salaries, pen-
sions, emoluments, interest and/or earnings, by the Constitution of the United States of America.” (Our italics.)

Your inquiry presents three questions:
First: Does the tax imposed by Chapter 50 of the Acts of 1933, apply to income derived from sources within the State of Indiana of corporations not authorized to do business under the laws of this state?
Second: Are the transactions described in the letter set forth above of the character of interstate commerce within the meaning of “the commerce clause” of the Federal Constitution?
Third: What will be the effect upon the taxability of the income described when it is noted that it arises from the sale of goods in the original packages sold subsequent to their coming to rest within the state?

In response to the first question, I am of the opinion that section 2 of chapter 50 of the Acts of 1933, is pertinent. It provides that the tax imposed “shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, * * * who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, * * *.”

The tax, therefore, is imposed not upon income of corporations authorized to do business in Indiana, but regardless of that contingency and upon a different basis, i.e., whether the foreign corporation derives gross income from within the state.

In reply to the second question, it is well to note that under each procedure outlined, the goods are first shipped into Indiana, stored there, and after orders have subsequently been taken, are delivered to customers within the state.

The requirement, that the orders be approved by the home office, does not of itself render the transaction interstate in character. When a foreign corporation ships an article into Indiana, not pursuant to an order previously taken, the interstate commerce character of the transaction terminates with the delivery of the goods in the state and orders subsequently
taken, and income received, has reference to property locally held and sold, and such income is taxable under the instant act.

This is borne out by reference to the general rule which is: that a sale is a transaction of interstate commerce, subject to federal regulation, where the transportation of the subject matter of the sale from one state to another is essential to delivery to the purchaser and the consequent completion or performance of the contract of sale.

Rossi v. Pennsylvania, 238 U. S. 62;
Norfolk, etc., R. Co. v. Sims, 191 U. S. 441;
Compton Co. v. Allen, 216 Fed. 537.

Further, the weight of authority is to the effect that, where the goods are in the state at the time of sale, the sale is not a transaction of interstate commerce, regardless of what prior transportation of the goods may have taken place.

Armour Packing Co. v. Lacy, 200 U. S. 226;
American Steel, etc., Co. v. Speed, 192 U. S. 500;

Therefore, I am of the opinion that the sale of goods by an agent taking place after the goods have come within the state is not an act of interstate character even though the goods were shipped in from the principal in another state.

Muskegon v. Zeeryp, 184 Mich. 181, 96 N. W. 502;
Canton v. McDaniel, 188 Mo. 207, 86 N. W. 1092.

In response to your third question, please permit me to refer you to the extended discussion of the "original package rule" in an official opinion of the attorney general addressed to William Storen, as Treasurer of State, under date of March 27, 1933. Sufficient to say at this time, that I am of the opinion that where the merchandise is first shipped into the state, not pursuant to an order previously taken, and is stored in a warehouse within the state until a sale is negotiated, that the fact that delivery is subsequently made in the original package within the state has no effect upon the taxability of the income derived from such sale.

See Official Opinions of the Attorney-General of Indiana, 1933, page 111.
Sonneborn Bros. v. Cureton, etc., 262 U. S. 506;
Emert v. Missouri, 156 U. S. 296.