OFFICIAL OPINION NO. 5

March 17, 1971

Mr. James O. Mathis, Commissioner
Department of Revenue
202 State Office Building
100 North Senate Avenue
Indianapolis, Indiana 46204

Dear Commissioner Mathis:

This opinion is in response to questions raised by you pertaining to your circular, No. ST-61, dated March 25, 1970, in reference to certain sales tax exemptions, and the legal effectiveness of your circulars in view of existing laws and duly promulgated administrative rules and regulations. Since the proper use of administrative rules and regulations is a matter of vital constitutional concern to the State of Indiana, this subject must be analyzed in detail.

ANALYSIS

Specifically, let's examine these two questions:

1. Can a constitutional distinction be made between fraternity and dormitory students in determining exemptions from Indiana sales tax? (Throughout this Official Opinion, reference will be made to the term "fraternity." As was stated in State *ex rel* Daggy v. Allen, (1920), 127 N.E. 145: "The word fraternity, in its generic sense, includes organizations composed of either or both sexes.")
2. What is the legal effectiveness of Department of Revenue Circular ST-61 dated March 25, 1970?

Directing our attention to Circular ST-61 dated March 25, 1970, as it relates to sales tax exemptions for college and university students, it states:

> "The furnishing of food by colleges and universities, not operated for private profit, to students in attendance at such colleges and universities is also *exempt* from the state sales tax * * * The furnishing

> of meals by any organization such as fraternities, sororities, clubs, etc., *is* subject to the sales tax." (My emphasis)

The sales tax statutes have made several exceptions to the requirements of this tax. Acts of 1933, Ch. 50, Sec. 39, as amended and found in Burns' (1970 Supp.), Section 64-2654, states one such exception:

> "(b) Nor shall the state gross retail tax apply to any of the following transactions:
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> * * *
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> "(7) The furnishing of school meals to school children and school employees on school premises in all schools in grades one [1] through twelve [12]; the furnishing of food by colleges and universities, not operated for private profit, to students in attendance at such colleges and universities."

To distinguish between students who live in facilities provided by the university and students who live in fraternities, sororities, clubs, etc., in relation to the Indiana sales tax on meals, is a violation of their constitutional rights. The 14th Amendment to the United States Constitution, and the Indiana Constitution, Art. 1, Sec. 23, provide for equal privileges and immunities under the law.

There is no logical basis for the distinction made in Circular ST-61 dated March 25, 1970. The fraternity members are governed by the same administrators and boards of trustees as dormitory students. Although they are a cohesive body within themselves, they are still under the auspices of the university, they are students the same as dormitory residents, and they must comply with the rules and regulations set forth by such university.

The law holds that, in order for a tax to be imposed upon a certain class, there must be a reasonable basis for distinguishing that class from others similarly situated. It was stated in Welsh *et al* v. Sells *et al,* (1963), 244 Ind. 423, 192 N.E. (2d) 753, in upholding the constitutionality of the Indiana sales tax that:

> "The legislature has latitude in determining classifications for taxation as long as it is based upon some reason connected with the subject matter."

To exempt only college students residing in university dormitories would be too restrictive to withstand constitutional scrutiny. The classification of students who reside and purchase meals in dormitories and university-approved fraternities is a sufficiently valid distinction as a constitutional taxing basis. When reviewing the constitutionality of this classification, a court would recognize a limiting principle that all reasonable doubt must be resolved in favor of the constitutionality of an act.

> "It is the duty of the court to sustain the constitutionality of an act of the General Assembly if it can be done by a reasonable construction, and any doubt concerning the constitutionality of an act must be resolved in favor of its validity." 5 I. L. E., Constitutional Law, Section 38, p. 310.

In the formulation of any tax, it is essential that the Legislature creates classifications that provide uniformity under the Indiana Constitution, Art. 4, Sec. 23, and the equal protection clause in the 14th Amendment to the United States Constitution. Criteria of reasonable classifications were recently discussed in Time, Inc. v. Hulman (1964), 311 Ill. (2d) 344, 201 N.E. (2d) 374. In that case, the State of Illinois attempted to place a sales tax on news magazines while exempting sales of newspapers. The Illinois Supreme Court stated that:

> "The power of the legislature to establish classifications which will extend a privilege to one group while denying it to another is well established. It is only that classification which 'unreasonably discriminates' against one group or another that violates the constitutional guarantees."

The court proceeded to hold that the distinction between newspapers and magazines for sales tax purposes created an arbitrary and discriminatory classification. Time, Inc. v. Hulman, *supra*, stated that:

> "After a full and careful consideration of the classes of newspapers and magazines disseminating news and information, we are of the opinion that there is no real substantial difference between newspapers and plaintiffs' magazines. The same consideration which induced the legislature to recognize that publishers of newspapers were not within the taxable occupation carries over to publishers of news magazines or other news periodicals."

Through the reasoning stated in Time, Inc. v. Hulman *supra*, the same considerations that led to an unconstitutional discrimination of news magazines directs the analogous conclusion that to exempt college students in university dormoritories from a sales tax on meals and to refuse this same exemption to the students who reside in university-based fraternities is an unconstitutional discrimination in violation of the equal protection provisions of both the Indiana and the United States Constitutions.

The Indiana General Assembly has, through proper legislation, given very specific guidelines to governmental agencies in their powers to make administrative rules and regulations. It is well established that the Department of Revenue is a state agency in accordance with Acts of 1945, Ch. 120, Sec. 3, as amended and found in Burns' (1970 Supp.), Section 60-1503, and has the powers vested by Acts of 1945, Ch. 120, Sec. 1, as found in Burns' (1961 Repl.), Section 60-1501, as follows:

> "It is the intent to establish a uniform method of making, promulgating, filing and publishing rules by all agencies of this state, to permit public participation therein and provide a method of making rules readily accessible to the public. It is not intended to give to any agency any additional rule-making power or authority and no additional or new power or authority to make or adopt rules is given to any agency by this act."

The above statute does not give state agencies unbridled authority in rule-making. Certain procedures are required

by statute. Burns' (1961 Repl.), Section 60-1505, *supra*, states that:

> "It shall be the duty of every agency which may have been or hereafter may be clothed with or given any power or authority to make, adopt, promulgate or enforce rules to submit the same to the attorney general for approval as to legality and when so approved to submit the same to the governor for approval."

Acts of 1945, Ch. 120, Sec. 4, as found in Burns' (1961 Repl.), Section 60-1504 provides for public hearings, in addition to the other requirements, before a rule or regulation becomes official.

A circular, such as ST-61 dated March 25, 1970, is not a rule or regulation, and therefore is not subject to the procedures required of rules and regulations. Yet a circular printed on Department of Revenue stationery and signed by the Indiana Commissioner of Revenue may be mistakenly considered by the public to be clothed with the authority of the law. It is, as you know, only an informal interpretation of the Department of Revenue and does not have the authority of properly promulgated rules and regulations. The law cannot be changed by such informal bulletins, memoranda, or tax form revisions. In previous circulars from your department, the Commissioner had placed a disclaimer beside his signature to the effect that:

> "The foregoing interpretations will be adhered to and applied until changed or rescinded by the Department of Revenue or until replaced by an official regulation or nullified by court decision or official opinion of the Attorney General."

CONCLUSION

It is my official opinion, therefore, that circulars such as ST-61 dated March 25, 1970, are not, and do not and cannot purport to be, rules and regulations. The circulars convey only the informal interpretation of the Department of Revenue; they do not have the legal effect of rules and regula-

tions. Even though it is unintentional, in order not to mislead persons who must rely on official information to institute policies relating to taxation, it should be stated clearly and unambiguously that the provisions in such informational circulars and bulletins are not legally promulgated and do not have the effect of law until they fully comply with the statutes of Indiana dealing with Administrative Rules and Regulations.

The Constitution would require that non-profit fraternity and sorority dining facilities for college students be treated on the same basis as the dining facilities of dormitories for college students on the same college campuses. If one is exempt from the sales tax on its meals, so must the other be.