

1969 O. A. G.

OFFICIAL OPINION NO. 4

May 12, 1969

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

Dear Commissioner Mathis:

This is in response to your written request for my opinion in regard to the following question:

“Is an insurance company which pays a tax on premiums pursuant to the Indiana Insurance Law exempt from the State Gross Retail Tax and Use Tax on its purchases of tangible personal property?”

In brief, my opinion is that such an insurance company is not exempt from the State Gross Retail Tax and Use Tax on its purchases of tangible personal property. The legal reasons follow.

The tax on premiums is imposed by the Indiana Insurance Law, Acts of 1935, Ch. 162, Sec. 235, as amended by Acts of 1963, Ch. 301, Sec. 1, as found in Burns' (1965 Repl.), Section 39-4802, which provides that every foreign insurance company, and those domestic insurance companies which elect to do so, shall pay a tax on their gross premiums, less certain deductions.

While it is true that insurance companies which pay the tax on premiums are exempted from the Adjusted Gross Income Tax by virtue of Acts of 1963, (Spec. Sess.), Ch. 32, Sec. 205, as amended by Acts of 1965, Ch. 233, Sec. 14, as found in Burns' (1968 Supp.), Section 64-3219(a), which provides in part:

“Notwithstanding any provision of this act, there shall be no tax on the adjusted gross income of the following * * * (d) Insurance companies subject to tax under section 235 of the Indiana Insurance Law.”

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And while it is true that insurance companies which pay the tax on premiums are exempted from the Gross Income Tax by virtue of Acts of 1933, Ch. 50, Sec. 6, as found in Burns' (1968 Supp.), Section 64-2606, which provides in part:

“There shall be excepted from the gross income taxable under this act * * * (k) All amounts received by insurance companies which pay the state of Indiana a tax of more than one per cent [1%] upon premiums, as provided by the laws of this state * * *”

Subsection (k) was added to Section 6 of the Gross Income Tax Act in 1937.

However, in the Special Session of 1963, the Legislature made it clear that the exemption provided insurance companies in Section 6(k) of the Gross Income Tax Act is not to be extended to the State Gross Retail Tax. Acts of 1933, Ch. 50, Sec. 39, as added by Acts of 1963, (Spec. Sess.), Ch. 30, Sec. 4, as last amended by Acts of 1967, Ch. 222, Sec. 4, as found in Burns' (1968 Supp.), Section 64-2654, provides in part:

“(a) The state gross retail tax shall not apply to such part of the gross income from transactions constituting selling at retail as is exempt from the gross income tax under the provisions of subsection (a), (b), (c), (m), and (o) of section 6 of this act. *No other exception of exemption provided in section 6 shall apply to the State Gross retail tax * * **” (Emphasis added)

This provision clearly indicates the legislative intent that insurance companies should not be exempt from the State Gross Retail Tax.

There is no conflict between the above subsection, which denies insurance companies an exemption from the State Gross Retail Tax, and Ch. 162, Sec. 235(d) of the Indiana Insurance Law, Burns' (1965 Repl.), Section 39-4802(d) *supra*, which provides in part:

“(d) The taxes provided for by the Acts of 1935, c. 162, as amended, shall be in lieu of all license fees or privilege or other tax levied or assessed by this state or

by any municipality, county or other political subdivision
of this state * * *

In my opinion, the Legislature intended that the "in lieu of" provision refer to taxes in existence at the time of its enactment and not to taxes which might be enacted in the future. The phrase "in lieu of" implies the existence of something for which substitution is being made. *Vancleave v. Wolf* (1934), 98 Ind. App. 650, 190 N. E. 371. Moreover, Ch. 162, Sec. 235(c) of the Indiana Insurance Law provides that the premiums tax is a tax on "the privilege of doing business in this state." It is my opinion that the "in lieu of" provision in subsection (d) is intended to refer only to other taxes on the privilege of conducting an insurance business, such as license fees. The provision should not be construed to exempt insurance companies from the State Gross Retail Tax, which is a tax on "transactions of retail merchants constituting selling at retail." *Burns'* (1968 Supp.), Section 64-2651. In *Commercial Standard Ins. Co. v. Hixson* (1939), 175 Tenn. 239, 133 S. W. (2d) 493, 495, the Supreme Court of Tennessee stated:

"The provision of Item F imposing a tax upon the privilege of engaging in a general insurance business for the benefit of the State and in lieu of all other taxes cannot be construed as exempting complainant from the special privilege tax imposed by Item 105 upon the business if insuring or guaranteeing titles. The two levies are not upon the exercise of the same privilege."

Similarly, the two levies under consideration here are not upon the same privilege.

(See also *Celina Mutual Insurance Co. v. Bowers* (1965), 5 Ohio St. 2d 12, 213 N. E. (2d) 175, and *Connecticut Light and Power Co. v. Walsh* (1948), 134 Conn. 295, 57 A. 2d 128)

Another pertinent consideration is the rule of law in Indiana that exemption statutes should be strictly construed against the one claiming the exemption. *Gross Income Tax Division v. National Bank & Trust Co.* (1948), 226 Ind. 293, 79 N. E. (2d) 651.

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Therefore, it is my opinion that an insurance company which pays a tax on premiums pursuant to the Indiana Insurance Law is *not* exempt from the State Gross Retail Tax and Use Tax on its purchases of tangible personal property.