OPINION 4

OFFICIAL OPINION NO. 4

February 27, 1967

TAXATIONS—BANKS—Tax Liability of National Banks with Respect to the Indiana Sales and Use Tax.

Opinion Requested by House of Representatives, Indiana General Assembly.

This is in response to your Resolution adopted February 21, 1967, which was offered by Representative Retterer, requesting my Official Opinion pursuant to Chapter 71 of the Acts of 1889 and Chapter 230 of the Acts of 1959. As stated in the Resolution, your request originally was for an opinion "as to the constitutionality of House Bills Nos. 1403 and 1473." Discussion with Representative Retterer subsequent to the adoption of such Resolution discloses that, instead of the question intended being as stated in the written Resolution, his request is for my Official Opinion on the question of whether the Indiana Sales and Use Tax can be imposed upon purchases made by national banks located within the State of Indiana. Upon his representation to me that the latter question is the question intended to be posed by the Resolution, this opinion is devoted to a discussion of such question and is not concerned with the above-numbered House Bills.

In 1936 O.A.G., p. 132, the then Attorney General issued an Official Opinion to John T. Sexton, Gross Income Tax Division, concerning the question of whether national banks could be required to pay the tax imposed upon the receipt of gross income by the Acts of 1933, ch. 50. After noting that the Congress of the United States has granted permission to the states to impose taxes upon national banks only in certain specific manners, as set forth in 12 U.S.C., § 548, the Attor-

ney General then held that the tax upon the receipt of gross income was not consistent with any of the methods (specified by the Congress) granting to the states the privilege of taxing national banks and, therefore, could not be imposed upon the receipt of gross income by a national bank.

12 U.S.C., § 548, referred to in 1936 O.A.G., p. 132, is still the law with respect to the taxation by states of national banks and provides as follows:

> "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:
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> "1. (a) *The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others,* except as hereinafter provided in subdivision (c) of this clause.
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> "(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.
>
> "(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed

upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business with its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares of any national banking association owned by non-residents of any State shall not be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R. S.

§ 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223." (Emphasis added.)

It should be noted that the Attorney General held in this 1936 Opinion, since the Legislature had elected the method of taxation adopted by the Acts 1933, ch. 83, as found in Burns § 64-2801, *et seq.*, which includes within the term "bank" . . . "any national banking association organized under the laws of the United States and engaged in business in the State of Indiana", that the Legislature had thereby precluded itself from taxing national banks in any other manner pursuant to 12 U.S.C., § 548, *supra,* subsection 1 (a) of which provides that the selection of any one of the four permissible forms of taxation shall be in lieu of the others, except as provided in subdivision (c).

However, assuming that the Indiana Legislature had not so precluded itself from enacting some other permissible form of taxation which would be applicable to national banks, I wish to direct your attention to the fact that it has been held (by a court of appellate jurisdiction in another state) that sales and use taxes which are imposed upon national banks as purchasers, cannot be levied upon such banks. Your attention is directed to the case of *Liberty Nat'l Bank & Trust Co. v. Buscaglia,* 26 A.D. 2d 97, 270 N.Y.S. 2d 871 (1966), in which the Supreme Court, Appellate Division, Fourth Department of the State of New York held that national banks could not be subject to the sales and use tax imposed by the laws of that state. In that case, the New York Court held:

> "The question to be decided is whether the Liberty National Bank, as a purchaser, is immune from the above sales and use taxes.
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> "Early in the history of this nation the United States Supreme Court ruled that states, and by necessary implication their governmental subdivisions, were without authority to impose a tax upon the Bank of the United States chartered under an act of Congress. (M'Culloch v. Maryland, 4 Wheat. [17 U.S.] 316, 4 L. Ed. 579.) Subsequently in Owensboro National Bank v.

City of Owensboro, 173 U.S. 664, 19 S. Ct. 537, 43 L. Ed. 850, the court considered in detail the immunity from state and local taxation of national banks, holding that such instrumentalities were not subject to such taxation except when and as permitted by legislation of Congress. Referring to section 5219 of the Revised Statutes, which authorized the taxation of shares of stock in a national bank and real estate of the bank, the court said: 'This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property, or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax, therefore, which is in excess of, and not in conformity to, these requirements is void.' (p. 669, 19 S. Ct. p. 539) (See also People ex rel. Hanover National Bank of City of New York v. Goldfogle, 234 N.Y. 345, 349, 137 N.E. 611, 612.)

"Although R. S. 5219, as amended, 12 U.S.C. § 548, has somewhat enlarged the area of state taxation of national banks, *it contains no reference to sales or use taxes as such are here under consideration and respondents do not assert any power to tax based upon this section. The contention is made rather that because of a change in the nature of national banks since the days of McCulloch and Owensboro, and because of a trend apparent in federal case law to limit the doctrine of implied delegated immunity, this court should now hold that national banks have become subject to taxation beyond the limits provided by the act of Congress.* However, as recently as 1939 the Supreme Court, although recognizing that 'the national bank's usefulness as an agency to provide for currency has diminished markedly', nevertheless reiterated that its banking operations are free from state taxation except as Congress may permit. (Colorado Nat. Bank of Denver v. Bedford, 310 U.S. 41, 48, 50, 60 S. Ct. 800, 803, 84 L. Ed. 1067; see also Des Moines Nat. Bank v. Fairweather, 263 U.S. 103, 107, 44 S. Ct. 23, 68 L. Ed.

191.) *In Michigan National Bank v. State of Michigan, 365 U.S. 467, 81 S. Ct. 659, 5 L. Ed. 2d 710, decided in 1961, the court had occasion to pass upon the validity of a state tax on national bank shares. It was there said, 'THE SOLE AUTHORIZATION upon which Michigan's Act No. 9 (the state taxing statute) may rest is § 5219'* (emphasis supplied), *thus reaffirming the principle that national banks are not generally subject to state taxation.* (p. 470, 81 S. Ct. p. 661.)

"With regard to the limitation of the doctrine of implied delegated immunity, it has been recognized that the recent curtailment in this area is confined to involvement of persons and corporations (most frequently, contractors) dealing with the United States government. 'But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation.' (United States v. Allegheny County, 322 U.S. 174, 177, 64 S. Ct. 908, 911, 88 L. Ed. 1209.) *In view of the authorities discussed above, this court is bound to conclude that a state or local subdivision thereof is without power to impose a sales or use tax upon a national bank. Such power can only be conferred by Congress.*

"Respondents' assertion that the New York State and Erie County sales and use taxes in question are not taxes upon petitioner bank but are taxes imposed on the vendor is without merit. It is the legal incidence, rather than the economic burden, (although in this case these seem to fall upon the same party to the sale) which is determinative of this issue. (State of Alabama v. King & Boozer, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3; Curry v. United States, 314 U.S. 14, 62 S. Ct. 48, 86 L. Ed. 9.) The Court of Appeals of this state has held that the incidence of a sales tax similar to those now under consideration is upon the purchaser. (Matter of Fifth Avenue Building Co. v. Joseph, 297 N. Y. 278, 284, 79 N.E. 2d 22, 24-25; Matter of Kes-

bec, Inc. v. McGoldrick, 278 N. Y. 293, 297, 16 N.E. 2d 288, 289.)

"We are aware that, when the question of the validity of a state taxing statute falling upon a United States government institution, instrumentality or activity is involved, the determination of the legal incidence of the tax as made by the highest court of the state is not controlling. (Society for Savings in City of Cleveland, Ohio v. Bowers, 349 U.S. 143, 75 S. Ct. 607, 99 L. Ed. 950; Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 74 S. Ct. 403, 98 L. Ed. 546.) In this circumstance, the United States Supreme Court is the final arbiter of legal incidence. *However, the conclusion reached by the Court of Appeals is in accord with the view expressed by the Supreme Court in Kern-Limerick, Inc. v. Scurlock, supra, and other similar cases where it has been held that a sales or service tax which by its terms must be passed on to the purchaser, separately stated, has its legal incidence on the purchaser.* (Colorado Nat. Bank v. Bedford, *supra*; State of Alabama v. King & Boozer, *supra*; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565.)

"Accordingly, we conclude that the sales and use taxes here in question could not lawfully be imposed on receipts from sales and services made or rendered to petitioner bank subsequent to April 19, 1963 and that it should be entitled to a refund of $31,401.42, the amount of such taxes including interest paid by it after that date, plus interest thereon." (Emphasis added.)

As pointed out in the above-cited New York case, to be permissible, a tax upon national banks by a state must be within one of the classifications of permissible taxes authorized by 12 U.S.C., § 548, or some other federal statute. For instance, in the case of *Security-First Nat'l Bank v. Franchise Tax Bd.*, 55 Cal. 2d 407, 359 P. 2d 625 (1961), the Supreme Court of California upheld the right to impose upon national banks a franchise tax based upon net income stating:

> "National banks, such as plaintiffs, may be taxed by a state *only as expressly permitted by Congress.* Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 244, 52 S. Ct. 133, 76 L. Ed. 265; First Nat. Bank of Guthrie Center v. Anderson, 269 U.S. 341, 347, 46 S. Ct. 135, 70 L. Ed. 295. Section 5219 of the Revised Statutes of the United States (12 U.S.C. § 548) sets forth the four methods by which a state may tax those banks. *The fourth method, which has been adopted by California,* is to tax them 'according to or measured by their net income.' . . ." (Emphasis added.)

However, the Indiana Sales and Use Tax, as imposed by the Acts 1963 (Spec. Sess.) ch. 30, as found in Burns § 64-2651, *et seq.*, clearly is not one of the permissible taxes which the Congress has stated may be imposed by states upon national banks. Also, as in the case of the New York decision in the case of *Liberty National Bank and Trust Company v. Buscaglia, supra,* the incidence of the Indiana sales and use tax falls directly upon the purchaser so that, with respect to purchases made by national banks, the tax would be directly upon them. Therefore, it is my opinion that the Indiana Sales and Use Tax known as the "State Gross Retail Tax" and the "Use Tax" cannot be validly imposed upon national banks located in Indiana with respect to purchases made by such banks.

OFFICIAL OPINION NO. 5

March 17, 1967

CITY OFFICERS—CITY JUDGE—City of the Fifth Class Creating City Court.

Opinion Requested by Hon. Harry Spanagel, State Representative.

I am in receipt of your recent letter which reads as follows: