mayor as a school employee concerning his duties salary, performance, and discharge. A clearer case of incompatibility cannot readily be imagined.

Since the positions involved so clearly fail to pass the test of incompatibility there is no need to consider the other tests set out above.

OFFICIAL OPINION NO. 23

July 19, 1967

TAXATION—Collection by Indiana Merchants of Out-of-State Sales and Use Taxes on Purchases Made by Out-of-State Residents—Remittances of Taxes to Other Jurisdictions.

Opinion Requested by Hon. J. Ben Rickets, State Representative.

This is in response to your March 6, 1967 letter requesting my opinion with respect to the following situation as stated by you:

> "A sales tax problem has developed in Vincennes, Indiana which is best explained by the following:
>
> "Several Vincennes merchants sell goods to Illinois residents and then deliver said goods to their homes. These merchants do not collect the 4% Illinois sales tax on the merchandise sold and delivered. However, representatives from the State of Illinois have contacted some of these merchants and informed them that they must collect this Illinois sales tax and remit same to the State of Illinois. . . . These merchants have also been requested to register with the State of Illinois. However, if they so register they must open up their books for the past two years and pay all back sales

> tax which, in the opinion of the State of Illinois, they should have paid over this two year period."

Not only from the standpoint of nomenclature, but also because of the difference in the theory between the taxable incidence of a sales tax from that of a use tax, it should be noted that Illinois cannot extend its jurisdiction into Indiana to impose its *sales* tax upon a sale made in Indiana. This is true (as to a *sales* tax) both in the situation in which delivery of the commodity is made in Indiana as well as in the case in which delivery is made by some common carrier to the purchaser in Illinois.

> See: *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 98 L.Ed. 1304, 64 S. Ct. 1023 (1944).

If the sale is both initiated and completed by delivery in Indiana, then **it would be the Indiana** Sales Tax which would apply and which the Indiana merchant would be required to collect, irrespective of whether the purchaser be a resident or a nonresident of the State of Indiana.

However, it would appear that your question pertains to the collectibility (by and from Indiana merchants) of the Illinois *use* tax with respect to goods sold to an Illinois purchaser for use in the State of Illinois.

Referring to the validity of a use tax enacted by the State of Iowa, the United States Supreme Court in the case of *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941), stated:

> ". . . The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, 'has been withdrawn from the arena of debate.' *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583, 81 L.Ed. 814, 819, 57 S. Ct. 524; *Southern Pac. Co. v. Gallaher*, [306 U.S. 167] *supra.* It is one of the well-known functions of the integrated use and sales tax to remove the buyers' temptation 'to place their orders in other states in the effort to escape payment of the tax on local sales.' *Henneford v. Silas Mason Co.* [300 U.S. 577] *supra,* p. 581. As pointed out in that case (p. 582), the fact that the buyer employs agencies of interstate commerce in order to

> effectuate his purchase is not material, since the tax is 'upon the privilege of use after commerce is at an end.' "

Thus, assuming the applicability of an Illinois use tax upon the use of the particular commodity purchased, your question then relates to the collectibility of such tax by and from the Indiana vendor, as a collection agent for Illinois. Your question appears to be basically the following:

> Can the taxing authorities of the State of Illinois *require* Indiana vendors to collect the Illinois use tax upon purchases made in Indiana by residents of Illinois?

From your letter, it further appears that the sales involved are not consummated by delivery of the goods to the Illinois purchaser in Indiana, (in which event the Indiana sales tax would apply), but rather such purchaser orders the goods to be delivered to his home in Illinois.

However, your letter does not state the factual pattern of the Indiana vendor's operation sufficiently in detail for a definite answer to be given to your question. The power of the taxing authorities of the State of Illinois to require the collection of such tax is dependent upon whether the Indiana vendor is in any way subject to the jurisdiction of the State of Illinois, which in turn depends upon whether the Indiana vendor has by his actions done anything in the way of the exploitation of the consumer market in Illinois sufficient to render him subject to the jurisdiction of that state. Some situations which have been previously reviewed by the United States Supreme Court in this general area disclose the following:

1. If the Indiana vendor were also to maintain a place of business in the State of Illinois (i.e., branch offices), as well as in the state of Indiana, the State of Illinois could constitutionally require the Indiana vendor to collect the use tax even with respect to mail orders sent to Indiana and filled by direct shipment by mail or common carrier from places of business in Indiana to such Illinois purchasers, even though such orders were not solicited or placed by any of the Indiana

vendor's agents in Illinois. A case upholding this proposition is *Nelson v. Sears, Roebuck & Co., supra.* In that case, the United States Supreme Court based its decision upon the theory that since Iowa had extended to Sears, Roebuck and Company *supra,* the privilege of doing business in that state, Iowa could exact the burden of collecting the use tax as a price of enjoying the full benefits flowing from its Iowa business, even though the sales upon which the use tax was imposed were mail order sales which were filled from places of business outside of the State of Iowa.

2. If the Indiana vendor has no place of business in the State of Illinois, but solicits orders from Illinois purchasers by sending its salesman into the State of Illinois, in that event the Indiana vendor may be required to collect the Illinois use tax, even though the goods be delivered by common carrier from the Indiana vendor's place of business in Indiana to the purchaser in Illinois. A case upholding this proposition is *General Trading Co. v. State Tax Comm'n,* 322 U.S. 335, 88 L.Ed. 1309, 64 S. Ct. 1028 (1944).

3. Moreover, if the Indiana vendor has jobbers who are in the State of Illinois, who are furnished with catalogs, samples and advertising material and who are actively engaged in Illinois as representatives of the Indiana vendor for the purpose of attracting, soliciting and obtaining Illinois customers, in such event, the Indiana vendor may be required to collect the Illinois use tax, even though such jobbers be considered independent contractors who have no authority to accept orders, receive money or make collections for the Indiana vendor. A case upholding this proposition is *Scripto, Inc. v. Carson,* 362 U.S. 207, 4 L.Ed. 2d 660, 80 S. Ct. 619 (1960). In that case, the United States Supreme Court stated that the fact that the jobbers were not technically salesmen and regular employees on the payroll of the company was a distinction without constitutional significance because the Scripto Company, (a Georgia corporation), was actually exploiting the Florida market by means of such jobbers, catalogs and advertising.

4. However, if the Indiana vendor stays in Indiana in all respects (so that there can be no claim of his exploitation of

the consumer market in Illinois), then it is probable that there would be no factual basis upon which to assert that he has subjected himself in any way to the jurisdiction of Illinois. Thus, if there is no exploitation of the consumer market in Illinois by the use of branch offices, salesmen, jobbers, no regular systematic display of products by catalogs, samples, or the like, so that the Indiana vendor is operating strictly only in Indiana, then, in such a situation, there would be no factual basis upon which Illinois could legally require the Indiana vendor to collect the Illinois use tax. Such a case is that of *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 98 L.Ed. 744, 74 S. Ct. 535 (1954). In the *Miller Bros.* case, the Appellant was a Delaware merchandising corporation which sold only to customers at its store in Wilmington, Delaware. It did not take any orders by mail or telephone. Residents of the nearby State of Maryland came to its store and made purchases, some of which they carried away and some of which were delivered to them in Maryland by common carriers and others by trucks of the vendor. Because the vendor had not withheld the Maryland use tax, that State seized one of the vendor's trucks and claimed that the Maryland use tax must be collected by the Delaware vendor no matter how the goods were delivered.

In the *Miller Bros.* case, the State of Maryland claimed that the Delaware seller was liable to withhold the Maryland use tax because ". . . (1) the vendor's advertising with Delaware papers and radio stations, though not especially directed to Maryland inhabitants, reached, and was known to reach, their notice; (2) its occasional sales circulars mailed to all former customers included customers in Maryland; (3) it delivered some purchases to common carriers consigned to Maryland addresses; (4) it delivered other purchases by its own vehicles to Maryland locations." (347 U.S. at 341, 342)

A few quotations of the United States Supreme Court from the *Miller Bros.* case seem appropriate in the discussion of your problem. On page 342 of 347 U.S. that Court stated:

> "It is a venerable if trite observation that seizure of property by the state under pretext of taxation when there is no jurisdiction or power to tax is simple con-

> fiscation and a denial of due process of law. 'No principle is better settled than the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction.' *New York, L. E. & W. R. Co. v. Pennsylvania,* 153 U.S. 628, 646. 'Where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void. . . .' "

And in discussing the purpose and scope of the use tax that Court stated at page 343 of 347 U.S. as follows:

> "We are dealing with a relatively new and experimental form of taxation. Taxation of sales or purchases and taxation of use or possession of purchases are complementary and related but serve very different purposes. The former, a fiscal measure of considerable importance, has the effect of increasing the cost to the consumer of acquiring supplies in the taxing state. The use tax, not in itself a relatively significant revenue producer, usually appears as a support to the sales tax in two respects. One is protection of the state's revenue by taking away from inhabitants the advantages of resort to untaxed out-of-state purchases. The other is protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices. In this respect, the use tax has the same effect as a protective tariff becoming due not on purchase of the goods but at the moment of bringing them into the taxing states. The collection of the use tax from inhabitants is a difficult administrative problem, and if out-of-state vendors can be compelled to collect it and remit it to the taxing state, it simplifies administration. But this raises questions of great importance to particular taxpayers to the course of commercial dealing among the states and as to appropriation by other states of tax resources properly belonging to the state where the event occurs."

Then in making the final decision, striking down the requirement for the Miller Brothers Company to collect the use

tax in that case, the United States Supreme Court stated at page 347 of 347 U.S. as follows:

> ". . . Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market. That these inhabitants incurred a liability for the use tax when they used, stored or consumed the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here."

Therefore, in my opinion, no all-inclusive, specific and simple answer can be made to the basic question which your letter of inquiry presents and which would be applicable to every situation. However, it is believed by the use of the guidelines stated above and the review of the cases supporting those statements that Indiana vendors can, either themselves or through advice from their own legal counsel, determine whether they can be *required* (under the particular facts of their operation) to withhold the Illinois use tax. A further source of information on this broad subject is: Thomas Reed Powell, Sales and Use Taxes: Collection from Absentee Vendors, 57 Harv. L.R. 1086, 1090 (1944).

However, it should be noted that there is nothing illegal in an Indiana vendor voluntarily agreeing to serve as a collecting agent for the State of Illinois for the collection of the use tax and remitting of such tax to the Illinois taxing authorities. In fact, subsequent to the adoption of the sales and use tax in 1963 by the State of Indiana, the Governors of Indiana, Illinois and Kentucky met respecting this problem and entered into an informal reciprocal understanding, the mutual interest of which was for each state to cooperate with each sister state in the collection of the use tax which would become due that state. In a news release issued May 14, 1964, by Governors Welsh, Kerner and Breathitt, it was stated that the primary purpose of the plan was to eliminate difficulties that had arisen in areas bordering Indiana, Illinois and Kentucky, regarding the responsibility for the collection

of the use tax. The cooperative arrangement adopted at that time is substantially identical to one which had existed for some time between Illinois, Iowa and Missouri, which will assist merchants in these three bordering states who experience difficulty in determining which tax to apply when making a sale to an out-of-state purchaser. It was pointed out that by this arrangement no state is taking any tax revenue from a sister state, but rather than the use tax which is collected and which will be better collected (by the arrangement proposed) is tax revenue which is usually lost to all three states in the absence of some such agreement. The new arrangement was stated as being one which will tend to equalize competition among merchants along the borders of the three states.

Under this reciprocal arrangement, it is intended that the retail merchant *voluntarily* register with the neighboring state for the purpose of the collection of the use tax only, such registration expressly *not* subjecting the retailer to the jurisdiction of the cooperating state for any purpose other than the collection of the use tax. Upon such registration with the cooperating state such retail merchant will then be enabled to collect and remit the use tax which he collects only on sales made subsequent to the date of his registration.

It was then pointed out (by such news release) that such voluntary arrangement will help to abolish competitive disadvantages which may be present in the border areas. It will tend to insure to the Indiana retailers that Indiana residents who make purchases in Illinois or Kentucky will be paying the two (2) per cent Indiana use tax on purchases made for use in Indiana, the same percentage of tax as the Indiana sales tax which would be imposed if such purchases were made in Indiana; in this manner the inducement to attempt to make tax-free purchases outside of Indiana simply by crossing the border into Illinois or Kentucky will become much less, if all or substantially all vendors in Illinois, Kentucky and Indiana will cooperate in collecting the tax due to their sister states by reason of the *use* of goods purchased outside of the taxing state. For this reason, it will be beneficial not only to the taxing authorities of the states but also to vendors to cooperate by voluntarily agreeing to collect such use tax pursuant to the procedure of the reciprocal agreement.