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one preferred claim or lien, and, in case of suit to join them in one cause of action.”

It is clear from the above-cited statutes, that the Commissioner of Labor may accept an assignment of a valid claim for wages so long as the amount claimed is less than \$500.00. See 1941 O. A. G., p. 101.

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OFFICIAL OPINION NO. 17

May 28, 1965

Mr. William L. Fortune, Commissioner  
Indiana Department of Revenue  
202 State Office Building  
Indianapolis, Indiana

Dear Mr. Fortune:

Your letter has been received, wherein you request an Official Opinion upon the following question:

“Will builders and contractors who have entered into fixed price contracts prior to the enactment of section 6 (k) under the premise that they were retail merchants continue as retail merchants until the expiration of these contracts or will they now be required to pay the tax when they make purchases of materials?”

The Indiana Gross Income Tax Act of 1933, ch. 50, was amended by the Acts of 1963 (Spec. Sess.), ch. 30. Said 1963 Amendment created new provisions which imposed Indiana's gross retail tax, commonly referred to as the sales and use tax. The sales tax provisions of the Gross Income Tax Act of 1933 imposed a sales tax upon all transactions of retail merchants constituting selling at retail. Under the provisions of the Acts of 1933, ch. 50, and the Acts of 1963, ch. 30, builders and contractors were considered as retail merchants who transfer ownership of tangible personal property, and the sales tax, under the provisions of said Acts, was imposed upon the contractor's transferee (the purchaser).

In 1965, the Indiana Legislature, during its session, enacted Chapter 232, of the Acts of 1965, which amended the gross

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income tax provisions and sales tax provisions of the Acts of 1933, ch. 50 as amended. One of the provisions enacted by the Legislature in 1965 is found in Section 6 (k) of said Chapter 232, which reads as follows:

“(k) Every person making sales of tangible personal property to be used by the purchaser, including builders and contractors, whether general, prime or subcontractors, for incorporation in or improvement of a facility or structure constituting or becoming part of the land on which such facility or structure is situated, and not for resale as tangible personal property, shall be deemed to be a retail merchant in respect to such sales, and every such transaction shall constitute selling at retail subject to either the state gross retail tax or the use tax. Every such builder or contractor who furnishes tangible personal property for the purposes aforesaid, in respect to which property when acquired by the builder or contractor or by any predecessor supplier thereof neither the state gross retail tax nor the use tax was imposed, shall be deemed to be a user for consumption in respect to such property and the furnishing of such property shall be subject to the use tax imposed by this act as in section 45 provided. Notwithstanding any other provision of this act, the furnishing of such property either to or by the builder or contractor, whether general, prime or subcontractor, for incorporation in or as incorporated in such facility or structure shall be subject to but one imposition of either of such taxes under the provisions of this subsection or any other provisions of this act and not to any repetitive or multiple imposition thereof. Provided, however, that no state gross retail or use tax shall be owing in respect to any of the foregoing transactions in which the ultimate purchaser or recipient of the tangible personal property to be incorporated in or used as an improvement to a real estate facility or structure would be entitled under the exemption provisions of this act to purchase such property from the supplier thereof without liability for the state gross retail tax or use tax.”

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The new provision, as added, in essence makes the supplier of tangible personal property (materials) to builders and contractors a retail merchant in respect to said sales. This section, therefore, has the effect of imposing the sales tax upon builders and contractors at the time they purchase materials from their suppliers (retail merchants). The 1965 amendments have, therefore, changed the status of builders and contractors from that of being retail merchants authorized to collect the tax from their purchasers to that of being purchasers against whom the tax is levied.

Your question refers to contracts entered into by builders and contractors wherein a fixed price has been determined for the builders and contractors furnishing services and materials in the performance of said contract. Under the provisions of the Sales Tax Act prior to its amendment by the 1965 Legislature, the builders and contractors at the time they supplied materials under such a contract were required to add to the cost of said materials the sales tax imposed upon the transfer of said tangible personal property. Under the sales tax provisions as amended by the 1965 Legislature, said builders and contractors, no longer being retail merchants, cannot add to their transfer of tangible personal property the sales tax for a transfer of tangible personal property under said fixed contracts. The situation then exists that said builders and contractors will be required to pay the sales tax upon their purchase of materials. For a period of time this will place the builders and contractors in a position of having to absorb the payment of the sales tax, which will, in effect, reduce their margin of profit from said fixed price contracts.

The State of California, under its Retail Sales Tax Act of 1933, which levied a tax as a direct obligation of the retailer upon the privilege of selling tangible personal property at retail, was faced with a question similar to that posed by your letter. In the case of *National Ice & Cold Storage Co. of California v. Pacific Fruit Express Co.*, 11 Cal. (2d) 283, 79 P.2d 380, 386 (1938), the California Supreme Court decided said issue and stated as follows:

“. . . the principle of law is well established that the existence of an executory contract between or among two or more individuals presents no obstacle to the

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right or power of the state to levy or to impose a tax which may adversely affect the financial interests of either or any of the parties which may have been acquired under or by reason of the mutual covenants of such parties to the contract. An excerpt from one eminent authority will suffice to illustrate the rule. In the dissenting opinion in the case of *Coolidge v. Long*, 282 U. S. 582, at page 638, 51 S. Ct. 306, 75 L. Ed. 562, the following pertinent language occurs: 'In short, it is evident from the authorities cited, and many more which might be quoted, that the power to tax property, or a right, or a status, or a privilege, acquired or enjoyed by virtue of a contract, is no wise hindered or impeded by the fact of the existence of the contract whether it antedates or follows the effective date of the taxing act. No exercise of a governmental power, whether it be that of taxation, police, or eminent domain, though it makes less valuable the fruits of a private contract, can be said to impair the obligation thereof.' "

and also, in the case of *Storen et al. v. J. D. Adams Mfg. Co.*, 212 Ind. 343, 7 N.E.2d 941 (1937), the Supreme Court of Indiana had before it a question under the Gross Income Tax Act of 1933, wherein the State of Indiana was attempting to tax interest income received from bonds or other obligations of municipal corporations, which, by statutes in force at the time of issuance, were exempt from taxation at the time The Gross Income Tax Act of 1933 was adopted, the Indiana Supreme Court, in the *Storen* case, stated as follows:

"The bonds from which the income was received are specifically exempted from taxation, but there is no statutory provision which exempts the interest from excise taxes which may be imposed by the state. In *Orr v. Gilman* (1902) 183 U. S. 278, 289, 22 S. Ct. 213, 218, 46 L. Ed. 196, it was held by the Supreme Court of the United States: 'That a transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities ex-

empt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States.' Upon the same reasoning, it does not offend against article 1, section 24, of the Constitution of Indiana. The gross income tax is not a tax upon property, but an excise upon a privilege. . . ."

Chapter 232 of Indiana Acts of 1965, in Section 13 of said Act, provides as follows:

"This act shall be in full force and effect from and after the passage of this act by reason of an emergency existing for the immediate taking effect thereof."

Said amending act was approved March 10, 1965, which, under Indiana law, becomes the effective date of said act. In the case of *Carpenter v. Montgomery*, 7 Blackf. 415 (1843), the Indiana Supreme Court stated as follows:

". . . By the constitution of this State, statutes are not to be in force until they are published in print, unless in cases of emergency. Of the existence of the emergency the Legislature must necessarily be the judges; and when they deem it to exist, they have the right to declare a statute in force from and after its passage. . . ."

See, also, *State ex rel. White v. Grant Superior Court et al.*, 202 Ind. 197, 211, 212, 172 N.E. 897 (1930).

In view of the foregoing authorities and discussion it is my opinion that from and after March 10, 1965, Chapter 232 of the Acts of 1965 imposes a duty upon the suppliers (retail merchants) of materials to builders and contractors to impose and collect from said builders and contractors the sales tax as provided in Section 6 (k) of said act, and it also becomes the duty of the builders and/or contractors to pay said sales tax at the time of purchase of tangible personal property from their suppliers irrespective of the fact that the tax may adversely affect the financial interests of either or any of the parties which may have been acquired under or by reason of a contract entered into prior to the effective date of the taxing act. The tax, as levied and imposed by the Indiana Legisla-

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ture under the provisions of Section 6 (k) of Chapter 232 of the Acts of 1965, is clearly to be paid by the builders and contractors, and said builders and contractors no longer act as retail merchants in the transfer of tangible personal property to the construction projects they are performing.

This Opinion is limited to answering your question as to the tax liability which will arise if contracts of the class described are performed. No opinion is expressed, nor is it within my province to express an opinion, as to the effect, if any, the unexpected shifting of the tax burden may have on the duties or obligations of either party to such a contract.

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### OFFICIAL OPINION NO. 18

June 11, 1965

Hon. Jack L. New  
Treasurer of State  
242 State House  
Indianapolis, Indiana

Dear Mr. New:

This is in response to your request for my Official Opinion in answer to the question of whether the "Depository Act of 1937," as amended, being the Acts of 1937, ch. 3, as amended, as found in Burns IND. STAT. ANN. (1961 Repl.), §§ 61-622 to 61-682, applies to certificates of deposit acquired by the State Office Building Commission pursuant to the Acts of 1965, ch. 203, § 2. Simply stated, your question is whether such certificates of deposit constitute "public funds," and if so, whether they are subject to the requirements of said depository act. As used in said depository act, the term "public funds" is defined by the Acts of 1937, ch. 3, § 1 (e), as amended, as found in Burns IND. STAT. ANN. (1961 Repl.), § 61-622 (e) as follows:

"(e) The term 'public funds' means and includes all funds coming into the possession of the treasurer of state, treasurer of the board of trustees of any state benevolent, penal or educational institution, and all funds coming into the possession of any state officer