OFFICIAL OPINION NO. 43

August 12, 1964

Mr. James C. Courtney, Commissioner
Indiana Department of State Revenue
202 State Office Building
Indianapolis 4, Indiana

Dear Mr. Courtney:

This is in response to your request for my Official Opinion upon the following subject:

> "We respectfully request your opinion concerning the applicability to Private Colleges and Universities of Section 39(b) (8) of the Indiana Gross Income Tax Act."

Your letter of request states that since the issuance to all state and other accredited colleges and universities of Circular ST-31 by the Indiana Department of State Revenue on January 6, 1964, upon the subject of "Sales Tax Instructions," your department has received a number of inquiries from individuals and from private colleges and universities in relation to the liability of said institutions under the Sales Tax Act. It should be immediately noted that your request for an opinion does not present a specific question based upon the liability of said institutions under any particular set of facts, but concerns the general applicability to private colleges and universities of the section of the statute to which your inquiry refers.

Section 39(b) (8) of the "Gross Income Tax Act of 1933," as amended, is a part of Section 39 which was added to that act by the Acts of 1963 (Spec. Sess.), Ch. 30, Sec. 4. This subsection, as found in Burns' (1964 Cum. Supp.), Section 64-2654(b) (8), provides as follows:

> "(b) Nor shall the state gross retail tax apply to any of the following transactions:
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> * * *
>
> "(8) *Sales* and purchases *by* organizations wholly exempt from liability for the gross income tax *under*

> "* * * Provisions of any other law to the contrary, notwithstanding, vacancies in membership of any school board shall be filled by the remaining membership and the selection shall be made subject to the same qualifications and limitations, other than ex officio, that governed the election of the member whose office is vacated. Appointments to fill vacancies shall be for the remainder of the unexpired term."

In consideration of the provisions of the last referred to statute, I am of the opinion when a member of a school board has resigned and an appointment is to be made to the school board, this appointment is for the unexpired term of the person who resigned.

In addition to the foregoing and in answer to your second question, Section 7, Clause (3) of said reorganization statute, *supra*, as it then existed in 1961, being Burns' (1961 Supp.), Section 28-6116a, Clause (3), provided, in part, as follows:

> "If at any time after the first board member election there shall occur a vacancy on the board of school trustees for any reason including but not limited to the failure of the sufficient number of petitions for candidates being filed, and whether the vacating member was elected or appointed, the remaining members of the board of school trustees, whether or not a majority of the board, shall by a majority vote fill such vacancy by appointing a person or persons from within the boundaries of the community school corporation to serve for the term or balance of terms respectively * * *"

It is therefore clear the provision of the reorganization statute at the time this school city was reorganized was entirely consistent with the provisions of Burns' 28-2824, *supra*, concerning filling of vacancies, and therefore does not modify this opinion as to filling of vacancies.

> *subsection (i) of section 6* of this act of tangible personal property and services (including public utility services and commodities) used by such organizations *predominantly* for the purposes for which such organizations are granted exemption under such subsection (i)." (Our emphasis)

In examining the above-quoted subsection, it should be noted that: (1) it applies not only to purchases by the organizations to which it applies, but also to *sales by* such organizations; (2) it applies to all organizations which are wholly exempt from liability for gross income tax *under Section 6(i)* of the Gross Income Tax Act, so that that subsection of said act provides the standard for determining the class of organization to which the subject sales tax exception applies; and (3) it does not necessarily apply to all purchases and sales by the organizations which are wholly exempt from liability for gross income tax under Section 6(i) of the Gross Income Tax Act, but applies only to such purchases and sales by said organization as are used by them *"predominantly"* for the purposes for which they are granted exemption under said Section 6(i) of the Gross Income Tax Act. Thus, the answer to your basic question depends upon whether "private colleges and universities" are includible within "organizations wholly exempt from liability for the gross income tax *under subsection (i) of section 6*" of the "Gross Income Tax Act of 1933," as amended, the qualified sales and purchases by such organizations not being subject to the state gross retail tax as specifically provided by Burns' (1964 Cum. Supp.), Section 64-2654(b)(8), *supra.*

Section 6(i) of the Gross Income Tax Act of 1933, as amended, as found in Burns' (1961 Repl.), Section 64-2606(i), provides as follows:

> "There shall be excepted from the gross income taxable under this act:
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> * * *
>
> "(i) Amounts received by institutions, trusts, groups and bodies organized and operated exclusively for religious, charitable, scientific, fraternal, educa-

tional, social and/or civic purposes and not for private benefit, as contributions, tuition fees, initiation fees, matriculation fees, membership fees, and earnings on, or receipts from sales of, intangible property owned by them: *Provided, however, That gross income received by* churches, labor unions, fraternal benefit societies, orders, unions or associations incorporated, licensed, and operating under sections 181 to 206, both inclusive, of Article X of the Indiana Insurance Law, approved March 8, 1935, applicable to fraternal beneficiary associations, monasteries, convents, hospitals, and schools which are a part of the public school system of the state of Indiana or are regularly maintained as parochial schools by recognized religious denominations, *state and other accredited colleges and universities, or any corporation organized and operated solely for the benefit of any of the same* or any trust created for the purpose of paying pensions, or other retirement benefits, to the employees of a single employer or a group of employers, or any trusts created for the purpose of paying pensions to members of any particular profession or business who have created the trust for the purpose of paying pensions to each other, *none of the foregoing being organized or operated for private profit, shall be excepted from taxation under the provisions of this act:* Provided, further, That it is not the intention by the foregoing language to exclude from taxable gross income, any fees, dues, or assessments that represent premium payments on insurance policies written by insurance companies which are included in section 1, subsections (o) and (p) of this act: Provided, further, That it is not the intention of the foregoing language to exclude any gross income from taxation under this subsection except as is specifically set out herein." (Our emphasis)

A study of Burns' 64-2606(i), *supra*, discloses that the exceptions from tax liability for gross income received are divided into two main categories, to wit:

First. Classes or amounts of gross income received by specified kinds of bodies, which classes or amounts of gross

income constitute contributions, tuition fees, initiation fees, matriculation fees, membership fees, and earnings on, or receipts from sales of, intangible property owned by such bodies.

Second. The *total* gross income received by that class of organizations which are specified following the first proviso in Section 6(i) as quoted above. It is this second class of exceptions following the first proviso in said Section 6(i) which constitutes the "organizations wholly exempt from liability for the gross income tax *under subsection (i) of Section 6" as provided in Burns' 64-2654(b)(8), supra.* (Our emphasis)

There can be no serious question concerning the conclusion that the total exemption of "state and other accredited colleges and universities, or any corporation organized and operated solely for the benefit of any of the same," as provided by Section 6(i), *supra,* would include "private colleges and universities" as specified in your inquiry.

I am not unmindful of the provision contained within the Acts of 1963 (Spec. Sess.), Ch. 30, Sec. 18, which added to the Gross Income Tax Act, Section 6C, which, as found in Burns' (1964 Cum. Supp.), Section 64-2606c, provides:

> "Notwithstanding any provisions of this act, the gross income received by the state of Indiana, its agencies and instrumentalities, all counties, townships and municipal corporations, their respective agencies and instrumentalities, and all other state governmental entities and subdivisions, *including state colleges and universities,* received on or after July 1, 1963, in the performance of private or proprietary activities or business shall be subject to the gross income tax." (Our emphasis)

While it is true that the effect of Burns' 64-2606c, *supra,* is to impose liability for gross income tax upon gross income received by the State of Indiana, its agencies and instrumentalities, etc., and all other state governmental entities, "including state colleges and universities" with respect to gross income received on and after July 1, 1963, from the

conduct of private or proprietary activities, this section does not change the fact that the exception from the Sales Tax Act as provided by Burns' 64-2654(b)(8), *supra,* extends to all organizations which are "wholly exempt from liability for the gross income tax *under subsection (i) of section 6.*" Thus, notwithstanding the liability for gross income tax upon gross income received by state colleges and universities on or after July 1, 1963, from the conduct of private or proprietary activities as provided by the new Section 6C, Burns' 64-2606c, *supra, state* colleges and universities are also includible in the class of organizations which, by the standards of Section 6(i), *supra,* were totally exempt and which Section 6(i) provides the standards for determining the class of organizations to which the exception provided by Burns' 64-2654(b)(8), *supra,* applies.

Moreover, I am not unmindful of another provision in the Acts of 1963 (Spec. Sess.), Ch. 30, Sec. 2(g), as found in Burns' (1964 Cum. Supp.), Section 64-2652(g), which provides:

> "(g) The state of Indiana, its agencies and instrumentalities, all counties, townships and municipal corporations, their respective agencies and instrumentalities, and all other state governmental entities and subdivisions, *including state colleges and universities,* shall, in the performance of private or proprietary activities or business constitute retail merchants in respect to receipts which would constitute gross income from selling at retail if received by a retail merchant." (Our emphasis)

The foregoing, Burns' 64-2652(g), *supra,* clearly imposes upon the state, its agencies and instrumentalities, etc., and all other state governmental entities, "including state colleges and universities" the obligation of collecting the sales tax and otherwise enforcing the provisions of the Sales Tax Act with respect to transactions growing out of the conduct of private or proprietary activities, if the receipts from such transactions would constitute gross income from selling at retail if received by a retail merchant. This subsection would obviously require that state colleges and universities must act

as retail merchants in respect to receipts derived from the conduct of private or proprietary activities (activities not conducted predominantly for the purposes for which such organizations were granted exemption under Section 6(i), *supra*), and which would constitute gross income from selling at retail if received by a retail merchant.

The apparent conflict between Burns' 64-2654(b)(8), *supra*, Burns' 64-2606c, *supra*, and Burns' 64-2652(g), *supra*, is illustrative of the many and various problems arising in the administration of the Sales Tax Act by reason of the failure of the act to delineate, by specific standards, those transactions which are or are not subject to the tax imposed by that 1963 Act. Nevertheless, applying the rule of giving force and effect to each provision of an act whenever possible, it is impossible to construe Burns' 64-2654(b)(8), *supra*, as not applying to both state and private colleges and universities because such, *by the standards of Section 6(i), supra*, are wholly exempt from liability for gross income tax even though state colleges and universities are liable for gross income tax upon receipts received on or after July 1, 1963, derived from the conduct of private or proprietary activities *by reason of the provisions of another section*. Thus, as to the sales tax, state colleges and universities would be engaged in the performance of private or proprietary activities or business when such institutions sell tangible personal property for a predominant purpose other than that purpose for which such institutions are granted exemption under Section 6(i), *supra*, as discussed *infra*. Therefore, the provisions of Burns' 64-2654(b)(8), *supra*, do apply to both state and private colleges and universities and the extent of the applicability is dependent upon the difficult task of determining what purchases and sales by such colleges and universities are used by them "predominantly" for the purposes for which they were granted exemption under said Section 6(i), *supra*.

The purposes for which "state and other accredited colleges and universities, or any corporation organized and operated solely for the benefit of any of the same" were granted exemption under Section 6(i), *supra*, are so that they may fulfill their primary goal of affording the best possible edu-

cation to all persons so desiring the same at the lowest possible cost to such colleges and universities in order that persons desiring a higher education may have the opportunity of acquiring such at the lowest possible cost to them. This is in conformity with the Indiana Constitution, Art. 8, Sec. 1, providing that the General Assembly shall encourage by all suitable means moral, intellectual, scientific, and agricultural improvement and is further in harmony with the Indiana Constitution, Art. 10, Sec. 1, by which the General Assembly, with respect to property taxation, is authorized to provide exemptions by law for property, both real and personal, which is used for educational purposes. Thus, for Burns' 64-2654(b)(8), *supra,* to apply, such purchases and sales of tangible personal property by such organizations must be used "predominantly" for educational purposes.

The difficulty in applying this standard to the great bulk of situations concerning the state colleges and universities and most of the so-called private colleges and universities is in the fact that most, if not all, of the income derived from all of the transactions conducted by such colleges and universities is ultimately used to defray the expense of the education furnished by them or to promote the acquisition of greater and/or better facilities for educational purposes. Nevertheless, your department has been delegated the responsibility of administering the Sales Tax Act and clothed with the authority of promulgating rules and regulations which are necessary to the proper administration of the act and which are not in conflict therewith.

Of further difficulty in applying the standard prescribed by Burns' 64-2654(b)(8), *supra,* is the fact that the term "predominantly" is not one of precise meaning and must be construed together with Burns' 64-2652(g), *supra,* which requires, as to state colleges and universities, that they act as retail merchants and thereby collect the tax with respect to transactions from the conduct of private or proprietary activities resulting in receipts which would, if received by a retail merchant, constitute gross income from selling at retail. The word "predominant" is defined in Ballentine's "Law Dictionary with Pronunciations," Second Edition, pages 998, 999, as follows:

> "In its natural and ordinary meaning, the word is understood to import something greater or superior in power and influence to others, with which it is connected or compared. Thus, a predominant motive, when several motives may have operated, is one of greater force and effect, in producing the given result, than any other motive."

There are, of course, such a multitude and variety of transactions by colleges and universities involving the purchase or sale by them of tangible personal property that it would be impossible in this opinion, in the absence of the precise fact pattern in each instance, to state what purchases and sales by colleges and universities are used by them "predominantly" for educational purposes as the word "predominantly" is defined above. It would seem that if the predominant motive of a transaction conducted by a college or university involving the purchase and sale by them of tangible personal property, is that primarily of earning income which in turn will ultimately be used for educational purposes, then such transactions would properly be categorized more in the nature of the conduct of a private or proprietary activity or business, rather than as the use of tangible personal property predominantly for educational purposes. Thus, while an educational purpose may exist as to any given transaction, yet such purpose must be the predominant purpose and not merely a subordinate purpose in order for such transaction to be exempted.

On the other hand, it would seem that the great bulk of the transactions involving the purchase and sale of tangible personal property by colleges and universities and the furnishing of services by them on the campuses of such colleges and universities would properly be considered as being predominantly for educational purposes. Particularly, those purchases and sales by colleges and universities and services performed by them on their campuses which are necessary to the conduct and fulfillment of their purpose of affording education would obviously be "predominantly" for such purpose.

Included in such purchases, sales and services would be the room and board charge, the cafeteria and dining-room sales

to students and members of the faculty and staff, if such purchases and sales are made or services furnished by the college or university involved, rather than by a private catering or restaurant firm or other lessee or licensee of property owned by such college or university. In the case of purchases and sales by catering or restaurant firms, lessees or licensees upon the campuses of colleges and universities, such would not qualify with the requirement of Burns' 64-2654(b)(8), *supra,* requiring that such purchases and sales be used or made by the organizations which are granted exemption under Section 6(i), *supra.* Moreover, an intentional effort by colleges and universities to compete with private and proprietary businesses by encouraging or soliciting nonstudent trade would not be in harmony with the requirement that the tangible personal property purchased and sold by such colleges and universities must be used predominantly for educational purposes.

Also included in those purchases and sales by colleges and universities which would qualify for exemption under Burns' 64-2654(b)(8), *supra,* would be the required textbooks and necessary classroom or laboratory supplies acquired from book stores operated by the college or university, but not if operated by a private lessee or licensee. On the other hand, in my opinion, the sale of books not required as a part of the curriculum of the particular college or university involved, the sale of clothing, novelties and such other items as are not necessary for the conduct of the educational purpose of the particular college or university, would not qualify as being used by it predominantly for educational purposes.

Reference is made to an article by F. James Kane appearing in the "Notre Dame Lawyer," Vol. 34, at page 238 entitled "Colleges and Universities—Unfair Competition—Taxation—Status of Educational Institution Engaged In Profit-Making Enterprise." While this article was prepared before the enactment of the Indiana Sales Tax Act, and therefore does not concern that type of taxation nor an exemption provision identical with that considered in this Opinion, nevertheless, it does discuss the power of a university to engage in a business for profit, businesses related to the educational purpose of the university, the problem of Federal taxation

and of the possible unfair advantage of universities when in competition with commercial enterprises. The conclusion of that article, appearing upon page 248, seems peculiarly appropriate in a consideration of this question which you have presented, which conclusion reads as follows:

> "With few exceptions, the power of an educational institution to engage in almost any type of commercial enterprise either directly or indirectly is well-established. As colleges and universities have expanded, their collateral powers have been extended to accommodate the process of growth. As has been demonstrated in the preceding cases the college or university occupies a unique and, in some respects, privileged position in the law of unfair competition because it stands in loco parentis to its student and has the discretionary power to enforce reasonable rules governing them, regardless of the adverse effects on local businesses seeking student patronage. The institution's own commercial rights, however, are given no less protection by reason of its status as a non-profit organization, and the commercial competitor is bound to respect these rights. For example, the property right of a university in its name, seals and symbols, as illustrated in the *Notre Dame Ring* case, 258 F. 2d 256 (7th Cir. 1958), *affirming* 152 F. Supp. 269 (N.D. Ind. 1957), gives the university the exclusive right to exploit these items. Affixing the university name or seal to a product in effect gives the university an exclusive and privileged market position protected for all time against all commercial interference.
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> "The sole commercial limitation placed upon such institution to date is the justified exception to the general trend expanding commercial rights and powers, and consists of the 1950 amendment to the Internal Revenue Code imposing taxation on the unrelated business income of a college or university. Even in this area, however, efforts to negative the competitive advantage of the nonprofit organization are overcome by the application of the primary-purpose doctrine to situations like that presented in the *Villyard*

> case, 204 Ga. 517, 50 S. E. 2d 313 (1948). There is need for further limitation and definition in this area, for despite the fact that the primary purpose of a campus business is to service the student needs, some control should be placed on the non-student trade if the activity is to retain a tax-free status. A claim that the primary purpose is to serve the students may be effectively refuted if it is found that there is a substantial margin of profit taken from all transactions and a large volume of outside business being done. This situation strongly suggests that the quest for profit is more than a secondary or incidental purpose, and invites limitations to the present liberal interpretations of the primary purpose doctrine. Before any further expansion or curtailment of educational commercial enterprising is undertaken, an extensive study should be made to ascertain the effects of such action on the university's function in a society devoted to free enterprise and public education."

In conclusion, I have examined Circular ST-31, issued to all state and other accredited colleges and universities by the Indiana Department of State Revenue on January 6, 1964, on the subject of "Sales Tax Instructions." It is my opinion that the effect of said circular is to subject substantially all sales by state and other accredited colleges and universities to the sales tax and thereby to nullify the express exemption provided by Burns' 64-2654(b)(8), *supra*. As herein stated, I fully realize the delicate problem of issuing any circular, instruction or regulation on this general subject. However, it seems to me that Circular ST-31, *supra*, has been prepared upon the basic assumption that every sale of tangible personal property by a college or university which could be made by a retail merchant, acting in a private or proprietary capacity, would thereby become subject to the sales tax on account of the provisions in Burns' 64-2652(g), *supra*, providing that state colleges and universities shall constitute retail merchants with respect to such transactions from the conduct of private or proprietary activities, as produce receipts which, if received by a retail merchant, would constitute gross income from selling at retail. Thus, it is my opinion

that Circular ST-31, *supra,* is contrary to law insofar as it does not give force and effect to the provision of Burns' 64-2654(b) (8), *supra,* which specifically accords to colleges and universities, whether state or private, exemption from tax liability under the Sales Tax Act for purchases and sales by them which are used "predominantly" for the purpose for which such organizations were granted exemption under Section 6 (i) of the Gross Income Tax Act. Until such time as the Legislature provides more specific standards for determining what purchases and sales by state and private colleges and universities are to be considered as exempt from the provisions of the Sales Tax Act, it is my opinion that Burns' 64-2654 (b) (8), *supra,* is applicable to all such universities, in that purchases and sales by them are exempt from the tax imposed by the Sales Tax Act to the extent that such are used by them predominantly for educational purposes.

OFFICIAL OPINION NO. 44

August 13, 1964

Hon. Anna Maloney
State Representative
131 East 5th Avenue
Gary, Indiana

Dear Representative Maloney:

You have requested my Official Opinion on the following question contained in your letter of August 5, 1964:

> "* * * Can the Financial Committee of the Gary Common Council make revisions, changes, and amendments to the salary and/or budget ordinance submitted by the mayor of the City of Gary so long as such revisions, amendments, and changes do not represent increases in the amounts mentioned in said salary and/or budget ordinance? If so, can such changes, revisions, or amendments be made prior to the time said salary and/or budget ordinances are reported out of the committee for action by the full Council?"

In your letter requesting this Opinion, you have quoted certain sections of the Ordinances of the City of Gary. It