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

Dear Mr. Courtney:

In your letter wherein you request an Official Opinion as to whether or not “speculative builders” are required to collect the 2% sales tax or pay the 2% use tax, your specific questions are stated as follows:

“(1) Is a contractor constructing a building on his own parcel of real estate required to pay the sales or use tax on the material used in constructing the building?

“(2) Is a contractor constructing a building on his own parcel of real estate, for the purposes of re-selling the real estate with the completed building situated thereon, required to collect the 2% sales tax on material used in construction of the building or to pay the 2% use tax on material purchased for construction of the building?”

In answer to your first question, your attention is invited to the provisions contained in Acts of 1963 (Spec. Sess.), Ch. 30, Sec. 1, as found in Burns’ (1964 Supp.), Section 64-2651, which provides as follows:

“In addition to the gross income tax imposed by this act, an additional excise tax, to be known as the state gross retail tax, is hereby imposed on transactions of retail merchants constituting selling at retail, as defined in section 37 of this act, occurring on or after July 1, 1963, subject to the exceptions and exemptions provided in section 39 of this act, at the rate of two per cent [2%] on the gross income derived therefrom. Such tax shall be borne by the purchaser and shall be paid by the purchaser to the retail merchant, who shall collect the tax as agent for the state, at the rate
fixed herein, any fractional cent of tax of one-half cent \([\frac{1}{2}c]\) or more to be one cent \([1c]\) of tax ** *”

The essence of this provision is to levy and impose the State gross retail tax on transactions of retail merchants constituting selling at retail. In the case of Welsh et al. v. Sells et al. (1963), — Ind. —, 192 N. E. (2d) 753, decided by the Indiana Supreme Court, said court stated as follows: (p. 757)

“The proposed tax in question falls within a category of an excise tax upon retail sales transactions as defined in the Act ** *”

The Acts of 1933, Ch. 50, Sec. 1, as amended, as found in Burns’ (1964 Supp.), Section 64-2601 (k), defines a transaction of selling at retail as follows:

“(k) The term ‘selling at retail’ means and includes only a transaction by a ‘retail merchant’ by which the ownership of tangible personal property is transferred, conditionally or otherwise, for consideration, when such transfer is made in the ordinary course of the transferor’s regularly conducted business and when such property is acquired by the transferee for any purpose other than the purposes designated in subsection (a) of section 3 of this act provided, however, that only so much of the consideration as represents the price at which such property is or may be sold without the rendition of any service whatever by the transferor in respect to such property and such bona fide charges separately stated on the records of the transferor as may be added to or included in such consideration for the preparation, fabrication, alteration, modification, finishing, completion, delivery or other services performed in respect to such property, and not to any extent in respect to any property owned by the transferee, by or on behalf of the transferor prior to the delivery of the property to the transferee, or to the place of delivery designated by the transferee, shall be considered to be received from ‘selling at retail,’ and all other charges added to or included in such
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consideration for any and all other services performed by or on behalf of the transferor in respect to such property and the receipts of all persons from the performance of services on behalf of such transferor in respect to transactions constituting 'selling at retail' by such transferor shall be considered receipts from the performance of services taxable under subsection (g) of section 3 of this act.”

Section 1 (k), supra, provides the definition of “selling at retail” for the purpose of the Gross Income Tax Act and has been in effect for many years. This definition of “selling at retail” is specifically incorporated into the Gross Retail Tax Act by Acts of 1963 (Spec. Sess.), Ch. 30, Sec. 2, as found in Burns’ (1964 Supp.), Section 64-2652 (a), which reads as follows:

“For the purpose of the state gross retail tax and use tax:

“(a) Transactions of retail merchants constituting selling at retail shall include all transactions defined as ‘selling at retail’ in subsection (k) of section 1 of this act, and all transactions constituting selling at retail under the provisions of section 37.”

Section 1 (k), supra, of the Gross Income Tax Act as incorporated into the Gross Retail Tax Act excludes from the definition of “selling at retail,” transactions involving the transfer of the ownership of tangible personal property, when said transfer is for any purpose designated in subsection (a) of Section 3 of the Acts of 1933, Ch. 50, as amended, as found in Burns’ (1964 Supp.), Section 64-2603 (a). Section 1 (a) reads as follows:

“The tax upon the receipt of gross income hereby provided for, shall be measured by the amount of volume of such gross income and shall be imposed at the following rates:

“(a) With respect to that part of the gross income of every person which is received from wholesale sales, except as hereinafter provided in subsection (e) of
this section, the tax shall be equal to one-half of one per cent \( \frac{1}{2} \% \) of such part of the gross income. The term 'wholesale sales' means and includes only the following: (1) Sales of any intangible personal property (except capital assets of the seller) to a purchaser who purchases the same for the purpose of reselling it in the form in which it is sold to him; (2) sales of any tangible personal property as a material which is to be directly consumed in direct production by the purchaser in the business of producing tangible personal property by manufacturing, processing, refining, repairing, mining, agriculture, or horticulture; (3) sales of any tangible personal property which is to be incorporated by the purchaser as a material or an integral part into tangible property produced by such purchaser in the business of manufacturing, assembling, constructing, refining, or processing; (4) receipts received from the business of industrial processing or servicing including but not limited to enameling and plating of any tangible personal property which is owned by and which is to be sold by the person for whom such processing or servicing is done, either as a complete article or incorporated as a material, or as an integral or component part of tangible personal property produced for sale by such person in the business of manufacturing, assembling, constructing, refining or processing; (5) sales of drugs, medical and dental preparations, and similar materials to be directly consumed in professional use by doctors, hospitals, embalmers, and tonsorial parlors; (6) sales of tangible personal property to be directly consumed by the purchaser in the business of industrial cleaning; and/or (7) sales of any tangible personal property to be directly consumed by the purchaser directly in the business of rendering public utility service: Provided, however, That no sale to a division, subdivision, agency, instrumentality, unit or department of government shall be deemed to be included within this definition: Provided further, That price or quantity shall not be considered in the application of this definition: Provided further, That it shall be immaterial in the appli-
cation of this definition whether sales are made from stock or upon order; Provided further, That in the application of this definition it shall be immaterial whether or not the seller is the manufacturer or producer of the property sold: Provided further, That the term 'consumed' as used herein shall refer only to the immediate dissipation or expenditure by combustion, use, or application, and shall not mean or include, the obsolescence, discarding, disuse, depreciation, damage, wear, or breakage, of tools, dies, equipment, rolling stock or its accessories, machinery, or furnishings."

The foregoing transactions as set out in Section 3 (a) are classified as wholesale sales. The transactions therein classified as wholesale sales are therefore not included within the Gross Retail Tax Act as taxable transactions.

A speculative builder/contractor purchasing tangible personal property for the purpose of constructing a building on his own parcel of real estate, would be included within those transactions contained in Section 3 (a) as follows:

"* * * (3) sales of any tangible personal property which is to be incorporated by the purchaser as a material or an integral part into tangible property produced by such purchaser in the business of * * * constructing * * *"

A speculative builder/contractor who purchases tangible personal property for the purpose of constructing a building on his own real estate, purchases said tangible personal property to be incorporated by said speculative builder/contractor (purchaser) as a material or integral part of tangible property (real property) being produced by said speculative builder/contractor (purchaser) in the business of constructing. The material which is so incorporated into the tangible property constructed by the speculative builder/contractor is therefore acquired in a "wholesale transaction" and is therefore not subject to the sales tax portion of the Indiana Gross Retail Tax Act. The answer to your first question, in part, is: A speculative builder/contractor constructing a building on his own parcel of real estate is not required to pay the sales
tax on the material purchased for use in constructing said building.

The remainder of your question number (1) to be answered concerns the taxability of the speculative builder/contractor for the use tax.

Acts of 1963 (Spec. Sess.), Ch. 30, Sec. 6, as found in Burns' (1964 Supp.), Section 64-2656, levies an excise tax which is designated as a use tax and is imposed upon the storage, use or other consumption in the State of Indiana, of tangible personal property purchased in a transaction at retail from a retail merchant, at the rate of 2% of the sale price paid for such property. Said section of the act reads as follows:

"Subject to the exceptions and exemptions provided in section 43 of this act, an excise tax, to be known as the use tax, is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased in a transaction occurring on or after July 1, 1963, in this state or elsewhere at retail from a retail merchant, wherever located, for storage, use or other consumption in this state, at the rate of two per cent [2%] on the sale price paid for such property. Such tax shall be paid by the purchaser to the retail merchant, who shall collect the tax as agent for the state, at the rate fixed herein any fractional cent of tax of one-half cent [½¢] or more to be one cent [1¢] of tax * * *" (Our emphasis)

It would appear from the language of this section that the use tax is to be levied only upon tangible personal property purchased at retail from a retail merchant, for storage, use or other consumption in this state. The use tax would therefore appear to be levied and imposed upon the same type of transaction upon which the sales tax is imposed, i.e. a transaction where the ownership of tangible personal property is transferred from a retail merchant to a purchaser in a transaction defined as "selling at retail."

The use tax portion of the Gross Retail Tax Act, being Acts of 1963 (Spec. Sess.), Ch. 30, Sec. 7, as found in Burns' (1964 Supp.), Section 64-2657, further provides:

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“For the purpose only of the imposition of the use tax, unless the context otherwise requires:

“(a) The term ‘purchased at retail’ shall mean and include only the purchase of property from a retail merchant in a transaction constituting selling at retail, as defined in section 37 of this act.

“(b) The term ‘sale price’ shall mean and include so much of the consideration paid for property purchased at retail from a retail merchant as would constitute gross income from selling at retail, as defined in this act, without reduction for any exemption or exception other than those provided for in section 43 of this act.

“(c) The term ‘use’ shall mean and include the exercise of any right or power over tangible personal property incident to the ownership of that property.

“(d) The term ‘storage’ shall mean and include any keeping or retention of tangible personal property in this state for any purpose except subsequent use solely outside this state.”

The above-quoted section for the purpose of the use tax defines a “purchase at retail” as including only a purchase of property from a retail merchant in a transaction constituting selling at retail as defined in Section 37 of the Gross Retail Tax Act, being Acts of 1963 (Spec. Sess.), Ch. 30, Sec. 2, as found in Burns’ (1964 Supp.), Section 64-2652, which is the section incorporating or adopting Section 1 (k) of the Gross Income Tax Act. It would follow, therefore, that for the purpose of imposing the use tax upon a purchaser who purchases tangible personal property for a use which is covered by Section 3 (a) (3), supra, said transaction would be a wholesale transaction and the use tax could not be levied or imposed upon said purchaser because the original purchase was not a transaction at retail. Therefore, in answer to the second part of your first question, my answer would be:

A speculative builder/contractor constructing a building on his own parcel of real estate is not required to pay the use tax on the purchases of material which are used in construction of said building.
Your second question will also have to be answered in two parts. The first part will be directed to answering that portion of your question relating to the selling of the improved real estate by the speculative builder/contractor who has used the material purchased at wholesale in the construction of a building upon said real estate in regards to whether or not the 2% sales tax can be collected from the purchaser of said real estate. The sales tax is levied against the sale of tangible personal property at retail. When the speculative builder/contractor sells his improved real estate, such sale is a sale of real estate (tangible property) and not a sale of tangible personal property. A sale of real estate is not subject to the 2% sales tax, and as a seller of real property the speculative builder/contractor could not be required to impose and collect the 2% sales tax against the sale of said real estate.

In answer to the second part of question number two, my answer would be based upon the same reasoning as set forth in this opinion in answer to your first question. A speculative builder/contractor, who purchases tangible personal property which is to be incorporated by said speculative builder/contractor as an integral part into tangible property (real estate) produced by said speculative builder/contractor in the business of constructing, is not subject to the payment of the sales tax or the use tax on the materials purchased for said construction, because both the sales tax and the use tax are levied and imposed originally upon a transaction constituting a sale at retail and not upon a transaction at wholesale. Where the materials sold to the speculative builder/contractor have been purchased at wholesale, and said materials are specifically used in improving his own real estate, no taxable transaction has thus occurred. I can find no provisions in the sales tax or use tax sections of the Gross Income Tax Act subjecting the original purchase or the subsequent use by said speculative builder/contractor to a tax liability under the Indiana Gross Retail Tax Act.