easements is not affected by the interest of the state if he has no notice of the servitude and further that such purchaser is not required to check the files of the State Highway Commission in order to ascertain the nature and description of the interest of the state.

State of Indiana et al. v. Young et al. (1958), 238 Ind. 452, 151 N. E. (2d) 697;


I would further note that language similar to that which appears in Burns' 36-2940, supra, stating that no fee shall be charged the state by recorders, has been held by a court in another state to be superfluous since, in the absence of express statutory provision, there are no exceptions to the rule that the state is not liable for costs.

State v. LaPlata River & Cherry Creek Ditch Co. (1937), 101 Colo. 368, 73 P. (2d) 997.

Based upon the above authorities it is my opinion that, since the provisions of Burns' 49-1308a, supra, do not contain express language requiring the State of Indiana to pay the fees set out therein, the Indiana State Highway Commission in recording rights-of-way or easements as required by law is not obligated to pay a recording fee.

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OFFICIAL OPINION NO. 17

March 31, 1964

Hon. C. Wendell Martin
State Senator
920 Circle Tower Building
Indianapolis, Indiana

Dear Senator Martin:

This is in reply to your recent request for an Official Opinion upon the questions contained in your letter which read as follows:

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"In Official Opinion No. 24, dated March 26, 1962, you ruled on four questions asked by Mr. B. B. McDonald, State Examiner. Your answer to the fourth question indicated that 'The gross salary paid to the teacher under the submitted form of contract, including the cost of the purchase of the annuity, must be reported to the Indiana Gross Income Division, and gross income tax deductions withheld from the gross amount of the salary contracted for.'

"Your Official Opinion is requested to the following question: Under the new Indiana Adjusted Gross Income Tax law, will the cost of the purchase of the annuity be deducted from gross income and therefore not reported to the Indiana Gross Income Division on form WH-2? If your answer is in the affirmative, would any amounts actually withdrawn from the annuity contract, regardless of the time, be then reportable to the Indiana Gross Income Division on form WH-2?"

Under the terms of the teacher’s contract, as prescribed by the State Superintendent of Public Instruction (revised 1962), which reads, in part, as follows:

"Said employer further agrees to pay the said teacher for his or her services under this contract as ___________________________ of said school corporation the sum of __________________ dollars per year for the period of contract. Said sum shall be deemed to constitute the annual compensation of the teacher as referred to in Chapter 329 of the Acts of 1955 as amended, the same being the teachers’ supplemental retirement benefit system. Of said sum referred to above $________________ shall be paid in scheduled installments (semi-monthly) (monthly) as follows ___________________________ and the balance $________________ due under this contract shall be paid by ___________________________.

(Name of School Corporation)
to purchase from the ___________________________

(Name of Annuity)
a non-forfeitible annuity contract providing for payments in amounts, on dates, and to payee designated by the employee, provided that no payment is made in advance of the teacher having earned the compensation used to purchase such annuity. The employer shall continue to maintain such teacher, so long as regularly employed, on not less than the compensation as provided by any locally adopted salary and compensation schedule that may be in force and effect.

it appears that the employee earns a stated and specific amount of salary out of which the employee authorizes the employer to deduct a portion which is then paid over to a designated insurance company for the purchase of a non-forfeitible annuity contract. Sections 61, 62 and 403(b) of the Internal Revenue Code would seem to render the entire contract payment to the employee taxable for Federal Income Tax purposes, and consequently also taxable for Indiana adjusted Gross Income Tax purposes under the provisions of Section 103a of the Adjusted Gross Income Tax Act of 1963.

Section 403(b), supra, reads as follows:

"(b) TAXABILITY OF BENEFICIARY UNDER ANNUITY PURCHASED BY SECTION 501(c)(3) ORGANIZATION OR PUBLIC SCHOOL.—

(1) GENERAL RULE.—If—

(A) an annuity contract is purchased—

(i) for an employee by an employer described in section 501(c)(3) which is exempt from tax under section 501(a), or

(ii) for an employee (other than an employee described in clause (i)), who performs services for an education institution (as defined in section 151(e)(4)), by an employer which is a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing,
(B) such annuity contract is not subject to subsection (a), and

(C) the employee's rights under the contract are nonforfeitable, except for failure to pay future premiums,

then amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such amounts does not exceed the exclusion allowance for such taxable year. The employee shall include in his gross income the amounts received under such contract for the year received as provided in section 72 (relating to annuities) except that section 72(e)(3) shall not apply.” (Our emphasis)

However, the United States Treasury Department, Internal Revenue Service, at Washington, D. C. has ruled on the taxability of the payments made for the purchase of an annuity contract under the teacher's contract referred to above. Said ruling was made on December 10, 1963 and, due to the fact that there was no change in the pertinent sections of the Internal Revenue Code from January 1, 1963 to December 10, 1963, such ruling was therefore based on the Internal Revenue Code as it existed on January 1, 1963. The ruling of the Internal Revenue Service reads, in part, as follows:

“A ruling is requested that the limited exclusion from gross income provided by section 403(b) of the Internal Revenue Code, as amended, will apply to amounts contributed to purchase annuity contracts for teachers in the public schools of the Metropolitan School District of Warren Township under the employment agreement.

“The contract of employment between the employer and the employee calls for a stated sum as annual compensation of the teacher. A portion of this sum may be designated as a payment by the employer for the purchase of a nonforfeitable annuity contract on behalf of the employee; however no such payment is
to be made in advance of the teacher having earned the compensation used to purchase such annuity.

"Section 403(b) of the Internal Revenue Code of 1954, as amended by the Technical Amendments Act of 1958 and Public Law 87-370, provides, in part, that if (1) an annuity contract is purchased for an employee who performs services for an educational institution (as defined in section 151(e)(4) of the Code) by an employer which is a State or political subdivision of a State or an agency or instrumentality thereof, (2) the contract is not part of a plan qualified under section 401(a) of the Code, and (3) the employees' rights under the contract are nonforfeitable except for failure to pay premiums, the amounts contributed by the employer to purchase the annuity contract are excluded from the gross income of the employee for the taxable year contributed to the extent of the 'exclusion allowance.'

"The 'exclusion allowance' is an amount equal to the excess, if any, of (A) the amount determined by multiplying 20% of the employee's includible compensation by the number of years of service, over (B) the aggregate of the amounts contributed by the employer for annuity contracts and excludable from the gross income of the employee for any prior taxable year. Section 151(e)(4) of the Code defines an 'educational institution' to mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on.

"Based upon the information submitted, it is held that a teacher employed in the Metropolitan School District of Warren Township pursuant to the terms of the Teacher's Contract (Revised 1962), a copy of which was enclosed with your letter, will be entitled to the deferred tax treatment provided under section 403(b) of the Code, as amended, if at the time premiums are paid on the annuity contracts, all requirements of such section of the Code are satisfied. This being
so, the amount paid by the employer to purchase an
annuity contract for the employee will be excludable
from the employee's current income to the extent of
the 'exclusion allowance' provided under section 403 (b)
of the Code, as amended. Amounts contributed by the
employer in excess of the 'exclusion allowance' are in-
cludable in the employee's current income. Amounts
made available or actually received under the contract
are taxable as provided under section 403 (b) (1) (C)
of the Code and the regulations to be promulgated
thereunder."

The provisions of the Adjusted Gross Income Tax Act of
1963 would seem to indicate that the Legislature intended
that said act be, as nearly as possible, co-ordinated with and
interpreted in the same manner as the Federal Internal
Revenue Code, subject to the qualifications of Section 117
of said act which reads as follows:

"Whenever the Internal Revenue Code is mentioned
in this act, the particular provisions which are referred
to, together with all other provisions thereof, in effect
on January 1, 1963, not specifically mentioned but
which are necessary to give full effect and implementa-
tion to the provisions specifically referred to, shall be
regarded as incorporated in this act by such reference
and shall have the same force and effect as though fully
set forth herein. Insofar as pertinent to this act, rules
or regulations promulgated pursuant to section 7805 (a)
of the Internal Revenue Code and in effect on Jan-
uary 1, 1963, shall be regarded as rules and regula-
tions promulgated by the Department under and in
accord with the provisions of this act, unless and
until the Department promulgates specific rules or
regulations in lieu thereof."

The ruling by the Internal Revenue Service quoted above
was obviously not in effect on January 1, 1963; however, as
already pointed out, said ruling was made on the basis of the
provisions of the Internal Revenue Code as they existed on
January 1, 1963, and Section 117, supra, indicates a desire by
the Legislature to correlate the Adjusted Gross Income Tax
OPINION 17

Act of 1963 with the provisions of the Federal Internal Revenue Code and rules and regulations promulgated pursuant thereto, unless the Department should specifically promulgate rules or regulations in derogation thereof.

Therefore, it is my opinion that the amounts paid by a school corporation on behalf of, and as authorized by an employee thereof, would, in accordance with the ruling of the Internal Revenue Service, supra, be entitled to the deferred tax treatment provided under the terms of Section 403(b) of the Federal Internal Revenue Code, thereby excluding such amounts from the gross income of such employee under the terms of Section 103 of the Adjusted Gross Income Tax Act of 1963, unless and until a contrary ruling is made by the Indiana taxing authorities.

In conclusion, reference is made to the Adjusted Gross Income Tax Act of 1963, Section 117, supra, which specifically provides that rules or regulations promulgated pursuant to Section 7805(a) of the Internal Revenue Code "and in effect on January 1, 1963, shall be regarded as rules and regulations promulgated by the Department * * *." Thus, the ruling of the Internal Revenue Service quoted herein and dated December 10, 1963, would not qualify under Section 117, supra, as being a rule which in itself was in effect on January 1, 1963. Therefore, there would be no requirement under Section 117, supra, that the December 10, 1963 ruling of the Internal Revenue Service be accepted on account of the provisions of Section 117, supra. However, because the December 10, 1963 ruling relates to a provision of the Internal Revenue Code, which provision was in effect on January 1, 1963, and which had not, prior to December 10, 1963, been interpreted as applied to the particular type of teacher's contract here involved, it is felt that, in the absence of such a ruling, the December 10, 1963 ruling should be followed. Nevertheless, because of the unusual circumstances surrounding the issue herein presented, this Opinion is not to be considered as a precedent for automatically accepting all other rulings of the Internal Revenue Service issued subsequent to January 1, 1963, for so to do would not accord with the provisions of Section 117, supra, which requires only that rules and regulations of the Internal Revenue Service which were in effect on January 1, 1963, must be regarded as regulations of the Department until the De-
OFFICIAL OPINION NO. 18

April 10, 1964

Hon. Matthew E. Welsh
Governor of Indiana
206 State House
Indianapolis 4, Indiana

Dear Governor Welsh:

This is in response to your letter of March 6, 1964, in which you refer to Acts of 1963, Ch. 432, Sec. 23, and state the following question:

"I should like your opinion as to the validity of appointments so made and the character and status of the office of each person so appointed * * *"

As you know, the act is composed of twenty-four sections and concerns medical assistance for the aged. It was vetoed by you, and for that reason, was not included in the 1963 Supplement to Burns' Indiana Statutes.

Section 22 of the act provides, in part:

"It is the intent and purpose of this act to implement Public Law 86-778 commonly known as the Kerr-Mills Act, dated September 13, 1960, to conform to the provisions thereof and to authorize the state department to adopt such rules and regulations and plans as may be necessary to comply with the provisions of said act and to receive the benefits thereof * * *"

and Section 23, about which you inquire, reads as follows:

"There is hereby created an advisory committee for medical assistance for the aged. Said committee shall consist of eleven (11) members. One member shall be appointed by and represent the Indiana State Medical Association. One member shall be appointed by and represent the Indiana State Osteopathic Association.

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