portions of the Indiana State Police Pension Act and the Pension Trust Agreement, and therefore all may be carried out in harmony.

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## OFFICIAL OPINION NO. 28

June 29, 1961

Mr. David Cohen, Chairman
Indiana State Highway Commission
11th Floor, State Office Building
Indianapolis 4, Indiana

Dear Mr. Cohen:

This is in response to your request for my Official Opinion as to whether Senate Enrolled Act No. 365 of the 92nd regular session of the General Assembly is applicable to the acquisition of right of way by the State Highway Commission. For the sake of brevity, that act will be referred to in this Opinion by its official designation as the Acts of 1961, Ch. 293 and as your request notes it provides that it shall be in full force and effect from and after July 1, 1961 pursuant to the emergency clause therein. The question as stated by your letter is as follows:

> "The Land Acquisition Division of the State Highway Commission is in a quandary as to its responsibility under the above-named Act which was passed by this last Legislature and which will be effective July 1, 1961. The provisions of this Act, if applicable to the State Highway Commission, would make the work of the Land Acquisition Division more cumbersome, to say the least. In view of our status as an arm of the State Government, there would appear to be some question as to whether the provisions of this Act are applicable to the State Highway Commission.
>
> "We hereby request an official opinion from you as to the applicability of the provisions of this Act to the acquisition of right of way by the Division of Land Acquisition."

The purpose of Ch. 293, *supra,* is to provide a more effective means of collecting the Indiana Gross Income Tax imposed upon the receipt of gross income derived from the sale of Indiana real estate or any interest therein. That act, Acts of 1961, Ch. 293, provides for accomplishing such purpose by advancing the due date for the payment of such gross income tax to "the time of the transfer of the title to such real estate, or any interest therein * * *." The process by which such tax is to be collected requires that the county recorder shall not accept for recording any instrument for the conveyance of real estate or any interest therein unless such instrument contains either adhesive stamps or a statement of the county treasurer affixed by a rubber stamp, evidencing that such gross income tax has been paid, or unless an affidavit be submitted with the instrument and recorded therewith stating facts sufficient to show that no tax is due or payable upon the proceeds received from such transfer of real estate or interest therein. Chapter 293 is not an independent act, but in form amends the Acts of 1933, Ch. 50, being the Indiana Gross Income Tax Law, by adding a new and additional section thereto to be numbered Section 3a. This 1961 Act is general in its application and on its face does not appear to provide for an exception in any case. However, inasmuch as it is but one part of the Indiana Gross Income Tax Act as amended, it is to be construed so as to give meaning and effect to each and all of the sections comprising the Gross Income Tax Law, excepting such only as are either expressly or necessarily repealed by its terms.

> Sutherland, Statutory Construction, 3rd Ed., Vol. 2, Secs. 4703, 4704, 4705.

Among the other sections of the Gross Income Tax Law which have a direct bearing upon your general problem and which should be noted and considered before entering a discussion of the effect of Ch. 293, *supra,* is Section 6(n) of the Indiana Gross Income Tax Statute, as last amended by the Acts of 1959, Ch. 375, Sec. 1, as found in Burns' (1959 Supp.), Section 64-2606(n). Subsection (n) was first added to the statutory provisions of the Gross Income Tax Law by the Acts of 1955, Ch. 47, although a substantially similar provision had been in force by a regulation of the Gross Income

Tax Division for some years prior to the 1955 enactment. Section 6(n), *supra,* provides as follows:

> "There shall be excepted from the gross income taxable under this Act:
>
> * * *
>
> "(n) All amounts received from the condemnation of real estate by the State of Indiana or instrumentality thereof or any organization given the power of condemnation by the State of Indiana or any amounts received as purchase price or compromise in contemplation of such condemnation, but in no case in excess of the total amount used within a reasonable time not to exceed two (2) years to obtain property of a similar kind."

Commenting upon this provision of the statute, Instruction 2-28(c) contained within the Indiana Gross Income Tax Regulations, Series VIII, page 67, provides as follows:

> "(c) Amounts Received From Condemnation of Real Estate By The State of Indiana Or Under Its Laws. Sub-section 6(n) enacted as an amendment to Section 6 effective March 7, 1955, establishes that all amounts received after such date from the condemnation of real estate by the State of Indiana, or by any of its instrumentalities, or by any organization given the power of condemnation by the State of Indiana, or received from such sources as purchase price or compromise in contemplation of such condemnation—shall be nontaxable to the extent that any such amount is used to obtain property of a similar kind within a period of two (2) years. (See Inst. 4-75.)"

Instruction 4-75, above-referred to, is of substantial similarity to Instruction 2-28(c) above-quoted and contains nothing in addition thereto which would be material to the matter considered herein. So long as Section 6(n), *supra,* remains in effect it would appear that the liability for gross income tax due and payable on amounts received from the condemnation of real estate by the State of Indiana or as the purchase price or compromise in contemplation of such condemnation could

not definitely be determined before the expiration of two (2) years from the receipt of such amounts. Further, if all such sums be used to obtain property of a similar kind at any time prior to the expiration of two (2) years from the receipt thereof, then there would be no liability for gross income tax upon such receipts.

It would seem that the problem which you have presented is reduced to the following specific questions to wit:

Whether the Acts of 1961, Ch. 293 advances the due date for the payment of gross income tax liability with respect to gross receipts attributable to the acquisition of right of way by the State Highway Commission, notwithstanding the provision of Section 6(n), *supra?*

Whether the county recorder may legally accept an instrument of transfer to the State of Indiana for highway purposes without the proof of payment of the gross income tax, as provided by the 1961 statute?

If the county recorder may accept for recording such an instrument without such proof, then must he require the affidavit that no tax is due or payable on the proceeds so received, or is he authorized to accept such instrument for recording without such affidavit?

In summary, as generally stated by your letter, whether the Acts of 1961, Ch. 293, *supra,* applies to the State of Indiana so that the state's evidence of its title or interest in property acquired for highway purposes may not be made a matter of public record, unless the grantor complies with the provisions of said 1961 law?

The answer to each and all of the above queries depends upon the determination of the basic question of whether the Acts of 1961, Ch. 293 specifically or by necessary implication repeals or amends Section 6(n), *supra,* and whether it applies to the sovereign.

For answer to this question reference is made to the Acts of 1961, Ch. 293, Sec. 1, which provides, in part, as follows:

> "SECTION 1. Acts 1933, c. 50, is amended by adding a new and additional section thereto to be numbered section 3a and to read as follows: Sec. 3a. From and

after July 1, 1961, *the gross income tax assessed* against the proceeds received from the sale of real estate, or any interest therein, *as provided in this act,* and not theretofore paid, shall become due and payable at the time of the transfer of the title to such real estate, or any interest therein, and the seller or grantor, of real estate, or any interest therein, shall be liable for the payment of the tax, and the tax so assessed shall not be added to the agreed purchase price of the real estate. Neither the purchaser nor any person, firm, association, financial institution or corporation holding or receiving any interest in the real estate from or through the purchaser shall have any responsibility for the determination or payment of any such tax due. * * *

"The seller, or grantor, of real estate, or of any interest therein shall pay such tax either (a) by affixing or causing to be affixed adhesive stamps for the proper amount of such tax, which stamps shall disclose the amount of the tax and shall be in a form to be prescribed by the department; or (b) by payment of the proper amount of such tax to the county treasurer of the county in which the real estate is located, who shall stamp the deed of conveyance with a tax-paid rubber stamp, to be furnished by the department, which stamp shall have spaces for inscribing the name of the seller or grantor, the amount and date of the payment, and such other information as may be prescribed by the department. * * *

"From and after July 1, 1961, no deed of conveyance of real estate, or any interest therein, shall be accepted for recording by any county recorder, nor shall any county recorder record any instrument of conveyance of real estate, or any interest therein, unless the instrument has adhesive stamps or the foregoing stamp of the county treasurer affixed thereto, evidencing the fact that the gross income tax has been paid on the proceeds received from the sale of real estate, or any interest therein, described in the instrument of conveyance; or in the event no tax is due or payable on the proceeds received from the sale of any real estate, or any interest therein, the seller, or grantor, shall, by written affi-

davit, certify to such fact and such affidavit shall, with the instrument of conveyance, be presented to the county recorder for recording. The county recorder shall cancel all stamps in a manner prescribed by the department. For recording such affidavit showing no tax is due or payable, a recording fee shall be taxed and collected in accordance with the provisions of Chapter 322 of the Acts of 1955, as amended. The failure of any instrument of conveyance to have a stamp or stamps affixed in the required amount or the failure of execution and recording of a written affidavit of the seller, or the grantor, that no tax is due, all as provided by this act, shall not affect the validity of such instrument of conveyance or the validity or effectiveness of notice given by the recording thereof as provided by the statutes of this state for the recording of instruments of conveyance. * * *" (Our emphasis)

The foregoing quotation from the Acts of 1961, Ch. 293, constitutes the major provisions of the act excluding only such as relate solely to administrative procedure. A careful consideration of the foregoing discloses that it is not an act which imposes a tax because it does not possess the necessary elements to constitute an independent taxing statute such as defining what is to be considered gross income, what gross income is to be assessed, providing a levying clause imposing the tax at a specified rate, nor does it contain other elements of an independent taxing statute, so that it could be self-effectual. It states specifically that it amends the Acts of 1933, Ch. 50, which is the Indiana Gross Income Tax Act, as found in Burns' (1951 Repl.), Section 64-2601 *et seq.*, so that at most, Ch. 293, *supra,* is but supplementary to the Gross Income Tax Law. When in the first sentence of Section 1 of said Act it provides that "the gross income tax assessed * * * as provided in this Act * * * shall become due and payable at the time of the transfer of the title to such real estate, or any interest therein, * * *," it is obvious that the Act to which reference is made is the Acts of 1933, Ch. 50, as amended, being the entire act known as the Indiana Gross Income Tax Law.

Your question concerns only those situations in which the State Highway Commission, as an agency of the State of

Indiana, acquires real estate or an interest therein either by condemnation, by outright purchase, or by compromise in contemplation of such condemnation. Applying the standard of Ch. 293, *supra,* as to whether a gross income tax is assessed against the proceeds received from the transfer of real estate or any interest therein so acquired, by referring to Section 6(n), *supra,* of the Gross Income Tax Law, as found in Burns' (1959 Supp.), Section 64-2606(n), it will be seen that the act does not assess a tax upon such proceeds if the total amount thereof is used within two years to obtain property of a similar kind. As stated by Instruction 2-28(c), *supra,* of the Gross Income Tax Division, such receipts "shall be nontaxable to the extent that any such amount is used to obtain property of a similar kind within a period of two (2) years." It appears to be the theory of Section 6(n) not to consider the proceeds from an involuntary transfer of real estate, or an interest therein, as described in said section, to be taxable, when the State of Indiana which imposes the tax, is also the party causing the transfer of such real estate to it, or has given power to another organization to compel such transfer, if the grantor uses the proceeds from such transfer to obtain property of a kind similar to that which was taken from him by the State of Indiana. Such transfers clearly do not constitute the sale of real estate, or any interest therein, in the commercial sense, although such is not an applicable test as to liability for gross income tax.

Also with respect to any part of such proceeds which are *not* used to obtain property of a kind similar to that taken by the State of Indiana within two years, it would appear that such part of the proceeds which is taxable becomes so, *commencing with the expiration of the two year period.* It is noticeable that the Gross Income Tax Law does not require that such proceeds be reported to the Gross Income Tax Division and tax paid thereon in the year of receipt with the right to file a claim for refund with respect to that part of the tax attributable to such proceeds as are used within two years to obtain property of a kind similar to that taken. Instead, the Act says that these amounts when so used "shall be excepted from the gross income taxable under this Act: * * *." It should be remembered that in many instances the real estate taken by the State of Indiana, especially when for highway

purposes requiring direct routes through urban areas, consists not only of unimproved real estate, but dwellings, so that the owners and inhabitants thereof usually have no choice but to acquire other homes in which to live. Knowing that the acquisition of another home is not an act to be accomplished without due consideration, the Legislature apparently intended that the recipients of proceeds from such condemnation of real estate should have the opportunity of a full two years within which to acquire property of a kind similar to that taken, including the right to use all of such proceeds if desirable. Therefore, the Gross Income Tax Law does not assess the tax upon such proceeds so used, which assessment is the condition upon which Ch. 293 is made to depend.

Further, the recipient of such proceeds cannot state under oath at the time of the transfer as provided by Ch. 293, *supra,* that "no tax is due or payable on the proceeds received * * *" if he has not expended all of such proceeds on or before said date to obtain property of a kind similar to that taken, because such recipient will not know until the expiration of the two year period what part, if any, of such proceeds will *not* be so expended so as thereby to become taxable. Therefore, it would appear that if Ch. 293, *supra,* were considered as being applicable to the acquisition of real estate, or any interest therein, by the State of Indiana that such interpretation would result in completely nullifying the effect of Section 6(n). However, there is no basis upon which to presume that the Legislature intended either to repeal or amend Section 6(n) by the enactment of Ch. 293, *supra;* certainly, Sec. 6(n) has not been amended in the manner provided by Art. 4, Sec. 19 of the Indiana Constitution and, inasmuch as repeal or amendment by implication is not favored in the law, there appears to be no basis for assuming that the Legislature intended to change the procedure concerning the taxable or nontaxable status of proceeds derived from the condemnation of real estate by the State of Indiana or by any organization given the power of condemnation by the State of Indiana.

In addition to the foregoing, it is noticeable that the effect of Ch. 293, *supra,* is to penalize grantees of real estate, or any interest therein, who have accepted a deed from the grantor without either the stamps or certification that the gross income tax has been paid upon the receipts derived from such trans-

fer, or without receiving an affidavit from the seller or grantor that no tax is due. Such person is penalized, in effect, in that the county recorder is not to accept the instrument evidencing such transfer for recording without compliance with the act. Although it is stated therein that the purchaser has no responsibility for the determination or payment of any such tax due, and the purchaser is not made a withholding agent having the authority to withhold the amount of the tax from such proceeds, nevertheless, in practical effect, the 1961 Act imposes a duty upon the grantee to see that compliance is had with the act or suffer the consequences of not having his instrument evidencing such transfer recorded. This is a situation in which the general rule is applicable that the sovereign is not presumed to have enacted a statute imposing a penalty, or having that effect, and to have intended that such penalty be imposed upon the sovereign, unless the statute so provides. This general rule is expressed in 82 C. J. S., Statutes, § 317 entitled "Construction as Including or Binding Government," wherein on page 554, it is provided as follows:

> "The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication.
>
> "This general doctrine applies, or applies with special force, to statutes by which prerogatives, rights, titles, or interests of the government would be divested or diminished, or to statutes under which liabilities would be imposed on the government. * * *"

The above rule of statutory construction seems obviously to be peculiarly applicable to the problem considered by this opinion, for Ch. 293, *supra,* does not manifestly include the State of Indiana and if it were to be applied to the state, its effect would be that of penalizing the State of Indiana by denying it the right to have the evidence of its ownership in real estate, or interest therein, recorded if the provisions of the statute were not complied with. There is no basis upon

which to conclude that the Legislature intended to penalize itself or that the Legislature intended to deprive grantors of real estate, or any interest therein, taken by the State of Indiana of their right at any time within such two-year interim to use the entire proceeds derived from land taken by the state for acquiring property similar to that taken. That the act was not intended as applying to the state is further indicated by the following sentence from the first paragraph of Sec. 1 of Ch. 293, *supra,* which provides:

> "* * * Neither the purchaser nor any person, firm, association, financial institution or corporation holding or receiving any interest in the real estate from or through the purchaser shall have any responsibility for the determination or payment of any such tax due. * * *"

This sentence indicates that the meaning of the term "purchaser," whose instrument of conveyance is not to be recorded without compliance with the act, is not intended to extend to the state, for in expanding the extent of the application of the term it includes "person, firm, association, financial institution or corporation" deriving an interest through such a purchaser. The word "person" as used in a statute is not to be construed as including the sovereign unless the intent to do so is manifest.

> See: 82 C. J. S. Statutes § 317, "Particular Words and Phrases," p. 557.

It should be noted that there is no difficulty in recognizing instruments which convey real estate, or an interest therein, to the State of Indiana, first of all, because the grantee is stated to be "The State of Indiana"; also it is my understanding that by far the greatest majority of these instruments are upon a special "Right of Way Grant," one form being used for lands taken for limited access highways and another form being for lands taken for highways not to be used for limited access highways, such being identified thereon as "Form I. C.-120-BP Purchase Grant Limited Access, Revised 8-54" or "Form I.C.-120-BP, Purchase Grant—Regular Long, Revised 8-54." Under either one of these forms it clearly appears that the State of Indiana is the grantee and that the right of way

thereby conveyed is to be used for highway purposes and the form is under the heading "State Highway Department of Indiana." It is my understanding also that on some occasions the State of Indiana secures a regular Warranty Deed in acquiring real estate for highway purposes, in which event the grantee would be shown as the State of Indiana. Under any one of these instruments, the county recorder will have no difficulty in determining that the grantee is the State of Indiana.

Therefore, it is my opinion that the Acts of 1961, Ch. 293, does not repeal or amend Section 6(n) of the Gross Income Tax Law and, consequently, does not advance the due date for the payment of gross income tax liability with respect to gross receipts received from the condemnation of real estate by the State of Indiana or instrumentalities thereof or by an organization given the power of condemnation by the State of Indiana or as to any amounts received as purchase price or compromise in contemplation of such condemnation. The county recorder may legally accept an instrument of transfer to the State of Indiana or to an instrumentality thereof or to any organization given the power of condemnation by the State of Indiana, or to the federal government or an instrumentality thereof, without the proof of payment of the gross income tax and without the affidavit that no tax is due or payable. It follows that the Acts of 1961, Ch. 293, does not apply to the State of Indiana or to its instrumentalities, nor to any organization given the power of condemnation by the State of Indiana nor to the United States Government nor instrumentalities thereof.

In closing, while it is not the purpose of this opinion to determine the ultimate taxable or nontaxable status of proceeds from transfers of real estate, or any interest therein, under any circumstances, nevertheless, because the Acts of 1961, Ch. 293, *supra,* does not apply to either sovereign, it also has no effect in any case wherein the State of Indiana or the United States, or an instrumentality thereof, is either a grantee or a grantor. The requirement for an affidavit to be made by the seller or grantor "in the event no tax is due or payable" would apply when the grantor is within that class of totally exempt organizations defined in Section 6(i) of the Gross Income Tax Law, Burns' (1959 Supp.), Section 64-

2606(i) which organizations "shall be excepted from taxation under the provisions of this act: * * *." The requirement for such affidavit would also apply to those situations of a minimal consideration equal to or less than the annual $1,000.00 deduction to which each taxpayer is entitled in computing his gross income tax liability; examples of such situations are quit-claim deeds or easements as to which the monetary consideration often is only a technical necessity and, therefore, may amount to token sums such as one dollar. There may be other situations, less frequently encountered, requiring the affidavit of no tax liability, as for instance in the case of reciprocal exchanges of real estate by and between the owners thereof which transfers do not generate gross income tax liability to the extent of the value of the property of which title is so surrendered.

The above illustrations constitute some of the situations in which the no-tax affidavit requirement would apply and indicate the reason for the necessity of such a requirement by the Acts of 1961, Ch. 293, *supra*. However, because that act does not manifestly apply to either sovereign, the requirement of a no-tax affidavit is not applicable to the State of Indiana or the United States, or an instrumentality of either, irrespective of whether such sovereign is the grantee or grantor; this is true even though the transaction is one creating a liability for gross income tax upon the proceeds derived from such transfer.

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OFFICIAL OPINION NO. 29

July 7, 1961

Honorable Ralph Rader
State Representative
Box 246
Akron, Indiana

Dear Representative Rader:

Your letter of June 16, 1961 has been received and reads as follows:

> "I am desirous of an official opinion relative to when and how signatures may be removed from a school