11-1-1947

Twelve Times and Out--Application of Indiana Gross Income Tax Act of 1933 Again Declared Unconstitutional

Robert T. Molloy

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.nd.edu/ndlr/vol23/iss1/4

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
TWELVE TIMES AND OUT—APPLICATION OF INDIANA GROSS INCOME TAX ACT OF 1933 AGAIN DECLARED UNCONSTITUTIONAL

The Indiana Gross Income Tax Act of 1933, as amended, has had an extended and not uneventful constitutional career. Enacted in 1933 in the depths of a depression to secure additional revenue to enable a measure of tax relief extended in the preceding years to the hard-pressed realty interests of the state to be continued, this act has been before the United States Supreme Court on twelve occasions. On the last of these occasions, the act, as applied to gross receipts from securities sold in interstate commerce, was again held to be unconstitutional. In view of this extended litigation and the broad implications flowing from this latest test of the act's constitutional scope, a closer examination both of the act itself and its juristic history would seem to be in order.

The tax levied by the act is, in fact, a gross receipts tax and not a sales tax although applied to gross receipts from sales. Nor is it a tax in lieu of ad valorem taxes on property since state and local taxes upon property within the state are not thereby reduced. It is not a consumption tax since no provision is made for passing the burden of this tax along to the consumer. Neither is the tax one on occupations since all groups are included within its scope.

1 Chapter 50 of the Laws of 1933, now Chapter 26 of Title 64 Burns Indiana Stat. Anno. (1943 Replacement), effective May 1, 1933.
6 Ibid.
7 Opinion of Attorney General of Indiana, Aug. 21, 1934.
Under this act a tax at rates varying from 1/4 of 1% to 1% according to the source of income is levied on the receipt of gross income of all persons resident or domiciled in Indiana and upon the receipt of gross income derived from activities or business or any other source within Indiana. The term "gross income" is broadly interpreted by both the act and the courts and includes not only wages, profits and rents but gratuities, prizes, dividends, judgments and capital gains. The wildest possible coverage is achieved by defining the word "person" as including individuals, fiduciaries, partnerships, associations, societies and corporations. The term even includes municipal corporations and other political subdivisions of the state engaged in private or proprietary activities or business.

Exemptions from the tax are limited, the principal sums excluded being amounts received exclusively for religious, charitable, scientific, educational, social and civic purposes by institutions, trusts, groups and similar bodies. These exemptions are strictly construed so that an agricultural cooperative organized as a non-profit association under the state's laws is not entitled as such to exemption from the gross income tax. More significant constitutionally is the exemption from tax of so much of a taxpayer's gross income

9 Section 64-2601 (m), Burns Indiana Stat. Anno. (1943 Replacement) (1945 Supp.).
10 The purpose of this Act was stated to be "to levy a tax on all income and not to limit the tax to accretions flowing from invested property." Department of Treasury v. Crowder, 214 Ind. 252, 15 N. E. (2d) 89, 92 (1938).
11 "The use of the term 'person' in the statute is broad and generic." Department of Treasury v. Dietzen's Estate, 215 Ind. 528, 21 N. E. (2d) 137, 139 (1939).
12 Section 64-2601 (a), Burns Indiana Stat. Anno. (1943 Replacement) (1945 Supp.)
13 Idem. Department of Treasury v. Michigan City, 223 Ind. 432, 60 N. E. (2d) 947 (1945); Department of Treasury v. City of Linton, 223 Ind. 363, 60 N. E. (2d) 948 (1945); Department of Treasury v. City of Evansville, 223 Ind. 435, 60 N. E. (2d) 952 (1945); Department of Treasury v. Tipton, 223 Ind. 373, 60 N. E. (2d) 957 (1945).
14 Section 64-2606 (i), Burns Indiana Stat. Anno. (1943 Replacement) (1945 Supp.).
15 Storen v. Jasper County Farm Bureau Co-Operative Ass'n. 103 Ind. App. 77, 2 N. E. (2d) 432 (1936).
“as is derived from business conducted in commerce between
this state and other states of the United States, or between
this state and foreign countries.”

The act as originally adopted levied taxes at just two sets
of rates, 1/4 of 1% and 1%. Provision has since been made
for a third rate, 1/2 of 1%. The 1% rate applies generally
to the gross income of public utilities, to rents, dividends,
salaries, wages, all receipts from retail sales and all gross in-
come not specifically taxable at a lower rate. The 1/2 of
1% rate applies generally to the gross income of retail mer-
chants, and of dry cleaning and laundering establishments.
The lowest rate of 1/4 of 1% is levied on gross receipts de-
derived from display advertising and wholesale sales, including
industrial processing.

The constitutionality of the original 1933 act was quite
literally challenged before the ink on the new measure was
dry. In *Miles v. Department of Treasury* the appellant
taxpayers had sued to enjoin the paying out of state funds
for the printing of the new act on the grounds of its uncon-
stitutionality. The respondent’s demurrer below had been
sustained and the taxpayer on appeal relied upon a two-fold
constitutional attack. The appellant first argued that the
tax was void because, being a property tax, the varying rate
of 1/4 of 1% to 1% kept the tax from being uniform as re-
quired by the state constitution. The Supreme Court of
Indiana in a lengthy opinion dismissed this argument on the
grounds that the tax in question was not a property tax but
was rather “an excise, levied upon those domiciled in the

---

16 Section 64-2606 (a), Burns Indiana Stat. Anno. (1943 Replacement) (1945
Supp.). This section concludes with the words “but only to the extent that the
State of Indiana is prohibited from imposing a tax . . . by the Constitution of
the United States of America.”

17 For full details as to the rates levied on gross income derived from various
sources see Section 64-2603, Burns Indiana Stat. Anno. (1943 Replacement) (1945
Supp.).


19 “The General Assembly shall provide, by law, for a uniform and equal
rate of assessment and taxation. . . .” Art. 10, § 1.
state, upon the basis of the privilege of domicile, and that the burden may reasonably be measured by the amount of income."\textsuperscript{20}

The second constitutional objection of the appellant was likewise dismissed. The tax rate's varying from 1/4 of 1% to 1%, it was urged, operated to deprive those subject to it of the equal protection of the laws guaranteed alike by the Fourteenth Amendment to the United States Constitution and the language of state constitution.\textsuperscript{21} In the court's opinion this argument failed because of the fact that the classification upon which the varying rates were based was reasonable and the tax was therefore upheld.

Thereafter a rehearing was granted and a new opinion issued superseding the original,\textsuperscript{22} in a fashion which in later years was to become popular with the United States Supreme Court itself.\textsuperscript{23} The only significant change in the new opinion\textsuperscript{24} was the correction of the former holding that the tax was an excise levied on the privilege of domicile in Indiana. Such a tax would, of course, violate the privileges and immunities clause of the Fourteenth Amendment. The tax instead was held to be "an excise, levied upon those domiciled within the state or who derived income from sources within the state, upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that

\textsuperscript{20} Miles v. Department of Treasury, 193 N. E. 855, 861 (1935).

\textsuperscript{21} "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Art. 1, § 23.

\textsuperscript{22} Miles v. Department of Treasury, 209 Ind. 172, 199 N. E. 372, 101 A. L. R. 1359 (1935).

\textsuperscript{23} For what is perhaps the latest example of this slip-shod procedure springing from inadequate research and thought see Zap v. United States, 326 U. S. 777 (1945) cert. denied; Zap v. United States, 326 U. S. 802 (1946), original order vacated and cert. granted; Zap v. United States, 328 U. S. 624 (1946) conviction affirmed; Zap v. United States, 329 U. S. 824 (Oct. 21, 1946) rehearing denied; Zap v. United States, 330 U. S. 800 (March 3, 1947) second petition for rehearing granted and conviction reversed.

\textsuperscript{24} Note Constitutionality of Indiana Gross Income Tax Act (1936) IND. L. J. 486.
the burden may reasonably be measured by the amount of income.”

The appellants’ further appeal to the United States Supreme Court was summarily dismissed *per curiam* on the ground that “the appellants have failed to show any interest entitling them to invoke the protection of the Federal Constitution.”

In the second case to test the constitutionality of the Indiana Act, the taxpayer elected a sounder method of attack. In *J. D. Adams Manufacturing Company v. Storen*, the taxpayer contested the validity of the Indiana gross income tax by a suit for a declaratory judgment. Here the home offices, principal place of business and the sole manufacturing plant of the taxpayer were located within the State of Indiana. Over 80%, however, of its annual gross income was derived from the sale of its products, road building machinery, through selling agents or otherwise, to dealers in other states and in foreign countries.

Reversing the Indiana Supreme Court, the United States Supreme Court held the tax unconstitutional. “The vice of the statute,” it was stated, “as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids . . . .

The opinion of the State Supreme Court

---

27 304 U. S. 307 (1938).
28 Storen v. J. D. Adams Manufacturing Company, 212 Ind. 343, 7 N. E. (2d) 941 (1937).
Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

The next assault upon the Indiana statute was commenced in the federal courts. In Department of Treasury v. Wood Preserving Corporation,30 the tax was held valid as applied to the gross receipts received by a taxpayer selling railroad ties in Indiana. There the ties in question were sold to the taxpayer at an Indiana rail head and were immediately resold on the spot to a railroad customer of the taxpayer. Upon resale the ties were immediately loaded on waiting railway cars and removed to another state for processing by the taxpayer as the railroad company's agent. The application of the state tax to the gross receipts of the sale was upheld even though no apportionment was attempted. The reason for this was that the sale took place entirely within Indiana and the tax was levied on such sales price alone thus making apportionment unnecessary.

In the same year the application of this tax was upheld in Department of Treasury v. Ingram-Richardson Manufacturing Company.31 There the taxpayer owned and operated an enameling factory at Frankfort, Indiana. The transactions from which the gross income subjected to the state income tax was received involved the fusing of enameling with metal parts used in the manufacture of stoves and refrigerators by customers of the taxpayer located in Indiana and neighboring states. Orders were solicited by the taxpayer's salesmen and upon acceptance, the metal parts to be enameled were transported to the taxpayer's factory in its own trucks. Upon completion of the enameling process, the finished parts were again placed in the taxpayer's trucks and returned to their respective owners both in Indiana and in adjoining states.

31 313 U. S. 252 (1941), rev'g Ingram-Richardson Manufacturing Company v. Department of Treasury, 114 F (2d) 889 (C. C. A. 7th, 1940).
The United States district and circuit courts held the application of the Indiana gross income tax to the proceeds of the taxpayer's business unconstitutional. In their view the income received by the taxpayer was compensation not only for the physical act of applying enamel to metal parts but also for the trucking and soliciting of order. These latter services were held clearly to constitute a part of interstate commerce in so far as out-of-state customers were involved. The state tax, not being apportioned to the local incidents of the manufacturing process, was held void in reliance upon Gwin, White & Prince, Incorporated v. Henneford. In the Gwin case the Supreme Court had invalidated a gross receipts tax levied by the State of Washington on the income of a corporation which served as the marketing agent of local fruit growers, such fruit being sold in interstate and foreign commerce.

On appeal by the Department of Treasury, the United States Supreme Court reversed the Seventh Circuit court in reliance upon its earlier decision in the Western Live Stock case. In the latter case a New Mexico privilege tax upon the gross receipts of certain businesses had been upheld where the income taxed was the advertising income of a monthly livestock trade journal, prepared, edited, and published within the state but distributed both within and without New Mexico. The advertising in question was derived from both local and intrastate sources as a result of solicitation by the taxpayer.

In the Ingram-Richardson case, the Supreme Court distinguished the Gwin case on the ground that in the latter

---

32 Ingram-Richardson Manufacturing Company v. Department of Treasury, 114 F. (2d) 889 (C. C. A. 7th, 1940).
33 305 U. S. 434 (1939).
34 Department of Treasury v. Ingram-Richardson Manufacturing Company, 313 U. S. 252 (1941).
case; the taxpayer's entire income was derived from services performed "in aid of the shipment and sale of merchandise in" interstate and foreign commerce. In the former case, however, the transportation of the stove and refrigeration parts together with the solicitation of orders was in and of the intrastate aspects of the taxpayer's business of enameling. In addition, it was held, that the burden of proving that the transporting of the customers' goods was regarded by the taxpayer as a separately chargeable item of service rested on the appellee which had not sustained that burden.

These two victories for the Department were followed by a third. Here the Indiana Supreme Court reversed the Circuit Court of Allen County which had declared the state gross income tax unconstitutional as applied to the taxpayer. The appellee was an Indiana corporation engaged in the manufacture and sale of live stock and poultry feeds. Two of the taxpayer's factories were located in Illinois and one in Indiana. The gross income of the taxpayer involved in this suit was derived from sales to customers resident in Indiana to whom delivery was made from the Illinois plants pursuant to orders taken in Indiana but accepted in Illinois.

In the opinion of the Indiana Supreme Court, the risk of subjecting interstate commerce to a double burden which had constituted the "vice" of this statute in the Adams case, was non-existent here. "The state of Illinois," it was felt "could not impose such a tax on the appellee's income from sales in Indiana." 38

On the taxpayer's appeal to the United States Supreme Court, the judgment below was affirmed per curiam in the

38 Note 36, supra. This confidence of the Indiana Supreme Court does greater credit to its heart than its head. Cf. Northwest Airlines Inc. v. State of Minnesota, 322 U. S. 292, 310 (1944), where Minnesota, state of taxpayer's incorporation, was allowed to levy a personal property tax on the full value of the appellant's airplanes, although such planes were already legally subject to personal property taxes in six of the seven other states through which they flew.
authority of *McGoldrick v. Felt & Tarrant Company* 89 and *Felt & Tarrant Company v. Gallagher*. 40 The first of these two cases upheld the constitutionality of New York City's sales tax on sales of merchandise to city residents whose orders were taken within the city subject to approval of the out-of-state vendors. Following acceptance of the orders, the goods were sent to the city buyers through interstate channels. In the second of these cases the Supreme Court had upheld the constitutionality of a California use tax requiring a non-resident Illinois corporation selling goods within the State of California to collect the tax from the local purchasers. Although not qualified to do business in California, the vendor solicited orders for its goods within the state through resident sales agents for whose use offices were maintained within the state.

A multiple assault was next launched upon the Indiana tax in the form of separate actions by four different companies. The first of these suits involved a Michigan corporation engaged in the manufacture and installation of furnaces and heating appliances. This corporation was qualified to do business in Indiana where it maintained sales offices and employed agents to solicit contracts. Each of these contracts provided for the installation on the customer's premises of a particular heating device in return for a stated amount payable at the corporation's home offices in Michigan. Title to the equipment remained in the installing corporation until full payment had been received. A specified portion of the entire contract price was regularly specified in each agreement as allocable to the costs of installation.

The second suit involved an Illinois corporation engaged in the roofing business. This taxpayer likewise was qualified to do business in Indiana. Although maintaining no

89 309 U. S. 70 (1940). "In independent transactions Felt & Tarrant had to pay a California use tax and also the New York City sales tax." Powell, *Sales and Use Taxes, Collection from Absentee Vendors* (1944), 57 Harv. L. Rev. 1086, 1090.

place of business within the state, the roofing company regularly sent salesmen into Indiana to solicit contracts requiring the application of asphalt or composition shingles to roofs and sides of houses. The taxpayer procured the shingles from out of state jobbers. Upon the approval of each contract by the head office in Chicago, the corporation sent its employees into Indiana to apply the shingles in performance of the contract, payments for which were to be made in Illinois.

The third and fourth suits involved respectively a New Jersey and an Illinois corporation having their principal places of business in Chicago but qualified to do business in Indiana. The gross receipts of these two corporations which were subjected to the Indiana gross income tax were derived from the performance of construction contracts for which payment was made in Chicago calling for the furnishing of materials, procured outside the state, and the construction of breakwaters, lighthouses and piers in Lake Michigan within the territorial waters of Indiana.

The tax was held properly assessed against all four in *Holland Furnace Company v. Department of Treasury*,\(^4\) on the grounds that a state "has the right to apply a gross income tax to business actually transacted within its borders, notwithstanding that interstate commerce, as an incident, may have intervened at some point in the transaction."\(^5\) The taxpayers' petitions for certiorari were denied by the Supreme Court.\(^6\)

The next case to reach the United States Supreme Court\(^7\) involved the constitutionality of the Indiana gross income

---

\(^{4}\) 133 F. (2d) 212 (C. C. A. 7th, 1943).

\(^{5}\) *Ibid* at p. 215.


tax as applied to a wide variety of closely related commercial transactions all possessing some aspects of inter-state commerce. The taxpayers, although incorporated in other states, were authorized to do business in Indiana. The business in question consisted of the manufacture and sale of farm machinery and implements. Numerous manufacturing plants and sales branches were maintained in Indiana and adjoining states.

The taxpayers' gross income was derived from several classes of sales transactions which for the purposes of clarity were designated as Classes A, C, D, and E. Class A transactions consisted of sales by branches outside Indiana to dealers and users located within the State. The orders were solicited in Indiana by agents of the out-of-state branches at the offices at which the order was accepted and payment made. Without direction from the Indiana purchasers, the goods were shipped to them from warehouses or factories located outside the state.

The Indiana Supreme Court held that the state gross income tax would not constitutionally be applied to the receipts derived from such sales since "the orders upon which the goods were sold were accepted outside the confines of Indiana and payment was made to branches in other states." 45

Class C sales were made by branches located outside the state to dealers and users residing in Indiana. The orders were solicited in Indiana but the customers accepted delivery at the taxpayers' Indiana factories to save time and shipping charges. Class D sales were made by branches located

---

45 Department of Treasury v. International Harvester Company, 221 Ind. 416, 47 N. E. (2d) 150 (1943). Under substantially similar circumstances the application of a sales tax to interstate sales has been held unconstitutional in McLeod v. J. E. Dilworth Company, 322 U. S. 327 (1944) while a use tax on a comparable sales transaction has been upheld on the same day in General Trading Company v. State Tax Commission, 322 U. S. 335 (1944). Despite complaints that the difference between the two types of taxes is a verbal rather than an economic one, the use tax remains valid and the sales and gross income tax invalid. Cf. Freeman v. Hewit, discussed infra.
within the state to dealers and users residing outside the state. These customers, however, came within the state to accept delivery. Class E sales were made by local Indiana branches to dealers and users residing within the state. The goods delivered, however, all originated outside the state and were shipped into Indiana to customers resident therein pursuant to express contract stipulation.

The application of the Indiana gross receipts tax to all three of these latter classes of sales, C, D and E, was upheld by the state court on the authority of the Allied Mills case. The Indiana court in reaching this decision construed the Adams case as validating a gross income tax "levied by the buyer's state regardless of the incidental interstate nature of the transaction." 47

On the taxpayer's appeal to the United States Supreme Court, the decision below was affirmed. 48 No constitutional difference was held to exist between receipts derived from Class C sales and the receipts from the sales held taxable in the Wood Preserving case. 49 Class D sales, it was held, would be subject to a state sales tax 50 and so were equally subject to a state gross income tax. And finally receipts from Class E sales were held taxable on the authority of the Allied Mills case. 51


47 This interpretation of the Indiana Supreme Court would scarcely appear to have been warranted although repeated in Hewit v. Freeman, 221 Ind. 675, 51 N. E. (2d) 6, 8 (1943); reversed Freeman v. Hewit, 329 U. S. 249 (1946). Cf. McLeod v. J. E. Dilworth Company, 322 U. S. 324 (1944), Note 45, supra. The technical type of tax, i.e., sales or use appears to be the touchstone to determine constitutionality rather than the multiplication of any basic economic burden imposed in interstate commerce. "Many States, for instance impose taxes on the consumption of goods and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State." Freeman v. Hewit, supra.


49 Department of Treasury v. Wood Preserving Corp., 313 U. S. 62 (1941).


51 Note 46, supra.
Even the limited victory won by the taxpayer with respect to Class A sales in the *International Harvester* case was not repeated in the next case involving the Indiana gross income tax to come before the United States Supreme court. In *Ford Motor Company v. Department of Treasury*, the high court by adopting the well known ruse of giving the taxpayer’s counsel a lesson in procedure was enabled to avoid the merits of the case entirely.

The Ford Motor Company, a non-resident corporation, had originally sued in federal district court to recover sums paid to the Department of Treasury under the Indiana gross income tax laws. Objection was made to the imposition of this tax on the gross receipts derived from sales where cars were shipped directly from the taxpayer’s factory in Michigan or assembly plants in Illinois, Ohio or Kentucky to Indiana dealers. The cars were paid for in cash or finance paper by the dealers upon delivery by truck-away or convoy companies at their places of business in Indiana.

Upon payment of the tax under protest, the corporation sued in the local federal district court in Indianapolis to recover the sums thus collected. Recovery was denied in both the district and circuit courts. The taxpayer relied upon the Indiana Supreme Court’s invalidation of the gross income tax when applied to Class A sales of the International Harvester Company. Two of the three judges sitting in the Circuit Court of Appeals felt that the *International Harvester* case was distinguishable in that the Class A sales there were made and paid for outside the state whereas here both acceptance and payment occurred within Indiana. The remaining judge was unable to make this nice distinction.

---

52 323 U. S. 459 (1945).
54 *Department of Treasury v. International Harvester Company*, 221 Ind. 416, 47 N. E. (2d) 150 (1943).
55 Kerner and Minton, C. J. J.
56 Lindley, D. J.
On the taxpayer's appeal, certiorari was granted, the judgment below vacated, and the cause remanded to the district court with directions to dismiss the complaint for want of consent by the state to the suit. The state had provided a means whereby any aggrieved taxpayer could seek a refund of gross income tax alleged to have been erroneously collected by application to the Department of Taxation, and upon its rejection of his claim bring suit therefor "in any proper action or suit against the department in any court of competent jurisdiction." The United States Supreme Court held that the words "any court of competent jurisdiction" were limited in meaning to "any state court of competent jurisdiction." This action, brought in federal district court, was held to institute a suit against the state in its sovereign capacity to which the state had not consented. It therefore followed that under the terms of the Eleventh Amendment, the federal courts were without jurisdiction to hear the action.

As undiscouraged by these set-backs as King Robert the Bruce's famous spider, an indefatigable taxpayer again commenced spinning his web about the Department of Taxation by starting what was to be the twelfth suit to bring the constitutionality of the Indiana gross income tax before the United States Supreme Court. Profiting by the expensive course in practice taught by the Supreme Court in the Ford Motor case, an Indiana trustee of a testamentary trust set up under the will of an Indiana decedent sued in the state courts to recover sums paid out in gross income taxes.

---

60 Section 64-2614 (a), Burns Indiana Stat. Anno. (1943 Replacement).
61 Note 58, supra.
62 Section 64-2614 (a) was amended in 1945 to provide that an aggrieved taxpayer may recover "any amount thus improperly collected, together with interest thereon, in a civil action or suit against the department in the circuit or superior court of the county of his residence or business location and if he has no such residence or business location then in the Marion Circuit or Superior Court. The state hereby consents to such suits in said courts and no others and said courts are hereby granted exclusive jurisdiction of said suits."
man, the trustee in question had, during 1940, effected some twenty separate sales of trust assets consisting of corporate stock and bonds. Orders to sell were placed by the trustee with a local Richmond, Indiana, broker who effected the sales through a New York brokerage house having membership on the New York Stock Exchange. Upon being notified that the sale had been consummated in New York, the trustee would forward the securities to New York through his local broker. Receipts from the sales less commissions and selling expenses were transmitted to the trustee from New York via his Richmond broker. It also appeared that all persons purchasing the particular securities sold in the fashion described above were non-residents of Indiana although at the time of sale the identity of these purchasers was unknown to the trustee.62

The application of the state gross income tax to the net receipts accruing to the trust from these sales was held illegal by the court of first instance.63 On appeal by the Department, the judgment below was reversed and the tax upheld.64 The theory behind the Indiana Supreme Court’s reversal may perhaps be best summed up in the phrase *mobilia sequuntur personam* which signifies that the situs of intangibles such as corporate securities is governed by the owner’s domicile. The state of such situs, it was held, possesses the power to tax such property even if multiple burdens result.65

On the taxpayer’s appeal to the United States Supreme Court, this decision was reversed.66 Although the Court would

---

62 An opinion of the Indiana Attorney General in July, 1946 (C. C. H. Ind. C. T. P. 15-014) had attempted to limit the doctrine of the *Adams* case to cases where goods were shipped to buyers outside of Indiana pursuant to prior orders. In the absence of a buyer whose identity was known at the time of shipment it was held that the constitutional immunity afforded by the Commerce Clause was nonapplicable. The soundness of this ruling is highly questionable, in view of *Freeman v. Hewit*, 329 U. S. 249 (1946), discussed infra.

63 Circuit Court, Wayne County, Hoelscher, J.

64 Hewit v. Freeman, 221 Ind. 675, 51 N. E. (2d) 6 (1943).

have based its reversal on a simple re-affirmance of the *Adams* case[^67] as Mr. Justice Rutledge pointed out in his concurring opinion, a majority of the Court, speaking through Mr. Justice Frankfurter, chose to base their decision on broader grounds.

Although interstate commerce must admittedly pay its way, a state may not place "what amounts to a levy upon the very process of commerce across state lines."[^68] A gross income tax is a "direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause." The tax here in question being on "the very process" of interstate commerce was declared invalid. The belief of the Indiana Supreme Court that the interstate sale of intangibles was subject to a gross income tax levied by the state of the owner's domicile was brusquely brushed aside. "Latin tags," the Court observed, "like *mobilia sequuntur personam* often do service for legal analysis, but they ought not to confound constitutional issues."[^69] Commerce is none the less protected by the Constitution whether the subject of such commerce be machines or "pieces of paper worth $65,214.20."[^70]

Mr. Justice Rutledge's fear[^71] that apportionment of a state tax on interstate commerce so that only the local inci-
dents of such commerce were subjected to tax would no longer serve to save a state import if "direct," would seem to have been without substantial foundation. Less than a month after its decision in the Freeman case the Supreme Court upheld an Ohio state franchise tax based on the privilege of doing business within the state. A formula for apportionment was provided in the act whereby one-half of the taxpayer's total capital is multiplied by the value of all of the taxpayer's Ohio property over the total value of its property wherever owned. The other half of the taxpayer's total capital is multiplied by the total value of the taxpayer's business done in the State over the total country-wide business. Addition of the two products gives the tax basis which when multiplied by the tax rate, 1/10th of 1%, yields the total franchise tax payable.

The use of this means of apportionment was upheld even though the receipts of interstate sales were admittedly included in the computation, i.e., goods produced in Ohio but sold to customers outside the state. Any legitimate and bona fide effort on the part of the state fairly to apportion a tax burden between local and interstate commerce, it was indicated, would be upheld.73

Despite the limitations of the Harvester case and the need to take Mr. Justice Rutledge's alarmist view of the effect of the Court's opinion in the Freeman case with caution, it must be admitted that the United States Supreme Court's views of the extent to which interstate commerce may be subjected to state and local taxation appears to have been altered considerably this term. Although the Indiana State Treasurer has announced an administrative policy of limit-

---


73 "Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments." Note 72, pp. 422-423.
ing the *Freeman* case to its own particular facts, there is little reason to believe that this policy will be sustained if challenged in the courts.

For example, it is understood that the state tax authorities are currently proceeding on the assumption that the net proceeds from the sale of securities in interstate commerce are exempt from the Indiana gross income tax only where the buyer is a non-resident of Indiana. This limitation is of dubious validity. In the *Freeman* case even though the sale on the New York Stock Exchange had been made to a non-resident of Indiana, the shares actually delivered to the buyer in fulfillment of the sales contract were not necessarily those constituting a portion of the corpus of the trust of which Mr. Freeman was trustee. Under the rules of the Exchange delivery is usually due on the second full business day following day of the contract, and the shares in the *Freeman* case were not even forwarded to New York until after the sale had been effected. The person who actually received the shares once owned by the trust of which Freeman was trustee thus may have been some one quite different from the person whose money was turned over to the trustee.

The present view of the Supreme Court clearly reflects a reversal of its former trend and a reversion to an older line

---

74 “Officials of the Gross Income Tax Division advise that the recent decision of the United States Supreme Court in the *Freeman* case, relating to the taxability of gross receipts from the sale of securities, is confined to a special and specific set of facts; and therefore, that the decision does not apply to all types of sales of securities.” Info. Bull. of Gross Income Tax Division, Jan. 1947, C. C. H. Ind. C. T. P. 15-017.

75 Rules of the Board of Governors for the Settlement of Exchange Contracts. A variety of dates govern special types of settlement, i. e. “Cash” (Rule 162); “Sellers’ Option” (Rule 164 (a)); “Regular Way Delayed Delivery” Rule 164 (b). The most common or so-called “Regular Way” calls for delivery on the third full business day following the day of contract (Rules 109 (b), 112 (b)).

76 See especially Rutledge’s concurrence in *Freeman v. Hewit*, supra, and his joint dissent with Douglas in *Lazarus Joseph v. Carter & Weekes Stevedoring Company* et. al., 330 U. S. 422, 444 (March 10, 1947) where he states “The failure of the Court to adhere to the philosophy of our recent cases corroborates the impression which some of us had that *Freeman v. Hewit*, 329 U. S. 249, marked the end of one cycle under the Commerce Clause and the beginning of another.”
of judicial authority once believed to be overruled. It now appears that the rumored demise of this older line of cases striking down unapportioned state gross receipts taxes levied on interstate communications and transportation such as radio stations, telephones, telegraphs, railroads and stevedoring companies has been greatly exaggerated.

Subsequent to both the Freeman and International Harvester cases the United States Supreme Court has affirmed the invalidation of an unapportioned privilege tax levied by New York City on the gross receipts of two stevedoring companies. The basis for decision rests on the proposition that stevedoring is essential to and indistinguishable from transportation which constitutes interstate commerce upon which a direct tax burden may not be laid either by the several states or by any political subdivision thereof.

In addition to its renewed interest in invalidating state burdens on interstate commerce, the Supreme Court since the commencement of the October Term, 1946, has evinced new interest in striking down state tax burdens on foreign commerce. Once an article of trade has entered into the stream of foreign commerce both the federal government and

77 "The Berwind-White decision in effect overruled the long-standing formal dogma that a state may not impose a tax directly on interstate commerce." Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication (1943), 57 Harv. L. Rev. 40, 87.

78 For a collection of these older cases see Dunham, Gross Receipts Taxes on Interstate Transactions (1947), 47 Col. L. Rev. 211, 222.


81 A tax of 1/10 of 1% is levied by the City of New York upon "the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, . . ." § R41-2.0(a). Local Laws of the City of New York (1940) No. 78.


83 Article 1, § 9, Clause 5 of the United States Constitution.
and the several states are forbidden to levy export duties thereon.

In a recent case the Supreme Court held a California sales tax violative of this constitutional prohibition when levied on the sale of oil to the New Zealand Admiralty. There the oil, extracted from the earth, processed and stored within the state, was both appropriated to the sales contract and inextricably started on its journey in foreign commerce by one and the same act, i.e., delivery on board a New Zealand naval tanker moored next to petitioner's oil storage tanks in a California harbor. A tax on the proceeds of such a sale was held to constitute a tax on exports, and hence an illegal exaction.

The Court's reawakened interest in the constitutional prohibition against the levying of export duties may also be traced in the Lazarus Joseph case. There Mr. Justices Douglas and Rutledge dissented in so far as the city tax was levied on gross receipts derived from handling goods in interstate commerce on the ground that the tax was non-discriminatory and of such a nature as to afford no possibility of being levied again by some other state or political subdivision. Both justices conceded, however, that the tax was void in so far as it attempted to subject receipts derived by the same companies from the handling of cargo destined for a foreign port to a tax burden.

---

84 Article 1, § 10, Clause 2 of the United States Constitution.
87 This interest is not limited to export duties but also extends to efforts of the states to tax imports. See Hooven & Allison Company v. Evatt, Tax Commissioner of Ohio, 324 U. S. 652 (1945).
88 Of the nine Supreme Court Justices only Black and Murphy seem to hold a different view on this point. Even Mr. Justice Black, however, failed to dissent in Puget Sound Stevedoring Company v. State. Tax Commission, supra. Could his silence have been due to stage fright? The case was argued only nine days after he first took his seat on the supreme bench and was decided less than a month after argument.
In light of the present trend of the United States Supreme Court with regard to the validity of direct state taxation of interstate commerce in the form of a gross receipts or gross income tax, it may well be doubted that the efforts of the Indiana tax authorities to limit *Freeman v. Hewit* to its own facts will prove successful. The holding in the *Adams* case upon which some doubt had been cast,\(^8\) has been reaffirmed, perhaps even gone beyond. The freeing of the Indiana broker from liability for state gross income tax on his commissions derived from interstate sales of securities can no longer be doubted.\(^9\) Brokers, dealers in securities, transportation and communication companies rendering services in connection with interstate commerce should all re-examine their liability for this tax in light of the United States Supreme Court's present attitude toward this direct imposition upon the proceeds of such interstate commerce. Indiana companies and dealers exporting goods to foreign countries should be particularly alert to the full implications of the *Richfield Oil* and *Lazarus Joseph* cases. Passage of title to goods on delivery to a carrier where such goods are destined for foreign countries would appear to be sufficient\(^1\) to bring an Indiana manufacturer or processor within the protection of this new line of authority.

Early comments upon the Supreme Court's decision in the *Freeman* case serve strongly to emphasize a current social phenomenon. For two thousand years the name of the publican, or tax gatherer, was constantly linked with that of the sinner, the Pharisee and the whitened sepulcher. Heroic

---

8. Cf. Mr. Justice Rutledge's concurrence in the *Freeman* case. See also: Dunham, *Gross Receipts Taxes on Interstate Transactions* (1947), 47 Col. L. Rev. 211.


resistance to the tax collectors made national heroes of Hampdem, Pym and Strode in Stuart times. Today, however, by the simple process of first doubling, then tripling and finally quadrupling the citizen’s tax burden, the once despised publican has metamorphosed himself into a “fiscal statesman” referred to in hushed tones as “The Commissioner.”

This process has gone so far that the freeing of the testamentary trust, created by the Will of the late Henry C. Starr, from liability for gross income tax on the capital gains realized by the trust in 1940 through the sale of corporate securities on the New York Stock Exchange has been interpreted by an Indiana law school professor as direct evidence of the existence of a policy of severity toward Indiana on the part of the Lord. If the tax gatherers have in fact been driven from a tiny corner of the fiscal field, without desiring to probe too deeply into “the adjudicative womb of the future” it may be hazarded that enterprising Indiana counsel will not stand bemused like sun-struck Joshuas but will make full use of “The Commissioner’s” temporary discomfiture no matter how juristic augurs interpret the celestial omens.

Robert T. Molloy.

Mr. Freeman’s testator, see Hewit v. Freeman, 221 Ind. 675, 51 N. E. (2d) 6 (1943).

Allison, Dunham, author of Gross Receipts Taxes on Interstate Transactions (1947), 47 Col. L. Rev. 211, was an assistant professor of law at Indiana University when his article appeared. His indignant protests against the escape of the Starr trust from taxation is forcibly reminiscent of the cry “Less Bread! More Taxes!” raised by Lewis Carroll’s bemused mob in Sylvie and Bruno.

The sub-title of Professor Dunham’s article is “(Ain’t God Tough on Indiana).”

The phrase is that of Thomas Reed Powell, note, Sales and Use Taxes: Collection from Absentee Vendors (1944), 57 Harv. L. Rev. 1086, at 1092. This dean of American constitutional law commentators through long experience with the vagaries of the Supreme Court has adopted a wait-and-see attitude with regard to the future significance of the cases dealt with above. See Powell, More Ado About Gross Receipts Taxes (1947), 60 Harv. L. Rev. 532, 710. For a less penetrating analysis see also Dowling, Interstate Commerce and State Power—Revised Version (1947), 47 Col. L. Rev. 558. Certiorari has already been granted in Memphis Natural Gas Company v. Stone on petition by the taxpayer against a Mississippi tax on its interstate natural gas pipe line running through the state.