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# Indiana's Intangible Tax Law

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## COMMENT

### *Indiana's Intangible Tax Law*

Causes numbered 26406, 26343, and 26352 relating to chapters 81, 82, and 83 of the Acts of 1933, being the Intangible Tax Law, raised questions as to whether such tax was a valid excise tax or a property tax unconstitutional as violating the "uniform and equal" clause of article 10, section 1 of the Constitution of Indiana; and whether such statutes providing for taxation of intangibles, building and loan associations, and banks and trust companies were unconstitutional because of the exemption of intangibles from personal property taxes. Held, that this was an excise tax, and, as such, not subject to constitutional provision that the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation on all property not specially exempted by law and that it is not unconstitutional because of the exemption of intangibles from personal property taxes.[1]

Property taxes are taxes levied indirectly on individuals because of their ownership and are levied according to valuation.[2] Excise taxes in contrast are taxes laid upon the manufacture, sale or consumption of commodities within a country and upon licenses to pursue occupations or to carry on business in a corporate capacity, or on the transfer of property, or upon the business of refining sugar and the like.[3] It is often very important to determine whether a certain tax is a property tax or an excise tax. Not only

[1] Lutz et al. v. Arnold et al. (1935), 193 N. E. 840; Muncie Finance Co. v. Walsman et al. (1935), 193 N. E. 840; Hamer v. Wise et al. (1935), 193 N. E. 840 (Ind. Sup.).

[2] Eastern Gulf Oil Co. v. Kentucky State Tax Com. (1926), 17 F. (2d) 394; In re Shelton Lead & Zinc Co.'s Gross Production Tax for 1919 (1921), 81 Okla. 134, 197 Pac. 495.

[3] Flint v. Stone Tracy (1911), 220 U. S. 107; Y. M. C. A. v. Davis (1924), 264 U. S. 47; Spreckels Sugar Refining Co. v. McClain (1904), 192 U. S. 397.

are excise taxes governed by many rules entirely different from those which control property taxation,[4] but also there are many constitutional provisions applicable to taxes on property but not to excise taxes. For instance, an excise tax is not within constitutional prohibitions such as those requiring taxation of property by value,[5] and those requiring uniformity and equality of taxation.[6] Generally the answer to whether a particular tax is a property tax or an excise tax is so apparent that there is no room for argument. If the tax is directly on property itself, the tax is a property tax. A tax is not an excise tax merely because the statute imposing it calls it an occupation or license or privilege or franchise or excise tax, where its real nature is a property tax.[7] The substance of the statute,[8] and its incidents and attributes[9] control, rather than the name given to the tax by the legislature, although the legislative designation is an important factor in determining the question.[10]

Section 2 of the act under consideration in the instant case provides:

"On and after the passage of this act, every person residing in and domiciled in this state, shall pay a tax to the State of Indiana at the rate and in the manner provided in this act, for the right to exercise any one or more of the following privileges:

"(a) Signing, executing and issuing intangibles.

"(b) Selling, assigning, transferring, renewing, removing, consigning, mailing, shipping, trading in and enforcing intangibles.

"(c) Receiving the income, increase, issues and profits of intangibles.

"(d) Having and possessing the right to transmit the same by will and of making gifts thereof and therefrom and of having the right to allow such property to pass to other persons by descent under the intestate laws of the State of Indiana.

"(e) For the right to have such intangibles separately classified for taxes levied, assessed and collected on account thereof and/or measured thereby."

Sections 4 and 5 of the act provide for computation and assessment of the tax as to valuation, just as any other property tax.[11] Furthermore, by another provision of the act, one who holds an intangible over a period of years is required to pay a tax each year for the privilege of selling or assigning it, notwithstanding he has not exercised the privilege.[12]

The majority opinion of the court, written by Judge Hughes and concurred in by only one other judge, after setting out section 2 of the act and carefully drawing the distinction between a property tax and an excise tax, fails to apply the law to the facts and takes the position that the above constitutes an excise. If the Legislature in section 2 of the act failed to list any incident of the ownership of intangibles the writer is unfamiliar with it. True an excise is a tax upon one or more of the incidents of ownership, but when all of such incidents of ownership are taxed does it not become clear that the property itself is being taxed? It is difficult to understand the court's error in this entirely understandable distinction.

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4 State v. Citizens' Bank of Louisiana (1899), 52 La. Ann. 1086, 27 So. 709.

5 Longyear v. Buck (1890), 83 Mich. 236, 47 N. W. 234; Holst v. Roe (1883), 39 Ohio St. 340.

6 Kaiser Land & Fruit Co. v. Curry (1909), 155 Cal. 638, 103 Pac. 341; Wiggins Ferry Co. v. East St. Louis (1882), 102 Ill. 560; Standard Underground Cable Co. v. Atty. Gen'l. (1889), 46 N. J. Eq. 270, 19 Atl. 733; Chicago & N. W. R. Co. v. State (1906), 128 Wis. 553, 108 N. W. 557.

7 Cooley, "Constitutional Limitations," 7th ed., pp. 131-132.

8 Security Savings & Commercial Bank v. Dist. of Columbia (1922), 51 App. D. C. 316, 279 F. 185; Thompson v. McLeod (1916), 112 Miss. 383, 73 So. 193.

9 Fleischman Co. v. Conway (1929), 168 La. 547, 122 So. 845.

10 Portland v. Portland Ry., Light & Power Co. (1916), 80 Or. 271, 156 Pac. 1058.

11 Laws of Indiana 1933, c. 81, secs. 4 and 5.

12 Laws of Indiana 1933, c. 81, sec. 16.

Though, as pointed out above, the court is entitled to attach some significance to the legislative designation, the substance of the statute and its incidents and attributes must control. Otherwise, the doctrine of the separation of powers is reduced to a nullity by the court's own volition. Judge Roll, in a minority opinion, concurred in by Judge Fansler, in reference to the court's position that this is an excise tax, says, "Whether the weight of authority sustains this view may well be doubted." However, he prefers to find the law "unconstitutional without regard to whether it be treated as an excise or a tax upon property."

Judge Hughes points out that section 1 of article 10 of the Indiana Constitution is not violated by the act in question for the reason that said provision relates to property taxes and not to excise taxes. Said article reads "The General Assembly shall provide by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law." Authority sustains Judge Hughes' contention that such provision is not applicable to an excise tax.[13] And, of course, the plan of taxation is with the Legislature alone, subject only to constitutional provisions.[14] In the matter of classification in an excise tax a wide discretion is conceded to the legislative power of the state.[15] It seems likely on reason and authority that, if this were an excise tax as contended in the majority opinion, the classification as made in chapter 81 of the Acts of 1933 is not invidious, capricious, or arbitrary so as to violate any provision of the State or Federal Constitutions. However, in the light of the court's attention to the fact that the "uniform and equal" provision of the Constitution does not apply to an excise tax so as to render the tax here invalid, the court clearly indicates its understanding of the meaning of "uniform" and its appreciation of the lack of uniformity in the act in question.

Equality in taxation is accomplished when the burden of the tax falls equally and impartially on all the persons and property subject to it,[16] so that no higher rate or greater levy in proportion to value is imposed on one person or species of property than on others similarly situated or of like character,[17] and it is not necessary that the benefits arising therefrom should be enjoyed by all the people in equal degree, nor that each one of the people should participate in each particular benefit.[18] Uniformity, however, as used in connection with taxation, though it has no reference to a uniformity of the sum total of taxes which a citizen is required to pay,[19] implies equality

[13] Thomasson v. State (1860), 15 Ind. 449; Bright v. McCullough (1886), 27 Ind. 223; Kersey v. City of Terre Haute (1903), 161 Ind. 471, 68 N. E. 1027; Gafill v. Bracken (1924), 195 Ind. 551, 145 N. E. 312, 146 N. E. 109; State Board of Tax Commissioners of Indiana v. Jackson (1931), 283 U. S. 527.

[14] Board of Com'rs. v. Adler (1922), 77 Ind. App. 296, 133 N. E. 602; Board of Com'rs. v. Holliday (1897), 150 Ind. 216, 49 N. E. 14.

[15] Baldwin v. State (1923), 194 Ind. 303, 141 N. E. 343; Board of Tax Com'rs. of Indiana v. Jackson (1931), 283 U. S. 527; Commonwealth v. Delaware Div. Canal Co. (1889), 123 Pac. 620, 16 Atl. 584.

[16] Sherlock v. Winnetka (1873), 68 Ill. 530; Miller v. Henry (1912), 62 Or. 4, 124 Pac. 197.

[17] Maenhaut v. New Orleans (1875), 16 F. Cas. No. 8,939, 2 Woods 108; Grossfeld v. Baughman (1925), 148 Md. 330, 129 Atl. 370; Bidwell v. Coleman (1865), 11 Minn. 78; Com. v. Anderson (1896), 178 Pa. 171, 35 Atl. 632.

[18] Gulf Refining Co. of La. v. Phillips (1926), 11 Fed. (2d) 967; Sawyer v. Gilmore (1912), 109 Me. 169, 83 Atl. 673; Essex County v. City of Newburyport (1926), 254 Mass. 232, 150 N. E. 234; State v. Board of Com'rs. of Allen County (1931), 124 Ohio St. 174, 177 N. E. 271.

[19] Quinn v. Hester (1916), 135 Tenn. 373, 186 S. W. 459; King v. Sullivan County (1913), 128 Tenn. 393, 160 S. W. 847.

in the burden of taxation,[20] and this equality of burden cannot exist without uniformity in the mode of assessment,[21] as well as in the rate of taxation. "Uniform" may be taken then to mean uniform as between persons so as to preclude classification, or taxing some and exempting others, or taxing one class higher than another.[23] This meaning of "uniform" in state constitutions may be contrasted to the meaning given to the term in the Federal Constitution that "all duties, imposts and excises shall be uniform throughout the United States."[24] In the Federal Constitution it merely means geographical uniformity, i. e., that the tax on any person, occupation, article or the like must be the same in every state. It means that an indirect tax cannot be levied at one sum in one place and at another sum at another place, upon the same article or business. It does not mean that the tax must be uniform as between persons so as to preclude classification, or taxing some and exempting others, or taxing one class higher than another.[25] Here we are not concerned with the federal interpretation of the term as found in the Federal Constitution. Because of the classifications and exemptions made in our Intangible Tax Act and because it provides that intangibles be taxed by a different rule and rate than any other property the tax lacks uniformity, as this requirement is understood under Indiana's Constitution, if it is properly viewed as a property tax.

As indicated above, only one judge concurred in the majority opinion written by Judge Hughes, taking the position that this is an excise tax. Judge Treanor, though voting with the majority, preferred to file a separate opinion, which at the date of this writing has not been reported. It hardly seems likely that he will agree that the tax here in question is an excise. Yet, unless he does accept this position, it would seem that he must disregard the import and meaning of the "uniform and equal" clause of our Constitution, and in effect say that its only meaning is equal and equal. One recent case, Fox v. Standard Oil Co. of New Jersey,[26] would seem to sustain such a view. In this case the court expresses the view that the standard of uniformity under the Constitution of the state of West Virginia was substantially the same as the standard of equality under the Fourteenth Amendment of the Constitution of the nation. However, in this case, which concerned

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20 Greene v. Louisville & Interurban R. Co. (1917), 244 U. S. 499; Cummings v. Merchants' Nat. Bank (1879), 101 U. S. 153; City R. Co. v. Beard (1923), 293 Fed. 448; Washington Water Power Co. v. Kootenai County (1921), 270 Fed. 369; Hanover Fire Ins. Co. v. Harding (1927), 327 Ill. 590, 158 N. E. 849; Shawmut Mfg. Co. v. Inhabitants of Benton (1923), 123 Me. 121, 122 Atl. 49; Columbus Exch. Bank v. Hines (1853), 3 Ohio St. 1.

Dominant idea of constitutional provision requiring needed revenue to be provided by the levy of a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or its property, is uniformity of taxation. People's Gaslight & Coke Co. v. Stuckart (1918), 286 Ill. 164, 121 N.E. 629.

Purpose always is that a common burden shall be sustained by common contribution, regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality. People v. Illinois Cent. R. Co. (1916), 273 Ill. 220, 112 N. E. 700.

21 Cummings v. Merchants' Nat. Bank (1879), 101 U. S. 153; Santa Clara County v. Southern P. Ry. (1883), 18 Fed. 385; Fesler v. Bosson (1920), 189 Ind. 484, 128 N. E. 145; Hilger v. Moore (1919), 43 Nev. 290, 185 Pac. 459; Green v. Hutchinson (1907), 128 Ga. 379, 57 S. E. 353.

22 Blake v. Young (1927), 128 Okla. 153, 261 Pac. 923; Greene v. Louisville & Interurban R. Co. (1917), 244 U. S. 499; City Ry. Co. v. Beard (1923), 293 Fed. 448; Cleveland etc. R. Co. v. Backus (1893), 133 Ind. 513, 33 N. E. 432; Pittsburgh etc. R. Co. v. Backus (1893), 133 Ind. 625, 33 N. E. 432.

23 Cooley, "Taxation," vol. 1, p. 253.

24 U. S. Constitution, art. 1, sec. 8, par. 1.

25 Cooley, "Taxation," vol. 1, p. 252; Flint v. Stone Tracy Co. (1910), 220 U. S. 107.

26 (1935) 55 S. Ct. 333.

the validity of a chain store license tax, the question as to the meaning of the "uniform and equal" clause of West Virginia's Constitution should not have been raised at all, since, as already explained, the clause has no application to excise taxes but only to property taxes. It is submitted that "uniform and equal" should mean what it says.

Sections 31 and 32 of chapter 81, section 9 of chapter 82, and sections 16 and 19 of chapter 83 provide that the taxes imposed in the Intangible Tax Act "shall be in lieu of all other taxes except estate and/or inheritance and gross income taxes which might have been or might be imposed upon intangibles or against the owners or holders thereof prior to the passage of this act," thus providing an exemption to the general ad valorem tax previously burdening intangibles together with other personal property. In most states, the constitutional provision as to equality and uniformity is held to preclude the legislature from either expressly exempting part of the property from taxation, or accomplishing the same result by failure to tax such property, except in so far as exemptions are especially provided for by the constitution. Other decisions hold that if the constitution not only provides for equality and uniformity but also provides that "all" property shall be taxed, except as expressly exempted by the constitution, there can be no exemptions other than those expressly authorized by the constitution. However, it is true that in some states the constitutional requirement is construed to mean merely that all property of the same class shall be taxed, in which case the only question, of course, is whether the classification is a proper one and the exemption broad enough in its scope to cover all of the class.[27] Two Indiana decisions have held that the Legislature may accomplish the result of an exemption by failure to tax such property,[28] and on these two cases the majority opinion of the court relies to sustain the exemption of intangibles from the general personal property tax as valid and not a violation of the "uniform and equal" clause of the constitution. No Indiana cases have supported the position that the Legislature may provide an express exemption to a property tax as is effected in the general tax by provision in the intangible tax. The majority of Indiana cases on this question have followed the position of most states having such constitutional provision to preclude the Legislature from either expressly exempting part of the property from taxation, or accomplishing the same result by failure to tax such property.[29] The minority opinion finds the intangible tax unconstitutional principally on this ground. As Judge Roll points out the rule of the two cases relied upon by the majority permitting an exemption by failure to tax not only does not go far enough to justify the Legislature in expressly exempting a class of property which is recognized as taxable property from the burden of taxation, but "Such a rule would have the effect of making the constitutional provision absolutely nugatory . . .", in effect permitting the Legislature to do by indirection what it cannot do by positive enactment. It is submitted that the opinion of the minority in this matter is well taken on reason, if "uniform and equal" is to be given any meaning at all, and on authority.

It follows then, as put by the minority opinion, "if the tax is treated as an excise, only the exemption feature need be held unconstitutional, and thus intangible property would still be subject to the regular ad valorem tax which

[27] Cooley, "Taxation," vol. 1, pp. 580-584, and cases cited.

[28] Board of Com'rs. v. Holliday (1897), 150 Ind. 216, 49 N. E. 14, 15.

[29] State v. Indianapolis (1879), 69 Ind. 375; Warner v. Curran (1881), 75 Ind. 309; State v. Workingmen's etc. Assn. (1898), 152 Ind. 278, 53 N. E. 168; State v. Smith (1901), 158 Ind. 543, 63 N. E. 25; Deniston v. Terry (1895), 141 Ind. 677, 41 N. E. 143; Harn v. Woodard (1898), 151 Ind. 132, 50 N. E. 33; Travelers Ins. Co. v. Kent (1898), 151 Ind. 349, 51 N. E. 723; Oak Hill Cemetery Co. v. Wells (1906), 38 Ind. App. 479, 78 N. E. 350.

was levied upon it before, and subject to the excise tax provided for in the act, in addition to other taxes. But it is perfectly clear that this was not the legislative purpose or intention, since the act provides that the tax shall be in lieu of all other taxes except certain excises." The whole statute will be declared invalid where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning, and purpose as to preclude the presumption that the Legislature would have passed the one without the other, but on the contrary justify the conclusion that the Legislature intended them as a whole and would not have enacted a part only.[30] Statutes relating to taxation are, of course, within this general rule.[31] Thus it becomes apparent that even though the intangible tax in Indiana be considered an excise it must fail in the light of the exemption of intangibles from the ad valorem tax, since such an exemption in effect renders the ad valorem tax no longer "uniform and equal".

Furthermore, the minority opinion of the court contends with some merit that the act should be held void for uncertainty, pointing out several obscure provisions of the act. The generally accepted view is that where the terms of an act are so vague as to convey no definite meaning to those whose duty it is to execute it, ministerially or judicially, it is inoperative.[32] An act imposing a tax must, under these rules, be certain, clear, and unambiguous, especially as to the subject of taxation and the amount of the tax.[33]

In summary then, the two judges concurring in the majority opinion hold Indiana's intangible tax to be an excise. Three will hold it a property tax, if Judge Treanor's premise is properly anticipated. May we assume then it is a property tax, since a majority so hold? If so, then the "uniform and equal" clause of the Indiana Constitution under the rule of this case has been reduced to a nullity by virtue of Judge Treanor voting with two other judges to constitute a majority in favor of the act's constitutionality. Yet only one judge in fact will have held that "uniform and equal" is without any meaning past that of "equality" in the Fourteenth Amendment of the Federal Constitution. We have then the anomalous situation in the instant case of one judge of the Supreme Court of the state controlling and deciding the law in his own way. Certainly, the state of the law in Indiana under the rule of the instant case will be difficult to determine.

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