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PROPOSALS FOR TAXING INTERSTATE SALES IN INDIANA

With the ever soaring cost of state government[1] the tax structure of the state must be constantly re-examined with a view to meeting the increasing demands upon it. The basic tax in Indiana today is the gross income tax.[2] This tax has two rates: 3/8 of one percent on sales at

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ingstar v. Strich, 326 Mich. 541, 40 N.W.2d 719 (1950); Malosh v. Thompson, 265 Mich. 320, 251 N.W. 346 (1933) (*semble*); Annis v. Britton, 232 Mich. 291, 205 N.W. 128 (1925) ("supervision"). New Jersey and New York have raised but not decided the general question. Daniels v. Brunton, 9 N.J. Super. 294, 76 A.2d 73 (1950), *aff'd*, 7 N.J. 102, 80 A.2d 547 (1951); Tkach v. Montefiore Hospital, 289 N.Y. 387, 46 N.E.2d 333 (1943).

62. Two additional suggestions have been directed to the repair statutes. One is that the statutes should make clear that contributory negligence is available to the landlord as a defense in a civil action arising under the statute and that the existence of contributory negligence should be determined from all the circumstances surrounding the plaintiff's conduct. The defense of assumption of risk should not be available. Feuerstein and Shestack, *supra* note 48, at 215-20, 227. The other proposal is that the statute should render void any agreement in connection with the lease which purports either to shift any duty imposed by the statute from the landlord to the tenant, or to exempt the landlord from civil liability for violation of the statutory duty. *Id.* at 220-25, 227-28. It has been noted that in the absence of the latter provision if the lessor uses a "superior bargaining position to impose a contract to repair on a lessee of insubstantial means, he would not necessarily be relieved of liability, at least as to third persons, because he might be held to be negligent in entrusting the performance of his duty to the impecunious tenant." Note, 62 HARV. L. REV. 669, 677(1949).

1. In 1955 the total expenditure of all state governments in the United States was $20,357,065,000. U.S. DEP'T OF COMMERCE, COMPENDIUM OF STATE GOV'T FINANCE IN 1955 8 (1956). By 1958 the total state expenditures had risen to $28,080,313,000, a percentage rise of 29.9% during the four year period. U.S. DEP'T OF COMMERCE, COMPENDIUM OF STATE GOV'T FINANCE IN 1958 21 (1959). Indiana also has had a general increase in state expenditures during the years 1955-1958. In 1955 Indiana expenditures were $440,168,000, U.S. DEP'T OF COMMERCE, COMPENDIUM OF GOV'T FINANCE IN 1955 8 (1956). By 1958 expenditures had risen to $584,407,000 an increase of 23.9% during the four year period. U.S. DEP'T OF COMMERCE, COMPENDIUM OF STATE GOV'T FINANCE IN 1958 21 (1959). And with the emphasis now being placed on education as well as other governmental expenses expenditures will continue to rise in the future.

2. When the gross income tax statute was passed in 1933, the purpose was not only to gain additional revenue for the state, but also to give relief to hard pressed parties with land interests. In addition, a gross income tax was utilized because of the possibility that a net income tax might be unconstitutional in Indiana. Three times prior to 1933 attempts were made to amend the state constitution to permit the enactment of a net income tax, however, all attempts failed. Ironically, shortly after the gross in-

wholesale and retail, sales of display advertising, and sales by dry cleaners and laundries; and 1½ percent on wages, salaries and other labor income, property incomes, sales of services and property sales.[3] The statute has broad coverage,[4] including within the definition of taxable person any "company, individual, assignee, receiver, commissioner, fiduciary, trustee, executor, administrator, institution, bank, firms, partnership, corporation, ..."[5] In addition, the court[6] has given a broad interpretation to gross income by holding that it includes not only wages but profits, rents, dividends, judgments and capital gain. However, despite this expanded coverage, a significant portion of income between twenty and twenty-five percent[7] of all reported gross income, presently escapes taxation. Although several items of income are exempt from taxation,[8] the single exemption of interstate sales accounts for one-half (amount of revenue loss in 1958 was about $18,700,000) of the gross income presently escaping taxation.[9] Interstate sales, both into and out of the state, now escape taxation entirely,[10] and because of the consequent loss of revenue, students of government finance have devoted considerable thought to the elimination of interstate sales from the tax exempt category.

Opponents of the proposal to tax interstate sales point out that this tax would fall on those industries involved in such sales and result in an unfavorable tax climate in the state.[11] They contend that a favorable

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come tax was enacted, the Indiana Supreme Court held that, in fact, the last attempted net income tax amendment was valid. *In re* Todd, 208 Ind. 168, 193 N.E. 865 (1935).

Whether the gross income tax is really an income tax, as its name implies, or in reality a sales tax is still a matter of controversy. The Supreme Court called the tax a gross receipts tax and not a sales tax, although the tax is applied to gross receipts from sales. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938). But a recent article indicated that the tax should logically be regarded as a combination of a proportional rate personal income tax and a gross receipts business tax. DUE, SALES TAXATION 290 (1957). Another author has said that the Indiana gross income tax is the most general sales tax levied in the United States. ANDREWS, THE INDIANA GROSS INCOME TAX—A CURIOUS HYBRID 139 (1958). For the purposes of this article, however, the definition of the tax is not as important as an understanding of how it operates.

3. IND. ANN. STAT. § 64-2603 (Burns 1951).

4. IND. ANN. STAT. § 64-2601(m) (Burns 1951).

5. IND. ANN. STAT. § 64-2601 (Burns 1951).

6. The purpose of the act was to levy a tax on all income and not to limit the tax to accretions flowing from invested property. Treasury Dep't v. Crowder, 214 Ind. 252, 15 N.E. 137 (1939).

7. ANDREWS, THE INDIANA GROSS INCOME TAX—A CURIOUS HYBRID 141 (1958).

8. The items which are either partly or wholly non-taxable include: proceeds from insurance policies; compensation for military service and veterans benefits; original stock sales of corporations; allowance on trade-in or exchanges of like kinds of property; gifts and inheritances; receipts from issuance or repayment of mortgages, notes, or deposits; pensions; non-commercial receipts of religious, charitable . . . institutions and interstate sales. IND. ANN. STAT. § 64-2606 (Burns 1951).

9. This figure is based on the current 3/8 of one percent.

10. Andrews, *op. cit. supra* note 7, at 142.

11. INDIANA COMM'N ON STATE TAX AND FINANCING POLICY, POSSIBLE ADJUSTMENTS IN THE INDIANA TAX STRUCTURE 21 (2d Report 1956).

tax climate is an important consideration in the location and expansion of business enterprise within the state for several reasons. First, a new tax is a burden on net profit, or the threat of a new tax a burden on prospective profits. Since an investment must be justified by a net profit, taxes become a very material factor in the location of the investment. Second, if taxes are raised in a given state, the businesses located therein must expand their markets to pay the additional tax. Third, it must be understood that while state and local taxes are deductible as an expense for federal income tax purposes, they are not a credit. They are merely included along with other costs of production, such as wages, in the determination of taxable net profit. In reality, because most corporate enterprises are within the 52% federal income tax bracket, an increase in state taxes on corporations results in a loss of federal revenue equal to about one-half of the increase.[12] Finally, the opponents contend that a favorable tax climate is important in encouraging the influx of industry into the state, and that an unfavorable tax climate tends to exclude industry from the state, thus decreasing the state's total gross income and ultimately causing a loss in total revenue.

The proponents of taxation of interstate sales argue that a favorable tax climate is really not an important consideration in the location and expansion of new business. They contend that the tax factor is overemphasized; it is, at best, a secondary consideration. The primary items of raw materials, labor, power, water and transportation are the really important elements of cost. The cost of state and local taxes is about 2.6 percent[13] of the total cost of corporate operation. Hence, if a corporation is considering expansion or location in a new area and the decision to move is based on an estimate of cost-revenue potential present state and local taxation will be of little significance. Secondly, proponents contend that industry's commitment of capital involves a long-term investment. The long-run tax factor is uncertain, for taxes may be changed in a relatively short period by action of the legislature. Thus, the tax factor is actually an unpredictable cost of industry. Third, industry begets taxes. Although taxes for a given community are relatively low prior to industrial development, the additional services required because of such development (*e.g.*, water, fire, and police protection) tend to increase the initial tax rate. Finally, all types of businesses are not taxed equally within a given state; some are afforded preferential

12. Brabson, *Do State-Local Tax Structures Influence New Industry Location—The Affirmative,* 37 TAXES 635, 847 (1959).
13. Maloon, *Do State-Local Tax Structures Influence New Industry Location—The Negative,* 37 TAXES 643 (1959).

treatment and others discriminated against. Therefore, the tax climate in the state will affect different industries in a different manner.[14]

If, after considering the preceding economic arguments, one agrees that interstate sales should be taxed, a method must be devised which will not violate the United States Constitution.[15] The present Indiana gross income tax statute has been validated by both the Indiana Supreme Court[16] and the United States Supreme Court.[17] The Indiana court specified that a tax burden could reasonably be measured by gross income and the Supreme Court sustained the decision.

Since the Constitution has given Congress the power to regulate commerce among the states, and since the Supreme Court has held that states must not burden interstate commerce, the type of income involved, whether derived from interstate or intrastate commerce, has been the subject of frequent discussion by the courts. In *Treasury Dep't v. Wood Preserving Co.*,[18] the tax was held valid when applied to the gross receipts received from a taxpayer selling railroad ties in Indiana. The ties in question were sold to a taxpayer at an Indiana railhead and were immediately resold, at the same spot, to the taxpayer's customer, who moved the ties into interstate commerce. Application of the tax to the gross receipts from the sale was held valid on the ground that the sale took place wholly within the state and the tax was levied solely on this intrastate sale. The same year, in another case,[19] the court upheld the gross income tax as applied to the increase in value resulting from the manufacturing process within the state against a contention that the commerce clause was violated.[20] In a recent case,[21] the application of the tax to services performed in Indiana was also validated by the Indiana court.[22] The taxpayer, Bendix Aviation Corporation, sought a refund for gross income tax paid under protest on the receipts from the sale of goods to the United States government. The taxpayer manufactured various products for the United States government in their Indiana plant and

14. *Ibid.*
15. U.S. CONST. art I, § 8; and U.S. CONST. amend. XIV, § 1.
16. Miles v. Treasury Dep't, 209 Ind. 172, 199 N.E. 372 (1935).
17. Miles v. Treasury Dep't, 298 U.S. 640 (1935).
18. 313 U.S. 62 (1941).
19. Treasury Dep't v. Ingram-Richardson Mfg. Co., 313 U.S. 252 (1941).
20. International Harvester Co. v. Evatt, 329 U.S. 416 (1947). The Court stated in this case that it has long been established that a state can tax the business of manufacturing, and the fact that the state chose to measure the amount of such a tax by the value of the goods the factory has produced does not make it invalid.
21. Indiana Dep't of State Revenue v. Bendix Aviation Corp., 237 Ind. 98, 143 N.E.2d 91 (1957).
22. See generally Indiana Farmers Guide Pub. Co. v. Treasury Dep't, 217 Ind. 627, 29 N.E.2d 781 (1940) and Indiana Creosoting Co. v. McNutt, 210 Ind. 656, 5 N.E.2d 310 (1936).

sold them f.o.b. carrier, at which time the government took possession of them. The taxation of the increased value resulting from the manufacturing process until the time the government took possession was held valid, on the ground that the transactions were completed in Indiana. The court said, "The performance was essentially local in character. The tax does not discriminate against interstate commerce, nor does it interfere with the grant of power to Congress to regulate commerce among the states."[23]

In the above cases the court, in validating the tax, denied that interstate commerce was involved. In *Holland Furnace Co. v. Treasury Dep't*[24] and *International Harvester Co. v. Treasury Dep't*,[25] however, the court, although upholding the tax, recognized that incidents of interstate commerce were involved. The *Holland* opinion involved four separate actions litigated by four different companies. The first action involved a Michigan corporation qualified to do business in Indiana, where it solicited contracts to install heating units. Payment was to be made to the corporation offices in Michigan. The second action concerned work done by an Illinois roofing contractor in Indiana. The contractor, although maintaining no place of business within the state, regularly sent salesmen into Indiana to solicit contracts to apply asphalt or composition shingles, which he procured from out of state jobbers, to the roofs and sides of houses. Upon approval of each contract by the main office in Chicago, the corporation sent its employees into Indiana to apply the shingles, payment for which was to be made in Illinois. The third and fourth suits involved New Jersey and Illinois corporations whose principal places of business were in Indiana. Both corporations were employed to construct breakwaters in Indiana territorial waters. The contract called for payment to be made in Chicago and for the materials to be procured from out side the state. In each of the actions the taxpayer sought to recover taxes which had been levied by the state upon his activities within Indiana, and in each situation the application of the tax was valid. In the *International Harvester case* the tax was applied to a variety of closely related commercial transactions each of which involved the manufacture and sale of farm machinery and implements. The taxpayer was authorized to do business in Indiana and operated many manufacturing plants and sales branches in Indiana. The taxpayer's income

23. Indiana Dep't of State Revenue v. Bendix Aviation Corp., 237 Ind. 98, 114, 143 N.E.2d 91, 99 (1957).

24. 133 F.2d 212 (7th Cir. 1943). *Cert. denied.* Holland Furnace Co. v. Treasury Dep't, 320 U.S. 746 (1943); Interstate Roofing and Supply Co. v. Treasury Dep't, 320 U.S. 746 (1943); Great Lakes Dredge and Dock Co. v. Treasury Dep't, 320 U.S. 746 (1943).

25. 322 U.S. 340 (1944).

was derived from several different types of transactions that for purposes of clarity the court designated classes A, C, D, and E. Class "A" transactions consisted of sales by branches outside Indiana to dealers and users located in the state. These orders were solicited in Indiana by agents of the out-of-state branches, and were accepted and payment made at the out-of-state branch offices. Then, without the direction of the Indiana purchasers, the goods were shipped to them from out-of-state warehouses and factories. Class "C" sales were made by branches located outside of Indiana to purchasers residing in Indiana. The orders were solicited in Indiana and the customers, to save time and expense of shipping, took delivery at the factories in Indiana. Class "D" sales were by branches located in Indiana to dealers residing outside the state, in which the customers accepted delivery at Indiana factories. Class "E" sales were by branches located in Indiana to dealers residing in Indiana, in which the goods were shipped from points outside of Indiana to customers in Indiana. As in the *Holland* case, the classes C, D, and E sales were upheld. The court stated, "the gross income tax could be imposed on receipts from intrastate transactions, even though the total activities from which the local transaction derives may have incidental interstate attributes."[26]

The court refused to permit the gross income tax to be levied against class "A" sales on the ground that the goods were accepted outside the confines of Indiana and payment was to be made to branches in other states; the transaction did not take place in Indiana. Other cases reach the same conclusion. In *J.D. Adams Mfg. Co. v. Storen*,[27] the home office, principal place of business and sole manufacturing plant of the taxpayer was located in Indiana. Eighty percent of the plant's annual gross income, however, was derived from the sale of its products to dealers in foreign countries and other states. The court declared the taxation improper on the ground that "the statute included within it, without apportionment, receipts derived from activities in interstate commerce."[28] The court further stated that this type of tax would subject interstate commerce to a double tax burden forbidden by the commerce clause. In *Freeman v. Hewit*,[29] an Indiana trustee of a testamentary trust established under an Indiana will sued in the state court to recover sums paid for gross income taxes. During 1940 the trustee had arranged numerous separate sales of trust assets, stock and bonds. The order to sell was placed with a Richmond, Indiana, broker who transacted the sale through

26. International Harvester Co. v. Treasury Dep't, 322 U.S. 340, 344 (1944).
27. 304 U.S. 307 (1938).
28. J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).
29. 329 U.S. 249 (1946).

a New York brokerage house. After the sale in New York the trustee sent the securities to New York through the Richmond broker, who in turn received the money from the sales and transferred it to the trustee. All of the purchasers were non-residents of Indiana. The application of the state gross income tax to the net receipts accruing to the trust from these sales was declared invalid on the ground that the tax in question was on the very process of interstate commerce. The Indiana Supreme Court, in another case, reached a similar conclusion.[30] Here the taxpayer was an Ohio manufacturer of furnaces who had shipped them fully erected to Indiana and then placed them on their foundations. Although the Gross Income Tax Division contended that all income was derived from the erection of the manufactured product in Indiana and thus was subject to taxation, the Court held the application of the tax invalid. The receipts were derived from interstate commerce, and since the gross income tax has no provision for apportionment, the application of the tax violated the commerce clause.[31]

In each case where the tax's application has been invalidated the tax was not apportioned, and when applied fell on activities outside the state. This, in turn, imposed a burden on interstate commerce. Conversely, where the tax has been validated the transactions taxed were completely within the state, although interstate commerce may have been "incidentally touched" along the way. These cases show the present limitation on the Indiana gross income tax where part of the receipts are from out-of-state transactions, even though part of the receipts are from sales within Indiana, none of the receipts can be taxed because no method of apportionment is incorporated in the statute.

There are constitutionally valid methods of taxing these sales. First, a net income tax, containing an allocation formula for reasonably apportioning and subsequently taxing only those transactions within the state, could be utilized. Such a tax could be applied to all taxpayers, or it could be limited only to corporate taxpayers. This tax would replace the gross income tax. Second, a net income tax system could be used in conjunction with the present gross income tax, the latter to remain unchanged, the former to be applied to those interstate sales that now escape taxation. Or, third, the present Indiana gross income tax could be amended by adding a reasonable apportionment formula and applying it to interstate sales.

30. Gross Income Tax Div. v. Surface Combustion Corp., 232 Ind. 100, 111 N.E.2d 50 (1953).
31. See generally Gross Income Tax Div. v. Chicago Dist. Elec. Generating Corp., 236 Ind. 117, 139 N.E.2d 161 (1956).

The first alternative, that of using a reasonably apportioned net income tax as a replacement for the present gross income tax, is unquestionably constitutional. This was decided definitely in the recent United States Supreme Court decision of *Northwestern States Portland Cement Co. v. Minnesota.*[32] In this opinion the Court held that a state has the right, under both the commerce and due process clauses, to apply a fairly apportioned net income tax to those interstate activities of a foreign corporation that take place within the taxing state. Both of the firms concerned in the *Northwestern* case maintained a single office in the taxing state and each authorized their salesmen only to solicit orders. The orders were forwarded to the home office outside the state where they were accepted. Shipment was made directly to the purchasers. Accordingly, the salesmen were not authorized to receive payments, collect accounts or adjust claims. Neither firm had a bank account in the taxing state and all salaries and expenses were paid by the out-of-state office. The opinion rests squarely on the ground that net income taxes, fairly apportioned and non-discriminatory, are valid applications of the state's taxing power even though all of the income in question was derived from interstate business. In addition, the Court held that a tax on net income is not a tax on the privilege of doing business and hence distinguished it from an earlier case where a "privilege" tax was held invalid.[33]

In addition to the commerce clause arguments in the *Northwestern case,* the Court also considered the possibility that a net income tax on interstate sales might violate the due process clause of the Constitution. The Court, however, dismissed this argument, pointing out that the tax imposed was levied only on that portion of the taxpayer's net income which arose from activities within the taxing state. These activities formed a sufficient "nexus" between the tax and the transactions within the state to meet the minimum constitutional requirements of due process.

When considering the validity of a tax on interstate sales the Court has emphasized that a valid tax must contain some fair and reasonable means of apportionment.[34] The Court has, however, refused to specify a suitable criteria for an apportionment formula, but has declared that

32. 358 U.S. 450 (1959) (hereinafter cited as Northwestern).

33. The Court distinguished the Northwestern case from Spector Motor Serv. v. O'Conner, 340 U.S. 602 (1951) holding that in the present case the tax was not a privilege tax. Thus, the Court did not specifically overrule the O'Conner case. But for all practical purposes the Court did, in fact, nullify the former decision because, although the present case discussed a net income tax and the former a privilege tax, the tax formulas involved in both cases were almost identical in structure.

34. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959).

any reasonable formula will suffice.[35] It should be pointed out that where different states use different formulas an overlapping might occur which could result in a burden on interstate commerce.[36] Thus, although the Court has heretofore refused to specify standards for state apportionment formulas, it may be forced to do so in the future to prevent a violation of the commerce clause.[37]

Although state taxing power is basically limited to transactions within the state, the *Northwestern* decision when combined with that of *International Shoe Co. v. Washington*[38] seems to imply that intrastate activity is not necessary to support a net income tax on interstate sales. It seems to make no difference for commerce clause purposes whether the taxpayer maintains an office in the state. In the *International Shoe* case the court held that the act of a drummer selling within a state provided a sufficient "nexus" within the state for taxation. Thus, it could reasonably be implied that a fairly apportioned net income tax on drummers would be valid. Further, a mail order business similarly might be subject to taxation, for in *McGee v. International Life Insurance Co.*[39] the court held that a mail order business provides sufficient contact with a state to subject the mail order company to suit within that state. Therefore, one may presume that mail order transactions may similarly be subject to the provisions of a reasonably apportioned net income tax.

The implications of the *Northwestern* decision when considered in the light of the *International Shoe* and *McGee* cases resulted in immediate and unfavorable Congressional reaction. This reaction culminated in the passage of a statute[40] which specifically prohibits the states from taxing income derived from transactions within a state which are a part of inter-

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35. *Ibid.*

36. Such a result could develop where the state of domicile or of manufacture and a state of market both use the factor of sales in determining their apportionment formula. If the state of domicile or of manufacture allocates all sales to itself and the state of market also allocates all sales to itself double taxation would result.

37. Typical examples of reasonable apportionment formulas which have been upheld by the Court may be found in, MINN. STAT. ANN. § 290.03-.19 (1957) and GA. CODE ANN. § 92-3113 (1950). The Minnesota apportionment formula uses the three factors of sales, tangible property and payroll. The percentage of total sales allowable to Minnesota is determined by dividing sales revenue from customers within the state by total sales revenue from customers everywhere. In the same manner, all tangible property within the state is divided by the total value of the firm's tangible property whereever located, and the payroll within the state is divided by the total payroll, thus giving percentages allowable to the state for these factors. The three percentages are averaged to arrive at the percent of the firm's net income allocated to Minnesota. The Georgia formula, although containing slightly different terminology, is basically the same as Minnesota. It is based on inventory, wages and gross receipts and applies these factors, as in Minnesota, to find the apportioned net income.

38. 326 U.S. 210 (1945).

39. 355 U.S. 220 (1957).

40. 15 U.S.C.A. 381 (Supp. 1959).

state commerce if the only business activities within said state are the solicitation of orders for sales of tangible personal property. The orders must be approved outside the state, and, if approved, must be filled by shipment from outside the state. The exemption does not apply to domiciliaries of the taxing state. Thus, it is still possible to establish a net income tax system patterned after that of Minnesota[41] or Georgia[42] and validated in the *Northwestern* case provided the requirements of 15 U.S.C.A. 381 (Supp. 1959) are fulfilled.

One additional observation should be made concerning state net income taxes. Although the Court referred to a "reasonably apportioned net income tax" throughout the *Northwestern* decision, the type of tax validated is sometimes referred to as a net worth tax. The Minnesota net income tax statute is almost identical to the "Massachusetts formula"[43] which is called a net worth tax. This formula has been adopted in many states,[44] and whether referred to as a net income tax, or a net worth tax is constitutional.

A second alternative by which interstate sales might be taxed would be to retain the present gross system, but adopt a reasonably apportioned net income tax to be levied solely upon interstate sales. If this method were adopted all intrastate sales would be taxed under the present gross income tax system, while all interstate sales would be taxed under the proposed net income tax. This alternative would be valid since it is merely a limited application of the reasonably apportioned net income tax discussed above.

The third alternative which may be utilized to tax interstate sales in Indiana, namely amendment of the present gross income tax to include an apportionment formula, can also be supported constitutionally. There might be some question about this, since the Court in the *Northwestern* decision only stated that they were validating a net income tax, had not the Court, in *Railway Express Agency v. Commonwealth of Virginia,*[45] validated a tax[46] on express companies, measured by gross receipts from operations within Virginia, which was in lieu of all property taxes on intangible and rolling stock.[47] As in the *Northwestern* case the decision in

41. Minn. Stat. Ann. § 290.03-.19 (1957).
42. Ga. Code Ann. § 92-3113 (1950).
43. Mass. Ann. Laws ch. 63, § 38 (1953).
44. Indiana Tax Study Comm'n, Tax Policy in Ind. 164 (1952).
45. 358 U.S. 434 (1959).
46. Va. Code Ann. § 58-546 (1950).
47. Although the tax was called a property tax in the majority opinion, Mr. Justice Brennan stated in the concurring opinion that, "The more realistic view is to view this tax as what it is—a levy on gross receipts fairly apportioned to the taxing state." Railway Express Agency v. Commonwealth of Va., 358 U.S. 434, 447 (1959).

Railway Express depended to a considerable extent on the conclusion that the tax was reasonably apportioned. The court was of the opinion that although a gross receipts tax may not be the best measure of value, it is nevertheless constitutional. Also, as in the *Northwestern* decision, the court in *Railway Express* refused to inquire into the exactitudes of the formula used to apportion income derived within the state from total income since the formula was not shown to be so baseless that it violated the due process clause. Thus, the decision in the *Railway Express* case supports the contention that a reasonably apportioned gross income tax is constitutionally valid.

In summary, should the legislature deem it advisable Indiana may tax interstate sales in any one of three ways. First, the legislature may adopt a reasonably apportioned net income tax system. Such a solution presents a greater problem than one of merely drafting a net income tax formula. Whether the net income tax is applied only to corporations, or to the population as a whole, the basic problem is that of incorporating a net income tax system in a state which has become adjusted to a gross income tax system during the past 25 years. The wisdom of completely abolishing the gross income tax system is questionable. The defects of the present system, which are numerous, were fully discussed by the 1952 Indiana Tax Study Commission which reported: "The gross income tax is tolerable only because of its low rates."[48] Despite this conclusion, the Commission recommended that the present tax structure be retained, emphasizing that it would not be wise to disturb a long established revenue system that is operating satisfactorily. This is the viewpoint of the current state Commission of State Tax and Financing Policy.[49] In addition, it should be observed that any net income or net worth tax patterned after that of the "Massachusetts formula" has many inequities that are not easily circumvented. First, such a tax generally is applied only to corporations, omitting other forms of business enterprise. Thus it merely adds an additional burden to the tax load already carried by corporations while permitting the interstate sales of individuals and partnerships to go untaxed. Yet, to extend the tax to those other forms of business entails serious administrative problems.[50] Second, this tax accentuates the difficulty of evaluating and allocating the property of the corporation that is to be taxed. If such evaluation and allocation is not accomplished in an equitable manner, the apportionment formula will be extremely un-

48. INDIANA TAX STUDY COMM'N, *op. cit. supra* note 44, at 157.
49. Hamilton, *Recent Developments in the Ind. Gross Income Tax,* 11 NAT'L TAX J. 273 (1958).
50. INDIANA TAX STUDY COMM'N, *op. cit. supra* note 44, at 165.

just. Finally, if a net income or net worth system were applied to corporations, and the present gross income tax retained, domestic corporations, who are presently required to pay gross income tax, would be subject to double taxation. This difficulty could be eliminated only if a credit towards the net worth tax were allowed for all gross income tax paid by the corporation.[51] This would equalize the tax burden of foreign and domestic corporations, and consequently cause industries engaged in interstate sales to bear the main impact of the net worth tax.[52] The second alternative, retaining the present gross income tax and adopting a net income tax applicable only to interstate sales, would encounter most of the same objections enumerated above regarding the first alternative. This plan would have the additional disadvantage of requiring the state to administer two separate types of tax systems simultaneously.

The third alternative which may be utilized to tax interstate transactions is a reasonably apportioned gross income tax. The present Indiana gross income tax statute could be amended by adding an apportionment feature patterned after that used in Minnesota,[53] but substituting gross receipts for net income. The application of a gross income tax to interstate sales would be subject to the same criticisms presently leveled against the gross income tax, however, this alternative would facilitate administration and would not necessitate establishment of a new state tax system. Regardless of the method utilized, two basic requirements must be met: first, any tax on interstate sales must include a reasonable apportionment formula; second, the conditions set forth in 15 U.S.C.A. 381 (Supp. 1959) must be fulfilled.

INTANGIBLE INTERESTS UNDER THE PERSONAL INJURY EXCEPTION TO THE INDIANA SURVIVAL ACT

Under the prior Indiana survival act actions for personal injuries did not survive the death of the plaintiff, and in the event of the defendant's death the damages in actions for personal injuries were limited in

51. A provision for a credit of this type is now being studied by the Ind. Comm'n on State Tax and Financing Policy.

52. INDIANA TAX STUDY COMM'N, *op. cit. supra* note 44, at 165.

53. Indiana could pattern its statute after that of Minnesota, by taking the revenue derived from sales to customers within the state and dividing this by total sales revenue, thus arriving at the percentage of sales subject to taxation in Indiana. MINN. STAT. ANN. § 92-3113 (1950).