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Indiana Gross Income Tax and the Commerce Clause

CONSTITUTIONAL LAW

INDIANA GROSS INCOME TAX AND THE COMMERCE CLAUSE

The Indiana Gross Income Tax Division has set forth the following 'prerequisites' to tax exemption under the Commerce Clause; (1) Income derived from transactions with customers who are non-residents of Indiana, and that (2) by reason of the receipt of a *prior order,* (3) delivery was required and made, and that (4) such delivery across states lines was necessary and *essential* to the consummation of the transaction. *Ind. Gross Income Tax Div., Departmental memorandum,* January 24, 1947.

This ruling was issued as a result of the recent Supreme Court decision in *Freeman v. Hewit,*[1] which held the Ind.

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27. E.g. section 15 of the Hatch Act enacts into law all the previous rulings of the Commission which are thus not subject to broad changes.
28. Leonard D. White, "Civil Service in the Modern State" (1930).
1. 67 S. Ct. 274 (1946). Rutledge, J., concurring at 280; Douglas and Murphy, J.J., dissenting at 292; Black, J., dissenting without opinion. The rationale of the majority opinion by Mr. Justice

Gross Income tax[2] invalid as applied to a sale of securities upon the New York Stock Exchange.[3] Although the memorandum is ostensibly addressed to security transactions, the test set forth therein purports to be that previously utilized for tangible transactions. It is, therefore, applicable to all transactions involving an Indiana seller where the sale has extra-state factors. Inasmuch as it represents the Gross Income Tax Division's interpretation of the effect of the Commerce Clause upon such transactions it is proposed to analyze these 'prerequisites' and discuss their applicability in those situations where Indiana is the Seller state.

The ruling limits the *Freeman* case to its holding that, for Commerce Clause purposes, transactions in intangibles and tangibles are to be treated alike. All other points of the ruling are derived from prior cases.[4] It should be noted that

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Frankfurter is that the gross income tax here applied is a tax "on the sale" and as such is invalid. The implications of the Freeman case on the word formula used by the Supreme Court in validating or striking down state regulation is without the scope of this note. This subject has proven a fertile field for constitutional law writers. For analysis of the historical and current formula, see, inter alia; Frankfurter, "The Commerce Clause" (1937); Gavit, "The Commerce Clause" (1932) cc. 5, 6, 13; Willis, "Constitutional Law" (1936) c. 11; Dunham, "Gross Receipts Taxes on Interstate Transactions" (1947) 47 Col. L. Rev. 211; Morrison, "State Taxation of Interstate Commerce" (1942) 36 Ill. L. Rev. 726; Powell, "New Light on Gross Receipts Taxes" (1940) 53 Harv. L. Rev. 909; Dowling, "Interstate Commerce and State Power" (1940) 27 Va. L. Rev. 1; Lockhart, "The Sales Tax in Interstate Commerce" (1939) 52 Harv. L. Rev. 617; Perkins, "The Sales Tax and Transactions in Interstate Commerce" (1934) 12 N.C.L. Rev. 99.

2. Ind. Stat. Ann. (Burns 1943 Repl.) §64-2601 et seq., see Dunham, "Taxation" (1946) 21 Ind. L. J. 113, 137.

3. Appellant, trustee of an estate created by the will of an Indiana resident, sold certain securities of the estate. The securities were offered, at prices specified by the trustee, through an Indiana broker and sold on the New York Stock Exchange. Appellant paid, under protest, the Indiana Gross Income Tax based upon the proceeds of the sale. In this action he sought a refund claiming the transaction was immune from tax under the Commerce Clause. The Supreme Court of Indiana sustained the imposition of the tax [221 Ind. 675, 51 N.E.(2d) 6 (1943)]. Reversed upon appeal to U.S. Supreme Court. (1) Intangibles are to be accorded the same protection under the Commerce Clause as tangibles, and (2) the tax is a direct tax upon an interstate sale and is unconstitutional in its application [67 S.Ct. 274 (1946)].

4. "The Court in its opinion cited with approval previous decisions rendered under the Gross Income Tax Law in the case of Adams Manufacturing Company v. Storen, the International Harvester Company v. Department of Treasury and other cases. The Supreme Court of the United States had also previously affirmed the Allied Mills Company Inc. v. Department of Treasury case. Since the Court in its present decision places the sale of securities

the individual 'prerequisites' are enumerated in the conjunctive and therefore, the absence of any one of these essentials apparently results in no tax immunity. It is doubtful that they have such broad and forceful application as the ruling suggests.[5]

The applicability of these 'prerequisites', in Seller state transactions can best be approached by an analysis of their possible meanings[6] together with a brief summary of their historical origin. No discussion will be made of the burden of proof imposed upon the taxpayer to prove the purchaser was a non-resident of Indiana.[7]

Prior Order

1. The term "prior order" is a vague one and requires definition. In order to be of value as a test, "prior order" is best defined in terms of sales transactions. A point of time from which the transaction is to be viewed must be taken in order to attach any significance to the word "prior." The "order" referred to, (apparently a request for delivery), may conceivably be given by the buyer at any one of the following times: (a) order before the contract of sale is formed, i.e. an offer or acceptance, (b) order prior to shipment, (c) order prior to delivery to the buyer.

(a) An initial reading of the Gross Income Tax Div. memorandum might connote to the taxpayer that a "prior

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in the same category as the sale of machinery and other tangible personal property in relation to the application of interstate commerce immunity from tax, such securities transactions must therefore fall within and meet the requirements and restrictions of the same court decisions, regulations as are applicable to transactions in machinery and other tangible personal property in interstate commerce." Ind. Gross Income Tax Div., Departmental Memorandum, January 24, 1947.

5. Admittedly no problem will arise where the Gross Income Tax Div. finds all of its 'prerequisites' of tax immunity are present. The problem arises where one or more of the "prerequisites" are absent. This analysis, therefore, will consider each 'prerequisite' with reference to its individual validity.

6. Each 'prerequisite' used in the memorandum is necessarily vague since no attempt was made to define the terms used. Unfortunately each has varied and well established connotations in contract and sales law.

7. It is sufficient here to comment that where sales are made on large markets and exchanges, the problem of proof of purchase by a non-resident is one of magnitude and great expense. In the Freeman case the purchase by a non-resident was stipulated by the State.

order" meant an offer or acceptance by an out-of-state buyer. Consideration of the cases and fundamental contract principles, however, compels a contrary conclusion. As a matter of contract law, the delivery requirement, whether express or implied, flows from the contract and it is immaterial which contracting party first proposed the delivery term finally agreed upon.[8] The *Freeman* case indicates that the out-of-state buyer need not propose this term to give the seller tax immunity. In that case, the Indiana seller was the offeror. The buyer's acceptance gave rise to the obligation to deliver the securities. The *Freeman* case is also conclusive that there is no requirement of an order previous to the formation of a contract. The mere fact that the securities were offered at a stated price rather than at market price did not result in an offer by the buyer before the contract of sale was consummated. Any concept of an "order" separate and distinct from the contract for sale overlooks basic contract law.[9] The contract of sale must then be the "order" the state has reference to. If this be true, it simply means that goods are shipped 'pursuant to or in consummation of a contract.'

(b) The second possibility, i.e. an order prior to shipment across state lines can have no significance in view of the *Gwin, White & Prince* v. *Henneford*[10] decision. To hold that an order must be in existance prior to shipment would result in taxibility where an Indiana seller ships goods out-of-state, consigned to himself, intending to sell while the goods are in transit or at destination.[11] The *Gwin, White* case, to the contrary, held this type transaction non-taxable.

(c) An order prior to delivery may be a valid requirement. No cases have been found wherein this type transaction has been held tax immune under the Commerce Clause. The dearth of cases of this nature in all probability results

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8. As a matter of contract principles, acceptance of an offer automatically results in the formation of a contract.

9. The contract of sale is complete upon acceptance at the Exchange. Restatement, "Contracts" (1932) §64, 66, 74; Meyer, "Law of Stock Brokers and Stock Exchanges" (1931) §28, p. 172.

10. 305 U.S. 434 (1939), (1939) 27 Calif. L. Rev. 336, (1939) 39 Col. L. Rev. 864, (1939) 23 Minn. L. Rev. 969.

11. E.g., Indiana Mining Co. ships carload of coal on consignment to itself in State X. Informs A that coal is available, A refuses. Shipper notifies B in state of Y who accepts. Shipper reroutes from State X or while car enroute, to state Y where B takes delivery.

from the fact that sales by this method are exceedingly rare. Very few concerns ship their product to a prospective customer without negotiation of some sort. Perhaps the most common example of this type transaction would be sales of Christmas cards, ties and magazines by specialty vendors.

2. Thus, the term 'prior order' can only have signifance in those few transactions where an Indiana seller delivers to an out-of-state buyer without prior negotiation of any sort and with the expectation of acceptance or return on the part of the "prospective" buyer. This is clearly a limited field of sales transactions.

3. The cases, historically, do not reveal the existence of a prior order as an element in determining the privilege of a state to tax a transaction with extra-state elements. The concept arose as a result of the dictum of Chief Justice Taft in the case of *Sonneborn* v. *Cureton.*[12] However, in the case of *Wiloil* v. *Pennsylvania*[13] this was rejected and the tax imposed in spite of the clear existence of a prior order. Subsequent cases have been in accord and give no consideration to this as an element of tax immunity.[14] In none of the cases involving Seller state transactions has the prior order concept been relied upon by the court as a significant element in tax determination. The Gross Income Tax Div. apparently obtained this test from *J. D. Adams Mfg. Co.* v. *Storen*[15] where there were prior orders "in fact." However, the Su-

12. 262 U.S. 506 (1923); at 515, "Many of the sales by appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were, in effect, contracts for sale and delivery across state lines."

13. 294 U.S. 169 (1935), (1935) 83 U. of Pa. L. Rev. 795. Taxing state (Buyer & Seller state) placed tax on local seller of fuel oil which had been shipped from out-of-state directly to purchaser. The Supreme Court sustained the tax on the ground that, "These contracts did not require or necessarily involve transportation across the state boundary . . . as interstate transportation was not required or contemplated, it may be deemed incidental."

14. Ford Motor Co. v. Dept. of Treasury, 141 F.(2d) 24 (C.C.A. 7th, 1944), rev'd. other grounds, 323 U.S. 459 (1945); Dept. of Treas. v. International Harvester Co., 322 U.S. 340 (1944) (Class C & E sales); Holland Furnace Co. v. Dept. of Treasury, 133 F.(2d) 212 (C.C.A. 7th, 1943) cert. denied, 320 U.S. 746 (1943); Allied Mills, Inc., v. Dept. of Treasury, 220 Ind. 340, 42 N.E.(2d) 34 (1942), aff'd. per curiam, 318 U.S. 740 (1943); Dept. of Treas. v. Wood Preserving Corp., 313 U.S. 62 (1941); McGoldrick v. Felt and Tarrant Mfg. Co., 309 U.S. 70 (1940).

15. 305 U.S. 307 (1938), 117 A.L.R. 429 (1938), (1939) 4 Mo. L. Rev. 64.

preme Court neither mentioned nor intimated this test in its opinion.

Required Delivery

1. This 'prerequisite' originated in the *Wiloil*[16] case to avoid the "prior order" test stated in the dictum of the *Sonneborn* case. This concept was flatly rejected in the later case of *McGoldrick* v. *Berwind White Coal Mining Co.*[17]

2. It is doubtful that the term has any meaning beyond the subsequent requirement considered, i.e. that delivery across state lines was necessary and essential to the consummation of the transaction.

Essential Delivery

1. In order to clarify and limit the scope of analysis of this 'prerequisite' it should be pointed out that consideration here will not be given to transactions where out-of-state delivery is specified solely for tax avasion purposes.[18]

2. Considering the possible interpretations of this 'prerequisite', a point of reference for the purpose of definition must be established. The use of the term in its context in the memorandum (i.e. delivery is essential to the consummation and completion of the transaction) connotes essentially of delivery pursuant to the contract of sale.[19] If this con-

16. See n. 13 supra.
17. 309 U.S. 33 (1940). The sale of coal which moved from a mine located in Pennsylvania to points of delivery in New York City pursuant to contracts entered into in New York City held subject to a city sales tax. Such tax does not discriminate against interstate commerce. At 53,54, "Respondent . . . insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the Commerce Clause. . . . But we think this distinction is without the support of reason or authority . . . True, the distinction has has the suppor of a satemen obiter in Sonneborn v. Cureton. . . ."
18. Superior Oil Co. v. Mississippi, 280 U.S. 390 (1930), (1930) 30 Col. L. Rev. 731, (1930) 16 Va.L.Rev. 848. For comment upon the element of tax evasion see Note (1921) 21 Col. L. Rev. 270.
19. No duty to ship across state lines could arise short of contract, i.e. mere offer or acceptance alone would not give rise to a duty to ship. The reference point is then the shipping requirements of the contract.

cept relates to the contract requirements, consideration must be given to the type of contract requirement to which the term is directed. What may be "essential" delivery from a contratual duty to deliver, may not be "essential" in fact or for taxation.[20] What may be "essential" delivery from the buyer's physical necessities, may not be "essential" for the seller.[21] The concluding possibility then is that "essential" refers to 'delivery pursuant to the *place of delivery* requirement of the contract.' Here we reach the anomalous result that the taxability of the seller is being established by the buyer when he requires the seller to deliver at the buyer's place of business.

3. The "essential delivery" prerequisite is apparently a perversion of the "required or contemplated" delivery test of the *Wiloil* case which validated a tax imposed by the Buyer state. Where the tax is levied by the Buyer state on a resident seller who chooses to deliver goods from out-of-state plants rather than in-state plants,[22] the concept might have meaning, if not significance. Consideration of the cases, however, indicates that the significant element is not that of "essential delivery" (i.e. that the seller *could* have shipped from within the taxing state) but is the 'local incident' of delivery within the taxing state. The local incident of delivery seems to have been the favored 'incident' utilized by

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20. E.g. the situation where the seller, due to fire, etc., finds it impossible to complete performance from his X state plant but does so in the same form from his Y state plant. The contract of sale specifically provides for delivery from X state plant. In the event of breach of contract by either party, performance from X state plant would not be "essential" insofar as to relieve either the buyer of his obligation to perform [Restatement, "Contracts" (1932) §§463, 464, 467] or the seller of his obligation to perform. [Booth v. Spuyten Duyvie Rolling Mill Co., 60 N.Y. 487 (1875). Note (1921) 12 A.L.A. 1273,1281]. It is apparent that the term "essential" in the memorandum does not refer to this type situation.

21. Conceivably a hypothetical California buyer of the Freeman securities could have come to Indiana to take delivery. Clearly "essential" in terms of physical ability to perform is not the intended definition of the term in the Gross Income Tax Division memorandum.

22. E.g. the fact situation of the Allied Mills case (n. 14 supra) appellee an Indiana corporation, engaged in the manufacture and sale of live stock and poultry feeds, with factories in Indiana and elsewhere. For business economies and not tax evasion, the appellee divided Indiana into three geographical areas, one served from Indiana Plant, the others from Illinois facilities. Held, appellee liable for tax upon all sales wherever delivery accepted in Indiana regardless of whether delivery was made from Indiana or elsewhere.

the Supreme Court in sustaining taxation of interstate transactions.[23] Needless to say, these cases have no bearing upon the problem here considered. The mere circumstance that

23. The recent cases establishing the states power to tax, under the theory that Interstate Commerce must pay its way, have been confined to those instances where the tax could be levied upon an appropriately 'local incident.' Principal case at 279, " . . . and the tax [Berwind-White] was sustained because it was conditioned upon a local activity delivery of goods. . . . ."; Western Live Stock v. Bureau of Revenue 303 U.S. 250 (1938). The Supreme Court has used delivery [Dept. of Treasury v. International Harvester Co., 322 U.S. 340 (1944) (class D sales)], delivery plus solicitation of contract of sale [Department of Treasury v. International Harvester Co., supra) (class E sales)], and performance of services [Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252 (1941)]. Unloading and reloading, within the taxing state, for out-of-state transshipment are insufficient contact points to support the imposition of gross receipts tax levied on 'local' business [Joseph v. Carter & Weekes Stevedoring Co., 67 S.Ct. 815 (U.S. 1947)] Cf. Rutledge, J., concurring in principal case, 284-289 at 286: "Selection of a local incident for pegging the tax has two functions relevant to determination of its validity. One is to make plain that the state has sufficient factual connections with the transaction to comply with due process requirements. The other is to act as a safeguard, to some extent, against repetition of the same or a similar tax by another state. . . . But the Freeman case is one of the latte rtype, that is, where, despite these connections (Indiana) there were equally close and important ones in another state, New York; and therefore, as the Adams case declared, the risk of multiple state taxation would be incurred." Compare the use of 'local incident' theory with the "Accumulation of Contracts Points" used in Barber v. Hughes, 63 N.E. (2d) 418 (Ind. 1945) in Conflict of Laws application. Noted in (1946) 22 Ind. L. J. 78.

A further refinement of the 'local incident' and its effect upon interstate sales occurs where an Indiana seller sells his product to an out-of-state buyer f.o.b. seller's point. The validity of the imposition of the Indiana Gross Income Tax upon such a transaction depends upon the extent to which the Supreme Court is willing to press its 'local incident' theory. Delivery within the taxing seller state has been held sufficient for the imposition of the tax (Dept. of Treasury v. International Harvester, supra). However, in the Freeman case the court apparently was unwilling to consider offer alone as a sufficient local incident to support the tax. Where, between the two polar incidents, the passing of title falls as a local incident is problematical. The case of McLeod v. Dilworth, 322 U.S. 327 (1944), would indicate that the passing of title was of sufficient import to support the tax. In contrast, the multiple burden concept of the Adams case would strike down the tax. Since "commerce among the several state is a practical conception not drawn from witty diversities of the law of sales" [Rearick v. Pennsylvania, 203 U.S. 507, 512 (1906)] the fact that title passed prior to delivery should have no more efficacy in imposing taxes than does the retention of title for security purposes in C.O.D. consignments. Norfolk & Western Ry. Co. v. Simms, 191 U.S. 441 (1903); accord, Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Lemke v. Farmer's Grain Co., 258 U.S. 50 (1922); Penna. R.R. v. Sonman Shaft Coal Co., 242 U.S. 120 (1916).

delivery was, in fact, taken in the taxing state with consequent tax imposition does not *a fortiori* mean that the tax could be imposed were delivery taken elsewhere, on the theory that such delivery was not "essential." Cases involving delivery in the taxing state, therefore, do not lend validity to the Gross Income Tax Div.'s 'prerequisite' of "essential delivery."

4. As was noted above, this concept is historically an adaption of the "required delivery" concept of the *Wiloil* case which was summarily rejected in the *Berwind-White* case. It would appear that the Gross Income Tax Div. finds support for the adaptation of this concept in *Dept. of Treas.* v. *Allied Mills*,[24] where an Indiana seller, because of freight rates and other considerations, delivered goods to Indiana buyers from out-of-state plants although the deliveries could have been made from Indiana plants. It is to be noted that this case was affirmed per curiam on the strength of *McGoldrick* v. *Felt & Tarrant Mfg. Co.*[25] and *Felt & Tarrant Co.* v. *Gallagher*,[26] the former being a companion case to *Berwind-White* which overruled the "required delivery" concept of the *Wiloil* case and the latter a use tax case. All of which would indicate that delivery within the taxing state rather than "essential delivery" was the basis of the court's affirmance. The 'local incident' of delivery as a test of tax immunity is separate and distinct from that considered here and the value of the *Allied Mills* case as support for the 'prerequisite,' as here used, is indeed questionable. In the Seller state cases the 'prerequisite' of "essential delivery" has never been utilized, discussed or intimated by the courts.

Conclusion

The above analysis suggests that the Gross Income Tax Div.'s test adds up to nothing more than this: tax immunity is granted to all transactions in which delivery across state lines occurs in the "ordinary course of business." In making

24. 220 Ind. 340, 42 N.E. (2d) 34 (1942), aff'd per curiam, 318 U.S. 740 (1943) on basis of McGoldrick v. Felt & Tarrant Mfg. Co. 309 U.S. 70 (1940).

25. McGoldrick v. Felt & Tarrant Mfg. Co., id. at 77, "Decision [here] . . . is controlled by our decision in the Berwind-White Coal Mining Co. case."

26. 306 U.S. 62 (1939).

an additional division of factual situations into (1) normal or usual course of business, and (2) isolated transactions, further clarification of the problem may be made. The cases considered above and found in the reports are those where the transaction sought to be taxed was one of the normal business activity of the taxpayer.[27]

The governing policy concerning "normal course of business" transactions was established in 1824[28] on the premise that the free flow of commerce is to be unimpaired by state regulation.[29] On the other hand, in the case of an "isolated" sale which is not in the usual course of business[30] the policy arguments which limit the scope of permitted state regulation are not so persuasive. For in the isolated sale situations, the state action is directed toward a transaction collateral to and not seriously affecting the predominate business of the taxpayer.

Under this classification, the Gross Income Tax Div.'s prerequisites conceivably have application but only in the limited field of isolated sales. Here, too, however, subject to possible exceptions. In the "isolated" transaction, assuming the existence of an equal local market, the sale could be tested by the application of the states 'prerequisites.' The assumption, however, of an equal local market indicates the exception mentioned above. In those cases where the method of marketing goods, through custom or necessity, has resulted in the creation of a special market, interstate in character, com-

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27. This, in all probability results from a balancing of economic considerations. If the type transaction sought to be taxed is the taxpayer's normal business it may be economically feasibble to contest the imposition of the tax. However, in the field of isolated transactions it is probably cheaper to pay the tax than contest its applicability.

28. Gibbons v. Ogden, 9 Wheat 1 (U.S. 1824).

29. Gross income taxes by state of seller which do not apportion the assessment in accordance with either, (a) the taxes imposed by the Buyer state [J. D. Adams v. Storen, 304 U.S. 307 (1938). Cf. Aponang Mfg. Co. v Stone, 190 Miss 805, 1 So. (2d) 763 (1941), aff'd per curiam, 314 U.S. 577 (1941)] or (b) with the amount of local activity [e.g. International Harvester Co. v. Evatt, 67 S. Ct. 444 (1947)] results in burden upon Interstate Commerce [Fargo v. Michigan, 121 U.S. 230 (1887); Crew Levick Co. v. Pa. 245 U.S. 292 (1917)] thereby invalidating the tax.

30. E.g. a manufacturing company purchases new machinery for manufacturing purposes and sells the replaced machinery to a used equipment dealer.

posing a "uniform stream of commerce,"[31] the commerce clause here, too, extends its tax immunity. The N.Y. Stock Exchange, Chicago Grain Exchange and Chicago Stock Yards are illustrative of the "stream of commerce" marketing suggested.

In the light of the foregoing it appears that the state's 'prerequisites' are significant and useful only in those few instances where the sale is an *isolated* one and marketing conditions are such that there is no application of the "stream of commerce" theory. The problem of state taxation and the commerce clause remains one for which no test or rule of thumb of uniform application may be evolved. Each situation must be judged upon its own facts and analogies drawn with prior cases.[32] The solution appears to be the adoption by Indiana of a different type of taxation[33] or affirmative federal action in this field.[34]

CONSTITUTIONAL LAW

RIGHT TO COUNSEL IN CRIMINAL CASES

Plaintiff, a nineteen year old, was convicted of murder in the first degree upon a plea of guilty without the advice of counsel. The Supreme Court of Indiana held plaintiff had

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31. Superior Oil Co. v. Mississippi, 280 U.S. 390 (1930); at 396, "Dramatic circumstances, such as a great universal stream of grain from the state of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here." Accord, Stafford v. Wallace, 258 U.S. 495 (1922); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

32. " . . . The Indiana Gross Income Tax Division does not include in the Regulations any specific rulings on taxability of receipts derived from activities in interstate commerce, because of the number and dissimilarity of situations. Therefore, each case will be considered in the light of the individual circumstances and the Division will determine whether or not immunity exists. . . . " CCH Ind. C. T. ¶ 10-574.

33. Freeman v. Hewit, 67 S. Ct. 274,278 (1946), suggesting the seller state may tax; manufacturing [American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919)], licensing local business [Cheney Bros. Co. v. Mass. 246 U.S. 147 (1918)], net income [U.S. Glue Co. v. Oak Creek, 247 U.S. 321 (1918)], property [Virginia v. Imperial Coal Sales Co., 293 U.S. 15 (1934)].

34. Inter alia; McAllister, "Court, Congress and Trade Barriers" (1940) 16 Ind. L.J. 144; Tax Institute Symposium, "Tax Barriers to Trade" (1940) p. 261; Browne, "Tax Coordination" (1945) 31 Corn. L.Q. 182; Comment, "The Commerce Clause and State Franchise Taxes Affecting Interstate Commerce" (1940) 35 Ill. L. Rev. 441.