XVII. Taxation

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A. Death Taxes

1. Recodification

The 1976 General Assembly adopted a new codification of the inheritance and estate taxes, replacing Article 4 of Title 6 of the Indiana Code with a new Article 4.1.[1] The enactment was "intended to be a codification and restatement of applicable or corresponding provisions" of the laws repealed, without any substantive changes.[2] Organization and clarity of the statute are significantly improved.

2. Deduction for Allowance to Surviving Spouse or Dependent Children

In one of two substantive amendments to the inheritance tax law, the list of deductions which may be taken from the value of property subject to the inheritance tax was expanded to include the $8,500 allowance provided by Indiana Code section 29-1-4-1 to the surviving spouse or dependent children of a resident decedent.[3] While this allowance may be satisfied only from the probate estate, the amendment also provides that any portion of the deduction not needed to reduce to zero the inheritance tax value of probate property may be deducted from the value of nonprobate property transferred by the decedent to those entitled to the allowance.[4] If more than one person is entitled to the allowance, the deduction against the nonprobate property is to be divided equally among them.

If the probate estate is insufficient to satisfy the $8,500 allowance in full, it is not entirely clear whether the difference

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[1] Act of Feb. 18, 1976, Pub. L. No. 18, §§ 1-2, 1976 Ind. Acts 69-104.

[2] *Id.* § 3, 1976 Ind. Acts 104.

[3] IND. CODE § 6-4.1-3-13(b)(10) (Burns Supp. 1976). The amendment is effective March 1, 1976, for inheritance taxes imposed on decedents dying after February 29, 1976. Act of Feb. 25, 1976, Pub. L. No. 20, § 3, 1976 Ind. Acts 108.

[4] IND. CODE § 6-4.1-3-14 (Burns Supp. 1976).

may be deducted from nonprobate property passing to individuals entitled to the allowance, or whether the deduction is limited to the amount actually passing through the probate estate. Although the statutory language lends itself to the latter construction, presumably the former result was intended since it would have the effect of equalizing the inheritance tax burden whether the surviving spouse or dependent children receive probate property under the allowance or nonprobate property which is otherwise subject to the tax. In any event, the amendment removes any possible doubt as to whether probate property passing to a surviving spouse or dependent children pursuant to the statutory allowance is exempt from the inheritance tax.[5]

3. Exemption for Charitable Transfers

The other noteworthy amendment[6] replaced provisions exempting certain charitable transfers with one stating that: "Each transfer described in section 2055(a) of the Internal Revenue Code is exempt from the inheritance tax."[7] Thus, the exemption for charitable transfers is generally limited to the types of transfers which are deductible for federal estate tax purposes. While a full discussion of the transformation wrought by this amendment is beyond the scope of this survey, some comments on a few of the more striking changes are in order.

The classes of qualified recipients in section 2055(a)[8] are

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[5]The allowance in IND. CODE § 29-1-4-1 (Burns Supp. 1976) was proposed to the General Assembly by the Indiana Probate Code Study Commission, which stated in a comment that the allowance would be deductible for purposes of the inheritance tax, apparently as a claim against the estate. INDIANA PROBATE CODE STUDY COMMISSION, PROBATE REFORM ACT OF 1975, at 5 (Proposed Final Draft, 1974).

[6]In addition to the amendments discussed in the text, Act of Feb. 25, 1976, Pub. L. No. 19, § 2, 1976 Ind. Acts 105-06 added IND. CODE § 6-4.1-9-1.5 (Burns Supp. 1976), providing that any inheritance tax imposed under *id.* § 6-4.1-7-6 as a result of a change in the fair market value of the decedent's assets in the final determination of federal estate taxes is due 30 days after the notice of final determination of the federal estate tax is received, with interest accruing at the rate of 6 percent annually after such due date.

[7]IND. CODE § 6-4.1-3-1 (Burns Supp. 1976). Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74-76, enacting and codifying Ind. Code §§ 6-4.1-3-2 to -4 was also repealed by Act of Feb. 25, 1976, Pub. L. No. 9, § 3, 1976 Ind. Acts 106. See text accompanying notes 10-15 *infra*. The amendment and repealer are effective July 1, 1976, with respect to transfers made by individuals dying after June 30, 1976. [References to Ind. Code in roman type are to those sections which were codified but later repealed].

[8]Before amendments enacted by the Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 1307(d), 1313(b), 1902(a), and 2009(b), 90 Stat. 1520 (1976), Int. Rev. Code of 1954, § 2055(a), provided as follows:

> For purposes of the tax imposed by section 2001, the value of

generally broader than those described in the repealed sections.[9] For example, section 2055(a)(1) includes transfers to the United

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the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

(1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

(3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation, and such trustee or trustees, or such fraternal society, order, or association, does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office; or

(4) to or for the use of any veterans' organization incorporated by Act of Congress, or of its departments or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

For purposes of this subsection, the complete termination before the date prescribed for the filing of the estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be considered and deemed to be an irrevocable disclaimer with the same full force and effect as though he had filed such irrevocable disclaimer.

[9]An exception, however, is a nonprofit cemetery corporation not owned by a church or municipality, which was recognized as a qualified transferee under the former statute in IND. ADMIN. R. & REGS. ANN. Rule (6-4-1-3) -3 (Burns 1976), but which has been held not to qualify under I.R.C. § 2055(a). *See* Child v. United States, [1976] FED. TAXES EST. & GIFT (P-H) (38 Am. Fed. Tax Rep. 2d) ¶148,104 (2d Cir. Aug. 19, 1976); Rev. Rul. 67-170, 1967-1 CUM. BULL. 272.

States, any state or territory thereof, any political subdivision of the foregoing, and the District of Columbia, and section 2055(a)(4) covers transfers to veterans' organizations incorporated by Act of Congress and their local chapters and posts. The repealed statute exempted only transfers to municipal corporations of Indiana,[10] and to "public institutions."[11] In addition, section 2055(a)(3) includes transfers to trusts and certain fraternal organizations if they are required to use such contributions solely for charitable and related purposes, whereas the prior Indiana law exempted such transfers only if the transferee was *organized* for charitable or related purposes,[12] or if the transfer was to a trust for the sole benefit of such an organization.[13] The new act also eliminates the prior law's restrictions on how much of the property or income therefrom must be used for charitable or related purposes in the state of Indiana as opposed to out-of-state localities,[14] as well as the requirement of reciprocity for transfers to organizations in other states.[15] On the other hand, except for governments or qualified veterans' organizations, section 2055(a) disqualifies transferees who engage in a substantial way in propaganda or lobbying activities, or who participate or intervene in any political campaign on behalf of a candidate for public office. These disqualifications were not previously imposed under the inheritance tax.

Since the amendment adopted only subsection (a) of section 2055, it does not include the disallowance in section 2055(e)(1) of transfers to certain private foundations and nonexempt trusts[16]

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[10]Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74, enacting and codifying Ind. Code § 6-4.1-3-1(1).

[11]Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74, enacting and codifying Ind. Code § 6-4.1-3-1(2).

[12]Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74, enacting and codifying Ind. Code § 6-4.1-3-1(4).

[13]Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74, enacting and codifying Ind. Code § 6-4.1-3-1(3).

[14]Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74-75, enacting and codifying Ind. Code § 6-4.1-3-2.

[15]Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 76, enacting and codifying Ind. Code § 6-4.1-3-4.

[16]Section 2055(e)(1) disallows a deduction for transfers to:

(1) private foundations which incur liability for the tax on termination of private foundation status [*see* I.R.C. §§ 507(a) and (c), 508(d)(1)];

(2) private foundations and nonexempt trusts unless the governing instrument requires an appropriate minimum distribution of income each year and prohibits self-dealing, retaining excess business holdings, making investments which jeopardize charitable purposes, and making certain taxable expenditures [*see* I.R.C. §§ 508(d)(2), 508(e), 4941-47]; and

or the limitations found in section 2055(e)(2) requiring an annuity trust, unitrust, or pooled income fund arrangement where interests in property are split between charitable and noncharitable beneficiaries.[17] It is possible, therefore, that some transfers will qualify for the inheritance tax exemption even though they are not deductible under the federal estate tax.[18] Apparently the legislature did not wish to utilize the inheritance tax to discourage the abuses which led Congress to enact the limitations in section 2055(e) for the federal estate tax.

A peculiarity of the amendment is its failure to specify whether it refers to section 2055(a) as in effect at a particular date. By contrast, another section of the death tax statute defines the term "federal death tax credit" by reference to sections 2011 and 2102 of the Internal Revenue Code of 1954 "as amended and in effect on January 1, 1976."[19] Such a limitation on the incorporation by reference of a provision of the federal statute is commonly used to avoid any problem of unconstitutional delegation of legislative authority.[20] Consistent with general principles of incorporation by reference, and in order to avoid unconstitutionality, the statute should be interpreted as referring to section 2055(a) as amended and in effect on the date the amendment to state law was adopted.[21] Thus, subsequent amendments to section 2055(a) by Congress

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(3) foreign organizations with substantial support from foreign sources which engage in certain prohibited transactions [*see* I.R.C. § 4948].

[17]Section 2055(e)(2)(A) generally disallows a deduction for a remainder interest transferred to a qualified charity unless the interest is in a charitable remainder annuity trust or unitrust [defined in I.R.C. § 664], or a pooled income fund [defined in I.R.C. § 642(c)(5)]. This limitation does not apply, however, to a remainder interest, not in trust, in a personal residence or farm, or to an interest, not in trust, which is an undivided portion of the decedent's entire interest in property.

Section 2055(e)(2)(B) disallows a deduction for the transfer of any other partial interest in property to a qualified charity unless the interest is in the form of a guaranteed annuity or fixed percentage distributed yearly of the fair market value of the property, whether or not such interest is in trust.

[18]Conversely, the inheritance tax exemption would not apply to the peculiar situation where a deduction is allowed under § 2055(b)(2) if a bequest is made by the decedent in trust to an octogenarian surviving spouse for life subject to a power of appointment which the spouse exercises in favor of a qualified charity.

[19]IND. CODE § 6-4.1-1-4 (Burns Supp. 1976).

[20]IND. CONST. art. 4, § 1, vests the legislative authority of the state in the General Assembly.

[21]The amendment was adopted on February 25, 1976, but the effective date was July 1, 1976. Act of Feb. 25, 1976, Pub. L. No. 19, § 4, 1976 Ind. Acts 106.

would not be included without further action by the General Assembly.[22]

B. *Income Taxes*

1. *Gross Income Tax—Exemptions*

Prior to an amendment enacted in 1971, Indiana Code section 6-2-1-7(i) provided for exemption from the gross income tax of "gross income received by churches . . . hospitals . . . or any corporation organized and operated solely for the benefit of any of the same . . . ."[23] The term "hospital" was not defined. In *State v. Bethel Sanitarium, Inc.*,[24] the state contended that a nursing home was not exempt because it did not fall within the definition of "hospital" for licensing purposes under Indiana Code section 16-10-1-6. Since the statute limited this definition to the chapter on hospital licensing and regulations, however, the First District Court of Appeals held that it was not controlling for tax purposes. Rather, the court decided that the term "hospital" for purposes of the tax statute should be given its usual and ordinary meaning, which is any institution for the reception and care of sick, wounded, infirm, or aged persons. Alternatively, the court found that the exemption of Bethel could be upheld on the ground that it was a corporation organized and operated solely for the benefit of the Seventh Day Adventist Church. While acknowledging that incidental benefits flowed to the patients of Bethel, the court felt that it was sufficient that any financial benefits inured to the church.

Indiana Code section 6-2-1-7(i) was extensively revised in 1971[25] and subsection (i)(3) now specifically limits the exemption for hospitals to those licensed by the Indiana State Board of Health. Furthermore, reference is no longer made to corporations organized and operated solely for the benefit of other charitable organizations. At the same time, however, a more general exemption was included in subsection (i)(1) for institutions, organizations and not-for-profit corporations organized and operated exclusively for charitable and related purposes. The court noted, therefore, that an institution like Bethel could still qualify for exemption under subsection (i)(1) even though it is not now entitled to exemption under (i)(3) as a hospital.

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[22]*See, e.g.*, the amendments to section 2055(a) in the Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 1307(d), 1313(b), 1902(a), and 2009(b), 90 Stat. 1520.

[23]Ch. 117, § 6(1), 1937 Ind. Acts 616, *as amended*, IND. CODE § 6-2-1-7(i) (Burns Supp. 1976).

[24]332 N.E.2d 808 (Ind. Ct. App. 1975).

[25]*Compare* IND. CODE § 6-2-1-7(i) (Burns 1972) *with id.* (Burns Supp. 1976).

2. *Adjusted Gross Income Tax—Criminal Offenses*

In *State v. Moles,*[26] the Third District Court of Appeals considered the proper county of jurisdiction and venue for the criminal offenses under Indiana Code section 6-3-6-11 of making a false and fraudulent tax return, making a false statement in a tax return, and swearing to or verifying a false and fraudulent statement in a tax return. The defendants prepared their income tax returns in Lake County and filed them with the State Department of Revenue in Marion County. Indictments were returned by the Marion County Grand Jury, but the Marion County Criminal Court transferred the cases to the Lake County Criminal Court,[27] which granted motions to quash the indictments on the ground they charged offenses committed outside the jurisdiction of the Marion County Grand Jury. The court of appeals held that both jurisdiction and venue lay in Marion County and ordered that the cases be transferred back to the Marion County Criminal Court.

In finding that the alleged offenses were committed in Marion County, the court construed "making" a tax return to mean "filing" the return and concluded that a filled-in tax form does not become a "return" until it is filed. The opinion quoted approvingly from a federal case[28] which reached the same conclusions with respect to similar statutory language in section 7206(1) of the Internal Revenue Code of 1954.[29] The court of appeals felt that any defect in a tax return does not become material until the return is filed and therefore taxpayers are entitled to a "right of self-correction" if they should decide not to file false returns after they are completed and signed. It was also pointed out that a contrary interpretation could defeat enforcement of the statute where returns are prepared and signed outside the state.

Under the federal statute, however, the courts have generally concluded that making a return is a continuous act occurring in any place where some part of the return is prepared as well as the place where it is filed.[30] Accordingly, prosecution is permitted

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[26]337 N.E.2d 543 (Ind. Ct. App. 1975).

[27]The transfer was made pursuant to IND. CODE § 35-1-38-2 (Burns 1975) [*superseded by id.* § 35-1.1-2-6 (Burns 1975)], which provided for transfer to the proper county where it appeared a defendant had been prosecuted in a county not having jurisdiction of an offense.

[28]United States v. Gilkey, 362 F. Supp. 1069, 1071-72 (E.D. Pa. 1973).

[29]*Cf.* United States v. Habig, 390 U.S. 222 (1968); Butzman v. United States, 205 F.2d 343 (6th Cir.), *cert. denied,* 346 U.S. 828 (1953); United States v. Horowitz, 247 F. Supp. 412 (N.D. Ill. 1965). *Contra,* United States v. Wyman, 125 F. Supp. 276 (W.D. Mo. 1954).

[30]*See* United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974); United States v. Lawhon, 499 F.2d 352 (5th Cir. 1974), *cert. denied,* 419 U.S. 1121 (1975); United States v. Slutsky, 487 F.2d 832 (2d Cir. 1973); United

in any district where any part of the offense took place.[31] The opinion in *Moles*, on the other hand, implies that trials under the Indiana statute are proper only in the county where the tax return is filed, *i.e.*, Marion County. Defendants residing in other counties may therefore be put to the hardship of producing witnesses and otherwise defending themselves in Marion County. While it is sensible to require that filing is a necessary element of the offense of "making" a false tax return, it does not follow that preparation of the return is not also part of the offense. It should be permissible to prosecute in the county where preparation of a false return took place as well as in the county where it was filed. Moreover, where prosecution is begun in the county of filing, a change of venue to the county where the return was prepared should be permitted if it appears to be the better forum in which to try the case.[32]

3. *Credit for Investments in Neighborhood Assistance Programs in Impoverished Areas*

A new income tax credit was enacted for investments in certain neighborhood assistance programs in impoverished areas, either directly or by contributions to neighborhood organizations.[33] The credit is allowed for physical improvement of impoverished areas, job training and education of individuals not employed by the person or firm claiming the credit, crime prevention, counseling, emergency assistance, medical care, housing, and recreational facilities.[34] An "impoverished area" is any area in Indiana certified as such by the State Department of Public Welfare,[35] and the Administrator of Public Welfare must approve the program to be conducted, the amounts to be invested therein, and the plans for implementation.[36]

States v. Hagan, 306 F. Supp. 620 (D. Md. 1969); *cf.* Kowalsky v. United States, 290 F.2d 161 (5th Cir. 1961); United States v. Gross, 276 F.2d 816 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960); Newton v. United States, 162 F.2d 795 (4th Cir. 1947), *cert. denied*, 333 U.S. 848 (1948); United States v. Goldberg, 206 F. Supp. 394 (E.D. Pa. 1962), *aff'd*, 330 F.2d 30 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964).

[31]However, 18 U.S.C. § 3237 (1970) permits the defendant to elect to be tried in the district in which he resided at the time the alleged offense was committed under I.R.C. § 7206(1), if it involved use of the mails and prosecution is begun in a judicial district other than the one in which the defendant resides.

[32]*Cf.* United States v. United States District Court, 209 F.2d 575 (6th Cir. 1954).

[33]IND. CODE §§ 6-3-3.1-1 to -7 (Burns Supp. 1976).

[34]*Id.* §§ 6-3-3.1-1 to -3.

[35]*Id.* § 6-3-3.1-1(b).

[36]*Id.* § 6-3-3.1-3.

The amount of the credit allowable for any taxable year is basically the lesser of $25,000 or 50 percent of the difference between the amount invested or contributed and the amount of any reduction or savings in the taxpayer's federal income tax attributable to the investment or contribution.[37] However, the total credit allowable among all taxpayers in any one state fiscal year is limited to $1,000,000.[38] Taxpayers desiring to claim the credit must file an application with the State Department of Revenue before the investment or contribution is made.[39] Applications will then be approved by the department in the chronological order of filing in the state fiscal year up to the $1,000,000 maximum.[40] Within thirty days after receiving notification that an application has been approved, the applicant is required to submit proof that the amount to be claimed as a credit has been paid or permanently set aside in a special account to be used soley for the approved program or purpose.[41] Once the $1,000,000 maximum has been reached in any one state fiscal year, no further applications filed in that year may be approved except to the extent of amounts previously approved for applicants who fail to file the required proof of payment within the prescribed thirty-day period.[42] If an applicant so requests, however, the department may approve an application, in whole or in part, with respect to the next succeeding state fiscal year.[43] Such approval would apparently give the

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[37]*Id.* § 6-3-3.1-4. Although the reference in subsection (c) of this section is to "any reduction *of* savings in the federal income tax" (emphasis added), presumably it was intended to read "any reduction *or* savings" in federal taxes. Furthermore, the literal language of subsection (c) provides for taking federal tax savings into account only in the case of a "business firm," whereas subsection (a) allows a credit equal to 50 percent of the amount invested by a "business firm or person." It is unclear, therefore, whether federal tax saving must be taken into account in figuring the amount of the credit for a taxpayer other than a "business firm." In any event, subsection (b) further limits the credit to a maximum of $25,000 in any taxable year of the taxpayer. No provision was made in the statute for a refund or carryover of the credit to the extent it exceeds the amount of income taxes due in any year.

[38]IND. CODE § 6-3-3.1-6 (Burns Supp. 1976).

[39]*Id.* § 6-3-3.1-5. At this writing, the Indiana Department of Revenue has not yet prescribed the forms and procedures to be used in applying for and claiming the credit.

[40]*Id.* § 6-3-3.1-6.

[41]*Id.* § 6-3-3.1-5. This section states that the Department of Revenue "may" disallow the credit if proof of payment is not filed within the 30-day period, but it is apparently not required to do so.

[42]*Id.* § 6-3-3.1-6.

[43]*Id.* The requirement that proof of payment be submitted within 30 days after notification that an application has been approved applies only where the credit is allowable in the same fiscal year of the state as the one in which the application is filed. *Id.* § 6-3-3.1-5. The statute is silent as to

taxpayer priority with respect to the $1,000,000 limitation over applications filed in the succeeeding fiscal year. It would generally be in the best interest of the taxpayer, therefore, to request such approval rather than relying on a resubmission of the application in the next state fiscal year.

Although credit applications are to be approved with respect to the state's fiscal year, a credit is allowable to a taxpayer only for the taxable year in which the investment or contribution is paid or permanently set aside.[44] The credit is available against any tax due under the gross income tax,[45] the adjusted gross income tax,[46] or the corporate supplemental net income tax.[47]

4. *Motor Fuel Tax Credit*

Taxpayers entitled to a refund of motor fuel taxes under Indiana Code section 6-6-1-22(b) now have the option to claim the refund as a credit on their state income tax returns.[48] To receive either the refund or the credit, the taxpayer must submit a verified statement accompanied by original invoices and declaring that the purchases of fuel were not for use in operating motor vehicles on public highways of the state.[49] The credit that may be claimed on an income tax return is limited to the motor fuel taxes paid during the taxable year for which the return is filed.[50] If the credit exceeds the amount of the taxpayer's income tax liability for the year, he is entitled to a refund of the excess.[51]

5. *Occupation Income Tax Changes*

The 1975 Indiana General Assembly enacted the Occupation Income Tax Law to permit taxation of occupation income by certain local governmental entities.[52] The law provides that a county council, common council, or board of trustees may adopt an ordinance to impose an annual 1.5 percent tax on occupation income

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whether or when proof of payment must be submitted if an application is approved with respect to the fiscal year succeeding the one in which the application is filed. In this situation, however, the credit apparently cannot be allowed until such succeeding state fiscal year.

[44]*Id.* § 6-3-3.1-7.

[45]*Id.* §§ 6-2-1-1 to -36 (Burns Supp. 1976) and *id.* §§ 6-2-2-1 to -3-1 (Burns 1972).

[46]*Id.* §§ 6-3-1-1 to -7-4 (Burns 1972 & Supp. 1976).

[47]*Id.* §§ 6-3-8-1 to -6 (Burns Supp. 1976).

[48]*Id.* § 6-3-3-7. The law is effective for income tax years beginning after December 31, 1975. Act of Feb. 11, 1976, Pub. L. No. 352, § 3, 1976 Ind. Acts 7.

[49]IND. CODE § 6-6-1-22(b) (Burns Supp. 1976).

[50]*Id.*

[51]*Id.* § 6-3-3-7(d).

[52]Act of Apr. 26, 1975, Pub. L. No. 63, 1975 Ind. Acts 512.

received by an employee who is principally employed in a taxing subdivision.[53] Occupation income is defined to include "wages, salaries, fees, or commissions received for services performed in this state."[54] A taxpayer is entitled to a credit against his occupation income tax liability in an amount equal to the lesser of his state adjusted gross income tax liability or his occupation income tax liability.[55]

The enactment of the 1975 law was greeted with mixed reactions. Only five counties and one city adopted ordinances to impose the occupation income tax for calendar year 1976,[56] and the State of Kentucky unsuccessfully challenged the constitutionality of the tax on the ground that it was a retaliatory measure aimed at Kentucky residents working in Indiana.[57] Subsequent to this suit, the Department of Revenue issued a circular showing that an Indiana resident could also be subject to the occupation income tax if his deductions in arriving at his adjusted gross income tax liability reduced that liability to a lesser amount than his occupation income tax liability.[58]

The legal controversy surrounding this tax led to the adoption of two clarifying amendments and one new provision by the 1976 Indiana General Assembly: (1) A definition of the term "political subdivision" was added;[59] (2) reference in the law to the state adjusted gross income tax liability was clarified to allow credit only for an individual's Indiana adjusted gross income tax liability;[60] (3) a new provision was added permitting an Indiana county, city, or town imposing the occupation income tax to enter into a reciprocal agreement with political subdivisions of other states.[61] This agreement could exempt an out-of-state political subdivision's residents working in an adopting county, city, or town from the occupation income tax if a like exemption from a tax imposed by the out-of-state locality was afforded to Indiana residents employed there.

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[53]IND. CODE § 6-3.5-3-2 (Burns Supp. 1976).

[54]*Id.* § 6-3.5-3-1(1) and (2).

[55]*Id.* § 6-3.5-3-6.

[56]The five counties are Clark, Dearborn, Jay, Perry, and Randolph. The only city adopting the tax was New Albany.

[57]Kentucky *ex rel.* Baker v. Indiana, Cause No. 6069 (Jefferson Cir. Ct., Oct. 22, 1975).

[58]Circular OT-1 (November 17, 1975).

[59]IND. CODE § 6-3.5-3-1(8) (Burns Supp. 1976).

[60]*Id.* § 6-3.5-3-6.

[61]*Id.* § 6-3.5-3-4.5.

C. *Sales and Use Taxes*

1. *Exemptions*

In *Indiana Department of State Revenue v. American Dairy of Evansville, Inc.*,[62] a case which drew some incredibly fine lines, the First District Court of Appeals held that the exemption from the sales and use taxes for "fungicides, insecticides and other tangible personal property to be directly used in the direct production of food and commodities"[63] is applicable to insecticides, insect spray, bird repellant, and cleaning compounds used by a dairy in and around its processing plant to maintain a production environment conforming to state health standards. Although the Second District Court of Appeals had previously held in *Indiana Department of State Revenue v. RCA Corp.*[64] that air conditioning equipment installed to maintain environmental conditions conducive to the manufacture of color television picture tubes and component parts was not "directly used" in "direct production," the court in *American Dairy* decided that since the statute referred to items such as fungicides and insecticides, the use of which generally has an immediate impact upon the production environment rather than upon the product itself, these items qualified for the exemption. While cleaning compounds are not specifically enumerated in the statute, they were also found to be exempt since their use in this case to retard the growth of harmful bacteria was functionally similar to the use of fungicides.

It is easy to agree with this reasoning so far as insecticides and fungicides are concerned, but it is difficult to reconcile the decision that cleaning compounds are also exempt with the earlier case holding that air conditioning equipment is not exempt. Continuing to try to walk this tightrope, however, the court in *American Dairy* held that cleaning equipment used by the dairy was not exempt. Noting only that the impact of such equipment on the production process was arguably less direct than that of the cleaning compounds, the court fell back on the principle of strict construction of the exemption against the taxpayer in cases of ambiguity. At the same time, exemptions were upheld for refrigeration equipment, ice, and dry ice used in the production plant to maintain the physical integrity of the dairy products during processing.[65] It was decided that these items operated directly on the dairy products during the production process and the exemp-

[62]338 N.E.2d 698 (Ind. Ct. App. 1975).

[63]IND. CODE § 6-2-1-39(b)(1) (Burns 1972).

[64]310 N.E.2d 96 (Ind. Ct. App. 1974).

[65]These items were found to be exempt under one or more of the exemptions in IND. CODE § 6-2-1-39(b)(1), (6) and (10) (Burns 1972).

tion was not limited to items actually incorporated into the final product. Finally, the court held that the exemptions for items "directly used" in "direct production" do not apply to items used in distributing finished goods to purchasers after completion of the production process. Accordingly, exemption was denied for wire and plastic milk cases used in delivering dairy products to purchasers[66] and for electricity consumed in storing finished goods.[67] An exemption was allowed, however, for milk cans used in the production process.

RCA and *American Dairy* have launched the Indiana courts on a never ending course of deciding exemptions under the sales and use tax on the basis of "attenuated subtleties."[68] Since the statute does not limit exemptions to items actually incorporated into a final product and since various items are enumerated which normally have only an indirect impact on the final product itself, exemptions should generally be allowed for any items which serve a function similar to those enumerated. It makes no sense to exempt fungicides and insecticides used to control a production environment while subjecting "other tangible personal property" similarly used to a higher standard. In this regard, the courts have jumped to strict construction of the exemption against the taxpayer without first seeking to resolve ambiguities in a manner consistent with the overall scheme of the statute.

2. *Collection Allowance*

Beginning January 1, 1977, retail merchants other than public utilities[69] are allowed to keep a portion of the sales and use taxes collected by them and otherwise timely remitted to the state.[70] The allowance, which is designed to compensate merchants for collecting and timely remitting the taxes, phases in over a period of four years starting at one-fourth percent of the taxes on returns for 1977 and increasing each year thereafter by an additional one-fourth percent to an allowance of one percent after 1979.

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[66]It was also found that the milk cases were not "returnable containers" entitled to exemption under IND. CODE § 6-2-1-39(b)(2) (Burns 1972).

[67]Exemption of the electricity was denied under IND. CODE § 6-2-1-38(c) (Burns 1972), which exempts electricity used in "production" but does not contain the words "direct" or "directly." *But see* State v. Farmers Tankage, Inc., 144 Ind. App. 392, 246 N.E.2d 409 (1969) (transportation equipment used to gather raw materials before actual production process began was exempt under an earlier version of the statute, Ch. 232, § 7(b)(1), 1965 Ind. Acts 570, which did not include the words "direct" or "directly").

[68]The term is from the opinion of Justice Holmes in Lucas v. Earl, 281 U.S. 111, 114 (1930).

[69]Described in IND. CODE § 6-2-1-38(c), (d) and (e) (Burns 1972).

[70]*Id.* § 6-2-1-49(c) (Burns Supp. 1976).

D. *Intangibles Tax*

1. *Low Income Individuals*

Overriding the Governor's veto of a bill originally passed in 1975, the General Assembly enacted an exemption from the intangibles tax for individuals whose "household income" for a taxable year does not exceed $10,000, effective January 1, 1976.[71] If an intangible is owned jointly with one or more persons who do not meet the income test, the exemption applies to a portion of the value of the property based on the ratio of qualifying owners to the total number of owners.[72]

The act adopts the definition of household income provided in Indiana Code section 6-3-3-6(a)(1) and (2) for purposes of the "circuit breaker" credit for disabled and elderly persons under the adjusted gross income tax. Household income is defined therein as the combined income of an individual and his or her spouse if they are residing together. In addition to their adjusted gross income for income tax purposes there is included the amount of capital gains excluded from adjusted gross income, the amount of any pension or annuity (including Social Security benefits) excluded from adjusted gross income, support money, cash public assistance and relief, tax exempt interest on government obligations, workmen's compensation, "loss of time" insurance benefits, and any other type of income not included in adjusted gross income. The only exclusions are surplus food and other relief in kind supplied by a governmental agency and gifts from nongovernmental sources.

It should be possible under this provision for high income taxpayers to avoid the intangibles tax by transferring ownership of intangibles to related family members, such as children, who qualify as low income individuals.[73] It must be remembered, however, that "household income" apparently includes gifts from nongovernmental sources, so the $10,000 limit might be exceeded in the year of the transfer if the transfer itself is taken into account. Moreover, the exemption might not apply to intangibles transferred to a trust, even if the beneficiary is a low income individual, since the taxpayer in that case is the fiduciary[74] (unless the trust is revocable or amendable by the grantor, in which case the grantor is considered to be the owner and taxpayer[75]). It

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[71]*Id.* § 6-5-3.5-1.

[72]*Id.* § 6-5-3.5-2.

[73]In Circular IN-27 (July 1, 1976), the Department of Revenue ruled that a transfer to a minor must be irrevocable to be recognized for purposes of the exemption.

[74]*See* IND. CODE § 6-5-1-1(d), (e), and (h) (Burns 1972).

[75]*See id.* § 6-5-1-1(j).

makes little sense, however, to base the exemption on the income of the fiduciary. Since the intangibles tax is essentially imposed on beneficial ownership and rights and privileges arising therefrom,[76] allowance of the exemption arguably should turn on whether the beneficial owner of the property is a low income individual. Some support for this approach may be derived from the provision requiring apportionment of the exemption in the case of jointly owned property on the basis of the number of joint owners who qualify as low income individuals. In addition, the exemption would apparently be available for intangibles held by a guardian or custodian for the benefit of a low income individual since the property would be reported on a return filed in the name of the individual for whom the property is held.[77] In the final analysis, it must be concluded that the amendment is ambiguous as to whether the exemption is to be allowed on the basis of beneficial ownership or on the basis of the duty otherwise to pay the tax.[78]

2. *Deposits in Credit Unions*

An exemption from the intangibles tax for deposits in federally chartered credit unions was enacted,[79] effective retroactively to January 1, 1975.[80] This amendment directly overturned the position taken by the Department of Revenue in Circular IN-22 issued on August 4, 1975 that such deposits would be subject to the intangibles tax starting January 1, 1975.[81] Deposits in credit unions organized under Indiana law were also exempted from the taxes imposed on banks and savings and loan associations, as well as the intangibles tax,[82] beginning January 1, 1976.[83] Such deposits

[76]*See id.* § 6-5-1-2.

[77]Intangibles are required to be reported in conjunction with the taxpayer's state income tax return. *Id.* § 6-5-1-11. If an individual is unable to file an income tax return, it must be filed by his or her agent, committee, guardian, fiduciary, or other person charged with the care of the person or property of such individual. *Id.* § 6-3-4-2(b).

[78]By contrast, IND. CODE § 6-5-2-1 (Burns 1972) exempts intangibles "owned by or held for the use and benefit of" religious and charitable institutions, and *id.* § 6-5-3-1 exempts property "held" in pension, profit sharing, and stock bonus trusts exempt under the federal income tax.

[79]IND. CODE § 28-7-1-32(3) (Burns Supp. 1976).

[80]Act of Feb. 18, 1976, Pub. L. No. 18, § 2(b), 1976 Ind. Acts 606.

[81]After the issuance of Circular IN-22, a class action suit was commenced by members of a federally chartered credit union. The court issued a preliminary injunction prohibiting the state from taxing deposits held by members in federal credit unions. Jester v. Clark, Cause No. S-775-1444 (Marion Co. Super. Ct., Dec. 22, 1975). Pursuant to the court's decision, the department's position was withdrawn in Circular IN-23 (Dec. 15, 1975).

[82]IND. CODE § 28-7-1-32(2) (Burns Supp. 1976).

[83]Act of Feb. 19, 1976, Pub. L. No. 124, § 2(a), 1976 Ind. Acts 606.

had not previously been considered subject to the intangibles tax because they were subject to the deposit taxes imposed on savings and loan associations at the same rate as the intangibles tax. The effect of these changes is to equalize the treatment of deposits in state and federal credit unions by exempting both types from the intangibles tax and equivalent deposit taxes.[84] To this extent, credit unions are given an advantage over other banks and financial institutions which must pay taxes on their deposits to the state.

E. *Property Tax*

1. *Easements*

In *Budnick v. Indiana National Bank*,[85] the First District Court of Appeals decided that an easement held by a pipeline company must be assessed separately from the remaining interest in the land. The issue arose when the land was sold for delinquent taxes and the new owner contended that the tax deed extinguished the easement. The court held that the tax deed could not convey more than the property interest with respect to which the taxes were delinquent, and if the easement was required to be assessed separately to the pipeline company it could not be considered as included in the tax sale where only the taxes of the land owner were delinquent. Although it was established that the full value of the land had actually been assessed to the land owner without any reduction for the value of the easement, the court construed the then-applicable statute taxing pipeline companies on "[a]ll property, including all rights, franchises, and privileges owned or used"[86] to require that the easement be separately assessed to the pipeline company. Moreover, since the statute required the assessed valuation of pipeline company property other than "land not con-

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[84]Federal credit unions themselves are exempted from state and local taxation by 12 U.S.C. § 1768 (1970).

[85]333 N.E.2d 131 (Ind. Ct. App. 1975).

[86]IND. CODE § 6-1-44-5 (Burns 1972). This section was repealed in 1975 when the property tax provisions of the Code were recodified in Article 1.1 of Title 6. Act of March 18, 1975, Pub. L. No. 47, § 4, 1975 Ind. Acts 466. Although the recodification was intended to be a restatement of the prior law, the language quoted in the text does not appear in the new codification. However, IND. CODE § 6-1.1-8-1 (Burns Supp. 1976) taxes "property owned or used by a public utility company," and *id.* § 6-1.1-8-10 provides for apportionment among taxing districts of the assessed valuation of a pipeline company's property other than certain tangible personal property and "real property which is not a part of a pipeline or *right of way* of the company." (emphasis added). Essentially, the court construed the former statute to require the easement to be included in the property assessed to the pipeline company, subject to apportionment among the taxing districts in which the company's pipelines were located.

stituting a part of the pipeline right-of-way" (and other than certain tangible personal property) to be apportioned by the State Board of Tax Commissioners among the taxing districts in which the company's pipelines were located,[87] it was concluded that only the State Board could assess the easement, and the local assessor lacked jurisdiction to assess the value of the easement to the land owner or to anyone else. By this reasoning, the court deduced that there were no delinquent taxes with respect to the easement and therefore the rights of the easement holder were not affected by the tax sale.

If this case properly construes the statute, it would appear that land owners should not be assessed for the value of easements held by others. But if the easement is property which must be apportioned by the State Board, as in the case of the pipeline company, then under the court's reasoning the local assessor may lack jurisdiction to determine the value of the easement to be excluded in assessing the land owner. The assessor would therefore have to obtain the value of the easement from the State Board in order to arrive at the residual value to be assessed to the land owner. Evidence introduced in *Budnick* indicates, however, that the State Board has been assessing pipelines only on the basis of the value of the pipe and not on the value of the easements associated therewith. Thus, the prospect of a real stalemate exists unless the local assessor may properly determine the residual value to be assessed to the land owner without regard to action by the State Board on the easement.

2. *Leasehold Interests*

In *Miller v. Bauer*,[88] the plaintiffs had sold their real estate in the Indiana Dunes area to the United States, retaining "lease-backs" consisting of the right to use and occupancy of improved property for noncommercial residential purposes for a term of twenty-five years or less. When property taxes on the residential improvements were thereafter assessed to the plaintiffs[89] they

[87] IND. CODE § 6-1-44-11(8) (Burns 1972), *now codified at id.* § 6-1.1-8-10 (Burns Supp. 1976).

[88] 517 F.2d 27 (7th Cir. 1975).

[89] IND. CODE § 6-1.1-10-1(a) (Burns Supp. 1976) provides:

> The property of the United States and its agencies and instrumentalities is exempt from property taxation to the extent that this state is prohibited by law from taxing it. However, any interest in tangible property of the United States shall be assessed and taxed to the extent this state is not prohibited from taxing it by the Constitution of the United States.

IND. CODE § 6-1.1-10-37 (Burns Supp. 1976) provides:

> If real property which is exempt from taxation is leased to

sought to enjoin collection of the tax and asked that the leasebacks be declared immune from local taxation.[90] The Seventh Circuit Court of Appeals affirmed dismissal of the complaint by the district court on the basis of a statute prohibiting federal courts from enjoining the assessment, levy, or collection of state taxes where a "plain, speedy and efficient remedy may be had in the courts" of the state.[91]

The appellate court was unpersuaded by the plaintiffs' argument that there was no "plain, speedy and efficient remedy" because Indiana law does not specifically allow a class action at the administrative appeals level.[92] Moreover, the court refused to entertain the notion that the tax was unconstitutional on the ground that the plaintiffs were mere instrumentalities of the federal government.[93] Rather it was correctly determined that the taxes were levied with respect to the leasehold interests retained by the plaintiffs and not upon property of the United States.

3. *Property in Interstate Commerce*

Scheneman v. State Board of Tax Commissioners[94] dealt with another situation in which a lease affected the taxable status of property. In this case the owner of a fleet of trucks had leased them to an interstate carrier for the purpose of transporting goods in interstate commerce. The First District Court of Appeals held that even though the owner himself was not an interstate carrier, he was entitled to have the assessed value of the property deter-

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another whose property is not exempt and the leasing of the real property does not make it taxable, the leasehold estate and appurtenances to the leasehold estate shall be assessed and taxed as if they were real property owned by the lessee or his assignee.

[90]The action was brought under 28 U.S.C. §§ 1331, 1343 (1970) and 42 U.S.C. § 1983 (1970).

[91]28 U.S.C. § 1341 (1970).

[92]The court noted that IND. CODE § 6-1-31-4 (Burns 1972), *now codified in part at id.* § 6-1.1-15-5 (Burns Supp. 1976), permits consolidation of appeals from the State Board of Tax Commissioners to the circuit or superior court, and IND. CODE §§ 6-1-26-5, -6, and -8 (Burns 1972), *now codified at id.* §§ 6-1.1-4-5 to -9 (Burns Supp. 1976), provide various procedures under which the State Board of Tax Commissioners may order a general reassessment of an entire township, parcel, or area.

[93]*Compare* United States v. City of Detroit, 355 U.S. 466 (1958) (tax properly imposed on property of the United States leased to a private party) *and* Auga Caliente Bank of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) (tax properly imposed on lessees of Indian land), *with* Department of Employment v. United States, 385 U.S. 355 (1966) (Red Cross is an instrumentality of the United States and therefore immune from state unemployment taxes).

[94]340 N.E.2d 385 (Ind. Ct. App. 1976).

mined in accordance with an allocation formula provided in regulations of the State Board of Tax Commissioners for trucks licensed in Indiana and "held, possessed or controlled" by an interstate carrier.[95] Under the formula, only a proportionate amount of the value of an interstate fleet is subject to the tax, based on the ratio of the number of miles traveled in Indiana to total miles traveled. The court noted that interstate use by the lessee could result in taxation of the property in other states on a proportionate basis, raising a constitutional question whether the property could also be fully taxed in Indiana.[96] Since the allocation formula was specifically designed to avoid such multiple taxation, it was construed to apply to the interstate fleet without regard to ownership.

In *Whirlpool Corp. v. State Board of Tax Commissioners*,[97] an exemption for inventory goods allegedly manufactured, boxed, and stored in a warehouse for the purpose of transshipment to an out-of-state destination was upheld on the basis of assumed legislative acquiescence in prior actions by the State Board of Tax Commissioners.[98] After the Board had ruled in favor of the claimed exemption in 1965, Whirlpool continued to claim it in 1966, 1967, and 1968 without further challenge. When Whirlpool claimed the exemption in 1969, however, the Board ruled that the property was not exempt. The First District Court of Appeals overruled the latter decision on the assumption that the failure of the legislature to act after the prior administrative interpretation by the Board indicated acquiescence in the exemption, and therefore the Board was bound to adhere to its first interpretation. The court also held the Board had not acted to hold a hearing and make a final determination with respect to the assessment of the property within the limitation period prescribed in Indiana Code section 6-1-31-10.[99]

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[95] IND. ADMIN. R. & REGS. ANN. Rule (6-1.1-3-9) -72 (Burns 1976).

[96] *See* Central R.R. v. Pennsylvania, 370 U.S. 607 (1962). *Compare* Braniff Airways, Inc. v. Nebraska State Bd. of Equalization, 347 U.S. 590 (1954), *with* Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944).

[97] 338 N.E.2d 501 (Ind. Ct. App. 1975). For a discussion of other issues in the case, see Shaffer, *Administrative Law*, *supra.*

[98] The exemption was claimed under IND. CODE § 6-1-24-5 (Burns 1972), *now codified at id.* § 6-1.1-10-30 (Burns Supp. 1976), which essentially provides an exemption to the extent the property is exempt under the commerce clause of the United States Constitution. *See generally* IND. ADMIN. R. & REGS. ANN. Rule (6-1.1-3-9) -32 (Burns 1976).

[99] *Now codified at* IND. CODE § 6-1.1-16-1 (Burns Supp. 1976). This statute provides that any change in assessment by the State Board of Tax Commissioners, including the final determination appeal from the County Board of Review, must be made and notice thereof given by October 1 of the year for which the assessment is made, or 16 months after the personal property

The statute provides that if the Board fails to act to change an assessment within the prescribed period, the assessed value claimed by the taxpayer on the personal property return is final.[100] Although a representative of the Board had conducted an audit of the taxpayer's return and his recommendation to disallow the claimed exemption had been adopted within the limitation period, the Board had also granted a further hearing to the taxpayer after expiration of the limitation period pursuant to a regulation permitting a hearing in the discretion of the Board if the taxpayer disagrees with the recommendation of a hearing officer and petitions for such a hearing before final assessment is made by the Board.[101] In these circumstances, the court decided that the audit was not a hearing and that the final action disallowing the exemption occurred after the formal hearing, which was too late.

4. Valuation of Real Property

In determining the value of real property for taxation purposes, the statute prescribes a number of factors to be considered[102] and requires that all of these factors must be taken into account to the extent they are applicable.[103] In *State Board of Tax Commissioners v. Valparaiso Golf Club, Inc.*,[104] the Third District Court of Appeals decided that the Board acted arbitrarily when it valued a golf course solely on the basis of the use of the property without considering whether other factors might be relevant. While it is not necessary to use all of the factors listed in the statute in making every appraisal, the Board is required to determine which ones are applicable and then to use those factors in appraising the value of the property. The court of appeals also held that the trial court

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return is filed if it is filed after May 15 of the assessment year, whichever is later.

[100]The court found the longer limitation period of three years specified in the case of undervalued or omitted property in IND. CODE § 6-1-30-2 (Burns 1972), *now codified at id.* § 6-1.1-9-3 (Burns Supp. 1976), to be inapplicable. This longer period does not apply where the taxpayer files a return in substantial compliance with the statute and regulations of the State Board of Tax Commissioners. In addition, IND. CODE § 6-1-31-15 (Burns 1972), *now codified at id.* § 6-1.1-16-4 (Burns Supp. 1976), provides that in case of any conflict the shorter limitation period is controlling.

[101]IND. ADMIN. R. & REGS. ANN. Rule (6-1.1-3-9) -13 (Burns 1976).

[102]IND. CODE § 6-1-33-3 (Burns 1972), *now codified at id.* § 6-1.1-31-6 (Burns Supp. 1976).

[103]IND. CODE § 6-1-33-2 (Burns 1972), *now codified at id.* § 6-1.1-31-5 (Burns Supp. 1976). The recodification does not specifically include the requirement that all factors must be considered.

[104]330 N.E.2d 394 (Ind. Ct. App. 1975).

could not fix the value of property on an appeal from the Board, since the proper procedure is to remand the matter to the Board for reassessment.[105]

XVIII. Torts

*James J. Brennan**

The purpose of this discussion is to highlight selected judicial decisions in the area of tort law. Not all tort cases decided during the survey period have been discussed, but an effort has been made to note recent developments and significant clarifications and affirmations of Indiana law. Because this discussion is synoptic in nature, it does not purport to provide either extensive coverage or extensive analysis of the cases.

A. *Limitations on Duty*

1. *The Guest Statute*

The Indiana guest statute[1] withstood a vigorous equal protection challenge during the survey period. In *Sidle v. Majors*,[2] a guest passenger who was injured in an automobile driven by the defendant appealed the dismissal of her negligence complaint on the ground that the guest statute violated the fourteenth amendment to the United States Constitution and article 1, sections 12 and 23 of the Indiana Constitution. The Seventh Circuit Court of Appeals, before addressing the questions of federal law, certified the questions of state law to the Indiana Supreme Court pursuant to Rule 15(N) of the Indiana Rules of Appellate Procedure.

In an opinion couched with judicial restraint,[3] the supreme

[105]*See* IND. CODE § 6-1.1-15-8 (Burns Supp. 1976); Indiana State Bd. of Tax Comm'rs v. Pappas, 302 N.E.2d 858 (Ind. Ct. App. 1973).

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[1]IND. CODE § 9-3-3-1 (Burns 1973).

[2]536 F.2d 1156 (7th Cir.), *certifying questions of state law to* 341 N.E.2d 763 (Ind.), *cert. denied,* 97 S. Ct. 366 (1976). Dempsey v. Leonherdt, 341 N.E.2d 763 (Ind. 1976) was a companion case to *Sidle*. This case is also discussed in Marsh, *Constitutional Law, supra* at 133. For an analysis of *Sidle,* see 9 IND. L. REV. 885 (1976).

[3]341 N.E.2d 763 (Ind. 1976). The extent to which the supreme court acted with restraint is exemplified by the following excerpt from the opinion: