# XVI. Taxation

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## *A. Introduction*

During the past survey period both the Indiana Supreme Court and the Indiana Court of Appeals displayed a pragmatic but statutorily oriented approach to the disposition of state tax cases. Perhaps the best example of this judicial temperament is *Indiana Department of Revenue v. Kimberly-Clark Corp.*[1] in which the supreme court vacated the opinion of the court of appeals[2] and expressly declined to follow a series of decisions from other states which were premised on an artificially literal but, practically speaking, absurd interpretation of Public Law 86-272.[3] In *Kimberly-Clark*, the supreme court clearly evidenced its belief that tax issues are not to be resolved against taxpayers on the basis of hypertechnical interpretations of statutory requirements. In essence, the court has firmly said, contrary to Mr. Bumble's oft-quoted comment in Oliver Twist that "the law is an ass, a idiot,"[4] common sense is still the prevailing yardstick in Indiana for measuring state tax liability.

A second highlight of recent Indiana tax decisions was the courts' renewed emphasis on the legal significance of the tax situs of intangibles in determining liability for both the gross income tax and the intangibles tax. In *Indiana Department of State Revenue v. J.C. Penney Co.*[5] and in *Indiana Department of State Revenue v. Mercantile Mortgage Co.*,[6] the court of appeals recognized that intangibles owned by a nonresident, and administered and controlled at an out-of-state business situs, are not subject to either the gross income tax (*Penney*) or the intangibles tax (*Mercantile Mortgage*) even though the payors (the debtors) on such intangibles were Indiana residents.

This acknowledgment by the Indiana courts of the independent legal significance of the tax situs of intangibles is a refreshing reaffirmation of a traditional state tax concept. The concept of "situs" in taxing intangibles, especially in taxing income from intangibles, has

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[1]416 N.E.2d 1264 (Ind. 1981).

[2]*Id. See* Weinstein, *Foreword: Indiana Taxation, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 1, 28 (1980).

[3]15 U.S.C. § 381 (1976).

[4]C. DICKENS, OLIVER TWIST, ch. 10, p. 51 (1837-38).

[5]412 N.E.2d 1246 (Ind. Ct. App. 1980).

[6]412 N.E.2d 1252 (Ind. Ct. App. 1980).

been aggressively challenged by a number of vocal proponents of the unitary business concept who argue that intangibles should have no independent significance either as to value or as to place of income when considering the apportionment of business income. The *Penney* and *Mercantile Mortgage* decisions should serve as a clear repudiation of this endeavor to abolish the "situs" concept for intangibles.

One other significant aspect of the past survey period warrants an introductory observation. In *State Board of Tax Commissioners v. Gatling Gun Club, Inc.*,[7] the court of appeals again admonished taxpayers and their lawyers that appeals from property tax assessments by the State Tax Board are not de novo evidentiary proceedings. Therefore, the appealing taxpayer cannot submit to the trial court on appeal new evidence or new witnesses that were not presented to the State Tax Board during its statutory hearing on the contested assessment. In the introduction to last year's Survey,[8] the following admonition was expressed to Indiana's two principal state tax agencies:

> One facet of the recent decisions may be of special concern to the two major state tax agencies, the State Board of Tax Commissioners and the Department of Revenue. The courts have continued to recognize that while these agencies, in holding taxpayer hearings, are not subject to the express requirements of the Indiana Administrative Adjudication Act, they are nonetheless subject to basic administrative law hearing requirements. This recognition may indicate that these agencies should re-evaluate their hearing procedures.[9]

This year's admonition runs to Indiana taxpayers and their counsel who must exercise greater care in their preparation and handling of contested assessments before the State Tax Board if they anticipate seeking judicial review because under the *Gatling Gun Club* decision and its forerunners,[10] the only evidence admissible on appeal is that submitted to the State Tax Board at its administrative hearing.

### *B. The Supreme Court's* Kimberly-Clark *Decision*

Public Law 86-272[11] was enacted by Congress in 1959 to immunize from state taxation the interstate income of taxpayers

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[7]420 N.E.2d 1324 (Ind. Ct. App. 1981).

[8]King, *Taxation, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 523 (1981) [hereinafter cited as King, *1980 Survey*].

[9]*Id.* at 523 (citation omitted).

[10]*See* Uhlir v. Ritz, 255 Ind. 342, 264 N.E.2d 312 (1970) and State Bd. of Tax Comm'rs v. Stone City Plaza, Inc., 161 Ind. App. 627, 317 N.E.2d 182 (1974).

[11]15 U.S.C. § 381 (1976).

whose only activity in a taxing state was the "solicitation" of sales. As a result, several state court decisions adopted a very narrow interpretation of the kinds of activities that were congressionally protected "solicitation." For example, in *Herff Jones Co. v. State Tax Commission*,[12] *Briggs & Stratton Corp. v. Commission*,[13] *Hervey v. AMF Beaird, Inc.*,[14] and *Miles Laboratories, Inc. v. Department of Revenue*,[15] the courts concluded that if, in conducting an interstate business, a taxpayer's activities in a taxing state amounted to something more than "mere solicitation of sales," then the taxpayer was not protected by Public Law 86-272 and could be taxed by states where he had engaged in such unprotected extra activities. The jurisdictional test developed by such decisions was soon popularly labeled the "solicitation plus" test and has been the subject of many redundant state tax articles generally espousing the correctness of the rule.[16] The Indiana Supreme Court now joins a small but growing number of state courts which are rejecting the "solicitation plus" test.

In *Kimberly-Clark*, the taxpayer employed at least sixteen salesmen, some of whom lived in Indiana, to represent Kimberly-Clark in Indiana. Each salesman was furnished an automobile by Kimberly-Clark along with such usual salesman's materials as brochures, samples of new products, order forms and sometimes portable typewriters, staple guns, and selling cases. In addition to taking orders from Indiana customers, the Kimberly-Clark salesmen would check customer inventories, check shelf facings, aid retailers in pricing their Kimberly-Clark products, and would even set up displays and put products on shelves in retail stores.

The Indiana Revenue Department contended before the court of appeals and again before the supreme court that these latter activities of the Kimberly-Clark salesmen in Indiana had amounted to something more than mere solicitation and that under the "solicitation plus" jurisdictional test Kimberly-Clark was not protected by Public Law 86-272 and was therefore subject to the Indiana adjusted gross income tax. That contention was accepted by the court of appeals which announced in its 1978 reversal of the trial court's decision for Kimberly-Clark that it would follow those decisions from

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[12]247 Or. 404, 412, 430 P.2d 998, 1002 (1967).

[13]3 Or. T. R. 174 (1968).

[14]250 Ark. 147, 155-56, 464 S.W.2d 557, 561-62 (1971).

[15]274 Or. 395, 400, 546 P.2d 1081, 1083 (1976).

[16]While there are numerous law review and tax journal articles, notes, and commentaries on this subject, some of the more notable of which are: Note, *Public Law 86-272: Legislative Ambiguities and Judicial Difficulties*, 27 VAND. L. REV. 313 (1974); Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 VAND. L. REV. 353 (1976); Note, *State Taxation of Interstate Commerce: Public Law 86-272*, 46 VA. L. REV. 297 (1960); Peters, *State Income Tax Problems of Interstate Business*, 33RD N.Y. INST. ON FED. TAX. 899, 901-15 (1975).

other states that had conceived and perpetuated the "solicitation plus" test.[17]

Shortly after its 1978 *Kimberly-Clark* decision, the court of appeals, in *Indiana Department of State Revenue v. Continental Steel Corp.*,[18] once more followed the "solicitation plus" test. This result was reviewed in last year's Survey as follows:

> The second observation [to the court of appeals' decision in *Continental Steel*] is actually a belated protest to the tide of decisions being handed down throughout the country applying the "solicitation plus" test in determining the applicability of Public Law 86-272. It is not possible within this survey to elucidate a total rebuttal to the unfortunate development of this case law. However, it is this writer's observation that the "solicitation plus" test is a wholly artificial and unrealistic concept. It is difficult to believe that Congress intended to restrict the protections of federal law to corporations whose salesmen engaged only in mere solicitation. Surely Congress understood that the ordinary and habitual practice of salesmen in 1959, and for many years prior thereto, included such routine selling functions as listening to customers' complaints, looking at customers' inventories, accepting customer payments from time to time, and rendering technical assistance to a customer's personnel. The strict "solicitation plus" test naively restricts the activities of a salesman to a sterile, unnatural environment never intended by the Congress. Nevertheless, *Continental Steel* is consistent with the majority of state court decisions now available on this point.[19]

The supreme court's final rejection in *Kimberly-Clark* of this artificial "solicitation plus" test is indeed a welcome result, not because it vindicates last year's comments, but because it reflects a sensible pragmatism by the court in the construction and application of Indiana tax laws. Teachers, lawyers, administrators, and consultants who deal with taxation issues—and sometimes even the courts—are guilty of predicating tax liability on sterile interpretations of the language in a taxing statute, without considering the problems to which the particular tax law was addressed. The supreme court is to be applauded for its common sense recognition in *Kimberly-Clark* that Congress' 1959 enactment of Public Law 86-272 was surely intended to protect activities that are "inex-

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[17]Indiana Dept. of Revenue v. Kimberly-Clark Corp., 375 N.E.2d 1146 (Ind. Ct. App. 1978), *vacated*, 416 N.E.2d 1254 (Ind. 1981).

[18]399 N.E.2d 754 (Ind. Ct. App. 1980).

[19]King, *1980 Survey*, *supra* note 8, at 539.

tricably related to solicitation"[20] as well as the narrow act of soliciting itself.

### C. Calcar v. Cave Stone—*A Continuing Sales Tax Dilemma*

At the time of writing this article, no action has yet been taken by the Indiana Court of Appeals to clarify the contradiction between that court's 1980 opinion in *Indiana Department of State Revenue v. Cave Stone, Inc.*[21] and its earlier decision in *State Department of Revenue v. Calcar Quarries, Inc.*[22] This contradiction could have a significant bearing on the future interpretation and application of the sales tax exemption for manufacturing machinery and equipment.[23]

As observed in last year's survey[24] the court of appeals in its 1979 *Calcar Quarries* decision had recognized that machinery and equipment used by the taxpayer in one continuous flow of production from the taxpayer's quarry operations to its concrete and asphalt manufacturing operations qualified for the statutory sales tax exemption as being "directly used in direct . . . production."[25] Thus the court in *Calcar* rejected the Revenue Department's standard contention that only machinery and equipment which had a *direct causal or positive effect* on the manufactured product could qualify for sales and use tax exemption under the statutory exemption for manufacturing machinery, tools, and equipment.[26] *Calcar Quarries* was quickly viewed by many as representing the first step toward a more practical and common sense construction by the Revenue Department of the manufacturing exemption.

The prospect of *Calcar Quarries* as a significant precedent was, however, soon clouded by the 1980 decision in *Cave Stone* in which the court of appeals sustained the Revenue Department's assessment of sales and use tax on equipment used to transport crude stone from a quarry to a stone crusher and then from the crusher to stock piles.

The court appears to have fundamentally accepted the Revenue Department's contention that, to be exempt, production machinery must have a direct causal effect on the product being manufactured. Unfortunately, it is not clear whether in *Cave Stone* the court was

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[20]United States Tobacco Co. v. Commonwealth, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978).

[21]409 N.E.2d 690 (Ind. Ct. App. 1980).

[22]394 N.E.2d 939 (Ind. Ct. App. 1979).

[23]*See* IND. CODE §§ 6-2.5-5-3, -4 (Supp. 1981) (previously codified at IND. CODE § 6-2-1-39(b)(6) (1976)).

[24]King, *1980 Survey*, *supra* note 8, at 536-37.

[25]*See* note 23 *supra* and accompanying text.

[26]*Id.*

really embracing the Revenue Department's direct use test and requiring that the machinery have a "positive effect" on the manufactured product or whether the court was simply concluding that the taxpayer was engaged in two separate exempt functions, quarrying and manufacturing. In the latter instance, transportation equipment which merely moved the stone from the quarry to the manufacturing operation was taxable because such equipment was not directly integral to either exempt function.

In both *Calcar Quarries* and *Cave Stone*, the Revenue Department had presented the supreme court's decision in *Indiana Department of State Revenue v. RCA Corp.*[27] as its authority for the contention that exempt machinery, tools, and equipment must have a direct "positive effect" on the manufactured product. This interpretation of *RCA*, which was apparently rejected in *Calcar* and possibly accepted in *Cave Stone*, goes far beyond the actual holding in *RCA* where the court was solely concerned with just two kinds of environmental control equipment. It is true that the supreme court in *RCA* was perplexed by the so-called "double direct" language in the statutory exemption for manufacturing equipment.[28] Nevertheless, it is not credible that the court in *RCA* intended to emasculate the manufacturing exemption by requiring that production machinery actually touch the product to be exempt.

In considering the daily manufacturing operations of a typical plant or factory, obviously there are many kinds of production machinery and equipment which would not, individually or separately, have a "direct positive effect" upon the manufactured product. For example, an electric motor which, as a component, drives a lathe on a continuous production line does not itself touch the manufactured product; but to say, therefore, that the motor is not directly used in direct production and therefore not exempt, and to concurrently ascribe to the General Assembly an intention to exempt the lathe is the very kind of absurdity which the supreme court in *Kimberly-Clark*[29] declined to endorse. In short, as in the case of the interpretation of Public Law 86-272 and the use of the term "solicitation" in that law,[30] the scope of this sales tax exemption cannot be determined on the basis of some sterile or clinical interpretation of words that makes a mockery of the law itself.

Perhaps by the time this Article is published, the court of appeals will have resolved the contradiction created by its decisions in

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[27]Indiana Dept. of State Revenue v. RCA Corp., 160 Ind. App. 55, 310 N.E.2d 96 (1974).

[28]IND. CODE § 6-2-1-39(b)(6) (1971) (currently codified at IND. CODE § 6-2.5-5-3 (Supp. 1981)).

[29]416 N.E.2d 1264 (Ind. 1981) (vacating 375 N.E.2d 1146 (Ind. Ct. App. 1978)).

[30]15 U.S.C. § 381 (1976).

*Cave Stone* and *Calcar*. If the court of appeals fails to do so, it is hoped that the supreme court will reexamine its *RCA* decision and clarify its intended scope as well as reconcile the apparent differences which now exist among *Calcar*, *Cave Stone*, and also the court of appeals decision in *Indiana Department of State Revenue v. American Dairy of Evansville*.[31] A welcome alternative would be for the Revenue Department itself to adopt a more realistic interpretation of the sales tax exemption.[32]

### *D. The 1980-1981 Gross Income Tax Decisions*

*Indiana Department of State Revenue v. J.C. Penney Co.*[33] was clearly the leading decision concerning gross income tax during this survey period. In that decision the court of appeals held that Penney's gross receipts from direct mail catalog sales to Indiana customers and from credit service charges attributable to revolving credit accounts with Indiana customers were not subject to the Indiana gross income tax.

In holding that Penney was not liable for gross income tax on its proceeds from direct mail catalog sales to Indiana customers, the court observed that Penney had in fact reported and paid gross income tax on its catalog sales from orders placed by Indiana customers at local catalog desks in the Penney stores. As to the direct mail order sales which the Revenue Department had taxed, the court observed that these orders were mailed by Penney's Indiana customers directly to Penney's catalog center in Wisconsin where the orders were accepted, and shipment was made from the Wisconsin catalog center directly to the Indiana customers.

The court expressly acknowledged that Penney, in conducting its mail order business, had engaged in some related activities in Indiana; for example, approximately twenty percent of Penney's catalogs had been made available to Indiana customers for a limited period of time at the local Indiana Penney stores, and on rare occasions a dissatisfied mail order customer would arrange for an adjustment or repair of his mail order purchase at an Indiana retail store. In discussing these activities, which were related to the direct mail

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[31]Indiana Dept. of State Revenue v. American Dairy of Evansville, Inc., 167 Ind. App. 367, 338 N.E.2d 698 (1975).

[32]It should be noted that in 1967 the Indiana Revenue Department adopted a very broad interpretation of the manfacturing exemption. That interpretation was stated in the Department's Sales Tax Circular No. 16, dated January 1, 1967. However, without any public hearings, that circular was later revised by the Department, effective July 1, 1969, to sharply curtail the Department's broader 1967 interpretation. Nevertheless, the Department, by it own actions, has itself in the past demonstrated that it believes it has a substantial measure of discretion in administering this exemption.

[33]412 N.E.2d 1246 (Ind. Ct. App. 1980).

sales, the court specifically acknowledged the supreme court's ruling in *Department of Treasury v. Allied Mills, Inc.*[34]

This acknowledgement of *Allied Mills* is extremely important because it finally put to rest the Indiana Revenue Department's contention that an out-of-state taxpayer is subject to gross income tax on sales delivered from an out-of-state source to an Indiana customer when that taxpayer has a like inventory or like selling activity in Indiana. In short, the court in *Penney*, while recognizing that the taxpayer had catalog desks in its local retail stores where catalog sales could be placed, nevertheless concluded that as to those catalog sales which were made by direct mail orders, no gross income tax liability could be imposed.

The *Penney* decision is also significant because of the court's emphasis on the Indiana Supreme Court's 1943 decision in *Department of Treasury v. International Harvester Co.*[35] There the court had ruled that International Harvester was not subject to gross income tax in respect to sales made by an out-of-state branch office to Indiana customers because the Gross Income Tax Act itself[36] did not impose a tax on the receipts of a nonresident from businesses conducted at an out-of-state business situs. In *Penney*, the court emphasized the *International Harvester* holding that Harvester's out-of-state branch office income was not "derived from sources within the state of Indiana"[37] and was, therefore, statutorily not taxable.[38]

The *Penney* court's recognition of the limited application of *Allied Mills* and its reapproval of the *International Harvester* holding should eliminate some of the confusion regarding the scope of taxation under the Indiana Gross Income Tax law. The *Penney* decision, by recognizing *Allied Mills* and *International Harvester*, as well as the *Gross Income Tax Division v. Owens-Corning Fiberglass Corp.*[39] and *Mueller Brass Co. v. Gross Income Tax Division*[40] decisions, has correctly enunciated that the gross income tax is a tax on *transactions*. Consequently, the Revenue Department and the courts must look to the taxpayer's activities in Indiana which are, in fact, directly related to the particular transactions the state seeks to tax. Only by doing this can it be determined whether those transactions are actually within the purview of the taxing statute. As the Indiana Supreme Court recognized in the *International Harvester* decision,

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[34]220 Ind. 340, 42 N.E.2d 34 (1942), *aff'd per curiam*, 318 U.S. 740 (1943).

[35]221 Ind. 416, 47 N.E.2d 150 (1943), *aff'd on other grounds*, 322 U.S. 340 (1944).

[36]IND. CODE § 6-2-1-2 (1976).

[37]412 N.E.2d at 1249 (quoting 221 Ind. at 422, 47 N.E.2d at 152).

[38]IND. CODE § 6-2-1-2 (1976).

[39]253 Ind. 102, 251 N.E.2d 818 (1969).

[40]255 Ind. 514, 265 N.E.2d 704 (1971), *dismissed for want of federal question*, 403 U.S. 901 (1971).

the issue is often not a constitutional question of due process or of the commerce clause, but rather whether the statute itself imposes a tax liability.

Consistent with its holding on the first issue, the court in *Penney* held that Penney's income from revolving credit accounts administered and maintained at an out-of-state regional credit office was not subject to the gross income tax. The court said: "The dispositive issue becomes whether Penney's service charge income, which was income earned on intangibles, was derived from activities, business, or sources within the state."[41] Citing its earlier decision in *Indiana Department of State Revenue v. Convenient Industries of America, Inc.*,[42] the court concluded that J.C. Penney's activities in Indiana with respect to the revolving credit accounts were "remote and minimal" and that accordingly "Penney's activities [were] not taxable *given the wording of* [*the Indiana*] *statute* . . . ."[43] In so holding, the court emphasized that its decision was based on the wording of the Indiana statute and that therefore it was not necessary for the court to reach the issue of whether the imposition of the tax would be unconstitutional.

Three other recent decisions in the area of gross income tax are worthy of mention. In *Indiana Department of State Revenue v. Marsh Supermarkets, Inc.*,[44] the court of appeals held that cash discounts extended by Marsh to its retail customers through the use of discount coupons in newspapers were not subject to the Indiana sales tax. The court also held that Marsh was not liable for Indiana gross income tax on cash discounts received by it from its vendor suppliers in connection with the issuance of the customer discount coupons. Likewise, the court also held that Marsh was not subject to gross income tax on reimbursements received by it pursuant to written agency agreements under which two wholly-owned subsidiary corporations had agreed to reimburse Marsh for various administrative costs Marsh incurred as agent for and on behalf of such subsidiaries.

In sustaining the trial court's judgment for Marsh, the court observed that "[e]ssentially the Department's quarrel with the trial court's judgment is that the Department disagrees with that judgment without recognizing that there is substantial evidence to support it."[45] In rejecting this "quarrel," the court once again acknowledged that a reviewing court shall not set aside the findings

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[41]412 N.E.2d at 1251.
[42]157 Ind. App. 179, 299 N.E.2d 641 (1973).
[43]412 N.E.2d at 1252 (emphasis added).
[44]412 N.E.2d 261 (Ind. Ct. App. 1980).
[45]*Id.* at 266.

or judgment of a trial court unless clearly erroneous, and neither will it reweigh the evidence nor judge the credibility of the witnesses.

With respect to the Revenue Department's attack on the agency agreements between Marsh and its subsidiaries, the court noted that the real issue was whether an agency relationship could exist in view of the fact that the reimbursements were based on percentage formulas. In answer to the Department's contention, the court said:

> *Ice Service, Inc., supra*, is dispositive. Our Supreme Court there decided that use of a percentage allocation did not necessarily make such receipts taxable under the Act. *Ice Service* recognized that a strict item by item reimbursement was not an indispensable characteristic of an agency relationship, but that the parties could agree as to allocated amounts, i.e., the use of percentage factors. Additionally, *Ice Service* found that the expense of a precise accounting system justifies a reasonable, estimated alternative.[46]

In *Indiana Department of State Revenue v. Commercial Towel & Uniform Service, Inc.*,[47] the court of appeals was confronted with whether the income of several taxpayers had been received from the business of dry cleaning and laundering within the meaning of Indiana Code section 6-2-1-3(d)[48] and therefore was properly taxable at the rate of one-half of one percent. The Department had contended that the taxpayers did not qualify for this lower gross income tax rate because they "did not have the requisite assets and operations to be classified in the business of laundering and dry cleaning."[49] According to the court's opinion, the taxpayers did not own or lease any laundering or dry cleaning equipment, but instead contracted with other separate corporations for the necessary laundering services. The taxpayers then furnished to their customers the clean linens, towels, and uniforms that were laundered or dry cleaned by the subcontractors.

In ruling that the taxpayers were in fact engaged in a rental service and did not themselves perform a laundering and dry cleaning business activity, the court observed that the controlling factor as to which gross income tax rate should be applied is not the "character of Taxpayer's business, but the source of the income" and that based on the uncontested facts before the court, "the rental service [was] the source of the income."[50]

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[46] *Id.* at 268.

[47] 409 N.E.2d 1121 (Ind. Ct. App. 1980).

[48] IND. CODE § 6-2-1-3(d) (1976).

[49] 409 N.E.2d at 1123.

[50] *Id.*

*Indiana Department of State Revenue v. Lyall Electric, Inc.*[51] is still another example of the courts' 1980-1981 pragmatic approach to the determination of state tax issues. In *Lyall Electric*, the Revenue Department sought to impose the gross income tax on income Lyall Electric had received for rendering services to affiliated corporations. The sister corporations had joined with Lyall Electric in the filing of a consolidated gross income tax return.

The Revenue Department argued that during the disputed tax years, the income from services rendered between affiliated corporations was taxable because the statutory consolidated return provision then in effect excluded only interaffiliate income derived from intercompany sales of property, rentals, interest, and dividends.[52] The consolidated return provision, however, was amended after the assessment years at issue to provide that all income between consolidating corporations is excludable.

The court of appeals recognized the argument that this amendment necessarily implied that income from services had not previously been excludable. The court concluded that the better view was that the amendment was enacted only to more clearly express the legislature's original intent. After observing that in the case of intercompany income between affiliated corporations the payor and the recipient are together one taxable entity, the court then considered whether there was any justification for holding that some kinds of intercompany receipts are taxable and other kinds not taxable. On this point the court concluded: "The question then arises whether there is a reason to treat certain receipts as income and to eliminate others from income merely because the acts generating the receipts differ. *The state offers no reason, nor is one apparent from reading the statute.*"[53]

### *E. The Tax Situs Of Intangibles*—Mercantile Mortgage

The court of appeals' decision in *Indiana Department of State Revenue v. Mercantile Mortgage Co.*[54] restores one's faith that the American system of jurisprudence is still fundamentally founded on the doctrine of *stare decisis*. Old cases are not, by age alone, bad law. The court in *Mercantile Mortgage* quite properly reaffirmed this position when it stated:

> It has long been recognized that the situs of intangibles follows the residence of the owner *unless* the property

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[51]411 N.E.2d 685 (Ind. Ct. App. 1980).

[52]IND. CODE § 6-2-1-14 (1976).

[53]411 N.E.2d at 687 (emphasis added).

[54]412 N.E.2d 1252 (Ind. Ct. App. 1980).

somehow acquires a permanent situs elsewhere. *Miami Coal Co. v. Fox* (1931) 203 Ind. 99, 176 N.E. 11; *Senour v. Ruth* (1895) 140 Ind. 318, 39 N.E. 946; *Powell v. City of Madison* (1863) 21 Ind. 335. One method whereby property can acquire its own separate permanent situs is where the property is controlled and placed with some degree of permanency in another state. *Standard Oil Co. v. Combs* (1884) 96 Ind. 179; *Foresman v. Byrns* (1879) 68 Ind. 247; *Herron v. Keeran* (1877) 59 Ind. 472; *Theobald v. Clapp* (1909) 43 Ind. App. 191, 87 N.E. 100.[55]

As noted in the introduction,[56] there has been in recent years a continuous clamor by some state tax authorities to abolish the situs concept as it has been traditionally recognized and applied in the taxation of intangibles. *Mercantile Mortgage* is a delighful respite from that clamor.

*Mercantile Mortgage* could become one of the most significant decisions of the last decade concerning taxation of intangibles because it stands for this proposition: A nonresident owner of intangibles does not incur an Indiana intangibles tax liability on intangibles administered and controlled at an out-of-state location *even though there are some minimal Indiana activities or contacts connected with the execution, issuance and delivery of the intangibles in Indiana.*

To some scholars and practitioners, *Mercantile Mortgage* may appear as a step back from the State's intended imposition of this tax. But this really is not the case. Over the last several years, there has been a gradual *administrative expansion* of the original scope of the intangibles tax law, and the court has simply made it clear to the Revenue Department that this tax law is to be administered within its original purview, which requires a proper recognition of the situs concept.

Undoubtedly, there will be those who will debate this interpretation of the intended purview of the 1933 intangibles tax law, but it should be remembered that this law was expressly intended to be "in lieu of all other taxes except estate and/or inheritance and gross income taxes."[57] Thus, the original design of the tax was to relieve owners of intangibles from the much harsher Indiana property taxes. The 1933 General Assembly was not concerned with intangibles having only a transitory presence in Indiana. Therefore, the court of appeals in its 1980 *Mercantile Mortgage* decision very properly, and quite laudably, recognized that Mercantile's transitory in-

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[55]*Id.* at 1254-55.

[56]*See* text accompanying notes 2-3 *supra.*

[57]Act of Feb. 28, 1933, ch. 81, § 31, 1933 Ind. Acts 537 (1933).

tangibles, while executed and delivered in Indiana, were not subject to the intangibles tax.

### *F. Judicial Review of State Tax Board Assessments—* Uhlir v. Ritz *Revisited*

The administrative proceedings of the State Tax Board, including its hearings on contested assessments, are specifically excluded from the requirements of the Administrative Adjudication Act.[58] Nevertheless, in *State Board of Tax Commissioners v. Gatling Gun Club, Inc.*[59] the court of appeals applied the supreme court's 1970 ruling in *Uhlir v. Ritz*[60] to an appeal from the State Tax Board's assessment and acknowledged the limitations of the reviewing court:

> Thus, even where the Administrative Adjudication Act is inapplicable and another statute expressly provides for an appeal de novo, the reviewing court must go no further than to examine the propriety of the agency's facts as the agency found them and the propriety of the agency's order in light of the facts found. The reviewing court may not simply review and reweigh the evidence without giving weight to the agency's findings. *Uhlir v. Ritz, supra.*[61]

The court in *Gatling Gun Club* held that the trial court had committed reversible error by admitting into evidence testimony and exhibits not introduced at the State Tax Board's administrative hearing, and further stated:

> We conclude that, aside from the hearing officer, who may testify regarding his investigation and his recommendation to the board, only those witnesses who testified at the board's hearing may testify at the judicial review hearing, and they may testify only to those facts to which they testified at the board's hearing. Similarly, only those exhibits introduced at the board's hearing may be introduced on judicial review. *See State Board of Tax Commissioners v. Stone City Plaza, supra.*[62]

One curious aspect of the *Gatling Gun Club* decision is that the court, in a footnote, recognized its 1979 decision in *Stokely-Van Camp, Inc. v. State Board of Tax Commissioners*[63] as follows:

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[58]IND. CODE § 4-22-1-2 (1976).
[59]420 N.E.2d 1324 (Ind. Ct. App. 1981).
[60]255 Ind. 342, 264 N.E.2d 312 (1970).
[61]420 N.E.2d at 1328.
[62]*Id.*
[63]394 N.E.2d 209 (Ind. Ct. App. 1979).

> Although the club did not raise the issue either before the circuit court or on appeal to this court, it does not appear from the record that the board issued written findings of fact. The notice given by the board of its action on the club's application for exemption merely stated that the exemption was denied for the property in question. The hearing officer's one-page report and recommendation to the board is too brief and conclusory to constitute findings of fact. Although findings of fact are not statutorily required for proceedings before the board, this court has held that written findings are necessary in order for the circuit or superior court to review the board's action. *Stokely-Van Camp, Inc. v. State Bd. of Tax Comm'rs*, (1979) Ind.App., 394 N.E.2d 209.[64]

The *Gatling Gun Club* case was remanded to the trial court for a new hearing consistent with the decision of the court of appeals. It is unclear, however, whether the taxpayer could now raise for the first time the procedural defect in the State Tax Board's order, which did not include written findings of fact as required by the *Stokely-Van Camp* ruling. Once again the court is admonishing the State Tax Board, as well as taxpayers, of the requirements of due process even though the Board is statutorily exempt from the administrative hearing requirements of the Administrative Adjudication Act.

### *G. Some Inheritance Tax Decisions*

The past survey period was sprinkled with several inheritance tax decisions. Most of these cases involved single issue rulings which do not represent significant developments in the law. Practitioners in this field are, of course, obliged to double check all of these rulings.

The holdings by the court of appeals in *In re Estate of Newell*[65] and *In re Estate of Wisely*[66] are interesting to compare because each dealt with the issue of whether a beneficiary's renunciation of a testamentary transfer of property affected the computation of inheritance tax. In *Newell*, the court applied the pre-1975 law and ruled that the beneficiary's renunciation would have no effect upon the assessment of inheritance tax.[67] In *Wisely*, however, the court con-

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[64]420 N.E.2d at 1329 n.5.
[65]408 N.E.2d 552 (Ind. Ct. App. 1980).
[66]402 N.E.2d 14 (Ind. Ct. App. 1980).
[67]IND. CODE § 29-1-6-4 (1971).

strued the amended version of Indiana Code section 29-1-6-4(c)[68] and concluded that the amendment made it clear that renunciation of a testamentary interest relates back to the date of the decedent's death *for all purposes*. Consequently, the inheritance tax is to be assessed as if there were no taxable transfer to the renouncing beneficiary.

In *In re Estate of Compton*,[69] the court of appeals considered whether the filing of a petition for redetermination by the Revenue Department would reopen the estate's right to petition the Department for a refund even though the three year statute of limitations for requesting refunds had elapsed. The court, relying on the well-settled principle that special statutory procedures must be strictly followed, ruled that the estate's right to petition for a refund terminated upon the expiration of the three year period and that the Revenue Department's filing of the petition for redetermination did not confer upon the estate the correlative right to reopen refund claim issues.[70]

### *H. 1981 Tax Legislation*

The 1981 General Assembly produced the usual quantity of new tax laws and amendments to existing laws. Some of the more significant include:

*1. Recodification of the Indiana Gross Income Tax.*—Public Law 77[71] amends Title 6 of the Indiana Code to add a new Article 2.1 which codifies the Indiana Gross Income Tax Law and repeals inconsistent provisions of the prior law. The drafters of this Gross Income Tax Code have done a commendable job as this recodification was certainly no simple task. However, as gross income tax questions arise, some of the codified provisions may appear to have effected substantive changes in the law. It must be kept in mind that the Code itself was not intended to change the substantive law as it existed immediately prior to the recodification. Therefore, when interpreting the new Code, it will be necessary for careful practitioners and the courts to look to the old law for controlling guidance as to the proper interpretation of the Code's new language.

*2. Elimination of Interest Charges on Assessment Errors Caused by Assessment Officials.*—Public Law 76[72] amends Indiana Code section 6.1.1.-37 to provide that a taxpayer shall not be subject to interest charges on property tax payments that are increased because of in-

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[68]IND. CODE § 29-1-6-4(c) (1976).

[69]406 N.E.2d 365 (Ind. Ct. App. 1980).

[70]*Id.* at 372.

[71]Acts of April 29, 1981, Pub. L. No. 77, 1981 Ind. Acts 914 (1981).

[72]Acts of March 27, 1981, Pub. L. No. 76, 1981 Ind. Acts 913 (1981).

creases in assessment, if the increased assessment was caused by the error or neglect of a taxing official.

*3. Interstate Commerce Exemption for Goods Stored in a Public Warehouse.*—Public Law 63[73] amends, *inter alia*, Indiana Code section 6-1.1-10-30 by expanding the personal property tax exemption for goods held in a public warehouse to include goods shipped to that warehouse by common, contract, or private carrier. The prior exemption was limited to goods moved by common carrier. The 1981 amendment also provides that goods stored in a public warehouse may not be exempted if the owner of such goods owns or leases the public warehouse. This amendment broadens the definition of "nonresident," for purposes of the Interstate Commerce exemption, to include any taxpayer who places goods in the original package into the stream of commerce from a location outside of Indiana but with an Indiana destination. This of course means that an Indiana resident could be deemed to be a "nonresident." The effective date of Public Law 63 is January 1, 1982.

*4. Property Tax Credits for New Manufacturing Equipment Located in "Economically Disadvantaged Areas."*—Public Law 72[74] amends Indiana Code sections 6-1.1-12.1 and 6-3-3.1 to provide a personal property tax deduction to a purchaser of new manufacturing equipment to be located in an "economically disadvantaged area." The permitted deduction for such new equipment ranges from 100% of assessed value of the equipment for the first taxable year to a termination of the deduction upon the sixth year, with a declining sliding scale for the intervening years. Applications for the new deduction must be filed between March 1 and May 10 of the year the new equipment is installed. The Act is effective for deduction applications filed after December 31, 1981.

*5. Inheritance Tax Amendments.*—Public Law 89[75] amends Indiana Code section 6-4.1-3 to increase from $5,000 to $10,000 the inheritance tax exemption for property that a decedent transfers to the decedent's child, if the child is under twenty-one years of age. Public Law 90[76] amends Indiana Code section 6-4.1-3 to increase the inheritance tax exemption from $2,000 to $5,000 for transfers to one of the decedent's parents. Public Law 91 amends Indiana Code section 6-4.1-8-4[77] so that a consent to transfer is no longer required in order to transfer funds to the surviving joint owner of a decedent's joint checking account. Notice of the transfer, however, must be furnished to the Revenue Department or to the County Assessor.

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[73]Acts of May 5, 1981, Pub. L. No. 63, § 4, 1981 Ind. Acts 837 (1981).
[74]Acts of April 28, 1981, Pub. L. No. 72, 1981 Ind. Acts 885 (1981).
[75]Acts of April 27, 1981, Pub. L. No. 89, 1981 Ind. Acts 1015 (1981).
[76]Acts of April 27, 1981, Pub. L. No. 90, 1981 Ind. Acts 1017 (1981).
[77]Acts of April 7, 1981, Pub. L. No. 91, § 1, 1981 Ind. Acts 1018 (1981).