OFFICIAL OPINION NO. 54

December 11, 1956

Honorable Frank T. Millis
Commissioner of Revenue
141 South Meridian Street
Indianapolis, Indiana

Dear Mr. Millis:

I have your request for an Official Opinion on "whether or not Mutual Hospital Insurance, Inc., known as Blue Cross and Mutual Medical Insurance, Inc., known as Blue Shield, have any liability under the Gross Income Tax Act and if so, on what basis that liability should be calculated." You indicate that you believe that these two corporations have qualified in this State as insurance companies. I have investigated this with the Insurance Department and find it to be true.

It appears to me that the first question to resolve is who must pay gross income tax under the Gross Income Tax Act. The Acts of 1933, Ch. 50, Sec. 2, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 64-2602, levies a tax as follows:

> "There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Acts of 1933, Ch. 50, Sec. 1 (a), as amended, as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 64-2601 (a), defines the word "person" as follows:

> "(a) When used in this act, the term 'person' or the term 'company,' herein (used) interchangeably, means and includes any individual, assignee, receiver, commissioner, fiduciary, trustee, executor, administrator, institution, bank, consignee, firm, partnership, joint venture, pool, syndicate, bureau, association, cooperative association, society, club, fraternity, sorority, lodge, corporation, municipal corporation, or any other political subdivision of the state engaged in private or proprietary activities or business, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context."

Thus, it would appear that all domestic corporations or associations who engage in business are subject to this Act.

Blue Cross and Blue Shield were both organized under the "Not for Profit" Corporation Act of 1935 (Acts of 1935, Ch. 157, Sec. 29). The Corporations were organized in 1944 and 1946, respectively.

The Articles of Incorporation of Blue Shield contain the following statement in its purpose clause:

> "To operate as a Mutual Insurance Company on the indemnity plan under Sec. 59 of Insurance Laws of 1935 Class 11 (e)."

The Articles of Incorporation of Blue Cross contain the following statement in its purpose clause:

> "To insure against hospitalization expense resulting from any cause or condition for which hospitalization would be appropriate for care and treatment, the class into which the said Insurance would fall being Class 2, (l) under Section 59, Ind. Insurance Law of 1935; and do all of the things necessary and appropriate for carrying on the business of such an Insurance Corporation."

It is, therefore, necessary to determine whether or not the two corporations in question are, in fact, insurance companies. Under the Indiana statutes and law, the Indiana Insurance Law, to-wit: Acts of 1935, Ch. 162, Sec. 3 (a), as found in Burns' Indiana Statutes (1952 Repl.), Section 39-3203, defines the word "insurance" as follows:

> "(a) 'Insurance' means a contract of insurance or an agreement by which one party, for a consideration, promises to pay money or its equivalent or to do an act valuable to the insured upon the destruction, loss or injury of something in which the other party has a pecuniary interest, or in consideration of a price paid, adequate to the risk, becomes security to the other against loss by certain specified risks; to grant indemnity or security against loss for a consideration."

Section 3 (w) of the same Act defines the word "premium" as follows:

> "(w) The term 'premium' means money or any other thing of value paid or given in consideration to an insurer, agent, solicitor or broker on account of or in connection with a contract of insurance and shall include as a part but not in limitation of the above, policy fees, admission fees, membership fees and regular or special assessments and payments made on account of annuities."

Mutual Medical Insurance, Inc., issues a certificate of membership for surgical or obstetrical services upon the payment of the membership fee. In each case the membership fees are a monthly figure for individual certificates and a family certificate.

The contract or certificate issued by Blue Shield, under Clause 5, provides as follows:

> "A. The Doctors' Plan will pay to the Member, or at its election, to the physician performing services for the Member or any Dependent named in his Application, or to such physician and Member jointly, the amount shown in The Master Schedule of Indemnities, subject to the limitations stated under this Article, to apply on

the fee for performance of any professional service, which is:

"1. Listed in the Master Schedule of Indemnities of this Certificate; and,

"2. Performed for the Member or his Dependent by a physician.

"B. The amount of such payments shall be limited as follows:

"1. If two or more surgical services listed in Master Schedule of Indemnities are caused by the same illness, injury or condition and are not rendered at the same time but are not separated by an interval of six months or more between such services, the total payment shall not exceed the amount of $200.00.

"2. If two or more services listed in Master Schedule of Indemnities are performed within the same procedure, the payment for such services shall be made only for that service for which the largest amount is stated in Master Schedule of Indemnities."

Under Clause 9, Section D of the certificate, it is provided as follows:

"Nothing herein contained shall confer upon a Member or Dependent any claim, right, or cause of action either at law or in equity against The Doctors' Plan for the acts of any physician from whom he received service under this Certificate."

Clause 11 of the certificate provides as follows:

"The Doctors' Plan, organized by physicians in Indiana, is intended to help solve the problem of providing professional service to the public on the basis of self-reliance and independence. The payments for service, provided in the Schedule of Indemnities, were fixed by representative physicians of the State. The physicians who fixed the fee schedule realize that no two cases are

exactly alike, and that economic conditions change. Therefore they left the fee as a matter between the physician and his patient, and made the amount payable under the Certificate an indemnity to apply on the fee.

"This Certificate covers surgical and obstetrical care. The amounts paid for specific services are stated in a pamphlet entitled, Master Schedule of Indemnities and Enrollment Regulations, a copy of which is on file in the Insurance Department of Indiana and in the office of The Doctors' Plan. Copies have also been delivered to physicians of Indiana and to the employers of employee-group members, and to group leaders where the groups are not employee-groups."

Upon the payment of a membership fee by an applicant, Blue Cross issues a certificate to its member stating that the member is entitled "to receive hospitalization consisting of the services provided in Article 5 of this certificate."

It further states that:

"The member shall be liable for an additional premium or payment in the amount for the kind of certificate shown by the number on the identification card as fixed in a schedule of fees."

The certificate of membership issued by Blue Cross provides in Clause 11, Section D:

"Nothing herein contained shall confer upon a member or dependent any claim, right, or cause of action, either at law or in equity against the service organization for acts of any hospital in which he or she receives care under this certificate."

Clause 12, Section C, states:

"All payments for the benefit of the member accruing under this certificate are assigned by the member to any hospital furnishing the services provided for under this certificate, and the service organization is

> authorized to pay such benefits directly to such hospital."

These certificates and the method of doing business of both Blue Cross and Blue Shield, contemplate the reimbursement to a member for expenses resulting from certain contingencies, namely, hospitalization, medical treatment and surgery when performed in a hospital. Similar questions covered by your request were considered by the then Attorneys General in 1934 and 1952. In 1952, the question was whether membership contracts in an automobile club constituted an insurance contract. Upon making a down payment and agreeing to pay the balance at designated times, the purchaser became a member of the club and was entitled to receive certain service and protection. This service and protection included reimbursement for emergency mechanical aid, reimbursement for tow-in charges, reimbursement for accident expense aid and reimbursement for defending property damage claims. The Attorney General concluded that the contract was one of insurance even though the contract contained the statement "not an insurance policy." (1952 O. A. G., page 53, No. 10.) Further discussion of this question is to be found in 1934 O. A. G., page 252, wherein an automobile club policy purported to indemnify the policyholder for loss and expenses resulting from certain certified contingencies or occurrences for a specified consideration; and there again, the Attorney General held that even though the contract contained other matters which were not of an insurance nature, the contract was basically one of insurance.

In the case of State v. Willett (1908), 171 Ind. 296, 86 N. E. 68, the Supreme Court held that a mutual burial association which provided a plan for the payment of fixed amounts for funeral expenses of members, was engaged in the insurance business even though the contract between the association and its members contained the following proviso:

> "The benefits herein provided are for the purpose of furnishing respectable funeral and burial services for deceased members, and the benefits provided are to be paid to the undertaker furnishing such services, and not to surviving relatives and friends as death benefits."

It is to be noted that pursuant to the terms of the original Indiana Gross Income Tax Act, particular reference being made to the Acts of 1933, Ch. 50, Sec. 7 (b), the corporations, organizations and associations therein named were excepted from the provisions of that Act if they were organized as a not for profit organization. In 1937, substantial amendments were made to the Gross Income Tax Act and the Section dealing generally with exemptions and exceptions became Section 6. It is to be noted that the Acts of 1937, Ch. 117, Sec. 6 (i) abandoned the general test as to whether the organization was formed as a not for profit institution as determinative of exempt status. Instead, that subsection confined the exceptions there granted either to specifically named classes of institutions or to particular types of income of specifically designated classes of institutions. The Acts of 1937, Ch. 117, Sec. 6 (i), as amended, as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 64-2606 (i), now exempts as follows:

> "(i) *Amounts* received by institutions, trusts, groups and bodies organized and operated *exclusively* for religious, charitable, scientific, fraternal, educational, social and/or civic purposes and not for private benefit, as contributions, tuition fees, initiation fees, matriculation fees, membership fees, and earnings on, or receipts from sales of intangible property owned by them: Provided, however, That gross income received by churches, labor unions, fraternal benefit societies, orders, unions or associations incorporated, licensed, and operating under sections 181 to 206, both inclusive, of Article X of the Indiana Insurance Law, approved March 8, 1935, applicable to fraternal beneficiary associations, monasteries, convents, *hospitals*, and schools which are a part of the public school system of the state of Indiana or are regularly maintained as parochial schools by recognized religious denominations, state and other accredited colleges and universities, or any corporation organized and operated *solely* for the benefit of any of the same or any trust created for the purpose of paying pensions, or other retirement benefits, to the employees of a single employer or a group of employers, or any trusts created for the purpose of

paying pensions to members of any particular profession or business who have created the trust for the purpose of paying pensions to each other, none of the foregoing being organized or operated for private profit, shall be excepted from taxation under the provisions of this act: *Provided, further, That it is not the intention by the foregoing language to exclude from taxable gross income, any fees, dues, or assessments that represent premium payments on insurance policies written by insurance companies which are included in section 1, subsections (o) and (p) of this act.* Provided, further, That it is not the intention of the foregoing language to exclude any gross income from taxation under this subsection except as is *specifically* set out herein." (Our emphasis)

As a cardinal principle of construing exemption provisions in taxing statutes, it must be remembered that such are to be strictly construed so as not to enlarge the scope of the exemption beyond that clearly intended by the Legislature. It is my opinion that the Blue Cross and Blue Shield are not within the group of organizations to which blanket immunity was granted by the Acts of 1937, Ch. 117, Sec. 6 (i), *supra,* either in its original form or any amendment thereof, and it is my further opinion that these institutions are not within the classes of organizations first mentioned whose income of specific types is exempted, pursuant to the Acts of 1937, Ch. 117, Sec. 6 (i), *supra,* either in its original form or any amendment thereof.

Thus, for the reasons heretofore stated and the Opinions of the Attorney General cited above, I am of the opinion that Blue Cross and Blue Shield are engaged in the business of insurance and that as such they are subject to gross income tax in the same manner as other insurance companies under Acts of 1933, Ch. 50, Sec. 1, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 64-2601.