OFFICIAL OPINION NO. 61

December 16, 1955

Honorable Frank T. Millis
Commissioner of Revenue
Indiana Department of State Revenue
141 South Meridian Street
Indianapolis 9, Indiana

Dear Mr. Millis:

This is in reply to your request for an Official Opinion which reads as follows:

"I wish hereby to request your official opinion on the following situation. Under Section 14 of the Gross Income Tax Act as amended, it is stated that after the taxpayer has filed a claim for refund, if the Department takes no action, the taxpayer may bring suit after six (6) months "* * * but in no event more than three (3) years from the date of the filing of the claim for refund * * *'."

"I find that some claims were filed with the Division more than three (3) years ago and were held by the Division pending the outcome of litigation without any action being taken by the Division. These taxpayers have not sued the Division. The litigation, on account of which they were held, has now been concluded and it appears that the claims for refund should have been granted. Is the Gross Income Tax Division authorized to allow and pay these claims more than three (3) years after the date of their filing?"

The original authority for the refunding of Gross Income Taxes illegally collected and paid was contained in the Acts of 1933, Ch. 50, Sec. 14, which Act was administered by the Gross Income Tax Division. The powers, authority, duties and jurisdiction of the Gross Income Tax Division were subsequently transferred to the Indiana Department of State Revenue, by the Acts of 1947, Ch. 10, as found in Burns' Indiana Statutes (1951 Repl.), Section 64-2901 et seq., which now administers the collection and refunding of the Gross Income Tax and certain other taxes.
The Acts of 1933, Ch. 50, Sec. 14, supra, as amended and found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 64-2614a, now reads as follows:

“(a) If any person considers that he has paid to the department for any year an amount which is in excess of the amount legally due from him for that year under the terms of this act, he may apply to the department, by petition in writing, at any time within three [3] years after the payment for the annual period for which such alleged overpayment has been made, for a correction of the amount so paid by him to the department, and for a refund of the amount which he claims has been illegally collected and paid. In such petition, he shall set forth the amount which he claims should be refunded, and the reasons for such claim. The department shall promptly consider such petition, and may grant such refund in whole or in part, or may wholly deny the same. If denied in whole or in part, the petitioner shall be forthwith notified of such action of the department, and of its grounds for such denial. The department may in its discretion, grant the petitioner a further hearing with respect to such petition. Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in a civil action or suit against the department in the circuit or superior court of the county of his residence or business location and if he has no such residence or business location, then in the Marion circuit or superior court. The state hereby consents to such suits in said courts and no others and said courts are hereby granted exclusive jurisdiction of said suits: Provided, however, That except as hereinafter provided, no court shall have jurisdiction over any such suit unless the taxpayer shall show that the complaint therein was filed within three [3] months after he shall have received notification of the action of the department denying said petition for refund in whole or in part. In the event that the department shall take no action upon such petition for refund within six [6] months after the same shall have been filed, the taxpayer may elect to institute such suit.
for refund at any time thereafter, but not more than three [3] months after such claim shall have been denied in whole or in part, in no event more than three [3] years from the date of the filing of the claim for refund. Any such petition shall be subject to the provisions of section 11 (b) [§ 2611]. In every such action, a copy of the complaint shall be served upon the department, with the summons, which summons shall be so served at least thirty [30] days before the return date thereof. It shall not be necessary for any taxpayer to protest against the payment of the tax in order to maintain such suit. In any suit to recover taxes paid, or to collect taxes, imposed under the provisions of this act, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

“(b) Either party to such suit shall have the right to appeal, as now provided by law in civil cases. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the treasurer in favor of such taxpayer, to pay such judgment out of any funds in the state treasury not otherwise appropriated.”

Under this section the Department clearly has the power and authority upon proper petition by a taxpayer to make a refund of Gross Income Taxes which it finds to have been illegally collected and paid. It is my understanding, however, that you are concerned as to whether the three-year limitation contained in the foregoing statute in regard to the filing of a civil action for the recovery of taxes illegally collected and paid is also a bar to the refunding of taxes by the Department on claims duly filed with the Department, but which have not been acted on within three years after being filed.

First of all, I do not think you can be compelled to make a refund in such cases since the taxpayer is barred from bringing suit against the Department by the foregoing three-year period of limitations on civil suits against the Department.

I have found only one reported decision, State ex rel. Northwest Airlines, Inc. v. Minnesota Tax Comm. et al. (1940), 208
Minn. 195, 293 N. W. 243, which deals with the power to act upon such claims under a similar statute and in an analogous factual situation.

In that case the statute involved provided as follows:

"Sec. 47 (a). A taxpayer who has paid, voluntarily or otherwise, or from whom there has been collected, (other than by the methods provided for in subdivisions (a) and (e) of Section 45) an amount of tax for any year in excess of the amount legally due for that year, may file with the Commission a claim for the refund of such excess. No such claim shall be entertained unless filed within two years after such tax was paid or collected. If the Commission finds that the taxpayer has paid more than was legally payable, it shall issue its certificate for the refundment of the excess with interest at the rate of 6 per centum per annum computed from the date of the payment or collection of the tax until the date the refund is paid to the taxpayer, and the state auditor shall cause such refund to be paid out of the proceeds of the taxes imposed by this Act, as other state moneys are expended. So much of the proceeds of such taxes as may be necessary are hereby appropriated for that purpose.

"(b) A taxpayer aggrieved by the decision of the Commission on his claim for a refund may sue the Commission to recover any overpayments of taxes made by him and not refunded by it. Such suits may be brought in the district court of the district in which lies the county of his residence or principal place of business, or, if an estate or trust, of the principal place of its administration, or in the district court for Ramsey County. Such suit shall be brought within six months after the Commission shall have taken final action on such claim for refund except as provided in subdivision (c) hereof.

"(c) No suit shall be entertained to recover overpayments of taxes imposed by this Act until the taxpayer shall have filed a claim for refund thereof with the Commission and until said Commission has finally disposed thereof, except that, if said Commission shall
fail to render final action on a claim for refund within 6 months after it is filed with it, the taxpayer may sue the Commission for such overpayment at any time thereafter but not more than 2 years after the filing of the claim for refund. On the bringing of such suit the Commission shall be deprived of further jurisdiction in hearing and determining such claim for refund.

“(d) Either party to the suits provided for in subdivisions (b) and (c) hereof may remove the judgment to the supreme court by appeal as provided for appeals in civil cases.”

The facts of the case were that the taxpayer had filed his claim for a refund within the two-year period prescribed in the foregoing statute. The Tax Commission did not act upon such claim until more than two years had elapsed after the filing of the claim at which time the Commission found that the taxpayer had paid more than was legally payable. The Commission, however, refused to allow the refund on the theory that the two-year period of limitations had run prior to its finding that a refund was due and it was without power to make the refund.

The taxpayer brought an action in mandate against the Commission and the Court held that the Commission had the power and duty to make the refund, saying, at page 245 of the opinion:

“* * * To be sure, § 47 (c) limits the right of the taxpayer to sue the commission for a claimed overpayment when a claim has not been decided within six months after filed to a period of two years following the filing of the claim. But this provision of § 47 (c) is inserted, as reference to the section will indicate, merely as an exception to the provision that the commission cannot be sued until it disposes of the claim. The section does not deprive the taxpayer of his right to a refund, and where, as here the commission proceeds to determine the merits of the claim, it has no application whatsoever.”

In my opinion the Indiana statute, Burns’ 64-2614a, supra, and the Minnesota statute set out above are so similar that the
reasoning of the Court quoted above is applicable to your question, and I think the Department has the authority to allow and pay these claims if, after acting thereon, it finds they were illegally collected and paid.

I am of the further opinion that the Department is under a duty to act on these claims and either grant the refunds in whole or in part or deny the same since Burns' 64-2614a provides that, "** the Department shall promptly consider such petition **." As shown in State ex rel. Northwest Airlines, supra, the running of the time for filing suit does not deprive the taxpayer of his right to a refund and therefore the Department should determine the matter one way or the other even though the taxpayer would have no recourse in the courts if the finding of the Department be adverse to such taxpayer.

OFFICIAL OPINION NO. 62

December 20, 1955

Mr. R. R. Wickersham
State Examiner
State Board of Accounts
304 State House
Indianapolis 4, Indiana

Dear Mr. Wickersham:

Your letter requesting an Official Opinion has been received and reads as follows:

"The Depository Insurance Fund Act of 1937 (Chapter 3, Acts 1937, as amended, Section 61-622 to 61-663 Burns' Statutes) provides for the deposit of public funds in an approved depository and the depositories accepting such funds are required to report such funds on deposit and pay an assessment based on such deposits into the Depository Insurance Fund at a rate fixed by the State Board of Depositories.

"It has always been the understanding of this office since the enactment of the above law that banks or trust companies are prohibited from paying interest on deposits of public funds to the State or municipal corporation as an earning on funds so deposited."