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."
"Chapter 9 of the Acts of 1945 provides for the investment of surplus funds in order that a municipal corporation may receive earnings on funds which are not to be used for a period of time.

"For the first time, our construction of the Depository Act has been questioned and we would appreciate your official opinion on the following questions:

"(1) Is a municipal corporation authorized to deposit public funds in a public depository on an interest bearing certificate of deposit?

"(2) Would your answer to question (1) be the same if the depository reported the amount covered by the certificate of deposit to the Depository Insurance Fund and paid the required assessment thereon?"

The law is firmly established that whenever an office is created by statute, public officers charged with the duties of performing the functions of such office may exercise only such powers as are expressly authorized by statute, plus only such additional incidental powers as are implied as being necessary for the purpose of performing the express statutory powers granted such public officer. As stated in Department of Insurance et al. v. Church Members' Relief Assn. (1940), 217 Ind. 58, 60, 26 N. E. (2d) 51:

"* * * When the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, no amount of acquiescence, or consent, or approval of the doing of it by a ministerial officer, can create a right to do the thing which is unauthorized or forbidden. * * *"

The Depository Act of 1937, to which your inquiry relates, is the Acts of 1937, Ch. 3, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 61-622 et seq. The manifest purpose of this act is twofold:

First, to provide for the protection of public funds and second to provide that public funds shall at all times be available for immediate withdrawal.
A discussion of the legislative history relating to the deposit of public funds and the payment of interest thereon is contained in the case of Storen, State Treasurer v. Sexton, Marion County Treasurer, et al. (1936), 209 Ind. 589, 595-599, 200 N. E. 251, which shows that there have been statutes from time to time authorizing the payment of interest on public deposits. While the statutes involved in the Storen case, supra, have all been repealed and replaced by the 1937 Depository Act, supra, it appears to me that the moneys which would otherwise be paid as interest on public funds under the former statutes are now being diverted, by assessments on the banks, to the insurance fund created in the 1937 Depository Act, supra. The theory of this seems to be that the interest on these public funds should be paid into the insurance fund for the collective security of all public funds in this state rather than to be paid to the independent governmental units having the funds on deposit.

First. The means by which the Act provides for the protection of public funds is by the creation of a separate state fund known as the “Public Deposits Insurance Fund” as provided in the Acts of 1937, Ch. 3, Sec. 20, as found in Burns' Indiana Statutes (1951 Repl.), Section 61-641. This and succeeding sections of the Act provide for the manner by which the “Public Deposits Insurance Fund” is to be created, the assessments of which it shall be composed, and further provides that it shall maintain a minimum reserve for losses of at least three million dollars ($3,000,000). The Acts of 1937, Ch. 3, Sec. 25, as found in Burns' Indiana Statutes (1951 Repl.), Section 61-646, states that the board of depositories shall manage and operate the insurance fund, that said board shall determine the cash working balance to be kept in such fund (which shall not exceed two hundred fifty thousand dollars ($250,000) except in times of emergency) and expressly authorizes said board for depositories to invest any funds of said insurance fund in excess of the cash working balance in certain specified types of securities, which do not include certificates of deposit issued by banks. At this point, it is significant in my opinion that the specific authority to invest funds in designated types of securities as provided in the Acts of 1937, Ch. 3, Sec. 25, supra, is granted only to the board of depositories which controls the insurance fund and is limited to funds of the insurance fund which may be in excess of the
cash working balance. It is noteworthy that while the Legislature specifically authorized this type of investment of excess funds of the Insurance Fund, at no place in the Act may be found any authorization for the investment of public funds by the state, counties, cities, towns, school cities, school towns or municipal corporations.

Second. The Acts of 1937, Ch. 3, Sec. 3, as found in Burns' Indiana Statutes (1951 Repl.), Section 61-624, commands that all public funds paid into the treasury of the state or the treasuries of the respective counties, cities, school cities, school towns and municipal corporations shall be "deposited" in one or more depositories "in the name of the state or municipal corporation by the officer having control thereof." It is noteworthy that with respect to the transfer of public funds to public depositories by the public officer having control thereof, that the Act consistently uses the term "deposited" or various forms thereof and does not use the term "invested."

The Acts of 1937, Ch. 3, Sec. 14, as found in Burns' Indiana Statutes (1951 Repl.), Section 61-635, provides in part that:

"** The proposal shall offer to receive public funds of the state or of the particular municipal corporations on deposit during the biennial period and to provide the security required by this act for the safekeeping and prompt payment of the deposited funds." (Our emphasis)

Other sections of the Act emphasize that the funds shall be available for prompt payment. For instance, with respect to tax monies, the Acts of 1937, Ch. 3, Sec. 5, as found in Burns' Indiana Statutes (1951 Repl.), Section 61-626, expressly provides in part:

"All taxes collected by the county treasurer shall be deposited as one [1] fund in the several depositories selected for the deposit of county funds and, except as otherwise provided herein, shall so remain until distributed at the following semiannual distribution made by the county auditor. **" (Our emphasis)

In other words, an examination of the entire act with respect to the handling of public funds discloses that the Legislature
apparently intended that such funds so deposited should be available for immediate withdrawal as demand deposits in accordance with the provisions of said statute.

The power of financial institutions of this State to issue interest bearing certificates is subject to regulation by the Department of Financial Institutions of the State of Indiana, pursuant to the Acts of 1933, Ch. 40, Sec. 244, as found in Burns' Indiana Statutes (1950 Repl.), Section 18-2002, and said state agency has adopted and promulgated rules and regulations on this subject, the purpose of which is to guarantee the particular bank the use of funds invested in interest bearing certificates for minimum specified periods in consideration of the bank paying interest thereon. In other words, the Department of Financial Institutions has the duty by its regulatory powers of protecting the financial stability of the bank by assuring it the full use of funds invested in interest bearing certificates for minimum specified periods of time.

Pursuant to said regulations, a time certificate of deposit must show on its face that it is payable:

(1) on a certain date, specified in the instrument, not less than 30 days after the date of deposit, or

(2) at the expiration of a certain specified time not less than 30 days after the date of the instrument, or

(3) upon notice in writing which is actually required to be given not less than 30 days before the date of repayment.

These regulations prohibit banks from paying interest in excess of 1% per annum on certificates of deposit having a maturity date of less than 90 days from the date of deposit or payable upon written notice of less than 90 days and said interest rates are graduated upward to authorize a maximum rate of 2½% interest per annum on certificates of deposit having a maturity date one year or more after the date of deposit or payable upon written notice of 12 months or more. These regulations further forbid any bank to pay any interest bearing time certificate before the specified date on which it is payable, except when necessary to prevent great hardship. Also, banks are prohibited from paying interest on demand deposits. Therefore, by way of contrast, interest bearing certificates, being time certificates, are substantially unlike de-
mand deposits as contemplated in the Depository Act of 1937, supra.

The requirements of interest bearing or time certificates are such that the investment of public funds in such certificates would be wholly inconsistent with the purpose of the Depository Act, supra, to protect and maintain public funds so as to be readily available for prompt withdrawal at any time.

In addition to the foregoing, the Acts of 1937, Ch. 3, Sec. 16 (c), as found in Burns' Indiana Statutes (1951 Repl.), Section 61-637 (c), contains the following proviso:

* * *

“(c) No bank or trust company shall, directly or indirectly, by any device whatsoever, pay any interest to any public officer on any deposit of public funds and no public officer shall take or receive any interest whatsoever on public funds.” (Our emphasis)

Correspondence accompanying your request intimates that the aforesaid prohibition of Section 16 (c) should be construed as meaning that no interest should be paid to any public officer for his own individual use. In my opinion the language used does not permit such construction for the following reasons: The public funds deposited pursuant to the Depository Act, supra, must be deposited in the name of the state or municipal corporation by the officer having control thereof. Since such officer has no right, title or interest in said funds in his individual capacity, there would be absolutely no legal basis for the payment of "interest" to anyone except to the owner of the fund. The word "interest" clearly refers to lawful earnings for use of the funds. The language of Section 16 (c), supra, has no reference to any unlawful payment such as a bribe, since it refers specifically to "interest" paid "to any public officer" and does not refer to all persons generally who might be tempted to accept unlawful or improper payments in return for this business. The language of Section 16 (c), supra, is unambiguous and means clearly that monies paid as interest shall not be received by any public officer as such.

This position is further strengthened when it is noted that public depository laws of many other states either expressly permit the payment of interest, or expressly require such
payment, as indicated by the annotation found in 104 A. L. R. 623. The authorities there cited clearly indicate the primary purpose of any such statute is for the safety and protection of public funds—the payment of interest thereon being secondary. It should be noted further that the Acts of 1937, Ch. 3, Secs. 35 and 36, as found in Burns' Indiana Statutes (1951 Repl.), Sections 61-656 and 61-657, specifically prohibit the deposit of any public funds otherwise than as provided in said statute and provide penalties of a criminal nature for its violation.

Mention is made in your request to the provisions of the Acts of 1945, Ch. 9, as found in Burns' Indiana Statutes (1951 Repl.), Sections 61-677 to 61-680. This is an independent act authorizing the State Board of Finance, the County Commissioners of each county and the governing body of cities, towns, townships, school cities, school towns, and other political subdivisions of the state to enact ordinances or adopt resolutions authorizing the investment of funds raised by the issuance of bonds for a specific future purpose, sinking funds, depreciation reserve funds, gifts, bequests and endowments in certain specified types of securities of the United States of America. This act clearly cannot be authority for the investment of public funds in time certificates issued by banks. If anything, said statute strengthens the proposition that investments by political bodies must be confined to the type of funds therein authorized to be invested and that such investments must be in accord with the authority given in said statute and confined strictly to the securities of the United States therein specified. The Acts of 1945, Ch. 9, supra, is clearly for the purpose of authorizing governmental bodies to invest specified funds in specified United States securities for a period no later than the time when such funds will be required, or if such time cannot be determined, not later than one year from the date of purchase or subscription.

Whether public funds may safely be invested as contemplated by your request and the wisdom of such investment, is clearly a matter of legislative policy. It is clear that the Depository Act, supra, contains no authority for the payment or receipt of interest on the deposit of public funds.

Therefore, in answer to your first question, it is my opinion that a municipal corporation is not authorized to deposit public
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funds in a public depository on an interest bearing certificate of deposit. It likewise is my opinion, in answer to your second question, that such an investment is not authorized even if the depository reported the amount of the certificate of deposit to the depository insurance fund and paid the required assessment thereon.