1. In answer to your first question I am therefore of the opinion the salary increases for city officials authorized by Section 1, Chapter 203, Acts 1945, same being Section 48-1223 Burns' 1945 Supplement are effective as to the officials named therein for the extra year of service of 1947 occasioned by the 1945 Skip Election Law. A similar result was reached in an Official Opinion of this office found in 1943 Indiana O.A.G., page 698. The Common Council would therefore be required to so fix such salaries at the amounts prescribed in said statute for such year.

2. Your second question is fully answered by the answer given to your question number one, supra.

OFFICIAL OPINION NO. 62

June 21, 1946.

Hon. Frank Millis, Director,
Gross Income Tax Division,
141 S. Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I am in receipt of your request for my official opinion as follows:

"We herewith submit an inquiry and request your official opinion concerning the proper application of Chapter 282, Acts of 1943, Page 793 (Section 10 of the Gross Income Tax Act).

"This inquiry is specifically directed to the limitations of this Division in adjudicating delinquency, assessing penalties and requiring returns in matters concerning gross income tax liabilities of military personnel under the above named Act.

"Chapter 282 provides that *
* * * compensation received for military or naval service from and after December 31, 1941, while in active service in the present war * * * shall be exempt from gross income tax."
"The above provision presents no problem of interpretation. The amendment in question, however, does present a problem with regard to income other than military pay. Chapter 282 further provides as follows:

"* * * With respect to OTHER income for which they (members of the armed forces) ARE liable for the tax imposed * * * they shall not be required to file any return therefor or pay any such tax thereon until six months after the termination of hostilities of the present war and they shall not be required to pay any penalty or interest with respect thereto if such return is filed and the tax due thereon is paid on or before six months after hostilities cease * * *." (Our capitals.)

"The first question we present concerns the right of the Division to require current returns and payment of tax with penalties and interest (if delinquent) on current income received by erstwhile members of the armed forces who have been discharged from service and have reverted to civilian status.

"The Division has been demanding such returns on current civilian income on the premise that the clause 'other income for which they are liable,' intended to include only such 'other' income received coeval with the tenure of military service, and therefore the deferment measured by cessation of hostilities, plus six months, does not apply.

"Our first question therefore is:

1. Is this Division required to enforce the current filing of returns and payment of tax on current income of discharged military personnel, and assess penalties and interest on delinquencies in like manner as such requirements are imposed upon other civilians?

"Our second question concerns the assessment of penalties and interest against discharged military personnel where delinquency existed prior to induction, but in which cases penalties and interest were suspended during the term of military service by the provisions of Chapter 282."
2. Where penalties and interest were assessed prior to induction and/or prior to December 31, 1941, should such penalties and interest now be demanded, or if such penalties and interest had not been assessed on delinquency, should they now be assessed and demanded from discharged members of the armed forces?

"If the answer to our second question is negative, then we wish to propound related third and fourth questions, as follows:

3. What date shall be observed by this Division as being the date of 'termination of hostilities' or the date 'hostilities cease' in applying Chapter 282?

"With respect to the terms 'hostilities cease' and 'termination of hostilities' (both used in Chapter 282) another term, to wit: 'termination of the war', is in frequent use and therefore may require comparison. (Attorney General's Opinion No. 103).

4. When the date of 'termination of hostilities' and other similar terms is determined, and the six months period immediately following such date has expired, should this Division assess and/or collect penalties and interest on discharged military personnel as indicated in our second question?

"We request your official answers to the above questions."

The text of the amendment to Section 10 of the Gross Income Tax Law, which you cite, is as follows:

"* * * Notwithstanding any of the provisions of this act, members of the armed forces of the United States, including the Army, Navy, Marine Corps, Coast Guard and Merchant Marine, shall be exempted from the payment of such tax with respect to the compensation received for military or naval service from and after December 31, 1941, while in active service in the present war. With respect to any other income for which they are liable for the tax imposed by this act, they shall not be required to file any return therefor or pay any such tax thereon until six months after the termination of hostilities of the present war, and
they shall not be required to pay any penalty or interest with respect thereto if such return is filed and the tax due thereon is paid on or before six months after such hostilities cease. Every such member when making his return shall show that he was a member of the armed forces of the United States, and he shall give the name and number of the military or naval unit of which he was a member. Provided, That in case of the death of any such member of any such armed forces on or before such date, such tax upon income other than compensation received for military or naval service shall be wholly forgiven and waived, and the same shall not be a lien upon the estate of such person, and no return with respect thereto need be filed.” (Sec. 64-2610, Burns’, 1943 Replacement.)

In addition reference must be made to Sections 5 and 8 of Chapter 2 of the Acts of the First Special Session of 1944 (Appx. 9, War Measures, Vol. 11, Burns’, 1945 Supp.) which are as follows:

“Sec. 5. Each person who has been, now is, or shall hereafter be a member of the armed forces of the United States of America, and receiving pay therefor from the United States Government, from the period beginning January 1, 1941, until twenty-four (24) months after the termination of the present hostilities, or until six (6) months after he shall be discharged if discharged prior thereto, is hereby declared to be exempted from all penalties, demand fees and interest for any taxes assessed or becoming a charge against such person or his property during said period of time, and any such penalties or interest are hereby expressly forgiven. Any official who has authority to assess or charge interest or penalties for nonpayment or delinquency of taxes shall strike the same from his records upon his own personal knowledge of the service with the armed forces of the person hereby exempted, or upon evidence of such service as is provided for by Section 3 of this act. No sale shall be made of the property of any member of the armed forces as defined by this section for any failure to pay any of his real or personal property taxes becoming due during the
period of his military service. Provided: That the ex-
emptions provided by this section shall not be applic-
able if the total assessed valuation of all property both
real and personal of such person exceeds the total sum
of $20,000."

"Sec. 8. The exemption provided by this act shall
not apply in any case where a person in the military
service has received a dishonorable discharge. In con-
struing this act, the singular shall include the plural;
the masculine shall include the feminine, and the fem-
ine shall include the masculine."

In an opinion dated January 20, 1945, addressed to Hon.
Otto G. Wulfman, Chairman, State Board of Tax Commis-
sioners, I expressed the following opinion:

"As the Congress of the United States and the Gen-
eral Assembly of Indiana have each passed said laws
granting relief to members of the armed forces, it is
my opinion by whichever provisions of said statutes of
the most benefit to such member of said armed forces,
whether passed by Congress or the Indiana General
Assembly, controlled in each particular case."

The Soldiers and Sailors Civil Relief Act, adopted October
17, 1940 and appearing at 50 U.S.C.A., Appx. No. 573 and
No. 584, provides:

"The collection from any person in the military serv-
ice of any tax on the income of such person, whether
falling due prior to or during his period of military
service, shall be deferred for a period extending not
more than six months after the termination of his
period of military service if such person's ability to
pay such tax is materially impaired by reason of such
service. No interest on any amount of tax, collection
of which is deferred for any period under this section,
and no penalty for nonpayment of such amount during
such period, shall accrue for such period of deferment
by reason of such nonpayment. * * *"

"* * *"

"This Act shall remain in force until May 15, 1945: Pro-
vided, That should the United States be then en-
gaged in a war, this Act shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter:

* * *"

Applying these statutes as indicated in the above mentioned opinion so as to give effect in each instance to whichever provisions are of most benefit to the armed forces, I come to the conclusion that in each instance the benefits of these statutes were granted to members of the armed forces and would be limited to the time when they are members of the armed forces, except where these statutes expressly provide for a period of sixty days following discharge; That as to the liability of members of the armed forces for a tax upon their service pay the exemption extends from the date of their entry into active military service, or December 31, 1941, whichever date is later, to the termination of their active military service, or the termination of the present war, whichever date is earlier.

I also conclude that the provisions of the Soldiers and Sailors Civil Relief Act, above quoted, are broader in their application as to penalties, interest and other charges, and that members of the armed forces may not be charged any penalties, interest or other charge for the period between October 17, 1940, or their induction into military service, whichever date is later, and six months after their discharge from military service, except that such exemption from penalties and interest can not extend beyond twenty-four months after the cessation of hostilities, or six months after the termination of the war as evidenced by the proclamation of a treaty of peace, whichever date is later.

I further conclude that the division is required to assess penalties and interest for all periods not within the above stated periods of exemption. It is, therefore, necessary to determine the time to be considered as the end of the war or the cessation of hostilities.

In my Official Opinion No. 103, addressed to Hon. Charles W. Kern, Commissioner of Labor, and dated September 18, 1945, I came to the following conclusions:

"However, under all the foregoing authorities, it is clear that the present war has not been terminated
in the legal sense and will not so terminate until formal action is had by competent authority terminating the war and re-establishing peace.

"The courts have used the date of the ratification of the peace treaty as the termination of the war with Spain. The dates used for the termination of the Civil War were those fixed by the President by proclamation and adopted by Congress. (It must be remembered this war was in the nature of an insurrection and not war with a foreign nation.) The First World War is generally recognized as terminated by the Joint Resolution of Congress, July 2, 1921.

"Until there is some such formal action terminating the present war, it must be considered as not terminated in the legal sense even though actual hostilities may be at an end."

We turn then to the question as to when there is a cessation of hostilities within the meaning of the above statutes.

The word "hostilities" in the law of nations relates to a state of open war.

Blacks Law Dictionary (3rd Ed. 1933), p. 905;
2 Bouvier, Law Dictionary (Rawles’ 3rd Ed. 1914), p. 1459;
Kent, Commentaries, 56, 60;
41 C.J.S. 361;
Opinion of the Attorney General (Florida), Aug. 27, 1945:

"A cessation of hostilities may precede or follow the termination of a war. Even if simultaneous therewith, the former event is rarely, however, to be regarded as marking the end of a conflict, or as indicative of a mode of the termination thereof, * * * ."
3 Hyde, International Law (2d Ed. 1945), No. 904, p. 2385.
Thus, although hostilities commenced at Pearl Harbor on December 7, 1941, the war did not legally commence until the adoption of the congressional resolution on December 8, 1941.

Rosenau v. Idaho Mutual Benefit Ass'n. (1944), — Idaho —, 145 Pac. (2d) 227;
Savage v. Sun Life Assurance Co. (1944), 57 Fed. Supp. 620,

and it is a matter of historical fact that the hostilities in the war of 1812 culminated in the battle of New Orleans some time after the war had terminated by the promulgation of a treaty of peace.

An armistice has been held to accomplish a cessation of hostilities.

Afric v. Alaska Gold Mining Co. (1922), 6 Alaska 540;
State ex rel. v. Dixon (1923), 66 Mont. 76, 213 Pac. 227.

But it has also been held that this is not necessarily true. In Commercial Cable Co. v. Burleson (1919), 255 Fed. 99, 105, Judge Learned Hand made the following statement:

"* * * An armistice effects nothing but a suspension of hostilities; the war still continues. It is true that a war may end by the cessation of hostilities, or by subjugation; but that is not the normal course, and neither had hostilities ceased, nor had the enemy been subjugated in the sense in which that term is used. There were still military operations, the armistice had not been carried out, and after it was, armed forces of the United States were in occupation of enemy territory and were in European and Asiatic Russia, where, indeed, they still remain. * * *"
In 2 Oppenheim, International Law (4th Ed. 1926), page 388, No. 231 ff., attention is called to the fact that there are three types of armistices or truces, the first of these being the mere suspension of arms for a very short time and regarding momentary and local military purposes only, such as collection of the wounded, burial of the dead, etc. Second are partial armistices which cover a wider field than mere suspension of arms, but do not constitute a complete suspension of hostilities. Third are general armistices, for the whole of the forces and the whole region of war. As to these it is there stated:

"On the other hand, since general armistices are of vital political importance, only the belligerent Governments themselves or their commanders-in-chief are competent to conclude them, and ratification, whether specially stipulated or not, is usually considered necessary. Should a commander-in-chief conclude a general armistice which would not find ratification, hostilities may at once be recommenced without breach of faith, it being a matter of common knowledge that a commander-in-chief is not authorized to agree upon exclusion of ratification unless he received special powers thereto."

It would seem then that a complete armistice or cessation of hostilities must receive the formal approval of the political authorities of the government and amounts to more than a mere military surrender.

This is clearly indicated by the fact that Congress has in many statutes used the phrase "upon the cessation of hostilities, as proclaimed by the President" or by concurrent resolution of Congress. See:

Public Law 30, 79th Congress;  
15 U.S.C., Sec. 713 A-8;  
Sec. 9, Selective Training and Service Act of Sept. 16, 1940 as amended;  
50 App. U.S.C., Sec. 1192;  
50 App. U.S.C., Sec. 1191;
Therefore, the cessation of hostilities is not purely a military matter, but is also partially a political question for the political branches of the government. The federal government, in the exercise of its constitutionally exclusive war powers, has clearly indicated that such political decision indicating a cessation of hostilities shall be evidenced by either a proclamation of the President or a concurrent resolution of Congress, and it would appear that the courts should accept this decision in the absence of contrary state legislation and that hostilities will not formally cease until such proclamation or concurrent resolution.

The situation pertaining at the present time is somewhat analogous to the state of facts existing at the close of our own war between the states, in that there is no existing organized government (at least in Germany), with which political agreements may be made terminating the war or hostilities. At the close of that war the Supreme Court was called upon to interpret a statute of limitations requiring the filing of claims in the Court of Claims "at any time within two years after the expiration of the rebellion." The Supreme Court called attention to the fact that by reason of the inherent difficulty in determining when the rebellion terminated, occasioned by the lack of an organized government with which to contract a treaty of peace, the burden of such determination could not properly be imposed upon individuals whose private rights were affected, but on the contrary such burdens should be borne by the proper public authorities, and that a public proclamation or legislation would seem to be required.


Again in The Protector (1871), 79 U.S. 700, the court again called attention to the difficulties engendered by the lack of an organized government with which to conclude a peace and held that it was necessary to refer to some public act of the political departments of the government.
It is my conclusion, therefore, that the legislature did not mean a mere temporary cessation of hostilities but it was rather the intent that the controlling date be a permanent and total end of the use of military force. Nor do I believe that the General Assembly intended that the members of the armed forces must determine this fact for themselves at the peril of being penalized for a mistake of fact. The reason for this statute exists as much today for those who are in service as it did at any time in the past few years. I believe, therefore, that the better view is that hostilities terminate within the meaning of these statutes at such time as the executive or legislative authorities of the national government proclaim such termination by some public proclamation or legislation.

Applying these principles to the statutes in question it must be held that both the exemption of military pay from gross income tax and the exemption of tax upon other income from penalties, interest and charges, will remain in effect until the publication of appropriate federal proclamations or legislation, declaring the termination of the war or the cessation of hostilities, respectively, and the expiration of the statutory periods thereafter. It is, however, competent for the General Assembly, by appropriate legislation, to hereafter define or re-define the phrases "end of the war" and "termination of hostilities" as used in state statutes.

It is, therefore, my opinion that:

(1) The war is to be considered terminated and hostilities are to be considered as having ceased at such time as formal action to that effect is publicly proclaimed in each instance by the proper federal authorities, as hereinbefore indicated.

(2) Members of the armed forces are exempt from payment of gross income tax upon their military pay from December 31, 1941, or their entry into active service, whichever later occurred, until their discharge from active service, or the termination of the war, whichever first occurs.

(3) Members of the armed forces are exempt from the payment of penalties, interest and other charges accruing from October 17, 1940, or their induction into military service, whichever latest occurs, until twenty-four months after hostilities cease or six months after the war, whichever occurs later, but in no event to exceed six months after their discharge from military service, but that they are liable for
any penalty, interest or other charges accruing either before or after such exemption periods and that no steps leading to the assessment or collection of such tax should be taken by the department during such period of exemption.

(4) Upon the expiration of the period of six months following discharge, the Gross Income Tax Division is required by law to enforce the current filing of returns and payment of tax on current income of discharged military personnel, and to assess penalties and interest on delinquencies relating thereto in like manner as such requirements are imposed upon other civilians.

(5) Where penalties and interest were assessed prior to induction and/or prior to October 17, 1940, such penalties and interest must be demanded from and, if not assessed, must be assessed against, discharged members of the armed forces upon the expiration of the period of six months following their discharge.

OFFICIAL OPINION NO. 63

June 25, 1946.

Hon. C. E. Ruston, State Examiner,
State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Mr. Ruston:

I have your letter of recent date in which you request an official opinion on the following questions:

"1. Is a bid for the sale of machinery or equipment for a public utility owned and operated by a city invalid if an escalator clause covering the machinery or equipment is included in such bid?

"2. Would your answer to the first question be the same if it involved the city in its governmental capacity?

"3. Is a bid for the sale of machinery or equipment and its installation by the bidder for a public utility owned and operated by a city invalid if an escalator