GROSS INCOME TAX DEPARTMENT: As to who are included in the term "armed forces" as used in Chapter 282 of Acts of 1943.

April 6, 1943.

Hon. Gilbert K. Hewit, Director,
Gross Income Tax Department,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter referring to House Bill No. 2, amending Section 10 of the Gross Income Tax Act as amended, which was enacted into law by the General Assembly and signed by the Governor on March 10, 1943. This particular legislation constitutes Chapter 282 of the Acts of 1943 and wherever referred to herein will hereafter be referred to as such. This Act is quite long. Your questions, however, relate to only a limited part of it which reads 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, and 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.” (Our italics.)

You submit five separate and distinct questions involving construction of this Act which I shall consider in the order in which they are stated in your letter. The first question is as follows:

“1. The Act above referred to exempts from the tax members of the ‘Armed Forces of the United States * * * 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.’

“We request your official opinion as to whether the exemption should be applied to all receipts of such persons received after the date mentioned in the Act, or whether it should be applied to all receipts earned after the date mentioned in the Act, for active military service.”

In the construction of statutes the statutory rule requires that unless such construction is plainly repugnant to the intent of the Legislature or of the context of the same statute “words and phrases shall be taken in their plan or ordinary and usual sense.” Burns’ Indiana Statutes, Annotated, Sec. 1-201.

It seems to me that this provision applies particularly to your first question. In other words, the word, “received”, referred to above should be given its usual and ordinary meaning, and, when so construed, such exemption should be applied to receipts which were actually received after the date mentioned in the Act, to wit, December 31, 1941.

Your second question is as follows:

“2. The Act specifies that receipts of ‘members of the Armed Forces of the United States, including the Army, Navy, Marine Corps, Coast Guard and the Merchant Marine shall be exempted’ from the tax.

“We request your official opinion exactly as to whom the exemption applies,—whether the exemption given by the Act applies to the women’s auxiliaries of the
various Armed Forces, persons serving with the Red Cross, Y. M. C. A. and similar organizations, and further, whether the exemption applies to those persons in the United States Public Health Service sometimes considered attached to the military forces."

The question here calls for a construction of the language, "members of the armed forces of the United States, including the Army, Navy, Marine Corps, Coast Guard and Merchant Marine". It seems to me that the language of the Act, "including the Army, Navy, Marine Corps, Coast Guard and Merchant Marine", branches which are very definitely a part of the armed forces, leads to the conclusion that such language is limiting rather than enlarging and was intended to limit those who are to receive the exemption to the designated branches of the armed forces and such auxiliaries as can be considered as belonging to some one of those branches. As authority for the proposition that the word, "including", as used above is a word of limitation, see the case of Department of Treasury of Indiana v. Muessel et al., (Ind. Sup.) 32 N. E. 2d, p. 596 at page 598. This case had to do with the construction of the word, "including", as used in another section of the Gross Income Tax Act. The Court there said:

"The word 'including' may be used as meaning 'also' or 'in addition to', that is, as a term of enlargement. But this is the exceptional use of the word. Its ordinary use is as a term of limitation, as specifying particularly that which belongs to the genus. Montello Salt Co. v. Utah, 1911, 221 U. S. 452, 31 S. Ct. 706, 55 L. Ed. 810, Ann. Cas. 1912D, 633. Used here as a term of limitation it would mean the same as the words 'such as.'

"If the legislature had intended to use the word 'including' here as a term of enlargement rather than as a term of limitation, they could have modified it with the phrase 'but not in limitation of the foregoing' as they did in section 3(f) of said Act where the word 'including' was not used as a term of limitation."

Applying this reasoning to the question now being considered, I think the women's auxiliaries of the various armed
forces would be included in the exempted class. I do not think, however, that the Red Cross or the Y. M. C. A. or the United States Public Health Service would be included in the exempted class.

Your third question is as follows:

“3. The Gross Income Tax Department has received numerous claims for refunds of taxes paid during the year 1942, measured by receipts of the taxpayers from active military service. There was no exemption from the tax in favor of such persons at the time such taxes, the refund of which is now being sought, were paid. The refunding provisions of the amended Gross Income Tax Act are contained in section 14 of Chapter 117 of the Acts of 1937.

“We request your official opinion with reference to the authority of the Gross Income Tax Department to make refunds of taxes so paid.”

The Act exempts members of the armed forces of the United States from the payment of the gross income 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. It is obvious that the Legislature was intending to give this Act retroactive effect. It is true that laws are ordinarily to be construed prospectively rather than retroactively. However, there is no legal objection to the enactment of a retroactive statute, provided vested rights are not interfered with.

Hiatt v. Howard, 104 Ind. App., 167 at pages 170 and 171;
The Conn. Mutual Life Ins. Co. v. Talbot et al., 113 Ind. 373 at page 378.

It would seem to me that no vested rights are involved in this particular legislation. If I am correct in this, the Legislature has provided retroactively that there is no taxable liability on the basis of compensation received for military or naval service during the year 1942. Attention is called to the fact that in this particular Chapter 282 of the Acts of 1943 there is
no provision for refunding of taxes already paid. However, it seems to me that the refunding section of the Gross Income Tax Act as a whole furnishes sufficient grounds to enable the Department to refund taxes which, in effect, have been forgiven by the state.

Your fourth question is as follows:

"4. If it is your opinion that the Gross Income Tax Department is authorized to make refunds of taxes paid upon the basis of receipts from military service during 1942, we would appreciate your official opinion as to whether the department would be within its authority in denying claims for refund of such taxes when such claims are filed by persons other than the individual member of the military personnel, unless such claims are accompanied by power-of-attorney or other documentary proof of fiduciary appointment."

In answer to the above question it seems to me that the Department would not be authorized to make refunds upon the application of anyone other than the person to whom the refund is due. This would not mean, however, that such persons would be required to appear personally before the Department; such person could be represented by an attorney.

Your fifth question is as follows:

"5. The Act of 1943 General Assembly referred to herein provides 'that in the case of the death of any such member of any such Armed Forces on or before such date such tax upon the 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.'

"We would appreciate your official opinion as to whether the department is authorized to make refund of taxes voluntarily paid on the basis of income from non-military sources to the personal representative of any member of the Armed Forces who dies within the period set out in the Act.'"
It seems to me that there would be no basis for a refund of taxes voluntarily paid on the basis of income from non-military sources. The Act does not make such income exempt from the tax, and when such tax from such income has been paid, it has been paid in discharge of an existing liability.

PUBLIC INSTRUCTION: Whether Mayor of second class city may appoint school board.

April 7, 1943.

Hon. Clement T. Malan, Superintendent,
Department of Education,
State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of April 2, 1943, received as follows:

"May we have your official opinion in regard to the following question on chapter 274, Acts of 1943?
"Does the mayor of second class cities have the authority to appoint the members of the school board?"

It is my opinion that the above Act does not give the mayor of second class cities the right to appoint members of the school board. An examination of the Act in question reveals that the intent of the legislature was to provide for appointment of officers and employees of the civil city and not the school city. The school city being a distinct municipal corporation for school purposes under the provisions of Section 28-2402, Burns' Revised Statutes 1933, same being Acts of 1865, Ch. 1, Sec. 4, p. 3.

Attention is further called to the decision of the Supreme Court of Indiana in the case of State ex rel. Osborn v. Edington, 208 Ind. 160 at 164, 165, to-wit:

"The people of Indiana have translated into a fundamental constitutional postulate the belief that the general diffusion of knowledge and learning throughout a community is essential to the preservation of free government. And in harmony with this constitutional