TREASURER OF STATE: Gross Income Tax Act, administration thereof; authority of Governor to assign administrative powers to Director.

August 4, 1941.

Honorable James M. Givens,
Treasurer of the State of Indiana,
State House,
Indianapolis, Indiana.

My dear Mr. Givens:

I have before me your request that an official opinion issue regarding the Indiana Gross Income Tax Act (Chapter 50, Indiana Acts of 1933) and the amendments thereto (Chapter 117 of the Indiana Acts of 1937; Chapter 140 of the Indiana Acts of 1941), and more particularly the administration of that Act at the present time.

Section 1 (b) of Chapter 50 of the Indiana Acts of 1933 (11 Burns Indiana Statutes, Ann. 1933 Ed. Sec. 64-2601 (b), Baldwin’s Indiana Statutes, Sec. 1581) provided that:

“(b) The term ‘department of treasury’ means that department, or any branch thereof, or any agency of the State of Indiana to which the Governor may assign the enforcement of this Act.”

The original Gross Income Tax Act was amended by the eightieth session of the Indiana General Assembly, which amendment provided in part:

“(b) The term ‘department of treasury’ means that department or any branch thereof, or any agency of the State of Indiana, to which the Governor may assign the enforcement of this act, and the word ‘department’ means said department of treasury.”

Section 1 (b) Chapter 117, Indiana Acts of 1937, p. 604.

The provisions of Section 1 (b) from the original Act and from the amended Act which have been set forth above are plain, clear and unambiguous. Patently, the Act means precisely what it says and can be interpreted to mean only that the Governor was to designate and assign the enforcement of the Indiana Gross Income Tax Act, and that any agency
which the Governor of Indiana might designate to enforce and administer that Act was for the purposes of that Act, to be known as the "department of treasury."

The language of Section 1 (b) of the Indiana Gross Income Tax Act has consistently been interpreted by the Attorney General's Office since 1933 as permitting the Governor of Indiana to designate any agency which in his discretion was the proper one, as the agency to enforce the Indiana Gross Income Tax Act and that any such agency when so designated by the Governor of Indiana, became the "department of treasury" for the enforcement of the Gross Income Tax Act, irrespective of the consideration that there existed a totally different and separate department created by Chapter 4 of the Indiana Acts of 1933, which happened to have a similar name. This similarity of name did not result in the extinguishment of that separate "department of treasury" created by the provisions of the Indiana Gross Income Tax Act, and it is interesting to note that if such extinguishment had been possible (which of course it was not) it would have been the department created by an earlier act which, under the rules of statutory construction would have to be considered as having been extinguished. It is plain that the legislative intention was that neither of these departments should be abolished or that their powers should be curtailed by the legislation to which reference has been made above. It is equally true that the Legislature clearly expressed the intention that each of these departments should function and have the duties and responsibilities which the General Assembly had conferred upon them, and that in such functioning the departments would be governed by the respective laws which brought them into being.

While it is true that the Gross Income Tax Act is so clear and positive in its terms that it does not admit of statutory construction, it is nevertheless interesting to note that if resort to the accepted rules of statutory construction were permissible, that the application of such rules would lead to the conclusion that the department of treasury referred to in the Gross Income Tax Act was a separate and distinct department from the department bearing a similar name created by Chapter 4 of the Indiana Acts of 1933, and further, that the administration and enforcement of the Indiana Gross Income Tax Act was vested in any agency to which the Governor assigned the enforcement of the Act and that such
agency automatically became the "department of treasury" when such assignment was made. For example: While it must be remembered that Chapter 4 of the Indiana Acts of 1933 did not in any way refer to the enforcement or administration of the Indiana Gross Income Tax Act, your letter indicates that you believe that these two acts deal with a common subject because the agencies separately created under these separate acts bear similar names. However, where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a more particular class of the same subject in a more minute and definite way (as in the case of the Indiana Gross Income Tax Act), the special statute, i.e., the one dealing with the common subject-matter in a more particular or minute way will prevail over the general statute.

Kigan & Co. v. Ossam, 109 Ind. 554, 131 N. E. 81;
Daly v. Carr, 190 N. E. 429, and 612.

The second rule of statutory construction applicable in this case is that where there are two statutory provisions the special act which is later in point of time will control.

Van Buren Light & Power Co. v. Inhabitants of Van Buren, 116 Me. 456, 109 Atl. 3.

The application of this second rule is quite apparent since insofar as the subject-matter referred to in your letter is concerned it is apparent that the Indiana Gross Income Tax Act and its amendments were passed subsequent in point of time to Chapter 4 of the Indiana Acts of 1933. We believe it equally apparent that insofar as the subject-matter referred to in your request is concerned, the Indiana Gross Income Tax Act is the special statute, within the meaning of the foregoing rule.

The third rule of statutory construction which might be applied is to refer to the balance of the Act as it is presently in force. Significant it is, then, that Chapter 117 of the Acts of 1937, specifically, and in so many words, vests the administration of the Gross Income Tax Act in the department of treasury, which, of course, meant that agency to which the Governor assigned the enforcement of the Act. Further, it is significant that the administration of the department of treas-
ury and of the Gross Income Tax Act were to be under the director. The director was an officer whose position was created by the Indiana Gross Income Tax Act itself, and this officer is not referred to by Chapter 4 of the Indiana Acts of 1933, nor was the office of director created by or under that act. The director was not a member of the Board of Department of Treasury created by Chapter 4 of the Indiana Acts of 1933, and none of his powers, duties or responsibilities were traceable to Chapter 4 of the Indiana Acts of 1933. While it is apparent from the entire Indiana Gross Income Tax Act that it was to be administered by a separate and distinct “department of treasury,” created pursuant to that Act itself, and that the supervision of the administration of the Act was to be by the director, these points were made abundantly clear by the provisions of Section 28 of Chapter 117 of the Indiana Acts of 1937, at page 641, where it is provided:

“The administration of this act is vested in and shall be exercised by the department of treasury, except as otherwise herein provided. Such administration shall be under the supervision of the director, and all notices, summons, warrants, waivers, demands, and other written documents except as otherwise provided in section 29, shall be signed by him, and when so signed shall be regarded as the official acts of the department. The enforcement of any of the provisions of this act in any court shall be under the direction of the department. The director may require the assistance of, and act through, the prosecuting attorney of any county, and may, with the assent of the governor, employ special counsel in any county to aid the prosecuting attorney, the compensation of whom shall be fixed by and paid only upon the approval of the governor; but the prosecuting attorney of any county shall receive no fees or compensation for services rendered in enforcing this act, in addition to the salary paid to such officer. The director, with the approval of the governor, may appoint, as needed, such counsel, agents, clerks, stenographers, and other employees as authorized by law, who shall serve under him, shall perform such duties as may be required, not inconsistent with this act, and are hereby authorized to act for the department as the director may prescribe and as provided herein. * * *”
Please note that there is not a single provision in Section 28 of Chapter 117 of the Indiana Acts of 1937 which indicates that the Board created by Chapter 4 of the Indiana Acts of 1933 has any duty to perform with reference to the administration of the Gross Income Tax Act. Further, it is significant that although the General Assembly well knew that it had provided for a chief administrative officer of the department created by Chapter 4 of the Indiana Acts of 1933, that nothing referred to in Section 28 of Chapter 117 of the Indiana Acts of 1937 was to be done either by, or with the consent, of such officer created by Chapter 4 of the Indiana Acts of 1933. Contrariwise, when assent was to be given, Section 28 of Chapter 117 of the Indiana Acts of 1937 specifically indicated that it was to be the assent and the approval of the Governor of the State of Indiana. This clearly indicates again the legislative determination that the department of treasury referred to in the Indiana Gross Income Tax Act was to be separate and distinct from any other department, whether it had a similar name or not, created under any other act passed by the General Assembly. Then, too, Section 28 abundantly indicates that the legislative body considered the administration and enforcement of the Gross Income Tax Act so important and so closely connected with the exercise of executive power that it provided that action could be taken by the director in certain instances with the assent of the Governor.

It is therefore my considered opinion that the department of treasury as defined in the Indiana Gross Income Tax Act of 1933 as amended is a distinct, separate and individual department of treasury for the purposes expressed in the Gross Income Tax Act itself, and is not to be confused with any other agency, division or department of the government of the State of Indiana which presently exists or which has heretofore existed. The Governor of the State of Indiana, in an administrative order effective from and after midnight of June 30, 1941, continued the enforcement of the Indiana Gross Income Tax Act in the department of treasury referred to in that act itself, and specified that the administration of the Gross Income Tax Act should be under the supervision of the Director, an officer created by the Indiana Gross Income Tax Act itself. No other official or department can under the law administer or enforce the Indiana Gross Income Tax Act in view of the foregoing circumstances.
Your request for an official opinion directs attention to section 29 of Chapter 117 of the Acts of 1937, which provides in part that:

"The department of treasury shall from time to time promulgate such rules and regulations not inconsistent with this act, for making returns and for the ascertainment, assessment and collection of the tax imposed hereunder, as it may deem necessary and desirable. Such regulations may also prescribe the qualifications of persons permitted to represent taxpayers before the department in connection with any taxes imposed under the terms of this act, and may provide for the admission and/or exclusion of such persons. Such rules and regulations and all amendments thereof shall be signed by the director and approved by the treasurer, and shall be kept open to inspection in a permanent volume provided for that purpose in the office of the department. Such rules and regulations, when so signed and approved, shall be in full force and effect from and after five (5) days from the date of such adoption, and shall be judicially noticed by all courts."

It is well recognized that the function of approving rules and regulations which have a binding force similar to that of a statute is a purely executive function. Approval of rules and regulations is not a ministerial duty but is a duty requiring the exercise of sound executive discretion, and is therefore a function which may not be performed by a ministerial officer, but only by an executive officer. Consequently, the attempt of Section 29 to vest in a ministerial officer the executive duty of approving rules and regulations is improper under the Constitution of the State of Indiana. Insofar as Section 29 purports to clothe the treasurer of state with purely executive power, it is invalid and of no effect.

Tucker v. State (June 26, 1941), 35 N. E. (2d) 270.

With the provisions of Section 28 of Chapter 117 of the Indiana Acts of 1937, which have been reproduced earlier in this opinion, the following language from the opinion of the Indiana Supreme Court is significant:
"Appellants argue again that the Secretary, Auditor and Treasurer of State are officers in 'the Executive including the Administrative' department of the government, and that therefore they may be given general duties and vested with general powers therein. It will be noted, first, that even though it could be conceded that they are officers in the executive department, the executive power is vested in the Governor, and not in the department, just as the judicial power is vested in the courts and not in the judicial department, and no one else in the department can be vested with executive power. But it must also be seen that these ministerial officers are not officers of the executive department. They are officers in the administrative department, which is included in and made a part of the executive department. * * * The bookkeeping department may be considered as included in the executive department of a corporation, but this does not permit of considering the executive department of a corporation as included in the bookkeeping department. * * * Among their express powers is the selection of executives who make up the boards and officers at the head of the various agencies which carry on the state's business and affairs, and these executives thus appointed are vested with full power to employ assistants, fix salaries, and remove from office at pleasure, a clearly and purely executive function, subject, however, to the approval of the supervising board. That the exercise of such discretion is not ministerial is so clear and well settled as to need no citation of authority."


Many of the powers and functions granted by the Indiana Gross Income Tax Act are purely executive powers, so that under the Constitution of the State of Indiana, as interpreted in Tucker v. State (1941), 35 N. E. (2nd) 270, the exercise of such executive powers could not be conferred upon the treasurer of state, even if the Indiana Gross Income Tax Act attempted to do so, which, with the exception contained in Section 29, to which reference has been made, it does not do.
At the top of page 3 of your letter in referring to the executive order of the Governor of Indiana dated July 1, 1941, you state:

"I am unable to find any statute now in force which authorizes the Governor or gives him any power or authority to create any departments, divisions or agencies or to assign or transfer the enforcement of any act to any department or agency of the State of Indiana."

"It is my opinion that the authority which the Governor assumes in the first paragraph of his executive order under date of July 1, 1941, was revoked by the repeal of Chapter 4 of the Acts of 1933 and that there is now no statute or other legal authority whereby the Governor may lawfully exercise this power."

The answer to the foregoing statement is to be found in the provisions of the Indiana Gross Income Tax Act itself, and particularly in Section 1 (b), which provides:

"The term 'department of treasury' means that department, or any branch thereof, or any agency of the state of Indiana, to which the Governor may assign the enforcement of this Act."

There is no other interpretation which can be given to this language than that the General Assembly of Indiana utilized this language to indicate that the Governor was to assign the enforcement of the Act to any agency which he chose and that such agency should become the department of treasury for the purposes of the Indiana Gross Income Tax Act whenever the Governor so designated. Reference to the executive order dated July 1, 1941, to which you refer on page 3 of your letter, will indicate that the Governor did not act under any power granted by Chapter 4 of the Indiana Acts of 1933, nor did he purport to act under that statute. The Governor by this executive order to which you refer, merely continued the administration and enforcement of the Indiana Gross Income Tax Act in the officer whom that Act designated should be its chief supervisor. Due to the provisions of Section 1 (b) of Chapter 50 of the Indiana Acts of 1933 and Section 1 (b) of Chapter 117 of the Indiana Acts of 1937,
there has never been a time since the passage of the Indiana Gross Income Tax Act at which any Governor of the State of Indiana would have had to rely upon Chapter 4 of the Indiana Acts of 1933 in assigning the enforcement and administration of this particular Act to any agency of government. That authority was contained in the original Gross Income Tax Act and has been preserved from that date to this. And it is under the authority granted by the Indiana Gross Income Tax Act itself that the Governor of Indiana acted in making his executive order of July 1, 1941, which continued the enforcement and administration of the Act in the department of treasury created by the Act. It is my opinion that the powers exercised by the Governor in making his executive order dated July 1, 1941, were executive powers lawful and proper to be exercised by the Governor, and were consistent with the provisions of the Indiana Gross Income Tax Act, and that the exercise of such executive power was in no wise affected by the repeal of Chapter 4 of the Indiana Acts of 1933.

It is to be noted that although your letter discusses the matter of the proper agency to administer the Indiana Gross Income Tax Act at great length, that no reference is made to any express provision contained either in the Constitution of the State of Indiana or in any statute which would indicate that the Treasurer of State is the official who has been expressly designated by law to administer and enforce this taxing Act. No such express provision exists, and this, together with the authorities cited above, leads to the conclusion that the Treasurer of State has not been vested with the duties of administering and enforcing the Indiana Gross Income Tax Act. There is no statute presently in force which even remotely suggests that the responsibility for administering and enforcing this taxing Act is vested in the Treasurer of State.

It is therefore my opinion that the department of treasury to which reference is made in the Indiana Gross Income Tax Act is a separate and distinct agency, which is not a part of nor is it to be confused with any department created under Chapter 4 of the Indiana Acts of 1933; further, that under the express provisions of the Indiana Gross Income Tax Act it is the duty of the Governor of Indiana to assign the administration and enforcement of that Act to some official or
agency, and that when such assignment is made such agency becomes, for the purposes of the Indiana Gross Income Tax Act, the "department of treasury"; further, that in making such assignment of the administration and enforcement of the Indiana Gross Income Tax Act the Governor does not act under any power conferred by Chapter 4 of the Indiana Acts of 1933, but contrariwise, under the power conferred by Chapter 50 of the Indiana Acts of 1933, and under Chapter 117 of the Indiana Acts of 1937—it being understood that any action taken during the present calendar year would be under and pursuant to the express provisions of Chapter 117 of the Indiana Acts of 1937.

DEPARTMENT OF PUBLIC WELFARE: Merit System. Authority of State Personnel Board.

August 7, 1941.

Hon. T. A. Gottschalk, Administrator,
State Department of Public Welfare,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Mr. Gottschalk:

I have your favor of recent date in which you ask for an official opinion regarding conflicting provisions of Chapter 139 and Chapter 179 of the Acts of 1941, and you ask the following questions, to-wit:

"1. Do the provisions of Section 9 of Chapter 179 control any conflicting provisions in Chapter 139 or does Section 48 of Chapter 139 prevail when both Acts are in force? These are the two sections which have the prevailing or overriding clauses as to other Acts.

"2. If Section 9 of said Chapter 179 controls, can the State Board of Public Welfare operate its own merit system for the state and county departments of public welfare?

"3. If the answer to the second question is in the affirmative can the State Board of Public Welfare request the Personnel Board, established in said Chapter 39, to operate the merit system for a state department