taxed gasoline into Indiana for use in operation on our highways are susceptible to the criminal penalties set out in the section as a whole.

TAX COMMISSIONERS, STATE BOARD OF: Intangibles tax, whether imposed on mortgage for which mortgagor is not personally liable.

August 2, 1939.

State Board of Tax Commissioners,
State House,
Indianapolis, Indiana.

Dear Sirs:

You have asked whether intangibles tax is imposed by the Intangibles Tax Law, Secs. 64-901 et seq. Burns Ind. St. Supp., 1939, upon a mortgage given to secure the payment, at a time certain, to the mortgagee of a certain sum of money, with interest and attorney’s fees but for the payment of which the mortgagor is not personally liable. You have furnished a copy of the mortgage involved, which contains the following provisions:

"Upon failure to pay any part of the mortgage debt, principal or interest, as the same shall become due, then all of the mortgage debt shall at the option of the mortgagee, become due and collectible and this mortgage may be foreclosed accordingly. In the event of suit to foreclose said mortgage, the mortgagee shall be entitled to the possession, rents and profits of said real estate from the time of filing such suit, such rents and profits, less costs and expenses, to be applied on the mortgage debt.

"It is understood and agreed that the mortgagor will presently convey said real estate to...............upon certain trusts to be set forth in the deed of trust. Said trustee and/or his successors in trust shall apply all the net income from said real estate, and all proceeds of sale or of any insurance, thereon, to the reduction of the mortgage debt, shall keep all legal taxes and assessments against said real estate paid as they become due, and shall keep the buildings thereon insured for the benefit of the mortgagee, as his interest may
appear, in an amount not less than the amount of the mortgage debt, and upon failure to do so, the mortgagor may pay said taxes and insurance, and the amount so paid, with eight per cent (8%) interest thereon, shall be and become a part of the mortgage debt.

"It is expressly understood and agreed that by the execution and delivery of this mortgage the mortgagor does not promise or agree to pay the said mortgage debt, or assume any personal liability whatever for the payment of the same, it being the intent and purpose hereof to create a valid and subsisting mortgage lien of the mortgagor upon the said real estate, but without and personal liability or obligation on the mortgagor therefor."

Sec. 64-901, supra, contains the following:

"(a) Property Covered. The term 'intangible' and/or 'intangibles' shall apply to, mean, and include * * * written instruments evidencing and/or securing a debt not otherwise evidenced, including mortgages, chattel mortgages, bills of sale, conditional sales contracts; * * * or other instruments evidencing an interest in property and/or rights whether held in trust or otherwise, for the benefit of the holders of such certificates or other instruments."

The language used in the mortgage discloses that a sum of money is payable to the mortgagor which the mortgagor has promised to permit to be collected out of the real estate.

The parties to this instrument apparently considered that the instrument secured the payment of a mortgage debt, hence the use of the term "mortgage debt" in the instrument. That its payment can be compelled only by resort to the real estate described does not change the fact that the instrument evidences the existence of a debt in favor of the mortgagor which can be satisfied because of the mortgagor's consent that specific property shall be liable therefor. While there is no personal liability upon the part of the mortgagor to pay the mortgagor, the mortgagor's consent, as evidenced by this instrument, renders the real estate subject to foreclosure and sale for the amount due the mortgagor, which can only be avoided by the owner of the real estate paying the mortgagor. The mortgage
is an instrument which evidences and secures a debt, payable in a certain manner, which is not otherwise evidenced.

Some significance might be attached to the fact that the instrument recites that the intent and purpose is "to create a valid and subsisting mortgage lien of the mortgagee upon the said real estate." At common law the term lien imported possession of the property by the holder of the lien. (Barry v. Boninger, 46 Md. 59, 65.)

By agreement, a lien may be given although possession is not retained by the person to whom payment is due.

"The word 'lien' is of the same origin as the word 'liable' and the right of lien expresses the liability of certain property for a certain legal duty, or a right to resort to it in order to enforce the duty."


"The term 'lien' in a narrow and more technical sense, signifies the right by which a person in possession of personal property holds and detains it against the owner in satisfaction of a demand; but it has a more extensive meaning, and in common acceptation is understood and used to denote a legal claim or charge on property, either real or personal, for the payment of any debt or duty. Every such claim or charge is still a lien on the property although the property be not in the possession of him to whom the debt or duty is due. A 'lien' is defined to be a hold or claim as security for some debt or charge."


The term "debt" as used in the quoted portion of Sec. 64-901, supra, should be taken in its commonly accepted sense as denoting that which is due from one person to another, whether money, goods or services. It is apparent that by this instrument, the real estate in question, to the amount named, is due from its owner to the mortgagee, if payment of the principal sum is not made.

Whether the mortgage submitted by you is treated as securing the payment of a mortgage debt, as recited therein, or as creating a mortgage lien, according to its expressed
intent and purpose, in either event it is a written instrument evidencing a debt not otherwise evidenced, within the meaning of Sec. 64-901, Burns etc., Supp., 1935, and therefore is subject to the tax upon intangibles imposed by the Intangibles Tax Law.

GOVERNOR'S OFFICE: Authority to transfer appropriation of one governmental agency to another upon transfer of powers and functions by executive order.

August 11,1939.

Hon. M. Clifford Townsend,
Governor of the State of Indiana,
Indianapolis, Indiana.

My dear Governor:

I have before me the letter of your executive secretary, Mr. Heller, in which he states that you desire an opinion in answer to the following question:

"Has the Department of Public Welfare authority to transfer funds allocated to it by the budget committee under authority granted under the Appropriation Act provided in chapter 46 of the Acts of 1939 to another governmental agency to perform like and similar functions as required of the Department of Public Welfare?"

The provision of chapter 46 of the Acts of 1939 to which you refer is the proviso attached to the appropriation made for the Department of Public Welfare wherein it is stated:

"Provided, That if the appropriations herein made are not sufficient to enable the State, through the above designated agency, to avail itself of all federal funds and services which may be allotted, granted or offered to the State during either fiscal year of the biennial period for the above purposes, there is hereby appropriated such further sum as may be required for such purposes, the amount, however, to be subject to the approval of the budget committee."


Before going further with the discussion, I desire to say that as I understand the above provision your question is in-