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-
volved in some misstatements to which I desire to call your attention. First of all, I do not think it is proper to treat the approval of the budget committee under the above proviso as an allocation of funds by it. As a matter of fact, the appropriation involved in the above quoted language is an appropriation made directly by the legislature, the amount of which to be determined by the budget committee by the application of the measure therein provided. That measure is the amount, incapable of exact ascertainment at the time the Act was passed, but which is necessary in order that the State may avail itself of all federal funds and services which may be allotted, granted or offered to the State by the federal government during either fiscal year of the biennial period embraced in the Appropriation Act. The budget committee is thus only a fact finding committee whose approval of the amount is to be determined by the application of the rule fixed in the statute itself. Second, your question is as to whether the Department of Public Welfare is authorized to transfer the funds described in the question. Limiting the answer strictly to the question as propounded, it would undoubtedly have to be answered in the negative, because it is very clear that the Department of Public Welfare has no authority to transfer the funds described in the question. The authority of the Department of Public Welfare in that regard would doubtless be found in chapter 3 of the Acts of 1936 and amendments thereof if such power existed. I have examined these statutes and have failed to find any authority for such a transfer being made by the Department of Public Welfare.

Third, the language of the question "another governmental agency to perform like and similar functions as required of the Department of Public Welfare" also should have further consideration so as to show the exact limitation of power to transfer appropriations. An examination of the Public Welfare Act of 1936, I think, leads to the conclusion that it was not contemplated that any of the express powers and functions therein conferred upon the Department of Public Welfare should or could be transferred by the governor under the general powers conferred by chapter 4 of the Acts of 1933. The Public Welfare Act, however, does provide (see section 12) that:

"The governor is hereby authorized to transfer any agency of the State government, not herein enumerated,
to the State Department of Public Welfare in conformity with the powers conferred under chapter 4 of the Acts of the General Assembly of 1933."

There is no provision expressly authorizing the governor to transfer any of the powers or functions expressly granted by the legislature to the Public Welfare Department,—to transfer any such powers and functions to another governmental agency or department, but I think that since the authority to transfer to the Department of Public Welfare is stated to be "in conformity with the powers conferred under chapter 4 of the Acts of the General Assembly of 1933" it is sufficient to authorize a re-transfer to some other governmental department any functions or services which had previously by like authority been transferred to the Department of Public Welfare. What I shall say, therefore, in answer to your question is not to be considered as authorizing a transfer of powers from the Department of Public Welfare to some other department, except such powers as have been previously transferred to the department by action of the governor. With this preliminary statement, I have treated the question as if the inquiry was simply this viz: Whether there is any authority to transfer such appropriation referred to in your question to another governmental agency whose powers and functions have previously been transferred to the Department of Public Welfare by the governor and have by him been re-transferred.

An examination of the several general Appropriation Acts, beginning with 1933, discloses the following provision:

"The balance of any appropriation of funds heretofore placed or remaining to the credit of any division of the State of Indiana, and any appropriations or funds herein placed to the credit of any division of the State of Indiana, the powers, duties and functions thereof are assigned and transferred to any department, for salaries, maintenance, operation, construction or other expenses in the exercise of such powers, duties and functions, shall be transferred to the credit of the department to which such assignment and transfer is made, and the same shall be available for the objects and purposes for which appropriated originally."

Section 3 of chapter 46 of the Acts of 1939 provides that the appropriations therein made shall so far as applicable be governed by the provisions of sections 3 to 13, inclusive, of the General Biennial Appropriation Act of 1939. The appropriation, therefore, to the Department of Public Welfare contained in chapter 46, including that contained in the proviso quoted earlier in this opinion, shall so far as applicable be governed by the provisions of sections 3 to 13, inclusive, of the General Biennial Appropriation Act of 1939. In addition to the above provision in the several Appropriation Acts, section 60-303 of Burns Indiana Statutes Annotated (1933), the same being section 3 of chapter 137 of the Acts of 1933, expressly authorizes the Department of Treasury to transfer any part of the appropriation made to one board or department to some other department. This has always been construed to have to do with inter-departmental transfers and I think it should be thus limited where the transfers are more or less arbitrarily made.

In other words, it is unthinkable that the legislature intended by the provisions of section 60-303, supra, to give to the Department of Treasury the authority to strip one department of its appropriations for the benefit of some other department, unless in connection with the transfer and as a part of it there had been a transfer of powers and duties from one department to another department. This likewise seems to be the purpose of the provision above quoted from the several Appropriation Acts. In other words, admitting the power in the governor to make the transfer of duties and functions, the purpose of the legislature in making an appropriation to a department would not be secured if subsequent to the appropriation a part of the duties and functions of that department were transferred to another department, unless the appropriation available for the performance of those functions and duties should follow them into the new organizational set-up. However, the purposes of the legislature is conserved if pursuant to the provision of section 12, supra, the transfer is made. The making of the transfer in such a case, using the language of section 12, supra, results in making the appropriation “available for the objects and purposes for which appropriated originally.”

The only difficulty which I see with the situation as it is presented in this particular case is the fact that the appro-
appropriation to the Department of Public Welfare by chapter 46 of the Acts of 1939 does not contain the inter-departmental budgets of the Public Welfare Department. The provisions already referred to of the several Appropriation Acts, beginning with 1933, seem to contemplate cases where the Appropriation Act itself has placed a specific appropriation to the credit of a division which thereafter was transferred. Section 60-303 is not so limited, it apparently being contemplated that the Department of Treasury in making the assignment would determine the proportion of the total appropriation which should go with the transfer. It would appear that section 60-303, supra, contains sufficient authority for the transfer contemplated by your question as limited by the discussion in the early part of the opinion, and I so hold.

HIGHWAY COMMISSION, STATE: Authority to enter into contract with beet sugar refining plant through whose land proposed highway will run to save harmless from future liability for maintenance of public nuisance.

August 11, 1939.

Hon. T. A. Dicus,
Chairman, State Highway Commission,
State House Annex,
Indianapolis, Indiana.

Dear Mr. Dicus:

I received your letter of August 9, in which you ask for an official opinion as to whether or not the State can legally make such an agreement as proposed in the letter. The letter is as follows:

"The State Highway Commission of Indiana has under consideration the reconstruction of State Road No. 27 through Adams County, Indiana. There is located on the proposed route the plant of the Central Sugar Company of Decatur, Indiana, which is the owner of a large tract of land through which the proposed road extends.

"The Central Sugar Company refines sugar from a beet which is known as the sugar beet. In the process of sugar refining, there is a certain pulp, or pumice, which must be disposed of by the refiners. This pulp