

local taxation. In that case it was held that where the funds involved were the state funds and they had been expended by the trustee, he could not be compelled to make good the loss, but the court in no sense departs from the rule as earlier established in the case of Johnson et al., School Trustees, v. Smith, School Trustee, supra.

I am returning herewith the letter of Messrs. Conboy and Pusch, which accompanied your request.

GROSS INCOME TAX DIVISION: Limitation as to time within which assessment may be made.

December 22, 1937.

Mr. Clarence A. Jackson,
Director Gross Income Tax Division,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have before me your request that an official opinion issue in response to the following inquiry:

“The provisions of Section 12 (d) of Chapter 50 of the Acts of 1933 contain the following provision:

‘(d)—If the Department of Treasury discovers from the examination of any return, or otherwise, that the gross income of any taxpayer, or any portion thereof, has not been properly assessed, it may, at any time *within two years* after the time when the return covering such income was filed * * * assess the same, * * *’

“Section 12 (a) of Chapter 117 of the Acts of 1937, which amended the original Gross Income Tax Act, contains the following provision:

‘Section 12 (a)—If the Department discovers from the examination of any return or otherwise, that the Gross Income Tax of any taxpayer, or any portion thereof, has not been properly assessed, it may, *at any time within three years* after the time when the annual return covering such gross income was filed * * *, assess the same * * *.’

“The Gross Income Tax Division has information that a taxpayer whose annual return for 1934 was filed

on January 30, 1935, was not assessed upon all of the gross income which he received in 1934. The Division also has certain information relating to taxpayer whose annual return covering 1935 was filed on January 30, 1936, which information indicates that the taxpayer was not assessed upon the entire amount of gross income which he received in the year of 1935. Your official opinion instructing the Department concerning the last date upon which assessments may be made against these respective taxpayers is desired and requested."

(Our italic.)

The essence of the provisions referred to in the inquiry is that they act as a limitation of actions in that they accord a reasonable time within which a right, otherwise unlimited, might be asserted. Such provisions, by their nature are purely remedial and no presumption exists that such remedial measures are intended to operate prospectively only.

A marked difference exists and is recognized between statutes affecting substantial rights and those affecting matters of procedure. Therefore, in the absence of an express prohibition, provisions relating to the remedy or to the law of procedure apply to all acts and actions initiated after the statute becomes effective whether the right of action accrued before or after the passage of the statute containing such provisions.

City of Chicago v. Industrial Commission, 292 Ill. 409; 127 N. E. 46;

City of Los Angeles v. Oliver, 102 Calif. App. 299; 283 Pac. 298;

In re Potter, et al., 175 N. Y. S. 598.

In view of the foregoing I am of the opinion that the additional tax to be assessed by reason of income received in 1935 where the taxpayer filed his return on January 30, 1936, can properly be assessed by the Department at any time within three years from the date of filing the return; i. e., January 30, 1936, or at any time prior to January 30, 1939.

However, I am of the opinion that the additional tax which you propose to assess against the taxpayer upon gross income received in 1934, where the taxpayer's return was filed on January 30, 1935, can not be properly assessed at this time. This for the reason that the period of two years granted under

the gross income tax enactment came to an end on January 30, 1937, prior to April 1, 1937, upon which the three-year period became effective.

Denny v. Bean, 51 Ore. 180; 93 Pac. 693.

The period of time within which the Department of Treasury could act having terminated definitely before the amended Act extending the time within which such assessments could be made was passed, the taxpayer could not be said to be imprudent if he had destroyed or lost the books, memoranda, vouchers and other evidence at the termination of the time specified by the original Act. Yet it is to protect persons against surprise by the pressing of claims at a time beyond which persons or their representatives will have evidence available with which to prove the claim erroneous that provisions such as section 12 (d) of Chapter 50 of the Act of the General Assembly of 1933 (Burns Indiana Statutes Annotated, 1933, Sec. 64-2612 (d) ; Baldwin's Indiana Statutes, 1934 Ed., Sec. 15992 (d)) are enacted. The object and intent of the legislature being to protect the taxpayer from unseasonable assessments after the specified time has elapsed, and in effect being a notification of the length of time that one must prudently preserve the evidence relating to his receipts of gross income, it would appear to be in the interests of sound public policy to acknowledge that when the time within which assessments could be made had wholly elapsed prior to the passage of an amendment permitting assessments to be made within a longer period, that such amendments should not be so construed as to permit the taxing officials to surprise taxpayers who had prudently preserved all necessary records during the period originally specified, and then, relying on the law then in effect, had destroyed such records.