OPINION 40

ating a nursing home. Provided, further: that no per-
manent injunction shall issue from the court unless and
until a hearing on petition or complaint therefor shall
have been had.”

Any such injunction must be based upon Acts of 1957, Ch.
136, Sec. 10, supra.

In summary, it is my opinion that there is no statutory
authority for the Indiana Nursing Home Council to hold an
administrative hearing against an operator of an unlicensed
nursing home whereby a cease and desist order could be issued
by the council.

It is my further opinion that by virtue of Acts of 1957, Ch.
136, Sec. 15, as amended, supra, the council may seek injunc-
tive relief in the courts against an unlicensed nursing home
operation to enjoin any person, as defined by said act, from
establishing, conducting, managing or operating any nursing
home defined by the act, without first obtaining a license.

OFFICIAL OPINION NO. 40

June 7, 1962

Hon. Rex S. Minnick
State Representative
P. O. Box 122
Brazil, Indiana

Dear Representative Minnick:

This is in response to your request for my Official Opinion
concerning the effect of the Acts of 1961, Ch. 300, Sec. 1(b),
your inquiry reading as follows:

“I am writing to request an opinion concerning Chap-
ter 300, Section 1 (b) of the 1961 Acts of the General
Assembly.

“This section provides in part, that all non-highway
motor fuel refund claims shall be filed within six
months after the date of the purchase.

“I specifically want to know if refunds should be
paid for fuel purchased for the period beginning six
months prior to the effective date of the act in question which was July 6, 1961, instead of four months which was the period provided for in the earlier law.”

The Acts of 1961, Ch. 300 amends Sec. 23, as amended, of the Acts of 1943, Ch. 73, known as the “Motor Fuel Tax Law.” The only change effected by the 1961 enactment is in subsection (b) of section 23, which is found in Burns’ (1961 Supp.), Section 47-1554(b), which reads as follows:

“(b) Refunds on motor fuel used other than upon highways. Any persons who shall buy or use any motor fuel for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, airplanes or aircraft, or who shall purchase or use any motor vehicle fuel for cleaning or dyeing or for any other commercial use except for propelling motor vehicles operated in whole or in part upon any of the public highways of the state, shall be reimbursed and repaid the amount of such license tax paid by him upon presenting to the administrator a statement, accompanied by the original invoices showing the payment of such purchases, including the motor fuel license tax due thereon, the truth of which statement shall be verified by a written declaration that it is made under the penalties of perjury by said person and shall set forth the total amount of such motor fuel so purchased and used by such consumer, other than for propelling motor vehicles operated or intended to be operated in whole or in part upon any of the public highways of this state, and the administrator, upon the presentation of such verified statement and such invoices, and after making such investigation as he deems necessary shall cause to be repaid to such consumer, from the fund created by this act herein provided, the amount of the license taxes paid by such consumer on motor fuel used for purposes other than propelling motor vehicles as hereinbefore provided.

“All consumers’ refund claims authorized by this section shall be filed with the administrator within six months after the date on which such motor fuel shall have been purchased as shown by the invoice. Where
such refund claims are mailed to the administrator, the date of mailing as shown by the post mark shall be taken as the time and date of filing with the administrator.

"Any person who shall change or alter the date, name, gallonage or other information shown on any invoice used to support any deduction or claim for refund authorized in this section shall forfeit the right to such deduction or refund and in addition thereto shall be deemed guilty of perjury and shall be punished accordingly. Any person, firm or corporation who shall make any false statement in connection with an application for the refund of any money or license taxes, as herein provided, or who shall collect or cause to be repaid to him or to any person any such taxes without being entitled to the same under the provisions of this section, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars nor more than one thousand dollars. No claim shall be allowed hereunder in cases where such claim is required to be verified unless such verification is established by such investigation as the administrator may deem necessary." (Our emphasis)

The Acts of 1961, Ch. 300, supra, contains neither an express effective date nor an emergency clause, as a result of which, pursuant to the Indiana Constitution, Art. 4, Sec. 28, the effective date of the act was July 6, 1961, the date upon which the acts of the General Assembly of Indiana for the year 1961 were completely published and circulated in the several counties of this state. You will note in the foregoing quotation of said subsection (b), supra, that I have emphasized the one word "six"; this is for the reason that the only change in the entire section 23, effected by the 1961 amendment to the "Motor Fuel Tax Law," was the substitution of the word, "six," in lieu of the word, "four," which appeared in the last previous enactment to that section, being the Acts of 1947, Ch. 334. By this substitution, the basic effect of the Acts of 1961, Ch. 300, supra, is to extend the time within which consumers' refund claims authorized by subsection (b) shall be
filed with the "administrator" (meaning the "administrative head of the Indiana department of state revenue") from "four months after the date on which such motor fuel shall have been purchased as shown by the invoice" to "six months after the date on which such motor fuel shall have been purchased as shown by the invoice." From the third sentence of your letter, above-quoted, it appears that the precise question which you have in mind is whether the amendment by the 1961 Act, extending the time within which the consumers' refund claim must be filed from four to six months after the date on which such motor fuel shall have been purchased as shown by the invoice, is to be given only a prospective application, or whether, and to what extent, it is to be applied retroactively.

You will note from the precise language of the second grammatical paragraph of subsection (b), supra, that the time within which such a refund claim must be filed is computed from and limited by "the date on which such motor fuel shall have been purchased as shown by the invoice." The right accorded by the Legislature to claim the refund of the motor fuel tax, which right accrues by reason of such motor fuel being used for nonhighway purposes, arises by reason of a purchase of motor fuel which is so used. Without question, as to any purchase of motor fuel for such nonhighway use, which purchase occurred on or subsequent to the effective date of the 1961 Act which was July 6, 1961, the right to file such a claim for refund extends for a period of six months after the date of such purchase. Therefore, with respect to purchases of such motor fuel for nonhighway uses made on the effective date of the act, July 6, 1961, such consumers would have had until January 6, 1962 within which to file refund claims. Thus, it appears that the heart of your problem is whether the Legislature intended this amendment to apply only with respect to purchases made on or subsequent to July 6, 1961, the effective date of the act, or whether this amendment was intended to apply so as to include purchases made prior thereto between the period of January 6, 1961 and July 6, 1961. Under this section, as last previously amended by the Acts of 1947, Ch. 334, supra, the time within which a claim for refund could have been filed with respect to a purchase made on January 6, 1961 expired on May 6, 1961. Therefore, your question, stated in another way, is whether the Acts of 1961, Ch. 300,
supra, applies to purchases of motor fuel for nonhighway uses made between January 6, 1961 and July 6, 1961, as well as to such purchases made after the effective date of the act.

In answer thereto, with respect to the purchase of any motor fuel for nonhighway uses made on or after January 6, 1961, it is my opinion that such a refund is due and payable to such consumer if he has complied with all other requirements of the act and if such a refund claim, properly executed and with the necessary supporting documents, was filed with the administrator within six months after the date of such purchase as shown by the invoice. As I have stated above, it is the act of purchase of motor fuel used for such nonhighway purposes which creates the right provided by the statute, so that if such a purchase were made within the six months' period prior to July 6, 1961, then on said effective date of the act, the right still existed to claim the refund, notwithstanding the former statute. The extension of the right to claim the refund was effective July 6, 1961, and if we were to say that the 1961 enactment applied only with respect to purchases of motor fuel for such nonhighway purposes made after the July 6th date, then the effect of such an interpretation would be that claims for refunds for purchases made prior to July 6th would be governed by the four months' rule. If this were so, a claim for refund on a purchase made on July 5th could not be made after November 5, 1961, whereas a claim for refund on a purchase made on July 6th could be filed at any time to and including January 6, 1962. This is obviously fallacious reasoning, because it would not make the amendment effective as to all claims for refunds on file as of or subsequent to July 6, 1961, but only as to those concerning purchases made on or subsequent to July 6, 1961. There is absolutely nothing in the statute to support the conclusion that the amendment applies only to that class of purchases made subsequent to the effective date of the act. There is nothing whatsoever to refute the supposition that the amendment was intended to apply to all refund claims filed or on file as of July 6, 1961, which included purchases made within six months prior to the July 6, 1961 date, as shown by the invoice.

In support of this conclusion, reference is made to the case of B-C Remedy Co. v. Unemployment Compensation Commission of North Carolina (1946), 226 N. C. 52, 36 S. E. (2d) 204
1962 O. A. G.

733, 163 A. L. R. 773. This case involved a claim for refund of unemployment compensation taxes paid by the employer under a North Carolina statute which admittedly should not have been paid. Such taxes were paid for the year 1940, the act, at that time, providing for the right of recovery of erroneously-collected unemployment compensation taxes if claimed within one year from payment. The employer filed its claim for refund on December 18, 1942, which was denied on the basis that the application had not been made within one year from the payment of the tax. Subsequently, the 1943 Legislature of the State of North Carolina amended Section 14(d) of that act so as to enlarge the time to three years, within which such application is required to be made. The defendant, Unemployment Compensation Commission of that state, contended that the employer's:

"* * * right to recovery had become barred by the expiration of one year from payment, under the one year statute, and could not constitutionally be revived by the amendment enlarging the time to three years; and that the amendment itself was not intended to be retrospective or retroactive, and should not be so construed * * *"

In upholding the right of the employer to the refund claimed, the Supreme Court of the State of North Carolina included, in its opinion, language which seems peculiarly appropriate with respect to the instant question, when it stated:

"* * * considering the statute to be one of strict limitation on actions, there can be no doubt that the Legislature can waive statutes of limitation which have completely run in favor of the State. In the situation here presented—that of a taxpayer attempting to recover from the State money justly his, and the State attempting through its own laws to let him have it—it does not follow that any of the ordinary difficulties in the way of a revival of a remedy have any force or application. The Constitution is infringed only when such action impairs the obligation of a contract or destroys a vested right, and these inhibitions are invoked when it is sought to enforce the restored remedy
in invitum. The relation between the State and a taxpayer is not one of contract; and certainly the State has acquired no vested interest in appellee's money which it cannot waive by appropriate legislation. Even a private debtor may waive the bar of the statute by his own conduct, and in so far as constitutional limitations are concerned, the State certainly has as much freedom in that respect as an individual.

"The statute is not only broad enough to cover taxes 'erroneously collected,' but it is also broad enough in its terms to cover any sort of taxes erroneously paid during the three year period preceding its enactment, provided no statutory rule of construction stands in the way. Considering the relationship of the parties and the remedial nature of the statute, any deterring rule should be fortified by some consideration of public policy rather than merely based on the experience that most legislation is prospective.

"No material change has been made by the amendment except the extension of time for making application for the refund or the power of the Commission to make it on its own initiative. The whole statute is intended to give relief to a class whose equities continually arise in natural course regardless of changes in the law which might occur at any time. Such a statute could not be expected to make a clean break with the past—repeal the old law—and make no readjustment whereby those still equitably entitled to relief, or entitled under previously existing law, might be heard. The fact that no express provision was made in the amendment for them strongly leads to the conclusion that it was intended they should have the benefit of the extended time. Once this is conceded, the theory of exclusively prospective application breaks down and the statute operates retroactively; and it does not make any distinction or create any classes among those from which taxes have been erroneously collected prior to the enactment of the law when action is taken in time. (Our emphasis)

"Since, as we have said, the language employed is broad enough to express the retrospective intent and to
be retroactively applied, we think the statute falls under the rule expressed in Byrd v. Johnson, 220 NC 184, 185, 16 SE2d 843, 846, in which quoting from Gillespie v. Allison, 115 NC 542, 548, 20 SE 627, it is said: "No vested right of property has been disturbed, and in our view, this is a remedial statute, enlarging rights instead of impairing them. 'Statutes are remedial and retrospective, in the absence of directions to the contrary, when they create new remedies for existing rights, remove penalties or forfeitures, extenuate or mitigate offenses, supply evidence, make that evidence which was not so before, abolish imprisonment for debt, enlarge exemption laws, enlarge the rights of persons under disability, and the like, unless in doing this we violate some contract obligation or divest some vested right.' * * *'" (Court's emphasis)

In said case, the court concluded as follows:

"We are of [the] opinion that the statute is retrospective in its effect and under the agreed facts makes it the imperative duty of the appellant to make the refund."

The reasoning contained in the foregoing North Carolina Supreme Court decision and opinion seems peculiarly appropriate to the instant question concerning the Indiana statute. The General Assembly of the State of Indiana did not enact any language from which it may necessarily be inferred that it intended to create classes, whereby the extension of the time for the filing of claims for refunds of motor fuel taxes used for nonhighway uses was intended to apply only to motor fuel used for such purposes purchased on and after July 6, 1961, the effective date of the act. This enactment is obviously a remedial statute which may be applied retroactively in the absence of directions to the contrary. There are no contrary directions in this act.

The doctrine of retrospective operation of statutes of limitation contained within taxation statutes, as enunciated in the above-quoted North Carolina case, has been adopted by the courts of Indiana. In a case involving a former provision in the Indiana Inheritance Tax Law, Acts of 1937, Ch. 159, Sec.
1, the basic issue was whether a statute of limitation, providing the time within which proceedings must be taken to determine inheritance tax liability, added to that law by the said 1937 amendatory statute, was applicable with respect to an estate of a decedent, whose death occurred prior to the enactment of such statute of limitation. In the case of In re Batt’s Estate (1942), 220 Ind. 193, 41 N. E. (2d) 365, 139 A. L. R. 1391, the decedent died in January, 1928; the question presented was whether the ten-year statute of limitation from the date of death, within which to commence proceedings to determine inheritance tax liability as provided by said 1937 amendment, operated retrospectively so that after January, 1938, the administratrix was entitled to an order releasing the property of the decedent’s estate from inheritance tax liability, because no proceeding had been taken to determine the tax within ten years after the decedent’s death as the amendment required. In this case the Indiana Supreme Court, at 220 Ind. 193, 199, stated the Indiana rule as follows:

“The appellants contend that the statute does not apply to, and does not afford relief from, taxes on property of decedents who died prior to its enactment.

“In construing statutes, the effort is to find the legislative intent. The statute here involved is clear and unambiguous. That part of the section above the proviso is a reenactment. Only the proviso is new. It is a statute of limitation and repose. It is in effect a time limitation on the prosecution of proceedings to collect inheritance taxes. From the earliest times it has been held by this court that such statutes operate retrospectively as well as prospectively. It was pointed out in State ex rel. Trimble v. Swope et al. (1855), 7 Ind. 91, 94, 95, that:

“* * * this is the whole current of the common law decisions. The assembly must, therefore, be presumed to have legislated with reference to that construction. * * * In the absence of a legislative rule, the decisions on the former act furnish the rule of construction for the latter.

“This view is greatly strengthened by the fact that it is customary for the legislature itself to limit the
1962 O. A. G.

operation of such acts, where they are not intended to affect rights of action already accrued." (Our emphasis)

The following factor is also worthy of special consideration. The Acts of 1961, Ch. 300, supra, although not containing a specific effective date nor an emergency clause, was approved by the Governor of the State of Indiana on March 10, 1961. It is common knowledge that wide circulation, by newspaper, radio and television facilities, is made during the sessions of each General Assembly and shortly thereafter as to what acts have been enacted, not only by reference to the enrolled act number, but also by means of summary or digest of the content of the enactment. The state, its agencies and officers, are not bound by such a summary or digest if the general public were to have inferred an erroneous impression therefrom. Nevertheless, from such media of information and upon inquiry of any interested person, the fact doubtless became, or could have become, known that the time within which claims for refunds of motor fuel tax on motor fuel used for nonhighway purposes could be filed was extended by this act, from four months to six months after the date of the purchase as shown by the invoice. With respect to any person having the right to file such a claim for refund on and after March 10, 1961, the date of approval of said act, it is entirely possible that such person, knowing of such enactment, could have neglected to file such claim within the four months' period provided by the 1947 Act, assuming that he had an additional two months as provided by the 1961 Act. Thus, the statute itself, and the information concerning such enactment, could well have contributed to many persons, otherwise entitled to a refund, being lulled into a false sense of security and not filing their claims therefor within the four months' period, but later filing such claims within the six months' period provided by the 1961 enactment. Unquestionably, the members of the General Assembly of the State of Indiana did not intend for any person, otherwise entitled to such a refund, to be deprived thereof by being confused concerning the operation of the effective date of the act. The purpose of this act was to extend the rights and remedies of persons entitled to such refunds,—not to defeat them. Therefore, for such persons to be deprived of the refunds otherwise due, because of such a
possible misunderstanding, if the claim therefor was made within the six months' period provided by the 1961 enactment, could be attributable to the very act which was supposed to extend remedies to the persons otherwise entitled to such refunds.

In conclusion, therefore, it is my opinion that the Acts of 1961, Ch. 300, Sec. 1(b), supra, was intended to apply, not only to purchases of motor fuel used for nonhighway purposes made on and after July 6, 1961, the effective date of the act, but also to such purchases made during the six months' interim prior thereto, if a claim for refund thereof, properly executed and with necessary supporting documents, was filed with the administrator within six months after the date on which such motor fuel was purchased as shown by the invoice.

OFFICIAL OPINION NO. 41

June 8, 1962

Hon. William E. Wilson
State Superintendent of Public Instruction
227 State House
Indianapolis, Indiana

Dear Mr. Wilson:

Your letter of May 22, 1962, has been received requesting an Official Opinion on the following:

"A teacher taught five successive years in a city school system under regular teachers contract, and then began to teach in a township of the same county but outside of the city school corporation in which the five years mentioned were taught.

"The schools in the said township were consolidated so that the school city and the township became a part of a consolidated school unit effective January 1, 1962.

"The new school corporation assumed such teachers contract and the salary was paid to the teacher by the new school corporation January 1, 1962 to the end of the school year of 1962. Is this teacher a tenure teacher by virtue of having taught five years in a city school