INCOME TAX: LIMITATION OF ACTION: Under Laws of Mo., 1949, page 611, section 11363, enlarging the period of limitation during which an assessment of state income tax could be made from three to four years, the four year period becomes applicable to those taxpayers who were subject to an assessment under the three year limitation at the effective date of the amendment on April 14, 1950, but this enlargement of the period of limitation does not revive the possibility of an assessment which has been barred under the three year limitation before the section was amended.

October 18, 1950

FILED

1

Mr. T. R. Allen
Supervisor, Income Tax
State Department of Revenue
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an official opinion from this office reading as follows:

> "In connection with the administration of the Missouri State Income Tax Law under Section 143.240, Revised Statutes 1949 (11363, A.L. 1945 p. 1881, A.L. 1949 p. 611) which changed the Statute of Limitation from three to four years. The ruling in respect to this section of the new law is desired as to when this may be applied.
>
> "The new law which was passed in the 1949 General Assembly became effective April 14, 1950. It is the contention of this department that this extension of the Statute of Limitation may be applied to the 1947 years, as the law was passed and became effective before the Statute of Limitation under the old law had expired in connection with the 1947 year.
>
> "I will appreciate you giving this your prompt attention as it seriously affects the limitation of time which this department has to make on adjustments for 1947."

Laws of Missouri, 1949, p. 611 (amending R. S. Mo. 1939, section 11363, as amended by Laws of Mo. 1945, p. 1881) reads as follows:

> "In case any taxpayer shall fail to make return as required by law, the director of revenue shall have authority to estimate the amount of such taxpayer's income, from such sources as he may be able to obtain including the business, records and books of any taxpayer, which business, records and books, the director of revenue is hereby given the right to examine during the usual business hours at any time within four years after the return of such taxpayer is required by law to be filed, and the director of revenue shall thereupon make the assessment including all penalties provided. At any time within four years after any return shall have been filed the director of revenue shall have the right to examine, during the usual business hours, the business, records and books of any individual, corporation, joint stock company, joint stock association or partnership, and to issue a credit slip to any taxpayer, if more tax has been paid than legally due, which credit shall be taken as deduction of the succeeding tax or taxes based on incomes to the extent of such credit, and to determine any deficiency not returned by the taxpayer; and thereupon the director of revenue shall make an additional assessment including all penalties provided: Provided, in case of overpayment of tax, the taxpayer shall not be precluded from any other remedy now or hereafter available. The director of revenue and his deputies shall have power to take and administer all oaths specifically required under any provisions relating to taxes based on income. Wherever the term director or director of revenue is used pertaining to the assessment, levy, collection or payment of taxes based on incomes it shall mean director of revenue or his deputies duly authorized by him."

As pointed out in your letter, this section changes the period of limitation during which an assessment may be made from three years to four years. After the expiration of this period, although the tax liability is not destroyed, the remedy for enforcing it is no longer available. The theory of a statute of limitations is that it does not affect the right but destroys the remedy. (Boyce v. Mo. Pac.R.R. 68 S.W. 920, 168 Mo. 583).

In the early case of Ryans v. Boogher (69 S.W. 1048, 169 Mo. 673) we find the Missouri State Supreme Court saying:

> "Statutes of limitation, which affect the remedy only are subject entirely to the will of the Legislature and it may repeal them in toto or fix a different limitation at any time before the bar becomes complete, and if the latter, then the new limitation must control."

In the recently decided case of Wentz v. Price Candy Co. (175 S.W. (2d) 852, 352 Mo. 1) the Supreme Court of Missouri said:

> "A statute which affects only the remedy may properly apply to a cause of action which has already accrued and is existing at the time the statute is enacted. Ordinary statutes of limitation are held to affect the remedy only. The <u>principle is well settled that the period of limitation prescribed by such statutes may be enlarged and become applicable to existing causes of action, but an enlargement of the period of limitation may not revive a cause of action which has been barred under the limitation as it previously existed</u>. Annotation, 46 A.L.R. 1101. It is the rule in this state that a statute dealing only with procedure or the remedy applies, unless the contrary intention is expressed, to all actions falling within its terms whether commenced before or after the enactment. Clark v. Kansas City St. L. and C.R. Co., 219 M. 524, 118 S.W. 40; Aetna Ins. Co. v. O'Malley, 342 Mo. 800, 118 S.W.2d 3." (Emphasis ours.)

Again in 1944, the Supreme Court said in the case of State ex rel. Bier v. Bigger (178 S.W.2d 347, l.c. 350):

> "In that case (Wentz v. Price Candy Company cited supra) we held that the extension of the period of limitation by amendment of a statute would extend an existing cause of action which had not expired at the time of the amendment."

From the foregoing decisions from our State Supreme Court it is the opinion of this office that the extension of the period of limitation by amendment of the statute would extend the existing period during which an assessment could be made, but if the period of limitation had expired at the effective date of the amendment on April 14, 1950, then the lengthened period would not serve to renew the cause which had been barred by the three year limitation.

The three year period of limitation prescribed by the statute is enlarged to four years and becomes applicable to those taxpayers who were subject to an assessment under the three year limitation; but this enlargement of the period of limitation does not revive the possibility of an assessment which has become barred under the limitation as it previously existed.

CONCLUSION

It is the opinion of this office that under the Laws of Missouri, 1949, p. 611, Section 11363, which enlarged the period of limitation during which an assessment of state income tax could be made from three to four years, the four year period becomes applicable to those taxpayers who were subject to an assessment under the three year limitation at the effective date of the amendment on April 14, 1950; but this enlargement of the period of limitation does not revive the possibility of an assessment which has already been barred under the three year limitation before the section was amended.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General