STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calender years

1965 - 1966

those employees enumerated in the above-stated question.

26 M.R.S.A. § 44 Right of Access "The Commissioner as state factory inspector, and any authorized agent of the department, may enter *any factory or mill, construction activity, workshop, private works or state institutions which have shops or factories,* when the same are open or in operation, for the purpose of gathering facts and statistics such as are contemplated by sections 42 to 44, and may examine into the methods of protection from danger to employees and the sanitary conditions in and around such buildings and places, and may make a record of such inspection." (Emphasis supplied)

The statutory language sets forth the right of inspection in areas of private economic enterprise and then specifically states "or state institutions which have shops and factories." It is apparent that the legislature did not wish to have workers in shops and factories in which the state is the employer, subjected to standards of safety and protection different than those which govern their counterparts in private industry. For this reason, the right to inspect shops or factories in state institutions was given.

We believe that the legislature intended nothing more than this however. Had the legislature intended to give the Department of Labor and Industry the authority to inspect shops and factories of other public employers, such as municipalities, counties, or public school systems, we believe they would have said so.

To expand the right of inspection as set forth in section 44 of 26 M.R.S.A. to include all workshops and factories, whether public or private in nature, could be accomplished only through legislative enactment.

In answer to the question presented, it therefore follows that if a *"factory"* or *"workshop"* as defined in 26 M.R.S.A. § 1 is maintained by a state institution or a private educational institution, that the Department of Labor and Industry may inspect the premises of said factories or workshops pursuant to the terms of 26 M.R.S.A. §§ 44 and 45.

PHILLIP M. KILMISTER
Assistant Attorney General

January 5, 1966
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Insurance Premium Tax – John Hancock Mutual Life Insurance Company

FACTS:

Taxpayer, a life insurance company, has established a contributory group insurance plan for its full-time employees.

Under the plan enrolled employees receive life insurance and health insurance, including hospital, surgical, major medical and other usual benefits.

Both the employees and the company contribute to the coverage; the employees by payroll deduction, the company by assumption of cost shown only by a journal entry in the company's books.

On November 3, 1965, under the provisions of the Maine Revised Statutes relating to taxation of insurance companies based on "gross direct premiums," the Bureau of Taxation made a supplemental insurance premium tax assessment against the taxpayer.

This assessment was based upon both premiums contributed by employees of the taxpayer and the premiums contributed by the taxpayer itself.

The taxpayer admits that the tax as applied to the employee's contributions is correct but contests the tax as applied to the company's contribution on the ground that the company has not paid a premium but has merely made a transfer from one account to another.

QUESTIONS:

1. Whether under such a plan employee contributions are taxable as "premiums."
2. Whether under such a plan employer (taxpayer) contributions are taxable as "premiums."

ANSWERS:

1. Yes.
2. No.

LAW:

Title 36 M.R.S.A. § 2513 imposes a tax on insurance companies doing business in the state as follows:

> "Every insurance company or association which does business or collects premiums or assessments including annuity considerations in the State, except those mentioned in sections 2511 and 2517, including surety companies and companies engaged in the business of credit insurance or title insurance, shall, for the privilege of doing business in this State and in addition to any other taxes imposed for such privilege annually *pay a tax upon all gross direct premiums* including annuity considerations whether in cash or otherwise, on contracts written or risks located or resident in the state for insurance of life, annuity, fire, casualty and other risks at the rate of 2% a year." (Emphasis supplied).

REASONS:

In order to answer the question we must determine what a premium is.

Although the taxation of insurance companies in the above fashion has been in effect for some years the words "gross direct premium" as a measure of the tax were first placed in the law in 1939 (See P.L. 1939, C. 1, § 1 and 3).

Since the phrase "gross direct premium" generally has no particular meaning in the field of insurance law it is safe to assume from the use of the language that the Legislature intended to tax the gross receipts from premiums directly attributable to business done in Maine paid by the insured to the insurer.

> ". . . a tax on gross premium receipts, merely as a basis for taxation, is usually considered to be imposed as a franchise or privilege tax, exacted for the privilege of doing business in the state . . . ." 74 C.J.S. Taxation § 167 b. (1).

The New York Supreme Court in the case of *Guardian Life Insurance Company of America v. Chapman,* 97 N.E. 2d 877 has, however, determined that the words "direct premium" exclude amounts paid for reinsurance but has not further defined the term.

PREMIUM DEFINED

Generally the word premium as used in taxing acts is to be given the construction placed upon it by ordinary usage and in accordance with its apparent meaning when used in insurance policies. See New York Life Insurance Company v. Wright (Ga.) 122 S.E. 706 and Guardian Life Insurance Company of America v. Chapman (N.Y.) 97 N.E. 2d 877.

> "The word 'premium' in the law of insurance has a well settled and specific meaning which is well understood. In its proper and accepted sense it means the amount *paid to the company* as consideration for insurance; the consideration *paid* for a contract of insurance . . ." (Emphasis supplied) 44 C.J.S. Insurance 340 a.
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> " 'Gross premium' is the amount actually charged by the insurer under the contract, and ordinarily includes both the net premium and the loading." 44 C.J.S. Insurance § 349 a ("loading" refers to the amount added to the net premium to defray business expenses, etc.). See also Couch, Cyclopedia of Insurance Law, Vol. 3, 579.

The Court in the Maine case of Portland v. Insurance Company, 76 Me. 231 indicates, in passing, their concept of a premium as follows:

> "The premiums are paid absolutely *to the corporation* as the consideration for the policy of insurance." (Emphasis supplied).

The following definition of premium is found in 29 Am. Jur. Insurance, 501:

> "An insurance premium may be defined as the agreed price for assuming and carrying the risk – that is the consideration paid an insurer for undertaking to indemnify the insured against a specified peril." See also Cyclopedia of Insurance Law, Couch, Vol. 3, § 579.

Other definitions are as follows:

> " 'Premiums' mean amount paid as consideration for insurance." 33 Words & Phrases, Premium, p. 95 supp.
>
> " 'Premium' in a broad sense is whatever sum of money is paid by an insured as consideration for issuance of any insurance policy . . . ." 33 Words & Phrases, Premium, p. 95, supp.

Therefore we must conclude that a "premium" is the amount *paid by or on behalf of an insured* to the *insurer.*

Under the facts here the employees are the insured; they pay for the policy of insurance by payroll deductions – this is the only payment made to the taxpayer, the insurer.

There is no question but what the employee's contribution is an "amount paid as consideration for insurance" and is a "premium." Therefore, the contribution should be taxed under the statute above cited as "premiums."

Turning to the question of whether the employer's contribution is taxable as a "premium" we must again consider the meaning of the words "gross direct premium" or "premium."

It is logical to state that if the amount paid by the insured is a "premium" then an amount paid on behalf of an insured is a "premium." For example, if A company pays consideration to B insurance company for a contract of insurance on C's life, it has paid a "premium." However, if A company and B company are one and the same and the consideration for the insurance on C's life is provided by a bookkeeping entry can A be said to have paid a premium? Generally, if we reason that a premium is monies paid to an insurer by the insured the answer is "No" since the company is the insurer and the

customer the insured. However, can the company be said to be paying monies to itself on behalf of the insured?

Remembering that the word premium implies a payment or consideration and that those words imply the existence of a debt or contractual relationship we must answer the question again in the negative. With the exception of this one instance monies paid (to a third person) on behalf of the insured constitute a premium since they are a consideration paid on an existing debt. But here, since one cannot contract with or owe monies to oneself, there is no debt and no payment and thus no premium.

Therefore, where one pays monies to oneself, on behalf of another, there is no payment of a "premium" as considered in the statute. Too, there is some question as to whether the monies transferred here are paid "on behalf" of the insured or merely reflect a reduced rate of insurance. The result is the same in either case, there is no premium paid.

CONCLUSION:

The monies contributed by the employees should be considered premiums, those by the company are not to be considered premiums.

JON R. DOYLE
Assistant Attorney General

January 17, 1966
Education

Kermit S. Nickerson, Deputy Commissioner

Mentally Retarded Children

FACTS:

The State Department of Education has an appropriation of monies in the amount of $1350 which is to be utilized in the manner authorized by 20 M.R.S.A. § 3161. The reference statute is as follows:

> "Any administrative unit may, in addition to the sum raised for the support of public schools, raise and appropriate money for the education of teachers and other school personnel to meet the educational needs of mentally retarded children. Such appropriation shall be expended on a matching basis with any funds made available by the department for the same purpose.
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> "Teachers and other school personnel who are so trained may be reimbursed through funds of the department on a matching basis for expenditures for such training approved in advance by the commissioner." *20 M.R.S.A. § 3161.*

Teachers employed in approved private schools and teachers employed at the Pineland Hospital and Training Center have inquired of your Department whether they are eligible for reimbursement of expenses incurred by them in their study of courses preparing them for the education of mentally retarded children.

QUESTION:

Whether the State of Maine may legally expend the appropriated monies under the given facts?