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STATE OF NEBRASKA
OFFICIAL
FEB 8 1995
DEPT. OF JUSTICE

DATE: February 3, 1995

SUBJECT: Authority of the Secretary of State to Issue Refunds for Overpayment of Corporate Occupation Tax

REQUESTED BY: Scott Moore
Nebraska Secretary of State

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

Foreign and domestic corporations operating in the State of Nebraska are required, by statute, to pay an annual corporate occupation tax to the Nebraska Secretary of State. ***Neb. Rev. Stat. §§*** 21-301 to 21-330 (1991, Cum. Supp. 1994). For that purpose, corporate occupation tax reports are mailed at the end of each year to those corporations covered by the statutes. From your correspondence, we understand that the 1995 corporate occupation tax forms mailed to corporations in 1994 contained rate structures based upon the 1994 tax rates which were higher than the 1995 rates. As a result, several thousand corporate occupation tax reports have been returned to your office with an overpayment of that tax for 1995. You are reviewing options to correct that situation.

One option which you would like to pursue is payment of a refund by the state to the corporations which overpaid the occupation tax. In that regard, you have requested our opinion as to whether "specific legislation [is] necessary to lawfully allow the issuance of refund checks for the overpayment of the corporate occupation tax due to a mistake on the tax forms?" After reviewing the applicable statutes and law in this area, we believe that such specific legislation is necessary.

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In general, an administrative body in Nebraska has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the purpose of the statutes which it enforces. ***Nebraska Association of Public Employees, Game and Parks Chapter v. Game and Parks Commission***, 220 Neb. 883, 374 N.W.2d 46 (1985). More specifically in the present situation, the Nebraska Supreme Court has also held that taxes voluntarily paid, as is presumably the case here, cannot be recovered back in the absence of a statute. ***Svoboda v. Hahn***, 196 Neb. 21, 241 N.W.2d 499 (1976). Consequently, we believe that for you to make the refunds which you contemplate in connection with the overpayment of corporate occupation taxes in this instance, you must have some specific statutory authority to do so.

An example of a statute which would allow the type of refunds which you wish to make is the statute which authorizes payment of refunds for overpayment of income taxes to the State of Nebraska. ***Neb. Rev. Stat. §*** 77-2791 (1) (1990) provides:

> The Tax Commissioner, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by the tax laws of this state on the person who made the overpayment, ***and the balance shall be refunded by the State Treasurer out of the General Fund.***

(emphasis added).

There do not appear to be any portions of the statutes dealing with corporate occupation taxes which are similar to Section 77-2791 (1). Section 21-238 does provide that any corporation paying occupation fees which are invalid for any reason may claim a refund which shall be paid out of the General Fund if the Secretary of State approves the claim. However, that statute requires the corporation to file a written claim together with supporting evidence to obtain a refund, and we assume that you wish to simply issue refunds for the overpayments in the current situation without requiring written claims from the corporations which overpaid.

In sum, the statutes currently allow the corporations which overpaid their occupation taxes due to the erroneous tax forms to file a written claim for the overpayment which you can then allow and pay from the General Fund. However, if you wish to simply

issue refunds for the overpayments to such corporations, we believe that you will need additional statutory authority.

Sincerely yours,

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05-27-14.op

Approved by:

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