

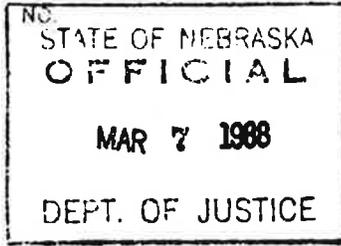
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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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# 88018



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DATE: March 7, 1988

SUBJECT: Constitutionality of the Ten Cent Fee Imposed Upon Each Acre of Agricultural Land Under the Provisions of LB 911; Excise Taxes

REQUESTED BY: Senator W. Owen Elmer, Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
Dale A. Comer, Assistant Attorney General

By letter dated February 5, 1988, you requested our opinion concerning several questions involving the constitutionality of LB 911. Subsequent conversations with you indicated that your primary question concerned the constitutionality of that portion of LB 911 which provides for the levy of a noxious weed fee for purposes of funding the Noxious Weed Control Act. Due to your concerns involving time, we gave you an informal response to your question. The purpose of this opinion is to formalize our earlier response.

Article VIII, Section 1A of our Nebraska Constitution provides, "the state shall be prohibited from levying a property tax for state purposes." The obvious import of this Constitutional provision is to leave property taxing authority to Nebraska's governmental subdivisions and to prevent the state from levying such a tax.

LB 911 would promulgate the Noxious Weed Control Act, and the bill contains various provisions for administering and enforcing noxious weed control requirements. Section 18 of the bill provides, "There is hereby levied a one-time noxious weed fee of ten cents per acre of land classified for purposes of taxation as agricultural or horticultural. The fee shall be collected by the county treasurers by February 1, 1989, and forwarded to the State Treasurer who shall deposit the fees in the Noxious Weed Revolving Fund which is hereby created." The constitutionality of this particular taxing provision turns upon a determination of whether this tax provides for a form of property tax or a form of excise tax. If Section 18 imposes a property tax, then the tax is unconstitutional under Article VIII, Section 1A set out above. If Section 18 imposes an excise tax, that constitutional provision does not come into play.

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Our Supreme Court most recently considered the distinction between excise taxes and property taxes in State v. Galyen, 221 Neb. 497, 378 N.W.2d 182 (1985). In that case, the court stated,

Black's Law Dictionary (5th Edition, 1979) at 506 defines an excise tax as "a tax imposed on the performance of an act.... tax laid on manufacture, sale, or consumption of commodities...." On the other hand, Black's Law Dictionary, supra at 1097 defines a property tax as "a tax levied on both real and personal property; the amount of the tax being dependent on the value of the property, generally expressed as a uniform rate per thousand of valuation."

Id at 500, 378 N.W.2d at 185. The court went on to add,

"An excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statute or referred to as privilege taxes, license taxes, occupation taxes, and business taxes."  
.... On a number of occasions this court has similarly recognized that a tax imposed upon the doing of an act is an excise tax and not a property tax.

Id at 500, 501, 378 N.W.2d at 185.

Under the Galyen standard, it is not entirely clear whether the "noxious weed" of Section 18 of LB 911 is a property tax or an excise tax. On the one hand, the fee is levied by the Legislature, it in no way is based upon the value of the property in question, and it is not subject to assessment procedures by local county assessors as are forms of property tax. On the other hand, the fee is imposed without the "doing of an act," as required by Galyen, for example the sale of a particular commodity. In the Galyen case, the fee in question was paid per head on cattle as they were sold.

Because it is not clear whether the fee imposed by LB 911 is a property tax or an excise tax under Nebraska law, we reviewed case law from other jurisdictions which deals with this issue. Several of those cases shed some light upon this question.

Several cases from other jurisdictions indicate that a tax on a particular use of property is an excise tax. For example in Eastler v. State Tax Assessor, 449 A.2d 921 (Maine 1985), the court indicated that an excise tax is not confined to a tax on business but also embraces any tax imposed on a particular use of property or a particular power over property which is incidental to its ownership. Similarly, in Weaver v. Prince George's County, 281 Md. 349, 379 A.2d 399 (1977), the court indicated that a tax on the use of property as distinguished from

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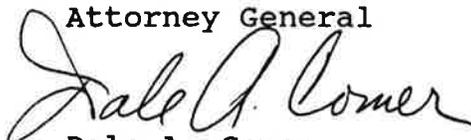
a tax based on ownership exclusively is in the nature of an excise tax. See also, Mount Tivy Winery, Inc. v. Louis, 134 F.2d 120 (1943); State v. Wynne, 134 Tex. 455, 133 S.W.2d 951 (1939).

Other cases from other jurisdictions focus on the methods used to impose the tax and on the methods used to determine the amount of the tax itself. For example, in Black v. State, 67 Wash.2d 97, 406 P.2d 761 (1965), the court indicated that a tax imposed directly by the legislature without assessment measured by the amount of business done or the extent to which conferred privileges have been used or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, is an excise tax. In contrast, a tax computed on valuation of property and assessed by assessors either where it is situated or at the owner's domicile is a property tax. See also, Weaver v. Prince George's County supra; City of Phoenix v. Bowles, 65 Ariz. 315, 180 P.2d 222 (1947).

It appears to us that the fee imposed by Section 18 of LB 911 could be characterized as imposing a tax on the use of property since it is levied only upon "land classified for purposes of taxation as agricultural or horticultural." In other words, the fee here is imposed upon use of the property as agricultural land. In addition, this tax is levied by the Legislature and is not in any way based upon valuation of the property. Therefore, the fee set out in Section 18 of LB 911 may be considered an excise tax. As such, it does not violate Article VIII, Section 1A of our State Constitution which prohibits the imposition of a property tax for state purposes.

Sincerely Yours,

ROBERT M. SPIRE  
Attorney General

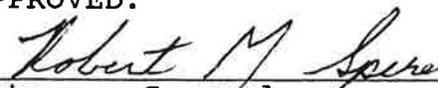


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cc: Patrick J. O'Donnell  
Clerk of the Legislature

APPROVED:

  
Attorney General