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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA
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ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: November 2, 1989
SUBJECT: Constitutionality of Legislative Exemption from Personal Property Tax for Railroad Rolling Stock.
REQUESTED BY: Senator Jerome Warner
Nebraska State Legislature
WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion on two questions relating to the constitutionality of legislation you intend to introduce in response to the Nebraska Supreme Court's decision in Northern Natural Gas Co. v. State Board of Equalization and Assessment, 232 Neb. 806, 443 N.W.2d 249 (1989) ["Northern"]. The legislation you seek to propose would provide a statutory exemption from personal property taxation for "railroad rolling stock owned or leased by railroads and used in railroad transportation." Your initial question concerns whether the classification and exemption of rail transportation personal property of this nature would "address the court's concerns" in the Northern case. In order to respond to this question, it is necessary initially to analyze the basis for the court's decision in Northern.

In Northern, the court, relying on its interpretation of certain federal court litigation¹ challenging the imposition of taxes under Nebraska law on rail transportation personal property brought pursuant to the anti-discrimination provisions of Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act ("the 4-R Act") (codified at 49 U.S.C. §11503(b)(4)), determined that, as the levy and collection of taxes on the personal property of certain railroads and car companies had been either permanently or preliminarily enjoined by federal court interpretation and application of the Act, the portion of Northern's unit value consisting of personal property (specifically pipelines) was also

¹ Trailer Train Co. v. Leuenberger, CV87-L-29 (D. Neb. Dec. 11, 1987), aff'd No. 88-1118 (8th Cir. Dec. 19, 1988), cert. denied sub nom. Boehm v. Trailer Train Co., ___ U.S. ___, ___ S.Ct. ___, 104 L.Ed.2d 630 (1989); Burlington Northern R.R. Co. v. Leuenberger, CV87-L-565 (D. Neb. Dec. 10, 1987); Oklahoma Gas & Electric Co. v. Leuenberger, CV88-L-52 (D. Neb. Jan. 26, 1988).

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|-----------------------|-----------------------|----------------------|---------------------|-----------------------|
| L. Jay Bartel | Yvonne E. Gates | Charles E. Lowe | Bernard L. Packett | Mark D. Starr |
| Elaine A. Catlin | Royce N. Harper | Lisa D. Martin-Price | Marie C. Pawol | John R. Thompson |
| Delores N. Coe-Barbee | William L. Howland | Lynn A. Meison | Kenneth W. Payne | Susan M. Ugai |
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| Denise E. Frost | | | | Linda L. Willard |

required to be excluded from taxation for the year 1988. Northern, 232 Neb. at 809-17, 443 N.W.2d at 252-56. In particular, the court's opinion states as follows:

Article VIII, §1, of the Nebraska Constitution provides in relevant part that except for motor vehicles, "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property" It would seem that no question exists that if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. See, Kearney Convention Center v. Board of Equal., 216 Neb. 292, 344 N.W.2d 620 (1984); Banner County v. State Bd. of Equal., 226 Neb. 236, 411 N.W.2d 35 (1987). This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax.

The state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution.

* * *

As we have previously stated, it makes no difference if the undervaluation of the property of the railroad and car companies comes about because of deliberate action by the Board, legislative enactment, or the final and binding judgment of the federal courts. The conclusion remains the same: The equal protection clause of the 14th amendment mandates that the same result be reached with respect to the personal property of Enron as that in the case of the railroad and car companies.

Id. at 815-16, 443 N.W.2d at 255-56. (Emphasis added).

The foregoing passages from the opinion in Northern reveal the court determined it was required to reduce the personal property component of Northern's unit value to the level of value of the

personal property of railroads and car companies (even though such property was not taxable by virtue of federal court orders) because the failure to do so would result in a lack of equalization in the valuation of taxable property in the same class, in contravention of the uniformity requirement of Article VIII, Section 1, of the Nebraska Constitution, and the equal protection clause of the United States Constitution.² The cases cited by the court in reaching its decision, including Kearney Convention Center v. Board of Equalization, 216 Neb. 292, 344 N.W.2d 620 (1984) and Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923), reinforce the conclusion that the opinion in Northern should be interpreted as being limited to application of the settled proposition that intentional and systematic undervaluation of other taxable property in the same class as the taxpayer's property violates the equal protection clause, and that the taxpayer suffering such discrimination has the right to have his assessment reduced to the percentage of true value at which comparable property in the same class is assessed.

Under your proposed legislation, rail transportation personal property in the form of rolling stock would be exempted and classified apart from the class of tangible property subject to taxation in Nebraska. Authority for the classification and exemption of personal property in this manner is provided in Article VIII, Section 2, of the Nebraska Constitution, which provides: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation." The Nebraska Legislature, exercising the authority granted under Article VIII, Section 2, has exempted certain types of personal property from taxation, including the following: Agricultural income-producing machinery and equipment; business inventory; feed, fertilizer, and farm inventory; and grain, seed, livestock, poultry, fish, honeybees, and fur-bearing animals. Neb.Rev.Stat. §77-202(6) - (9) (Cum.Supp. 1988).

In Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974), the Nebraska Supreme Court upheld the validity of the exemptions provided for personal property in the nature of business inventories, agricultural machinery and equipment, and agricultural products (currently contained in §77-202 (6)-(9)) against numerous constitutional challenges. Rejecting contentions that the

² It is not clear from the court's opinion in Northern that it based its decision in this regard on consideration of the uniformity clause of Article VIII, Section 1, independent of its clear reliance on the Equal Protection Clause of the United States Constitution.

exemptions violated the principle of uniform taxation under Article VIII, Section 1, and that the classifications established were unreasonable, the court stated:

Plaintiffs also urge that the statutes are violative of Article III, section 18, and Article VIII, sections 1, 2, and 4, Constitution, in that the classifications exempted are unreasonable, the act serves to exempt certain taxpayers from payment of their proportionate share of taxes, prevents the levy of taxes by valuation uniformly and proportionately, and is discriminatory. The 1970 amendment of Article VIII, section 2, to provide "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation" specifically confers broad authority on the Legislature to classify and exempt personal property from taxation. (Emphasis supplied.) The amended portion of Article VIII, section 2, represents a special constitutional provision adopted later than, and with full knowledge of, the constitutional provisions relied on by plaintiffs. Within the plain ambit of its meaning and purpose it stands supreme and effectively negates plaintiffs' contentions, with the possible exception of the one dealing with the reasonableness of the classifications exempted.

* * *

In view of the recent amendment of Article VIII, section 2, Constitution, it is doubtful if the statutes are subject to challenge as violating Article III, section 18, dealing with special laws, or Article VIII, section 1, requiring uniform taxation. In any event, we do not find the classifications set forth in the act to be unreasonable.

* * *

The exemptions granted pertain to property used in agricultural production, the products thereof, and business inventories. They are granted to all persons engaged in the lines of endeavor mentioned. There can well be public policy reasons for the grant of these exemptions.

Id. at 67-69, 218 N.W.2d at 896-97 (Emphasis in original).

Stahmer recognizes the general rule that classifications of property for tax purposes are permissible if based ". . . on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified." 192 Neb. at 68, 218 N.W.2d at 896 (quoting Shear v. County Board of Commissioners, 187 Neb. 849, 195 N.W.2d 151 (1972)).

The decision in Stahmer stands for the proposition that, to the extent the Legislature has acted to classify and exempt personal property under the authority granted by virtue of Article VIII, Section 2, the provision relating to uniformity of taxation in Article VIII, Section 1, is not implicated. The only issue recognized by the court in Stahmer as relevant in assessing the constitutionality of the classification and exemption of personal property pursuant to this constitutional authority was the reasonableness of the classification adopted by the Legislature.

In the event the Legislature were to enact legislation similar to your proposal by virtue of the authority provided under Article VIII, Section 2, establishing a class of exempt personal property consisting of rolling stock, the result in Stahmer reveals the adoption of an exemption of this nature would not contravene the constitutional requirement of uniformity of taxation in Article VIII, Section 1. Rather, the question which would remain is whether such a classification would satisfy the requirement of reasonableness articulated in Stahmer. It is important at this point to note the distinction between this situation and that addressed by the court in Northern. In Northern, the court apparently concluded that, while the Legislature had the authority to classify and exempt personal property (including rail transportation personal property) from the class of tangible property subject to the requirement of uniform taxation, the Legislature had not enacted legislation pursuant to Article VIII, Section 2, establishing as a matter of state law a separate classification exempting the personal property at issue. Accordingly, to the extent that rail transportation personal property had not been exempted from the class of taxable property by legislative act, the court in Northern, by virtue of its refusal to discuss the impact of Article VIII, Section 2, evidently determined that, to the extent such property remained in the same class under Nebraska law as the taxable personal property of Northern, it was required to equalize the valuation of the personal property component of Northern's unit value at the level of value of the personal property of railroad and car companies resulting from federal court judgments entered under the 4-R Act. If a statutory exemption were to be created for rail transportation personal property by virtue of the enactment of your proposed exemption of rolling stock, however, such legislation should

eliminate any claim by taxpayers asserting a right to have the value of their taxable property equalized with personal property classified by statute as exempt, as, under Stahmer, the state constitutional requirement of uniformity applies only within the class of taxable tangible property, and does not encompass personal property which has been classified and exempted pursuant to Article VIII, Section 2.

As to the reasonableness of the classification established by your proposed legislation exempting rolling stock, we believe a compelling argument may be advanced in support of the constitutionality of such a classification. Beginning in 1987, various federal court lawsuits have been initiated challenging the taxation of the personal property of rail carriers under the provisions of Section 306(1)(d) of the 4-R Act. As a result of the final judgment in Trailer Train Co. v. Leuenberger, CV87-L-29 (D. Neb., Dec. 11, 1987), aff'd No. 88-1118 (8th Cir., Dec. 19, 1988), cert. denied sub nom. Boehm v. Trailer Train Co., ___ U.S. ___, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989), the federal courts have continued to grant preliminary and permanent injunctive relief for various tax years in other federal court actions involving railroads and car companies challenging the imposition of taxes on their personal property. It appears imminently reasonable for the Legislature, in response to federal court determinations striking down Nebraska's current system of classifying and taxing rail transportation personal property, to attempt to create a class of exempt personal property (permissible under state law) which may satisfy the provisions of the federal 4-R Act.³ As it is axiomatic that the state, by virtue of the supremacy clause of the United States Constitution (U.S. Const. Art. VI, Section 2, cl.2), is bound to comply with the requirements of federal law, the establishment of an exemption for rolling stock by the Nebraska Legislature appears to constitute a reasonable response to the current dilemma facing the State of Nebraska as a result of federal court interpretations of the impact of the 4-R Act in relation to

³ We note that the classification of exempt personal property set forth in your proposed legislation is to be limited to "railroad rolling stock owned or leased by railroads and used in railroad transportation." It is our understanding that a classification of this nature would include all car company personal property currently taxed pursuant to Neb.Rev.Stat. §77-624 et seq. (Reissue 1986), and would equate to application of an exemption of approximately 75 to 80 per cent of the personal property component of railroads operating in the state. We believe the establishment of an exemption of this nature would enable the state to successfully defend any future claim of discriminatory taxation of rail transportation personal property which may be brought pursuant to the current version of Section 306(1)(d).

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Nebraska's personal property tax system. While action of this nature may not be the only possible option available to the Legislature, it would appear that, given the minimal level of constitutional scrutiny appropriate in assessing such a claim of reasonableness, the classification you propose should be sustained as within the prerogative of the Legislature.

Apart from consideration of the constitutionality of the establishment of a separate classification and exemption of rolling stock from personal property tax as a matter of state law, it is necessary to consider whether legislation providing differential tax treatment between property of this nature and other property complies with the requirements of the equal protection clause of the United States Constitution. In this regard, assuming the Legislature were to establish a separate classification exempting rolling stock from taxation, the only federal constitutional question raised in regard to this issue under the equal protection clause would be whether a "rational basis" exists to support the Legislature's classification of such property for tax purposes.

The equal protection clause "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation." Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526 (1959). In structuring their internal tax structures, "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973). It is inherent in a state's power to tax that it be free to select the subjects of taxation, and to grant exemptions. Carmichael v. Southern Coal and Coke Co., 301 U.S. 495 (1937). In order for a state tax classification or scheme to withstand scrutiny under the equal protection clause, it is necessary only to consider whether the challenged classification or tax is rationally based and related to a legitimate state purpose. Exxon Corp. v. Eagerton, 462 U.S. 176 (1983). "A state law is not arbitrary though it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution." Kahn v. Shevin, 416 U.S. 351, 355 (1974) (quoting Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959)). As the Court stated in its recent decision in Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, ___ U.S. ___, ___, 109 S.Ct. 633, 638, 102 L.Ed.2d 688, 697 (1989): "The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assigned to each class a different tax burden so long as those divisions and burdens are reasonable."

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In light of the foregoing, it is doubtful that the Nebraska Supreme Court, in the face of such United States Supreme Court interpretations of the equal protection clause, would invalidate a state taxing scheme which, under authority of the state constitution as implemented by legislative enactment, provided for the separate classification for tax purposes of rail transportation property in the nature of rolling stock and other taxable property. As noted previously, the only appropriate constitutional inquiry in this regard relates to the existence of a reasonable or rational basis for a legislative classification drawn upon such lines. A legislative attempt to comply with federal court determinations as to the interpretation and application of the federal 4-R Act with regard to the classification and taxation of rail property in Nebraska should provide a sufficient reasonable basis to satisfy any constitutional concerns in this regard. Indeed, courts from other states have rejected equal protection challenges brought by virtue of the different classification and taxation of rail property under state law resulting from application of the 4-R Act. Federal Express Corp. v. Tennessee State Board of Equalization, 717 S.W.2d 873 (Tenn. 1986); State v. Colonial Pipeline Co., 471 So.2d 408 (Ala.Civ.App. 1984), writ quashed Ex Parte Colonial Pipeline Co., 471 So.2d 413 (Ala. 1985), app. dismissed 474 U.S. 936 (1985).

In sum, in response to your initial question, it is our conclusion that your proposal to exempt by statute certain rail transportation personal property (consisting of rolling stock) is not, per se, unconstitutional on state or federal grounds, and, if challenged, we believe such legislation could be defended as consistent with both state and federal constitutional requirements relating to the reasonableness of the classifications created by virtue of such legislation. The establishment of a separate class of exempt property of this nature should eliminate the basis for the Nebraska Supreme Court's apparent application in Northern of the mandate that taxable property in the same class must be valued uniformly and proportionately, as your proposed legislation would remove rolling stock from the class of taxable tangible property under Nebraska law. Given the lack of clarity and guidance in the Northern decision, however, we cannot state with certainty that our court would uphold the reasonableness of a classification of this nature, nor can we be certain that the court continues to adhere to the principles enunciated in Stahmer with regard to the broad authority of the Legislature to classify and exempt personal property under Article VIII, Section 2, of the Nebraska Constitution, without regard to the uniformity clause.

In addition, you ask whether the proposed exemption of personal property consisting of rolling stock may be enacted with an effective date for the exemption that would occur before disposition of the numerous equalization cases for the 1989 tax year currently pending before the Nebraska Supreme Court, during

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the special session to be conducted in 1989, or during the next regular session of the Legislature in 1990. Specifically, your question concerns whether enactment of an exemption of this nature may be made retroactive for the 1989 tax year.

It is well established that "[a] legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." Brown v. Sullivan, 195 Neb. 729, 730, 240 N.W.2d 51, 52 (1976). Furthermore, our court has held that "[a] legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights." Travelers Ins. Co. v. Ohler, 119 Neb. 121, 125, 227 N.W. 449, 450 (1929).

To the extent that enactment of a retroactive exemption of rolling stock effective for tax year 1989 may impact the appeals from the State Board of Equalization and Assessment pending in the Nebraska Supreme Court, it is necessary to consider whether such legislation would operate to impair any vested right. In City of Fremont v. Dodge County, 130 Neb. 856, 865, 266 N.W. 771, 775 (1936), the court stated: "[I]t is truly said that the bringing of a suit vests in a party no right to a particular decision; and, his case must be determined on the law as it stands, not when the suit is brought, but when the judgment is rendered." This is consistent with the general rule that retroactive legislation affecting litigation will not be held invalid where a final judgment has not been rendered. 2 Sutherland, Statutory Construction §41.08 (4th ed. C.D. Sands 1973). Therefore, it appears that, to the extent that retroactive application of the exemption for rolling stock may impact the outcome of pending judicial matters, this would not, per se, render such legislation invalid, as no impairment of a vested right would occur if legislative action were taken prior to any final judgment in such actions.

"It is well settled that the mere retroactivity of a statute affecting taxation does not render it unconstitutional. Such a statute is valid if it is not arbitrary and does not disturb vested rights, impair contractual obligations, or violate due process." Colonial Pipeline Co. v. Commonwealth, 206 Va. 517, 521, 145 S.E.2d 227, 231 (1965), app. dismissed 384 U.S. 268 (1966). Generally, the validity of retroactive tax legislation is assessed in terms of reasonableness, the focus being on whether the retroactive feature is arbitrary and burdensome, or involves an undue period of time. See generally 2 Sutherland, Statutory Construction, supra, §41.10; See also Welch v. Henry, 305 U.S. 134 (1938). The retroactive tax legislation you propose appears to meet these criteria. The legislation exempting personal property of this nature is constitutionally authorized pursuant to Article VIII,

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Section 2, and is designed to bring the state's classification and taxation of rail transportation property into compliance with a federal court determination invalidating Nebraska's tax on rail personal property under the 4-R Act. In addition, as the situation sought to be remedied by this legislation was brought about by a final court determination occurring near the end of the Legislature's regular session during 1989, it is reasonable to permit the Legislature to now take action to be effective within the current tax year in an attempt to adopt a legislative remedy to reduce or mitigate potential revenue shortfalls resulting from pending or future court actions. Finally, as noted previously, retroactive legislative action such as you propose would not infringe any vested right, as that term does not encompass judicial matters which have not proceeded to final judgment.

One area of concern as to the constitutionality of the proposed retroactive exemption from personal property tax for rolling stock is whether such retrospective application may result in a violation against the prohibition in Article VIII, Section 4, of the Nebraska Constitution, barring legislative action resulting in the release, discharge, or commutation of taxes. Article VIII, Section 4, provides, in pertinent part:

. . . the Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, no shall commutation for such taxes be authorized in any form whatever;"

Initially, it should be noted that the court in Stahmer rejected the contention that the statutory exemptions for business inventory, agricultural machinery and equipment, and agricultural products violated the prohibition in Article VIII, Section 4. 192 Neb. at 67, 218 N.W.2d at 896. The court emphasized the broad authority granted the Legislature to classify and exempt personal property in Article VIII, Section 2, stating: "The amended portion of Article VIII, Section 2, represents a special constitutional provision adopted later than, and with full knowledge of, the constitutional provisions relied upon by plaintiffs. Within the plain ambit of its meaning and purpose it stands supreme and negates plaintiffs' contentions, with the possible exception of the one dealing with the reasonableness of the classifications exempted." Id.

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Assuming, arguendo, the prohibition in Article VIII, Section 4, is applicable in considering the validity of the retroactive effect proposed with regard to legislation exempting railroad rolling stock, it appears that no violation of this provision would arise with regard to application of the exemption of rolling stock of car companies if such legislation were enacted prior to December, 1989, as no levy is made on car company property until such time. It has been recognized that ". . . [p]roperty is taxed when the tax is levied, and not when it is valued by the assessor." Hardin v. Pavlat, 130 Neb. 829, 830, 266 N.W. 637, 638 (1936); See also American Province of the Servants of Mary Real Estate Corp. v. County of Douglas, 147 Neb. 485, 23 N.W.2d 714 (1946). Thus, as a tax liability is not created until after both assessment and levy, any legislation exempting rolling stock which would apply to car companies, enacted prior to levy, would not implicate Article VIII, Section 4, as no tax would even exist which could be deemed released or discharged by such exemption.

With regard to railroads, however, property tax levies on the full equalized valuations of railroads in the state (other than certain railroads which obtained a temporary restraining order in federal court against levy on the personal property component of their valuations) were made in September, 1989. Arguably, in the event that an exemption for railroad rolling stock were enacted after the levy date for railroad property, but applied retroactively to be effective for the 1989 tax year, such an exemption may be construed to represent an unconstitutional release or discharge of a tax within the meaning of Article VIII, Section 4. It may be possible for the Legislature to alleviate any such concern by limiting the retroactive effect for 1989 to rolling stock which has not been subject to any levy for this tax year, which would include both car company rolling stock and personal property of railroads upon which no levy has been made by virtue of federal court order.

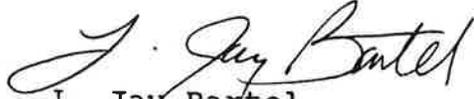
In conclusion, we recognize that the result in Northern, as well as events occurring subsequent thereto, have raised substantial concern as to the stability and certainty of Nebraska's current property tax system. Your proposed legislation addresses such concern in a manner which recognizes the need for immediate legislative action to deal with this situation. Based on the matters previously discussed, we believe that, subject to the caveats previously noted, retroactive enactment of the legislation you propose should satisfy the current dictates of the 4-R Act, and, consequently, may remove the basis for equalization relief

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raised on the basis of the decision in Northern with respect to tax year 1989 and in the future.

Very truly yours,

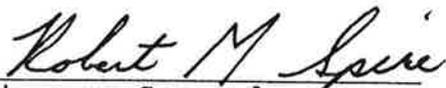
ROBERT M. SPIRE
Attorney General



L. Jay Bartel
Assistant Attorney General

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

APPROVED:



Attorney General

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