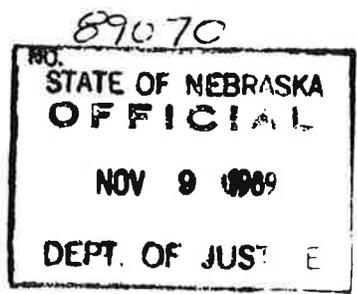


Linda W.

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA
TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General



DATE: November 9, 1989
SUBJECT: Limitations on property tax refunds, LB2
REQUESTED BY: State Senator James D. McFarland, District No. 28.
WRITTEN BY: Robert M. Spire, Attorney General
David Edward Cygan, Assistant Attorney General

We are writing in response to your request for an opinion regarding the constitutional implications of a bill placing limitations on property tax refunds. Specifically you have requested us to determine whether such a bill would violate the Uniformity of Taxation clause of the Nebraska Constitution (Article VIII, Section 1) or the Equal Protection Clause of the 14th Amendment of the United States Constitution, or any other state or federal constitutional provision.

The current proposed legislation, LB2, would seek to alter the state property tax statutes by:

- 1) Increasing the penalty for unpaid taxes to 50% of the unpaid taxes.
- 2) Prohibiting refunds or non-payment of the property taxes during the pendency of an appeal.
- 3) Defining as illegal taxes those which:
 - a) are beyond the jurisdiction of the levying body;
 - b) are in excess of the constitutional or statutory levy limit;

L. Jay Bartel
Elaine A. Catlin
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Lynne R. Fritz

Denise E. Frost
Yvonne E. Gates
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Donald E. Hyde

Kimberly A. Klein
Donald A. Kohtz
Charles E. Lowe
Lisa D. Martin-Price
Steven J. Moeller
Harold I. Mosher
Fredrick F. Neid

Bernard L. Packett
Marie C. Pawol
Kenneth W. Payne
Douglas J. Peterson
LeRoy W. Sievers
James H. Spears

Mark D. Starr
John R. Thompson
Susan M. Ugai
Terri M. Weeks
Melanie J. Whitmore
Linda L. Willard

- c) are levied for an unauthorized purpose;
 - d) are the result of fraudulent conduct by a taxing official, or;
 - e) are exempt from taxation pursuant to subdivision (1)(a) of section 77-202 (the enumerated exemptions)
- 4) Specifically excluding from the definition of illegal those taxes invalidated for constitutional or equalization reasons.
- 5) Limiting refunds for taxes invalidated for constitutional or equalization reasons to only those taxpayers who have timely and successfully prosecuted a claim for equalization relief.

Your request specifically indicates a concern with the last point above, whether the Legislature can limit refunds to those individuals who have not timely prosecuted their claim for equalization relief in court. However, it would appear that this bill mirrors and may eventually codify what the current Nebraska Supreme Court position is on this issue.

The Nebraska Supreme Court has addressed this issue in Beshore v. Sidwell, 222 Neb. 441, 384 N.W.2d 290 (1986). In Beshore, the court addressed a taxpayer who sought a refund following the court's decision of Kearney Convention Center v. Board of Equal., 216 Neb. 292, 344 N.W.2d 620 (1984) which, similar to Northern Natural Gas Co. v. State Board of Equal. 232 Neb. 806, ___ N.W.2d ___ (1989) granted equalization relief in the form of reducing the valuation of the complaining taxpayer to the value of other property in the same class. Subsequent to the Court's decision in Kearney Convention Center, the Nebraska Unicameral passed an amendment to Neb.Rev.Stat. §77-1735 which read in relevant part:

If a person who claims a tax or any part thereof to be invalid for any reason other than the valuation of the property shall have paid the same to the treasurer or other proper authority in all respects as though the claim was legal and valid, he or she may, at any time within thirty days after such payment, demand the same in writing from the county treasurer to whom paid. If the same shall not be refunded within ninety days thereafter, he or she may sue such county treasurer for the amount demanded.

Neb.Rev.Stat. §77-1735 (Cum. Supp. 1984). The legislature afforded taxpayers seeking a refund this remedy that needed to be initiated within thirty days after the payment of the disputed tax. In

Beshore the taxpayer neglected to address their grievances to the county treasurer within the mandated thirty days and instead marched straight into district court. In directing the review to be first before the county board of equalization, the Nebraska Supreme Court noted that the tax on an over-valuation was not a void tax for which refunds would be the apt remedy. The court quite clearly stated that the tax was a voidable tax, which required action on behalf of the taxpayer to first apply for equalization relief before the county board. This subtle distinction between "void" and "voidable" taxes places the burden upon the taxpayer with a "voidable" tax complaint to first go forward and seek relief within the established channels for equalization. The Nebraska Supreme court held that the district court was without jurisdiction to grant equalization relief. The Court reasoned that to permit such jurisdiction would constitute a collateral attack upon a voidable tax. Collateral attack is an attempt to avoid, defeat, or evade a judicial proceeding in an incidental proceeding with the intent to defeat it. May v. Casker, 188 Okl. 448, 110 P.2d. 287 (1940). The Court further stated:

Appellants (taxpayers) argue to us that the legislature would not have amended Neb.Rev.Stat. §77-1735 unless it believed that such amendment was necessary to preclude claims for refunds being made. Such argument must be rejected. As we have already said, even before Neb.Rev.Stat. §77-1735 was amended to specifically preclude an action such as the one brought here, such an action could not be maintained. The amendment to Neb.Rev.Stat. §77-1735 merely made clear by statute what was already the law. The fact that the Legislature may have believed that such amendment is necessary does not change the law nor permit such action to be brought directly in the district court.

Beshore v. Sidwell, 222 Neb. 441, 445, 384 N.W.2d 290, 294 (1986) (citations and parenthetical supplied).

Likewise, it would appear that the proposed bill is again codifying the current law of collateral attack. Those taxpayers that have failed to file appeals from locally assessed taxes within the forty-five days after adjournment of the county board of equalization are barred from bringing refund claims for prior years. Centrally assessed taxpayers are afforded ten days under Neb.Rev.Stat. §77-510 to perfect a valuation appeal to the Supreme Court. For 1989, the State Board of Equalization met on August 11.

Senator James D. McFarland
November 9, 1989
Page -4-

Therefore any appeal after August 21, 1989 is barred both by the proposed bill and the doctrine of collateral attack.

The short response then to your question regarding the constitutionality of such a limitation in light of the foregoing is that we cannot foresee any constitutional problem with the limitation for the reason that it mirrors current case law.

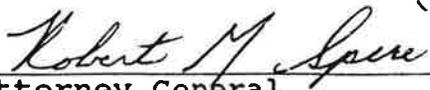
Respectfully submitted,

ROBERT M. SPIRE
Attorney General



David Edward Cygan
Assistant Attorney General

Approved By:



Attorney General