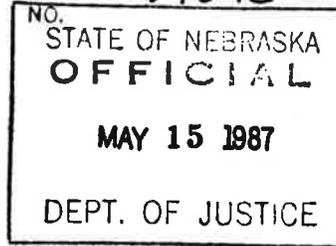


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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

# 87075



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DATE: May 15, 1987

SUBJECT: Constitutionality of LB 775 - Employment and Investment Growth Act.

REQUESTED BY: Senator Ernest Chambers  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
L. Jay Bartel, Assistant Attorney General

You have requested our opinion concerning the constitutionality of a portion of LB 775, as amended. Specifically, your question concerns whether the creation of a separate class of exempt personal property, consisting of certain aircraft or computer equipment used in connection with qualified projects involving an investment of at least ten million dollars in qualified property and the hiring of at least one hundred new employees, constitutes invalid special class legislation prohibited under Article III, Section 18, of the Nebraska Constitution.

If a law operates alike on all persons or localities of a class or affects equally all persons who come within its operation, it is not deemed a "special" law within the meaning of the Constitution. The enactment of legislation which applies to all persons within a specified class is permissible, provided the classification rests upon a reasonable basis. State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445, 283 N.W.2d 12 (1979); State ex rel. Johnson v. Consumers Public Power District, 143 Neb. 753, 10 N.W.2d 784 (1943); Bauer v. State Game, Forestation and Park Commission, 138 Neb. 436, 293 N.W. 282 (1940); State v. Stuhl, 52 Neb. 209, 71 N.W. 94 (1897).

Section 5(2) of LB 775 provides a 15 year tax exemption on the class of personal property consisting of certain aircraft or business computers used in connection with qualified projects involving an investment of at least ten million dollars in qualified property and the hiring of at least one hundred new employees. The benefit of the exemption provided under this subsection is available to any taxpayer entering into an

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agreement with Tax Commissioner pursuant to the requirements imposed under this provision. Under these circumstances, the personal property tax exemption provided under Section 5(2) would not be viewed as a special law within the prohibition contained in Article III, Section 18, as it applies equally to and operates uniformly upon all members of the class established.

The question remaining for consideration is whether a reasonable basis exists to support the classification established under this provision.

In Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974), the Nebraska Supreme Court addressed the scope of the Legislature's authority to classify or exempt personal property from taxation under Art. VIII, Section 2. The plaintiffs in Stahmer challenged exemptions granted by the Legislature pertaining to personal property used in agricultural production, the products thereof, and business inventories, contending, in part, that the statutes violated Art. III, Section 18, prohibiting unreasonable class legislation, and Art. VIII, Section 1, requiring uniform taxation. In rejecting these contentions, the Court stated:

The 1970 amendment of Art. 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 Art. VIII, Section 2, Constitution, it is doubtful if the statutes are subject to challenge as violating Art. III, Section 18, dealing with special laws, or Art. VIII, Section 1, requiring uniform taxation. In any event, we do not find the classifications set forth in the act to be unreasonable. "Ability to bear the burden of the tax is everywhere recognized as a reasonable ground on which to base a classification in tax measures. Classification for tax purposes may be based on the manner of

conducting business, and business conducted in one manner may be taxed differently from business conducted in another manner. The purpose for which property is kept or used has long been a recognized, if not a favorite, basis for distinction in taxation. The view has also been taken that reasonable discrimination with respect to tax matters to promote fair competitive conditions, equalize economic advantages, or encourage particular industries from consideration of public policy is lawful." 51 Am.Jur., Taxation, Section 182, p. 242.

Id. at 67-68, 218 N.W.2d at 896.

Section 2 of LB 775 manifests an intent

. . . to make revisions in Nebraska's tax structure in order to promote the general health, safety, and welfare of the people of the State of Nebraska by encouraging new businesses and aiding in their expansion, promoting the creation and retention of new jobs in Nebraska, and attracting and retaining investment capital in the state of Nebraska.

On numerous occasions, courts have upheld the constitutionality of tax exemptions designed to encourage the development of new industry and the relocation or expansion of existing industries. Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959); State ex rel. Tomasic v. Kansas City, 230 Kan. 404, 636 P.2d 760 (1981). See also DeArmond v. Alaska State Development Corp. 376 P.2d 717 (Alaska 1962); Green v. The City of Mt. Pleasant, 256 Iowa 1184, 131 N.W.2d 5 (1964); Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956). See generally Note, Legal Limitations on Public Inducements to Industrial Location, 59 Colum.L.Rev. 618 (1959). In State ex rel. Tomasic v. Kansas City, supra, the court, in upholding the reasonableness of a classification providing tax exemptions to industrial use facilities to be established within the state, stated:

Favorable tax treatment for industrial-use facilities under the Act as amended in 1961 will undoubtedly promote the development of new industries within the state as well as encourage the retention of old and so bears a rational relationship to the otherwise legitimate purpose of the Act.

\* \* \*

[T]he legislature, in emphasizing economic development as a means of promoting the general welfare of

the state, has given that economic development priority as a matter of public policy in the Act as amended in 1981. To further economic development of the state, the legislature has attempted to provide the most favorable, constitutionally permissible, conditions to attract industry to the state and to retain industrial facilities currently operating in the state. This court is cognizant of the public interest in such economic development. 230 Kan. at \_\_\_\_\_ 636, P.2d at 778.

As was noted, one of the purposes of LB 775 is to attract and retain in Nebraska businesses which will contribute to the economic growth and development of the state through capital investment and the creation of new employment opportunities. These certainly constitute legitimate legislative purposes, and we cannot conclude that the separate classification for exemption purposes of the items of personal property used in qualified projects under Section 5(2) is wholly without any conceivable reasonable basis. The exemption provided for certain aircraft and computer equipment under this subsection is designed to provide an incentive for businesses to invest in a qualified project or projects which would involve an investment of at least ten million dollars and the hiring of at least one hundred new employees. Given the large amount of investment required as a threshold for qualifying for these exemptions, we cannot say it is wholly unreasonable to assert that businesses able and willing to invest in the state at this level would be likely to utilize these types of property, and that they would view the personal property tax relief provided under this section as a significant incentive to invest and expand in Nebraska.

Furthermore, while we are somewhat troubled by the narrowness of the classification established, we cannot affirmatively state that the Legislature's determination to limit the exemption granted is without a rational basis. While the Legislature may desire to exempt certain personal property from taxation as an incentive to encourage businesses to locate or expand in Nebraska, it is not unreasonable to permit the Legislature to limit the scope of the exemption in order to reduce the adverse effect on the amount of property tax revenues received by local governments if a larger class of property were exempted.

In assessing the reasonableness of the classification at issue, it must be remembered that the courts have shown great deference to legislative judgments in this area. In upholding the validity of legislation designed to permit municipalities to encourage new industry, the Supreme Court of New Mexico stated the following regarding legislative efforts in this area:

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Any movement reasonably calculated to improve the economic welfare of the people as a whole through furnishing employment, promoting industry and trade, and inspiring new hope, seems well worthwhile. Whether the present enactment will achieve these aims, none can tell. Only trial, effort and actual experience can give the answer.

While operation of a given project, in the field of competition, may hurt some, if the overall picture shows a comfortable balance of advantages over disadvantages to the many, none can doubt that the measure authorizing it has justified its enactment. After all, the question is one of policy and, within constitutional bounds, that is for the legislature. Even though we may question the wisdom of a given enactment, as a matter of policy, that gives us no right to strike it down, if it violates no provision of the fundamental law. Village of Deming v. Hosdreg Co., supra, 62 N.M. at \_\_\_\_\_, 303 P.2d at 931

In conclusion, based upon the deference allowed the Legislature in matters relating to classification for purposes of taxation, and the broad authority granted the Legislature to classify and exempt personal property under Article VIII, Section 2, of our Constitution, it is our view that the separate classification of the personal property exempted under Section 5(2) of LB 775 could be successfully defended against constitutional attack, as the exemption appears to be rationally related to the legitimate purposes of the Act of encouraging the creation of new jobs and investment in the state.

Very truly yours,

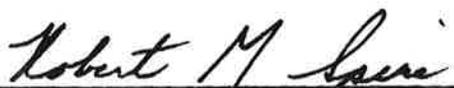
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cc: Patrick J. O'Donnell  
Clerk of the Legislature

APPROVED:

  
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