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STATE OF NEBRASKA
OFFICIAL
MAR 12 1992
DEPT. OF JUSTICE

DATE: March 12, 1992

SUBJECT: Waiver of Penalty and Interest for the Omission or Failure to Report Personal Property for Taxation Under Neb.Rev.Stat. § 77-1233.04(4) (Reissue 1990).

REQUESTED BY: Senator Rex Haberman
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion as to the application of the provision for the waiver of penalty and interest for failure to timely report personal property for tax purposes presently provided for under Neb.Rev.Stat. § 77-1233.04(4) (Reissue 1990), in light of what you refer to as the "considerable confusion" faced by taxpayers regarding their responsibility for filing personal property tax returns for tax year 1992. You state that, based on our response to your question, you are considering amendatory legislation.

Neb.Rev.Stat. § 77-1229 (Reissue 1990) provides: "Every person required to list property shall make out and verify by a statement of all personal property which he or she is required to list,". . ."on forms [which] shall be furnished to each taxpayer by the county assessor . . . for that purpose," which forms "shall be delivered to the county assessor on or before March 1 of each year, ..." Section 77-1229 further allows county assessors, "upon receiving an application made prior to March 1 of each year showing hardship or impossibility of meeting such date for reasons beyond the control of the applicant," to "extend the time for compliance, but not beyond March 31." As you note in your request, some county assessors have granted "blanket extensions" to extend the filing deadline for personal property tax returns for 1992 to March 31,

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1992, while other county assessors have not provided such "blanket extensions."

As we understand your request, it appears your particular question is whether, in light of the fact that the exemption of certain personal property, consisting of personal property previously exempted under Neb.Rev.Stat. § 77-202(6)-(9), was declared unconstitutional under the tax scheme existing in 1990 in MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991), and the fact that all personal property was exempted for 1991 under 1991 Neb. Laws, LB 829, § 7, such personal property would qualify as property "not required to be reported in previous years" within the meaning of the mandatory waiver of penalty and interest provision of § 77-1233.04(4).

Prior to addressing your question, we believe it is appropriate to address the manner in which omitted or unreported personal property is assessed under § 77-1233.04. Pursuant to subsection (2) of § 77-1233.04, the county assessor must list "personal property omitted from or not returned on a personal property tax return," and add "a penalty of fifty percent of the tax due." Interest is also assessed on both the tax and penalty, "from the date the tax would have been delinquent until paid." Subsection (3) of § 77-1233.04 requires the county assessor to send notice to the taxpayer of action taken pursuant to subsection (2), including notice of "the taxpayer's appeal rights and the appeal procedures." Subsection (4) gives the county assessor discretion to "waive all or part of the penalty assessed and any interest thereon," with the approval of the county board of equalization. This subsection also provides for the mandatory waiver of penalty and interest "if the omission or failure to return any item of personal property was for the reason that the property was not required to be reported in previous years or the property was timely reported in the wrong taxing district." This entire process, therefore, is triggered by affirmative action on the part of the assessor to list personal property for tax purposes when property is omitted or a return is not filed.

In addition, § 77-1233.05 addresses the situation where a taxpayer voluntarily files a return or voluntarily lists omitted property "after the final date for returning such property has passed for the current tax period. . . ." Under these circumstances, "a penalty of ten percent of the amount of the tax due" is added, as well as interest "upon such penalty from the date of delinquency of the tax until paid." The county assessor "may waive all or part of the penalty and the interest on the penalty," with the approval of the county board of equalization. In addition, § 77-1233.05 provides that "[i]f the omission or failure to return or report property was caused by the fact that such

property had not been required to be reported in previous years. . . , the entire penalty and the interest on the penalty shall be waived." Thus, under § 77-1233.05, a different penalty is provided when a taxpayer voluntarily reports property after the filing deadline, as opposed to the penalty applicable under § 77-1233.04, which deals with action taken by the county assessor to list and value omitted or unreported property.

In essence, therefore, your question entails consideration of whether the mandatory waiver of penalty and interest provided for under either §§ 77-1233.04 or 77-1233.05 for omitted or unreported property is applicable to personal property not timely reported for tax year 1992 based on the language excusing any penalty and interest if the omission or failure to return property was because such property "was not required to be reported in previous years," in view of the previous exemption of personal property under LB 829 for tax year 1991, as well as previous legislative enactments exempting certain personal property.

As a general rule,

> [u]nder statutes so providing penalties are imposed against property owners for failure or refusal to make a list, report, or statement of their taxable property, or for property omitted therefrom. It has been held that the requirements of such a statute are mandatory, and that the assessor has no discretion as to the imposition of the penalty and must impose it in all instances where the taxpayer fails to list his taxable property within the required time.
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> * * *
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> The penalty imposed for the failure of property owners to make a list, report or statement of their taxable property is imposed only for the breach of a duty by the taxpayer. It is only when the taxpayer is at fault or to blame for failure to comply with the requirements of the statute that a penalty may be exacted.

85 C.J.S. Taxation § 1025 a. and c. (1954).

While there are no Nebraska cases directly on point, the decision in Misle v. Miller, 176 Neb. 113, 125 N.W.2d 512 (1963), is instructive. Misle was an action brought by the taxpayers to recover penalties added to taxes paid for tax year 1959. The taxpayers had filed a list reporting the value of their inventory with the Lancaster County Assessor on April 20, 1959, and subsequently filed additional lists with the assessor after such date. The assessor, pursuant to former § 77-1235, added fifty

percent of the value of the subsequently filed inventory as a penalty. The taxpayers alleged that, as the Nebraska Legislature had, between February and June of 1959, enacted three separate bills altering the date by which personal property tax returns were required to be filed, such action made it "impossible to comply with the law relating to the listing of personal property for taxation that existed from time to time in the year 1959." Id at 115-16, 125 N.W.2d at 514. The court agreed, stating: "An examination of the statutes in force throughout the year 1959 with respect to the time of filing of personal tax schedules makes it abundantly clear that the plaintiffs' contention that no timely compliance could be made thereunder is correct." Id. at 116, 125 N.W.2d at 514.

Furthermore, in Johnson Fruit Co. v. Story, 171 Neb. 310, 313, 106 N.W.2d 182, 185 (1960), the court, discussing the interpretation of penal statutes of this nature, stated:

> [A] penalty statute. . .must be strictly construed. Its import may not be extended by construction. Such a statute may not be applied to situations or parties not fairly or clearly within its provisions. In construing such a statute nothing will be recognized, presumed or inferred that is not expressed, unless necessarily or unmistakably implied in order to give the statute full operation. (Citations omitted).

While the facts involved in Misle are not identical to those involved in the situation posed by your question, it is evident that, in view of proposed legislation and constitutional amendments currently before the Legislature, alteration of the manner of assessment and time for listing personal property for taxation for 1992 is a clear possibility. Indeed, § 98 of LB 1063 would, if enacted, amend § 77-1229 to require the filing of personal property tax forms on or before June 1, 1992. We also note that §§ 102 and 103 of LB 1063 would remove the specific language previously referred to in §§ 77-1234.04(4) and 77-1233.05 mandating the waiver of penalty and interest where the failure to list or report property was due to the fact that such "was not required to be reported in previous years." The discretionary authority granted to county assessors to waive penalty and interest, with the approval of the county board of equalization, would be retained under §§ 102 and 103 of LB 1063.

It could be argued that, given the state of uncertainty regarding the system of personal property taxation for 1992, it would be inequitable to attempt to penalize taxpayers who did not list all personal property by March 1, or, if a "blanket extension" has been granted by a particular county, do not do so by March 31. Indeed, proposals before the Legislature to enact legislative and

constitutional changes which are intended to affect the current tax year would alter the date by which such lists must be filed, thus eliminating the need to apply the March 1 (or March 31) deadline applicable under current law.

Even if the mandatory waiver of penalty and interest provisions of §§ 77-1233.04(4) and 77-1233.05 remain in effect and are deemed inapplicable, it would seem that fundamental fairness would require that county boards of equalization exercise their authority to direct county assessors to waive any penalty and interest required under these provisions in appropriate cases, given the obvious dilemma facing taxpayers as a result of the uncertainty existing under present circumstances. In view of the strict construction applicable to penalty provisions of this nature, it would seem wholly inappropriate to penalize all taxpayers under these provisions, particularly those who voluntarily file personal property tax schedules subsequent to the time required by statute.

In order to avoid any attempted application of such penalties, however, we note that the Legislature may properly enact amendatory legislation clarifying that any penalties and interest provided for under §§ 77-1233.04 and 77-1233.05 are to be waived or remitted with respect to personal property taxes for 1992, as such penalties, being dependent upon existence of statute, cannot be collected if the statute providing for such has been repealed or has been amended to require their waiver or remission. Tukey v. Douglas County, 133 Neb. 732, 277 N.W. 57 (1938). This is so, of course, because a penalty imposed for not reporting taxable property, or the failure to report such within the statutory period, is not part of the tax. Steinacher v. Swanson, 131 Neb. 439, 268 N.W. 317 (1936); Tukey v. Douglas County, supra.

Very truly yours,

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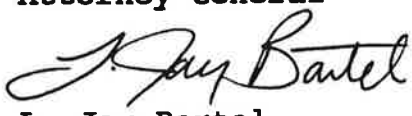

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cc: Patrick J. O'Donnell
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7-327-7.12

APPROVED BY:

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